

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**ANALYSING THE EFFECTIVENESS OF INFORMAL ACCESS
TO JUSTICE IN KAJIADO NORTH AND KAJIADO WEST
CONSTITUENCIES**

BY

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PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)**

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NOVEMBER 2015

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APPROVAL

This thesis titled Analyzing the effectiveness of informal access to justice in Kajiado North and West Constituencies has been done under my supervision and has been submitted to The University of Nairobi, School of Law for examination with my approval as the candidate's supervisor.

Signed: _____ Date: _____

Supervisor: **NANCY BARASA (LJ)**

DEDICATION

This Thesis is dedicated to my parents Prof. Francis. M. Njeruh and Mrs. Lily W. Mwihurih who have been a source of great inspiration and have constantly encouraged me in furthering my education. Their words of encouragement and push for tenacity ring in my ears. You have successfully made me the person I am becoming by your invaluable guidance, timely suggestions and your support throughout the research period and in my life. You helped me keep things in perspective and I greatly value and deeply appreciate your belief in me. I look forward to continue carefully to follow in your footsteps.

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CHAPTER ONE

GENERAL OVERVIEW AND OUTLINE

1.1 Introduction/Background of Study

Justice can be defined as ‘the exercise of authority in maintenance of right’¹ and the ‘judgment of persons or causes by judicial processes.’² Justice has also been defined as ‘vindication’ of state-determined legal rights through an adjudicative institution that administers and enforces them.³

Access to justice as a terminology can be loosely referred to as an avenue that is created where an individual(s) can seek redress for wrongs or omissions and injustices occasioned against them.

Access to justice may be restricted due to geographical factors, institutional limitations, demographic biases, cultural differences and economic factors.⁴ Other factors that may hinder access to justice are mode of delivery of legal services and the nature of Court proceedings, including procedural requirements and language used in Court.⁵

Access to justice would ordinarily mean improving the functioning of the justice institutions and it requires broadening their accessibility and legitimacy while simultaneously making them more cost and time effective.⁶ While dispensing justice, the concept and doctrine of the Principles of Natural Justice should be applied in decision making processes dealing with matters touching on rights and liberties of persons. It safeguards against any judicial or administrative order or action,

¹ Joyce Hawkins, *The Oxford Reference Dictionary* (Oxford University Press 1986) 448.

² Authur Delbridge and others (eds), *The Macquarie Dictionary* (Macquarie Library 1981) 961.

³ Seana McQuire and Roderick MacDonald, ‘Small Claims Courts Cant’ (1996) 34(3) *Osgoode Hall Law Journal* 509, 510.

⁴ Caleb Atemi (ed), *Justice At City Hall: A Joint Report by ICJ Kenya and TI Kenya on Municipal and City Courts* (ICJ Kenya Strengthening Judicial Reforms Series XIV 2013) 1.

⁵ Mary Anne Noone, ‘Paralegals-In the Community’s Interest La Trobe University’ 25 <http://www.aic.gov.au/media_library/publications/proceedings/03/noone.pdf> accessed 05 January 2015.

⁶ Open Society Justice Initiative, ‘Legal Empowerment: An Integrated Approach to Justice and Development’ (2012) Draft Working Paper, 5 <<http://www.opensocietyfoundations.org/sites/default/files/lep-working-paper-20120701.pdf>> accessed 05 January 2015.

adversely affecting the substantive rights of the individuals. 'Natural Justice' is an expression of English common law.⁷ In one of the English decisions, *Local Government Board v. Arlidge*,⁸ Viscount Haldane observed that-

...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.

There are different views and definitions of what access to justice is. Article 48 of the Constitution of Kenya 2010 guarantees access to justice for all persons in Kenya.⁹ The outcome, however, is that in Kenya access to justice is perceptively limited to formal institutions that are Courts of Law. In this study, access to justice was assessed by analyzing the effectiveness and existence of informal institutions that serve as another means of access to justice. This form of access to justice has been recommended by other researchers¹⁰ and has also been enshrined in the Constitution of Kenya 2010 under Article 159.¹¹

In Kenya, determination to access justice has been known to be a preserve of the law courts and various tribunals. However, majority of Kenyans use Informal Justice Systems (IJS) including traditional dispute resolution mechanisms (TDRM) in their quest to access justice. Chapter 4 of the Constitution of Kenya 2010 provides for access to justice and procedures for administration of justice. It embraces the Bill of Rights as a way to promote and encourage administration of justice. The administration of justice should be conducted in a manner that maintains social

⁷ Brijesh Kumar, 'Principles of Natural Justice' (1995) 1(3) Judicial Training and Research Institute Journal 1, 1.

⁸ (1915) AC 120 (138) HL.

⁹ The Article provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

¹⁰ See, for example Patricia Kameri Mbote and Migai Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011).

¹¹ Article 159(3) recognizes and provides for the use of traditional dispute resolution mechanisms.

fabric by integrating the offenders back in the community. Access to Justice is also one of the major objectives of Kenya's Vision 2030 which guarantees individual rights as stated in the Bill of Rights and the Property Rights in Kenya.¹²

At independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice.¹³ Despite their popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized IJS would naturally die but this has not happened.¹⁴

IJS are dispute resolution mechanisms that are not part of a State's formal judiciary. They do not apply written laws when resolving disputes, but instead apply common sense, consider community consensus and follow traditions.¹⁵ IJS are dispute resolution mechanisms such as those performed by community mediators in Bangladesh and indigenous mediators in Niger who are not members of their State's formal judiciaries.¹⁶ In the recent past, International Organisations¹⁷ have developed interest in working with IJS as a way of ensuring access to

¹² Government of the Republic of Kenya, 'Kenya Vision 2030' (2007) 6.1.

¹³ Leah Wambura Kimathi, 'Non-State Institutions as A Basis of State Reconstruction: The Case of Justice Systems in Africa' (CODESRIA's 11th General Assembly, Maputo, 6-10 December 2005) 7 <<http://www.codesria.org/IMG/pdf/kimathi>> accessed 06 January 2014.

¹⁴ *ibid* 8.

¹⁵ Joseph Ricken, 'The Rule of Law and Informal Justice Systems: A Potential Conflict in Judicial Development' (2013) 6 <<http://www.diva-portal.org/smash/get/diva2:626025/FULLTEXT01.pdf>> accessed 05 January 2015.

¹⁶ *ibid*.

¹⁷ 1). In September 2012 the United Nations(UN) released a report (Informal Justice Systems- Charting a Course for Human Rights Based Engagement) that focused on identifying how engagement with informal justice systems can build greater respect for human rights around the world.

2). The International Development Law Organization(IDLO) released a report in 2011 (Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform) that focused on how informal justice systems can be utilized to help improve access to justice.

3). The United Kingdom's Department for International Development(DFID) ,Ministry of Foreign Affairs Denmark(DANIDA) ,the Office of the High Commission for Human Rights(OHCHR) and the World Justice Project(WJP), have all made calls for engagement with informal justice systems in recent years.

See Department for International Development Briefing, 'Non-state Justice and Security Systems' (2004) <<http://www.gsdrc.org/docs/open/SSAJ101.pdf>> accessed 05 January 2015; Organization for Economic Co-operation and Development, 'Handbook on Security System Reform: Supporting Security and Justice' (2007)

justice is available to all citizens regardless of their social status in society. When access to justice is made available to everyone, their justice will be realized and promotion of the Rule of Law¹⁸ will be enhanced and strengthened.

1.2 Statement of the Problem

The problem this research purposed to address was whether access to justice is only limited to the judiciary. In Kenya access to justice is a mandate bestowed on the Judiciary of which judiciary has for a long time limited the scope to formal institutions through courts of law and tribunals. This has also been reflected as such in Article 159 of the Constitution. However, courts have been inaccessible to many due to the high court fees, geographical location, complexity of rules of procedures, use of legalese, understaffing, lack of financial independence, lack of effective remedies, a backlog of cases that delays justice, lack of awareness on Alternative Dispute Resolution (ADR) mechanisms and TDRM.¹⁹

<<http://www.poa-iss.org/RegionalOrganizations/OECD/Instruments/OECD%20SSR%20Handbook.pdf>> accessed 05 January 2015; DANIDA, 'Informal Justice Systems: How to Note' (2010) <<http://um.dk/en/~media/UM/English-site/Documents/Danida/Activities/Strategic/Human%20rights%20and%20democracy/Human%20rights/Informal%20Justice%20Systems%20final%20print.jpgH>> accessed 05 January 2015; Office for the Commission of Human Rights, 'Rule-of-law Tools for Post-Conflict States: Mapping the Justice Sector' (2006) HR/PUB/06/2 <<http://www.ohchr.org/Documents/Publications/RuleoflawMappingen.pdf>> accessed 06 January 2015; World Justice Project Website, 'Informal Justice' (2012) <<http://worldjusticeproject.org/factors/informal-justice>> accessed 05 January 2015.

¹⁸ Yash Ghai and Jill Cottrell, 'The Rule of Law and Access to Justice' in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge 2010) 1: The American Bar Association (ABA) developed a tentative definition of the Rule of Law (ROL) by stating it comprised of four Universal principles (a) a system of self government in which all persons, including the government, are uncountable under the law; (b) a system based on fair, publicized, broadly understood and stable laws; (c) a robust and accessible process in which rights and responsibilities based in law are enforced impartially; and (d) diverse, competent, independent and ethical lawyers and judges (ABA 2008).

¹⁹ ICJ Kenya and USAID, 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the New Constitution' (2002 vol III < http://pdf.usaid.gov/pdf_docs/pnacw006.pdf> accessed 06 January 2015; Jackton Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' (2007) 1 Kenya Law Review Journal 19, 29.

These have posed a challenge to access of justice for the greater majority in rural Kenya. As such, for a long time, people in rural Kenya have resorted to IJS which tends to be immediate in resolution of disputes and problems. Similarly, the formal justice systems especially in criminal matters are punitive as compared to IJS which are restorative and affordable.

The Judiciary in its transformation framework²⁰ is anchored on four (4) pillars one of which is people-focussed delivery of justice which lays emphasis on access to and expeditious delivery of justice. To realise this, the framework proposes to promote and facilitate ADR and also to promote and enforce dispute resolution systems which are in line with the Constitution. The framework however does not make reference to TDRMs expressly and is more focussed on the state of formal access to justice.

The purpose of this study was to investigate the effectiveness, affordability, feasibility, accessibility and sustainability of informal access to justice in Kajiado North and Kajiado West Constituencies through IJS.

1.3 Objectives of the Study

The main objective of the study was to establish whether informal access to justice is an effective means of accessing justice. The areas the research focused on were: the scope of TDRM and its elements; the relationship between TDRM and access to justice; and the impact of TDRM in resolving disputes and in particular the social impact TDRMs have on the community as opposed to formal access to justice.

²⁰ Government of Kenya, 'Judiciary Transformation Framework 2012-2016: Laying the Foundation for the Transformation of the Kenyan Judiciary' 13-14.

1.4 Research Question

This study sought to answer the following question: Is informal access to justice an effective way of accessing justice thereby complementing the formal justice system?

1.5 Significance of the Study

The research aimed at broadening the perspective of informal access to justice as an alternative means of justice that is affordable, feasible, accessible, safe and sustainable.

It will inform the government and especially the Kenyan judiciary with regard to ensuring that access to justice is available to all persons which would eventually benefit the poor and marginalised people in rural areas who cannot access justice through formal court systems in Kajiado North and Kajiado West Constituencies. It will enhance establishing ways in which informal access to justice can be legitimized and incorporated as a system of justice.

1.6 Scope of the Study

The scope of this study was informal access to justice in rural Kenya. However, the main focus was Kajiado North and Kajiado West Constituencies in Kajiado County. Kajiado North Constituency is the largest constituency in Kajiado County which comprises of 18 wards.²¹ It is reported to cover an area of 7, 404.4 Km Square.²² Kajiado West Constituency on the other hand comprises of 3 wards.²³ It is reported to cover an area of 8,397.50 Km Square.²⁴ The population of the two constituencies mainly comprises of the Maasai tribe who are pastoralists still grounded in their traditional practices. The study also analysed the effectiveness of informal

²¹ Central Keekony Okie, Kaputei North, Kiserian, Kitengela, Magadi, Mosino, Ngong, Nkar-Mu-runya, North Keekonyokie, Oldkiramatia, Oloolua, Ongata Rongai, Shompole and South Keekonyokie.

²² Independent Electoral and Boundaries Commission.

²³ Keekonyokie, Iloodokilani, Magadi, Ewuaso OO Nkidong'i and Mosiro.

²⁴ Independent Electoral and Boundaries Commission.

access to justice in averting unnecessary legal cases. The available informal accesses to justice in the area are:

- a) Village Elders
- b) Chiefs and Assistant Chiefs
- c) *Barazas*
- d) Council of Elders.

The focus of the study was on all the levels of dispute resolution in the area to determine the effectiveness of the system by determining how the system works, the resolutions offered if any and how the sanctions are enforced.

1.7 Research Methodology

The research was conducted through secondary research of literature written on IJS and also through fieldwork to gather primary data. Face to face interviews were conducted with the a total of ten (10) Chiefs and Assistant Chiefs between 07 September 2014 and 20 September 2014 at Ongata-Ronagi and Oletepes; five (5) members of the Council of Elders on 22 November 2015 at Kamukuru Shopping Centre; five (5) Village elders on 22 November 2015 at Kamukuru Shopping Centre; six (6) consumers (beneficiaries of the IJS) on 22 November 2015 at Kamukuru Shopping Centre; and a Women Forum comprising six (6) women on 22 November 2015 at Kamukuru Shopping Centre.²⁵ The persons interviewed were assigned pseudonyms. This means of collecting data was used since the research purposed to determine the social effect of IJS in the community and determine its effectiveness. To be able to achieve this, it was necessary to engage persons who have used IJS to resolve disputes in Kajiado North and Kajiado West

²⁵ See Appendix 1.

Constituencies to establish how the system works and the extent to which it has aided in conflict resolution within the area afflicted by limited access to formal justice systems.

There were no structured questionnaires used. Instead, an interview schedule²⁶ was used as an aid to establish the reporting mechanisms, the scope of disputes handled, the resolutions arrived at using the IJS, and the feelings of the consumers towards the system. This method of data collection is very much like collection of data through questionnaires, with little difference which lies in the fact that schedules are filled in by enumerators who are specially appointed for the purpose.²⁷ The researcher asked questions to the participants of the interview and the answers given were recorded by the researcher and the research assistant separately. The reason for this simultaneous recording was to minimise the chance of vital information given by respondents being lost as a result of the recorder failing to record it. During the interviews, Senior Chief John and a representative of the Group Ranch acted as interpreters. The researcher would ask the questions in either the English or Swahili language, and the interpreters would then interpret in Maasai language. The interviewee would respond in either Kiswahili or Maasai language in which case the interpreters would translate the response. Occasionally, for purposes of ensuring that the information given was recorded accurately, the research assistant would repeat the answers given to the interviewees for confirmation. To facilitate engaging of the respondents in the area, introductory letters²⁸ were sent in advance through the Senior Chief to the respondents before the actual meeting took place.

²⁶ See Appendix 2.

²⁷ Rajesh Kothari, *Research Methodology: Methods and Techniques*, (2nd edn, John Wiley and Sons Ltd 1985) 104.

²⁸ See Appendix 3.

The snow balling method was used. Snowball or chain referral sampling is a study sample through referrals made among people who share or know of others who possess some characteristics that are of research interest.²⁹ The Senior Chief was introduced to the researcher by a relative. During the first meeting, the Senior Chief informed the researcher that there would be a *baraza* to be held for all chiefs during the Heroes Day celebrations. He would identify persons to be interviewed from Kajiado North and Kajiado West Constituencies. A facilitation fee was given to the Senior Chief to enable the interviews to be conducted with ease. Refreshments were provided at the researcher's cost and transport money was also reimbursed by the researcher as a way of thanking the interviewees for their participation and time.

The first set of interview was conducted on a day when all the chiefs of Kajiado North and Kajiado West constituencies were in a *baraza*, a forum in which they all meet to celebrate Heroes' Day in Kenya. This was helpful in that, accessibility to the chiefs was made easier and it was more of a one-stop shop. The *baraza* was helpful since a lot of information was gathered from the Chiefs and Assistant-Chiefs present. However, some Chiefs and Assistant Chiefs declined to give their names and particulars even after the introductory letters had been read to them but agreed to an informal session and the information gathered forms part of this research. There are those who agreed to sign their consent to be mentioned in the research. The interviews were conducted from 9:00 a.m. to 5:00 p.m. The total number of Chiefs and Assistant Chiefs interviewed in this study was ten (10). During the interviews, information was given³⁰ that Council of Elders in the Maasai culture are senior persons who ensure that the Maasai culture is followed and they rarely resolve ordinary disputes amongst the Maasai. The disputes they are

²⁹ Patrick Biernacki and Dan Waldorf, 'Snowball Sampling: Problems and Techniques of Chain Referral Sampling' (1981) 10(2) Sociological Methods Research 141, 141.

³⁰ By the Senior and Assistant Chiefs interviewed.

normally involved in are when there is a dispute between clans³¹ or where there is a conflict/fight between and concerning boundaries.

The second set of interviews were conducted at Kamukuru Shopping Centre and involved the Council of Elders, Village Elders, the consumers of IJS in Magadi Ward (victims and offenders) and the Women representatives. This meeting was organised by Senior Chief John. These interviews were conducted using the Focus Group Discussion (FGD) research method. FGD is a method used for generating hypothesis based on the perception of the participants and to generate additional information for a study on a wide scale.³² The FGDs are required to be small so that everybody has an opportunity to share their perceptions and big enough to provide diversity of perceptions.³³ FGDs are useful in exploring and examining what people think, how they think, and why they think about the issues of importance to them without pressuring them into making decisions or reaching a consensus.³⁴ Having earlier interviewed Chiefs and Assistant Chiefs who largely gave their experience as enforcers of the IJS system, the researcher felt it necessary to engage village elders who are at the lowest level of the administration, the Council of Elders that sets the rules of engagement, and the consumers who are beneficiaries of the system. This was necessary in order to engage all stakeholders with the aim of fully comprehending the workings of the system.

The research also used observation as a method of data collection where reconciliation between two communities was conducted at 3:00 a.m. Under the observation method, the information is

³¹ There are nine (9) clans in the Maasai community which are, Lodokilani, Kaptei, Kikonyokie, Purko, Damat, EloKangeri, Matapato, Kisongo and Isiria.

³² ISRC Working paper 010298, February 1998, 'The Focus Group, A Qualitative Research Method' at page 2.

³³ Richard Krueger, 'Designing and Conducting Focus Group Interviews' October 2002 <<http://www.eiu.edu/~ihcc/Krueger-FocusGroupInterviews.pdf>> accessed 19 September 2015.

³⁴ *ibid.*

gathered by way of investigator's own direct observation without asking from the respondent.³⁵ This method is particularly suitable in studies which deal with subjects (that is, respondents) who are not capable of giving verbal reports of their feelings for one reason or the other.³⁶ The offender had murdered a man whom he had found in bed with his wife.³⁷ He was expected to give fifty (50) cows to the family of the deceased. The offender travelled from a place called Olekisanje at Kilonito Town to Olkisanai Hill at a town called Mile 46 which is fifteen (15) Kilometres away and the ceremony was to begin at midday after negotiations. With the aid of the Senior Chief John, we got to the home of the offender at about 3:00 a.m and witnessed him ferry his cows up to Olkisanai Hill. We got there at about 6:00a.m. and the offender had to wait for the reconciliation ceremony to begin at midday whereby he would be expected to deliver the cows to the family of the deceased as a peace offering.

1.8 Literature review

In order to understand the grassroots movement for justice and access to justice, one must better understand the concept of justice itself.³⁸ John Rawls has arguably written the seminal piece on justice from a Western perspective.³⁹ He theorized a vision of the world where actors, behind a 'veil of ignorance' rendering all parties equal, determined the principles of the institutions governing their social relations.⁴⁰ Rawls' institution-focused theory of justice essentially led to two central principles.⁴¹ First, each person has the right to the same liberties as those received by

³⁵ Rajesh Kothari, *Research Methodology: Methods and Techniques*, (2nd edn, John Wiley and Sons Ltd 1985) 96.

³⁶ *ibid.*

³⁷ As informed by Senior Chief John.

³⁸ Siena Anstis, 'Access to Justice in Cambodia: The Experience of Grassroots Networks in Land Rights Issues' (2012) Legal Working Paper Series on Legal Empowerment for Sustainable Development <<http://cisdl.org/public/docs/Anstis.pdf>> accessed 30 March 2015.

³⁹ John Rawls, *A Theory of Justice* (Harvard University Press 1971).

⁴⁰ *ibid* 2.

⁴¹ *ibid* 4.

others. Second, if there are to be social and economic inequalities, they must be attached to offices predicated on fair and equal hiring and must be advantageous to the worse off.⁴² In as much as he acknowledges that each person has the same liberties as those received by others, he does not consider how those liberties would be enjoyed by each person in the view of social and economic inequalities. A solution to balance the social and economic inequalities by legitimising IJS shall be offered.

Catherine Albiston and Rebecca Sandefur write that access to justice needs to foster innovative original approaches by considering not only individuals but also institutions, not only resources but also social meaning, not only how civil legal services are provided, but how demand, for those services is shaped in a bid to address poverty and inequality.⁴³ They cite various studies that have laid emphasis on formal access to justice which is attributed to accessing the laid down judicial systems (courts of law) for dispute resolution. This has over time resulted to a movement of calling for independence of the judiciary and putting into place mechanisms of reforming the judicial sector that would enable more people to access justice.

Albiston and Sandefur's observation above is particularly relevant considering that in Kenya, like in many other African countries, dispute resolution amongst various communities was not subjected to the 'formal' systems of justice as the formal system was perceived to be the preserve of the rich in society. Formal systems of justice have been marred by complaints of high litigation costs, resolution of problems taking long and above all inaccessibility to the Court system based on geographical location, thus hampering the prevalence of justice. Due to the

⁴² *ibid* 7.

⁴³ Catherine Albiston and Rebecca Sandefur, 'Expanding the Empirical Study of Access to Justice' (2013) *Wisconsin Law Review* 101.

challenges, overtime researchers have been led to consider the supply side system of access to justice which considers what services are being provided to ensure justice, by whom, and under what restrictions and limitations.⁴⁴ Access to justice should be interpreted in light of its effectiveness; supply and demand taking into consideration societal needs and how systems of justice are put into place and whether they are accessible to citizens of any given country with ease. Access to justice requires evaluating service delivery models, institutional designs which affect sustainability, independence, effectiveness and inequality in access to representation.⁴⁵ How a society perceives their problems will determine how they react to resolving the issues at hand. As such the development of access to justice is associated with equity, equality, human rights, fairness, respect, integrity, trust, empowerment, dignity, kindness, appreciation, people development, community development, contribution, dialogue, democracy and participation by a society.⁴⁶ The research seeks to apply the standards identified by Albiston and Sandefur in interrogating the place of IJS among the Maasai of Kenya in relation to Kenya's formal justice system.

The research also adopts Siena Anstis' definition of access to justice which, according to her, means supporting improvement of justice service delivery at the local level focusing on the rights of women, ethnic groups and the rights of the most vulnerable and empowering those groups to claim and have rights adjudicated and grievances remedied.⁴⁷ This can be realized by supporting

⁴⁴ *ibid* 114.

⁴⁵ *ibid* 116.

⁴⁶ *ibid*.

⁴⁷ Anstis (n 38).

informal/traditional justice systems and understanding how they interface and interact with formal justice systems.⁴⁸

Kariuki Muigua in collaboration with the Commission for the Implementation of the Constitution (CIC) and the International Development Law Organization (IDLO) in Kenya, acknowledges that Courts have been inaccessible to many, especially the poor and vulnerable groups. The report, highlights that hindrance of access to justice is inaccessibility to Courts of Law.⁴⁹ The report further highlights lack of resources, negative attitudes towards the judiciary, few advocates in rural areas and marginalization of certain groups of people and the legal system has been the main obstacles to access to justice for all in Kenya.⁵⁰ The report further proposes the enactment of an ‘Alternative Dispute Resolution Act’ so as to incorporate ADR and TDRM in conformity with Article 159 of the Constitution of Kenya 2010. The report does not expound on what comprises of TDRM and the extent to which TDRM has contributed to access to justice and has in fact resolved disputes amongst communities in Kenya.

Kameri Mbote and Migai Aketch⁵¹ state that many Kenyans remain unaware of their basic right which is a major hindrance to access to justice especially among the poor, vulnerable and uneducated people. The writers also propound that due to the structuring of the Courts where they are found in urban areas as opposed to rural areas where the majority of Kenyans reside, does not facilitate equal access to justice for all. As a result, many Kenyans resolve their grievance and conflicts in alternative forms, including traditional or informal systems. The

⁴⁸ *ibid.*

⁴⁹ Kariuki Muigua, *Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya* (CIC and IDLO 2012).

⁵⁰ *ibid* 4.

⁵¹ Patricia Kameri Mbote and Migai Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011) 156 and 174-177.

authors highlight traditional systems to include peace or reconciliation forums, and interventions of local chiefs. As such, they recommend that the government should encourage and institutionalize alternative dispute resolution to ease the backlog in Courts and ensure expedient solution of justice and ensure that traditional justice systems adhere to the Constitutional norms of equality and non-discrimination and also implement the provisions of the Constitution on alternative forms of dispute resolution.

Virtus Chitoo Igbokwe analyses the IJS among the Ibo-Speaking people of Nigeria to determine its impact on social order and social interactions and also its impact on law and formal legal institutions. According to him, IJS purposes to achieve common cultural identity, kinship and collectivism. He finds that IJS has a deep history and significance for social order and organisation in African societies and despite modernisation, this system is not about to be discarded entirely. In this regard, he opines that modern society should consider an effective way of making IJS complementary to formal justice systems. He argues that this will promote the elevation of shared responsibilities above individualism and moderate adversarial tendencies. As such, he emphasises the need to incorporate IJS within acceptable rights parameters in order to discourage resort to court for matters where reconciliation is possible. In conclusion, Igbokwe argues that the overall purpose of IJS is not determination of who is right or wrong, but the achievement of an acceptable solution for all parties involved.⁵² The findings of Igbokwe's study are particularly relevant to this study as it provides a comparative perspective to the researcher while investigating IJS among the Maasai.

⁵² Virtus Chitoo Igbokwe, 'Socio-Cultural Dimensions of Dispute Resolution: Informal Justice Processes Among the Ibo-Speaking People of Eastern Nigeria and Their Implications for Community/Neighbouring Justice System in North America' (1998)10 African Journal of International & Comparative Law 446.

1.9 Hypothesis

This research proceeded on the presumption that IJS are effective in dispensing justice and ought to be recognised as a means through which people access justice. While the Constitution recognises that TDRM is likely to go a long way towards the attainment of the stated objectives,⁵³ there needs to be an all-inclusive approach in dealing with the problems faced with regards to access to justice. It is also posited that recognising the existence of TDRMs and expressly providing for them in law will largely change how the public views access to justice with regards to inaccessibility of the formal justice system.

1.10 Theoretical Framework

The theories of justice formed the basis of the research. Justice would be determined by the extent to which disputes are resolved and parties concerned satisfied. To determine what would ensure the realisation of justice, the restorative justice theory and theory of legal pluralism (theory of ‘living law’) were relied upon.

1.10.1 Restorative Justice Theory

Restorative justice is a movement in the fields of victimology and criminology that acknowledges that crimes cause injury to people and communities.⁵⁴ It insists that justice repairs those injuries and that the parties be permitted to participate in that process by enabling the victim, the offender and affected members of the community to be directly involved in responding to the crime.⁵⁵ The restorative process of involving all parties, often in face-to-face meetings, is a powerful way of addressing not only the material and physical injuries caused by

⁵³ Constitution of Kenya 2010, art159 (2) (c).

⁵⁴ Centre for Justice & Reconciliation at Prison Fellowship International, ‘What is Restorative Justice’ (2005) Restorative Justice Briefing Paper, 1
<<http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>> accessed 01 April 2015.

⁵⁵ *ibid.*

crime, but the social, psychological and relational injuries as well.⁵⁶ Restorative justice views criminal acts more comprehensively rather than defining crime as simply lawbreaking, it recognizes that offenders harm victims, communities and even themselves and measures crime by taking into account how much harm is repaired or prevented as opposed to how much punishment is inflicted.⁵⁷

Referring to Elmar Weitekamp,⁵⁸ Michael King says that some proponents assert that restorative justice is essentially a return to practices of pre-state societies involving informal, participatory means of resolving disputes directed at restoring the parties and maintaining community integrity.⁵⁹ They contrast this approach, which they assert was successful, with the punitive and apparently unsuccessful approach of the modern justice system.⁶⁰ While it is true that earlier communities used informal practices, the evidence that they were predominant is not compelling: punitive methods were also used, and where informal practices were used they were often accompanied by social pressure.⁶¹ The evidence suggests that while restorative justice has similar elements to these past informal methods, it is a modern development based on contemporary needs and social and governmental structures.⁶²

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Elmar Weitekamp, 'The History of Restorative Justice' in Gordon Bazemore and Lode Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press 1999) 75.

⁵⁹ Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1101.

⁶⁰ *ibid.*

⁶¹ King (n 59) 1101 *quoting* Anthony Bottoms, 'Some Sociological Reflections on Restorative Justice' in Andrew von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing 2003) 79 *and* Declan Roche, *Accountability in Restorative Justice* (Clarendon Studies in Criminology 2003) 7, 33.

⁶² Centre for Justice & Reconciliation at Prison Fellowship International (n 54).

Encounter processes emerged at a time when there was increasing awareness of the plight of victims of crime.⁶³ The state had largely marginalised victims by assuming the role of the injured party and undertaking the investigation and prosecution of crimes.⁶⁴ While there were advantages to this arrangement, few individuals had the resources to investigate and prosecute offences, the manner in which it was done meant that victims were not involved in and uninformed of the process.⁶⁵ Where victims participated, it was according to rules designed to meet the justice system's needs rather than victims' needs. Material or symbolic reparation for the victim was not a part of the court process. Increased awareness of victims' marginalisation resulted in justice system reform internationally, including empowering courts to order restitution, criminal injuries compensation schemes, victim support services and the use of victim impact statements in sentencing.⁶⁶ By involving victims rather than marginalising them, encouraging offenders to make amends to victims and focusing on victims' needs, encounter processes shared common ground with concepts of restitution and victims' rights.⁶⁷

The informal justice movement was also a significant influence on restorative justice.⁶⁸ In a graphic depiction of the victims' (and offenders') situation, Nils Christie described the state as having stolen the dispute from them.⁶⁹ He proposed less formal methods of resolution of harm

⁶³ King (n 59) 1102 *quoting* Daniel van Ness and Karen Heetderks Strong, *Restoring Justice* (2nd Routledge 2002) and Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (3rd edn, Herald Press 2005).

⁶⁴ King (n 59) 1102 *quoting* James Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2005) 63-65.

⁶⁵ Centre for Justice & Reconciliation at Prison Fellowship International (n 54).

⁶⁶ King (n 59) 1102 *quoting* Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press 2002) 1-24.

⁶⁷ King (n 59) 1102 *quoting* James Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2005).

⁶⁸ King (n 59) 1102 *quoting* Daniel van Ness and Karen Heetderks Strong, *Restoring Justice* (2nd Routledge 2002) 38.

⁶⁹ King (n 59) 1102 *quoting* Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1, 2-4.

involving the participation of victim and offender.⁷⁰ According to Daniel Van Ness and Karen Strong, social justice thinking in the areas of peacemaking criminology, feminism and critiques of imprisonment have also influenced restorative justice thinking.⁷¹

There is no single restorative justice theory. Themes within restorative justice such as victimisation, encounter and dialogue between victim and offender, apology, forgiveness, reconciliation and/or reparation, and collaborative decision-making have been accommodated within diverse perspectives including republicanism, communitarianism, feminist thought and spiritual and/or religious perspectives.⁷² There is also no agreed definition of restorative justice.⁷³ Tony Marshall's definition is most commonly cited: 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'⁷⁴ Purists favour this definition as they stress the value of an encounter process that involves victims, offenders and the community in promoting their restoration.⁷⁵ Maximalists are more concerned with promoting the justice system's wider use of restorative processes and see the purists' narrow focus as counterproductive.⁷⁶ Thus, maximalists consider community work performed by offenders as repairing the damage they have done to the community and therefore a form of restorative justice; purists do not agree.⁷⁷

⁷⁰ King (n 59) 1102 *quoting* James Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2005) 63-65.

⁷¹ *ibid.*

⁷² Centre for Justice & Reconciliation at Prison Fellowship International (n 54).

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ King (n 59) 1103 *quoting* Paul McCold, 'Towards a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model' (2003) 3 *Contemporary Justice Review* 357, 358.

⁷⁶ Centre for Justice & Reconciliation at Prison Fellowship International (n 54).

⁷⁷ *ibid.*

1.10.2 Legal Pluralism (the theory of ‘Living law’)

Legal Pluralism was as a result of colonisation where there was no serious European endeavour to develop jurisdiction over an indigenous population according to their own law nor were there attempts on a large scale to extend European law to the subject population.⁷⁸ In most cases it was not necessary for colonial interests, nor practicable, nor economically efficient to extend legal rule over indigenous population.⁷⁹ Accordingly, indigenous legal institutions were mostly left alone, unless they directly affected the status of the European traders, missionaries, settlers or officials.⁸⁰ Coexisting within the ambit of an overreaching legal system were state court processes and norms instituted by the colonising power that applied mainly to economic activities and government affairs, while officially recognized customary or religious institutions enforced local norms.⁸¹ Jurisdictional rules and conflict of laws rules addressed the relations between these systems.⁸² Although less formal by design, customary and religious courts sometimes adopted the forms and styles of state courts.⁸³

In many locations during and after colonisation, state legal institutions were relatively weak by comparison to other normative systems; they were poorly developed, under-funded and understaffed, and their presence was limited to the larger towns or cities.⁸⁴ The bulk of the state legal norms was transplanted from elsewhere and almost inevitably did not match the norms that

⁷⁸ Brian Tamanaha, ‘Understanding Legal pluralism: Past to Present, Local to Global’ (2008) 30 Sydney Law Review 375, 382.

⁷⁹ *ibid.*

⁸⁰ Wolfgang Mommsen, *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (BERG 1992) 4.

⁸¹ Tamanaha (n 78) 384.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ Tamanaha (n 78) 385.

prevailed in social life.⁸⁵ Legal liberalism referred primarily to the incorporation or recognition of customary law norms or institutions within state law,⁸⁶ or to the independent coexistence of indigenous norms and institutions alongside the state law.⁸⁷

Social scientists who tout the concept of legal pluralism emphatically proclaim that law is not limited to official state legal institutions and is found also in the ordering of social groups of all kinds.⁸⁸ Since every social group has normative regulation, every social group has ‘law’, in this understanding, regardless of the presence or absence of state legal institutions.⁸⁹ Legal pluralism as a fact based on the presumption that, while resolving disputes and ensuring access to justice for all, IJS relies on a set of norms and institutions to regulate the conduct of the people they govern as a source of justice other than relying solely on rules, procedures and regulations laid down in legislation and the states recognized formal access to justice.

Legal pluralism is the existence of multiple legal systems within a given society whereby on one hand there are laid down legislations and rules and regulations governing mankind, and on the other hand customary practices are invoked. The idea was that certain issues would be covered by colonial law, while other issues would be covered by traditional law.⁹⁰ Legal pluralism occurs where there are different laws governing different people, for instance, the existence of *sharia* law, customary law or the use of TDRMs.

⁸⁵ See Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) cap 5.

⁸⁶ See Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975).

⁸⁷ See Leopold Pospisil, *The Anthropology of Law: A Comparative Theory* (Harper & Row 1971).

⁸⁸ Tamanaha (n 78) 391.

⁸⁹ *ibid.*

⁹⁰ Anne Griffiths, ‘Legal Pluralism in Arica: The Role of Gender and Women’s Access to Law’ (1996) 19(2) *Political and Legal Anthropology Review* 93-108.

Eugene Ehrlich is central to the concept of legal pluralism which he posited as the theory of ‘living law’. He argues that it is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision.⁹¹ Ehrlich considers that law is fundamentally a question of social order which is found everywhere, ‘ordering and upholding every association’.⁹² It is from these associations, from these instances which produce norms of social control, that law emerges meaning that law is synonymous with normativity.⁹³ Ehrlich definition of what is meant by “living law” was that, “the living law is the law which dominates life itself even though it has not been posited in legal propositions. The Source of our knowledge of this law is, first, the modern legal document; secondly, direct observation of life, of commerce of customs and usages and of all associations, not only those that the law has recognized but also of those that it has overlooked and passed by indeed even those it has disapproved.”⁹⁴ To this end, TDRMs are a social norm and as such would be considered to be law.

Legal pluralism relies on the corrective and distributive theories of justice. Thomas Aquinas opined that in distributive justice a just law is one that served the common good, distributed burdens fairly, promoted religion and was within the lawmakers’ authority.⁹⁵ Aristotle differentiated corrective justice and distributive justice.⁹⁶ Corrective justice involves rectification between two parties, where one has taken from the other or harmed the other while

⁹¹ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter Moll tr, Harvard University Press 1936) 24.

⁹² *ibid*, 25.

⁹³ *ibid*.

⁹⁴ *ibid*.

⁹⁵ Michael David Alan Freeman, *Lloyd’s Introduction to Jurisprudence* (6th edn, Sweet & Maxwell 1994) 87.

⁹⁶ Aristotle, *The Complete Works of Aristotle: The Revised Oxford Translation*, vol 2 (Jonathan Barnes ed, Princeton University Press 1984) 1825: Aristotle wrote, ‘When men are friends they have no need of Justice.’

distributive justice involves the appropriate distribution of the goods among a group.⁹⁷ The reason for adopting the theories of justice is because the research focuses on the effect of TDRM in dispute and conflict resolution and its ability to be easily accessible to the ‘common’ man.

1.11 Limitations

During the interview, it was apparent that it would be possible to concentrate on only one ward since each ward comprises of a minimum of two (2) and maximum of seven (7) locations. The research was conducted in Magadi Ward in two (2) locations Oldonyonyokie and Musengi Locations. The persons selected to be interviewed were persons who deal with dispute resolution in Magadi Ward in Oldonyonyokie and Musenge Locations. The research as such limited its research to Kajiado North and Kajiado West Constituencies in Kajiado County in particular, Magadi Ward. The research was centred in analysing the effectiveness of IJS in a bid to determine whether it works and if it does how the system actually works on the ground.

1.12 Chapter Breakdown

Chapter One is an outline of the whole aim of the study. It has an introduction outlining the background of the research study which addresses the issue of access to justice. It further outlines the problem the research purposes to address as a result of difficulties experienced with regards to access to justice. It includes the objectives, research question, and significance of the study, theoretical framework, research methodology, hypothesis and limitations identified.

Chapter Two is a discussion on the concept of access to justice generally and what it means to have access to justice. Access to justice is analysed taking into consideration the constitutional requirement of every citizen to access justice. It forms the genesis and platform of the research

⁹⁷ Brian Bix, *Jurisprudence: Theory and Context* (5th edn, Sweet & Maxwell 2009).

by analysing various opinions and understandings of access to justice and what it entails in detail. Further it seeks to shed light on the concept of informal justice systems and how they generally operate.

Chapter Three investigates informal justice systems in Kajiado North and Kajiado West constituencies in a bid to determine how the concept plays out in the given area. It outlines and discusses the study carried out and the various findings with regards to justice prevailing in the given society.

Chapter Four gives the conclusion and recommendations for the study by identifying the major problems facing informal access to justice and outlining the challenges faced and how the same may be resolved.

CHAPTER TWO

UNDERSTANDING THE CONCEPT OF ACCESS TO JUSTICE

Ni kupata haki kupitia kwenda mahakamani lakini kuna shida nyingi sana, kwani mahakama iko mbali kama Kajiado town na Nakuru. Hii inakuwa ngumu kwenda kwa sababu mtu anahitaji pesa za kusafiri na pia za kulipa wakili. Mara Nyingi, kesi hukaa mahakamani na pia wanafunga watoto wetu jela na hiyo sio mzuri.⁹⁸

2.1 Introduction

The informal justice movement advocated the removal of intervention of legal professionals and sought to shift management of disputes away from agencies of state into the hands of the parties.⁹⁹ The manifest goals of this movement are to provide a speedy, inexpensive and simple justice in contract and tort cases which involve small amounts of money.¹⁰⁰ Over the years, legal scholars have had cause to question the efficacy of the courts in settling controversy between parties before the court.¹⁰¹ There is an incontrovertible impression that the court process is only interested in answering the question ‘who has won?’ and thereby causing the parties to leave court totally estranged from one another and seldomly does it reconcile the ‘warring factions’.¹⁰² It is this background that has led to the legitimacy of the advocates of informal justice systems to maintain the fabric of social harmony.

⁹⁸ Interview with Mary, Oletepes, Kenya, 20 October 2014. (She was asked what she understood by the concept of access to justice: Access to justice was accessing rights through the courts of law but the same is difficult because there are only two courts which were far apart in Kajiado town and Nakuru. It is also expensive to access the courts because this requires money for travelling and for engaging Advocates. Cases also take very long in courts and the courts also jail our children, and that is not good [translation by Author]).

⁹⁹ Louis D’Souza, ‘An experiment in informal justice: The small Claims Tribunal of Singapore’ (1991) 3 Singapore Academy of Law Journal 264, 264.

¹⁰⁰ *ibid.*

¹⁰¹ Virtus Chitoo Igbokwe, ‘Socio-Cultural Dimensions of Dispute Resolution: Informal Justice Processes Among the Ibo-Speaking People of Eastern Nigeria and Their Implications for Community/Neighbouring Justice System in Justice System in North America’ (1998) 10 African Journal of International & Comparative Law 446, 446.

¹⁰² *ibid.*

In Nigerian village communities, a good number of civil disputes, conflicts and controversies are settled or compromised without even reaching the stage of any judicial process.¹⁰³ They more often than not settle between the parties themselves, although sometimes they reach the hands of lawyers and are settled between them without any legal proceedings being commenced.¹⁰⁴ These settlements are of immense benefit to the whole community because they enable the members of the society to lead their lives unburdened by resorting to the Court process.¹⁰⁵ In these communities it is recognized that what the parties really desire is not adjudication which determines which party is wrong, but an acceptable solution for the particular disputes between the parties.¹⁰⁶ Thus, the emphasis is on negotiation, mediation and conciliation. Conciliation is indeed a socially valuable process for adjusting relations between parties who are in controversy, even if controversy concerns their legal rights and duties.¹⁰⁷ It is used as a healing process of bringing people together and ensuring they live in harmony.

The way a society perceives law is determined by the interaction in society on how disputes are resolved and eventually this affects and influences the reaction to law and legal institutions. Disputing is cultural behaviour, informed by participants' moral view about how to fight, the meaning participants attach to going to court, social practices that indicate when and how to escalate disputes to a public forum and participants' notions of rights and entitlements parties to a dispute operate within systems of meaning where the normative framework shapes the way people conceptualize problems, the way they pursue them and the kind of solutions they look

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.* 447.

¹⁰⁷ *ibid.*

for.¹⁰⁸ Culture is thus the mirror through which humans not only view the world but they try to understand it; develop and propagate their knowledge about the world and adjust their approach on how it ought to be.¹⁰⁹

2.2 Understanding Justice and Its Nature

The understanding of justice is often related to a just society with universal respect for the human rights of all people including the poor, minorities, indigenous people, and etcetera. In just societies, there is open exchange of knowledge, universal access to important information, education, health care, economic opportunity, judicial process, and etcetera.¹¹⁰

Justice emerges from the literature as a multidimensional construct, and a number of approaches to its definition have so far been detected.¹¹¹ At the most general level, typologies of justice are often discussed, which are largely convergent.¹¹² These typologies generally seek to define justice in terms of three domains: outcomes, processes, and interactions.¹¹³ At its most general, these three domains of justice are referred to respectively as distributive, procedural and interactional justice.¹¹⁴ Distributive justice pertains to the fairness of the outcomes that one

¹⁰⁸ Sally Engle Merry, 'Disputing without Culture: Review Essay on Dispute Resolution' (1897) 100 Harvard Law Review 2057, 2063.

¹⁰⁹ *ibid.*

¹¹⁰ 'The Development of Indicators and Assessment Tools for CSO Projects Promoting Value-Based Education for Sustainable Development' <<http://about.brighton.ac.uk/sdecu/research/esdinds/resources/Excerpt%20from%20Draft%20Handbook%20on%20Understanding%20Justice.pdf>> accessed 31 March 2015.

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

receives; procedural justice involves the perceived fairness of an allocation process; interactional justice concerns the fairness of the interpersonal treatment one receives from others.¹¹⁵

In the definitive words of John Paul Lederach-

Conflicts are in, in every sense, of the word, ‘Cultural’ events like all cultural events, they are constituted largely by the taken- for granted, common sense understandings that people have about their worlds, including themselves and the other people who inhabit it. Such commonsense includes knowledge about what is right and wrong, how to proceed, whom to turn to, when, where and with what expectations.¹¹⁶

On the other hand, anthropological studies reveal that when disputants are bound together by multi-stranded social relationships, they will seek victory in adversarial contests rather than attempt to reach a compromise.¹¹⁷

From the understanding of justice, a number of subdivisions are further identified: distributive justice in relation to resource allocation, restorative justice, corrective justice, retributive justice, transformative justice, informational justice, formal justice and legal-pragmatic justice.¹¹⁸

Anticipatory justice is also identified in relation to the expectations of future fair treatment.¹¹⁹

Without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a vicious cycle

¹¹⁵ Andrew Li and Russel Cropanzano, ‘Fairness at the Group Level: Justice Climate and Intraunit Justice Climate’ (2009) 35(3) *Journal of Management* 565, 568.

¹¹⁶ John Paul Lederach, ‘Of Nets, Nails and Problems: The Folk Language of Conflict Resolution in a Central American Setting’ in Kevin Avruch, Peter Black and Joseph Scimecca (eds), *Conflict Resolution: Cross-Cultural Perspectives* (Greenwood Press 1991) 166.

¹¹⁷ Merry (n 56) 2061; *See also* Michael Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press 1968) 17: ‘The way in which a society is organized has a marked effect on the way order is achieved within it.’

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

of impunity, deprivation and exclusion.¹²⁰ The inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems. Ultimately, ‘poverty will only be defeated when the law works for everyone.’¹²¹ Although discriminatory patterns manifest themselves differently across regions and within countries, in every country in the world the poorest and most marginalized segments of society, commonly women and girls, ethnic minorities, indigenous peoples, undocumented migrants or those living in rural areas continue to be excluded from accessing justice on an equal footing with the most privileged groups in any of the population.¹²² Even in the most developed countries, legal disempowerment is rife and persons living in poverty do not have full *de jure* or *de facto* access to justice.¹²³ This means that globally, persons living in poverty are often prevented from claiming, enforcing and contesting violations of their rights.¹²⁴

Amartya Sen presents an alternative interpretation of justice.¹²⁵ He does not necessarily offer a concrete definition of justice, but rather a way of considering how an effective pursuit of justice might happen. Sen’s focus is on the behaviour of people in societies and not on institutions. He underlines the importance of the ‘comparative approach’ rather than focusing on a utopic goal, such as the overall perfectly just institution. Sen suggests comparing different communities facing similar challenges and understanding the mechanisms that provide them with more just

¹²⁰ Magdalene Sepulveda Carmona and Kate Donald, ‘Access to Justice for Persons Living in Poverty: A Human Rights Approach’ 7 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437808> accessed 01 April 2015.

¹²¹ George Soros and Fazle Hasan Abed, ‘Rule of Law can Rid the World of Poverty’ *Financial Times* (26 September 2012).

¹²² ‘The Development of Indicators and Assessment Tools for CSO Projects Promoting Value-Based Education for Sustainable Development’ <<http://about.brighton.ac.uk/sdecu/research/esdinds/resources/Excerpt%20from%20Draft%20Handbook%20on%20Understanding%20Justice.pdf>> accessed 31 March 2015.

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009).

outcomes.¹²⁶ This approach moves the focus away from institutions and is concerned with an individual or communities ‘actual realizations and accomplishments.’¹²⁷ The comparative approach also recognizes that ‘different reasonable principles of justice’ exist and is thus a more flexible construct when trying to understand justice as perceived by a different culture or community.¹²⁸

Sen also emphasizes on open impartiality where he writes that this concept allows different types of unprejudiced and unbiased perspectives to be brought into consideration, and encourages us to benefit from the insights that come from differently situated impartial spectators.¹²⁹ He continues, ‘In scrutinizing these insights together, there may well be some common understanding that emerges forcefully, but there is no need to presume that all the differences arising from distinct perspectives can be settled similarly.’¹³⁰ Sen’s idea of justice welcomes a plurality of opinions on what can be considered more or less just and emphasizes the process of reasoning. The latter, he says, can be ‘concerned with the right way of viewing and treating other people, other cultures, other claims and with examining different grounds for respect and tolerance. We can also reason about our own mistakes and try to learn not to repeat them’.¹³¹ Sen’s view allows for a greater consideration of alternative means to access justice, which grassroots communities exercise in practice, rather than solely considering the quality of institutions thus ensuring that every person is capable of enjoying what makes them happy and is able to resolve disputes/misunderstandings amongst them with ease. The issue of where disputes

¹²⁶ *ibid* 7.

¹²⁷ *ibid* 10.

¹²⁸ Steven Poole, ‘The Idea of Justice by Amartya Sen’ *The Guardian* (London, 7 November 2009) <<http://www.theguardian.com/books/2009/nov/07/amartya-sen-justice-book-review>> accessed 03 March 2015.

¹²⁹ Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009) 44.

¹³⁰ *ibid*.

¹³¹ *ibid* 47.

are resolved and by who does not play a significant role rather than as the resolution of the disputes when they arise.

The concept of access to justice in as much as it cannot be defined covers justice in all aspects of life encompassing the social, economic, physical and to some extent spiritual. It relates to fair treatment and the unending conquest of labouring to ensure that persons from all walks of life have equal rights and opportunities accorded to them. The concept of Access to Justice may be as broad as any individual may perceive it based on the challenges faced on a daily basis. The concept should thus be expanded in research to come up with innovative strategies to close the gap between the need for, and availability of quality legal assistance.¹³² This would explain why Access to Justice has overtime been viewed as a means of conflict resolution which ensures that any dissatisfied person may seek redress where they feel that they have not been treated fairly.

The United Nations Commission on Legal Empowerment of the Poor estimated in 2008 that four billion people were excluded from the rule of law.¹³³ A more recent study estimates that an access to justice gap exists for a majority of the people in the world, perhaps even as many as two thirds.¹³⁴ Every year, one in every eight people on earth runs into a serious conflict that is hard to avoid: at home, at work, regarding land, about essential assets they bought, or with local authorities.¹³⁵ About half these people do not succeed in obtaining a fair, workable solution,

¹³² United States Department of Justice, 'Access to Justice' <<http://www.justice.gov/atj>> accessed 30 March 2015.

¹³³ Report of the Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone' vol I (Commission on Legal Empowerment of the Poor and UNDP 2008) 1.

¹³⁴ Hague Institute for the Internationalization of Law, 'Towards Basic Justice Care for Everyone: Challenges and Promising Approaches' (2012) 28–29 <http://www.hiil.org/data/sitemanagement/media/TrendReport_BasicJusticeCare_Executive_Summary_030412.pdf> accessed 30 March 2015.

¹³⁵ *ibid.*

although many of these problems could be addressed and solved with better access to justice.¹³⁶ Many (if not the majority) of these people who are left without remedy or recourse will be people living in poverty, and the conflict and lack of solution will often evolve into a threat to their livelihood.¹³⁷ Institutional and systemic obstacles are found in the ideology, design and operation of justice system that create barriers for the poor at all stages of the justice chain.¹³⁸

2.3 Access to Justice in the Kenyan Context

The formal justice system in Kenya has faced challenges overtime which has resulted to people in the rural parts of Kenya continuing with the practice of relying on informal justice systems to resolve their disputes. The challenges in the formal justice system in Kenya can be traced back to the Moi era when corruption and impunity thrived in the judicial courts. This, with the promulgation of the Constitution of Kenya 2010 has resulted in the judiciary reform though at a slow pace. Article 48 of the Constitution of Kenya enjoins the state to ensure access to justice for all. Excessive emphasis on legal procedure has been the hallmark of previous legal regimes.¹³⁹ The Constitution seems to indicate that substance shall not be sacrificed at the altar of procedure; that procedure shall be a true ‘handmaiden of the law’.¹⁴⁰ Article 159 (2) (c) and (3) of the Constitution of Kenya 2010 do encourage the use of alternative dispute resolution mechanisms, including traditional dispute resolution mechanisms. Further, Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be

¹³⁶ The Development of Indicators and Assessment Tools for CSO Projects Promoting Value-Based Education for Sustainable Development’ <<http://about.brighton.ac.uk/sdecu/research/esdinds/resources/Excerpt%20from%20Draft%20Handbook%20on%20Understanding%20Justice.pdf>> accessed 31 March 2015.

¹³⁷ *ibid.*

¹³⁸ UN Women, ‘Progress of the World’s Women 201-2012: In Pursuit of Justice’ 11-12 <<http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>> accessed 30 March 2015.

¹³⁹ ICJ Kenya, Report On The Interface Between Formal and Informal Justice Systems in Kenya’ (June 2011) 6 <http://ppi-mande.integrityaction.org/sites/default/files/icj_kenya_tiri_-_research_on_alternative_dispute_resolution_in_kenya-628.pdf> accessed 29 March 2015.

¹⁴⁰ *ibid.*

guided by the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration but does not recognize expressly these forms of dispute resolution mechanisms as being more than just principles yet they form part of ADR.

The Constitution of Kenya sets the broad framework within which access to justice is to be guaranteed to all Kenyans. It acknowledges both the formal and the informal justice systems. Judicial authority or the power to arbitrate legal matters vests in the people and is exercised by courts and other tribunals on their behalf.¹⁴¹ When exercising their power, courts and tribunals are to be guided by the following principles:-¹⁴²

- a) Justice shall be done to all, irrespective of status.
- b) Justice shall not be delayed.
- c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.
- d) Justice shall be administered without undue regard to procedural technicalities.
- e) The purpose and principles of the constitution shall be protected and promoted.

Traditional justice systems are acknowledged in the constitution.¹⁴³ However their application is guided by the requirement that it doesn't contravene the Bill of Rights; is not repugnant to justice and morality or result in outcomes that are repugnant to justice and morality; and should not be inconsistent with the constitution or any written law.¹⁴⁴

The Constitution in Chapter 4 which makes provisions on rights and fundamental freedoms proclaims the Bill of Rights as an integral part of Kenya's democratic state and as the framework

¹⁴¹ Constitution of Kenya 2010, art 159(1).

¹⁴² *ibid*, art 159(2).

¹⁴³ *ibid*, art 159(2)(c).

¹⁴⁴ *ibid*, art 159(3).

for social, economic and cultural policies.¹⁴⁵ Through the recognition and protection of human rights and fundamental freedoms, the dignity of individuals and communities is preserved and social justice is promoted. Indeed an obligation is bestowed upon the state and its organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of rights.¹⁴⁶ The government is to put in place legislative, policy and other measures including the setting of standards, to achieve economic and social rights progressively.¹⁴⁷ The state and its organs are also to address the needs of vulnerable groups within the society including women, older members of society, persons with disabilities, children, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. Under the same provision the state is obliged to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

Article 27 of the Constitution proclaims every person as being equal before the law and as having the right to equal protection of the law and equal benefit of the law. The government ought to endeavour to ensure that all Kenyans are able to access legal facilities without any inhibitions. Article 48, which is on access to justice, provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. This provision places a responsibility on the government to the best of its ability to facilitate the citizenry to achieve justice in all spheres of life.

The formal justice system in Kenya is faced with a myriad of challenges which have forced Kenyans to Alternative Dispute Resolution mechanisms including the Informal Justice Systems.

¹⁴⁵ Constitution of Kenya 2010, art 19.

¹⁴⁶ Constitution of Kenya 2010, art 21.

¹⁴⁷ Constitution of Kenya 2010, art 21(2).

These challenges include the fact that the courts are largely inaccessible to most Kenyans since they are far apart, they follow procedures that are alien to the locals, are arbitrary and unfriendly, take too long to conclude matters, are susceptible to corruption and are inefficient. Due to the credibility challenges facing the formal justice system, Kenyans particularly the poor and marginalized have resulted to the informal justice system. This mode of solving disputes varies from one community to another. Though not specifically provided for in Kenyan statutes this dispute resolution method is widely practiced and accepted by Kenyans. Rural folk and those in slums in urban centres rely on IJS because they have no alternatives.

While there is a clear constitutional and legislative framework for the formal justice system, the informal justice system is largely unregulated and uncoordinated. This research addresses itself to informal justice systems particularly the Traditional Justice systems in Kajiado North Constituency.

2.4 Accessing Justice through Informal Justice Systems

2.4.1 Introduction

The informal justice system (IJS) refers to forms of disputes resolution that take place outside of formal court systems and that have a certain degree of stability, institutionalisation and legitimacy within a designated constituency.¹⁴⁸ It's noteworthy that there is no universal definition of IJS and the same has been referred to as either community, traditional, non-formal, informal, customary, indigenous or non-state justice systems.¹⁴⁹ Traditional Justice Systems refer

¹⁴⁸ DANIDA, 'Informal Justice Systems: How to Note' (2010) < <http://um.dk/en/~media/UM/English-site/Documents/Danida/Activities/Strategic/Human%20rights%20and%20democracy/Human%20rights/Informal%20Justice%20Systems%20final%20print.jpgH>> accessed 05 January 2015

¹⁴⁹ For an analysis of the meaning of each of the terms *see* FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf>> accessed 8 March 2014.

to all those people-based and local approaches that communities innovate and utilize in resolving localized disputes, to attain safety and access to justice by all.¹⁵⁰ They are non-state justice systems which have existed since pre-colonial times at the local or community level which have not been set up by the State.¹⁵¹ It's a system of justice that usually follows customary law or an uncodified body of rules of behaviour, enforced by sanctions, varying over time.¹⁵² Examples include traditional authorities (Mozambique), traditional Shalish (Bangladesh), traditional courts (Zambia, Ghana and Kenya), and traditional dispute resolution (Nepal). Despite the difference in typology the following types of systems are included in the definition of IJS:¹⁵³

2.4.2 Semi-Formal Courts

These systems have been created or endorsed by the state and are often integrated into the formal justice system but apply customary norms¹⁵⁴. Examples include: Community courts (Mozambique), local council courts (Uganda), local courts using informal procedures (Zambia), government administered Shalish (Bangladesh), Juntas Vecinales (Bolivia), justice of the peace courts (Guatemala).¹⁵⁵

¹⁵⁰ FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 1 <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf>> accessed 8 March 2014.

¹⁵¹ Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (Penal Reform International 2001) 11.

¹⁵² UNDP, 'Informal Justice Systems: Charting a Course for Human Rights Based Engagement' 100 <<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf>> accessed 8 March 2014.

¹⁵³ *ibid.*

¹⁵⁴ DANIDA, 'Informal Justice Systems: How to Note' (2010) < <http://um.dk/en/~media/UM/English-site/Documents/Danida/Activities/Strategic/Human%20rights%20and%20democracy/Human%20rights/Informal%20Justice%20Systems%20final%20print.jpgH>> accessed 05 January 2015

¹⁵⁵ *ibid.*

2.4.3 Alternative Community-Based Systems

These are often initiated by the state or non-governmental organisations (NGOs).¹⁵⁶ Many draw on community norms, adapted to include human rights, and use modern alternative dispute resolution procedures (such as negotiation and mediation).¹⁵⁷ Examples include: community mediation centres (Nepal), paralegals, justice committees, neighbourhood watch committees and community policing councils (Mozambique, Ghana, Uganda, Zambia).¹⁵⁸

IJS form a key part of individuals' and communities' experience of justice and the rule of law, with over 80 percent of disputes resolved through informal justice mechanisms in some countries.¹⁵⁹ Nevertheless, one of the key areas of debate in relation to traditional and informal justice systems is whether justice can be made more accessible by encouraging such systems, by adopting or transforming some of their processes, or by facilitating a more collaborative approach between such systems and formal justice systems.¹⁶⁰ Indeed, there have been proposals that some elements of informal justice should be incorporated into formal state processes.¹⁶¹

International organizations have started recognizing that in order to strengthen access to justice for poor and disadvantaged people, there is need to increase engagement with informal justice systems.¹⁶² Providing accessible justice is a state obligation under International Human Rights Standard of which requirement does not require that all justice be provided through formal

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ UNDP, 'Informal Justice Systems- Charting a Course for Human Rights Based Engagement,' <<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf>> accessed 8 March 2014.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) UNDP <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>> accessed 05 March 2015.

justice systems so long as the system used upholds and respects human rights.¹⁶³ Human Rights Standards offer the possibility of fairness in three dimensions of Justice: Structural, procedural and normative.¹⁶⁴ The key objective for engagement with IJS would be to ensure that effective rights are protected. The report notes that the best access to justice and protection of human rights will be afforded when the different systems and mechanisms, formal and informal, are allowed (a) to exchange with and learn from one another, (b) to cooperate with one another, (c) to determine the best division of labour, guided by user preferences as well as state policy imperatives, and (d) to develop in order to meet new challenges.¹⁶⁵

Further, the International Institute for Democracy and Electoral Assistance (IDEA)¹⁶⁶ acknowledges that the shift in transitional justice paradigms has opened up sample space to discuss the role of traditional mechanisms and give an example of the traditional technique used in Rwanda by the Gacaca Initiative.

¹⁶³ UNDP, UN-Women and UNICEF, 'Informal Justice Systems: Charting a Course for Human Rights-based Engagement' 11
<<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf>>
accessed 06 March 2015.

¹⁶⁴ See Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) UNDP <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>> accessed 05 March 2015: Structural dimensions consist of participation accountability. Particular attention must be paid to the rights of groups not strongly represented in IJS, which include women, minorities and children, Procedural justice consists of guidance for adjudication process that ensure that the parties to a dispute are treated equally, that their case is decided by a person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide verifiable evidence to support it. Finally, normative justice consists of substantive rules that protect the vulnerable. Examples include prohibition against marrying off children for the economic benefit of parents or guardians or the guarantee of the right of widows to inherit.

¹⁶⁵ Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) UNDP <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>> accessed 05 March 2015.

¹⁶⁶ IDEA, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (IDEA 2008) ch 7.

However, the role of informal justice systems remains a contentious issue for a number of reasons as enumerated in the following section.

2.4.4 Salient Features of IJS

There is no single, uniform or universal type of traditional and informal justice system to be found in all countries or among communities. Each community has its own unique and divergent IJS. Nevertheless there are overlapping characteristics that are shared amongst them:

2.4.4.1 Structure

In most of the communities, there is a hierarchy of IJS¹⁶⁷ from village, locational, divisional and district levels.¹⁶⁸ The arbitrators or facilitators are appointed from within the community on the basis of status or lineage.¹⁶⁹ The Arbitrators may be either a) traditional leaders/council of elders, for example, Njuri Ncheke (Meru), Athuri Aitura (Kikuyu), Kokwo (Pokot), Ngaisikou Ekitoe (Turkana), Oo-olpaiyan (Samburu);¹⁷⁰ b) religious leaders, for example, use of *shariah* amongst Muslims; c) local administrators with an adjudicative or mediation function , for example, chiefs who in many instances, they may be fulfilling an adjudicative function without a clear legal basis to do so; and d) community mediators, for example, during inter-ethnic disputes.

¹⁶⁷ For instance the Kipsigis in Kenya a domestic squabble will be mediated by the neighbours, if the dispute can't be resolved then the larger community is called upon to resolve the issue.

¹⁶⁸ FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 8 <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf> > accessed 8 March 2014.

¹⁶⁹ FIDA – Kenya, 'The People version of Informal Justice System' (2011) 7 <<http://www.ppi.integrityaction.org/sites/ppi.integrityaction.org/files/publications/Engaging%20With%20The%20Informal%20Justice%20System%20doc.pdf>> accessed 8 March 2014.

¹⁷⁰ FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 4 <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf> > accessed 8 March 2014.

2.4.4.2 Composition

In most IJS, the members are men only, although there are a few IJS made up of both men and women with men comprising the majority. Two exceptional cases are the *Had Gasa* of the Orma community and the *Kijo* of the Pokomo community, which are IJS made up of women only.¹⁷¹ IJS members are older, married, residents of the area, knowledgeable and respected in the community. Many male IJS members are religious leaders or knowledgeable in religious matters, for example Islam or Christianity.¹⁷²

2.4.4.3 Jurisdiction

At the village and locational levels, IJS mostly deal with family and neighbourhood disputes, marital conflicts, parental misconduct, juvenile misconduct, abusive behaviour and boundary disputes.¹⁷³ They also hear petty criminal offences such as theft and assaults. At the divisional and district levels they deal with issues such as security, livestock theft, grazing patterns, land disputes and etcetera.¹⁷⁴ Serious offences such as homicides and robberies are referred to the police.¹⁷⁵ Some IJS mediate in serious conflicts to prevent family feuds and cleanse the community.

Women-only IJS deal with matters related to women's sexuality, for example, rape or defilement as well as social issues such as HIV/AIDS and Female Genital Mutilation (FGM). The spiritual Kaya among the Digo is concerned only with spiritual matters and is not involved in resolution

¹⁷¹ Fida-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 8 <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf>> accessed 8 March 2014.

¹⁷² *ibid.*

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

of disputes.¹⁷⁶ It's noteworthy that any dispute is viewed as a problem for the entire community or group. This is contrary to the civil and criminal cases in formal court systems where disputes are viewed between parties and state versus accused person respectively.

2.4.4.4 Procedure

Proceedings usually involve a complaint¹⁷⁷ being brought to the lower level IJS, often after the family has been unable to resolve the problem. The respondent is summoned (by word of mouth or sometimes in writing) and a date set for hearing of the matter. In some IJS a file is opened for the matter. At the hearing the complainant is given a chance to give his/her side of the matter and also to call witnesses in support. The respondent thereafter gives evidence and also calls witnesses. The IJS members deliberate and then reach a decision, which is delivered either on the same day or communicated at a later time. If a party is dissatisfied with the decision he/she may refer the matter to a higher level IJS, for example at the divisional or district level. If still not satisfied a party may appeal to the chief.

2.4.4.5 Cost

A payment (usually in Kenya between Kenya Shillings 200-300) is usually paid prior to the hearing, although in some IJS there is no payment.¹⁷⁸ In some IJS an additional fee of about Kenya Shillings 200 is payable before the decision of the IJS can be released. In some IJS a non-monetary fee applies, for example, a goat or chicken. In others there is no set fee but the

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid* (The Complainant in most communities is the man. Women and children rarely have *locus standi*. In some communities the women have to be accompanied by a man though they are the complainants); *See also* Law Resources Foundation, *Balancing the Scales: A Report on Seeking Access to Justice in Kenya* (LRF 2004).

¹⁷⁸ Fida-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 8 <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf>> accessed 8 March 2014.

disputing parties are expected to give a token after completion of the case in appreciation of the work of the IJS.

2.4.4.6 Enforcement

Remedies range from apology, fines and physical punishment depending on the type of conflict.¹⁷⁹ In most cases enforcement of a decision by an IJS consists of social sanctions, for example, shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form such as cursing. In the women-only *Had Gasa* punishment may be meted out in the form of beating. The chief is usually notified of such punishment. Compliance with IJS decisions varies. In some IJS, enforcement is weak and decisions are not always adhered to, while in others, particularly where there are spiritual sanctions, the compliance rate is very high.

2.5 Factors Influencing People's Choices and Uses of Informal Justice Systems

Below are some reasons why people may avoid formal justice systems and instead use IJS:¹⁸⁰

2.5.1. Geographical Location

In remote areas and societies, and also in areas not under state control, the courts are often physically too far away and the only accessible form of resolution for disputes may be IJS.¹⁸¹

¹⁷⁹ FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 9-10 <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf> > accessed 8 March 2014 (Children and youth are often treated as chattels in some communities for instance with no recourse for personal justice, so that recourse for rape and other forms of sexual abuse are in the form of compensation in kind paid to the fathers, uncles or brothers. Women have almost no recourse in cases of domestic violence with all cases ruled against women, and just reprimand for men on the severity of the beating).

¹⁸⁰ See FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf> > accessed 8 March 2014; Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (Penal Reform International 2001).

¹⁸¹ The communities in Northern Kenya have been marginalized since the colonial era, post-independence to date. The formal court systems in place are few, mobile, under staffed and ill equipped. As a result, the communities, especially the Borana, Gabbra, and Burji, have stuck to their IJS.

During the interviews at Oletapes and Kamukuru¹⁸² one of the issues that was clear is that the formal justice system (court) is out of reach. It is only available in Kajiado Town and in Nakuru town which is quite a distance to access and costly. The other places where help could be received in form of government agencies are through the District Officers offices which are in Magadi town.

2.5.2 Costs

The costs associated with the formal justice system (court and legal fees, travel costs, delays) are often too high, especially for the poor and disadvantaged. Albert and Koikoi¹⁸³ said that the Courts were far apart and this resulted to them losing hope in accessing court. What was clear was the perception that, for one to access audience with the Court one needed to use an advocate. This was an indication that despite the provision of the Constitution that every person has a right to access justice,¹⁸⁴ and the provision that every person is equal before the law and having a right to equal protection of the law and equal benefit of the law,¹⁸⁵ the provision remains a fallacy in reality.

2.5.3. Sentencing

IJS case settlement outcomes. In resolving disputes many IJS emphasize on reconciliation, restoration, compensation and reintegration. The aim is to restore social cohesion within the community. The formal state system by contrast is characterized by its adversarial style and emphasis on retribution. It does not, therefore, always provide appropriate solutions for people living in close-knit communities who rely on continued social and economic co-operation with their neighbours. During the interviews, it was evident that the community is Kajiado North and

¹⁸² See Appendix 1.

¹⁸³ Interview with Albert and Koikoi, Oletapes, Kenya, 20 October 2014.

¹⁸⁴ Constitution of Kenya 2010, art 48.

¹⁸⁵ Constitution of Kenya 2010, art. 27.

Kajiado West Constituencies believe that formal systems only punish offenders and sentence them to long jail terms. Zawadi an Assistant Chief when asked what she thought about the formal state system said,

wanachukua watoto wetu, wanapeleka kwenye gereza na watoto wanakufia huko. Sisi kama wazazi hatupendelei kuona watoto wetu wakiteseka. Lakini tukienda kwa Chief, shida inatatuliwa na tunaendelea kuishi na watoto wetu wanaposamehewa na kurekebisha maneno mabaya akifanya.¹⁸⁶

This translated means that she believes that taking a child/offender to court means that the offender will be sentenced to jail and stays there for a long time and perhaps dies there. She preferred resolving disputes at the Chiefs office because the offender is integrated back to the community and they live in harmony after making good their wrong deeds.

2.5.4 Legitimacy of the People

This is the perception that cultural, religious and/or customary beliefs and practices, IJS procedures and substantive norms, compared to those of formal justice systems, are more in accordance with the local cultures and the social relations of people.

During the interviews there was reservation that courts use a language they do not understand and must use Advocates to dispense with justice. Intimidation can be an important factor preventing people from seeking justice under formal systems. Unfamiliarity with formal procedures and the formal court atmosphere can be an obstacle. As traditional forms of justice are often conducted in the local language and follow local customs, people are less likely to be intimidated by the proceedings. During the interview, the participants confirmed that the

¹⁸⁶ Interview with Zawadi, Oletepes, Kenya, 20 October 2014 (Our children are taken and jailed, and they die in jail. We don't like seeing our children suffer; instead we prefer going to the chief who finds an acceptable solution to the dispute and reconciles the parties [translation by Author]).

language used during resolution of disputes is the local language (Maasai) and it becomes easier to understand and relate to the system.

Further, traditional adjudicators are usually aware of the local context. For example, the case may be about livestock theft, but during the hearing, other issues such as land disputes may emerge and the traditional system has the flexibility to address those problems as well.

2.5.5 Expeditious Resolution of Disputes

People may also prefer to use traditional justice systems because the process of dispute resolution is usually much faster than formal systems. Long court delays thus can be avoided.

Legitimacy and authority of IJS' justice providers: Preference might be based on the individual or community perception that a justice provider, such as a traditional leader or religious leader, has the legitimate authority to adjudicate, decide or mediate a case.

2.6 Role of Informal Justice Systems in Strengthening Access to Justice

Access to justice is a fundamental right for it's the only means that an aggrieved person is able to seek redress and attain justice for their needs. However the formal justice systems are sometimes in accessible, the rules of procedure too technical to be comprehended by the common people and cases take too long to be determined ultimately causing an injustice for justice delayed is justice denied.

Traditional and informal justice systems become the alternative particularly in the rural areas and among disadvantaged urban communities. IJS approaches are accessible, culturally appropriate and tailored to the most common types of conflict in local communities, including inter-personal security; protection of land, property and livestock; and family and community disputes. Therefore they play a key role in strengthening access to justice in any state.

2.7 Challenges to Ensuring Access to Justice through Informal Justice Systems

2.7.1 Gap between Traditional Laws and Human Rights Standards

Most of the informal justice systems offend conventional human rights principle-in particular, equality and non-discrimination.¹⁸⁷ Another problem arises when human rights standards directly contradict local customs and beliefs. For example, public humiliation and physical violence may be considered an appropriate punishment for someone who has committed a crime in the community. During the interviews at Kamukuru, the researcher was informed that a persistent repeat offender who has refused to adhere to the decisions of the *baraza* is publicly shamed by being stripped and caned as s/he is escorted to government authorities (police).¹⁸⁸ However, this would be in direct opposition to human rights laws that protect individuals from torture and cruel forms of punishments. As has been observed in jurisdictions with fairly advanced human rights jurisprudence, particularly by the South African Constitutional Court in the case of *Shilubana & others v Nwamitwa* CCT 3/07, a community must be empowered to act so as to bring its customs in line with constitutional norms and values in order to achieve human rights values.

2.7.2 Inappropriate Use of Traditional and Indigenous Justice Systems

The informality of procedure, which may be strength in dealing with small scale civil and criminal cases, makes these systems inappropriate for cases in which formality is needed to protect the rights of both the victim and the offender, for example, in rape and murder cases. This includes the right to due process and to legal assistance, rules of evidence and presumption of innocence.

¹⁸⁷ UNICEF, 'Informal Justice Systems: Charting a Course for Human Rights-Based Engagement' 90 <http://www.unicef.org/protection/files/INFORMAL_JUSTICE_SYSTEMS.pdf> accessed 03 April 2015.

¹⁸⁸ See Appendix 1.

2.7.3 Exclusion of Disadvantaged Groups

Globally, IJS are often dominated by men of high status and tend to exclude women, minorities, younger people and most disadvantaged groups.¹⁸⁹ As a result, social hierarchies and biases are reinforced in the dispute resolution system and there is little opportunity for people from disadvantaged groups to appeal against decisions made by those in power. Traditional laws can also be biased and can discriminate against women and other disadvantaged groups, for example, punishing women only in adultery cases.

2.7.4 Forum Shopping

When jurisdictions are not clearly defined or overlap, it poses a problem for an effective justice system. For example, if one party in a dispute is not satisfied with the outcome of the decision, they have the option of appealing against the decision in other forums. This undermines the ability of IJS to rule effectively and their positive role in reducing the backlog in formal systems.

2.7.5 Lack of Enforcement Mechanisms

IJS are often centered around the concept of restorative justice where emphasis is placed on reconciling the victim and the offender and reaching a consensus about settlement.¹⁹⁰ However, because traditional systems do not have specific enforcement measures to back their decisions, often they are non-binding and rely primarily on social pressure.¹⁹¹ Though this may be sufficient for minor cases, for serious offences however, accountable enforcement mechanisms

¹⁸⁹ The Formal Justice Systems also under-represents the women. The difference between the formal and the informal systems as regards the equal treatment of women should, therefore, be seen as a matter of degree.

¹⁹⁰ Government of New Zealand, 'Defining Restorative Justice' <<http://www.justice.govt.nz/publications/publications-archived/1996/restorative-justice-a-discussion-paper-1996/chapter-2-defining-restorative-justice>> accessed 07 February 2015.

¹⁹¹ Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) UNDP 22 <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>> accessed 05 March 2015.

need to be in place that are both humane (that is, avoid cruel and degrading treatment) and effective.

2.7.6 Enforcement Mechanisms That Violate Human Rights

Sometimes, corporal, cruel and inhuman punishment for committing even minor crimes is used in IJS.¹⁹² These rights violations need to be addressed when developing strategies to improve IJS.

2.7.7 Corruption

Some structural deficiencies make IJS susceptible to corruption. Traditional leaders with the authority to resolve disputes may abuse their power to benefit those who they know or who are able to pay bribes.¹⁹³ Traditional judges are often not paid or are insufficiently paid and may rely on gifts and bribes for an income, influencing the outcome of the hearing. Nepotism is also a problem in traditional systems.¹⁹⁴ Traditional judges may be chosen on the basis of who they know or are related to, not on their ability to make appropriate and fair decisions. Finally, traditional justice systems may also lack independence and decisions may be influenced by outside (political) concerns and pressures.

¹⁹² For instance among the Turkana and Samburu community, if a girl gets pregnant out of wedlock she is forced to abort the child by being stepped on in the stomach by other women in the household and if she gives birth she is ordered to kill the child or else it is killed by older women. This is not considering that young men are allowed to ambush and 'rape' young girls they are interested in for marriage as a sign of 'making their mark' and claiming the girl. If the young man changes his mind, and the girl gets pregnant she has to undergo the above ordeal. Where a case is a clear case of rape and not of 'expression of interest to marry', survivors of the rape are forced to marry the rapist. In most murder cases, there is no opportunity for suspects to be heard and they are summarily executed communally through very cruel methods. See Connie Ngondi-Houghton, *Access to Justice and the Rule of Law in Kenya* (Commission on Legal Empowerment of the Poor 2006) 44.

¹⁹³ Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) UNDP 22 <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>> accessed 05 March 2015.

¹⁹⁴ *ibid.*

2.8 TDRMs in Kenya

In Kenya, Traditional Dispute Resolution Mechanisms (TDRM) as an area of social inquiry is fairly new.¹⁹⁵ Earlier studies tended to focus more on the existence, organization and functionality of TDRM but not in relation to justice.¹⁹⁶ However this has changed over the last few years and TDRMs is receiving much attention. In recent times, these mechanisms have been recognized within the law subject to some limitation.¹⁹⁷ These mechanisms have a huge potential of enhancing access to justice, strengthen the rule of law and bring about development among communities, hence their recognition.¹⁹⁸ They also promote and achieve social justice and inclusion, particularly amongst groups that have been excluded from the formal system.¹⁹⁹ Their recognition is also borne out of the increasing acceptance of the validity and legitimacy of the adjudicative power of non-state justice systems,²⁰⁰ which are home-grown, culturally appropriate and operate on minimal resources and are easily acceptable by the communities they serve.²⁰¹

The Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.²⁰² What informs the dispute resolution among the Maasai as was evident in the research is that the Maasai community rely on cultural practices that have been passed over generations to resolve disputes amongst them; a practice

¹⁹⁵ FIDA-Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province Kenya' 3 <<http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf>> accessed 8 March 2014.

¹⁹⁶ *ibid.*

¹⁹⁷ Francis Kariuki, 'Community, Customary and Traditional Justice Stems in Kenya: Reflecting on and Exploring the Appropriate Terminology' 1 <<http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf>> accessed 17 November 2015.

¹⁹⁸ *ibid.*

¹⁹⁹ Kariuki (n197) 1 *quoting* Estelle Hurter, 'Access to Justice: To Dream the Impossible Dream?' (2011) 44(3) The Comparative and International Law Journal of Southern Africa 408.

²⁰⁰ Kariuki (n 197) 2 *quoting* Miranda Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems,' (2007) 56 Journal of Legal Pluralism 67, 69.

²⁰¹ Kariuki (n 197) 2 *quoting* David Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law' (2010) 32(2) Harvard International Review 32.

²⁰² Constitution of Kenya, 2010, art 11(1).

that they have learnt to live with and are proud to adhere to. The constitution further guarantees the right of persons to participate in their cultural life of their choice and provides that such a person shall not be compelled to observe or undergo any cultural practice or right.²⁰³ It is also guaranteed in the Constitution that the state shall put into place affirmative action programmes designed to ensure that minorities and marginalized groups develop their cultural values, languages and practices.²⁰⁴ The Constitution requires courts and tribunals to be guided by the principles of traditional dispute resolution mechanisms in delivering justice as long as they are not repugnant to justice and morality or inconsistent with justice and morality or inconsistent with the Constitution or any written law.²⁰⁵

2.9 Concluding Remarks

This Chapter has elaborated that access to justice is a concept that is measured on the scale of Justice. Justice would then mean that every person in a given community, region or country must as a matter of human rights be able to access dispute resolution mechanisms of whatever nature. These mechanisms must uphold the rule of law, be fair and promote equity and equality across the board. Further, the chapter has demonstrated the challenges that face access to justice at different levels of society and shall be expounded on and perhaps resolved in the following chapters. The Chapter has also discussed the nature of TDRMs and the effect that they have in society and why people result to them. It has also demonstrated the extent to which the Constitution of Kenya recognizes culture and traditional dispute mechanisms.

²⁰³ *ibid*, art 44.

²⁰⁴ *ibid*, art 56 (d).

²⁰⁵ Kariuki (n 197) 2 *quoting* Constitution of Kenya, 2010, arts 159 (2)(c) and 159 (3),

CHAPTER THREE

INFORMAL JUSTICE SYSTEM IN KAJIADO NORTH AND WEST

CONSTITUENCIES

3.1 Introduction

Kajiado North Constituency is in Kajiado County and is one of the largest constituencies in Kajiado County comprising of 18 wards.²⁰⁶ It is reported to cover an area of 7, 404.4 Km Square.²⁰⁷ Kajiado West Constituency, also in Kajiado County, comprises of 3 wards.²⁰⁸ It is reported to cover an area of 8,397.50 Km Square.²⁰⁹ The mainstream tribe is the Maasai tribe who are mainly pastoralists and are still grounded in their traditional practices. Each ward has 3-7 locations each and about 2-3 sub-locations comprising mainly of the pastoralist groups of the Maasai community. There are no formal courts in most of the areas and residents would have to travel far to access the formal justice systems thereby making access to formal courts costly. Therefore, residents in Kajiado North and West Constituencies result to informal justice systems to resolve disputes amongst them. In this Chapter, the traditional disputes mechanism in Kajiado North and West Constituencies will be identified and discussed, outlining the reporting mechanism, the scope and the resolutions that are made in various different issues.

3.2 Resolution of Disputes

Senior Chief (SC) John who has been a Chief for 21 years informed that despite having the challenge of accessing courts of law, he has over time resorted to community policing to address

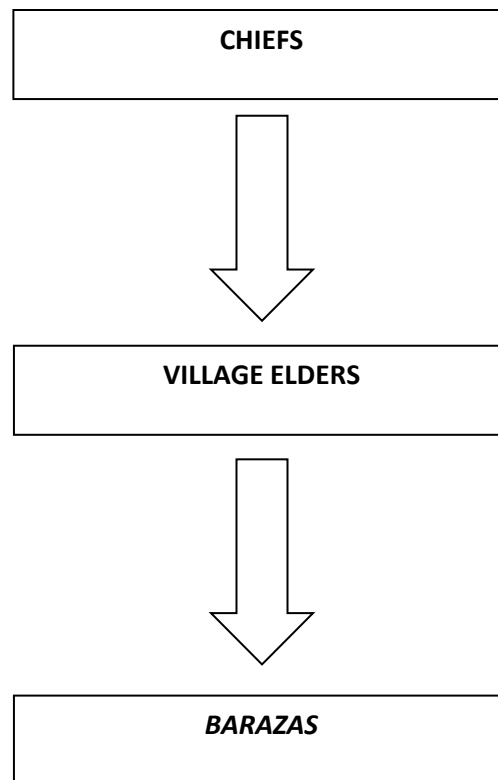
²⁰⁶ Central Keekony Okie, Kaputei North, Kiserian, Kitengela, Magadi, Mosino, Ngong, Nkar-Mu-runya, North Keekonyokie, Oldkiramatia, Oloolua, Ongata Rongai, Shompole and South Keekonyokie.

²⁰⁷ Independent Electoral and Boundaries Commission.

²⁰⁸ Keekonyokie, Iloodokilani, Magadi, Ewuaso OO Nkidong'i and Mosiro

²⁰⁹ Independent Electoral and Boundaries Commission.

major security issues affecting the community in collaboration with a General Service Unit camp within the area.²¹⁰ In order to make the community policing efficient, village elders are involved and assigned twenty (20) households each for which they are responsible for, monitoring and reporting events in the households to the chief. However, he also mentioned that one of the challenges especially when it comes to reporting cutting of trees and smuggling of wood from the Kora Forest is the distance and the lack of transport.²¹¹ This assertion was supported by Chief James who lamented that the nearest police post is about ten (10) kilometres away thereby making reporting crimes to the police a challenge.²¹² SC John acknowledged that as Chiefs they have a reporting mechanism of disputes and a manner in which disputes are resolved, being in three (3) tiers as follows:



Source: Author

²¹⁰ Interview with John, Oletapes, Kenya, 20 October 2014.

²¹¹ *ibid.*

²¹² Interview with James, Oletapes, Kenya, 20 October 2014.

As advised by Kameri Mbote and Migai Aketch²¹³ the government should encourage and institutionalize alternative dispute resolution. The information given by SC John proved that indeed the use of IJS is alive and operational amongst the Maasai community and there are laid down structures of how the system works. What is required is to ensure that the process of IJS adheres to the rule of law and is in tandem with the Constitution of Kenya, 2010. Further, as theorized by John Rawls²¹⁴ he saw justice as a system in which all people are rendered equal before the law by balancing the social and economic inequalities. Legitimizing the use of IJS would ensure that the social and economic inequalities are balanced by ensuring that the IJS used adheres to the laid down requirements of law.

3.2.1 Resolution of Disputes by Chiefs

In the given area, the Chiefs and Assistant Chiefs are tasked with resolution of disputes among the communities that live in their area of jurisdiction. They handle matters that cut across the legal divide that is criminal, civil, land and family disputes. Where a person has a dispute to resolve, the dispute is reported to the Chief/Assistant-Chief and the detail would be recorded in a record sheet²¹⁵ which has the date the issue is reported; the person reporting the issue (complainant); age of complainant; nature of the issue; the accused person; details of the services rendered (ranging from family disputes, school issues, water and land problems; and person rendering the service. Once the Chief/Assistant-Chief has listened to the complainant and taken all the details, he would then summon the offender and inform him of the charge against him. The Chief/Assistant-Chief endeavours to discuss and conclude the matter in his office, but if

²¹³ Patricia Kameri Mbote and Migai Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011) 156 and 174-177.

²¹⁴ John Rawls, *A Theory of Justice* (Harvard University Press 1971).

²¹⁵ Interview with John, Oletapes, Kenya, 20 October 2014.

need be he calls a meeting of village elders at a later date to consult them. Where the offender admits that he has wronged the complainant, he is fined and reconciled into the society. The details of the fine and the date of payment are given and agreed upon.

SC John gave examples of cases he has handled and how they have been resolved.²¹⁶ He said that where an offender is accused of stealing a goat and admits to the offence, the offender is fined three calves. Where a person steals a female cow, the offender is fined five cows and if the female cow was pregnant, the offender is fined a bull and seven cows. Where a person inadvertently kills another's bull, he will be ordered to replace the bull with another bull; however, if the killing was intentional, the offender is fined five bulls. It is apparent that the dispute resolution has a fine to be paid for the wrong-doing and as such is restorative justice whereby the victim of the injustice is taken back to the state of normalcy and the offender is integrated back into the community.

One perplexing example was a dispute with regards to murder. The issue was that, a man had left his wife and had gone to graze the animals. Upon his return, he found another man with his wife. Out of anger he killed the man. It was decided that the man was to be reconciled with the family of the deceased whereby the offender was to pay the deceased's family fifty (50) cows. With the aid of the Senior Chief John, I witnessed the offender travelling from a place called Olekisanje at Kilonito town to Olkisanai hill at a town called Mile 46.

Once a penalty is agreed upon, communication is given to all locations so that everyone is aware that a particular clan owes compensation. The end result is that the offender will regain the

²¹⁶ Interview with John, Oletepes, Kenya, 20 October 2014.

community's trust after payment in full of the compensation. It is also noteworthy that these dispute TDRM relating to death run concurrently with the formal justice system.

The most interesting discovery that emanated from the interviews conducted amongst the various Chiefs and Assistant Chiefs, most of who declined to be mentioned in this research, was the issue of disputes of a sexual nature. One of the Chiefs gave an example of how disputes regarding impregnating a child of tender years are handled. An offender who impregnates a girl child is fined Kenya Shillings Fifty Thousands (50,000/-) and seven (7) cows and is then required to pay for the girl's education. In as far as the education of the child is paramount as envisaged in the Constitution,²¹⁷ the question would be whether the fine levied against the offender is sufficient enough to deter other persons from committing similar offence. The fine or punishment seems to be quite lenient unlike in the formal justice system where defilement is an offence under the Sexual Offences Act (Number 3 of 2006) punishable by life imprisonment if a child is aged eleven (11) years or less; imprisonment for not less than twenty (20) years if the child is aged between twelve (12) and fifteen (15) years; and imprisonment for not less than fifteen (15) years if the child is age between sixteen (16) and eighteen (18) years.²¹⁸

It is evident that Sen's view of every person having the right to enjoy what makes them happy is realised in the IJS system as discussed above. However, enjoying a right should go beyond an individual by ensuring that solutions offered are within the law and a balance is struck. Like opined by Aristotle²¹⁹ corrective justice involves rectification between two parties, where one

²¹⁷ *Constitution of Kenya* 2010, art 53.

²¹⁸ *Sexual Offences Act* s 8.

²¹⁹ Aristotle, *The Complete Works of Aristotle: The Revised Oxford Translation*, vol 2 (Jonathan Barnes ed, Princeton University Press 1984) 58.

has taken from the other or harmed the other. However, the rectification should be reasonable and fair to all parties concerned.

Where Chiefs are unable to resolve the dispute at their level, the matter is referred to a *baraza* which comprises the Senior Chief, Chiefs, Assistant Chiefs, Group Ranch leaders,²²⁰ area Councillors (now Members of County Assembly), village elders and other community people. Normally, the *baraza* has up to three hundred (300) people depending on the gravity of the dispute in question and the attention a dispute has elicited amongst the people of the community. If the offender is found guilty but refuses to reconcile with the complainant by refusing to pay the fine, the Chief writes a letter to the area Officer in Charge of the nearby Police Station and hands over the case to the formal justice system. Further, the *baraza* appoints seven (7) elders to place a curse on the offender. Curses in the Maasai community by the elders are still in force to date and are feared by the community members. It is thus in extremely rare cases that disputes at the *baraza* stage remain unresolved.

3.2.2 Resolution of Disputes by Village Elders and the *Baraza*

Village elders handle day to day disputes in the community. They are tasked with handling matters such as birth notification and advocating for peace.²²¹ Sandra said that the purpose of birth notification is to ensure that the information of new persons born into the society is reported to the Chief and also for purposes of citizen registration which she was aware is a requirement of government. She indicated that she ensures she visits homesteads where a child has been born or health facilities if any within the location. She further informed that village elders normally have

²²⁰ The leaders of the Group Ranches in the Maasai community are normally represented at the *baraza* by the Chairperson, Treasurer and the Secretary. A group ranch is a community ranch comprising of consolidated huge parcels of land which are referred to as community land and run by an elected few from the community.

²²¹ Interview with Sandra, Kamukuru, 22 November 2015 (Sandra is a female village elder aged 50 years).

monthly meetings through *barazas* conducted on a rotational basis among the villages and such meetings are determined by the calendar of the Chief or Assistant Chief in the area.

Village elders are normally not less than seven (7) persons chosen from within the community by the community members and charged with care of at least twenty (20) homesteads each.²²² The Maasai community has infused gender inclusivity and has both male and female village elders who are usually consulted by the Chief/Assistant-Chiefs in decision-making. They are chosen based on the knowledge of the location and is normally by consensus, and where there is no consensus, the people present in a *baraza* vote by queuing behind their preferred person. However, it is in very rare cases that the latter situation happens.

The village elders are tasked with community policing initiatives and handling issues of illegal logging, grazing patterns, reporting deaths and keeping track of new person visiting the area.²²³ Idris further informed that as village elders they do not record disputes that are resolved; however they ensure that a verbal report is given to the Chiefs and Assistant Chiefs on a monthly basis.

Village elders have the mandate to come up with basic rules to govern their areas thus giving them some measure of autonomy over their villages.²²⁴ In order to solve disputes spanning across villages in a given location, village elders meet amongst themselves to deliberate and once a decision is arrived at, the decision is passed as law and the same cannot be disputed by the community at large.²²⁵ Where village elders are unable to resolve an issue/dispute before them,

²²² Interview with Maurice, Kamukuru, 22 November 2015 (a 57 year old Village Elder).

²²³ Interview with Idris, Kamukuru, 22 November 2015 (a 60 year old male Village Elder who is tasked with community policing).

²²⁴ Interview with Moses, Kamukuru, 22 November 2015 (a 55 year old Village Elder).

²²⁵ Interview with Nezbit, Kamukuru, 22 November 2015 (a 50 year old Village Elder).

they refer the matter to the Chief or Assistant Chief of the area who would then resolve the dispute as required.²²⁶

3.3 The Council of Elders

Unlike the common belief that the Maasai Council of Elders resolves all manner of disputes amongst the Maasai Community, they, just like the Supreme Court of Kenya, sit occasionally to listen to matters that would have a great impact on the community as a whole and have unlimited jurisdiction. Ordinarily, the Council of Elders is tasked with ensuring adherence to the Maasai culture by the community. The Council of Elders is composed of senior citizens elected from each of the nine Maasai clans during sectional *barazas*, with one person representing a clan (section). Particularly worrying is the fact that the Council of Elders comprises men only,²²⁷ as women are forbidden by Maasai culture from sitting on the Council of Elders. The reason given as to why women are not incorporated in the Council of Elder is first, that women themselves shy away from the responsibility that is bestowed on the Council of Elders²²⁸ and second that women's knowledge based on the Maasai cultural practices is limited, if not none at all, based on their historical practices.²²⁹

The Council of Elders is tasked with handling matters considered to impact the whole community. Most importantly, the Council of Elders ensures compliance with Maasai cultural practices and makes decisions on review of customs. This ability and right of a community to

²²⁶ *ibid.*

²²⁷ *See* Appendix 1.

²²⁸ This was confirmed during a discussion with the women by Mary, a Traditional Birth Attendant (TBA), who said that the position of women in the Maasai culture is to ensure that their homes are tendered to and their children educated and to ensure that the daily chores of the homestead are done. Further, the women also unanimously said that matters of punishment and ensuring that their culture is adhered to is tasked to the Council of elders and it is a very challenging task.

²²⁹ Interview with Edwin, Kamukuru, 22 November 2015 (a 65 year old member of the Council of Elders).

amend or repeal its laws/customs, a role performed by the Council of Elders in the Maasai community, has been hailed in the South African case of *Shilubana & others v Nwamitwa* as enabling communities to bring their customs in line with human rights norms and values. Further, the Council of Elders sets rules governing cultural festivities/ceremonies; resolves disputes between clans and disagreements on boundaries in the community; presides over passing-out from one age-group to another; and advices on leadership.²³⁰ While resolving the disputes, sessions are conducted in an informal manner and because of the fear and respect the Council of Elders commands, the community never questions any decisions it makes. This would then pose a challenge when faced with the Rule of Law and matters constitutional as they seem to be the ‘alpha’ and ‘omega’ of the community.

In matters death and theft, the Council of Elders ensures that the Maasai culture of *Inkirro*²³¹ and *Enyamu*²³² are adhered to. These practices to date continue to govern the manner in which disputes surrounding death and theft are handled. The Council of Elders also informed that even where the formal justice system for instance punishes an offender, the clan of the offender must pay the penalties as prescribed under the Maasai culture.²³³ These penalties have been passed down generations and cannot be varied.

²³⁰ Interview with the Council of Elders, Kamukuru, 22 November 2015.

²³¹ This is the set down penalty of the Maasai culture that where a person kills another person in the Maasai culture to avoid hostility between the family of the offender and the victim, the offender (murderer) is required to pay to the family of the deceased 49 cows (plus 1 at times) or 249 cows as a peace offering. The payment is staggered over a period of between 1 year – 10 years. The animals are collected from amongst the clan of the offender and pregnant or lactating mothers should not contribute to the herd.

²³² This is a set down penalty amongst the Maasai with regards to theft of animals. Where a person has stolen an animal the same is recovered from the offender. Where the animal has died, (i) if it is a Bull the same is replaced with 5 cows; (ii) 1 cow is replaced with 7 cows; (iii) Pregnant cow is replaced with 14 cows; (iv) goat is replaced with 2 bulls. In all instances, the victim gets to choose the animals.

²³³ For instance during the discussion with the sampled women, it was explained that where a Traditional Birth Attendant is attending to a woman, where he child is born with the placenta, the woman is required to pay 1 small

3.4 Perception of the Consumers on IJS amongst the Maasai

It was apparent that the consumers approached the formal justice system with a lot of caution, if not distrust. All the respondents had negative things to say of the formal justice system. They were of the view that courts of law are far from the people and they are normally expected to travel long distances in order to access justice. As a matter of fact, the nearest law courts are situated at Kibera in Nairobi and Kajiado Town. There also emerged the perception that accessing legal redress in a court of law was expensive since one had to engage the services of a lawyer, and the cases were lengthy. Further, the respondents felt that the judicial system's concept of justice is adversarial and ensures victory for good orators at the expense of other parties; a situation they argued the Maasai IJS avoided by providing a fair platform to all. These factors contribute to a loss of confidence by the community in the formal justice system.

They suggested that, if they were to access the formal systems, the same should be brought nearer to them preferably at Magadi and Oletapes townships. They also wanted leeway to be allowed to only refer matters to the formal system where they have failed to resolve issues themselves. The argument they advanced in support of this demand was that it beats logic and sense to clog the judicial system with mostly inter-personal matters that can be amicably resolved at a community level in a manner that ensures justice is done and relationships and culture preserved. According to the respondents, the Maasai IJS is most preferable to them for the following reasons: disputing parties are eventually reconciled; offenders get cleansed of their evil deeds thus wading off any evil that may befall them as a result; the parties are assured of peace of mind after the process; and that the intervention of elders prevents the people from taking the law into their own hands.

lamb as a fine. Also, where the woman giving birth is uncircumcised, the lady must pay 1 heifer as a fine. The Heifer is said to cleanse the woman as an uncircumcised woman is perceived to be unclean.

The Maasai community indeed rely on IJS to resolve their disputes. As propounded by Ehrlich, law is fundamentally a question of a social order.²³⁴ Social order connotes the most fundamental parts of the system of social institutions, focussing attention on the self-enforcing nature of institutions and on the importance of implicit and informal rules of behaviour as opposed to formal, written rules.²³⁵ The social order of the Maasai is to resolve disputes using the Chiefs, Village Elders and *Barazas*. However, there is need to strike a balance between the social order and the laid down rules to ensure that laws are adhered to and above all that human rights are upheld. The respondents also advanced the desire to see their customary rules and practices documented and codified in order to give them formal recognition and ensure their preservation for future generations.

3.5 Conclusion

This Chapter has discussed the dispute resolution mechanisms in place in the aforementioned constituencies. It outlines the reporting mechanism and procedure that is followed and gives examples of the scope of the disputes that are handled in the informal justice system. The issue to be considered is what needs to be done to strengthen the informal justice system in Kajiado to ensure that it conforms to requirements of the Constitution of Kenya 2010 in upholding the Rule of Law and respecting the Bill of Rights. It cannot be ignored that the informal system continues to have a very large impact in the community and the people have faith in the system which to the 'educated' somewhat seems like an archaic way of handling issues. The next and final chapter will wind up this research study with conclusions and recommendations.

²³⁴ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter Moll tr, Harvard University Press 1936) 24.

²³⁵ Randall Calvert, *Explaining Social Order: Internalization, External Enforcement or Equilibrium?* (1995) Working Paper No. 4 < http://www.wallis.rochester.edu/WallisPapers/wallis_4.pdf > accessed 12 June 2015.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

Access to justice in Kenya has had its own challenges because of the lack of trust in the formal justice systems by citizens especially in the rural areas. The promulgation of the Constitution of Kenya 2010 that recognizes the TDRMs as a form of dispute resolution is a step towards the right direction. Despite much work going into improving the formal justice system by training judges, magistrates, prosecutors, public defenders, renovating court buildings and regularising judicial officers' salaries, this has not aided in changing the perception of the Maasai community with regards to accessing legal redress in courts of law.

Chiefs, village elders and council of elders continue to resolve disputes amongst the Maasai community based on widely accepted cultural paradigms. Indeed as posited by the critical feminists' theory, written law does not offer all the solutions. It is, however, true that some of the approaches are repugnant to justice. For instance, defilement would be casually treated as a dispute between two families and the victim is seldom considered yet it is a wrong that affects an individual physically and even psychologically. Be that as it may, save as for the harsh punishment imposed on the offender in the formal justice system, the same does not provide a remedy for the victim. The dispute resolution mechanism does not differentiate between criminal and civil cases and does not pay much attention to the requirements of written law if any. There is thus need to engage the Chiefs, the Village Elders and council of elders to educate them on the Rule of Law and the Bill of Rights so as to integrate the same in their dispute resolution mechanisms.

The Constitution of Kenya 2010 is the *grund norm* which guarantees access to justice to all citizens of Kenya ensuring that justice is administered fairly and in accordance with the Bill of Rights. The Constitution also recognizes Alternative Dispute Resolution Mechanisms and the TDRMs.²³⁶ It is evident from the research that despite the recognition of TDRMs there is much more that needs to be done in bridging the glaring gap between the informal justice systems and the formal justice systems. This is attributed to the fact that informal justice systems are based on unwritten laws, rules and procedures which are left at the mercy of the persons conducting the system. The informal justice system also determines all matters including those of a criminal nature that would ordinarily in the formal system attract harsher penalties. The system does not adhere to basic principles such as due process, fair trial, non-discrimination, equality, and equity. In fact, it is more concerned with reconciliation and restoration of both the complainant and the offender. It is a justice system that derives its principle from the participants of the community that are governed by the informal justice system and as such is a legitimized practice by the people. There is therefore need to link the formal and informal justice systems by putting up an institutional framework that would be agreeable to all stakeholders concerned.

Indeed the research has proved the hypothesis that indeed IJS is an effective way of dispensing justice and ought to be recognized as a means through which people access justice. The Maasai community in Kajiado North and Kajiado West constituency resolve their disputes through IJS. The three-tier structure goes a long way in resolving disputes and reconciling the complainant and offender. The problems facing accessing to justice indeed go beyond the geographical location of courts of law; it needs to be approached in all-inclusive approach by recognising

²³⁶ Constitution of Kenya 2010, art 159.

TDRMs expressly in law and establishing a framework on how the formal justice system can be linked to the informal justice systems.

4.2 Recommendations

The following recommendations would be instrumental in resolving the issues discussed above.

4.2.1 Strengthening the Formal Justice System

The government, particularly the judiciary, has provided capacity and technical support to provide regular training for judicial officers and also increase the number of courts to ensure that they are easily accessible by the common citizen. Even with this development, the research has proved that the effect has not yet trickled to the common citizen in the rural and remote areas. There is need for the government to establish a link between the IJS practiced at the local level and the state formal justice system. The TDRMs would perhaps be recognized as Courts of First Instance with an option of appeal to the Magistrates Court where persons are aggrieved by the decisions of the informal systems.

In 2007 in Liberia, the Carter Center and the Liberian Catholic Justice and Peace Commission developed a Community Legal Advisor (CLA) to train and guide local people through the formal, informal and traditional options for settling disputes.²³⁷ The CLA provides rural citizens with free information on their rights and the law; helps people interact with the government, courts and traditional authorities; mediates small-scale conflicts; and engages in advocacy

²³⁷ Pewee Flomoku and Lemuel Reeves, 'Formal and Informal Justice in Liberia' (2012) 23 ACCORD <http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/formal-informal-justice-liberia-accord-issue23.pdf> accessed 02 April 2015.

around justice.²³⁸ This would be an option that the Judiciary in Kenya could explore to create and establish the link between the two systems of justice.

4.2.2 Strengthening Informal Justice Institutions

It is evident from this research that Kenyans still rely on traditional justice to resolve disputes amongst themselves. Some of the solutions that are offered are inconsistent with the national laws and international standards for instance, where in cases of defilement the offender is charged only Fifty Thousand Kenya Shillings (50,000/-) and seven (7) cows without considering the effect on the victim.

The government and the judiciary should put into place mechanisms to ensure that where there are conflicts between traditional practices and the law, they should engage the administrators of the traditional systems and sensitise them about the Constitution and the Rule of Law. During the interviewees conducted, one thing that was clear is the misconception that to access justice in the courts of law, one has to have an Advocate and that all cases that end up in the courts of law result to sentencing of all offenders. There is need to ensure that the stakeholders are sensitized on the provisions of the Constitution of Kenya, 2010. In Liberia, County Resolution Monitors have been established who have developed guidelines to work with the Chiefs where there is such conflict.²³⁹

There is also need to establish a system that will help build the dispute resolution capacity of the traditional leaders in a manner consistent with the law. In Liberia this has been done by the

²³⁸ *ibid.*

²³⁹ *ibid.*

Carter Center²⁴⁰ which provides modest financial support and has used dialogue and training to introduce traditional leaders to new laws and dispute resolution approaches that promote inclusion.²⁴¹ In Kenya, it is recommended that the Commission on Administrative Justice (CAJ) (Ombudsman) be tasked with the mandate of engaging traditional leaders through dialogue and training to ensure that the traditional systems conform to the Rule of Law and respect the Bill of Rights. The traditional system should be formalised in a manner that ensures and guarantees consistency in dispute resolutions. There should be established a recording mechanism and record-keeping of the disputes resolved and possibly ensure that the punishment meted on individuals is consistent across the board for similar offences committed.

4.2.3 Linking Formal and Informal Justice

There needs to be established a policy reform that will help link the formal and informal justice systems. Since the traditional justice system is legitimised and accepted by the rural persons as an effective dispute resolution mechanism that integrates the victim and the offender, there needs to be legal empowerment in the grassroots which would involve the traditional leaders and the local people.

There is need to establish an agreed legal framework which creates a nexus between the informal justice system and the formal court process to enhance access to justice that will be accepted and employed by the local community. The case of *R v Mohamed Abdow Mohammed*²⁴² applied

²⁴⁰ This is an organisation that was established in order to promote justice in post-war Liberia and was used in particular to link traditional and formal justice systems in Liberia.

²⁴¹ Pewee Flomoku and Lemuel Reeves, 'Formal and Informal Justice in Liberia' (2012) 23 ACCORD <http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/formal-informal-justice-liberia-accord-issue23.pdf> accessed 02 April 2015.

²⁴² [2013] eKLR; *See also* Francis Kariuki, 'Community, Customary and Traditional Justice Stems in Kenya: Reflecting on and Exploring the Appropriate Terminology' 1

traditional dispute resolution mechanism in resolving a murder case. Abdow Mohamed was charged, together with others not before the court, for the murder of Osman Ali Abdi on 19 October 2011 in Eastleigh, within the Starehe District of Nairobi.²⁴³ On the date of the trial, the prosecution made an application to court to mark the matter settled based on Islamic laws and customs.²⁴⁴ The prosecution stated that the accused's family had paid compensation to the deceased family in form of camels, goats, and performed rituals.²⁴⁵ The rituals were a form of blood money to the deceased's family.²⁴⁶ Further, the prosecution stated that witnesses to the murder were not willing to testify and therefore they could not be able to proceed with the case.²⁴⁷ The court upheld the application of the traditional dispute resolution system based on Article 159 and Article 157 that allowed the Director of Public prosecution to withdraw cases with the leave of the court.²⁴⁸ This decision depicts the widening scope of TDRMs into the arena of criminal law, a position rarely held by courts in pre-2010 jurisprudence on customary law.²⁴⁹

The viable legal framework would include establishing a law or policy that expressly provides and accepts traditional dispute resolution mechanisms. This may be done by giving jurisdiction and authority to village elders to handle matters with express recognition. The Kenya Law Reform Commission should explore the possibility of having the legal framework realised. This would ultimately strengthen the traditional justice systems and streamline them by

<<http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf>> accessed 17 November 2015.

²⁴³ *R v Mohamed Abdow Mohammed* [2013] eKLR.

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

institutionalisation and also create a nexus between the traditional justice systems and the formal court system.

Further, to create the nexus, there is need to ensure that the practices and dispute resolution methods are documented for ease of reference and consistency, and also to ensure preservation for future generations. It is not enough to recognize the TDRMs in the Constitution with limitations. On one hand as demonstrated earlier, the Constitution recognises culture and the use of TDRMs and also guarantees that every individual has a right to choose whether to adhere to a given cultural practice or not. This poses a challenge as during the interviews²⁵⁰ it was evident that, even where an offender has been charged with an offence and served their sentence through the formal sentence, the fines imposed by the Maasai cultural practice will still have to be paid by the offender or their families/clans. There is therefore need to create a nexus between the two systems to provide harmony and avoid the risk of double jeopardy.

4.2.4 Conducting Survey on Existing TDRMs in Kenya

There is need to conduct an in-depth survey to identify and document all the TDRMs in Kenya. This would go a long way in establishing the various structures and modes of operation which would help identify the strengths and weaknesses of the TDRMs. In the long run, the study would play a big role in establishing a link between the formal and informal justice systems in the country. As a matter of priority before the realisation of the legal framework linking the two systems, there is need to encourage the traditional systems to document their processes which would help in restructuring the process if at all there is need to.

²⁵⁰ Interviews with the Council of Elders, Village Elders and Consumers of the IJS in Kajiado North and Kajiado West Constituencies.

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APPENDIX 1

SCHEDULE OF INTERVIEWS

| INTERVIEW WITH CHIEFS AND ASSISTANT CHIEFS ON 07 SEPTEMBER 2014 AT ONNGATA RONGAI AND ON 20 OCTOBER 2014 AT OLETEPES | | | | | |
|---|------------------|------------|---------------------------|----------------------------|-------------------|
| No. | Pseudonym | Sex | Place of Interview | Rank of Interviewee | Date |
| 1. | Peter | M | Ongata-Rongai | Chief | 07 September 2014 |
| 2. | James | M | Oletepes | Chief | 20 October 2014 |
| 3. | John | M | Oletepes | Senior Chief | 20 October 2014 |
| 4. | Mary | F | Oletepes | Assistant Chief | 20 October 2014 |
| 5. | Linda | F | Oletepes | Assistant Chief | 20 October 2014 |
| 6. | Albert | M | Oletepes | Senior Chief | 20 October 2014 |
| 7. | Zawadi | F | Oletepes | Assistant Chief | 20 October 2014 |
| 8. | Koikoi | M | Oletepes | Chief | 20 October 2014 |
| 10. | Tom | M | Oletepes | Chief | 20 October 2014 |

| INTERVIEW WITH COUNCIL OF ELDERS BETWEEN 11:00 A.M AND 12:35 P.M AT KAMUKURU SHOPPING CENTRE ON 22 NOVEMBER 2015 | | | |
|---|-------------|---------------|------------|
| No. | Name | Gender | Age |
| 1. | Jonas | Male | 55 |
| 2. | Oscar | Male | 62 |
| 3. | David | Male | 60 |
| 4. | Peter | Male | 54 |
| 5. | Edwin | Male | 65 |

INTERVIEW WITH VILLAGE ELDERS BETWEEN 12:35 AM AND 1:10 PM AT KAMUKURU SHOPPING CENTRE ON 22 NOVEMBER 2015

| No. | Name | Gender | Age |
|-----|---------|--------|-----|
| 1. | Idris | Male | 60 |
| 2. | Nezbit | Male | 50 |
| 3. | Maurice | Male | 57 |
| 4. | Moses | Male | 55 |
| 5. | Sandra | Female | 50 |

INTERVIEW WITH CONSUMERS BETWEEN 1:15 PM AND 3:30 PM AT KAMUKURU SHOPPING CENTRE ON 22 NOVEMBER 2015

| No. | Name | Gender | Description |
|-----|---------|-----------|--------------------|
| 1. | James | Male – 64 | Family of victim |
| 2. | Joseph | Male – 40 | Family of victim |
| 3. | Philip | Male – 57 | Family of victim |
| 4. | Andrew | Male – 54 | Family of offender |
| 5. | Jackson | Male – 40 | Family of offender |
| 6. | Robert | Male – 40 | Family of offender |

INTERVIEW WITH WOMEN FORUM BETWEEN 3:30 PM AND 4:30 PM AT KAMUKURU SHOPPING CENTRE ON 22 NOVEMBER 2015

| No. | Name | Gender | Age |
|-----|--------|--------|-----|
| 1. | Janet | Female | 28 |
| 2. | Mary | Female | 50 |
| 3. | Agnes | Female | 50 |
| 4. | Grace | Female | 35 |
| 5. | Risper | Female | 28 |
| 6. | Nancy | Female | 50 |

APPENDIX 2

INTERVIEW SCHEDULE

The following Schedule was used during the interviews.

1. What do you understand by Justice and access to justice and how does it work in the community?
2. How are disputes resolved in the community?
3. Are there reporting mechanisms if yes, what are they?
4. What scopes of issues are handled in the community?
5. How decisions agreed upon are enforced.
6. The consumers' feelings about their IJS system *vis-a-vis* the formal system.

APPENDIX 3

CONSENT LETTER

Study Title: Analysing the effectiveness of informal access to justice in Kajiado North and Kajiado West Constituencies.

Researcher: Mumbi S. Mwihurih, LL.M Candidate, University of Nairobi

Supervisor: Lady Justice Nancy Baraza

Introduction

I trust this finds you well.

Thank you for accepting to participate in this interview. I am currently pursuing my master's degree in Law (Democracy and Governance) at the University of Nairobi. As part of the course, I am required to write and present a project paper in the area of interest. My paper interrogates issues surrounding access to justice. This letter is administered as part of the study in appreciating the importance and social impact of informal access to justice systems. The paper will give recommendations on mechanisms for improvement of ensuring access to justice for all. It will assess the effectiveness and efficiency of informal access to justice and how it contributes significantly in ensuring access to justice.

As a participant in this interview.

Please note the following

1. Your participation is voluntary. You may withdraw at any time from the interview
2. The interview will take approximately one half an hour
3. Feel free to seek clarification where needed
4. Your response will be recorded
5. Your identity will only be revealed with your permission. Otherwise an identity number known only to the researcher in which case you will not be named in any study reports, presentations or publications will protect your identity in this interview.

Do you agree to participate in this study?

Yes

No

Please sign below confirming your decision

Signature and Date

APPENDIX 4

INTRODUCTION LETTER FROM THE UNIVERSITY



UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES & SOCIAL SCIENCES
SCHOOL OF LAW, PARKLANDS CAMPUS
OFFICE OF THE DEAN

Telephone: 254-020- 2314371-5
Cell Phones: 0724-922 608/ 0734-273 568
Fax: 254-020-3744284
E-mail: deanlaw@uonbi.ac.ke

P.O Box 30197
00100 G.P.O.
Nairobi,
Kenya.

14 July, 2014

TO WHOM IT MAY CONCERN

Dear Sir/Madam

RE: MUMBI S. MWIHURIH – G62/68562/2013

This is to confirm that the above named is a *bonafide* student at the University of Nairobi School of Law. She is undertaking studies leading to the award of Master of Laws degree (LLM).

Ms. Mwihurih is in the process of writing a Project Paper as partial fulfilment for Master of Laws degree programme. She would like to get a permit in order to collect data for her Project Paper.

Any assistance accorded her will be appreciated.

Yours faithfully

A purple circular stamp from the University of Nairobi, School of Law, Parklands Campus. The stamp contains the text "UNIVERSITY OF NAIROBI" at the top, "SCHOOL OF LAW, PARKLANDS CAMPUS" at the bottom, and a date stamp "15 JUL 2014" in the center. There is a signature over the stamp.
NOEL MANYENZE
SENIOR ADMINISTRATIVE ASSISTANT
SCHOOL OF LAW

APPENDIX 5

RESEARCH AUTHORISATION FROM NACOSTI



NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Telephone: +254-20-2213471,
2241349, 310571, 2219420
Fax: +254-20-318245, 318249
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NAIROBI-KENYA

Ref. No.
NACOSTI/P/14/59/3037

24th September, 2014

S. Mumbi Mwhurih
University of Nairobi
P.O. Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on "*Analyzing the effectiveness of informal access to justice; Kajiado North Constituency,*" I am pleased to inform you that you have been authorized to undertake research in **Kajiado County** for a period ending **17th August, 2015**.

You are advised to report to **the County Commissioner and the County Director of Education, Kajiado County** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.


DR. S. K. LANGAT, OGW
FOR: SECRETARY/CEO

Copy to:

The County Commissioner
The County Director of Education
Kajiado County.

APPENDIX SIX
RESEARCH CLEARANCE PERMIT FROM NACOSTI

THIS IS TO CERTIFY THAT:
MS. S. MUMBI MWIHURIH
of UNIVERSITY OF NAIROBI, 42126-100
NAIROBI, has been permitted to conduct
research in Kajiado County

Permit No : NACOSTI/P/14/0965/3037
Date of Issue : 24th September, 2014
Fee Received : Ksh 1,000

on the topic: ANALYSING THE
EFFECTIVENESS OF INFORMAL ACCESS
TO JUSTICE; KAJIADO NORTH
CONSTITUENCY

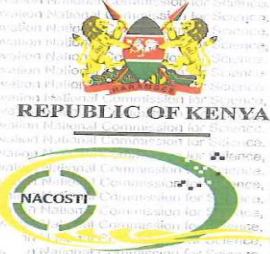
for the period ending:
17th August, 2015

Applicant's
Signature

Secretary
National Commission for Science,
Technology & Innovation

CONDITIONS

- 1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit**
- 2. Government Officers will not be interviewed without prior appointment.**
- 3. No questionnaire will be used unless it has been approved.**
- 4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.**
- 5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.**
- 6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice.**



National Commission for Science,
Technology and Innovation
RESEARCH CLEARANCE
PERMIT

Serial No. A 3288

CONDITIONS: see back page