

"OATHING IN ELECTIONS"

Dissertation Submitted in Partial fulfilment of the  
Requirements for the LL.B. Degree, University of  
Nairobi.

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By

RACHEL M. NYAGAH

NAIROBI

APRIL 1984

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## 1.0 General Introduction

The topic under discussion in this dissertation is the customary oath and its effects on national parliamentary elections in Kenya. This is a relatively unexplored area in the sense that, although some basic research has been done on it, certain aspects of customary oaths still remain a mystery to the general public. Even in our law courts, there has been a lot of contradictions on the legality and interpretation of cases on oathing.

In the past, this area could have been ignored for the core reason that customary law was viewed as barbaric by the colonisers. Indeed, it is likely that, a community's strong belief in the oaths, its killing effects and the procedure of its administration were regarded as superstition and so repugnant to justice and morality.<sup>1</sup>

The customary oaths and their mechanism among the Africans have been in usage, since time immemorial, however. The area could exhaustively be explored therefore by those well versed with the customs of the different communities. Hitherto, there lacked the kind of intellectual expertise capable of carrying out such studies until the late sixties when the Kenyan élite began some serious research on their traditional life and their customs.<sup>2</sup>

Much of what is known about the 'customary oath'

is parole, that is, it is narrated orally by the community elders and traditional experts, and in the case of the Mau Mau oaths, by those who took part in the administration of those oaths.

It is a pity that sociologists have never taken oathing among the Africans seriously, noting that this is an area as ancient as the communities themselves.

Various people have attempted to write in an attempt to explore this field. However, in most cases, what has been written, except in a few instances, is very much generalised or distorted to a very large extent.<sup>3</sup>

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The reasons for such inadequate information, especially where the authors have been Europeans, are derived from the heavy reliance on what they saw, or were told by the communities concerned and more so, what they concluded or thought to be the real situation.

Some comprehensive research on the different traditional oaths is necessary, more so by persons who themselves are members of that community and who are not confronted with the usual linguistic problems or suspicion and distrust by the people among who they carry on their research. In situations where these problems arise, the usefulness of a research is minimised and this leads, to a large extent, to wrong, (usually distorted), information being casually given in order to quickly dispense of the stranger.

A new unexplored area by the Kenyan courts came about during the 1974 General Election petitions when the oaths' binding nature and effects on the people were paid regard to. The nature of the petitions dealing with oathing forced the High Court to resort to the traditional oaths.

Where it was proved that oathing had been administered in a given constituency, the elections were nullified. The highest court in the nation recognised the existence of traditional oathing in their laws. Present day oathing was viewed together with the past and original form of oathing. From these analyses, decisions were passed by the court on whether or not a particular oathing was binding on the people. In cases where oathing was found to have been administered and the people felt bound by it, the elections were held to have been illegally conducted. This gave rise to the elected member being declared wrongly elected and his election thereby nullified.

The court ordered cleansing ceremonies in the Iveti, Kangundo and Meru constituencies where oathing was proved. The purpose of the cleansing ceremonies was to remove the oathed people from 'bondage' of the taken oath.

Introduction Footnotes

1. S. 3(2) of the Judicature Act, 1967.
2. "Elite" here is used to mean the educated who are capable of doing research on a wider scale eg. Prof. Mbiti Prof. Mutungi.
3. Gerhard Lindblom, C.W. Hobley, D.J. Penhill and Prof. Anthony Thomas.
4. Traditional oaths as they existed in their pure and original form.
5. The electorate wanted to be freed from the force of the binding oath they had taken so that they could now vote for a person of their own free choice.

1.1 The Kikuyu Oaths

The customary oath forms a very significant aspect of the African traditional way of life. After the Emergency in the 1950's, and the oathing allegations made after T.J. Mboya's assassination in July 1969, oathing has become closely associated in the public mind. The present state of the law with regard to oaths and oathing in Kenya is not entirely satisfactory, and in certain instances, it must be stated that the law appears to be honoured more in the breach than in the observance.<sup>1</sup>

Great caution and care should be taken in differentiating between an oath as found under the oaths and statutory Declarations Act<sup>2</sup> and an oath under an African customary setting. This difference has been misunderstood or deliberately diminished resulting in awkward consequences therefrom. Under the Oaths and Statutory Declarations Act, an oath is defined as an act by which the recipient undertakes to tell the truth in judicial or quasi-judicial proceedings. The usual format for the usual oath runs something like, "I so and so, swear that the evidence I shall give before this court, touching on the matters in question, shall be the truth, the whole truth, and nothing but the truth, so help me God."

The breach of the undertaking can have two possible consequences. The court, firstly, may reject the evidence of the witness as incredible with all the consequences to the outcome of the case before the court, and secondly, if the court is convinced that the witness was deliberately lying, then the witness may be charged with perjury.<sup>3</sup>

Under the "native" custom, definition of an oath would require a shift to a completely different level of consideration and the matter is much more serious than that of an oath under Chapter 15 and Chapter 63 of the laws of Kenya. Thus, for example, under the Kamba Customary law, the term kithitu is not synonymous with the English term oath. The word embraces a number of different categories of oaths which vary not only with the gravity of the dispute in issue, but also in the seriousness of the consequences of the oath once it has been administered.

Oaths were traditional among the Kikuyu and different forms suited different needs. There was one kind for cleansing an individual from a broken taboo, another to test his innocence in a court of elders, others again to impart power over an enemy, or as occasion demanded. Missionaries discouraged the practice absolutely, but the administration allowed recourse to them in different legal cases such as the Kioi land dispute in which the late Jomo Kenyatta assisted. In the first Kikuyu Central Association, members, many of them Church elders, introduced a new form of oath in

1925 consisting of the use of a Bible held in one hand and earth pressed on the navel with the other. The Kikuyu Central Association leaders who were restricted during the <sup>World</sup> War II decided to drop usage of the Bible for goat's meat as this was seen to be more in keeping with the Kikuyu tradition.

A more important development came from a dispute between the administration and a section of the Kikuyu living in an area known as Olenguruone, which lay in the present day Masailand. This large group of Kikuyu steadily resisted every move by the government to enforce its resettlement terms. Their solidarity as a tribal unit was cemented by an oath which all members, including the women and children, had taken. Oath taking by women and children was a radical departure from the Kikuyu custom. When Jomo Kenyatta and the late Mbiyu Koinange visited the area in 1947, they were very impressed by the unity shown by those people. It was as a result of this incident that the Kiambu leaders decided to resort to this new oathing as a means of unifying the whole tribe behind themselves.<sup>4</sup> They also intended to use it to bring pressure upon their contemporaries in government service, a counter-oath, as it were, to these civil servants' Oath of Allegiance to the Crown.

In the Kikuyu society, oath or ordeal was the most significant factor in controlling court procedures. It served two purposes; the fear of bad omen prevented people giving false evidence, and helped to bring the

offenders to justice through guilty conscience and confession. On the other hand, it ruled <sup>out</sup> bribery and corruption and ensured an impartial or unbiased judgement, for, not only the parties in a case were subjected to the oathing practice, but also the elders of the Kiama who were sworn in before being allowed to try a case. In this form of oath, the elders promised that they would not accept bribery or any private gift from those concerned in a particular case or from anyone else acting on their behalf.

#### 1.1 Types of Oaths Known to the Kikuyu

Among the Gikuyu, there were 3 important concepts of oaths, namely; Mugiro, Kirumi and Thahu. It is important to define the meaning of these three terms because, the Kikuyu beliefs in the effects of oaths were to a great extent based upon their beliefs in the powers underlying these three concepts. Mugiro means 'prohibition' or 'ban' in Kikuyu. This is directed to a specific object or act, which some or all people in the society are not expected to have or to do. If a person were to break such a rule, several consequences may follow. He may, for example, fall sick or even die, his animals may die and his family may also be affected. If such sickness was detected and diagnosed early, it could be cured by a divine doctor in a purification ceremony.

In relationship to oaths, we find that Mugiro is



an act that the person taking an oath has been prohibited to do, and this prohibition is announced by the administrator of that oath. The aim of such an oath is to make the person swear ritually that he will not act contrary to the prohibition. During a swearing ceremony, a man binds himself to the effect that he will keep the promises he has made in the oath.

Kirumi is another Kikuyu term meaning a curse. According to the Kikuyu people, to 'leave a curse' means to laudably announce a prohibition especially if the person who did so announce has since then died. Once a prohibited act is done, this act brings a thahu on the doer, for whom the act was prohibited. This thahu enters the person, and it is believed could lead to many misfortunes. Most often than not, the victim could wither away in sickness, his flocks may die as might his children, and even his crops may fail to yield. If thahu is detected at an early stage, it can be cleansed by the diviner-doctor in a ceremony known as Ndahikio i.e. ritual vomiting ceremony.

A person may invoke a curse on himself during an oath. He, for example, may swear: "If I do not obey these rules, may this soil kill me." The last part of the statement is a curse directed to the self. In the swearing statement above, there is both a prohibition, namely, not to break the rules, and a curse, namely, "may this soil kill me." This means the soil should

bring thahu to him if he ever breaks the prohibition. This kind of oath becomes the everlasting oath because the man must of necessity feed on products from the soil.

The above Kikuyu traditional concepts of kirumi, mugiro and thahu were very pronounced in the ceremonies performed even by the Mau Mau and discussed in chapter three. These same concepts are also particularly pronounced in Election Oathings.

Among the Kikuyu, it was said that people drunk the oath ('kunyua muma') rather than they ate the oath. Indeed, there was no actual drinking during the ceremony. All that there was, was sipping of a liquid, and at times spitting it out, or biting at a piece of raw meat used in such a ceremony. The use of the word drinking of the oath is symbolic to taking the oath, while vomiting is symbolic of thahu removal. Thahu does not affect those who do not contravene the oath but only affects the person who acts contrary to what has been sworn in an oath.

An example of the connection between thahu and the oath is:-

In an oathing ceremony, there are three things which bring thahu to the recipient of the oath. One source is the curses pronounced by the administrator of the oath. He curses the recipient if he ever breaks the rules he had sworn in or if he had lied in the oath.

The second source is the contents used in the oath ceremony, called "migerwa". These were mainly foods mixed with soil, blood and even milk. The recipient of the oath invoked curses on himself if he ever contravened the oath. The third source of "thahu" is the vows that the recipient himself takes and the articles he swears with. The recipient sips some of the contents in the oath to symbolise eating. It means that the person feeds and has been feeding on the foods he has taken under oath. If he fails to do so, his curse on himself, as well as the curses from the oath administrator, would kill him.<sup>5</sup>

Among the Kikuyu, muma means a solemn oath taken in a ritual ceremony before the elders. There were other casual forms of swearing among the Kikuyu which did not require a ceremony. But still, such forms aided people in judging who among the two parties was a liar. Muma was taken generally on minor disputes. The symbol of the oath consisted of a lamb which was killed and the contents of the stomach mixed with herbs, water, and a little of the blood of the animal. The 'Mundu Mugo' dipped the brush into the mixture and lifted it to the mouth of the kneeling man, who took the oath by licking the brush saying: "If I lie, let this symbol of truth kill me. If I falsely accuse anyone, let this symbol of truth kill me. If the property I am now claiming is not mine, let this symbol of truth kill me."<sup>6</sup>

Kuringa Thenge (Striking the He-goat) in  
an Oath<sup>7</sup>

In traditional Kikuyu societies, the he-goat, called 'thenge', was used in many ceremonies. It was used in oathing ceremonies as well as in cursing ceremonies. Female animals were never used in major ceremonies. Other objects were also used in place of thenge but were referred to by the same term. For example, a sun-dried pot and a stone called 'githathi'.

The person taking the oath was made to break the bones of the thenge with seven blows. With each blow, the person uttered the statements he was swearing in - "If the property I am now claiming is not mine, let my limbs be smashed to smithers like the bones of this male goat. If I am claiming more than what is due to me, let my family group be crushed like the bones of this male goat."<sup>8</sup> It was a strong belief among the Kikuyu that the liar in such a ceremony would be affected by the thahu which would come from the curses he invoked upon himself, as well as the curses from the elders. The effect of thahu was expected to occur before seven years were over. If either of the two persons died or became seriously sick before the seven years were over, he was considered the liar, for it was said that the sickness or death was a result of thahu which he contracted from the oath. But if none of the two were affected during that span of time, it

was concluded that there was no case to be answered by the accused and the matter was dropped.

The Kikuyu believe that <sup>the</sup> number seven - 'Mugwanja Muru' - i.e. Ominous Seven, is a numeral of ill luck or misfortune. Performing an act seven times, possessing seven objects or animals is always believed to bring thahu on both the person and his property. When the number was used in an oathing ceremony, it was believed that the numeral would increase the seriousness of the effect of such an oath.

Kuringa Githathi (Striking the 'Githathi') in an oath.<sup>9</sup>

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This was taken mainly in criminal cases such as murder or theft. The symbol of this oath consisted of a small red stone with seven natural holes on it. The stone was put on a small stick which was planted on the ground. The elders stood at a distance facing the spot where the oath ceremony was taking place. The venue always had to be a barren ground not likely to be cultivated, for no-one would allow the ceremony to be performed on or near his cultivation. It was feared that the evil of the oath symbol might spread to a cultivated crop and destroy it. After the initial preparations, the accused persons were asked to pass several grass stalks, ('Ngonda'), through each hole, seven times while concurrently swearing to the validity of their statement of innocency. Meanwhile, all the elders present would put a piece of creeper, ('Mokengeria'),

on their ears to protect themselves against the evil of the symbol of the oath. Women were excluded from taking any of these oaths. Their male counterparts or male siblings took the responsibility, for women were not considered mentally and bodily fit to stand the ordeal which involved, not only the particular individual, but also the whole family group.<sup>10</sup>

Githathi is similar to the thenge oath insofar as the element of cursing is concerned. Indeed, they are all actions which involve prohibitions and curses. They are all considered equally capable of consuming the criminal, either through sickness or at the most extreme case, death.

The Elephant 'Ngata' Oath.<sup>11</sup>

In taking this oath, if the accused, (normally in theft cases), denied the charge, he was required to swear in a special ceremony so far as to prove his innocence. In taking this oath, the accused would use 'Migere' sticks just as in the Githathi oath. In a case where one had lied, the effect of the oath could either kill him or could bring thahu in some form of disability.

The oaths so far described dealt with crimes committed in a past period, for example, murder or theft. We now introduce a form of a future oath, the Warrior's Oath.

The Warrior's Oath.<sup>12</sup>

This was given to the newly circumcised men. An animal would be killed and its blood used to bless the weapons of the junior warriors. This was done by sprinkling the warriors with the blood of the ceremonial animal. This form of oath, contrary to the other three, tried to encourage or prohibit some actions in the future rather than curse people who performed actions in the past. The Mau Mau oaths were of this nature and so are the oathings taken prior to national elections.<sup>13</sup> It also differs from the other forms because of its eternity, i.e. it has no time limit. The others had a specific life span while this form of oath under discussion was expected to last as long as a man remained a warrior.

The Soil Oath (taken in cases involving Land Ownership).

If a man tried to deprive another man of his piece of land, or if two men disputed among themselves, each claiming the ownership of a certain track of land, the senior elders were always expected to resolve the dispute. But if all the judicial channels were exhausted, and no compromise was reached, the two disputants were called upon to take the soil oath.

This oath was taken in an attempt to reconcile the people involved in a land dispute. The use of soil for swearing was taken very seriously - it was considered to be an everlasting oath. It was believed

that the soil and its products would bring death or thahu upon the person who contravened an oath. For the Kikuyu people, the use of soil in an oath symbolised the divine gift which comes from 'Ngai', for 'Ngai' was believed to be the giver of soil to the Kikuyu. In relation to the forms of oaths described in the early part of this chapter, this oath seems more elaborate and complicated. It contains more symbols and rituals than the oaths dealt with before.<sup>14</sup> During a land case, the participants had to take the oath in front of senior elders. However, old women were allowed to spectate.

One cannot conclude on Kikuyu oathing without mentioning the relationship of the Mau Mau oaths with the traditional Kikuyu oaths.<sup>15</sup> In many Kikuyu religious ceremonies, sugar cane stems and banana leaves arranged in an arch formation were used, more particularly so in the very solemn ceremonies of initiation from juvenile to adult status. The act of passing through an arch of the form described above was intimately linked in the mind with the most solemn moments of the initiate's life and signified a definite graduation from one status to another.

It is not surprising therefore to find that the planners of the Mau Mau oath, which was to lead those who took it into a great brotherhood of the elect, arranged as a first step in this procedure the passing of the candidate either voluntarily or by force, through such an arch, with its



solemn ceremonial significance...Unless they went through the new initiation ceremony, and unless they could prove that they had done so, they would no longer rank as children of the house of Mumbi and Gikuyu. Instead they would be as despised as people who have never taken part in the traditional initiation ceremonies of the tribe. The mere act of passing through the ritual arch had the effect of preparing those who did so, mentally, for something solemn and binding, in a way probably few, if any, Europeans can ever fathom. <sup>16</sup>

There was nothing bestial or particularly abhorrent about these early ceremonies. They only adapted or prevented recognised Kikuyu customs, and it is probable that the majority of those who took the oath were willing recipients. The oath itself was almost identical with the original Kikuyu Central Association oath. The format ran something like this, 'I will not give away the secrets of the society. I will not help the government to apprehend members of the society. I will not sell land to strangers.'<sup>17</sup> The Mau Mau oaths were to a great extent based on the traditional Kikuyu oaths.<sup>18</sup>

The curses in traditional oaths always emphasized the point that the oath would kill the liar. The Mau Mau oaths were similar in this respect. However, the Mau Mau did not wait for the effect of the oath to kill the person who contravened the vows he had made. The betrayer was killed instead. Indeed, in their oaths,

a person would be warned that he would be killed by the Mau Mau if he violated the oath. In traditional Kikuyu society, however, no persons were forced to take an oath. If a man refused to take an oath, it was assumed that he was guilty, and he had to comply with the judgement of the elders.

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The Mau Mau were fighting to restore the rights of the black people especially on land ownership. Any Kikuyu who refused to fight for justice, and the first sign of refusal was a rejection of Mau Mau oaths, was judged to be guilty and therefore had to be punished.

Nothing but absolute unity, implicit obedience and a sublime faith in our cause could bring victory against the guns, the armies the money and the brains of the Kenya Government. It was a war for our homes, our land and our country in which the price of failure was death.<sup>19</sup>

The effect of the oath was believed to be a sign of supernatural penalty.<sup>20</sup> This belief, that the power behind an oath was God, is an important indication of the religious significance of the oaths. This religious significance of oaths is rooted in the traditional Kikuyu beliefs and practices.

The European administration neglected and discouraged these oaths and ordeals. They regarded them as mere superstitions. The Europeans adopted a form of raising hands or kissing the Bible as symbols of oath. This form of oath definitely had no meaning

to the Africans. It had no binding force, moral or religious. The result had, and has been, fabrication of evidence in courts of justice, and furthermore, bribery and corruption in many cases that go before a magistrate or court of elders. It would not be an exaggeration to say that in most cases, judgement depends entirely on who pays most.<sup>21</sup>

## 1.2 Types of Oaths Known to the Wakamba.<sup>22</sup>

Apart from the Kikuyu, the Kamba are another community who placed, and still uphold, oathing as a cardinal part of their traditional life.

Oathing among the Wakamba is an old creation that has run from time immemorial. It is used for the purpose of solving disputes when parties have failed to compromise.

This practice is believed to have come about or have been invented by early man as a form of prompt arbitration in cases where the council of elders were not able to settle disputes once and for all.

There are numerous types of Kithitu oaths existing among the Kamba society. Only five of the major Kithitu oaths which are widely practiced and revered as effective will be dealt with here. Various types vary from clan to clan, and from a particular area to another. These differences are negligible and any major Kithitu oath will be known by the Wakamba whether resident in Machakos, Tharaka, Kitui or Kilungu

areas, despite the slight linguistic differences which are likewise negligible.

It is believed widely that the Kithitu oath was invented by a person aggrieved by the decision reached during a litigation and so he thought of an ordeal which could affect whoever told a lie. The inventor did this by gathering all the inedible wild roots and fruits, including the substances believed to bring omen or bad luck upon someone, and those birds which are not edible, and he combined all these to make an oath.

The Kithitu oath is taken in special circumstances, for example, when a person borrows from another and refuses to give the property back. The Kithitu oath is invoked to compel him to pay. The oath may also be taken when one destroys the property of another maliciously and the wrongdoer refuses to pay compensation or even to acknowledge by admitting the guilt.

Oath taking among the Wakamba is not only used for tracing offenders or solving litigation problems, but it is also used for maintaining peace.

Peace is maintained by the oath of the Kithitu which is the most solemn and binding thing known to the Wakamba. This oath is not only taken upon the treaty of peace but when any other specially serious covenant is being entered into.<sup>23</sup>

Whenever a wrongdoer, for example, a thief, murderer, or a rapist does not identify himself, the

Kithitu oath can be used so that on hearing that the said oath has been invoked, such a thief or offender may usually admit for fear of the consequences. If such a person dies, such death is equated to a suicidal act and cannot traditionally be mourned for.

Another reason for taking the Kithitu oath is to guard against intrusion to land boundaries and grazing pastures ('Kisesi'). The Kithitu oath can also make homesteads immune to spells, witchcraft and even to another Kithitu oath. This is done by carrying the Kithitu around the homestead or pasture grounds.

Women never take the Kithitu oath. Ordeals or curses may be administered against them but not the Kithitu oath. Women are kept out of oath taking as much as possible. It is believed that their intelligence is limited and any woman can mess very easily and cause a big catastrophe in the entire family. There is a mock Kithitu for women only, the aim of which is to deceive women to stop witchcraft practices. Such an oath is a harmless one because, it contains only harmless things of various trees wrapped together but this is not revealed to the women takers.<sup>24</sup> The rationale in this is to see whether she will refuse to swear which will mean finding her guilty.

The Kithitu oath is not easily definable. This is due to the form it exists in. The Kithitu exists in many forms and therefore a definition covering only one

aspect does not tell us what the Kithitu is. There are several types of Kithitu oaths that are known to and practised by the Kamba people. The term has a great traditional significance and Gerhard Lindblem writing on this point says that the Kithitu oath derived its meaning from 'thita' - faster, bind; and muma - oath from the Kamba word 'uma' - bite or curse.<sup>25</sup> The Muma and the Kithitu oath are<sup>a</sup> divine creation, fierce in nature, binding and taken to establish naturality or intimacy between the takers. It is taken where parties in a litigation have come to a deadlock and the elders have failed to intermediate between them.

The Kithitu oath is a very fierce one and for that reason, they are not kept within the precincts of the home. These are never kept in houses where people live. They were kept in places where there was no access by many people for they were considered to be very dangerous. The Kithitu oath should not be touched with bare hands because by doing so, one would be inviting its omens upon himself.<sup>27</sup> The legal nature of the Kamba Kithitu oath is seen on the basis of the ordeals' competence in solving the disputes which have gone through the courts and have not been settled. It is only then that the Kithitu oath comes in as the final arbiter or the supreme court of appeal.

There is a general consensus among investigators that, although commonly considered an oath, the Kithitu

oath resembles a traditional ordeal, in that the oath fetish is expected to strike down the oath taker and his family with various forms of disabilities and even death if he makes false claims in the oath ceremony. The Kamba believe that the silent arbiter is the fetish itself, its power derives from its secret ingredients and is measured by its reputation for inflicting sickness and, or death on false swearers. The reputed ability of a Kithitu to strike down a false swearer may vary from two weeks, for a very powerful one, to a year, for a marginal one, with the mode being somewhat between one and two months.

The Kamba people believe in the power of the institution and are terrified in its power. They are also terrified of the workings of the fetish during this time period. In the ceremony, the fetish owner, who is also ordeal administrator, will announce a period of time during which the fetish power is expected to take effect. If no severe sickness or death, or other major misfortunes beset the Kithitu taker and his family by the end of the defined time, then, as far as the community is concerned, the swearer's claim is legitimate, and in the case of a land dispute, no person may challenge his supernaturally tested right to land tenure. In 1968, Norman Methven, (Presiding Officer over the systems of courts in Kamba territory - Machakos and Kitui districts during 1967 and 1968 and 1969), introduced a formal or fixed procedure for controlling the court's involvement

in the administration of the Kithitu and ndundu for dispute settlement. As the Resident Magistrate, Mr. Norman Methven, constructed a court order form and formulated a rationale for administering the Kithitu in civil suits. In practice, the Kithitu ordeal was incorporated as quasi-judicial remedy at all levels of appeal including the High Court.<sup>28</sup>

1.2.1 General oath taking and their purposes among the Wakamba

The most commonly practised and widely administered Kithitu oaths among the Kamba community are viz:-

- (i) Muma or Ndii oath.
- (ii) Mbisu or Nyungu oath.
- (iii) Uvya or Ngunga oath.
- (iv) Ndundu oath.
- (v) Kiiva or Nyundo oath.

(i) The Muma oath

This type of oath is also known as Kithitu Kya Ndii or the fibre oath. It is believed to be the oldest oath among the Wakamba. This oath is made up of very many ingredients which are mixed up and put together in an old 'Kyondo' (basket).<sup>29</sup> The 'kyondo' with its contents is then kept on three stones which represents a pot in cooking position.

The basket is struck three times at given intervals and again seven times by the offended person.



The offended person, speaks 'divine' words assigned to have evil results on the wrongdoer. It is only struck after the words have been spoken. The stick used for striking is then cut and taken to the offender's home.

The Muma oath owner is then requested to unset the 'Kyondo' after the ritual is over and the elders have eaten meat before dispensing to their homes. This oath is complicated to understand and not many people know of its composition - not even some distinguished elders. This is due to the fact that the ingredients are enclosed in the 'Kyondo' and are not open to the public for observation. It is only the Muma owner who knows exactly what it contains as he prepares it alone and brings it ready for taking on the oathing day.

(ii) Mbisu or Nyungu oath

This is believed to be the second oldest known type of oath to the Kamba community. Mbisu or Nyungu can literally be defined to mean 'pot'. The whole pot or just a piece of it can be used provided that, <sup>in</sup> whichever form it is used, it is smashed into pieces. Among the Wakamba, in normal circumstances, hitting or tapping a pot, or smashing is strictly forbidden because doing such an act would constitute a full Nyungu oath.

This Kithitu oath contains no ingredients except the pot itself. The pot must be one used in cooking or has in the past been used for that purpose. It is a simple oath without many formalities required thereof.

This is why it is popular amongst women and young people generally because of its simplicity in administration.

Whenever anybody wrongs another, or witchcraft practises are alleged on oneself and that person knows otherwise, he can invoke the use of the Nyungu oath. This is done by picking a pot and speaking evil words upon the wrongdoer then the pot is smashed into pieces. If the pot does not break into pieces, the oath is regarded as impossible on the wrongdoer or that he has undergone some customary treatment.

After the Nyungu oath has been taken, two things must be observed. Firstly, one must refrain from sexual intercourse as must the other members of the family too. Secondly, there should be no further cooking in pots since cooking is done with pots.<sup>30</sup>

Owing to the easy and fast procedure of administration many people prefer this form of oath. This type is invoked by both men and women equally.

(iii) Uvya or Ngunga Kithitu oath

Uvya literally means a horn. This oath is therefore known as the horn oath. It is made from an animal's horn and is a common oath among many medicinemen and witchdoctors.

It is also known as the Ngunga oath because the horn is kept in the cave or valley which is called 'Ngunga' in Kikamba. The owner of the Ngunga is presumed to

know the most about the oath. The owner is called upon to set it after which the offender strikes it with the 'Mukulwa' stick. The offended must report to the wrongdoer prior to the administration of the oath.

There is a very strong myth among the Kamba elders, that the Ngunga oath originated from Meru. The Wakamba used to go to Tharaka and Meru and while there, they visited certain markets and homes where they bought their witchcraft.

The Uvya oath is taken in caves or valleys or far away from homesteads for fear of contamination or exposure to members of the community. When depositing the Kithitu oath, the owner must do a number of things. First, he must seek solitude at night or on a day prior to that scheduled for taking the Kithitu oath; secondly, he must be naked; thirdly, he must approach the place with his back facing the cave; and fourthly, he should observe the rules of celibacy.

(iv). The Ndundu oath

The Ndundu oath is used extensively where witchcraft or evil spells are known to exist in a certain homestead or clan. The elders are summoned to the home of the offender or offended and when they assemble, a black bull is slaughtered and meat from one side of its body is removed and chopped up into many pieces.

All the ingredients of the oath are mixed up and

put into the bag made from the animal's appendix. The openings are blocked by using the 'ngata'. The bag is then hung on a kilaa tree and a sharp instrument, a needle or a sharpened rib of the slaughtered bull, is used to pierce the bag as people take the oath. Those taking the oath line up in a queue, each person piercing the bag and uttering the relevant words. After piercing it, the person licks the sharp end of the needle or rib. When all have finished the act, the last person, usually the owner, splits open the ndundu oath contents, either by using a special knife or the sharpened rib, and then brandishes the knife as the contents pour down on the earth.

(v) Kiiva or Nyundo oath

Kiiva or Nyundo is the Kamba name for a hammer. This is why the oath is called a hammer oath, because it is administered with the use of a hammer. It is a very serious oath which is actually irrevocable and has no certainty as to when it may become effective. The invocation of this oath is very rare indeed.

The hammer, like the one used by a blacksmith, is obtained and removed from its handle. It is placed on top of the 'Kawenzi' and water is spilt down through its hole while at the same time the administrator is uttering the desired words to bring the oath into effect.

After spilling the water and uttering the relevant

desired words, the administrator holds the 'mukulwa' and taps or strikes the hammer seven times, each such time cursing and uttering evil words upon the offender. After striking the hammer seven times, a full hammer oath is regarded to have been administered.

Many people who own the Kiiva oath only know how to administer it but not how to reverse or cleanse it. This is an oath only common to, or confined to, certain families of blacksmiths. Ownership is said to favour that group of professionals because of their vast knowledge in the field of metallic substances.

In James Manzi Muthiani v Kimatu Mbiru<sup>31</sup>, the case came before the Native Tribunal Appeal Court and the elders rejected the nyundo oath on the grounds of being too potent; "An oath on a piece of iron that is used for beating and hammering other pieces of iron is regarded as completely binding and irrevocable ...it cannot be removed or the consequences reversed by the man who brought the iron like an ordinary oath."<sup>32</sup>

This means if it is sworn falsely, nothing can stop the aftermath until, and unless, that family is extinguished. The hammer oath is not acceptable in tribunals because of its grave consequences.

### 1.3 Conclusion of Chapter One

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From the submission above, it is possible to see that oathing was very highly placed in the two societies

referred to. This ritual was greatly connected with religion and as it were, the society revolved around it. In Chapter 3, oath-taking will be viewed in its present context and the similarities it might share with the original ones. It is only after such a study that we can answer the question; "Does oath-taking influence the electorate and is it an illegal practice?"

Chapter One footnotes

- 1 Phillip, P.D., 'Customary oathing and the legal Process in Kenya' (1970) 1 J.A.L.P.17.
- 2 Cap. 15 Laws of Kenya.
- 3 Cap. 63 Laws of Kenya.
- 4 Jeremy, M.B., Kenyatta Richard Clay Ltd., Suffolk.
- 5 Benson, M.G., 'Thesis' Chege Gathogo Interview at Nyandarua.
- 6 Jomo Kenyatta, Facing Mount Kenya (6th ed., 1978), p.223.
- 7 E.A.P.L.R. Vol. II p.147. The most binding form of oath is for a goat to be bound and beaten to death with a club, the operator meanwhile declaring, "If I do wrong, say what is untrue, etc., may I die like this sengi."
- 8 Jomo Kenyatta, supra, p. 224
- 9 Phillips, A Report on Native Tribunals (C.P.K.) Legal Dept., Nairobi 31st August, 1944.
- 10 Jomo Kenyatta, supra, p. 225
- 11 Glossary at p.
- 12 Muma wa Aanake (the oath of the warriors) to bind them before going on a raid. The purpose of all these oaths was to give those participating a feeling of mutual respect, unity and shared love, to strengthen their relationship, to keep away any bad feelings and to prevent any disputes.

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- 13 The oaths are taken before the voting day so that the voters can be bound to vote for the candidate oathing them.
- 14 A Muma oath ceremony, "The Kenya National Archives," File Number KNA/DC/KBU/7/1 Anon, for all details and photographs of the oath.
- 15 The oath of unity (given the mysterious and sinister name of 'Mau Mau' by a cunning propaganda machine) has the same background. It was intended to unite not only the Gikuyu, Embu and the Meru, but all the other Kenya tribes. Every tribe in Kenya had an oath for bringing together and solemnizing certain transactions.
- 16 Leakey, Defeating Mau Mau Methven & Co. Ltd., London (1954 ed. ), p. 165.
- 17 Ibid.
- 18 In some oaths, some objects were used and some activities performed which were believed to bring 'thahu' in form of sickness when they were used or performed in daily life. Such objects or actions were prohibited. But when some of these objects or actions were present in an oath ceremony, they strengthened the effect of that oath by increasing the 'thahu' element in the oath.
- 19 Josiah, M.K., 'Mau Mau' Detainee Oxford Univ. Press, East Africa, (1963 ed.), p. 32.
- 20 Leakey, Supra, p. 98.
- 21 Jomo Kenyatta, Supra, p. 301.
- 22 E.A.P.L.R. Vol. III p. 117.



- 23 Lindbleem, Gerhard, The Akamba in British East Africa (2nd ed., 1920).
- 24 Penhill, Kamba Customary Law, MacMillan (1957 ed.), p. 65.
- 25 Lindbleem, Gerhard, supra p. 67.
- 26 Hobley, C.W., Bantu Beliefs and Magic H.F. & Witherby Ltd., (1938 ed.), Ch. 3.
- 27 Volenti non fit Injuria, one would apply sheep's fat on his hands before touching a Kithitu oath.
- 28 Anthony Thomas, 'Oaths, Ordeals, and the Kenyan Courts: A policy Analysis' (1974) 33 No. 1 Spring.
- 29 The oath is known as the fibre oath because, the 'Kyondo' or 'nthungi' is woven or spinned in fibres.
- 30 It is believed, when pots are used for both cooking and for Kithitu oathing, the repercussions are aggravated.
- 31 Court of Appeal for Eastern African Law Reports, No. 68 of 1949.
- 32 Penhill, supra, p. 65.

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## CHAPTER TWO

### 2.0 Oathing in Elections

Elections are very important in every democratic country. It is a time when the electorate go to the polls to elect their representatives to parliament. The importance of this freedom is recognised and well protected by the constitution, the Election Offences Act and the National Assembly and Presidential Elections Act.<sup>1</sup> These statutes lay down the procedures and rules to govern elections and penalties for breach of any such rules.

The election offence I am concerned with here is that of (political) oathing. When oathing began to be used to further political aims, the oaths assumed a different character than used in traditional form and traditional purposes.

Once oathing became established as a legitimate political instrument, its use was bound to be invoked at some future time under conditions where questions of unity once more became of vital importance. This is precisely what happened in 1969, when the Mboya assassination exacerbated dormant but deeply-rooted tribal rivalries and fears. Although they were administered in secrecy - they were administered on behalf of the legitimate political authority, a complete reversal of the situation prevailing in the 1950's when the Mau Mau group whose unity it was sought to ensure

through the oath was seeking to subvert the then lawful government.<sup>2</sup>

## 2.1 The Political oath and the Criminal law

The Penal Code<sup>3</sup> section 62 to 64 deals with the compelling of another person to take an oath, and how far such compulsion is a defence. Forcing a person to take an oath by use of physical force, threat or intimidation for the purpose of binding that person to act or not act in a certain way is a felony, and the guilty person is liable to imprisonment for a period of ten years.

If one reports within five days of such forced participation in oathing to the authority, then he can use it as a defence to prove that he was unable to do so due to sickness or some other disability he should report immediately he is able to.

Any person who is present at the administering of an oath or engagement in the nature of an oath mentioned in s.59, s.61 or s.62 of this code shall be deemed to have consented to the administering of such oath or engagement unless, within five days thereafter or, if he is prevented by physical force or sickness, within five days after the termination of such physical force or sickness, he reports to the police...<sup>4</sup>

The question arose under the oathing cases during

the emergency as to whether those persons to whom oaths were administered, owing to their complicity in the commission of the offence and their failure to make the required report, were accomplices whose evidence required corroboration. An obvious difficulty was (and is) that normally all persons present at an oath-taking, if not administrators, would be taking the oath, and since witnesses who require corroboration cannot be corroborated by other witnesses also requiring corroboration, convictions would be difficult to obtain. In M'Nduyo M'Kanyoro V.R.<sup>5</sup> none of the witnesses could rely on compulsion as a defence had they been charged. In this case, the appellant was convicted by a Magistrate of administering an unlawful oath to one M'Kanyoro, contrary to S.62(1)(f) of the Penal Code. At the trial, M'Kanyoro and another witness testified that in fear, they took a Mau Mau oath administered by the appellant in the presence of several armed men. Neither witness reported the incident to the police and therefore, could not rely on compulsion as a defence to a charge of taking an unlawful oath. Both witnesses however reported to the headman. The Magistrate held that the two witnesses had acted under compulsion, and followed Dedan Mugo s/o Kimani V.R.<sup>6</sup> that they were not accomplices, and convicted the appellant on their evidence.

On appeal, the judges of the Supreme Court held that they were bound but doubted the authority of that case in view of the decision in Davies .V. D.P.<sup>7</sup>

The appellant appealed once again when it was argued on his behalf that the conviction depended on the testimony of two witnesses who were accomplices in the crime charged; that there was no corroboration of their evidence; and that the Magistrate had not said that he would convict without corroboration; and further, that if the witnesses acted under compulsion as defined under S.17 of the Penal Code, they would not be accomplices, but that for this section to apply, there must be two or more offenders of which there was no such evidence, and finally, that if Dedan's case was good law, S.63 would not apply as the witnesses had not been charged.

Section 63 of the Penal Code only precludes a person who has taken an oath, and who is actually charged with the offence thereunder, from setting up the defence of compulsion unless he makes the declaration required by the section within the time prescribed. It cannot be invoked against persons who have never been charged.

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The court was bound by its own decisions in Dedan Mugo and R.V. Mukwate and Another<sup>8</sup> and was of the opinion that they were rightly decided - in holding that a prosecution witness who has been compelled unwillingly to take an oath and is not in fact an accomplice is not, when he is a witness in the prosecution of another person for the offence of administering that oath, to be treated as an accomplice, this even though,

were he to be charged with an offence, he would be statutorily presumed under S.64 to have consented to the administration of the oath, and the defence of compulsion would be curtailed under S.63 of the penal code.

A prosecution witness, who has been compelled unwillingly to take a Mau Mau oath and is not in fact an accomplice, is not, when a witness in the prosecution of another person, to be treated as an accomplice merely because if he were himself to be charged with one of the specified offences, would have his consent to the administration of the oath statutorily presumed under S.63A, or a defence of compulsion statutorily curtailed under S.63. The appeal was thereby dismissed.

The Constitution provides: "No person shall be compelled to take an oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief"<sup>9</sup>. There the person oathed is a 'pagan' or follows one of the customary religions, the point of enquiry might be limited to the question whether the form and nature of the oath is in violation of traditional practice.

## 2.2 Traditional oathing in Civil Cases and the Role of the Courts

Traditional oaths are still utilized in certain types of cases in Magistrate Courts in Kenya. This is for the purpose of settling the entire dispute by

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putting it to the test. It is submitted;<sup>10</sup>

- (1) there is no legal authority for the procedure;
- (2) that to order a case to be decided by administration of an oath is beyond the powers of a court whether in the first instance or an appeal;
- (3) the courts cannot waive their responsibilities to decide such cases on the evidence presented; and;
- (4) that in any event administration of such oaths in today's circumstances can lead to substantial injustice.

The Natives Court Regulation of 1897 established two types of Native Courts - The Chief Native Court which was presided over by a European officer, and the other by a "Native" authority. The Ordinance were repealed by the Courts Ordinance, 1907, which provided for the promulgation of Native Tribunal rules of 1911 and 1913 which repealed and replaced them. In 1930, a parallel system of courts came into being with the enactment of the Native Tribunals Ordinance replaced in 1951 by the African Courts Ordinance, and integration of the court structure took place in 1967 when the present Magistrates Court Act became law.

### 2.3 Three Separate Categories of Oath in Customary law and Procedure<sup>11</sup>

The first is the Customary oath taken by a party

to the case in which he swears that what he has spoken or will speak is the truth or he will be affected by the oath. The second is the oath taken by a party which in effect settles the entire dispute, for if the oath does (or does not) take effect within the prescribed period, the matter is settled without further inquiry into the actual facts of the case.<sup>12</sup>

The third type is that administered to a witness, whether or not a party to the dispute. "The meaning and object of an oath as generally understood among the native tribes partakes rather of nature of "trial by ordeal" of an accused person than a mode of adding solemnity to evidence."<sup>13</sup>

#### 2.4 Present Day Use of the Oath

In 1965, the Commissioner of African Courts circulated to such courts a copy of a decision by the Court of Review, on appeal arising from the trial of a pregnancy case in Fort Hall, the gist of which was that African courts should decide cases on the evidence before them and not upon the effect of an oath.

The Kithitu oath is believed to be the most powerful of the Kamba oaths where the truth is "vindicated" by death, miscarriage or abortion within the family of the false swearer. Apart from the purely legal aspects of employing the oathing procedure, there are practical difficulties which have led District Magistrates to disapprove of its continued use. The false swearer or



a member of his family, is supposed by tradition, to be killed by the oath. If, however, one dies a "natural death", as one Magistrate put it, his family unjustly loses land to which they are entitled to.

Chapter One of this dissertation shows very clearly how oathing was highly placed in the African society. Today, the need to protect people during elections from this fear of oathing is provided for in the Election Offences Act.

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Undue Influence S.9 Every person shall be guilty of the offence of Undue Influence who directly or indirectly by himself or by any other person on his behalf, makes use or threatens any force, violence or restraint or any temporal or spiritual injury, damage or loss, or any fraudulent device, trick or deception, for the purpose of or an account of -

to  
(a) Inducing or compelling a person to give or refrain from giving his vote, whether to a particular candidate or not, at an election, or

(b) Otherwise impeding or preventing the free exercise of the franchise of an election or voter, or

(c) Inducing or compelling a person to refrain from becoming a candidate, or,

(d) Impeding or preventing a person from being nominated as a candidate for an election or from being registered as a voter.<sup>14</sup>

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Traditional beliefs are part and parcel of African culture and it would be wrong if by the mere virtue of

education - one learns how to read and write - one abandoned one's cultural heritage. No religion or system of education can wholly convert and alienate a people from their cultural way of life. Indeed, the Kenya legal system has adopted many traditional concepts. In Chapter 3, this is shown by traditional oaths being recognised in the highest court in the country.

### 2.5 The Use of the Oath by Politicians

Oathing has often times been used by politicians in Elections as a means to win votes from the electorate. Through this method, they invoke fear on a people who still believe strongly in breach of such an oath. Oathing, therefore, is a corrupt method used by unscrupulous politicians who want to get into parliament to serve their own needs and not those of their constituents. It is for this reason, that the Government has provided machinery to keep such people in check. The High Court disqualifies all persons who resort to such practices.

In the Busia South petition against a former Cabinet Minister, Mr. J. Osogo, the court was told that more than 300 people had gathered in a house belonging to one Leya Ndekwe and that one Samuel Osogo had administered the Nakhabuka oath to them. He had made them swear; "I will give my vote to the Minister and no one else. If I vote for anyone else may I die because I am holding the Bible." Those given the oath were made

to spit in a pot while repeating: "The oath of Nakhabuka says that I should vote for the Minister and no one else."<sup>1</sup>

One Ouma testified that, following the oathing, Samuel Osogo had produced two posters. The first depicted a frightened man in the bush falling backwards in the face of a lion (Mr. Osogo's symbol) which had sprung on him. On the top right corner was Osogo's picture and underneath, the words, 'sikhokho ali khumbasi'. Ouma explained that 'sikhokho' referred to one Ombere, who was one of the other candidates who had challenged Osogo in 1979, being eaten by a lion. Mr. Samuel Osogo was said to have pointed at the picture saying that those who did not vote for his brother would be eaten by the lion like Mr. Ombere, now that they had taken the oath. The second poster showed a man holding a key (the symbol of the third candidate, Okondo) jumping from a boat into the water while a lion loomed in the background threateningly. This meant the owner and the boat were in trouble and this is what would happen to all who opposed Mr. Osogo or voted for Mr. Okondo.<sup>16</sup>

In its ruling, the court found Mr. Osogo guilty of the Election offence of administering oaths contrary to S.9 of the Elections Offences Act.<sup>17</sup> The 1979 election of Mr. Osogo as member of parliament for Busia South was therefore nullified.

For the High Court to disqualify a candidate on the grounds of oathing, the petitioner has to prove to

the court that oathing did take place. He does this by calling witnesses to show that oathing was really conducted in the constituency. The evidence tendered has to be convincing to the judges and they can only disqualify a person, on being satisfied that, the alleged oathing did actually take place.<sup>18</sup>

In another petition, one William Murgor contested in his petition that people refused to vote for him after they had taken the Monyonyo Oath which was administered in the Kerio Central Constituency by one Francis Kaino Mutwol.<sup>19</sup> His lawyer submitted that the people of the Constituency had been denied their constitutional right to vote freely in the elections because of the oath which intimidated them.<sup>20</sup>

Mr. Murgor said the purpose of the oath was to keep the tribe intact and to reserve clan secrets and customs.<sup>21</sup> The High Court dismissed the petition on the grounds that it was satisfied a Monyonyo oath could never be condoned by the administration - "far less during periods of elections." The court heard that the District Commissioner had said the meeting was covered by Special Branch Officers. It was alleged that the Monyonyo oath was administered at a meeting held at Koitilial on October 11, 1979 and was addressed by Mr. Mutwol.<sup>22</sup>

Another important case on oathing was that of Mr. Paul Ngei. In respect to this case, the court

recalled evidence that Mr. Ngei had visited several stations in his Range Rover vehicle which had a wood carving of a lion (his election symbol) mounted on the roof-rack. This, according to witnesses, had resulted in voters fleeing away from polling stations "for the lion was said to be alive". The carving was brought before the court as an exhibit. "The lion carving we have observed could not cause fear. Evidence does not support the allegations that the lion was alive" they (judges) ruled."<sup>23</sup>

The judges further ruled that they could not accept the allegations that the lion carving was a form of oath taken to support Mr. Ngei. Indeed, in the witness box, Mr. Ngei had not been cross-examined about the oathing allegations in connection with the lion and hence, the matter of the oath had faded away, the judges ruled.<sup>24</sup>

Election times are great times in Kenya. It is like one big festival with posters and slogans and rallies. Great times of great promises. Promises candidates know they may never fulfil in their life time but, nevertheless, which they make if they want to be elected. In Kenya, the services of witchdoctors whose work is through the power of suggestion and association is sought after. This creates fear and threatens people and it's as unfair as the magic of the bullet, though not necessarily having the same finality.

During the 1983 "Nyayo Elections", the President

told 'wananchi' that problems facing the country do not just happen. They are caused by people, and added, "If you elect leaders who are propelled by lust for personal gains, you will be in trouble." The President asked the electorate to judge the candidates on the basis of their intimate knowledge of the problems which hinder social-economic development in their respective areas.<sup>25</sup> Above all, the President asked that the campaigns and elections be conducted peacefully. Despite this call, violence and deaths still resulted during the campaigns in the Mathira Constituency of Nyeri and in Kitui Central Constituency where one of the candidate's brother was murdered.

The Monday September 12, 1983, Kenya Times reported an interesting story on oathing. A Mathira parliamentary candidate, it was said, had converted his house into an oathing venue. The Kenya Times investigators revealed that the candidate had engaged the services of a male witchdoctor, one Musyimi, and another female, Kamene, who reportedly were hired from Donyo Sabuk near Thika. Musyimi had been hired to conduct oathing on males while Kamene was similarly to specialise on females. As a reminder, female and male oath takers never mix during their respective ceremonies.

During the male ceremonies, the witchdoctor administers the oath clad in a red robe, a red hat and a feather on his straw hat. Not all those who visited

the candidate's home were welcome for oathing.

According to the Kenya Times, male oath-takers are forced to remove all their clothes and kneel down on an animal skin during the ceremony. The candidate's symbol is displayed prominently in the oathing room. Other charms as horns, decorated with animal hair, are placed next to the candidate's symbol.

A big bottle with an egg placed at the bottom is filled with magic water made of different types of herbs. All oath takers are forced to sip the water seven times during which they swear never to vote for any other candidate and if he faltered, he be rejected by the Kikuyu soil and perish.

After the oath, the candidate's symbol is passed between the legs of the oath taker from behind and then placed on his penitentialia. The symbol is then raised near the face and one is asked to kiss it several times saying, "Ndirothuruo ni maciaro ingigagutigana kana njage gukuhe kura yakwa". (Should I defect from you and fail to vote for you, I deserve total condemnation).

Later, the oath taker is allowed to dress, after which he goes round the charms seven times. In the meantime, the witchdoctor splashes water on the person's face using a fibrous animal whisk.

During the female oathing in Mathira, Kamene wore a black robe and a red head-dress. Her charms included traditional calabashes decorated with beads. It is

understood that after the ceremonies, some of the oath takers became wild and confused.

The question arising from this oathing was whether the oath was binding on the Mathira people (who are predominantly Kikuyus) since it was conducted by Kamba witchdoctors. Mr. Kuguru, an aspiring candidate, was quoted to say, notwithstanding whether the reports were true or false, the government should act quickly.<sup>26</sup>

The Central Provincial Commissioner, Mr. David Musila, denied there was any oathing in the Mathira Constituency. He said intensive investigations by security personnel had revealed no evidence of oathing having taken place or being administered by any of the candidates in the constituency.<sup>27</sup> Candidates who were indulging in methods of using witchcraft and oath-taking to scare or win the electorate to their side were warned by the Attorney-General, Mr. Mathew Muli, that they were committing an election offence - such practices amounted to corrupting the conscience of wananchi and the Government would not allow them to continue.<sup>28</sup>

Acting on a tip-off, the Kenya Times launched investigations into possible oathing in Mathira. The investigations were carried out over several days in a bid to obtain substantive evidence. In the process, a correspondent pretended to be a supporter of the election candidate and was accordingly allowed to go through the entire oathing ceremony.



Supporters were being screened within the compound of the home before undergoing the ceremony individually, and they were thereafter required to keep the incident secret (hopefully bound by the oath). Days later, when the Kenya Times revisited the home, they found that the oathing paraphernalia had been removed evidently before the police launched a house search.

The police, it was learnt, did not swing into action on the material day until 9 a.m., four hours after the report disclosing the oathing had been circulated in the area. The Kenya Times copies arrived at 5 a.m., which apparently gave the candidate concerned ample time to clear out the paraphernalia.

Was there or wasn't there any oathing in Mathira constituency? At first, the Kenya Times insisted there was, while the Provincial Commissioner for Central Province thought otherwise. However, some time later on, Mr. Shamalla, Managing Director of the Kenya Times, startled Kenyans when he announced that the Provincial Commissioner had been right after all and that the Kenya Times story, which the newspaper had earlier on defended with a strongly worded editorial, was, after all a cooked-up story.<sup>29</sup>

Reading the editorial on oathing in the Kenya Times, it is difficult to believe that no oathing took place in Mathira. The editorial said, 'refutations of

stories by the editors and publishers shakes the foundation of their credibility.' In Kenya, on a number of occasions, editors have in their hands, hard evidence that makes it impossible for a refutation to hold out. Quite often, they are content to let a refutation pass unchallenged either because the evidence is not fool-proof enough or because it is impolitic to challenge certain authority. The Kenya Times, no exception to this occupational hazard, found itself unwittingly locked in a battle for the truth with the Central Provincial Commissioner, over a report on oathing in the Mathira Constituency.

The story of oathing in Mathira caused quite a stir - notably from the Mathira candidates, because oathing is an election offence; and also from the provincial administration, because it calls into question the efficiency of the security personnel.

If the Provincial Commissioner was to admit the possibility of the oathing and promise to tighten security, he would perhaps be doing the nation a better service, but that would also be an admission that the security personnel in the Province was not thorough. That would be an issue which the Provincial boss would be admitting that his security forces are caught napping. We find this to be a major reason for the rebuttal.<sup>30</sup>

From the ongoing, it appears that oathing in fact

did take place, despite Mr. Shamalla's denial of the fact. His reasons for refuting the story was not well supported and left a lot to be desired. The question should have been; What should be done to ensure that oathed persons were set free before the voting day? Instead, he stopped at; Was there oathing in Mathira Constituency or not?

Oathing is part of the African customary way of life and it knows no difference between a Christian and a non-Christian. Even the Christians believe and practise it strongly, and anybody trying to raise the defence that the people were not bound because they were Christians would have a very weak ground. In the Kangundo petition, Mr. Ngei, for his own good, argued that the Kangundo people 'are civilized and most are Christians who cannot be associated with oath taking of any nature.' He admitted, however, that oath taking was used against the colonialists.<sup>31</sup> Indeed, in the same way, a politician can also use the oath against his rivals.

Chapter Two footnotes

- 1 The Constitution of Kenya (Cap. 66, Laws of Kenya). The National Assembly and Presidential Elections Act Cap. 7, Laws of Kenya) Penal Code (Cap. 63, Laws of Kenya).
- 2 Phillip P. Durand, 'Customary Oathing and the legal Process in Kenya' J.A.L. Vol. 14 (1970) p. 17
- 3 Penal Code (Cap. 63, Laws of Kenya) S.62, S.63.
- 4 Penal Code, infra, S.64.
- 5 (1962) E.A. 110.
- 6 (1951) 18 E.A.C.A. 139.
- 7 (1954) 1 All E.R. 507.
- 8 Kenya Supreme Court Emergency Criminal Case No. 64 of 1955 unreported, cited in (1951) 18 E.A.C.A.
- 9 The Constitution, supra, S.78(4) Protection of freedom of Conscience.
- 10 Phillip P. Durand, supra, p. 23.
- 11 Infra, p. 24.
- 12 The Kithitu oath is a good example of this.
- 13 Hamilton J. Appendix 1 (1905) E.A.L.R. p. 111.
- 14 The Constitution of Kenya, supra.

- 15 The Standard, 16th April 1981, for further reading, Daily Nation, 19th March 1981.
- 16 The Weekly Review, 17th April 1981, p. 4.
- 17 This was the first petition case in Kenya's history since Independence where a petition was filed not by an unsuccessful candidate but by a voter registered in the constituency.
- 18 The ruling in the Mbiri case is discussed in Chapter three. Daily Nation, 13th February 1980. The former Minister for Water Development Mr. Gikonyo Kiano was ordered by the High Court to supply details of ceremonies in which Mbiri constituents allegedly took oaths to vote for Member of Parliament Kenneth Matiba.
- 19 Daily Nation, 14th March 1980, p. 28.
- 20 Infra.
- 21 Daily Nation, 5th March 1981, p. 28.
- 22 Daily Nation, Sunday March 1980.
- 23 Daily Nation, 18th March 1981, p. 8.
- 24 Infra.
- 25 The Kenya Times, 12th September 1983, p.1
- 26 The Kenya Times, 13th September 1983, p. 16.
- 27 The Kenya Times, 14th September 1983, p. 1
- 28 Infra.

29 The Weekly Review, 23rd September 1983, p. 7.

30 The Kenya Times, 14th September 1983, editorial p. 6

31 The Kenya Times, 20th September 1983, p. 1

CHAPTER THREE

3.0 Mystery of Traditional oaths and Election  
Petitions

Traditional oaths in Election petitions is quite a new and unique area that first cropped up in the High Court following the 1974 General Elections. No fewer than 43 petitions were filed by losing candidates seeking to nullify the Election results in their respective constituencies. In five of them, oathing of the particular petitioner was alleged and relied on as one of the major grounds by the petitioners. Despite the discrepancies in the evidence adduced before the court, in three out of the five cases where the issue was raised, the petitioners succeeded in their petitions.

The pertinent issue here is not whether oathing was accepted or not by the court, although it was very important, but the way and approach adopted by the court on the matter. There was implication of admission that customary oathing constituted undue influence under the Election Offences Act.<sup>1</sup> There was also possible legal complication resultant from some of the courts conscious, or otherwise, pronouncements in the course of the judgements:-<sup>2</sup>

(1) The judgements reiterated that customary law and rituals are, and will for a long time to come so

remain, powerful forces within Kenya's legal system.

(2) The cases raise interesting jurisprudential points which are difficult to reconcile, not only within the customary law setting in which they arose, but also within the existing statutory laws of Kenya.

From the 1974 General Elections there was raised doubt whether the Kithitu oath, and the other African oaths invoked were not permanent features of the African peoples rather than dying practices.

In the larger part of this chapter, we shall now proceed to examine a case study of five election petition cases regarding oathing.

3.1 Francis Philip Wambua .V. Galgalo & Anor.  
El. Petition No. 20 of 1974 (Hereinafter  
Kiilu's Case).

The relevant ground upon which all five cases found their way to the High Court of Kenya seems to be well represented in paragraph 12 of Wambua's petition.

That on or about the 1st day of October 1974 the 2nd Resp. held a public meeting at Masinga Market within the said constituency (of Yatta) which meeting was attended by several thousand persons of Kamba Tribe. When seven Kamba elders with the concurrence and connivance of the 2nd Resp. and in his presence administered the Kithitu oath to the said several thousand persons requiring them to vote for the 2nd Resp. or not to vote at all



knowing that the said oath is regarded as a sacred oath amongst the Kamba people who fear its temporal or spiritual injurious effect with the result that the said persons either voted for the 2nd Resp., or did not vote at all to the detriment of your petitioner.<sup>3</sup>

Most witnesses called to give evidence testified at length on effects of the Kithitu oath amongst the Kamba people and the awe the oath is viewed with. An example to illustrate this is the general belief held that, after such an oath is administered, people will die. The most common of the Kithitu oath is the seven sticks one. Originally, this type of oath was taken by the Wakamba when they fought the Masai. It was commonly believed that if you retreated, your people would at once start to die. Other examples are cited from Kiilu's case.

If someone refuses to give back my property, I can administer an oath which can kill that person...I voted for Kiilu, so that the oath did not affect me .<sup>3</sup>

Another witness, Simon Musau Ndala, an educated Christian and one of the candidates who could not vote for himself because of the oath he had taken said;

The Wakamba take oathing seriously and believe in it. whether Christian or not, I would have considered myself

bound by the oath and would have voted for Mr. Kiilu. If I had not so voted, I would have died.<sup>4</sup>

One John Makau (P.W.7) gave the following reason for voting for the second respondent:

I am a Christian, a Catholic.  
I believe in Kamba oathing. Even a Christian Kamba believes in oaths. I believe in the Kamba oath more than in the court oath.<sup>5</sup>

Even Christians and Church elders said that although they believed in God, they still feared the oath very much.

The court came to the decision that there was evidence that many Christians and some educated Wakamba did not believe in tribal oaths and would not consider themselves bound by such oaths. Indeed, it would have been surprising if this were not so after decades of educational effort. Although the court attaches importance to this evidence, it noted, however, that there was overwhelming acceptable evidence that a very large proportion of the illiterate peasant Kamba people still believe in the seven sticks oath.

From the foregoing, it would appear that only the illiterate, non-Christian Kamba would have believed in the Kithitu oath. This, however, was not necessarily the case as many educated and Christian witnesses asserted that the belief in tribal oaths was not confined

to the illiterate and non-Christians. They said that they themselves voted in accordance with the oath or refrained from voting. It is clear that from all this that Christianity and education are not incompatible with beliefs in the traditional oaths.

From this case, it can be seen that the Kithitu oath has the power of making several thousand people, in fact, the electorate in an entire constituency, vote or not vote at all. The Kithitu oath may, or may not have any limits in its scope of operation if it could affect several thousand persons within one constituency then it is omni-potent to the extent to which it can affect all those constituents.

A Kithitu oath can be administered to a group of persons with an intention or a consequence of detrimentally affecting an independent person not a party to it, thus one Francis Wambua in this case was not a party to the Kithitu oath ceremony, and in fact he was not there himself, but it affected him in that people did not vote for him.

All these allegations were proved as facts in court, because they were admitted and judgement consequently based upon them as evidential facts. Mr. Wambua stated the purpose of such oathing was to bind the people in a resolution they all wanted to follow. It can be seen that the oath has the effect of binding its taker and that it is taken when the

takers want to be bound by, or to follow, a resolution passed by them. Whether it is taken before or after the resolution has been made, however, the implication is that whenever it is taken, it binds the taker. This might have retrospective or prospective effects, that is, it has power to bind in advance, and it can be taken when a decision has been made.

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It is clear from this petition that the seven sticks oath has the effect of bad luck or death not only to the individuals to whom it is administered but also to their respective families. A Kithitu oath can be reversed by the same elders who administered it and if any one of them dies, the remaining can elect another elder. This notwithstanding, from Wambua's evidence, it can be deduced that a Kithitu oath binds until such a time it is retrieved.

Procedure in a Kithitu oath ceremony is very important. This is because it is upon correct procedure of the ceremony that the ordeal itself is capable of binding upon the takers. For example, the venue has to be in a solitary place, preferably in the bushes but unlike in a Muma oath, where one has to be naked, this need not be so for a Kithitu oath. There should also be a leader who recites the binding words of the Kithitu oath, while the others repeat them after him. After this is done, the effect of the Kithitu oath is expected immediately.

Another witness, P.W.4; one Simon Musau Ndala, testified that the oath binds both those who are present or absent equally. During the oathing ceremony, seven elders take the oath on behalf of several thousand people, whether they are present or not, which becomes binding whether the people consented to its administration or not and whether they believed it or not. In the same breath, during a cleansing ceremony, people present or absent are equally cleansed, provided the latter are informed. Due to the large numbers, this is made possible through radio or market announcements.

From the evidence submitted, it was adduced that a Kamba customary Kithitu oath is far much more powerful than the court oath. This is centred on the degree of belief and more so on the effects attributed to each form of oath by the members of the community.

On the whole, the three judges who heard this petition came to the conclusion that a Seven Sticks oath was taken and it had a binding effect upon those present and those not present. It was established that the same Kithitu was taken in the older days to bind the entire Kamba community when they fought the Masai.

The judges made the observation that in the present political circumstances of Kenya, the Kithitu oath is out of place, but in the same breath concluded

that in these same circumstances, the oath was taken in this particular case and it was effective. On that basis, therefore, the judges proceeded to nullify the election.

It would be dangerous in a democracy to allow elections to be determined - even partially - by an oath. More than one witness has told us that the oath was used in olden days for the benefit or the protection of the whole population of an area. It would not be proper to use it - even in those days - for the benefit of an individual. In any case, whatever the use and utility of oaths in the past, they are out of place in the political circumstances of the Kenya of today. The Constitution allows citizens a free vote. An oath would, by putting shackles on the freedom, subvert the Constitution.<sup>6</sup>

Simon Kiilu was found not to have been validly elected and returned as a member of the National Assembly for the Yatta Constituency. This was found to be contrary to S.9 of the Elections Offences Act (Cap. 66) as read with S.2 of the National Assembly and Presidential Elections Act (Cap. 7).

In their judgement, the judges held that a cleansing ceremony was necessary to restore to the people of the constituency the freedom of choice of candidates which the Constitution gives them. If no cleansing ceremony took place, the people would be bound

for life. The question that might be raised here is what would be the effect of this on future elections? The court is sanctioning administration of another customary ritual. The question here is whether this is lawful or whether <sup>it is</sup> against the Witchcraft Act (Cap. 67).

3.1.1 Simeon Musau Kioko .V. Luka Galgalo & Fredrick M. Kalulu El. Petition No. 24 of 1974.

In the Election petition of Simeon Musau Kioko .V. Luka D. Galgalo & Fredrick M. Kalulu (hereinafter Kalulu's case), paragraph 13 reads as follows:

..... a few days prior to the polling day the second respondent held a public meeting at Kikima Market within the said constituency which meeting was attended by several thousand persons of Kamba tribe where Kamba elders with the concurrence and connivance of the second respondent and in his presence administered the Kithitu oath to the said several thousand persons requiring them to vote for the second respondent or not to vote at all knowing fully well that the said oath is regarded as a sacred oath amongst the Kamba people who fear its temporal or spiritual injurious effect with the result that the said persons either voted for the second respondent or did not vote at all to the detriment of your petitioner.<sup>7</sup>

One Simeon Kioko (P.W. 1) testified that he did not vote himself because he was scared of the oath. He stated it was dangerous and he believed in oaths seriously. He went on to state, the oath affected those who were not there, even future generations, if not reversed or cleansed.

The ingredients of the oath consisted of blood, finger millet grain and beer in a calabash. It took the form of seven sticks and seven men. Another witness observed that:

One can perish or die if one disobeys it. To avoid it one must be cleansed if one takes it.<sup>8</sup>

Many people abstained from voting or voted for the second respondent for fear of the oath.

The question as to who fears the oath may be raised. The question is well answered by the testimony of an African Brotherhood Church elder at Mbooni who said:

Though I am a Church elder,  
all we Kambas fear the oath  
very much.<sup>9</sup>

From this evidence, it is clear that it is everybody who fears it. An expert on Kamba customs - Kioko (P.W.10) in fact emphasised the fact that, everyone who is Kamba believes in the oath.

The consequences falling on failure to abide by



ones word are tied up with the fears attached to the fetish. One Timothy Ngite (P.W.11) approached the Chief of his location, Mbooni, with a request for cleansing on the ground that his father, one Kyule who died on October, 1974, and who allegedly was one of the Kithitu administrators, died because of the oath. Further, it was claimed that another member of young Kyule's family and three goats had died in consequence of the oath. His brother's wife had a miscarriage which all the more made him believe that oathing was the root cause of the misfortune. After consulting five witchdoctors, he was warned of the need to have a cleansing ceremony to remove the evil power.

If an oath is taken in public, it affects the whole area and its people whether or not they are present in the meeting - cleansing must be by elders using a bull and ram or ewe which are slaughtered.

The two petition cases referred to above are very similar. To fully understand the substance and meaning of the Kamba Kithitu oath, we have to investigate on the matter more deeply.

It is important to ask the following questions; whether the place where the Kithitu oath ceremony is conducted actually matters; is it of paramount importance that it is conducted within an electoral constituency and if it was administered outside such a constituency, would it be held binding. It appears from the evidence

tendered that the place of ceremony is crucial and it should be within the constituency.

In a meeting held at Kikima Market within the said constituency he administered an oath.<sup>10</sup>

It is not clear whether the non-Kamba's are bound by the Kithitu oath. There are very many Kikuyus permanently resident in Yatta for example. The question is; Are they immune to the Kithitu or the Pot oath? It has also not been clear whether the Kamba Kithitu oath is the only type that can bind the Wakamba. It would appear then, that it is only the Kamba Kithitu oath that should be administered to the Wakamba.

It would be assumed, from looking at the cases, that for an effective Kithitu oath to take place, the consent of the second respondent is necessary, that is, the person seeking to have people vote for him. Hence, "...with the concurrence and connivance of the second respondent. The question arising from this presumption would then be, if he is unavailable and his presence is necessary, would the oath be defective on that ground only?" One can see that the knowledge by the respondent as to the effects of the Kithitu oath is very important. The 2nd respondent's knowledge is necessary, Unlike in the other context where the knowledge of the people is not necessary in order to bind them, hence:

...with the concurrence and connivance of the second respondent and in his presence administered the Kithitu oath ...knowing fully well that the said oath is regarded as a sacred oath amongst the Kamba people who fear its... <sup>11</sup>

The best test for a Kithitu oath to be regarded as effectively valid is by its effects. Once they are seen, then the oath is regarded as a valid one. That is why in all these cases we find;

...temporal or spiritual injurious effect with the result that the said persons either voted for the second respondent or did not vote at all to the detriment of the petitioner. <sup>12</sup>

The intended results are that the electorate would not vote for the person against whom the oath is taken, or that they would not vote for the second respondent. It appears from these two petitions that an oath may be improper, i.e., not strictly conforming to the traditional setting. In Mr. Kiilu's case, there were seven elders with seven sticks which they struck against each other and this act itself constituted a valid Kithitu oath. In Kalulu's case, the same form of the Kithitu oath was alleged, but with ingredients that are not mentioned in the first case; thus, blood, millet, beer poured in a calabash and seven elders holding seven sticks. However, there are some common features, specifically, the intended consequences upon

those who were present, as well as those not, are similar. The future generation are also bound, that is, the children yet to be born by the Kithitu oath-takers are equally bound as their fathers. For how long this would continue is not answered.

In both Kiilu and Kalulu cases, a lot of time was spent on, and evidence adduced on, the procedure in the administration of the Kamba traditional oath. As to be expected in such cases, the evidence was widely divergent. In Kalulu's case, it was remarked that the authenticity of the Kithitu oath is irrelevant, that a candidate who wants the electorate to vote for him would not strictly follow the procedure of a well known traditional oath, and all that he requires to do is perform something resembling a Kithitu oath in order to confuse the voters.

The court lays an important emphasis on the type of witnesses giving evidence, and particularly with respect to their age in such cases. Perhaps they had in mind the fact that the elders are the best people who could be recruited to testify in court because of their position in the society.<sup>13</sup>

One important factor of the Kamba Kithitu oathing is not discussed in these petitions. The Kamba (traditional) oathing distinguishes between people who qualify to take a Kithitu oath and those who do not, specifically young people, women and

unmarried people or people who have not yet undergone certain customary rites. But in all the meetings in constituencies being reviewed, as is evidently expected in such political rallies, peoples of all age-groups must have attended, some of whom, are prohibited from taking Kithitu oaths. It is therefore questionable whether the Kithitu oaths administered were binding on the women who attended those meetings. It is, however, possible that they were bound because their husbands, as heads of their families, had taken the oaths.

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3.1.2 Silas Jediel Njagi Wakiondo .V. Alex Kang'ethe & James G. Njeru El. Petition No. 21 of 1974

All Kenyan communities regard oathing as a very serious act. And from the five different petitions that we deal with here, this is undoubtedly made clear. Among the Tharaka people, the Muma oath is regarded as a very sacred act which binds upon the takers. Thus, in the matter of Silas Jediel Njagi Wakiondo .V. Alex C. Kang'ethe & James G. Njeru (hereinafter Njeru's case), it was alleged that a few days prior to the said Election at Chiakariga, as well as at Gatunga K.A.N.U. Branch office within the said constituency, the second respondent and others with his concurrence and connivance, administered customary oath to several hundred persons requiring them to vote for the second respondent or not to vote at all to the detriment of the petitioner.<sup>14</sup>

The Tharaka traditional oath is very much like the Kamba one. One example is that women and young people are not permitted under any circumstances to take an oath. There is marked contradictory accounts as to the form it must take before it can be held valid. The second respondent, James Njeru, testified to the effect that the Muma oath can only be taken, among the Tharaka, by old women and that it would be a violation of Tharaka customary law if women were to take the oath. This evidence was corroborated by one Karigu Mbura, respondent witness number two, who testified that no woman in Tharaka knows anything about oaths and neither take it, or administer it, nor do young people or very old people take it.

It was further argued that women learn from birth that they are not supposed to take oaths and indeed, as testified by respondent witness number three, men do not tell women about oaths. However, according to one Chobani Rukunja (P.W.2), women can, and did, take the Muma oath. A woman witness (P.W.4) testified that Tharaka women cannot only take the Muma oath, but they can also administer it. The witness testified further that Tharaka women take oaths even on land matters, for example, when the husband is on safari.

The Muma oath among the Ntharaka is considered a very serious matter - P.W. no. 5 testified to the effect that he would have died if he had disclosed

of his taking the oath. A woman whose son died when she returned from the oathing ceremony believed the cause of death was related to the oath she had just taken because before then, her son had not exhibited any signs of sickness. She went on to say:-

We took oaths before all Elections in 1964. Mama Mbura administered an oath so that we could vote for Njeru.<sup>15</sup>

If this be the case then, those past elections should not have been valid. A question arises, why then should the people have taken another oath if no cleansing ceremony had ever taken place because the former oaths should still have been effective even in 1974.

There were many difficulties surrounding the oathing during the material time under consideration. P.W.2, James Njeru, stated that one of the conditions of a valid Tharaka traditional oath is that one must not have sexual intercourse with a woman prior to taking the oath nor after <sup>taking</sup> the oath, until one has cast one's vote. A further requirement is, one must take the oath naked and take raw meat dipped in blood. According to the evidence adduced before the court, oathing was administered without any notice of it being given to the people concerned. If they had been warned in advance, the purpose of the oathing would have been defeated. The people might have refused

to attend the meeting and the chances of it leaking to the authorities concerned would have been very high.

In Njeru's case, the court ruled in part;

We were not impressed by the evidence of Traditional oaths according to Tharaka customs. The oath described to us was not a traditional oath. An illegal oath does not necessarily follow any traditional pattern. We see no reason to reject the evidence of the petitioner's witnesses merely because the ceremony described is contrary to custom in that women and young persons were involved.<sup>16</sup>

The court was confronted with the difficulty of deciding who was telling the truth and vice versa. The pronouncements show lack of proper understanding of the nature of traditional oaths and the confusion arising from it, hence, causing a lot of contradictions. Since the cases were not heard by the same judges and were not heard simultaneously, this may or may not have been conscious acts by the court.<sup>17</sup> Despite this, members of public cannot be satisfied or willing to accept the contradictions on these basis. The judges should be bound by the same authorities, on novel points as those regarding the Kithitu and Muma oaths.

Underrating of the reasonableness of the believers in traditional oaths is expressed in the above statement.



The court was of the view that the oath described was not a traditional oath. The question arising from this then is; What basis did the court use to arrive at these conclusions? The court, as a matter of fact, should have found out, what makes valid a Muma oath among the Tharaka. The court did not attempt to do so but went on to say that there was no reason to reject the evidence of the petitioner's witness, namely because the ceremony described was contrary to the custom. There really is no logic in this argument they tried to follow.

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The court appears to have confused traditional oaths with illegal oaths and hence the error in its decision. From these cases, there is an implication that the court accepts the Seven Sticks oath (among the Wakamba) and the Muma oath in Tharaka, under certain circumstances and conditions. For example, where it is administered for the good of the whole population in an area, then it is deemed as permissible.

The court was not called upon to pass the illegality or otherwise of just any oath. The court was confronted with the issue as to whether Muma oath had been administered by the second respondent for the voters to vote in a particular way, to the detriment of the petitioner. The court should have first determined the requirements and essentials of such an oath according to the Tharaka people. The people concerned in these petitions, it can be said, believed

any oath as binding upon them, <sup>and</sup> whether the oathing ceremony complied with the traditional requirements or not was irrelevant. They believed that they were bound.<sup>18</sup>

In the petition cases, each petitioner alleged, and attempted to prove, the taking of a specific oath, feared and respected by the voters of his particular constituency. It is one thing for the court not to believe in the traditional oaths, but it is quite another, for the court to hold that whether a particular form of the oath, proved or alleged, was followed or not, was irrelevant, but the people were unduly influenced by such an oath. This is a contradiction of known terms and untenable.<sup>19</sup>

In Njeru's case, the petitioner was unsuccessful on the finding that the allegations of oathing had not been proved to the court's satisfaction. The case for the petitioner failed purely on the basis that they were unable to show that the oathing ceremony did take place. The question as to who gave the true or correct procedure for a Muma oath to be recognised as a valid oath did not play any role in coming to that decision.

3.1.3 Elias Marete .V. Alex Kang'ethe & M'Mbijiwe Gilbert Kabere El. Petition No. 15 of 1974 (hereinafter M'Mbijiwe's Case).

Among the Meru tribe, the oath issue was once

again raised and successfully contested in the M'Mbijiwe' case. It was alleged that the said Kabere M'Mbijiwe was personally, or by his agent or agents, or other persons on his behalf, guilty of the corrupt practice of undue influence, or alternatively, of counselling and procuring the same before the said Elections, contrary to S.9 of the Elections Offences Act (Cap. 66) in that:

(a) On sundry dates before the Election at the house of the said M'Mbijiwe and

(b) on the 13th October 1974 at the house of the Chief of Abogeta location (a polling area) the said M'Mbijiwe procured one Araigua to administer to persons then present an oath to vote for the said M'Mbijiwe thereby investing such persons with spiritual fear impeding the free exercise of the franchise.<sup>20</sup>

It was stated that for the oath to be a proper effective one, there must be goat meat and skin which are placed under the apex of an arch from which hangs the goat's head so that those passing through the arch either step or pass over it.<sup>21</sup> It was further stated that women and children must not be present and that all people present must be naked. The issue arising here, and in most of these cases, is whether an oath is effective and binding if it is not performed in accordance with the tribe's customary procedure and if the necessary ingredients are missing. Many matters

have to adhere to procedural details for them to be considered as valid.<sup>22</sup> On the matter regarding petitions, the judges ruled:-

As we have said in another case, however, the authenticity of the oath is irrelevant. A candidate wishing to bind people to vote for him would not necessarily follow strictly the procedure of a well-known traditional oath. All he requires is something which will sufficiently resemble traditional oath to influence voters and perhaps at the same time confuse the police and administrative police.<sup>23</sup>

This was, as it were, to defend or justify their stand for not having a procedural requirement for oathing. This statement is contradicted by known customary rules. The court stated that the oath need not follow any laid down procedure, nor are any ingredients indispensable for an oath to be traditionally valid.

That there is an oath of the nature of that described it was called a Beating of the Goat oath - is perhaps hardly in dispute though according to the second respondent, that said to have been taken on the night concerned was not a proper oath in its pure form, this may be so - we do not know. But we are not persuaded that if it is otherwise, the effect on the mind of the person to whom it is administered, and whether those who took the oath believed that it was an oath and was

binding on them. Nor do we believe that nakedness is an essential ingredient of the ceremony.<sup>24</sup>

Like in all the other communities we have studied, oathing is a phenomenon most feared in the Meru community. The name for the oath in Kimeru is Muuma or Muma. In M'Mbijiwe's case, one Mugira Karanja (P.W.4) stated that,

I took this oath in 1952 when I was fighting for Independence. I seriously believe in Muma as well as all other Meru people that Muma can do harm to persons. I consider myself bound by it though I was never going to vote for M'Mbijiwe.<sup>25</sup>

Most of the people were obliged to take the oath. They were forced to take it because the directions came from the Chief who had invited them for the meeting and they had to comply with his invitation.

It is important to note the great belief the community has on the oath. One P.W.8 said;

I am Meru by tribe. I am acquainted with Meru customs. There is Muma in Meru. Muma is an oath - general name for oaths. There are names - general oath is KURINGA MBURI (no English equivalent - literal meaning is beating the goat). One type of Muma is where an elder sits on a goat and actually hits it on the head saying what has

been agreed upon as the form of the oath. Another time the elder holds a goat on his shoulder and this is normally in land disputes and he goes round what he thinks is the boundary and saying it is his boundary and if it is not the case 'I shall die like this goat'. The goat is normally dead.<sup>26</sup>

The other type of oath can be taken when people are naked or dressed. An oath has binding effect in present/ day Kenya. After it has been administered, the recipient is fully bound by it whether educated or illiterate. In 1969, after the death of the late Mboya, there was a general oath of unity, code-named TEA, which was administered generally to all tribesmen of Kikuyu, Embu and Meru of all walks of life from higher echelon of society to all and sundry. P.W.8 took the oath and feels bound by it. He also stated he had heard of M'Araigua who was a living legend in Meru.

In passing judgement the court ruled;

We believe and we have no doubt at all about it, that an oathing ceremony, such as was spoken of, took place in the compound of the home of the Chief on the night of the 13th Oct. 1974, when the opportunity was unfairly taken by the second respondent to have an oath administered to unsuspecting, trusting people requiring them to vote, whether they wished to do so or not, for him. As a result, those who were there voted for him through fear and not free choice. They

believed, whether educated or uneducated Christian or pagan, that if they did not do so, they would die.<sup>27</sup>

The allegation was proved and the petition was allowed.

The Meru oaths are very similar to the Kikuyu and Embu oaths. This is not a wonder considering that the three communities live within an area of geographical proximity. In the petition cases referred to in this paper, the courts realised and accepted the importance attached to oath taking by local communities and that the practice cannot be done away with. The court further accepted, on the strength of adduced evidence, that traditional oaths have binding effects in present day Kenya upon both educated and illiterate alike.

3.1.4 Dr. Julius Gikonyo Kiano .V. Hudson Misiko & Kenneth Stanley Nyindo Matibi El. Petition No. 6 of 1979 (hereinafter Matiba's case).

The last 1974 petition case alleging oathing as a ground was Matiba's case. The petitioner, in his plaint, claimed that, on diverse dates during the period August, 1979 and the first week of November, 1979, various persons acting on behalf of the second respondent and with the knowledge, concurrence and connivance of the second respondent,

- (i) at the second respondent's homestead in Mbiri location
- (ii) at Maragua Ridge Settlement in

Mbiri location...caused oaths to be administered to the persons then present being voters to vote and to procure votes for the second respondent upon penalty of physical, temporal and spiritual injury and thereby impeded and prevented the free exercise of the franchise of the voters in contravention of S.9 of the Election offences Act (Cap. 66).<sup>28</sup>

Daniel Karanu, a witness, answered to the question why he did not tell the police or District Commissioner by saying that he feared the oath would finish him if he did so. John Kariuki P.W.5 stated <sup>that</sup> he could not report to the police or authorities later because one cannot reveal the oath just like that. This shows further the heavy reliance on oathing offence to have an election nullified.

In this case it was held, "In conclusion, having found that the petitioner has failed to discharge the burden of proving any of the allegations that remain, it follows that we must dismiss the petition."<sup>29</sup>

### 3.2 Duration of the Effects of the Oath and Cleansing

A jurisprudential point arose after the 1974 Elections where oathing was alleged, about the duration of the effects of the Kithitu or the Muma oaths.

The wish of the court regarding the effects of the oath seemed to be confined to the specific elections.



In Kalulu's case, the P.W.2 said the oath was as follows;

Whoever will not vote for Kalulu may he also be poured like this, and be swallowed by the earth. Whoever does not vote for Kalulu, may he and his family perish.<sup>30</sup>

The same words were expressed in the other cases;

If I do not do what I have agreed, and that is to give my vote to Mr. Mbijiwe, let me die like this goat.

In Njeru's case, P.W.2 Chobari Rukunja swore;

If I do not vote for Njeru, let all my generation die. It is only Njeru whom I will vote.<sup>31</sup>

The court also accepted that the effects are binding for as long as the taker has not been cleansed. A witness in Kalulu's case said the oath can take effect even after ten years. Another witness in Kiilu's case said the effects of the oath continue thereafter unless the oath is reversed.<sup>32</sup> The act of cleansing is a requirement among the Kikuyu, Meru, Wakamba and Tharaka communities. This is Kuoria Nthenge or appeasing the he-goat. It was on those basis that the court directed cleansing ceremonies to be held in case no. 20 and case no. 24. In the two cases, it was held that a cleansing ceremony was necessary to restore to the people the freedom of choice of

candidates which the constitution gives them.<sup>33</sup>

What Onesmus Mutungi states in his book while commenting on the fear and awe of the oath was put to the court. However, the court missed a golden opportunity of testing the truth about oath fears. And maybe the chance will never present itself that way for a long time.<sup>34</sup> The court should have tested the validity and genuinity of such expressed fears. This could have settled once and for all the basis of fear expressed after oathing has taken place.

In Kalulu's case, it was established that oathing did take place on 22nd Sept. 1974 to an estimated crowd of 5,000 people. One thing that was not fully established, however, was as to the cause of death of Kyule Ngite, whose son believed his cause of death was a consequence of taking part in the oath ceremony. This is due to the fact that no one knew for whom Ngite had voted for or whether indeed he had voted in violation of the oath. This question would have to be answered before the true role of the oath can be established and attained, otherwise it remains and stands only as mere speculation.

The oath, it appears, does not really influence the electorate as to whom to vote for. As P.W.1 Francis Philip Wambua in Kiilu's case stated;

The oath is used when the people want to pass a resolution they all want to follow. This shows that

the people have already made up their minds as to whom they want to vote for. The people therefore would vote for that person with or without having taken the oath. One might still argue that a voter should be free up to the last minute, to change his mind as to whom to vote for.<sup>35</sup>

The 1974 Election petitions produced an issue that the bench and the bar had never dealt with before in the country's short political history. The matter was made more difficult by the lack of literature on the different tribes on this point. The court had only the evidence of the witnesses to rely on. This created a problem in that, the witnesses called by opposing parties were inclined to state the customary law and procedure in favour of their party.

Traditional oathing was recognised and endorsed at the High Court level. It had a role in determining who holds the position of a legislator. It proved the view of the court in Kiilu's case wrong where it said;

Whatever the use and utility of oaths in the past, they are out of place in the political circumstances of the Kenya of today.<sup>36</sup>

In the present political system of Kenya, the oath seems to be a powerful force and it may remain so for a long time to come.

Chapter Three Footnotes

- 1 Cap. 66, S.9(a) (b) Laws of Kenya.
2. Onesmus K. Mutungi The Legal Aspects of Witchcraft in East Africa p. 80.
- 3 Kiilu's case P.W. 2 Musao Kisusia p. 9.
- 4 Ibid p. 8.
5. Ibid P.W.7 p. 9.
- 6 Ibid p. 12.
- 7 Kalulu's case paragraph 13 p. 1.
- 8 Ibid P.W.2 John Mutiso Masola.
- 9 Ibid P.W.7 Elder of A.B.C. Mbooni.
- 10 Ibid paragraph 13 p.1.
- 11 Ibid.
- 12 Ibid.
- 13 The court in Kalulu's case said, "The petitioner witnesses are respected leaders of their community and we think unlikely to tell a lie when 5,000 people would know they were doing so."
- 14 El. Petition No. 21 of 1974 para. 20.
- 15 Ibid P.W.4 A woman p. 4
- 16 Ibid p.9.

- 17 Kiilu's Case was heard before Trevelyan J., Chanan J., Shah J, Todd J.  
Kalulu's Case:- Simpson J., Kneller J, and Todd Ag. J.  
M'Mbijiwe's Case:- Trevelyan J, Hancox J. and Todd Ag.  
Kiano's Case:- Hancox J., Sachdeva J., Todd J.  
Njeru's Case:- Simpson J., Kneller J., and Todd Ag. J.
- 18 Kiilu's Case - An illegal oath does not necessary follow any traditional pattern p.9.
- 19 Mutungi supra p. 94.
- 20 Mbijiwe's Case paragraph 3 under para. 3(1)a.
  - (i) The oathing was conducted between 10th and 13th Oct. 1974.
  - (ii) The number of people alleged to have been oathed were over 600 people (from Kionyo, Meru).
- 21 Ibid p. 5.
- 22 An example is that of a Will S.50 third rule Cap. 34 Laws of Kenya.
- 23 Kalulu's Case p. 5.
- 24 M'Mbijiwe's Case pp. 5-6.
- 25 Ibid p. 3.
- 26 Ibid P.W.8 David Mugambi p. 4.
- 27 Ibid p. 6.
- 28 El. Petition No. 6 of 1979 p. 1.
- 29 Ibid p. 82.

30 Kalulu's Case P.W.2 John Masola p. 2.

31 Njeru's Case P.W.2 p. 2.

32 Kiilu's Case P.W.4 Simon Ndala.

33 Ibid p. 12 and Kalulu's Case p. 10.

34 Mutungi supra p. 97.

35 Kiilu's Case P.W.1 Philip Wambua p. 2.

36 Ibid p. 12.

CHAPTER FOUR

4.0 Cleansing Ceremony among the Wakamba:

A General Commentary

There is a common, accepted and substantially applicable, procedure of naturalising or reversing the Kithitu oath. This procedure includes the slaughtering of a sheep, either a ram or an ewe, by the village elders or those who initially administered the Kithitu oath. The sheep is offered by the affected party. The purification ceremony is then done when the Kithitu effects have begun to manifest, or at the affected party's own initiative which is also possible even before the effects have started being realised.

When it is agreed that the cleansing ceremony is to be conducted, a convenient date is set for the purpose and the elders are summoned by the parties who have consented to the cleansing. Usually, five to ten elders are called, but the number does not really matter as it has no traditional significance.

The group of elders slaughter the sheep in the presence of all those who took the Kithitu oath and are seeking to be cleansed after which they perform a number of rites:-

First, they sprinkle the contents of the sheep's insides on the spot where the Kithitu oath was initially placed or taken. Secondly, they smear some of the contents on the hands of all those who

took the Kithitu oath. During this performance, "divine" words are uttered. These are words believed to carry intrinsic neutralising powers within them and uttered by the minister leading the Kithitu oath cleansing. Thirdly, instructions on how the cleansed people should behave after the purification ceremony are given. The consequences upon disobedience of these instructions are also told to the participants. Finally, after these rituals are over, the elders eat the mutton at the end of the ceremony.

During the ceremony, the Kithitu oath takers are warned to refrain from:-

- (a) sexual intercourse and contracts for seven days;
- (b) washing for the same period of time; and
- (c) indulging in witchcraft activities until that period is over.

It is believed if the Kithitu oath is not reversed or, for that matter, whoever took it does not ensure taking steps to have it cleansed, he and his family members would perish or realise adverse consequences any time after the expiry of the seven days.

There are other consequences that might or might not occur to the family of the Kithitu-oath-taker. These include barrenness amongst the women in that family and this would perhaps extend to the domestic animals.

The Kithitu oath's operational mechanism is beyond



the comprehension of the ordinary member of the Kamba community. It is a phenomenon which is too complex for them to really grasp and understand fully well. It is passed from generation to generation with no exception to class, even within the élite circles it prevails.

The impact of Christianity has not had much change in the belief the entire community has in the Kithitu oath. The community, on the other hand, has not stood immune to the impact of education, Christianity, technological advancement and the development of the judicial system incorporating customary and English laws. These changes have made their influences felt. The society members living in the town, unlike those in the rural areas, have a vague understanding of the Kithitu oath and its mechanism in the society.

In the olden days, only special people used the Kithitu oath for the purpose of administering it to wrongdoers. Today, a larger number of people own it and trade on it for hiring by the disputing parties. Thus, it has been commercialised to a very large extent and this will probably have the effect of reducing the omni-potency that is attributed to it by the Wakamba.

#### 4.1 The Kangundo Constituency Oath Cleansing Ceremony

Back in 1963, a large number of people in Ukambani, particularly in Machakos District, reportedly took an oath to support the then African Peoples Party

led by Mr. Paul Ngei.<sup>1</sup> In the ensuing general elections, Mr. Ngei won the Kangundo seat with a huge majority.

Two decades later, Ngei's prominent opponents supported a number of people who took the oath and decided that the oath, called Kithitu Kya Ndata Mwanza (the oath of the Seven Walking Sticks), still holds those who took it spell-bound. Some of the persons who took it asked the government to supervise an oath-cleansing ceremony that would remove this spell from them and thereby allow them to vote freely in the September 1983 general elections in Kangundo.

This request appears to have had a sympathetic hearing in high places in government. Many observers held the view that if indeed the oath had been taken in 1963 to bind voters in Kangundo always to vote for Ngei, then it was only correct to remove this spell.

If such cleansing is sincere and is not being motivated by some other political designs, then we highly commend and appeal to those concerned to hasten the exercise so that those affected can be psychologically free to exercise their constitutional right in the choice of those they genuinely desire to be their representatives.<sup>2</sup>

A ceremony was conducted by a number of elders to free the people from their original oaths. This cleansing, like the actual partaking in the original

oath, is greatly believed in. A huge crowd, estimated by The Standard newspaper at 3,000 and The Daily Nation newspaper at 10,000, attended the ceremony.<sup>3</sup> The large attendance perhaps indicates the urgent need the people felt for a cleansing ceremony.

The first to be cleansed, according to the Daily Nation, were local administration chiefs from Tala, Kangundo, Mwala and Mbiuni locations of Kangundo Constituency. 'The cleansing involved five stages.'<sup>4</sup> Participants had to stride over seven walking-sticks including one which they are said to have walked over in 1963; they then crossed a line of three trees joined with sisal threads; a mixture of sheep dung, water and herbs was then sprinkled on them. Later, all the participants spat into a common container; finally the spittle was used to cleanse the seven walking sticks.<sup>5</sup>

One of the surviving members of the team of seven elders who administered the original oath in 1963, one Makau Kivinda, was present at the cleansing ceremony as one of the elders in charge of the ceremony. The police and administration officials were also present during these cleansing ceremonies to ensure that there was law and order.

The cleansing ceremony was performed in order to remove the magical spell cast by the seven elderly men way back in 1963. Mr. Ngei had challenged this move

by saying that after the 1979 general elections, Mr. Muli, an unsuccessful candidate in the said election, had filed a High Court petition against Ngei's election, citing oathing as one of the grounds for his petition and that the High Court had rejected the petition. Mr. Ngei had a very good point here. It appeared as if the administration had gone against the court's decision since, in a prior election, the court had not found that oathing had taken place in the petition brought to the High Court by Mr. Muli (petitioner)

The administration could have allowed this cleansing on the basis that, quite a large number of people in the constituency felt bound to vote for Mr. Ngei. In allowing the cleansing ceremony to take place, the authorities were, as it were, removing fetters on the people who felt they had no freedom to exercise their constitutional rights, by electing a person of their own choice. The Kamba people as a community are well known for their strong belief in oaths. The administration probably chose to put many thousands of people's minds at rest and hence, their allowing the ceremony to be conducted in the traditional manner.

The court has found cleansing as of necessity where oathing has been proved to have taken place. They allowed this in two petition cases and stated their reasons as follows:-

In our view, it would be dangerous in a democracy to allow elections to be determined - even partially - by an oath. More than one witness has told us that the oath was used in olden days for the benefit or the protection of the whole population of an area. It would not be proper to use it - even in those days - for the benefit of an individual. In any case, whatever the use and utility of oaths in the past, they are out of place in the political circumstances of the Kenya of today. The Constitution allows citizens a free vote. An oath would, by putting shackles on that freedom, subvert the Constitution...We, therefore, find that the petitioner succeeds on Ground 3 of the petition. It would seem a cleansing ceremony is now necessary to restore to the people of this constituency the freedom of choice of candidates which the Constitution gives them.<sup>6</sup>

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#### 4.2 Oath Cleansing Ceremony among the Kikuyu

Among the Kikuyu, oaths could, and can only, be overcome by performing cleansing ceremonies on the oathe persons.

When one took the oath, they uttered prohibitory words such as; 'May this soil kill me if I do not do as I say.' This kind of oath becomes an everlasting oath as it is from the soil where Man gets his daily necessities of life.

Oath cleansing can only be performed by a diviner-doctor in a ceremony called Ndahikio, i.e. ritual vomiting ceremony. The person being cleansed is required to bring a sheep that has to be of a single colour i.e. not spotted. Normally, the colour white is preferred since it symbolises cleanliness.

The goat is slaughtered and the person requiring the cleansing is made to go over it three times uttering the words to reverse the original intended consequences of the Muma oath, or if consequences have already begun, to stop them immediately. The divine-doctor also uses cleansing water and his traditional tools which are put in the Miano.

Oathing among the Kikuyu goes back many years. The form of oathing that received the biggest attention among the Kikuyu was that taken by the Mau Mau. The first Mau Mau oath leaked to the government at an early period, hence, the government adopted strong measures to overcome the effects of the oath on the people. In government circles, there was a clear understanding that the oaths used by the Mau Mau were considered by many people as highly ceremonial. Dr. Leakey suggested to the government that the oaths could only be overcome by performing cleansing ceremonies on the oathed persons.

The authorities also started to use traditional cursing ceremonies in which a 'thenge' was beaten in a ceremony of cursing the Mau Mau. The government was

aware that traditional Kikuyu ceremonies were still adhered to by the Kikuyu at the time of the Mau Mau movement. The cleansing ceremonies were conducted by the traditional Kikuyu diviner doctors.<sup>8</sup> They used their traditional tools of work to do so - Miano. They also used cleansing water which was extracted from herbs like arrowroots and contained in leaves of bananas. The divine-doctor told the person who was being cleansed that if he had taken Muma, the oath would go out of his mind and out of his heart. The person seeking to be cleansed was then asked to confess the oath so as to be wholly purified.

In the pure traditional oaths, once a person was cleansed by the divine-doctor, he believed he was no longer bound by the oath taken. In the case of Mau Mau oaths,

Once taken, it followed that an oath were irrevocable. There was no possibility of mental reservation or de-oathing ceremonies, the only effect of which was to confuse the people with one further variety of fear. Certainly few felt that the ceremonies absolved them and their families from the evils to follow the renunciation of their original oath.<sup>9</sup>

In traditional Kikuyu society, a cleansing ceremony could free a victim from the effects of an oath, if the victim changed his mind and pleaded guilty after he had taken the oath.

Chapter Four Footnotes

- 1 The Weekly Review 23rd September 1983. p.7.
- 2 The Kenya Times Editorial 14th September 1983.
- 3 The Kenya Times 21st September 1983.
- 4 The Daily Nation 21st September 1983.
- 5 Weekly Review supra p.7.
- 6 Kiilu's case p.12 and Kalulu's case p.10.
- 7 Leakey, L.S.B. Defeating Mau Mau pp.83-85.
- 8 Wanyoike, E.N. An African Pastor p.232.
- 9 Gatheru, M. Child of Two Worlds New York, 1965 p.177.



## Chapter Five

### Reforms and Conclusions

#### 5.0 The Administration Involvement in the Cleansing Ceremonies

The Administration is rightly regarded by people as the arm of <sup>the</sup> government which is supposed to enforce government policies upon them. The High Court should therefore, be very cautious on how it involves the Administration in the cleansing ceremonies. Indeed, such ceremonies should not be seen as if they are aimed at benefiting a particular party. This, it would, as it were, be defeating the purpose for which a cleansing ceremony was ordered for, namely to remove the spell from the people so that they can vote freely in the future. The Administration would be creating fetters on a peoples' voting rights and freedom if they showed themselves as favouring any party.

The Administration should never get over involved in the cleansing ceremony otherwise it might appear as if it is the one conducting the cleansing ceremony and yet it is not the one which administered the oath. The presence of the Administration should be to ensure that there is no violence erupting during the cleansing ceremony. If the Administration got itself over involved in the ceremony, i.e., it ceased to play the supervisory role and instead partook in the cleansing ceremony, it would be erring greatly. The people being cleansed

may feel obliged to be cleansed because of the presence of the Administration. Indeed, this would be coersing the people to be cleansed. As a result, people might still feel bound by the oath taken since the 'cleansing ceremony would not have been carried out by persons who administered it.

A most difficult question to comprehend is as to whether oathing can go on in a constituency without the knowledge of the Administration. It is my view and that of other observers that indeed, the practice and administration of oaths goes on with the full knowledge of the public administration officials.

It would be most difficult to believe that the police, Special Branch and the Criminal Investigation Department would fail to discover such undertakings. Oathing is never done on such a small scale as to go unobserved and undected by the Administration and the above mentioned security personnel. More often than not, some people in the constituency where oathing is alleged usually report this oathing to the Public Administration offices. It is then upon the Public Administration to ensure that steps are taken to discover whether such acts are being practiced by any individuals. This can also be curbed by calling meetings to warn the general public on the seriousness of such offences and therefore, the need to end such practices immediately.

Where oathing is proved to have taken place, then

it can be assumed quite correctly that the Administration was all along aware of the practice but chose not to take action against those administering it. However, as happened in the Mathira constituency case, the Administration will in most cases deny any such oathing because it calls into question the efficiency of the security personnel.

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The Central Provincial Commissioner, Mr. David Musila, yesterday denied there was oathing in the Mathira Constituency of Nyeri District. He said intensive investigation by security personnel had revealed no evidence of oathing taking place or being administered by any of the candidates for the constituency.<sup>1</sup>

The Provincial Commissioner could not admit that his security forces were caught napping and that is the major reason for his denial of oathing having been administered in Mathira Constituency.

At times, the Administration can choose to back a particular candidate and for that reason may deny any oathing practices having taken place in the constituency. Indeed, oathing is a serious offence which should be dealt with severely by both the Administration and the Judiciary. The judges had this to say in Kiilu's case:

In our view, it would be dangerous in a democracy to allow elections to be determined - even partially - by an oath...<sup>2</sup>

### 5.1 Necessary Court Reforms

Oathing in the past was genuinely believed in and was resorted to, to settle land disputes or when a person wanted to ascertain a declaration he had made was true. Tradition oaths served, and still serve, a very central aspect in the settings of the African community. As observed in Chapter One, it served many purposes in the society. The courts have realised the awe it is held in, and where it is proved to have taken place during parliamentary elections, those elections have been nullified and a cleansing ceremony ordered to take place.

It would seem a cleansing ceremony is now necessary to restore to the people of this constituency the freedom of choice of candidates which the Constitution gives them.<sup>3</sup>

The High Court recognises that peace and unity can be disrupted when oathing has taken place in a constituency. To maintain this peace and unity, cleansing ceremonies are ordered to take place so that the people do not remain divided due to conflicting interests. Muma is supposed to be kept as a secret. Once it is uncovered, it ceases to be binding on the people and of necessity, it becomes a public affair, and hence, the need for mass cleansing.

We note with appreciation that the courts have tried their best to see justice is done in cases where

oathing is alleged to have been administered. Despite this, there is still room for further improvement when dealing with oathing cases.

There are as many forms of oathing ceremonies as there are different communities in Kenya. Despite these differences, the oaths administered by the different communities are essentially the same; all the oaths have binding effects on the people oathed, and this effect can only be removed by a cleansing ceremony. Children and women are not allowed to attend, and the ingredients used in the oaths are very similar in nature.

Since all oathing practices in Kenya are essentially the same, the rules governing oath in our courts should be standardized. The courts should take all that which is common in all the different communities and make it binding on all oathing cases. The petitioners would, as it were, have to prove certain grounds and requirements before discharging the burden of proof placed on them. There is always a major problem when the court has only the witnesses' evidence to rely on. This creates a problem in that, the witnesses called by opposing parties are inclined to state the customary law and procedure in favour of their party.

Another reform should be in the area of the bench. Oathing is an area where very deeply-rooted traditions are adhered to. Indeed, it would be very difficult for

a person with a different cultural background to understand or even begin to appreciate the true nature of such a tradition. The bench should be Africanised in such instances because, the true essence of the cases would be missed if the bench was non-African. This does not suggest in any way the slightest implication that the non-African judges are not competent to listen to such cases. It is only fair and just to allow judges who have a deeper understanding of traditional values to preside over such cases - these are judges who have been brought up in these communities and for this reason, they appreciate the true nature of these oathing cases.

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If a non-African bench is chosen to hear a petition case dealing with oathing, they should always have people advising them on traditional oaths efficacy. These people should act as "assessors" and "advisers". These advisers need of course to be people from different constituencies from the parties in court. This way, it can be ensured that biasness is removed from the decisions that are reached.

In the 1984 Election petitions, at least one African judge has been appointed to sit in each petition case filed in the High Court. Indeed, this is a change for the better, especially in petitions dealing with oathing. The parties feel more comfortable appearing before such a bench rather than one which is

purely non-African. This way, justice is not only done but it's also seen to have been done.

In pursuit of justice, the courts should not initiate any reforms that would erode the importance of traditional oaths. The courts, too, have their own form of oathing. When people giving evidence in a court of law take the Bible in their right hands and put it up and swear on it, they are taking a Muma. Some other examples of oaths taken and recognised by the courts are Marriage Vows, and the oath of allegiance to the Head of State and the Government taken by Cabinet Ministers and Members of Parliament. The court would never disregard the force and enforceability of such oaths because they play a very major role in their context. The traditional oath also plays a very major role in African societies and therefore, it should also be regarded in the same light as the other oaths. Muma is in the belief of each individual, and each individual's belief should always be respected.

As regards oathing in elections, the High Court should take some deterrent measures to discourage, frighten and prevent any such future oaths being administered. Persons found to have administered such oaths should have punitive sentences which should serve to discourage others harbouring such thoughts from doing similar acts. In cases where there is clear indication that some degree of harm has been committed to the community by oathing, the offenders should be punished.

By punishing the offenders, the seriousness of such offences would be recognised. There would be a general fear to administer such oaths because of the consequences that follow when one is apprehended.

Most Election oaths are exploitative in nature. They are not binding in the true sense of a genuine oath. They are administered to serve purely selfish ends or to bind a certain clan or community to act in a certain way. In conclusion, it must be stated, oaths must be judged on their own merit, bearing in mind that there are oaths of unity and oaths of disunity.

## 5.2 Conclusion

From all the submissions tendered in the petitions, it was shown clearly that oathing is binding on everybody.

An oath has binding effect in present Kenya...whoever took the oath was fully bound by it whether educated or illiterate.<sup>4</sup>

The fact that one was a Christian would not deter the taking or the efficacy of the oath. This was brought out clearly in the petitions.

We are sorry to have to say that we believe it to be so.<sup>5</sup>

Oathing is not a new phenomenon. It has been in existence throughout the societies' existence. The courts realised this and their judgements are a clear indication that oathing is there to stay. The courts



also realised how deeply rooted this tradition is and how strongly the people feel about it. Indeed, it can be confidently stated in conclusion that, oathing is not a dying practice but rather, a practice that is very much alive and well recognised by the High Court.

Chapter V footnotes

1 The Kenya Times September 14th 1983.

2 Kiilu's Case p. 12.

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3 Ibid.

4 Mr. Mugambi advocate M'Mbijiwe's Case p. 6.

5 Ibid.

Glossary

1. Thahu: Defilement; the ill consequences due to a contravened prohibition, curse, or oath. Sickness and even death are some of the symptoms of thahu.
2. Kirumi: A curse (literary means an insult).
3. Mugiro: A prohibition or a ban.
4. Muma: An oath.
5. Kuringa thenge: Striking the he-goat. To swear by beating a goat (usually male) or by breaking its bones.
6. Githathi: A stone with seven holes drilled through it, used as a symbol in oaths and curses. It is used in a ceremony called Kuringa githathi especially in an oath.
7. Mugwanja muuru: The number seven (the ominous seven).
8. Gikuyu: The name of the traditional ancestor (male) of the Kikuyu. Also used for the Kikuyu.
9. Mugere: A shrub that was commonly used as a symbol in oath and curse ceremonies (plural migere).
10. Ngata: A small roundish bone at the back of the neck (of a goat or an elephant) used as a symbol in oath ceremonies.
11. Ngai: The common Kikuyu name for God.

12. Muma: An oath.

13. Miano: Traditional tools of diviner-doctors.

14. Ndahikio: Ritual vomiting ceremony.

15. Kirumi: Dying curse.

16. Mundu Mugo: Medicine man.

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