

**ENFORCEMENT OF INTERPRETERS' LEGAL DUTY FOR EFFECTIVE REFUGEE  
STATUS DETERMINATION IN KENYA**



**UNIVERSITY OF NAIROBI - SCHOOL OF LAW**

**A THESIS SUBMITTED TO THE UNIVERSITY OF NAIROBI SCHOOL OF LAW IN  
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**BY**

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**SEPTEMBER 2021**

## DECLARATION

I, **MUSE HEDWIG**, hereby declare that this is my original work and that it has not been presented for award of a degree or any other academic credit in any other University.

**Muse Hedwig**

**G62/34726/2019**

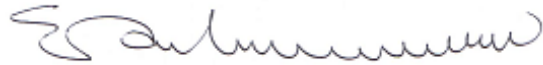
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Date.... 07.. September 2021.....

This thesis has been submitted for examination with my approval as the University of Nairobi Supervisor.

Signed



Date.... 07....September 2021....

**Prof. Edwin Abuya**

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May God bless you all.

## **DEDICATION**

To all those who support the vulnerable people, and work towards their bright future.

## **ABSTRACT**

This study seeks to find out whether adequate enforcement of interpreters' legal duty in RSD would improve the quality of interpretation in Kenya. Section 12 of the Refugee Regulations outlines the need for interpreters. Interpretation in Kenya is a constitutional right. However, previous studies show that interpreters are largely untrained. The study has four objectives: To assess the importance of interpreter's legal duty for effective refugee status determination. Evaluate the attributes of an effective interpreter. Further, to examine the various mechanisms of adequate enforcement of the law with regard to interpreters' legal duty of effective interpretation in refugee status determination. Finally, to identify the various proposals that Kenya can adopt in order to improve on the refugee status determination process.

The study aimed at linking poor performance of interpreters to inadequate enforcement of laws. The research sought to answer the questions on the importance of interpreters' legal duty, requirements for effective interpretation, the mechanisms that can be used for adequate enforcement of the law and proposals which can be adopted by Kenya in order to improve the RSD process. To respond to the questions, the study carried out both primary and secondary research. The problem the study sought to address is why there is inadequate enforcement of the law with regard to interpretation despite the statutory provision.

The findings of the study were: there are no set standards on interpretation in Kenya. The current minimum qualification for interpreters is knowledge of two languages. Interpretation directly affects the decision by the refugee determination officers. Training of interpreters would improve the standard of interpretation. However, training is just one aspect among others. The study revealed that inadequate number of trained interpreters is one of the causes of inadequate enforcement of the law. Further, Kenya and Africa at large is highly multilingual. The main recommendations were: training and certification be expected as the minimum standard for all interpreters. An official database of all trained interpreters should be maintained at the central place. In addition, a consortium of interpreters should be established at National level. Asylum seekers should be sensitized on the importance of effective interpretation. There is need for evaluation of interpreters' performance. Finally, other enforcement mechanisms should be utilized to ensure interpreters carry out their duty successfully.

## TABLE OF CONTENTS

DECLARATION .....	i
ACKNOWLEDGEMENT .....	ii
DEDICATION .....	iii
ABSTRACT.....	iv
PRELIMINARIES .....	viii
Table of Statutes .....	viii
List of International Legal Instruments.....	ix
Table of Cases.....	xi
Definition of Terms.....	xii
<b>CHAPTER ONE .....</b>	<b>1</b>
<b>INTRODUCTION: A GENERAL OVERVIEW AND OUTLINE.....</b>	<b>1</b>
1.1 Introduction to the Chapter . .....	1
1.1.1 Nature of Interpretation.....	1
1.2 Statement of the Problem.....	4
1.3 Justification of the Study .....	5
1.4 Research Objectives.....	5
1.5 Research Questions.....	5
1.5.1 General research question.....	6
1.5.2 specific research question.....	6
1.6 Literature Review.....	6
1.6.1 Introduction.....	6
1.6.2 Importance of interpreters Legal Duty for Effective RSD.....	7
1.6.3 Requirements for Effective Interpretation .....	16
1.6.4 Enforcement of Interpreters' Legal Duty.....	21
1.7 Hypotheses.....	30
1.8 Theoretical Framework.....	30
1.8.1 Introduction.....	30
1.8.2 Natural law Theory .....	31
1.8.3 Language Expectancy Theory.....	32
1.8.4 The African Theory on the Culture of Community .....	33
1.9 Research Methodology .....	35

1.10	Limitation of the Study .....	37
1.11	Chapter Breakdown .....	37
1.11.1	Chapter One - Introduction: A General Overview and Outline .....	37
1.11.2	Chapter Two Requirements for Interpreters to fulfill the Legal Duty of Effective Interpretation RSD.....	38
1.11.3	Chapter Three Mechanisms for Enforcement of Interpreters Legal Duty in Refugee Status Determination .....	38
1.11.4	Chapter Four Summary of Findings, Conclusion and Recommendations.....	38
1.11.5	Effective Communication Process.....	38
	<b>CHAPTER TWO:REQUIREMENTS FOR INTERPRETERS TO FULFIL THE LEGAL DUTY OF EFFECTIVE INTERPRETATION .....</b>	<b>39</b>
2.1	Introduction.....	39
2.2	The Duty of Interpreters in the Asylum seeking Process .....	<b>Error! Bookmark not defined.</b>
2.2.1	Ethical dilemma in interpretation.....	43
2.2.2	Qualities of an Effective Interpreter .....	50
2.2.3	Cultural Competence .....	53
2.2.4	Competent Interpreters.....	55
2.2.5	Language Fluency .....	58
2.3	Consequences of Poor Interpretation .....	60
2.3.1	Measures for Effective Interpretation .....	63
2.3.2	Setting High Standard in Interpretation .....	66
2.4	Conclusion .....	69
2.4.1	Ineffective Communication Process.....	71
	<b>CHAPTER THREE: MECHANISMS FOR ENFORCEMENT OF INTERPRETERS LEGAL DUTY IN REFUGEE STATUS DETERMINATION.....</b>	<b>72</b>
3.1	Introduction.....	72
3.2	Inadequate Enforcement of the Law .....	73
3.3	Laws on Interpretation .....	75
3.3.1	Enforcement Mechanisms.....	77
3.3.2	Standards of Practice for Interpreters .....	80
3.3.3	Asylum Seekers' Right to an Interpreter .....	84
3.4	The Role of Stakeholders in Refugee Status Determination .....	87
3.4.1	Civil Society.....	87
3.4.2	Interpreters .....	89

3.4.3 Refugee Status Determination Officials .....	89
3.4.4 Asylum seekers .....	90
3.4.5 Refugees.....	91
3.5 Availability of Interpreters.....	91
3.6 Measures for Enforcement of the Law.....	94
3.7 Conclusion .....	99
<b>CHAPTER FOUR: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS .....</b>	<b>100</b>
4.1 Introduction.....	100
4.2 Summary of the Findings on Enforcement of Interpreters’ Legal Duty in Refugee Status Determination in Kenya.....	101
4.3 Testing of the Hypotheses and Presumptions .....	108
4.4 Conclusion .....	109
4.5 Recommendations.....	110
4.5.1 Importance of Interpreters.....	111
4.5.2 Attributes of a Good Interpreter.....	111
4.5.3 Accurate Renditions.....	112
4.5.4 Measures .....	112
4.5.5 Enforcement of the Law.....	115
4.5.6 Role of stakeholders.....	117
4.5.7 Evaluation of Interpreters .....	120
4.8.5 Interpreting for persons with Disability.....	120
4.6 Closing Statement .....	121
<b>REFERENCES.....</b>	<b>121</b>
Books .....	122
Journal Articles .....	125
Theses .....	129
Working Papers.....	129
Reports .....	130
Internet Sources .....	131
APPENDIX I: WORKPLAN .....	133
APPENDIX II: RESEARCH PERMIT FROM NACOSTI.....	134
APPENDIX III: QUESTIONNAIRE .....	<b>Error! Bookmark not defined.</b>
APPENDIX IV: SCHEDULE OF INTERVIEW .....	<b>Error! Bookmark not defined.</b>



## **PRELIMINARIES**

### **Abbreviations and Acronyms**

RSD	Refugee Status Determination
UNHCR	United Nation High Commissioner for Refugees
USA	United States of America
UK	United Kingdom
NGO	Non-Governmental Organization
NACOSTI	National Commission for Science, Technology and Innovation
LEP	Limited English Proficiency
USCIS	US Citizenship and Immigration Services
ATI	Access to Information
UN	United Nations
RAS	Refugee Affairs Secretariat
UoN	University of Nairobi
DHA	Department of Home Affairs
ATI	Access to Information

### **Table of Statutes**

The Constitution of Kenya, 2010.

Refugee Act, 2006.

The Refugee (Reception, Registration and Adjudication) Regulation, 2009.

The Evidence (Out of Court Confessions) Rules, 2009.

## **List of International Legal Instruments**

The Universal Declaration of Human Rights, 1948.

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

Statute of the International Court of Justice.

The International Covenant on Civil and Political Rights, 1966.

The Charter of the United Nations, 1945.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,  
1984.

International Covenant on Economic, Social and Cultural Rights, 1966.

## Table of Cases

### Kenya

1. *Abdalla v Republic* [19891] eKLR456.
2. *Abdinor Ahmed v National Land Commission and 2 others* [2014] eKLR
3. *Beatrice Wanjiku & Another v AG & Others Nairobi HCCC. No. 190 of 2011.*
4. *David Ndungo Maina v Zippora Wambui Mathara, Kangema SRMCC No. 19B of 2010.*
5. *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa, Nairobi HCCC No. 70 of 2002.*
6. *Bernard Wachira Kamonye v Republic* [2008] eKLR 386.
7. *Livingstone John Muthuke Wanagru v Republic, [2008] eKLR.*

### United States of America

1. *Augustin v Sava* 735 F.2d 32 (2d Cir. 1984).
2. *Marincas v Lewis* 735 F.2d 32 (2d Cir. 1984).
3. *State of Ohio v Alejandro Ramirez* No. 97-L-289 3d 89; 1999.
4. *United States ex rel. Negron v State of New York* 434 F.2d 386 (1970).

### Canada

1. *Rasaratnam v Canada* [1991] 1F.C. 706, 140 N.R. 138 (F.C.A).

### UK

1. *R (on the application of Gashi) v Chief Adjudicator* [2001] All ER (D) 262.

### Italy

1. *Brozicek v Italy* [1989] ECHR 23, 10964/84.

### **Definition of Terms**

Asylum seeker	A person seeking refugee status.
Bilingual	One who expresses himself fluently in two languages.
Fair Trial	Court process that is unbiased.
Legalese	Specialized legal language or legal jargon.
Monolingual	One who expresses himself fluently in one language only.
Working language	The language that one uses actively and is often used in the line of work.

‘Injustice anywhere is a threat to justice everywhere.’<sup>1</sup>

## CHAPTER ONE

### INTRODUCTION: A GENERAL OVERVIEW AND OUTLINE

#### 1.1 Introduction

This chapter introduces the research paper by giving a brief background on the nature of interpretation in refugee determination process. This is followed by a statement of the problem, justification, objectives of the study, and the existing literature upon which this study was built. The chapter proceeds to discuss the theoretical framework and the methodological approach applied to collect and analyze data. This chapter gives the research questions, hypotheses as well as the limitation to the study. Finally, the chapter provides a breakdown of chapters for the study.

#### 1.1.1 The Nature of Interpretation in Refugee Status Determination

In the recent years, migration has escalated to the extent where a significant number of displaced people and asylum seekers have migrated to several countries.<sup>2</sup> They move to countries where languages, other than their home languages are spoken.<sup>3</sup> Kenya is not the least among the countries that have received a big number of migrants coming to seek asylum.<sup>4</sup> Such asylum seekers face a number of challenges, including communication problems.<sup>5</sup> Many asylum seekers rely on interpretation services, which are often lacking in certain aspects.<sup>6</sup> Despite a contentious debate on the meaning and essence of the duty of interpreters in judicial forums, scholars have agreed on the important role of interpreters in legal settings.<sup>7</sup> Interaction in churches, prisons, hospital, weddings, funerals, in refugee status determination and courtrooms where there is a language barrier depends on interpreters.<sup>8</sup> For example, research in church interpreting is on the

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<sup>1</sup> Interview with Kim, Nairobi, Kenya, 7 January 2021.

<sup>2</sup> The World Migration Report, International Organization for Migration (17 route des Morillon 2020).

<sup>3</sup> Lee J, ‘A Pressing Need for the Reforms of Interpreting Service in Asylum Settings,’ A Case Study of Asylum Appeal Hearings in South Korea,’ (2013) (1) 27 Journal of Refugee Studies Published by Oxford University Press, 4-6.

<sup>4</sup> Abuya, ‘Refugees and their Interpreters: Lessons from the Kenyan Experience,’ [2004] 25 (1) The African Australasian Review of African Studies 66.

<sup>5</sup> Kakuma Operation RSD Backlog Report as of 18 August 2017.

<sup>6</sup> Kiguru, ‘At the Mercy of others’ Voices: An Illustration of Frequent Interpreter Language Errors in Kenyan Courtrooms,’ (2010) 1 The University of Nairobi Journal of Language and Linguistics, 1-18.

<sup>7</sup> Hale S et al, ‘Controversies over the Role of Court Interpreters, in *Crossing Borders in Community Interpreting Definitions and Dilemmas*, (76 Benjamins Translation Library, 2008) 99–122.

<sup>8</sup> See Livingstone John Muthuke Wanagru vs Republic, [2008] eKLR, the High court sitting at Nyeri it was clearly stated that the requirement of the provision of an interpreter during criminal trials in a language in which the accused

increase globally.<sup>9</sup> Failure to cautiously interpret effectively has resulted in misunderstanding of the Bible. For instance, a number of people have believed that Adam and Eve used to spend time with God during the day.<sup>10</sup> Although it may be feasible that they spent some time with God, the Holy Book does not affirm this. Instead, the bible discloses that after the two had sinned, they “heard the sound of God walking in the garden in the cool of the day,” and they hid away from Him.<sup>11</sup>

Inadequate interpretation service for asylum seekers has been disapproved by lawyers<sup>12</sup> and Civil Society organizations. However, these concerns have not yet been thoroughly studied by scholars.<sup>13</sup> This research aims to investigate the standard of interpretation during Refugee Status Determination in Kenya. In the absence of adequate enforcement of legislation, experience, training and accreditation system, as this study indicates, interpreters frequently deviate from the norms of interpretation.<sup>14</sup> Inadequate interpretation expertise makes interpreters to struggle in order to provide correct message of the original statements.<sup>15</sup> My experience of interpretation in RSD contributes to the emphasis that interpreters have to meet some qualities. Further, they need to be guided by some regulations. Untrained interpreters have been able to do some work.<sup>16</sup> However, knowledge of two languages is inadequate for proper interpretation. Therefore, like any other career, minimum professional requirements must be defined for interpretation. In addition, the need for specialized training and qualities of interpretation must be emphasized.<sup>17</sup>

This study argues for better quality of interpretation through interpreter training, workshops, internship, apprenticeship, mentorship, and enforcement of laws. The study focuses on the RSD

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understands is a mandatory requirement hence its compliance ought to be reflected in the record of court proceedings.

<sup>9</sup> James, ‘Me, a Religious Interpreter? No Way! A Monthly Publication of the Registry on Interpreters for the Deaf,’ (1998) 15(3), 16-17.

<sup>10</sup> Rhodes R, ‘Rightly Interpreting the Bible,’ <<http://home.earthlink.net/~ronrhodes/Interpretation.html>.> Accessed 23/6/2020

<sup>11</sup> *The New Jerusalem Bible: reader's edition* (18th ed New York: Doubleday Harvard 1990) Genesis, 3:8.

<sup>12</sup> See Abdalla vs. Republic [1989] KLR, where the Court held that the right to an interpreter is fundamental.

<sup>13</sup> Lee (n3), 5.

<sup>14</sup> Ibid.

<sup>15</sup> Hale, *Discourses of Court Interpreting: Discourses Practice of the Law, the Witness and the Interpreter*, (Amsterdam Philadelphia John Benjamins Publishing Company, 2004) 86-99.

<sup>16</sup> Gile D, *Basic Concepts and Models of Interpreter and Translators Trainings*, Revised Edition, (Amsterdam Philadelphia, John Benjamins Publishing Company, 2009) 278.

<sup>17</sup> González R et al, ‘*Fundamentals of Court Interpretation: Theories, Policy and Practice*,’ (Durham North Carolina, Carolina Academic Press, 2012) 49.

process, which is a crucial means by which an asylum seeker is given refugee status. Refugees have a number of rights they enjoy.<sup>18</sup> These include employment, access to justice, security, health and education.<sup>19</sup> Employed refugees pay tax to the host country and they are able to provide for their own basic needs.<sup>20</sup>

As provided in the law, interpreters have a duty to be impartial.<sup>21</sup> They are supposed to carry out a neutral role of interpretation throughout the RSD process. They also have a duty of confidentiality during RSD.<sup>22</sup> Further, they need to keep secrecy with regard to the information they get during their work.<sup>23</sup> However, most interpreters in Kenya are not qualified for the job. Further, the law in relation to interpretation as a profession is not adequately enforced.<sup>24</sup> Although the Refugee Act provides for the need for interpretation in asylum interview, more mechanisms need to be put in place for its adequate implementation.<sup>25</sup> In enforcing the duties of interpreters, there is need to ensure that interpreters who breach their duties are punished by law enforcement authorities, if found guilty. However, interpreters should also be guided by a code of conduct and moral standards.

Three theories will advance this study. First, is the Natural law theory which emphasizes the importance of human rights. Second, is the African theory on the Culture of Community with focus on the leniency and fairness in the African justice system. Finally, the Language Expectancy theory, which explains language rules used in interpretation.<sup>26</sup> The study will look into possible measures, requirements and standards to be adopted by interpreters. These standards, measures and requirements will, if adhered to, ensure that every asylum seeker gets a

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<sup>18</sup> Rosa, 'Rights of Refugees in the Contexts of Integration: Legal Standards and Recommendations,' (2006) Legal and Protection Policies Research Series UNHCR 48-78.

<sup>19</sup> Sara et al, 'Hidden and Exposed: Urban refugees in Nairobi Kenya,' (2010) HPG Working Paper March, 20-25.

<sup>20</sup> Ibid.

<sup>21</sup> Section 12 of the Refugee (Reception, Registration and Adjudication) Regulations, 2009.

<sup>22</sup> Ibid.

<sup>23</sup> Procedural Standards for Refugees Status Determination under UNHCR's Mandate, (2003 RSD Procedural Standards) UNHCR RSD, 21-28.

<sup>24</sup> Onsongo, 'Effectiveness of Language Interpretations in Case Management at the Chief Magistrates Court at Kisumu,' Retrieved from University of Nairobi Digital Repository: (2010) <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/5919/Onsongo\\_Effectiveness%20of%20language%20interpretation.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/5919/Onsongo_Effectiveness%20of%20language%20interpretation.pdf?sequence=1)> accessed on 16 May 2020.

<sup>25</sup> Section 12 (n21).

<sup>26</sup> See discussions on Theoretical Framework Section 1.8, 28-32.



fair hearing.<sup>27</sup> Additionally, interpreters' duties, as stipulated under the Refugee Act and UNHCR guidelines, form the core of this research.

## 1.2 Statement of the Problem

For communication to take place in any sphere of life, the message is encoded by the sender, transmitted through a channel, decoded by the receiver who will then give feedback.<sup>28</sup> When the message is encoded in a language that a receiver cannot understand, an interpreter bridges the gap.<sup>29</sup> The aim of interpretation is to help the intended receiver to understand the message. Interpretation services are necessary if asylum seekers are unable to communicate with asylum officers.<sup>30</sup> The fate of the applicants in terms of granting refugee status depends on the way information is conveyed by the interpreter.<sup>31</sup> According to Refugee Regulations,<sup>32</sup> interpreters are supposed to be competent. They are supposed to abide with the law on confidentiality and impartiality.<sup>33</sup> However, in most cases untrained interpreters are utilized. As a result, misinterpretation has been noted in RSD.<sup>34</sup> Further, elements of ethics in interpretation always bring dissatisfaction to asylum seekers. Therefore, the problem seems to persist.

Despite the fact that there are laws with regard to interpretation in Kenya, nevertheless there has been inadequate enforcement of those laws by enforcement institutions with regard to the duty of interpreters and their qualification. The law provides for the right of asylum seekers to a knowledgeable interpreter. However, the practice on ground is that persons are picked upon to interpret as long as they can speak two or more languages. The problem that this study seeks to tackle is why there is inadequate enforcement of the law on interpreters' legal duties in RSD, in spite of the statutory requirements.

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<sup>27</sup> Interpreting in Refugee Context: Interpreting in a Refugee Context UNHCR, Training Module (Rld 3 June 1993).

<sup>28</sup> Wenbin N, *The Advantages and Disadvantages of Written and Spoken Communication*, (New York, The McGraw-Hill 2008) 3-4.

<sup>29</sup> Ibid.

<sup>30</sup> Forced Migrations Study Programme, *National Survey of the Refugee Reception and Status Determination Systems in South Africa*, Research Report February, (MRMP Johannesburg: Wits University, 2009) 37.

<sup>31</sup> Ibid.

<sup>32</sup> Section 12 (n21).

<sup>33</sup> Ibid.

<sup>34</sup> Abuya (n4), 66-67.

### **1.3 Justification of the Study**

Effective interpretation is significant in the acquisition of refugee rights. The future of asylum seekers is determined by the quality of the communication during interviews. This study will explore whether inadequate interpreting services are among the reasons why some peoples' asylum applications in Kenya are turned down. Refugees are important to a country's economy, by their economic contribution in terms of expertise, tax and revenues to their host countries.

In a country that has many languages like Kenya, the question of what an interpreter's duty is, and what the minimum qualifications should be, cannot continue to be vague. Guided by the fundamental right of fair hearing,<sup>35</sup> the study will explore how the process of RSD is affected by inadequate enforcement of law. The findings of this research will provide mechanisms for adequate enforcement of the law. The mechanisms will be useful for RSD process, asylum seekers, interpreters and other stakeholders. The findings of this study will also provide recommendation to be incorporated in the national legal and institutional framework that will guide interpretation in RSD. Further, this study will enrich scholarly work as it will create awareness on the need to enforce the laws with regard to the legal duties of interpreters.

### **1.4 Research Objectives**

This study will:

1. Assess the importance of interpreter's legal duty for effective refugee status determination.
2. Evaluate the attributes of an effective interpreter.
3. Examine the various mechanisms for adequate enforcement of the law with regard to interpreter' legal duty for effective interpretation in refugee status determination.
4. Identify the various proposals that Kenya can adopt in order to improve on the refugee status determination process.

### **1.5 Research Questions**

To achieve its objectives, the study will respond to the following questions:

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<sup>35</sup> The Constitution of Kenya, 2010.

### **1.5.1 General Research Question**

The overall research question is; how is the process of refugee status determination affected by inadequate enforcement of the laws with regard to interpreters?

### **1.5.2 The Specific Research Questions**

1. Why is the interpreter's legal duty important for an effective refugee status determination process?
2. What are the necessary attributes for effective interpretation?
3. What are the mechanisms of adequate enforcement of laws with regard to interpreters' legal duty?
4. Which proposals can Kenya adopt to attain effective interpretation in refugee status determination?

## **1.6 Literature Review**

This part of the study aims at presenting the related literature to the study as presented by different scholars. A number of scholars have written on the duty of interpreters. They have forwarded their views on the topic in question. This section will therefore focus on the review of related studies conducted by these scholars. The study will then identify the gaps in their works upon which this research seeks to address.

### **1.6.1 Introduction**

An efficient interpreter is one who is capable of translating in simple words, without missing the meaning, of the applicant's original intention.<sup>36</sup> They should be well informed about their legal duty.<sup>37</sup> Interpreters should be aware of the historical and current events of the applicant's home country and be fluent in the language of the applicant.<sup>38</sup> They are expected to maintain

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<sup>36</sup> Abuya (n4), 67.

<sup>37</sup> Refugees Review Tribunal, Interpreters Handbook, (Canberra RRT, 1996) 4-7.

<sup>38</sup> Ibid.

confidentiality in relation to all information shared by a claimant.<sup>39</sup> Finally, an interpreter should maintain the impartial role throughout the RSD process.<sup>40</sup>

To achieve its aim, this section is subdivided into subsections. The first part deals with interpreters' legal duty for Effective RSD. The second subsection evaluates the Requirements for effective interpretation. The last examines the need for other mechanisms for enforcement of the law with regard to interpreter's duty. The discussion in subsection one, seeks to analyze the importance of the duty of interpreters and their influence on the RSD decision. Subsection two aims at weighing the various attributes an interpreter needs to have. Finally, the last subsection will seek to find out ways through which interpreters can comply with their obligations.

### **1.6.2 Importance of Interpreters Legal Duty for Effective RSD**

A research conducted by Abuya reveals that those seeking asylum in Kenya are basically from Somalia, Sudan, Rwanda, Burundi, Congo and Uganda and speak different languages.<sup>41</sup> The languages that mostly require interpretation include: French, Kinyarwanda, Arabic, Lingala, Somali, Amharic, and Tigrinya.<sup>42</sup> He further states that, the RSD assessment process is limited in terms of fairness, effectiveness and precision.<sup>43</sup> Asylum seekers face a complex process coupled with delays, insufficient number of determination officers and challenges with interpretation.<sup>44</sup> This study seeks to investigate interpretation challenges experienced by asylum seekers.

According to Abuya, in most cases refugee status determination officers do not speak many languages,<sup>45</sup> hence the need for interpreters. While their responsibility is important in promoting communication between refugee status determinations officers and asylum seekers, sometimes interpreters are obstacles to good communication.<sup>46</sup> This affects both the cases of individual asylum seekers and the whole RSD process. This study is keen on examining interpreters' obligations in RSD.

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<sup>39</sup> Ibid, 8.

<sup>40</sup> UN High Commissioner for Refugees, 'Interpreting in a Refugees Context,' 1 January (2009) Self-Study Module 3 <<http://www.refworld.org/docid/49b6314d2.html>> accessed 28 April 2020, 22.

<sup>41</sup> Abuya (n4), 66-68.

<sup>42</sup> Ibid, 67.

<sup>43</sup> Ibid, 67-67.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

In the UNHCR paradigm, interpreters facilitate various tasks like enrollment, admission, status determination and counseling of asylum seekers.<sup>47</sup> Effective communication between interpreters and the status determination officers is imperative. An interpreter therefore plays the role of a communication facilitator. Further, an interpreter acts as a bridge between the determination officer and the person applying for asylum.<sup>48</sup> UNHCR is concerned with interpreters generally at international level. This study seeks to find out the reasons why interpreters deserve more scrutiny and why effective interpretation is important in RSD.

In his study, Gile states that interpreters need an accurate interpretation of asylum seekers' statements.<sup>49</sup> This is to enable the determination officers understand their concerns and make appropriate decisions.<sup>50</sup> He adds that interpreters work is carried out effectively, if they provide a satisfactory communication service according to the requirements of the sender or the recipient. Whereas Gile emphasizes accurate interpretation, this study will go further to develop measures for accurate interpretation.

The study by UNHCR shows that the role of an interpreter can be very contentious.<sup>51</sup> It is sometimes difficult for female asylum seekers to communicate through a male interpreter or a male officer. This is especially cases involving sexual abuse.<sup>52</sup> These assertions are echoed by Amit, who posits that females who have been raped are ashamed to disclose to male interpreters about their ordeal.<sup>53</sup> The reason is this issue is still a taboo in many societies.<sup>54</sup> She supports the notion that such female asylum seekers are at times compelled to rely on interpreters whom they are uncomfortable with. This puts them in a position to have the abuse revealed to unfamiliar persons. Whereas UNHCR and Amit recommend the use of female interpreter for female asylum seekers whose claims involve sexual violence, they do not give the qualities of such interpreters. This study argues that interpreter of such victims should use appropriate method to get

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<sup>47</sup> UNHCR (n40), 32-36.

<sup>48</sup> Ibid.

<sup>49</sup> Gile (n16), 44.

<sup>50</sup> Ibid.

<sup>51</sup> UNHCR (n40).

<sup>52</sup> Ibid.

<sup>53</sup> Amit, All Roads Lead to Rejection: Persistent, Bias and Incapacity in South African Refugees Status Determination Process, Research report ACMS, (Wits Johannesburg June, 2012) 38-41.

<sup>54</sup> Ibid.

information from females during the asylum hearing. In addition, this study will assess the importance of cultural competence as a vital quality for interpreters.

In the Self-Study Module, UNHCR argues that community interpreters have to be culturally focused.<sup>55</sup> Interpreters have the task to help people from different cultural background understand each other.<sup>56</sup> While contributing to the discussion, Lee and Buzo confirms that community interpreting differs from conference interpreting.<sup>57</sup> Community interpreters facilitate communication between people from various backgrounds.<sup>58</sup> Whereas UNHCR and Lee and Buzo emphasize on the aspect of community interpreting as being helpful in bridging the cultural gap, this study will investigate whether interpreters are aware of their boundaries in the course of their work. This study opines that interpreters need to be skilled and competent.

While contributing to the debate, Pöllabauer argues that many times interpreters intervene openly, paraphrase and filter the statements of the claimant.<sup>59</sup> Besides, sometimes they attempt to weigh the validity of their communication.<sup>60</sup> By so doing, the interpreter tends to bias the applicant's claim. Whereas Pöllabauer conducted his study in Netherlands and came up with recommendation for professional behavior of interpreters, such study has not been conducted in RSD. This is one of the gaps which this study seeks to fill.

According to Gonzalez et al, interpreters must always foster communication otherwise the course of justice will be diverted.<sup>61</sup> He narrates a case of Joshua, a Fisherman who grew up in the neighborhood full of immigrants who could not speak English.<sup>62</sup> He noted that when he interpreted, he could influence the outcome of the communication process. This was because he emphasized words that he himself introduced into the flow of communication.<sup>63</sup> This is true of some interpreters. However, the author does not show how the duty of an interpreter should be

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<sup>55</sup> UNHCR (n40), 27.

<sup>56</sup> Ibid.

<sup>57</sup> Lee J, *Community Language Interpretation: A Workbook* (The Federation Press: Sydney, 2009) 3-4.

<sup>58</sup> Ibid.

<sup>59</sup> Pöllabauer, *Interpreting in Asylum Hearing, Issues of saving faces*, (The Netherlands: Library of Congress 2007) 39.

<sup>60</sup> Ibid.

<sup>61</sup> González (n17), 53.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

streamlined. It is for this reason that the legal duty of an interpreter ought to be defined and controlled.

Another scholar, Kiguru, is aware of mistakes made by interpreters in court. He discusses major errors and their impact on the court's understanding of the message. He explains grammatical errors, distortions and omissions.<sup>64</sup> However, Kiguru's discussions specifically targets courtroom interpretation. This study will examine errors interpreters make during RSD process.

Penman's research demonstrates that the characteristics of courtroom debate have an impact on interpretation. Court officers like judges, magistrates and advocates are usually addressed in unique ways.<sup>65</sup> Such a debate makes it difficult to attain successful interpretation. This is because some words or titles have no equivalent meaning on interpretation. In this regard, this literature review seeks to analyze how the ordinary language is influenced by formalism.

Scholars like Lee argue that an interpreter should be conscious of cultural differences and should be sensitive to culture.<sup>66</sup> The author further claims that an interpreter also has a role to play as a language expert for effective communication.<sup>67</sup> An interpreter is often used as a bridge. Therefore, interpreters need to assert this position accurately, without any personal bias.<sup>68</sup> Nevertheless, Lee does not demonstrate how these specifications are to be fulfilled by interpreters. This study will look into the consequences of misinterpretation. This research will further suggest measures for effective interpretation.

Several scholars have proposed that interpreters are often invisible. Angelelli disagrees with the idea.<sup>69</sup> She argues that interpreters are always visible with all their characteristics. Further, she argues that interpreters together with other participants reconstruct the meaning of words.<sup>70</sup>

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<sup>64</sup> Kiguru (n6).

<sup>65</sup> Penman, 'Discourses in Courts: Cooperation, Coercion and Coherence,' (1978) 10 *Discourse Processes* 201-218.

<sup>66</sup> Lee J, '*Interpreting in Explicit Languages During Courtroom Examinations*,' *Applied Linguistics* 30/1:93-114 (Oxford, Oxford University Press, 2009) 35-56.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Angelelli, *Deconstructing the Invisible Interpreter: A Critical Study of the Interpersonal Roles of Interpreters Cross-Cultural, Linguistic Communication Event* (Doctoral Dissertation Stanford: Stanford University Press: UMI 2001) 141-162.

<sup>70</sup> Ibid.

Angermeyer supports her assertion by maintaining that interpreters usually act as mediators.<sup>71</sup> Angelelli and Angermeyer illustrate clearly interpreters' visibility in the debate. However, they fail to show measures to be put in place to promote accuracy in interpretation. More especially, when interpreting for the deaf since there is an important distinction between sign and verbal speech. This is another gap the study will fill.

In his research, Hsieh argues that, when interpreting, the interpreter has to remain neutral.<sup>72</sup> An interpreter facilitates communication between a physician and a patient for instance, to help them understand each other.<sup>73</sup> The interpreter helps them to overcome their differences to achieve a common goal. Hsieh's clarification is intended for interpreters in a medical context. Interpreters are important to all facets of life. This study acknowledges the crucial role played by an interpreter during the RSD process. It will, therefore, investigate and outline the specific aspects that constitute interpreter's legal duty to ensure that the RSD process is effective.

In addition, Greenhaig believes that an interpreter should serve as a counselor and supporter of the patient's wellbeing.<sup>74</sup> This neutrality is also reflected in the courtroom setting.<sup>75</sup> As in the hospital, the court interpreter should avoid interfering with the roles of other participants. Misinterpretation in the hospital context can lead to serious consequences like loss of lives.<sup>76</sup> Misinterpretation in RSD can lead to injustice.<sup>77</sup> Greenhaig just looks at the neutrality aspect of interpretation. She contends that interpreters have certain standards that they need to comply with in their work. This study will examine these standards in detail. It will also propose a framework for effective interpretation.

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<sup>71</sup> Angermeyer P, 'Translation Styles and Participant roles in Court Interpretation,' (2009) 13 (1) *Journal of Sociolinguistics* 3-28.

<sup>72</sup> Hsieh E, 'Understanding Medical Interpreters: Reconceptualizing Bilingual Health Communication,' *Health Commun* (2006) 20 (2) 177-186.

<sup>73</sup> *Ibid*, 182.

<sup>74</sup> Greenhaig T et al, 'Communicative and Strategic Actions in Interpreted Consultations in Primary Health Care: A Habermasian Perspective,' (2006) 63 *Social Science and Medicine* 1170-1187.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*.

<sup>77</sup> Benton G, 'Speak English: Language Access and Due Process in Asylum Proceedings' (2020) Vol. 34:453 *Georgetown Immigration Law Journal* 456-457.



According to Lipkin's research, courtroom interpreters in Yehuda perform many tasks like, those in Kenya.<sup>78</sup> They maintain order, and other administrative duties.<sup>79</sup> In her observations, interpreters prefer other roles to interpretation. While reviewing courts in Venezuela, Vilela states that there are no training programs and regulatory structures in that country. Vilela agrees with Lipkin that interpreters have the dual function of court interpretation and administration tasks.<sup>80</sup> Kenya, like Venezuela and Yehuda, Court interpreters carry out other duties. The authors show how interpreters perform many tasks in the courtroom.<sup>81</sup> However, they do not provide any strategy on how the performance of an interpreter can be reviewed and improved upon. This study will explore and recommend ways in which the performance of interpreters can be evaluated. Further, this study argues that the code of conduct, good practice and mentorship of interpreters is vital.

After reading the Sabbath School Lesson on interpretation of scripture, I noted the crucial aspects in relation to interpretation of the Bible.<sup>82</sup> The Bible talks about redemption. To acknowledge our redemption as Christians, the understanding of the Bible is vital. If the Bible is wrongly interpreted, false conclusions are made without understanding the truth.<sup>83</sup> In the same way, wrong interpretation during the RSD process will certainly lead to wrong decisions. This research will find out consequences of such misinterpretation.

In her research, White points out that preconceived ideas distorts the understanding of a message.<sup>84</sup> She argues that interpreters should avoid preconceived views and ideas. She further says it is a struggle to find the truth as people read the Bible to affirm their own views.<sup>85</sup> The word in the Holy Book is to be read with a mind free from bias. White points out that if personal

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<sup>78</sup> Lipkin S, *Norms, Ethics and Roles among the Military Court Interpreters: The Unique Cases of Yehuda Military Court*, (John Benjamins Publishing Company, 2010) 59.

<sup>79</sup> Ibid.

<sup>80</sup> Vilela-Biasi E, 'Court Interpreters as Social Actors in Venezuela: A Case Study,' in Brunette et al, the *Critical Link 3, Interpreters in the Community*, (Amsterdam/Philadelphia2003) 239-245.

<sup>81</sup> Ibid.

<sup>82</sup> Ssnet.org/lessons/20b/less06.html, accessed on 09 May, 2020.

<sup>83</sup> Ibid.

<sup>84</sup> See Ellen White, 'What to Do With Doubt',105-113, in Steps to Christ' at <[www.adventistbiblicalresearch.org/materials/bible-interpretation-hermeneutics/methods-bible-study](http://www.adventistbiblicalresearch.org/materials/bible-interpretation-hermeneutics/methods-bible-study)> accessed May 2020.

<sup>85</sup> Ibid.

views do not align with the word of God, the reader should not make the word suit those views.<sup>86</sup> This study will therefore build on the discussions made by the author to establish the impact of misinterpretation on the administration of justice.

The UNHCR Handbook also acknowledges that occasionally, asylum-seekers falter, fail to express themselves clearly, or offer testimonies which are inconsistent.<sup>87</sup> Asylum officers have the duty to find out those who create their stories or who withhold information on instruction by friends or family.<sup>88</sup> RSD officers have a complex duty to differentiate true stories from fabricated ones. On the other hand, Anker contends that more focus should be on the vulnerable position in which most asylum applicants find themselves when being interviewed by asylum officers.<sup>89</sup> However, neither UNHCR nor Anker gives a way forward on how asylum interviews can be conducted in a profound and objective manner. This study will explore various mechanisms with the aim of helping interpreters carry out their duties effectively.

Venuti suggests that the more the interference of the communication goes unnoticed by the user, the more the interpreter is invisible.<sup>90</sup> As suggested by Valero and Gauthier, the authors agree that interpreters' presence should be invisible in the communication process.<sup>91</sup> If possible, the communicative event should unfold as though it were a non-mediated communication. They affirm that, interpreters should modify the meaning of words without other participants realizing it.<sup>92</sup> The authors do not explain further how such modifications can be done without biasing the process. This study will discuss ways through which an interpreter can remain impartial and accurate in RSD.

A number of scholars claim that that the presence of interpreters should be visible. According to Lang, the official role of interpreters was that of a neutral conduit.<sup>93</sup> Community interpreters

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<sup>86</sup> Ibid.

<sup>87</sup> 'The Handbook on Procedures and Criteria for Determining Refugee Status,' (UNHCR Handbook, 1992) para 198.

<sup>88</sup> Ibid, paragraph 198 and 199.

<sup>89</sup> Anker D, 'Determining Asylum Claims Process in the United States' (1992) XIX Review of Law and Social Change 433–528.

<sup>90</sup> Venuti L, *Translators Invisibility: A History of Translations* (London, Newyork, 1995) 102.

<sup>91</sup> Valero Garcés et al, 'Public Service Interpreting and Translation: Towards a Social Theory in PSIT,' (2010) 2 5-9.

<sup>92</sup> Ibid.

<sup>93</sup> Lang R, 'Behavioral Aspects and Liaison Interpreters in Papua New Guinea: Some Preliminary Observations,' in David and Wallace, *Languages, Interaction and Communication* (New York/London, Plenum, 1978) 241.

usually play an active role.<sup>94</sup> As a result, they do not conceal their effect on the communication. Instead, they ensure that the parties recognize that interpreting means a certain reformulation of the message. Therefore, a mediated message will never be the same as a non-mediated one. Martin and Phelan claim that active role enhances the position of the interpreter as a cultural mediator.<sup>95</sup> The interpreter is able to detect cultural barriers and provide the necessary interpretation to reinforce understanding of the message among participants.<sup>96</sup> Obviously, when the interpreter gets more involved in the process, he or she takes on other roles in the course of giving clarification. However, the authors do not suggest ways on how to strike a balance in such a situation. The dilemma lies in having interpreters acting as mediators as well conduits while retaining their neutral position. To fill the gap, this study argues that there is need to adopt formal guidelines to guide interpretation process.

While analyzing categories of interpreters, Abuya came up with three groups.<sup>97</sup> He calls the first category 'Omniscient' interpreters. These are interpreters who greatly filter what the claimants say. He argues that determination officers admitted that, at times, interpreters use many words in transmitting the words of the asylum seeker.<sup>98</sup> This is contrary to the fundamental idea that interpreters must be neutral. This research will examine how this type of interpreters can be replaced and what particular situations need to be addressed. The study will also seek to find ways through which the duty of interpreters can be modified to suit the Kenyan circumstances and identify key suitable measures for the RSD process.

The author refers to the second category as the 'distortional' interpreters. He states that, this category of interpreters misinterpret the statements made by the applicants.<sup>99</sup> UNHCR, Eligibility Interview Form allows the determination officer to ask the applicant about the language they prefer for interview.<sup>100</sup> Further, the asylum officers need to find out whether there

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<sup>94</sup> Ibid.

<sup>95</sup> Martín et al, 'Interpreters and Cultural Mediators: Different but Complementary Role,' (2010) *Translocations* 6 (1) <<http://www.translocations.ie/docs/v06i01/Martin%20and%20Phelan.pdf>> accessed 7 April, 2021.

<sup>96</sup> Ibid.

<sup>97</sup> Abuya (n4), 70-72.

<sup>98</sup> Ibid.

<sup>99</sup> Abuya (n4), 71.

<sup>100</sup> See UNHCR, Eligibility Interview Form, Checklist.

is need for an interpreter.<sup>101</sup> In addition, the interpreter should be competent in the language of the applicant.<sup>102</sup> This study will discuss the qualities of an interpreter in detail.

The last group refers to a situation where interpreters are unable to execute their duties. Abuya refers to this category as the ‘nought’ interpreters.<sup>103</sup> He points out that there are times when interpreters have been brought in only to find that they are not in a position to speak the same language with the applicant. Worse still, they may be unable to understand each other with the applicant.<sup>104</sup> He goes on to share his experience with one of the respondent in an interview. He narrates Mekele’s experience. The interpreter in that case was unable to express the views of the asylum seeker. Abuya concludes that in such cases, interpreters should admit that they are unable to interpret a given language.<sup>105</sup> This study argues that, prior to the hearing, the determination officer is to avail a competent interpreter and ensure that the applicant is confident that the interpreter will understand him or her well.

A vital characteristic of an interpreter is the ability to exhibit highly ethical behavior. Interpreters are put in various positions in which they are told confidential information regarding a client. They not only have to keep this information confidential but they have to remain unbiased and impartial. More so, they are to refrain from inserting even a fraction of their personal opinions on matters being discussed.<sup>106</sup> This study opines that adequate enforcement of the law will promote adherence to the duties of interpreters. The study will further discuss ways through which interpretation process can be improved upon for an effective asylum determination process. More details and clarity on the importance, responsibility and requirements for effective interpretation will be discussed in Chapter two of this research.

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<sup>101</sup> Ibid.

<sup>102</sup> UNHCR (n40), 14.

<sup>103</sup> Abuya (n4), 72.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Elamin Saadia, ‘Reflections on the Teaching of Interpreting: Languages and Translation,’ (2003) Journal of King Saud University 9-12.

### 1.6.3 Requirements for Effective Interpretation

With regard to interpretation in the asylum process, Stanners confirms that it has been noted internationally that there are many concerns about interpretation.<sup>107</sup> He argues that the absence of education plan for interpreters could lead to their incompetence and possible irregularities.<sup>108</sup> Sometimes interpreters use their role to influence both the claimant and the determination officers.<sup>109</sup> However, Stanners does not explain the rationale of such education plans. This study will particularly seek to find out reasons why interpreters should have excellent knowledge on matters related to the field of interpretation in Kenya.

In his research Ndongo-Keller posits that United Nations International Criminal Tribunal for Rwanda usually identifies potential interpreters.<sup>110</sup> Later, they are recruited and trained in translation and interpreting skills.<sup>111</sup> These include visual translation, successive interpretation and simultaneous interpretation.<sup>112</sup> After which they are tested. Those who pass the interpretation test undergo further training, which then enables them to work as court interpreters.<sup>113</sup> The gap identified by this study is that, whereas the Tribunal recruited and trained interpreters, such interpreters were meant for courtroom interpretation and not RSD. This is a gap that this study seeks to fill.

Martin and Valero-Garcés claim that, it is difficult to interpret details that you are not technically familiar with.<sup>114</sup> In response, Gile comments that interpreters and translators must have sufficient knowledge on the language or speeches they deal with.<sup>115</sup> The authors specifically accept that migration problems require relevant knowledge, including cultural values. An interpreter should be familiar with the relevant skills in order to interpret faithfully. Whereas Martin, Valero-

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<sup>107</sup> Stanners P, 'Poor Interpretation put asylum-seeker at a Risk, *The Copenhagen Post*,' (2012) September 11, <<http://cphpost.dk/news/national/poor-interpreters-put-asylum-seekers-risk-70>> accessed on 15, May 2020.

<sup>108</sup> Ibid.

<sup>109</sup> UNHCR (n40), 17.

<sup>110</sup> Ndongo-Keller, 'Vicarious Trauma and Stress Managements,' (2015) in *The Routledge Handbook of Interpreting*, edited by Holly M, and Renée (London, UK, Routledge, 2015) 337-351.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Martin A, Valero Garcés in Benjamins J, *Cross Borders in Community Interpretation: Definitions and Dilemmas* (Library of Congress, Netherlands, 2009) 2-3.

<sup>115</sup> Gile D, *The Empirical Research into the Roles of Knowledge in Interpreting: Methodological Aspects, Knowledge Systems and Translation* (Berlin, Mouton De Gruyter, 2005) 149-171.

Garcés and Gile agree that interpreters should have general information about the applicant's background, this study argues further that training such interpreters is important. The study will further look into the possibility of having relevant training institutions in place. This will promote effective communication.

Throughout their study Matu, Odhiambo, Adams and Ongarora concluded that interpreters are careful. Further, they pay attention on how applicants view their role in terms of precision, omission and impartiality. Their study focused on Dholuo-English court interpreters in Nyanza.<sup>116</sup> They concluded that the interpreters they interviewed understood their position as knowledge sources. Therefore, they were careful to avoid any inaccuracies, omissions and prejudice when interpreting.<sup>117</sup> The research which was carried out in Nyanza provides useful insight and platform for studying interpretation in RSD context. However, the author's approach is narrowed to the role of interpreters in court interpretation. This creates a gap in terms of interpretation in RSD. Further, it results into an imbalance between safeguarding the rights of accused people in court and the need to protect asylum seeker in RSD. Therefore, there is need to conduct a study on how interpreters can carry out their duties effectively in RSD.

Court interpreters in Kenya are often untrained court clerks. Matu et al contends that interpreters are critical in ensuring clear communication.<sup>118</sup> However, they can easily jeopardize the delivery of justice due to the errors they make.<sup>119</sup> This is because they are the ones who understand the language of the claimant. Interpreters may be aware of what is required of them, but in the absence of training, their interpretation adversely affects the judgment of the court.<sup>120</sup> While Matu's work focuses on court interpreters, the goal of this research is to find out whether mentorship, internships, experience or training would eliminate unprofessional and inaccurate interpretation.

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<sup>116</sup> Matu P, Odhiambo et al, 'Court Interpreters Roles Perceptions: The case of English-Dholuo Interpreters in Subordinate Courts in Nyanza Province of Kenya,' [2012] 2 (4) Greener Journal of Social Sciences 121-126.

<sup>117</sup> Ibid, 124.

<sup>118</sup> Ibid, 125.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

In his research Tennent asserts that training of interpreters and translators is useful.<sup>121</sup> Skills acquired help anyone who wishes to be a professional interpreter. Such skills advance their ability to reach their full potential.<sup>122</sup> He believes that preparation helps interpreters improve their abilities more quickly than by field experience and self-instruction, which requires a lot of trial-and-error.<sup>123</sup> This study agrees with the author that acquired skills improve interpretation. In addition, this study argues that frequent practice of interpreting leads to acquisition of expertise which improves interpretation.

In his article Moeketsi acknowledges that South Africa is a multicultural nation with a number of official languages.<sup>124</sup> The Ministry of Justice of South Africa initiated a programme of training interpreters with the aim of improving the services they render.<sup>125</sup> It included the training of interpreters who were already employed. They also set educational requirements for those who would undertake the profession. In addition, this study seeks to understand whether higher learning institutions can develop relevant courses on interpretation ranging from certificate to degree in interpretation.

Metzger argues that the judicial systems in the USA and South Africa have two characteristics in common that ensure quality interpretation.<sup>126</sup> Both South Africa and the U. S have explicitly laid down criteria and minimum requirements. The requirements must be taken into account for one to qualify. For the USA passing the certification exam is a pre-requisite.<sup>127</sup> To qualify in South Africa one must go through court interpretation training. Metzger's focus is on U.S and South Africa. However, no such minimum requirements exist in RSD. This is a gap that this study seeks to fill.

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<sup>121</sup> Tennent Martha, *Trainings for the New Millenium: Pedagogies for translations and interpreting*, (Amsterdam, Philadelphia John Benjamins, 2005) 134-144.

<sup>122</sup> Ibid

<sup>123</sup> Ibid.

<sup>124</sup> Moeketsi R and Wallmach, 'From Sphaza to Makoya! A BA Degree for Court Interpretation in South Africa,' (2005) 12 *The International Journal of Speech, Language and the Law* 77-108.

<sup>125</sup> Ibid.

<sup>126</sup> Metzger, *'Sign Languages Interpretation: Deconstructing the Myths of Neutrality,'* (Washington DC, Gallaudet University Press, 1999) 114-143.

<sup>127</sup> Ibid.

The University of Nairobi launched its program for Master's Degree in conference interpretation in June 2010.<sup>128</sup> The main objective was to train interpreters to work with various organizations.<sup>129</sup> The course included UN languages, plus Kiswahili.<sup>130</sup> The graduates emphasized the lack of job for the Kiswahili and English combination. The significance of Kiswahili in Kenya in terms of interpretation was little.<sup>131</sup> The scholars were more interested in conference interpreting. RSD is a form of community interpreting, hence the course and language combination offered at UoN are not relevant for the Kenyan context. This study will seal this gap by recommending that such training should involve RSD, court and community interpreters. Further, the study argues that such strategy will advance the reliability and importance of training interpreters in Kenya.

Kenyatta University and the University of Geneva together began a certificate program in community interpretation in 2014–2015.<sup>132</sup> The training targeted students residing in the three refugee centers of Kakuma, Dadaab and Nairobi.<sup>133</sup> The aim of the course was basically to train community interpreters for organizations working in refugee areas. The language combination for the training was narrowed to Somali and English. Somali is the common and important language amongst refugees in Dadaab refugee camp.<sup>134</sup> None of the trainers at the Kenyatta University and the University of Geneva spoke Somali. A Somali speaker resident in Europe was frequently consulted to assess students.<sup>135</sup> The training launched at Kenyatta University targeted the community. However, asylum seekers in Kenya speak various languages. The English and Somali combination was inadequate to meet asylum seekers needs. This is the gap that this study will fill. In addition, this study argues that there is need to recruit professional interpreters as trainers. Further, it is vital to have pedagogical framework in place to guide trainers.

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<sup>128</sup> Muylle N, *The Language Matter: Trainings of Translators, Conference Interpreters Public Service Interpreters in Africa, a Technical Report*, (United Nations Office at Nairobi, 2008).

<sup>129</sup> Mwiria et al, *The Public and Private Universities in Kenya: New Challenges, Issues, and Achievements*, (Oxford England, Jamey Currey, 2007).

<sup>130</sup> Delgado C, *setting up a Masters Programme in Conference Interpreting at the University of Nairobi: An Interdisciplinary case study of Development Projects involving Universities and International Organizations* (2015) PhD thesis, Faculté de traduction et d'interprétation, University of Geneva.

<sup>131</sup> Ibid.

<sup>132</sup> Michieka, 'Language Maintenance and Shifts among Kenyan University Students: In Selected Proceedings of the 41st Annual Conference on African Linguistics,' (2012) Association of Contemporary African Linguistics.

<sup>133</sup> Ibid.

<sup>134</sup> Mwiria (n129).

<sup>135</sup> Ibid.



The strategies discussed above shows the effort made thus far, to train interpreters in Kenya. These strategies show stakeholders' ability to make improvement in the interpretation career. The two courses tried to adopt measures of training interpreters basing on languages spoken in Kenya.<sup>136</sup> In spite of an urgent need for interpreters in Kenya, none of the training course was relevant to the situation of Kenya. Further, the training was based on the languages spoken in Kenya. Asylum seekers speak diverse language as discussed in the introduction to this literature review. The goal of this research is to explore other means of skills acquisition in interpretation to compliment training. Furthermore, this study advances the argument that benchmarking from the already established countries will be of help to shape the career of interpreting in Kenya.

In his analysis Benmaman believes that the duty of an interpreter is important.<sup>137</sup> Therefore, an interpreter should be able to understand and control the dialect.<sup>138</sup> There is need for one to have knowledge in the relevant jargon and nuances.<sup>139</sup> The person interpreting has to understand the communication made in court. Benmaman insists that, it is essential for an interpreter to consider aspects like context of the language and institutional cultures for effective communication.<sup>140</sup> A sequential method of interpretation is used in the courtroom when evidence is presented. As a result, an interpreter is required to transmit short segments. This study argues that training and apprenticeship of interpreters will enable them to understand the interpretation requirements advanced by Benmaman.

According to Newbigging and Thomas, often interpreters are recruited from different service providers in the community.<sup>141</sup> This means, they are involved in maintaining and establishing working relationships with local interpreting agencies. This helps them to obtain better experience and expertise.<sup>142</sup> However, the service providers do not know that incompetent interpreters are likely to prejudice the cases of asylum seekers. Whereas Newbigging and Thomas focus on the impact of interpretation, this study aims at identifying potential alternatives

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<sup>136</sup> Ibid.

<sup>137</sup> Benmaman, 'Legal Interpreting: An Emerging Profession,' (1992) *The Modern Language Journal* 76(4) 445-454.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Newbigging K. and Nigel, '*Good Practices in Social Care with Refugees and Asylum Seekers*, Social Care Institute of Excellence, (First published in Great Britain, 2010) 5-8

<sup>142</sup> Ibid.

to reinforce the legal duty of an interpreter. The aim is to ensure that the testimony made by the asylum seeker is correct. Further, that all participants in the asylum hearing are at the same level of understanding.

According to Berk-Seligson, interpreters usually do their best.<sup>143</sup> They are honest in their work, and faithful to the testimony of foreign languages.<sup>144</sup> However, interpreters are likely to make mistakes in the course of their work, if they do not have the necessary skills. That is why this research argues that acquiring skills through training is one of the requirements for effective interpretation in RSD.

There is no doubt that those who have worked longer as interpreters have acquired some of the skills that allow them to do their job better. But the need for professional training cannot be ignored.<sup>145</sup> As it has been observed in South Africa and the USA all interpreters, including those that are already in service, are trained. While drawing lessons from the two countries, this study argues for better interpretation services in the RSD process. This can be achieved through interpreter training, apprenticeship, mentorship, self-instruction, workshops, seminars and experience.

#### **1.6.4 Enforcement of Interpreters' Legal Duty**

According to Black's Law Dictionary, enforcement is defined a means of enhancing adherence to laws, instructions, directives, standards, guidelines, and norms.<sup>146</sup> It involves putting in place strategies and measures to ensure compliance with regulations.<sup>147</sup>

Throughout his research, Berk-Seligson argues that constitutional guarantee to a court interpreter is the best obligation that the state can make in this regard.<sup>148</sup> In the absence of a constitutional provision for interpretation, legal provisions are made in different states in the USA.<sup>149</sup> The Director of the Administrative Office is required to certify qualifications of certified interpreters.

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<sup>143</sup> Berk-Seligson S, *The Bilingual Courtrooms: Court Interpretation in the Judicial Process*, (2nd Edition, Chicago: University of Chicago Press, 2002) 97-103.

<sup>144</sup> Ibid

<sup>145</sup> Lee (n3), 3-6.

<sup>146</sup> Henry Campbell B, *BLACK'S LAW DICTIONARY* (4th ed. Paul Minn West Publishing Co, 1968).

<sup>147</sup> Ibid.

<sup>148</sup> Berk-Seligson (n143).

<sup>149</sup> Ibid, 99.

Consequently, Examination program was put in place.<sup>150</sup> Whereas Berk-Seligson gives details of the training system of interpreters in USA, Kenya does not have such policies. The lack of such policies and inadequate enforcement of legislation in this area is the gap this study will fill. The information and data which will be generated will help fill the gap.

In addition, Berk-Seligson says that the State of California goes beyond creating laws and regulations.<sup>151</sup> It further came up with a program for training and examining those who wish to become interpreters.<sup>152</sup> All interpreters have programs for annual renewals, continuing education and professional assignment standards defined by the California Judicial Council.<sup>153</sup> Whereas Berk-Seligson made his study in California, this study will be conducted in Kenya with special focus on interpreters' duty during the status determination. The study will further analyze the legislation provision in Kenya, with a particular focus on the Refugee Act.

According to an article written by Ilse de Lange, Court interpretation was in the spotlight in South Africa during the famous trial of Oscar Pistorius.<sup>154</sup> The claim was that interpreters made errors while interpreting from the local language to English. The Department of Justice reported, however, that it was satisfied with the work of the interpreters. On the other hand, the public expressed dissatisfaction with the level of interpretation.<sup>155</sup> Identifying the role of interpreters is the main or major trend of current research studies.<sup>156</sup> As Roy asserts interpreters' challenge is mainly identifying the exact role to play.<sup>157</sup> None of the authors explains the consequences and nature of errors made by interpreters. Nevertheless, this study will make its contribution by discussing the nature of errors and mistakes made by interpreters and their consequences. Further measures for adequate enforcement of law will be discussed in chapter three of this study.

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<sup>150</sup> Ibid, 100.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ilse de Lange, for The Citizen Newspaper in South Africa, 29th March 2014.

<sup>155</sup> Ibid.

<sup>156</sup> Springer, Rafal, 'The Roles of Community Interpreters Versus Professional Standards and Ethics' Thesis' (2000) University of Warsaw, Faculty of Applied Linguistics, <<http://www.academia.edu/5808685/Role>> accessed 26 June, 2020.

<sup>157</sup> Roy C, 'The Problems with Definitions, Descriptions and the Roles Metaphors of Interpreters,' (1993) Journal of Interpretation 6 (1) 127-154, reprinted in Pöchhacker, Franz and Miriam Schlesinger, *The Interpreting Studies Reader* (London Routledge, 2002) 345-353.

Mikkelson affirms that interpretation is regulated alongside with moral principles that interpreters have to abide with.<sup>158</sup> Moral or ethical principles help them to effectively carry out their duties.<sup>159</sup> These include: loyalty, commitment, secrecy, neutrality and honesty.<sup>160</sup> She states that adherence to such ethical standards by interpreters contributes to a fair process. She discusses the principles vaguely without shedding much light on how interpreters can attain them. It is critical that these elements are extensively discussed. This clarity is important in enforcing interpreters' duty. This study will discuss the elements of enforcement in chapter three giving the much-needed clarity on the importance enforcement.

According to González, Vásquez, and Mikkelson, they all agree that even in absence of legislation to regulate interpreters, training and certification for all court interpreters will definitely improve their services.<sup>161</sup> When organizational expectations of interpreters are defined, any deviation from the set organizational behavior will lead to corrective measures being taken.<sup>162</sup> Whereas González, Vásquez, and Mikkelson are concerned, in particular, with the training of court interpreters, this study will further examine the importance of having adequate enforcement of regulations with regard to interpreters. Further, the study will examine alternative enforcement mechanisms.

Nida and Taber identified three stages of interpretation.<sup>163</sup> The first is the analysis of the surface structure which involves the relationship of words and their meaning. This is followed by interpretation of the analyzed words from one language to another. The analyzed statement is then reorganized to give a meaningful message.<sup>164</sup> However, the interpreter in a live situation is often burdened by time constraints. Since interpretation takes place there and then, it is not easy for an interpreter to follow the process suggested by Nida and Taber. This may contribute to the need for adequate enforcement of laws in relation to interpreter's legal duty which is the focus of this study.

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<sup>158</sup> Mikkelson H, 'Towards a Re-definition of the Roles of the Court Interpreters in Interpreting' (1998) Vol 3(1) 21-45.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Gonzalez (n17), 55.

<sup>162</sup> Ibid.

<sup>163</sup> Nida, Taber, *The Theory and Practice of Translations*, (4th Edition Leiden, Brill, 2003) 35-56.

<sup>164</sup> Ibid.

Watermeyer points out that those who interpret need to consider a number of factors for communication to be effective.<sup>165</sup> They need to consider the body language and demeanor, in addition to the spoken words of the claimant.<sup>166</sup> Failure to recognize these factors during the interpretation process may be detrimental to a claimant's case. As a consequence, an asylum seekers failure to testify may come about because of ignoring the aspects mentioned above and not lack of evidence. However, the author does not delve into explaining the types of non-verbal communication and how they impact on the interpreter's task. This study will therefore seek to establish the connection between interpreter's duty and the need to pay attention to how people use non-verbal language to express their opinion. Hence, it is critical for this study to discuss the duty of interpreters for effective RSD.

Furthermore, Gonzalez et al maintain that the interpretation of the Courtroom is similar to interpretation in any other context.<sup>167</sup> This can be interpretation at border point, police cells, migration departments, and RSD, among others.<sup>168</sup> The aim is to enable persons who speak different languages communicate effectively.<sup>169</sup> In addition, Gonzalez states that an interpreter has to provide similar message for legal terminologies.<sup>170</sup> The similarity in the context of the message has to align with the language rules of the applicant and the target language. In their conclusion, they mention that interpreters have many obligations to fulfill.<sup>171</sup> Whereas the authors emphasize on the necessity of interpreters, this study will seek to advance for adequate enforcement of the law relating to the interpreters' legal duty in RSD for a fair process.

In his study, Mikkelson emphasizes that the interpretation process has to be clear and simple to ensure that participants understand each other.<sup>172</sup> He goes on to say that interpreters have a number of roles to play. They have to struggle to ensure that the message interpreted carries

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<sup>165</sup> Watermeyer J, 'She will hear me: How Flexible Interpreting Style enable Patients to Manage Inclusion of Interpreters in Mediated Pharmacy Interactions (2011) 26 Journal of Health Communication, 71–81.

<sup>166</sup> Ibid.

<sup>167</sup> Gonzalez (n17), 42-48.

<sup>168</sup> Ibid, 43.

<sup>169</sup> Ibid, 44.

<sup>170</sup> Ibid, 45.

<sup>171</sup> Ibid.

<sup>172</sup> Mikkelson and Mintz, *Orientation Workshops for Interpreters of all Languages: How to Strike a Balance between Ideal World and Reality* (Amsterdam, John Benjamins, 1997) 57-64.

similar meaning.<sup>173</sup> Mikkelson unlike Gonzalez, specifically points out the difficulty of equivalent interpretation and the immense responsibility facing the interpreter. However, he does not propose any way forward. This study argues that there is need for enforcement of legislation to direct the career of interpretation.

Morris critically notes that the process of interpretation in Court is influenced by many external factors.<sup>174</sup> The interpreter is assessed by those who speak the languages being interpreted. Particularly, they assess the language of the asylum seeker and the language used in RSD to evaluate their accuracy.<sup>175</sup> Whereas Morris talks about the courtroom, this research will focus on RSD process and the duty an interpreter carries out. This study further argues that the code of conduct is helpful for interpreters to carry out their duty accurately.

According to Hale, like Morris, confirms that interpretation process is influenced by many factors.<sup>176</sup> Interpreters have to prove that their interpretation is genuine, and made in good faith. However, some challenges are encountered like the complexity in interpretation process. They include: inadequate institutional and legal frameworks, and misunderstanding of interpreter's position by lawyers and other participants.<sup>177</sup> Hale does not give any suggestion on how the legal and institutional framework should be improved to enforce interpreters' duty. This study will recommend appropriate measures to ensure that interpreters carry out their duties effectively. This can be achieved by putting in place interpretation policies, manuals and certification procedures.

Many scholars agree that the duty of interpretation involves tasks such as mediation, facilitation and advocacy.<sup>178</sup> The assertion is echoed by Steytler who is convinced that their duty includes facilitating interaction among individuals.<sup>179</sup> Particularly, between individuals who are unable to understand the language being used.<sup>180</sup> Lebesse agrees with the views of Steytler that the major

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<sup>173</sup> Ibid.

<sup>174</sup> Morris, 'The Moral Dilemmas of Courtroom translating,' (1995) 1 The Translator 25-46.

<sup>175</sup> Ibid.

<sup>176</sup> Hale (n 16), 19.

<sup>177</sup> Ibid.

<sup>178</sup> Berk-Seligson (n143), 99.

<sup>179</sup> Steytler N, 'Implementing Languages Rights in Courts: The Role of Court Interpreters in South Africa,' (1993) 9 (2) The South Africa Journal on Human Rights, 205-222.

<sup>180</sup> Ibid.

responsibility of an interpreter is to transmit the message from the source language to the target language.<sup>181</sup> However the authors fail to give guidelines to help interpreters fulfill their duty. To fill this gap, some guidelines during interpretation will be suggested by this study.

Research conducted by Matu reveals that, an interpreter is supposed to comply with some code of conduct.<sup>182</sup> Sometimes, there are situations that make an interpreter fail to comply with such code of conduct.<sup>183</sup> Improper interpretation process affects the decisions arrived at by adjudicators.<sup>184</sup> In Kenya, the official language of the court is English. Therefore, all documents are kept in English. The Judicial officers rely so much on efficient interpretation to ensure that their records are accurate. It is therefore important to carry out a study, on how interpreters can maintain their position of accurate interpretation, while at the same time protecting the asylum seekers' rights.

While reviewing interpreters' role, Benmaman contends that, they should ensure that, the interpreted version is correct, true and fair with correct meaning.<sup>185</sup> This is the focus of my research. As the need for interpreters services increase, so too has the realization that people dedicated to this career have to be knowledgeable apart from just speaking two languages.<sup>186</sup> Specifically, this study agrees with the author that maintaining the message of the speaker is vital for effective communication. While Benmaman raises crucial aspects of interpretation, he does not explain how interpreters should enhance their duty as conduits. This is another gap which this study seeks to fill.

De Jongh's research indicates that for effective communication, an interpreter should have relevant knowledge, good mastery of vocabulary and phrases.<sup>187</sup> This includes words with no equivalence in the target language.<sup>188</sup> He further states that, it is important for the one

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<sup>181</sup> Lebesse, *A pilot Study on the Undefined Roles of Court Interpreters in South Africa*, *Southern African Linguistics and Applied Languages Studies*, (Harvard University Press, 2011) 343-357.

<sup>182</sup> Matu (n 116).

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Benmaman (n137).

<sup>186</sup> Ibid, 286.

<sup>187</sup> De Jongh, 'Court Interpreting: Linguistics Presence and Linguistics Absence,' (2008) 82 Florida Bar Journal 20-36.

<sup>188</sup> Ibid.

interpreting to be well acquainted with the language and vocabulary used in judicial process.<sup>189</sup> While acknowledging the various duties of an interpreter, the author notes that, there is need for an interpreter to know more than one language. Further, the person needs to be well versed with the applicant's culture.<sup>190</sup> However, no research has been conducted in Kenya to produce information that can help establish frameworks for bicultural and bilingual interpreters in RSD. The results of this research will help to establish the importance of cultural competency and language proficiency in interpretation.

According to Ibrahim and Bell, the mode of interpretation in Kenya is different from that of the United Kingdom.<sup>191</sup> In UK, interpreters employed by the government and those in private sector are registered on the roll of interpreters.<sup>192</sup> Hence, they are hired whenever their services are required. Whereas Ibrahim et al, emphasize the presence of a roll of interpreters in UK, interpretation in Kenya is not formalized. This study seeks to provide information on the need for enforcement of the laws regarding the duty of interpreters. The study will facilitate the growth of intervention strategies for the reform of interpretation in RSD.

Throughout his research, Angermeyer argues that some interpreters assume that the persons they interpret for are incompetent.<sup>193</sup> Hence, they are unable to follow the court procedure. This bias affects their performance.<sup>194</sup> Angermeyer further argues that, interpreters are careful when interpreting the message from a dominant language to a less dominant one.<sup>195</sup> This is because they know that many people understand and are able to critique their performance.<sup>196</sup> Angermeyer mentions one of the major limitation which affects interpreter's duty. However, he does not recommend any measures or strategies to improve on the performance the interpreters. To fill this gap, there is need to put in place measures, policies and strategies to evaluate interpreters' work.

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<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibrahim Z and Bell, *'Court Interpreting: Malaysian Perspective,'* (John Benjamins Publishing Company, Amsterdam, 2003) 90-91.

<sup>192</sup> Ibid.

<sup>193</sup> Angermeyer (n71), 22.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.



According to Wadensjö's opinion, interpreters cannot avoid being both interpreters as well as mediators.<sup>197</sup> Authors like Nakane suggest that the notion of an interpreter functioning simply as an invisible mediator is a myth.<sup>198</sup> Pöchhacker recognizes that mediation is a critical part when addressing the problems surrounding the idea of community interpretation.<sup>199</sup> Wadensjö, Nakane and Pöchhacker further agree that mediation is one aspect that brings controversies in interpretation. However, they do not give any suggestions on how the legal framework can help to enforce interpreters' duty. This study looks into the attempts made so far in the legal framework in Kenya and the improvements required.

With regard to types of interpretation, Linnell identifies two ways of interpreting.<sup>200</sup> The first one is the monologic model of transmission. The second is the dialogic model of social interaction. Some interpreters see communication as monological. The focus here is solely on the sender. The message produced is not affected by the interpretation of the recipient, because his or her position is merely passive.<sup>201</sup> Therefore, interpreters can give the exact message without changing it. Interaction, coordination and mediation used in dialogic model are understood as excessive and beyond the scope of the interpreters' obligation.<sup>202</sup> Berk-Seligson maintains that both the sender and receiver are involved in the negotiation of meaning.<sup>203</sup> Linnell and Berk-Seligson clearly discuss the communication process, which involves monologic and dialogic respectively. It is clear that interpreters carry out many responsibilities. Further, they do so concurrently. However, Linnell and Berk-Seligson fail to mention other hurdles that most interpreters are faced with that this study will examine.

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<sup>197</sup> Wadensjö, *interpreting as interaction*, (London: Longman, 1998) 58-73.

<sup>198</sup> Nakane I, 'Myths of an invisible Mediator: An Australian Case Studies of English-Japanese Police Interpreting,' [2009] 6 (1) *Journal of Multidisciplinary International Studies* 1-16.

<sup>199</sup> Pöchhacker, Franz, '*The Community Interpreters' Task: Self-Perception and Provider Views*,' (Amsterdam: John Benjamins 2000) 49-65.

<sup>200</sup> Linnell Per, 'Approaching Dialogues: Monological and Dialogical Models of Talk and Interactions,' in *Working Papers from the Department of Communication Studies* (1994) 10 Linköping, Department of Communication Studies, University of Linköping 17-35.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> Berk-Seligson (n143), 87-99.

Gercek states explicitly that the rule means that the practice of the society, the manner in which the law is generally enforced, clarifies and reinforces the meaning of the law.<sup>204</sup> Where there is ambiguity or disagreement about the interpretation or implementation of the law, the manner in which it is actually practiced by the people is the best test of the law. Whereas several researches have been conducted to show the need for considering customs of community interpretation in other countries, more of such studies need to be carried out in Kenya.

According to Vilela, the interpreter's presence cannot be invisible, since the interpreter greatly affects the way the participants communicate.<sup>205</sup> Participants in RSD include the applicant, the witness, and determination officers. There appears to be a universal agreement about the truth that the interpreter's duty is more than being a conduit.<sup>206</sup> Similarly, that the long-established conduit form seems to be insufficient since it ignores too many elements included in the course of Communication.<sup>207</sup> The authors simply focus on the mode of interpretation. They do not look at the aspect of enforcement and standards of practice. This study will assess the legal duty of interpreters in the decision making. This research will borrow from the above model in encouraging Kenya to adopt legislative and policy measures and adequately enforce them for the effective RSD process.

While commenting on refugee status, Abuya acknowledges that the use of refugees as interpreters is beneficial on two grounds. In the first place, they get job opportunities which help them to be self-reliant. Secondly, a third party is added to the general status system that can interact with the truth of the claim.<sup>208</sup> He goes on to state that one big issue is that determination officers do not have the experience of fleeing from one country to another to seek asylum. Working with refugees in RSD is vital as refugees have experience in relation to forced

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<sup>204</sup> Eraslan G, 'Cultural Mediators or Scrupulous Translators: Revisiting the Roles, Context and Culture in Consecutive Conference Interpreting,' (2008) <<http://www.arts.kuleuven.be/cetra/papers/files/eraslan-gercek.pdf>> accessed 4 June, 2020.

<sup>205</sup> Vilela (n80) 239-245.

<sup>206</sup> Niska, Helge, 'Community Interpreters Training: Past, Present, Future,' (2002) in Garzone and Viezzi (eds) *Interpreting in the 21st Century: Challenges and Opportunities*, Selected papers from the 1st Forli Conference on Interpreting Studies, 9-11 November (Philadelphia, John Benjamins, 2000) 133-144.

<sup>207</sup> Ibid.

<sup>208</sup> Abuya, 'Parlez-vous l'anglais ou le Swahili?' The role of Interpreters in Refugee Status Determination interviews in Kenya, (2004) 19 FMR 48-50.

migration. While the author recognizes the benefits of using refugees as interpreters, this study will weigh up the fairness of such a plan.

According to the argument in the handbook for interpreters, the guide book stipulates the procedure to be followed before the interview.<sup>209</sup> This procedure is to enable the applicant be at ease and get acquainted with the RSD process. For example, the determination officers have a duty to help the applicant by reviewing registration details.<sup>210</sup> Whereas UNHCR provides clear guidelines on status claims, this study seeks to find out whether the RSD process in Kenya conforms to UNHCR standards.

This study will therefore look into causes of misinterpretation in RSD. It will determine whether inadequate enforcement of the law is one of them. Hence, there is need for further research to help interpreters understand their legal duty.

## **1.7 Hypotheses**

The first hypothesis of this research is that when interpreters perform their legal duty of bridging the communication gap well, the process of refugee status determination becomes effective. The second hypothesis is that effective interpretation depends on the ability of an interpreter to transmit the exact message from the asylum seeker to the refugee status determination officer. The third hypothesis is that poor interpretation is caused by inadequate enforcement mechanisms of interpreters' legal duty of accurate interpretation of asylum seekers' words. The last hypothesis is that for Kenya to improve on the process of refugee status determination there is need to adopt some proposals and best practices from other countries.

## **1.8 Theoretical Framework**

### **1.8.1 Introduction**

Any research study is guided by some key assumptions that gravitate towards a theory or a group of theories. Theoretical framework provides tools for data collection, processing, analysis and

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<sup>209</sup> Ibid.

<sup>210</sup> UNHCR (n87), 5.

interpretation.<sup>211</sup> The study will employ the Natural Law Theory, Language Expectancy Theory and the African Theory on the Culture of Community.

### **1.8.2 Natural law Theory**

The study will rely on natural law theory to advance effective interpretation in Refugee Status Determination. The theory is associated with philosophers such as Saint Thomas Aquinas, Mesembe Ita Edet, Mbiti, J S Omoregbe and Maurice Makumba. The proponents of Natural law affirm that there is a higher supreme order that ought to regulate human behavior. The theory asserts that a true law is in conformity with nature, prohibits wrong doing and applies universally.<sup>212</sup> Natural Law ideas have not only influenced positive law, but have come to form part of it.<sup>213</sup> The law was either ordained or handed down by the Supreme Being and can be discernible by human reason. Scholars like Omoregbe, contend that good positive laws are obtained from natural law.<sup>214</sup> Further, Aquinas asserts that human beings are rational beings and, therefore, they are called upon to be virtuous. The theory has attracted a number of criticisms from positivists for its assertion on morality of law. Positivists like Kelsen posit that law and morality should be separate.<sup>215</sup> In his pure theory of law, Kelsen argues that laws are to be free from any impurities such as morality.<sup>216</sup>

The Refugee Act, as read with Refugee Regulations, provides for the right to interpreters. The aim is to enable asylum seekers express themselves clearly where they do not understand the language of the determination officer.<sup>217</sup> Through interpreters, asylum seekers are able to express their claims clearly. Effective interpretation enables the determination officers to make a fair decision.<sup>218</sup> As advanced by Saint Thomas above, positive law is obtained from natural law. Therefore it can be asserted that the provision in the Refugee Act,<sup>219</sup> on rights of asylum seekers

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<sup>211</sup> Wasamba, *The Contemporary Oral Literature Fieldwork: A researcher's Guide*, (University of Nairobi Press, 2015) 300.

<sup>212</sup> Burns and Tony, *Aristotle and Natural law: History of Political Thoughts*, (1998) 19 imprint academic ltd 145-147.

<sup>213</sup> Mesembe E, 'The Natural Law theories in Traditional African Jurisprudential Thought,' (2014) Vol 26 Journal of Law, Policy and Globalization 47-54.

<sup>214</sup> Omoregbe J, *Philosophical Look at Religions*, (Joja Educational Research and Publishers Ltd Lagos, 1993) 63.

<sup>215</sup> Hart H.L.A, *Positivism and the Separation of Laws and Morals*, (Harvard law review, 1958) 604-605.

<sup>216</sup> Ibid.

<sup>217</sup> Refugees (Reception, Registration and Adjudication) Regulations, 2009.

<sup>218</sup> Mikkelsen (n158), 48.

<sup>219</sup> Refugee Act, 2006.

aligns with natural law. According to natural law, rights are natural and inherent in a human being by the fact that the person exists.<sup>220</sup> All human beings deserve a just treatment which is a universal requirement according to natural law. Therefore, it will not be different in any society of the world. The requirement for effective interpretation in asylum hearing in Kenya and the entire world will remain unchanged since it is an ethical obligation whose standards can only be determined by reason. Hence, it is an undeniable right.<sup>221</sup>

The universality of natural right for protection of asylum seekers is emphasized in various National and International Refugee law instruments.<sup>222</sup> The natural law, therefore, will demonstrate the importance of enforcement of laws for effective interpretation in refugee status determination.

### **1.8.3 Language Expectancy Theory**

Jones, Gerald Miller and Michael Burgoon are the proponents of this theory.<sup>223</sup> Language expectancy theory suggests that various languages have particular set of rules specifically put in place in line with the prevailing circumstances.<sup>224</sup> The theory states that the preferred communication is based on the customs of a given community.<sup>225</sup> This theory presupposes that language is based on a system of rules where suitable norms are developed according to the language usage in a given context.<sup>226</sup>

The theory anticipates departure from the existing language norms, and use of language rules due to the needs of society.<sup>227</sup> Such differences affect how the words are construed and whether or not the listeners are convinced by the language. The theory maintains that there are some standards of language that have already been laid down in various societies.<sup>228</sup> The language

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<sup>220</sup> Omony John Paul, *Key Issues in Jurisprudence*, (law Africa, Kampala, 2004) 23-31.

<sup>221</sup> Maurice Makumba, *An Introduction to African Philosophy: Past and Present* (Paulines Publication, 2007) 25.

<sup>222</sup> The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

<sup>223</sup> Dillard J, Pfau, *The Persuasion Handbooks: Developments in Theory and Practices* (California: SAGE, 2002).

<sup>224</sup> Burgoon, Dillard, Doran, 'Friendly or Unfriendly Persuasions: The Effect of Violation of Expectations by Males and Females' (1984) 10Human Communication Researches 283–294.

<sup>225</sup> Burgoon M, Miller, 'An Expectancy Interpretation of Languages and Persuasion' (London, United Kingdom: Lawrence Erlbaum Associates, 1985) 199–229.

<sup>226</sup> Ibid.

<sup>227</sup> Dillard (n223).

<sup>228</sup> Ibid.

used in a judicial proceeding is a case in point of the socially expected deviations from standard language.<sup>229</sup> Language is an important tool that guides any judicial hearing.

The language of the quasi-judicial or judicial context is different from the language used in casual dialogue. For this reason, a judicial officer or a legal representative is expected to use formal language. Therefore, an interpreter cannot interpret in such a context without understanding the formal language. Some skill is needed to understand the formal language.<sup>230</sup> Since the language used in RSD is a divergence from the usual set language, a bilingual interpreter will not interpret effectively. There is need for such interpreters to have some experience, qualifications and knowledge on legal and refugee terminologies.<sup>231</sup> On the basis of this, this study shows the need for assessing the qualities of interpreters and enforcement of laws relating to interpreters' duty.

#### **1.8.4 The African Theory on the Culture of Community**

The study will also rely on the African theory on the culture of Community in attempt to safeguard the rights of Asylum seekers in RSD. The proponents of this theory include: John Mbiti,<sup>232</sup> Ifeanyi Menkiti,<sup>233</sup> William Idowu,<sup>234</sup> and Daniel Mdombi.<sup>235</sup> Mdombi asserts that Africa is known for its extended families, its cultural coping mechanisms in the face of need, and for its hospitality.<sup>236</sup> He places a great deal of focus on African values.<sup>237</sup> He argues that such principles will make a great contribution by being integrated and widely used in society.<sup>238</sup>

In support of the African theory of community, Ifeanyi acknowledges that, most Europeans define a person with reference to physical characteristics.<sup>239</sup> To them, it forms a description of an

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<sup>229</sup> Berk-Seligson, 'The Importance of Linguistics in Court Interpreting,' (2012) 14 (2) La Raza LJ 14 -16.

<sup>230</sup> González (n17), 19-25.

<sup>231</sup> Ibid.

<sup>232</sup> John M, *African Religion and Philosophy*, (New York, Doubleday and company, 1970)141.

<sup>233</sup> Ifeanyi A Menkiti, *Persons and Communities in African Traditional thought*, (Lanham, MD, University Press of America, 1984) 171

<sup>234</sup> William I, 'African Jurisprudence: Transcending the Boundary between Myth and Reality', (2004) 52 Enter Text Journal 62-66.

<sup>235</sup> Mdombi D K, 'African Theory on the culture of Community', (2016) 16 (1) General Education Journal 36-48.

<sup>236</sup> Ibid, 38.

<sup>237</sup> Ibid, 41.

<sup>238</sup> Ibid, 47.

<sup>239</sup> Ifeanyi (233), 17.

individual.<sup>240</sup> The African idea of a person disagrees with the notion that an individual can be described by analyzing their physical traits. Instead, a person is defined and characterized basing on the society where he or she belongs. Mbiti concludes that the African perception of a person is simply summarized as: “I am because we are, and since we are, therefore I am.”<sup>241</sup> Africans value communal life more than individual life.<sup>242</sup> There is a critical contrast between the definition of a person in the African perspective and that of the western perspective. For Africans, a person is defined basing on the community, not any other characteristics.

African communities are believed to practice and share similar characteristics. They practiced what had common importance to all the members of the community.<sup>243</sup> For example, moments of sickness, natural disasters, funerals, wars, among others. Community members not only sympathized, but also empathized with practical care shown by carrying out significant tasks.<sup>244</sup>

Clifford supports the idea of African community that, unity is a vital aspect of community.<sup>245</sup> The African community was also characterized by restorative justice, which was intended to restore the relationship and reconcile the individual with the community.<sup>246</sup> This was opposed to retributive justice, which was intended solely to punish an individual.<sup>247</sup> While resolving conflicts, the accused was given ample opportunity to be heard. Hence, there was an aspect of justice and fairness. This is a clear allusion to the fairness an asylum seeker needs in RSD. This theory is an important pointer to the aspect of value of humanity, care and concern for people in a society. John Mbiti strongly emphasized the importance of unity. The essence was to make each individual have a sense of belonging and peaceful co-existence.<sup>248</sup>

However, scholars like RT Paget have criticized this school of thought.<sup>249</sup> They contend that Africans lacked legal authority.<sup>250</sup> According to them, African communities were governed by

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<sup>240</sup> Ibid.

<sup>241</sup> Ibid, 174.

<sup>242</sup> Ibid, 179.

<sup>243</sup> Ocholla A, ‘Traditional Ideologies and Ethics among the Southern Luos,’ (1976) The Scandinavian Institute of African studies Uppsala 51-52.

<sup>244</sup> Ibid.

<sup>245</sup> Clifford W, *A Primer of Social Case Work in Africa* (Oxford University press; Nairobi 1996) 76.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid, 77.

<sup>248</sup> John (n 232).

<sup>249</sup> William I, ‘Africans Jurisprudence: Transcending Boundaries between Myth and Reality’, (2004) 52 *Enter Text Journal* 62-66.

fetish and not logic.<sup>251</sup> While supporting Paget, Hugh Trevor argues that there was no possible development in African society before the coming of Europeans.<sup>252</sup> Such claims disregard the fact that African societies were civilized and had organized Kingdoms, Empires, Chiefdoms and communities that thrived before the pre-colonial period. They also had enforcement mechanisms for those who violated the rules of the community. On the basis of this theory, this study argues for the enforcement of interpreters' legal duty.

## 1.9 Research Methodology

In order to investigate the research problem identified, this study embarked on research. Therefore, the study carried out desktop and fieldwork research. The first aspect of research involved gathering and analyzing information in books, journal articles, reports, statutes and case laws. The study reviewed the existing literature in the library of school of law, Parklands. The study also made use of online sources to view and download literature. All the literature reviewed was obtained through the desktop method of research.<sup>253</sup> The study reviewed numerous relevant sources but not all of them were useful to address this study's research problem. The study then carefully selected the desktop data to be used for the study, considering the context and purpose for which the data was collected. Through this desktop research, the researcher was able to identify some gaps, which formed the basis of the fieldwork.<sup>254</sup>

The second aspect of the study involved fieldwork. The fieldwork was intended to address various aspects of the study that the desktop research did not address. The researcher identified a group of respondents from which a sample was selected for gathering of the primary data. The researcher conducted fieldwork research personally, by way of interviews, observation and questionnaire. These methods were suitable because they enabled the researcher to get first-hand information that was relevant to the study.<sup>255</sup> To arrive at a conclusion, the respondents were interviewed to determine whether interpreters' duty is being adequately enforced as stipulated in

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<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Trevor-Roper Hugh, 'The Rise of Christians Europe,' (London: Thames and Hudson, 1964) 9.

<sup>253</sup> Kisilu Kombo, Delno T, *Proposals and Theses Writing: An Introduction*, (Paulines Publications Africa, 2006) 62.

<sup>254</sup> Mugenda and Mugenda, *Research Methods: Quantitative and Qualitative Approaches*, (Nairobi Acts Press, 1999).

<sup>255</sup> See appendix III of this study.



the law. The questionnaire contained questions that covered various issues that this study seek to investigate.<sup>256</sup> The researcher tested the questionnaire through a mock interview and amended to ensure that the questions were clear enough to obtain the information required to cover all the parameters to be tested.<sup>257</sup>

The research targeted a sample size of seventy respondents through a stratified sampling method.<sup>258</sup> The population was divided into distinct groups from which various participants were selected.<sup>259</sup> The individuals in the sample included officers working with Refugee Affairs Secretariat, UNHCR, the judiciary, refugees, police, interpreters, Pastors, members of various organization working with refugees, scholars of refugee law and RSD officials. The reason for this approach was to ensure that the research captures a wide spectrum of respondents from all the key areas of the study. The people interviewed were both male and female, drawn from various parts of Kenya. Some respondents were interviewed from outside the country. The fact that the respondents were from Kenya and others outside Kenya did not prejudice the research in any way because the information sought does not impact on geographical importance.

Appointments for the interviews were made through phone calls and emails.<sup>260</sup> The questionnaires were sent to the respondents in advance via email. This was to gives them sufficient time to interrogate the issues raised and give quality responses. The interviews were voluntary and the study assured the respondents of anonymity and confidentiality. Pseudonyms were used instead of actual names in the presentation and analysis of the data. However, some respondents did not give their feedback. To overcome this challenge, the supervisor of this study advised me to send more questionnaires to more respondents and follow up with reminders. The strategy worked and I was able to receive feedback from 46 interviewees. Furthermore, I carried out most of the interviews online because of the Covid-19 Pandemic. The time estimated for

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<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> See list of respondents in schedule IV of this study.

<sup>259</sup> See also Josiah Nyauncho and Isaac Nyamweya, who preferred the stratified method since the respondents belonged to different categories, carrying out different roles; Josiah Nyauncho and Isaac Nyamweya, 'Assessment of Effects of Cost Leadership Strategies on the Performances of Liquefied Petroleum Gas Companies in Eldoret town, Uasin Gishu County, Kenya' *International Journal of Businesses and Management Inventions* ISSN (Print): 2319 – 801X, 4.

<sup>260</sup> Satirenjit Kaur J, and Sumathi R, recognize that phone calls and emails are important tools for obtaining access to the research field; Satirenjit J, and Sumathi R, 'Strategy for Gaining Access in Doing Fieldwork: A Reflection of two Researchers' (2010) Volume 8 Issue 1, *The Electronic Journal of Business Research Methods*, 42, 42.

each interview was forty minutes. Before conducting interviews, the researcher assured respondents that the research was for academic purposes. The questionnaire had a number of open-ended questions that required the respondent to explain further by giving their opinions on the study.<sup>261</sup>

The total numbers of individuals actually interviewed were 46 out of the 70 initially intended to be interviewed. This was 65.7% of the intended sample. Some of the people who were contacted for the interview by email did not respond. Some few who were contacted via telephone promised to call back but did not. In addition, some of the responses were shallow in terms of content. The interviews were conducted during the period of October 2020 to March 2021. The researcher applied to the National Commission for Science, Technology and Innovation for a research permit. The application was done online through the NACOSTI website. The researcher attached a copy of the study proposal for NACOSTI to determine the nature of approval to be granted. The application was granted and the license issued.<sup>262</sup>

Finally, the study acknowledged all the sources of information used.

### **1.10 Limitation of the Study**

Most respondents had busy schedules. Interviewing them was a challenge due to time constraints. Further, some respondents received emails but did not respond. Hence, not all the respondents in the sample participated. Also, some responses were shallow in terms of content. Nevertheless, the interviews with those who responded were very resourceful to this research.

### **1.11 Chapter Breakdown**

#### **1.11.1 Chapter One - Introduction: A General Overview and Outline**

This chapter introduces the topic of research and states the problem. It justifies the study and provides a theoretical framework. This chapter evaluates the existing literature on the topic, states the research objectives and formulates research questions and hypotheses. The chapter identifies the methodology to be used in the research and gives the limitations to the study.

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<sup>261</sup> Many of the respondents explained their responses in an elaborate manner offering insights that would not have been obtained had the study opted to use a closed-ended questionnaire.

<sup>262</sup> Copy of research permit from NACOSTI attached at Appendix II to this thesis.

### **1.11.2 Chapter Two-Requirements for Interpreters to fulfill the Legal Duty of effective Interpretation**

This chapter explains the qualities of an interpreter for effective RSD process in Kenya. The chapter investigates how other jurisdictions have been able to do well. It also looks at the instances where interpreters who lack qualification and relevant qualities have failed in their duties. This chapter reports the results of the fieldwork.

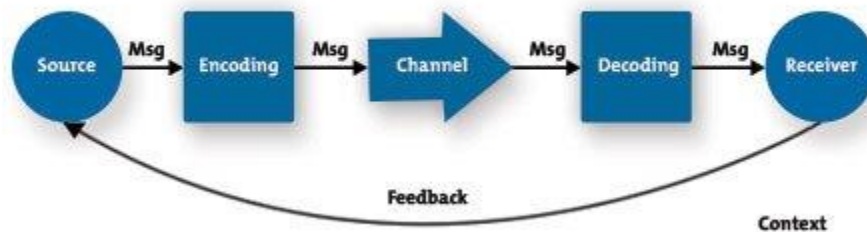
### **1.11.3 Chapter Three - Mechanisms for Enforcement of Interpreters Legal Duty in Refugee Status Determination**

This chapter analyses the enforcement of the law relating to interpreters. The chapter identifies loopholes for ineffective interpretation in RSD. It goes ahead to examine other available enforcement mechanisms besides the law. This chapter continues to report the results of the fieldwork.

### **1.11.4 Chapter Four - Summary of Findings, Conclusion and Recommendations**

Chapter four presents a summary of the findings on the enforcement of interpreters' legal duty. It also gives recommendations on the way forward.

### **1.11.5 The process of Effective Communication can be summarized as follows:**



Source: [www.mindtools.com/CommSkill/CommunicationIntro.htm](http://www.mindtools.com/CommSkill/CommunicationIntro.htm)

‘Where there is a will there is away.’<sup>1</sup>

## CHAPTER TWO

### REQUIREMENTS FOR INTERPRETERS TO FULFIL THE LEGAL DUTY OF EFFECTIVE INTERPRETATION

#### 2.1 Introduction

Chapter one introduced the study. It gave the background to the study, its objectives and the existing literature upon which this study was built.<sup>2</sup> An interpreter carries out a neutral role of simply transmitting the message as a conduit.<sup>3</sup> An interpreter’s duty is to provide efficient communication so that all participants in the asylum procedure are able to communicate adequately.<sup>4</sup> It is important for the court to receive all the details necessary to achieve its aim.<sup>5</sup> Further, the applicant having a communication barrier should be provided with an interpreter to be able to take part fully in the asylum interview and express his or her claim with ease.<sup>6</sup> Interpreters fulfill a critical duty of mediators to facilitate interaction between people who speak diverse languages.<sup>7</sup> Literature review shows a general opinion that the interpreter’s function is to eliminate language barriers among parties in asylum hearing.<sup>8</sup> This chapter seeks to find out the attributes an interpreter should have, in order to fulfill the effective duty of interpretation.

Interpreting is the act of promoting communication from one language to.<sup>9</sup> The important element is to preserve the meaning of the source language content.<sup>10</sup> An interpreter must not only quickly and carefully interpret meaning, but should consider other aspects of intonation

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<sup>1</sup> Interview with Mumbi, Nairobi, Kenya, 2 November 2020.

<sup>2</sup> See section 1.1 of Chapter one.

<sup>3</sup> Kadrić, ‘*Dolmetschen bei Gericht. Erwartungen - Anforderungen - Kompetenzen in English, Interpreting in Courts: Expectations - Requirements and Skills*’ (Wien, facultas, 2009) 25-28.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Hale S, ‘Controversy over the Roles of Court interpreters,’ in Valero Garcés, *Crossing Borders in Community Interpreting: Definitions effective and Dilemmas*, (Amsterdam/Philadelphia, John Benjamins, 2008) 99-121.

<sup>8</sup> Berk-Seligson, ‘*The Bilingual Courtroom: Court Interpreters in the Judicial Processes*,’ (Chicago, Univ. of Chicago Press, 1990).

<sup>9</sup> *Merriam-Webster’s Collegiate Dictionary* (10th edn, 1999) <<https://www.merriam-webster.com>> accessed 12 January, 2021.

<sup>10</sup> Llewellyn-Jones et al, ‘Getting to the Core of Roles: Defining interpreters Roles Space,’ (2013) 5 (2) *International Journal of Interpreter Education* 54-72.

and aim of the original message.<sup>11</sup> RSD requires a person who is capable of translating in simple words without missing the meaning of the applicant's original intention;<sup>12</sup> he or she should be well informed.<sup>13</sup> Interpreters should be aware of the historical and current events of the applicant's home country. They should also be fluent in the language of the applicant.<sup>14</sup> They are expected to maintain confidentiality in relation to all information shared by a claimant.<sup>15</sup> Finally an interpreter should maintain the impartial role throughout the process.<sup>16</sup>

Many people do not know the difference between translation and interpretation.<sup>17</sup> Whereas translation is written, interpretation is verbal.<sup>18</sup> For effective interpretation, an interpreter must be able to interpret the received message correctly.<sup>19</sup> Further, the interpreter should be able to express the accurate meaning in the target language.<sup>20</sup> Interpretation requires different standards of precision from translation.<sup>21</sup> While interpreters make effort to achieve total accuracy at all times, facts of the original message can be lost in the course of interpretation into the target language.

The aim of this chapter is to answer the question on the requirements for effective interpretation. The study will then establish a connection between interpreters' qualities and their performance in RSD. Absence of vital qualities for interpreters is a cause of poor interpretation. The chapter addresses the problem of why there is inadequate enforcement of the law on the interpreters' legal duties in RSD. In spite of the legal requirements on the rights of asylum seekers, there is variance between the law and practice. A refugee status determination officer may avail interpreting services. However, issues such as the shortage of interpreters, the use of untrained interpreters arise. Further, inappropriate communication and the question of ethics in

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<sup>11</sup> Ibid.

<sup>12</sup> Abuya, 'Refugees and their Interpreters: Lessons from the Kenyan Experience', (2004) 25 (1) The African Australasian Review of African Studies 66-67.

<sup>13</sup> See Refugees Review Tribunal, *Interpreters Handbook* (Canberra RRT, 1996) 4-7.

<sup>14</sup> Ibid, 7-8.

<sup>15</sup> Ibid, 9-11.

<sup>16</sup> Ibid.

<sup>17</sup> Hatim B, *The Translators as Communicators* (London: Routledge, 1997) 125.

<sup>18</sup> Ibid.

<sup>19</sup> Hale, *The Discourses of Court Interpreting: Discourses and the Practice of Laws, the Witnesses, and the Interpreters*, (Amsterdam Philadelphia, John Benjamins, 2004).

<sup>20</sup> Ibid.

<sup>21</sup> González, et al, *Fundamentals of court Interpretation: Theory, Policies and Practices*, (Durham, Carolina Academic Press, 2012) 19-25.

interpretation usually bring dissatisfaction to asylum seekers.<sup>22</sup> Hence, there is need for interpreters to have some qualities to carry out their legal duty effectively. The hypothesis that this chapter sets out to prove is that effective interpretation depends on the qualities of an interpreter.

This chapter considers how professional and efficient interpretation can be attained by training of interpreters and by setting standards. The aim is to give an asylum seeker a right to fair hearing. This right has been greatly informed by the Natural Law theory. You recall that the theory was discussed in Chapter one.<sup>23</sup> Natural Law ideas have not only influenced positive law, but have come to form part of it.<sup>24</sup> According to natural law, rights are natural and inherent in a human being by the fact that the person exists.<sup>25</sup> All human beings deserve a just treatment which is a universal requirement.<sup>26</sup> However, Natural Law theory cannot operate in a vacuum. To enhance interpreters' rights, the African theory on Community comes in to reinforce this need. The African theory on community puts a special emphasis on the aspect of individual sense of belonging and co-existence. Further, it focuses on leniency in the African justice system.<sup>27</sup> Finally, the Language Expectancy theory explains that all languages have rules in place. It goes ahead to anticipate deviation from the language rules based on different needs of society.<sup>28</sup> For instance, an interpreter should be well versed with the customs, traditions, history and jargon of the source language.<sup>29</sup> Further, an interpreter should be well acquainted with the figurative and symbolic language as used in the applicant's language.

## **2.2 The Duty of Interpreters in the Asylum-seeking process**

Kenya has over 42 indigenous languages and two official languages.<sup>30</sup> Language rights are stated clearly in several Articles of the Constitution. General protection is given by Article 7, which

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<sup>22</sup> Forced Migrations, Studies Programmes, *National Survey of Refugee Reception and Status Determination Systems in South Africa*, A Research Report February (MRMP Johannesburg: Wits University, 2009) 37.

<sup>23</sup> See Chapter One, section 1.5.

<sup>24</sup> Mesembe I, 'The Natural Laws: Theory in Traditional African Jurisprudential Thought,' (2014) Vol 26 Journal of Law, Policy and Globalization 47-54.

<sup>25</sup> Omony John Paul, *Key Issues in Jurisprudence*, (law Africa, Kampala, 2004) 23-31

<sup>26</sup> John Mbithi S, *African Religion and Philosophy* (London: Heinemann Educationa Lagos l Book Ltd, 1982).

<sup>27</sup> Ocholla A, 'Traditional Ideologies and Ethic among the Southern Luos,' (1976) The Scandinavian Institute of African studies Uppsala 51-52.

<sup>28</sup> Dillard, Pfau, *Persuasion Handbook: Development in Theory and Practices*, (California, SAGE, 2002), 62.

<sup>29</sup> See section 1.5.4 chapter one, 29.

<sup>30</sup> Mbaabu I, *Language policy in East Africa*, (Nairobi, Kenya: Educational Research and Publications, 1996)

provides that everyone has the right to use the language and participate in the cultural life of their choice. Articles 27 (4), 44 (1 and 2), 49 (1a, b and c) Article 50 (2, 3 and 7) relate to the right of using a language a person is comfortable with. The Constitution bestows official status to English and Kiswahili as follows: Article 7 (1) states that the national language of the Republic is Kiswahili. Furthermore, Article 7(2) states that the official languages of the Republic are Kiswahili and English.

Article 14(3) (a) of the International Covenant on Civil and Political Rights gives the accused persons the right to an interpreter. This is to protect the person's right to a fair process. According to the Universal Declaration of Human Rights, people are free to look for asylum in other states for safety and protection from persecution.<sup>31</sup> While this does not render an automatic right to asylum, the granting of this right remains under the discretion of country. However, states are called upon to put in place fair refugee status determination procedures for asylum-seekers. Article I (1) of the OAU Convention, urges state parties to establish measures which are align with their domestic laws for purposes of giving refuge to asylum seekers. In addition, Article II (2) acknowledges that the protection given to asylum seeker is a humanitarian act. Therefore, it is not to be handled in unfriendly manner by any country.<sup>32</sup>

The duty of persons who interpret in any legal setting is to serve as a bridge between speakers of different languages.<sup>33</sup> Interpreters perform an important duty in the execution of justice in the course of their work. They ensure that the parties to a proceeding have a fair hearing. Further, they also guarantee effective participation in the judicial system to all those involved.<sup>34</sup> Finally, people who are unable to express themselves in English should be helped by interpreters to understand the process closely like any other English speaker.<sup>35</sup> By doing so, the interpreter helps both the non-English speaker and the English speaker to be at the same level of

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<sup>31</sup> Abuya, 'Past Reflections, Future Insight: African Asylum Law and Policy in Historical Perspective,' (2007) 19 (51) International Journal of Refugee Law, 51-54.

<sup>32</sup> Sara Pavanello et al, 'Hidden and Exposed: Urban Refugees in Nairobi, Kenya,' (2010) HPG Working Paper, available on the Overseas Development Institute <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5858.pdf>> accessed 28 September 2020.

<sup>33</sup> Hoza, Jack, 'Towards an Interpreters Sensibility: Three Levels of Ethical Analyses and Comprehensive Models of Ethical Decision-Making for Interpreters,' (2003) Journal of Interpretation: 1-48.

<sup>34</sup> Roseanne, et al, *Fundamentals of Court Interpretation: Theories, Policy and Practices*, (Durham, NC Carolina, Academic Press, 1991).

<sup>35</sup> Ibid.

understanding. Although the aim of an interpreter is to bridge the communication gap, as discussed earlier in this chapter, the interpreter should be able to also bridge any cultural barriers that exist. This includes the meaning of words, vocabularies and phrases. This way, the interpreter then comprehensively allows the asylum seeker to fully participate in the asylum process. Maka advised that:

The main responsibility of interpreters is to convey what an applicant communicates in a language the recipient of the information understands. Interpreters must maintain strict confidentiality with regard to the information they receive when carrying out their duties. They endeavor to be as precise, and accurate as possible. They limit their role to interpretation, and nothing else.<sup>36</sup>

UNHCR Handbook outlines four principles which are important when interpreting in asylum procedure.<sup>37</sup> These include: secrecy, neutrality, accuracy, confidentiality and honesty, as well as professional conduct.<sup>38</sup> These values are usually found in the particular professional policies which regulate the conduct of interpreters.<sup>39</sup> The principles enumerated above are equivalent to virtues or values. For example, confidentiality enhances specific values such as privacy, respect and non-disclosure and aligns with values of equality.<sup>40</sup> Similarly, impartiality is a basic principle which supports the values of fairness and justice.<sup>41</sup> In addition, integrity gives rise to specific values of precision, transparency, justice and perception.<sup>42</sup>

### **2.2.1 Ethical dilemma in interpretation**

At times, interpreters find themselves in a moral dilemma.<sup>43</sup> The most appropriate means of resolving an ethical predicament is to come up with a choice on the basis of clear reasoning.<sup>44</sup> Excellent sense of judgement, critical thinking, and the ability to assess and evaluate a situation are key considerations.<sup>45</sup> In normal circumstances, decisions are usually made immediately without a lot of discussions.<sup>46</sup> Therefore, interpreters should handle ethical dilemmas with

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<sup>36</sup> Interview with Maka, Nairobi, Kenya, 14 November 2020.

<sup>37</sup> UNHCR, 'The Handbook for Interpreters in Asylum Procedures: Vienna, UNHCR Austria,' (2017) 72-78.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Smallwood and James, *Dilemmas, Moral in International Encyclopedia of Ethics* (London: FD 1995) 228-229.

<sup>44</sup> Ibid, 229.

<sup>45</sup> Ibid.

<sup>46</sup> Gernot H et al, 'Professional Ethics and Professional Conduct,' (2017) *Journal of Interpretation*, 71-76.



critical and informed mind-set. They need to be careful and cautious about the many options available to them, and to be prepared to give reasons for their decision. For instance, during an interview process, the asylum seeker gets overwhelmed and cries. The interpreter is convinced that the asylum seeker will not calm down if the interpreter or the asylum officer fails to comfort the applicant.<sup>47</sup> All the same, the refugee status determination officer reminds the interpreter to remain impartial.<sup>48</sup> Further, the basic values of care, charity and empathy as advanced by the African theory on the culture of community are inconsistent with the basic principle of interpretation. Therefore, in this case the interpreter needs to have extensive knowledge on the cultural behavior of the respective community. If the interpreter is abreast with the customs, he or she may positively influence the process of the interaction, although such interaction may still be inconsistent with the rule of impartiality.

Kiki stated that:

I will choose two duties here. First is that they have to be able to effectively listen and communicate as required during the interview. This is key and important for both the asylum seeker and the officer in charge. Second is that they have the duty to be confidential. This is necessary any trust to be established and for security of the asylum seekers.<sup>49</sup>

On the other hand, Leru commented that:

An interpreter helps in bridging the cultural and lingual barrier that may exist between the Asylum-seeker and the assessing officer. Moreover, if the interpreter shares the same country or state with the asylum seeker, the encounter can be calming and assuring. The asylum-seeker will kind of feel at peace with the familiar face.<sup>50</sup>

Efficient interpretation needs one to pay attention to the incoming message.<sup>51</sup> Many scholars define this type of listening as active listening. The active listening is rather different from other types of listening, and needs to be acquired by interpreters.<sup>52</sup> Memory is also recognized as

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<sup>47</sup> Ibid, 77.

<sup>48</sup> Ibid, 78.

<sup>49</sup> Interview with Kiki, Nairobi, Kenya, 17 October 2020.

<sup>50</sup> Interview with Leru, Nairobi, Kenya, 3 December 2020.

<sup>51</sup> Gentile, Adolfo, 'The Genesis and Development of Interpretation in Australia: Salient Features and Implications for Teaching,' (1989) 257-260.

<sup>52</sup> Llewellyn-Jones et al, 'Getting to the Core of Roles: Defining Interpreters Roles and Space,' (2013) 5 (2) International Journal of Interpreter Education 54-72.

crucial by many scholars of interpretation. Regardless of the sort of interpretation, memory and understanding go hand in hand. Therefore, one is a function of the other.<sup>53</sup> Rufus remarked that:

Interpreters help in facilitating communication among people with language barrier and therefore are unable to talk or interact without the help of an interpreter. They do this by interpreting, explaining and re-communicating both oral and printed messages from one language to another. The aim is to ease communication<sup>54</sup>

Following the interviews, it was reported that in most cases the RAS officials would distribute the application forms to asylum seekers and disappear into their offices.<sup>55</sup> Sometimes they ask them to use the little English or Kiswahili they know to fill in the forms.<sup>56</sup> At times they ask any of their family members with some knowledge in the mentioned languages to fill the forms.<sup>57</sup> Interpreters would then interact with asylum seekers and help them fill in the forms after listening to their stories.<sup>58</sup> By doing so, they perform the duty that is not theirs. Tabu noted that:

Some asylum seekers believe that interpreters do a good job helping them fill their forms. However, some say that they fill the application forms using the little English they knew from home. Others only copy what the interpreter writes on the application form of the person sitting next to them.<sup>59</sup>

There is a need to insist on having professional interpreters for effective RSD process. There is a need, too, to hold interpreters accountable. More especially when they carry out tasks which are out of their scope. Further, they should be held accountable when they fail to observe the confidentiality rule.<sup>60</sup> Sometimes interpreters tend to be corrupt. Zida said that:

That same day when the interpreter wrote my story, he called another person and wrote her story using mine on their application form. Interpreters can use similar story for many people. They don't mind the different situation of people. Sometimes they ask for some money for doing the job.<sup>61</sup>

Interpreters need to collaborate with the determination officers to help the asylum seeker undergo a fair process. Participants can for instance explain situations of interpretation which

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<sup>53</sup> Ibid.

<sup>54</sup> Interview with Rufus, Nairobi, Kenya 8 December 2020.

<sup>55</sup> Leru (n50).

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Interview with Hilda, Nairobi, Kenya, 4 January 2021.

<sup>59</sup> Interview with Tabu, Nairobi, Kenya, 7 November 2020.

<sup>60</sup> Ibid.

<sup>61</sup> Interview with Zida, Nairobi, Kenya, 5 January 2021.

they have experienced that were complicated or challenging.<sup>62</sup> Sometimes people become realistic and alert if they are faced with problems that affect them directly.<sup>63</sup> Being faced with a decision that does not please them after an asylum hearing motivates applicants to find valuable solutions.<sup>64</sup> The reality is that, asylum seekers may not have the capacity to question the interpretation. Furthermore, it does not take one to train in order to keep the secrecy rule. There are many interpreters who are able to interpret with open mind and honesty without necessary being trained. They develop skills from practice and experience. Amani contended that:

He was interrupting me when I was giving him the answers. When he was asking me to speak fast, I became confused. Instead of speaking Arabic, I started speaking Bari and the interpreter could not understand what I was saying because he only spoke Arabic. I then told the officers that I needed to speak in Bari in order to say what I had to say.<sup>65</sup>

An interpreter must render a correct and accurate message on interpretation. This is possible by reproducing the exact information which is an equivalent of the message in the original language. Interpreters are seen as verbatim reproducers of message from the applicant to the interviewer. They therefore, have to remain neutral and invisible. The invisibility can be achieved when they interpret without altering, omitting, or manipulating the meaning of the message.

Respondents agreed that there are challenges encountered by asylum seekers.<sup>66</sup> Some found it difficult to communicate with their interpreters where the language variety spoken is different from that of the applicant.<sup>67</sup> One respondent from the Congo stated that she had some difficulties with her interpreter.<sup>68</sup> Though Kiswahili is spoken in Congo, the Kiswahili version spoken in Kenya where the interpreter came from was quite different from the Congo one.<sup>69</sup>

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<sup>62</sup> Hetherington, 'Supervision and the Interpretation Profession: Support and Accountability through Reflective Practice,' (2012) 4(1) *International Journal of Interpreter Education*, 46-57.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Interview with Amani, Nairobi, Kenya, 20 October 2020.

<sup>66</sup> Hilda (n58).

<sup>67</sup> Zida (n61).

<sup>68</sup> Interview with Yve, Nairobi, Kenya, 9 January 2021

<sup>69</sup> Ibid.

It is vital to have a defined evaluation criterion for interpreters.<sup>70</sup> This can be for individual performance while taking into account the whole scenario.<sup>71</sup> Besides, when interpreter's speech and interaction is evaluated sufficiently, then the interpreter can advance and make progress in the career. It is important to make a systematic evaluation. All parties to RSD process have to take a responsibility on the aspect of evaluation. By doing so, interpreters can then improve on their work.

According to the literature reviewed, there was a consensus that interpretation is vital where there is language barrier.<sup>72</sup> This is important for purposes of effective communication. The research established that interpretation is a crucial component in the delivery of justice. One of the challenges asylum seekers face is the language barrier. Mambo stated that:

Interpreters are important in ensuring asylum seekers are granted an audience to determine whether they should be granted refugee status. This aid in ensuring the principle of natural justice is met, the requirement of a fair hearing. In addition, most refugees come from countries whose national languages differ from their host countries. To enable them understand the process of status determination, it is critical to have access to an interpreter, otherwise, the process would be vain.<sup>73</sup>

On the role of interpreters, Mumbi remarked that:

Interpreters are critical in Refugee Status Determination (RSD). All communications between an applicant and the registration and RSD officers must be expressed in a language that both the asylum seeker and RSD officers understand and are able to communicate with clearly. Many times, the officers engaged in the RSD process usually have difficulties comprehending the asylum seekers' languages and therefore the interpreter is a central bridge and conduit that conveys the requisite information to the officer.<sup>74</sup>

Interpreters have to ensure that asylum seekers with language barriers have accurate interpretation. This is to enable the authority reach a fair decision.<sup>75</sup> Interpreters have a duty to ensure that a witness, a juror, a litigant, understand the proceedings fully, as if they spoke the English language fluently.<sup>76</sup> However, interpreters need to be aware of the culture and customs

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<sup>70</sup> Benton G, 'Speak English: Language Access and Due Process in Asylum Proceedings,' (2011) Vol. 34:453, 456

<sup>71</sup> Ibid.

<sup>72</sup> See section 1.5 Chapter one 7-10.

<sup>73</sup> Interview with Mambo, Nairobi, Kenya, 14 October 2020.

<sup>74</sup> Mumbi (n1).

<sup>75</sup> Ibid.

<sup>76</sup> Gile, *The Basic Concepts and Models for Interpreters and Translators Training*, (Amsterdam, John Benjamins Publishing Company, 2009) 7-11.

of the language they interpret. For example, in Luganda, the word “Abaganda” refers to people generally, not necessarily the Baganda people. Kiki commented that:

Interpreters are very important because most of the time asylum seekers do not fully comprehend the language of the country they are seeking asylum and the vice versa. Thus, it is imperative that we have multi-lingual and multi-cultural persons who are competent serving as interpreters.<sup>77</sup>

Amani noted that:

Interpreters facilitate communication between people from different cultures during asylum hearing. This happens between asylum seekers and refugee status determination officers. The aim is to allow asylum officers to assess the application and decide to award refugee status. They therefore serve as an important link.<sup>78</sup>

Occasionally, individuals who represent themselves do not speak the English language fluently. In that case, the officers should determine whether or not they need an interpreter.<sup>79</sup> Otherwise, the individuals may not understand the proceedings, and if they don't understand the proceedings, their cases may be decided unfairly.<sup>80</sup>

Kiki observed that:

The criterion for the refugee status determination is dependent how the asylum seeker relays facts and the ascertainment of these facts to assess whether a person satisfies the inclusion criteria to qualify as a refugee. Communication thus plays a pivotal role and the interpreter's duty cannot be gainsaid.<sup>81</sup>

Many scholars have deliberated on the most appropriate function of the community-based interpreters to enhance best performance. The participative role of community interpreters has led to divergent views about this category of interpreters.<sup>82</sup> At times, interpreters are seen as a word for word reproducers of information while maintaining the neutral and invisible positions.<sup>83</sup> However, interpreters sometimes actively participate in the communication asserting the position of a cultural expert who manages the interaction as a cultural mediator.<sup>84</sup> As Jiang notes, scholars

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<sup>77</sup> Kiki (n49).

<sup>78</sup> Amani (n65).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Kiki (n49).

<sup>82</sup> Goffman Erving, *The Forms of Talk,* (Philadelphia, University of Pennsylvania Press, 1981).

<sup>83</sup> Berk-Seligson S, *The Bilingual Courtroom. Court Interpreters in the Judicial Processes,* (Chicago, Chicago University Press, 1990).

<sup>84</sup> Giovannini et al, *On Both Sides of the Fence: Proceedings of the Evaluation of the Professional Development Seminar for Trainers and Trainees of Cultural Interpreters held in Toronto,* Report prepared for the Ontario Ministry of Citizenship (August 26-28, 1992).

have not agreed on the specific role of interpreters in a concrete interpreting scenario.<sup>85</sup> Roy outlines four functions of a community-based interpreting as: the medium, the communication helper, the bilingual- mediator, and the advocate.<sup>86</sup> These functions are classified according to the level of participation and tasks allocated to the interpreter. The interpreter's involvement is lower in the role of medium and higher in the role of mediator.

The right to an interpretation was emphasized in *Bernard Wachira Kamonye V Republic*,<sup>87</sup> the Kenya Court of Appeal indicated that accused persons are entitled to the service of an interpreter. Interpreters bridge the language barrier in the interest of a fair trial. It is a basic right of an accused person to be availed with the help of an interpreter during the proceeding. With the support of an interpreter, the accused person is facilitated to take part in the process.<sup>88</sup> Further, this right was pointed out in *Livingstone John Muthuke Wanagru V Republic*,<sup>89</sup> the court decided that it is important to avail the interpreter during criminal trials. The court noted that it is a mandatory requirement to interpret the language of the accused person. Therefore, its compliance ought to be reflected in the record of the court proceedings. Although the cases above are criminal matters, the pronouncement of the court on the importance of interpreters is critical and gives directives on the importance of interpreters. Though the study advocates for requirements like training of interpreters, the practice is different. In Kenya interpreters who are bilingual are usually utilized. The courts, RSD, churches and other fields requiring interpretation would be at a standstill should strict measures be stressed. The Nevada Supreme Court emphasized that:

A criminal person who does not understand the procedure going on around him . . . has not received due process of law. He or she might as well have been tried in his or her absence.<sup>90</sup>

In other words, where there is a communication gap, the absence of an interpreter is likely to exclude the applicant from the process. At times, people who have undergone persecution are

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<sup>85</sup> Jiang, Lihua, 'From Community Interpretation to Discourse Interpreting: Establishing some of the useful Parameters' (2007) 2 MuTra LSP Translation Scenarios: Conference Proceedings: 1-10.

<sup>86</sup> Roy, Cynthia, 'Problems with Definitions, Descriptions and the Roles Metaphors of Interpreters,' (1993) 6 (1), *Journal of Interpretation* 127-154, Reprinted in Pöchhacker, Franz and Miriam Schlesinger, *The Interpreting Studies Reader* (London: Routledge, 2002) 345-353.

<sup>87</sup> [2008] eKLR 386.

<sup>88</sup> *Abdalla vs. Republic* [1989] eKLR456.

<sup>89</sup> [2008] eKLR.

<sup>90</sup> *Ton Vs State* 110 Nev. 970, 971-72 (Nev. 1994).

likely to have experienced trauma and therefore find it hard to express themselves.<sup>91</sup> This can significantly inhibit one's ability to "articulate a clear story that successfully summarizes their experiences."<sup>92</sup> Language access is particularly relevant. Interpretation inaccuracies can blend with other challenges to affect articulation of a clear narrative. Such challenges include: trauma, memory loss, inconsistencies and credibility issues, leading to a denial of relief.<sup>93</sup>

### **2.2.2 Qualities of an Effective Interpreter**

Ideally, an interpreter should have the ability to speak a given variety of foreign languages with accurate articulation and intonation.<sup>94</sup> An interpreter should have the competence to articulate the foreign language smoothly, including the nuances and jargons.<sup>95</sup> Similarly, an interpreter should have the knowledge to reproduce the exact, accurate interpretations from one language to another without omitting or adding words.<sup>96</sup> Two kinds of training are usually carried out: the first one is short, inexpensive with high level of concentration to educate interpreters about the profession.<sup>97</sup> The second one is longer. It involves formal programs of teaching and training to advance interpreters' ability in interpreting skills.<sup>98</sup> Proficiency used in interpreting skills involves the double elements of a high level of mastery of two languages and particular performance skills in the modes of interpreting.<sup>99</sup> Obtaining the specific performance skills requires some element of natural ability and practice. Nevertheless, the reality is little formal training is provided to interpreters who work in RSD. Bilingual interpreters without formal training are usually hired.

During the literature review, this study recognized that interpreters who are trained perform better than those who are not. From an interrogation on the aspect of interpretation, this study finds that most interpreters are not qualified. However, they have been able to do some work to

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<sup>91</sup> UNHCR, *Interviewing Applicants for Refugee Status determination*, Training Module RLD 4 (1995) [www.unhcr.ch/](http://www.unhcr.ch/), accessed 8 January 2021.

<sup>92</sup> Alana M, 'Re-Victimization and Asylum Process: Reassessing the Weight placed on Credible Fear, Interviews in Determining Credibility,' (2018) 36, 315, 326.

<sup>93</sup> UNHCR (n91), 17-18.

<sup>94</sup> William E, 'Court Interpretations: Models, Guides for Policies and Practice in the State Courts' (1995) National Center for State Courts 42-45.

<sup>95</sup> *Ibid*, 43.

<sup>96</sup> *Ibid*, 44.

<sup>97</sup> *Ibid*, 44-45.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid*.

enable determination officers make decisions in RSD. Nonetheless, interpreters require official training to improve their performance. Kezia stated that:

There is a grey line in this, however I hold the opinion that qualified and professional interpreters perform better than the unqualified. A qualified interpreter understands the rules and clear roles of an interpreter. They may not fully follow the rules for an effective interpreter but will more often be inclined to stick to their professional obligation.<sup>100</sup>

The Language Expectancy theory discussed in Chapter one points out that in some social setting, certain language variations are used. Language of a judicial or quasi-judicial process often differs from the language we use in other settings. This is not only due to the formal setting of judicial proceedings, but also due to the language specificity of various contexts.<sup>101</sup>

Stanners argues that the absence of education plan for interpreters could lead to their incompetence and possible irregularities.<sup>102</sup> However, as stated in the introduction, interpreters have been able to do a credible work without formal training. They can perfect their skills by experience, on the job training and attending some workshops. This is realistic because, as the situation is in Kenya, there are no specialized training institutions. In addition, we need the service in various contexts of life. Therefore, there is need to utilize the available interpreters in the meantime. Lila advised that:

Interpreters should be sharp. They should convey information accurately. Their mastery of the languages should be accurate. They should refrain from conveying their own perceptions, feelings, or biases, but instead concentrate on their role of being the conveyor of information. They need to be faithful to the meaning of the statements they interpret; they need also to be familiar with the context of the cases they are interpreting and know their subjects well.<sup>103</sup>

Pendo said that:

An effective interpreter comprehensively understands the language and as a deep appreciation of its hidden meanings, idiomatic expressions and stylistic devices so that all interpretation is true to the substance of what the speaker is conveying. An effective interpreter is also honest, open-minded, objective, and impartial, and the only goal should be effective communication.<sup>104</sup>

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<sup>100</sup> Interview with Kezia, Nairobi, Kenya, 10 January 2021.

<sup>101</sup> Ibid.

<sup>102</sup> Stanners P, 'Poor Interpretation put Asylum-seekers at a Risk, The Copenhagen Post,' (2012). September 11, <<http://cphpost.dk/news/national/poor-interpreters-put-asylum-seekers-risk-70>> accessed on 15, May 2020.

<sup>103</sup> Interview with Lila, Nairobi, Kenya, 25 October 2020.

<sup>104</sup> Interview with Pendo, Nairobi, Kenya, 11 November 2020.



The variety of spoken language and used in various contexts is characterized by professional jargon and complex syntax.<sup>105</sup> There is no doubt that those who have worked longer as interpreters have acquired some of the skills. Hence, expertise in interpretation can be obtained from experience. Interpreters should then allow themselves to learn from the experienced colleagues as they build their competence. Korir contended that:<sup>106</sup>

There are so many challenges. One is that interpretation requires knowledge on special terminology. We need to understand the legal system, the languages and ensure we interpret them in a way to ensure that a common person can understand. That is one of the challenge I personally had. It's just on-job-training. We go for short courses for hardly a month but that does not necessarily train you as an interpreter, it's an on-job-training.

In response on whether training is one of the qualities of an interpreter, of the 14 interviewees, 12 said it is important to train interpreters. Two affirmed that there was no need to train interpreters. Therefore, 85% [n=12] of the interviewees find training interpreters as a requirement. While only 14% [n=2] did not see the essence of training interpreters as long they are fluent in the language of the asylum seeker.

Interpreters assist people of various education levels, social status, cultural backgrounds and age. As a result, their knowledge of cultural nuances should be deep. They should have abroad understanding of vocabularies, jargons and slang.<sup>107</sup> Further, they need to firmly stick to their moral code. Interpreters act as intermediaries in bridging the language gap to ensure effective communication. They should uphold the professional code of conduct, neutrality, confidentiality and trustworthiness.<sup>108</sup> In addition to that, interpreters' personal traits are critical. There are persons who volunteer to interpret bearing good traits of honesty, open-mindedness and fluency. Such persons by no means are capable as interpreters.

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<sup>105</sup> Berk-Seligson S, *The Bilingual Courtroom: Courts Interpreters in the Judicial Processes* (Chicago, University of Chicago Press, 2012) 256.

<sup>106</sup> Interview with Korir, Nairobi, Kenya, 24 October 2020.

<sup>107</sup> UN High Commissioner for Refugees, 'Interpreting in a Refugee Contexts,' 1 January (2009) 'Self-Study Module 3' <<http://www.refworld.org/docid/49b6314d2.html>> accessed 28 April 2020, 17.

<sup>108</sup> Ibid.

### 2.2.3 Cultural Competence

Cultural competence is the ability of persons and organizations to respond respectfully to the social, cultural, and linguistic needs of people of all cultures.<sup>109</sup> Cultural competency is important because we live with people from different ethnic and cultural background like migrants and asylum seekers.<sup>110</sup> The respect of cultural diversity recognizes the values, customs and beliefs of other people and the need to protect and preserves their dignity.<sup>111</sup> Interpreters must not only act as a linguistic bridge but also a cultural bridge.<sup>112</sup> They should have the knowledge to detect verbal as well as non-verbal cultural traditions.<sup>113</sup> As de Jongh notes, interpretation is not a linguistic exercise in for exact word equivalencies.<sup>114</sup> Therefore, factors such as cultural nuances, and geographic differences, register, style, intonation and non-verbal communication cues are essential factors.<sup>115</sup> Customs, thoughts and beliefs allow an interpreter to convey the intended message to a non-native speaker with ease and certainty. Candy stated that:

He or she helps in bridging the cultural and lingual barrier that may exist between the Asylum-seeker and the assessing officer. Moreover, if the interpreter shares the same country as the asylum-seeker, the encounter can be calming and assuring.<sup>116</sup>

An interpreter who is knowledgeable in many languages is more efficient in the work. Cultural knowledge is important in preserving the rights of asylum seekers. On importance of biculturalism, one author noted that:

Represents the proficiency with both one's traditions and culture of other a society, nation, region or area where one has settled. The components include: customs, beliefs, norms, jargons, slang, nuances, etc. where one can switch from one culture to another with all the competence, emotional and artistic elements into a verbal communication using totally diverse forms of communication. In essence, to interpret is to understand

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<sup>109</sup> Christina et al, *Interpreting in Changing Landscapes: Selected Papers from Critical Link 6* (Amsterdam, John Benjamins Publishing Company, 2013) 187-202.

<sup>110</sup> Ibid.

<sup>111</sup> Cross T, et al, 'Towards Culturally Competent Systems of Care: A Monograph on Effective Services for Minority Children who are severely and emotionally disturbed,' (1989) Volume 1 Washington DC: Georgetown University Child Development Center 28-29.

<sup>112</sup> Ibid.

<sup>113</sup> Christina et al (n109).

<sup>114</sup> De Jongh and Elena, 'Cultural Proficiency and Non-verbal Communications in Court Interpreting' (1991) Vol 7 (1) 99-106.

<sup>115</sup> Ibid.

<sup>116</sup> Interview with Candy, Nairobi, Kenya, 21 November 2020.

wholly the communication in order to separate it from the oral content and reconstruct it with the intact message in a different speech.<sup>117</sup>

The duty of interpreters is to constantly transmit the correct message from one language to another. The meaning of statement is to remain intact. As already discussed, interpretation process has to take into account other aspects. These include: the customs, culture, traditions, and non-verbal cues like intonation and tone.<sup>118</sup> Clearly, interpretation process involves linguistic and extra-linguistic criteria. Verbal communication and customs are hence indivisible.

Equivalence in interpretation is not word for word, sign for sign, or gesture for gesture, but rather message similarity.<sup>119</sup> Further, because language and gestures are conventional symbols, they have to be analyzed in the context of the community in which they are used as conventions.<sup>120</sup> Customs offers a logical way of coping with the unlimited challenges of reality.<sup>121</sup> Language is usually an expression of customs.<sup>122</sup> It communicates significant message on how a given culture perceives the world.<sup>123</sup> According to Frank, besides dialectal connotation of words and expressions, cultural fluency includes demeanor and non-verbal communication.<sup>124</sup> As reflected in the literature review, a gap exists between the practice on ground and theory in books. Consequently, interpreters are obliged to ‘step out’ of role.<sup>125</sup> Cultural fluency is essential for accurate interpretation.<sup>126</sup> To be able to interpret speech, one must be able to consider the entire context, culture and traditions into the target language.<sup>127</sup>

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<sup>117</sup>Seth J, ‘Biculturalism and Context: What Is Biculturalism, and When Is It Adaptive?’ (2010) 53(1) Hum Dev 26-32.

<sup>118</sup> Elena M de Jongh, ‘Foreign Languages and Interpreters in Courtrooms: The Case for Linguistic and Cultural Proficiency’ (1991) Vol. 75 No 3, The Modern Language Journal 285-295.

<sup>119</sup> Ibid.

<sup>120</sup> Frankenthaler, ‘How to Work with Court Interpreters,’ (1981) 95 New Jersey Lawyer 24-30.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid, 27.

<sup>123</sup> Ibid, 28.

<sup>124</sup> Ibid, 29-30.

<sup>125</sup> De Jongh (n114)

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

## 2.2.4 Competent Interpreters

A competent interpreter is a person who has professional skills and abilities, and exhibits an excellent level of expertise in two or more languages.<sup>128</sup> The person should have the suitable training and expertise to remain impartial.<sup>129</sup> Similarly, a competent interpreter should be capable of adhering to the Code of conduct and Ethical Standards.<sup>130</sup> Further, such interpreters have the skill to evaluate and understand the information and reproduce it in another language without any difficulty. However, unqualified interpreters are hired too often. In the absence of formalized standards, interpreters in Kenya are forced to come up with their own standards of interpretation. Besides, if we only allow competent professional interpreters, shall we have interpretation services? Simply put, interpretation in Kenya has been going on, though interpreters are not trained. Hence, if we close doors for non-professional interpreters, then we shall have almost zero interpreters. Competence therefore, goes beyond formal training to include other factors. Kiki advised that:

Competent interpreters will obviously perform better because they have met the requisite qualifications of interpretations. Further, due to their training, they understand the bare minimum regarding refugee law. Trained interpreters are capable of using their skills and abilities in conducting interpretation. They are less likely to express their opinions, or biases in interpreting.<sup>131</sup>

Tabu commented that:

If competency in this case means education credentials, then I am afraid I will say “NO.” This is mainly because the work of an interpreter is more than just translating the language. There is cultural, historical, and inter-personal issue that needs to be brought into surface. Thus, qualified person should be a person who in addition to being culturally and lingual informed, he or she should be honest, professional, caring, attentive to small details, and empathic.<sup>132</sup>

United Nations International Criminal Tribunal for Rwanda usually identifies potential interpreters. They are recruited and trained in interpreting skills.<sup>133</sup> These include visual translation, successive interpretation, and simultaneous interpretation after which they are tested.

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<sup>128</sup> Sylvia Kalina, ‘Fachhochschule Köln, Interpreting Competences as a basis and Goal for Teaching,’ (2016) 2-5.

<sup>129</sup> Ibid, 8-13.

<sup>130</sup> Elena (n118).

<sup>131</sup> Kiki (n49).

<sup>132</sup> Tabu (59).

<sup>133</sup> Ndongo-Keller, J, ‘The Practices, Training and Ethics of Interpretations in Judicial and Multicultural Environment: The Experiences of the United Nations International Criminal Tribunal for Rwanda,’ (2013) Talking to the World.

Those who pass the interpretation test undergo further training. After training they work as court interpreters.<sup>134</sup> It is important for interpreters to express themselves effectively in various languages. They should have an excellent grasp of terminologies and jargons in various languages and cultures. Just growing up speaking a language does not automatically empower one with language skills. Accordingly, measures must be taken to ensure compliance with legal standards.

Shishi remarked that:

It is my considered opinion that qualified interpreters definitely perform better than unqualified ones. They have the necessary language requirements, experience and are aware of the code of conduct and ethical considerations that arise in interpretation. Similarly, they are trained in necessary refugee terms mostly used in asylum hearings and possess special skills including how to deal with trauma and how to be sensitive with regards to gender, age, diversity and culture when carrying out interpretation. They understand their impartial and neutral role in addition to the registration and RSD procedures.<sup>135</sup>

Arguably, the need for training does not imply that the interpreters do not have knowledge of the language required. Training of interpreters recognizes that interpretation is a skill that goes beyond simply knowing and speaking two languages. Interpreting is a highly focused career that needs qualification and experience. Qualified interpreters obtain the knowledge which the common bilingual interpreter does not have. Korir Contended that:

Qualification is Very, very, important without any skills; it's like every day you have to teach yourself what to do. Nobody teaches you what to do and yet everybody expects you to perform well, they don't care whether you have received any relevant qualification or not.<sup>136</sup>

Language should not be an obstacle that prevents people from applying for asylum or voicing their concerns.<sup>137</sup> Speaking through an interpreter is considered a human right for asylum seekers. It is the obligation of the country of asylum to give all necessary facilities to persons

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<sup>134</sup> Ibid.

<sup>135</sup> Interview with Shishi, Nairobi, Kenya, 19 November 2020.

<sup>136</sup> Korir (n106).

<sup>137</sup> Ibid.

seeking asylum.<sup>138</sup> They should be able to adhere with all the requirements, including availing the services of competent and impartial interpreters.<sup>139</sup> Fahari acknowledged that:

Qualified interpreters perform better because they are able to convey the exact message to the recipient and this accurate message is what will be used by the host countries in granting the refugee status to the asylum seekers.<sup>140</sup>

In South Africa, a number of people seeking asylum come from both African countries and the rest of the world.<sup>141</sup> Upon arrival in the country, they are directed to the various refugee reception centers.<sup>142</sup> They are basically received in the country to start the asylum process. At the refugee reception offices, they complete application forms and, later on are interviewed by DHA officials.<sup>143</sup> The information gathered during the interviews determines whether or not the applicant qualifies for the asylum-seeker document and, at a later stage, for refugee status.<sup>144</sup>

Lila said that:

DHA ensures interpretation Services to all Immigration Services in eighteen languages including Amharic, Arabic, Bengali, Chichewa, Chinese, French, Gujarat, Hindi, Igbo, Lingala, Oromo, Portuguese, Shona, Somali, Swahili, Tigrena, Twi and Urdu. DHA provided interpreting services to them. All the interpreters are obtained from outside the DHA. Some are physically present during the interview or at least deal with telephone interpreting service.<sup>145</sup>

An ideal interpreter is one who is certified.<sup>146</sup> Such an interpreter needs to have learnt interpreting techniques and obtained experience in legal settings among others.<sup>147</sup> Furthermore, the interpreter must have knowledge of immigration terminology,<sup>148</sup> which is crucial. If the interpreter does not personally know the claimant, it will work very much in his or her favour. An interpreter with such qualities is likely to be impartial, remain professional and ensure

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<sup>138</sup> United Nations High Commissioner for Refugees, 'Handbooks on Procedures and Criteria for Determining Refugee Status determination,' (UNHCR Handbook, 1992) para 198.

<sup>139</sup> Article 50 (2) M of the Constitution of Kenya, 2010.

<sup>140</sup> Interview with Fahari, Nairobi, Kenya, 18 January, 2021.

<sup>141</sup> Ncube M, *Assessing the Outcomes of the DHA/RMC Translation and Interpretation Services Project Refugee Ministries Centre (RMC) report* (May 2013).

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Lila (n103).

<sup>146</sup> NAATI, 'Ethics of Interpreting and Translating: Guides to obtaining NAATI Credentials,' (2013) National Accreditation Authority for Translators and Interpreters LTD Canberra 2013. July 2013. <[https://www.naati.com.au/media/1257/ethics\\_information\\_booklet.pdf](https://www.naati.com.au/media/1257/ethics_information_booklet.pdf)> 2-8 accessed 10 March, 2021.

<sup>147</sup> Ibid, 4.

<sup>148</sup> Ibid, 6.

accurate rendition of the story. Interpreters are guided by ethics and honesty and they understand the dangers of wrong interpretation.<sup>149</sup> However, there are potential alternatives to reinforce the legal duty of an interpreter. Such measures ensure that the testimony made by the asylum seeker is not only correct, but also makes sure that participants to the asylum proceeding are at the same level of understanding. They include: experience, learning on the job and captivating relevant personality, traits and good practices in interpretation.

To sum up, interpreting skill includes the competence to process information in a unique manner as a conduit.<sup>150</sup> Over the years, many scholars have argued that interpretation compels one to ignore personal thoughts and views.<sup>151</sup> An interpreter is not the author of the spoken words, rather, a medium through which information is transmitted from one language to another.<sup>152</sup> That said, interpreters' personal feelings, opinions, ideas and views about the subjects they interpret, are not allowed to be manifested in the process of interpretation.<sup>153</sup>

### **2.2.5 Language Fluency**

Linguists have not agreed upon a single universal definition of fluency. However, Bailey defined fluency as the capacity to communicate fast and comfortably with no hesitation or abnormal pauses which may result to hindrances in communication.<sup>154</sup> Speed, pauses, proper expressions, and degree of understanding are some key elements of fluency.<sup>155</sup> According to Shahini and Shahamirian one of the major characteristics of communicative competence is fluency.<sup>156</sup> Fluency is considered as an important indicator for progressing in language learning.<sup>157</sup> Accordingly, it becomes one of the conditions which ensure success in communication.<sup>158</sup> Gaps in vocabulary are possible but a fluent speaker can easily guess the meaning from context. He or she can get a point across by explaining, rewording, or describing the unfamiliar word.

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<sup>149</sup> Ibid, 6-7.

<sup>150</sup> Henderson J, *Personality and the Linguists*, (Bradford UK, Bradford University Press, 1987) 225.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Bailey K, *Practical English Languages Teaching and Learning*, (New York, McGraw-Hill Contemporary, 2003).

<sup>155</sup> Ibid.

<sup>156</sup> Shahini and Shahamirian, 'Improving English Speaking Fluency: The Role of Six Factors,' (2017) 8 (6) *Advances in Language and Literary Studies*, 100-104.

<sup>157</sup> Chambers F, 'What do we mean by fluency System?' (1997)25(4) 535-544.

<sup>158</sup> Ibid.

It is not enough that the interpreters say that they can speak a certain language.<sup>159</sup> The eligibility officers ought to establish that indeed the language can be spoken to a level that is sufficient for interpretation. As discussed in the literature review in judicial systems like that of the USA and South Africa,<sup>160</sup> emphasis is put on qualification and certification of interpreters. Consequently, interpreters are subjected to proficiency tests to check their legibility. Korir advised that:

The work of an interpreter is more than just translating the language. There is cultural, historical, and inter-personal issue that needs to be brought into surface. Thus, qualified person should be a person who in addition to being culturally and lingual informed, he/she should be honest, professional, caring, attentive to minute details, and empathic.<sup>161</sup>

Pendo noted that:

The difficulty comes in when the interpreter is subjected to technical jargon. When we have an expert witness like a medical practitioner, he will use medical terms and expect it to be interpreted, because an interpreter is the link between the determination officer and the party.<sup>162</sup>

Language is the basis of interpretation.<sup>163</sup> Essentially, interpretation is re-expressing what has been said in one language in another language.<sup>164</sup> At its lowest levels of performance it can be performed by persons with minimum knowledge of the language. The requirements become more stringent in RSD interpretation.<sup>165</sup> Although training interpreters is advantageous for interpreters, informal practices will still remain prevalent.<sup>166</sup> The need for training of interpreters should be considered as a continuing process so that the untrained ones can still be utilized as they are phased out gradually.<sup>167</sup> There should be numerous training opportunities both in the formal and informal sector of a country.<sup>168</sup> Further, employees in countries where many languages are spoken should be equipped with basic interpreting skills. As a result, the

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<sup>159</sup> Treffers-Daller, Jeanine, 'Operationalizing and measuring languages dominance,' (2011) 15 International Journal of Bilingualism 1-17.

<sup>160</sup> See Chapter one, section 1.5.

<sup>161</sup> Korir (n106).

<sup>162</sup> Pendo (n104).

<sup>163</sup> Treffers-Daller (n159).

<sup>164</sup> Pendo (n104).

<sup>165</sup> Ibid.

<sup>166</sup> Tseng, Joseph, 'Interpreting as an Emerging Professions in Taiwan: A Sociological Model,' (1992) Unpublished Master's Thesis, Fu Jen Catholic University, Taiwan.

<sup>167</sup> Ogechi N, 'On Language Rights in Kenya,' (2003) 12(3) Nordic Journal of African Studies, 277-295.

<sup>168</sup> Ibid.



interpretation ability may help them improve on their service delivery to the public. As discussed earlier, interpretation services are widespread in Kenya however, they are not formal.

### **2.3 Consequences of Poor Interpretation**

The literature reviewed shows that misinterpretation happens in judicial settings.<sup>169</sup> The study identified gaps on measures to be used to overcome poor interpretation.<sup>170</sup> Further, the fieldwork affirmed that there are cases of misinterpretation in RSD. Various factors like differences in understanding, knowledge gaps, and lack of awareness on respective contextual setting leads to poor interpretation.<sup>171</sup> The result is misguidance that leads to making poor judgments. Further, it widens communication gaps and results to poor decision making.<sup>172</sup> The reason is people have different abilities in understanding and decoding information.<sup>173</sup> Other reasons of misinterpretation could be rush judgment, making assumptions, biasness, or inadequate understanding.<sup>174</sup> For one to interpret well, there is need to understand the message based on information, and details of the story as narrated by the speaker.<sup>175</sup> It happens at times that a group of people may analyze the same situation and come up with different findings. Many states do not use qualified interpreters hence they jeopardize asylum seekers' constitutional rights.<sup>176</sup> Inaccurate interpretation leads to devastating consequences to asylum seekers' right to life, liberty, family, and property interests.<sup>177</sup> Astiz found out that very few interpreters in courts are acquainted with interpreting methods used by qualified interpreters.<sup>178</sup>

Amani said that:

Yes, it has happened to me. There are instances where you interpret and the officer is discontented. I have seen that happen and noted that it could lead to a wrong decision. If the asylum seeker claims that the interpretation was not done well and he did not understand what was going on, whatever judgment had been passed an appeal can easily

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<sup>169</sup> See Chapter one, Section 1.5.

<sup>170</sup> Ibid.

<sup>171</sup> Hammond R, 'Lost in Translations: Twin Cities Reader,' (1992) 8 (1), 11-18.

<sup>172</sup> Ibid.

<sup>173</sup> Hale S, 'The Challenges of Court Interpreting: Intricacies, Responsibilities and Ramifications,' (2007b) 32(4) *Alternative Law Journals*, 198–202.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Carlos A, 'Non-English Speaking Individuals and the Criminal Justice Systems: A Violation of Due Process of Law?' 32-43.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

follow on the point of misunderstanding. Denial of asylum status could occur or asylum status may be granted even in cases that are not genuine.<sup>179</sup>

When the level of distortion is high it means there is lack of accuracy.<sup>180</sup> Accuracy is one of the cornerstones of efficient interpretation. The researcher asked a pertinent question to the respondents. The aim was to investigate whether the interpreter's duty in the asylum process was one of the contributing factors for the denial of the refugee status. Out of 20 respondents, 90% [n=18] of them were sure that poor interpretation contributes to the negative outcome of the decision. In addition, they said that at times misinterpretation led to misrepresentation and withholding of material facts during asylum interview. However, 10% [n=2] were not sure.

Koki contended that:

Persons who would be deserving of the refugee status may be turned away due to language barrier. An asylum seeker may not be granted refugee status or the same may be compelled to go back home country and may be prone to human rights violations. Further, interpretation that is not of the acceptable standard can result in the rejection of an application or in the acceptance of an application that should otherwise have been rejected.<sup>181</sup>

Maka stated that:

Yes, this happens quite a lot. If you have a poor interpreter, he or she can give false information or hope to both asylum-seeker and the assessing officer. Worst is if the interpreter is a dishonest person. He can relay wrong information. This wrong information can be in support of asylum-seekers story or against it. This former is more common if the interpreter and asylum-seeker share some commonalities e.g. language, religion, tribe, political ideology or when interpreter has presented him/herself in the decision making person.<sup>182</sup>

Courts have affirmed that for interpreters to reproduce the exact meaning of the message at any judicial proceedings, they should be trained to understand the legal systems.<sup>183</sup> In addition, they should have interpreting skills, and professional ethics.<sup>184</sup> It is argued that interpreters' main duty is to give correct and accurate interpretations. Further, interpreters must maintain the speaker's

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<sup>179</sup> Amani (n65).

<sup>180</sup> Owiti B, 'Meaning loss in Interpretation: A Judgment Ruling in Nyando Magistrates Court Kenya,' (2015) Retrieved from Academia: <<https://www.academia.edu/9502888/>> Accessed 23 October 2020.

<sup>181</sup> Interview with Koki, Nairobi, Kenya, 28 November 2020.

<sup>182</sup> Maka (n36).

<sup>183</sup> Susan Berk-Seligson, *Bilingual Courtrooms: Court Interpretation in the Judicial Processes*, (published by University of Chicago Press, 2017).

<sup>184</sup> See *Rasaratnam v Canada* [1991] 1F.C. 706.

intention of the message.<sup>185</sup> Without any knowledge interpreters may not know such necessities of interpretation. Skills of interpretation enable them to reproduce the original message as closely as possible. Occasionally, interpreters intervene openly, paraphrase and filter the statements of the claimant. At times, they even attempt to weigh the validity of their communication. By so doing, the interpreter tends to prejudice the applicant's claim.<sup>186</sup> Sometimes it is almost impossible to get equivalent words in interpretation. An interpreter should be sharp enough to get a word that is as close as possible to the meaning of the original word. If they fail, the meaning will be lost. Maka said that:

Many asylum seekers are not happy with their interpreters' attitude, which does not permit them to speak freely. When I was struggling to clarify the story, the interpreter said to me to use few words. He also told me to speak faster because he has other people to attend to.<sup>187</sup>

With regard to interpreters' right, the Third Circuit of the Court of Appeal held that the accused person's procedural rights are violated if they are not given the assistance of an interpreter.<sup>188</sup> In that case, interpretation was insufficient and "nonsensical" during the hearing before the Immigration Judge.<sup>189</sup> As an example of the interpretation errors that occurred, inquiries were made to establish whether Augustin was from Haiti, his answer was interpreted as "I am not married as yet, but I know I am the Haitian."<sup>190</sup>

Martin and Valero-Garcés claim that, it is difficult for interpreters to interpret details they are not familiar with.<sup>191</sup> In response, Gile comments that interpreters and translators must have sufficient knowledge on the language or speeches they deal with.<sup>192</sup> From the foregoing, an interpreter should have not only been fluent in the language but also had the knowledge of the nuances, jargons and vocabularies. Hammond argues that responses made by non-English speaking

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<sup>185</sup> Keselman et al, 'Mediated Communications with Minors in Asylum-Seeking Hearing,' (2008) 21(1) *Journal of Refugee Studies* 103–116.

<sup>186</sup> Pöllabauer, *Interpreting in Asylum Hearings: Issue of saving face* (Netherlands: Library of Congress 2007) 39.

<sup>187</sup> Maka (n36).

<sup>188</sup> *Augustin vs Sava* 735 F2d 32 (2d Cir 1984).

<sup>189</sup> *Ibid.*

<sup>190</sup> Benton G, 'Speak English: Language Access and Due Process in Asylum Proceedings,' (2011) Vol. 34:453, 456.

<sup>191</sup> Martin A, Valero Garcés in Benjamins J, '*Cross Border in Community Interpreting: Definitions and Dilemma*', (Library of Congress, Netherlands, 2009) 2-3.

<sup>192</sup> Gile D, *The Empirical research into roles of knowledge in interpreting: methodological aspects, Knowledge systems and translation* (Berlin: Mouton De Gruyter, 2005) 149-171.

accused persons or witnesses can be wrongly interpreted.<sup>193</sup> The interpreter may precisely use incorrect words or may embellish the question to the witness.<sup>194</sup> The interpreter may also give unnecessary details or dodge the question by translating only part of it.<sup>195</sup> For example, they may choose not to interpret vocabularies and jargons that they do not know. As a result, false information may lead to denial of asylum to applicants who qualify.

### 2.3.1 Measures for Effective Interpretation

Measures is defined as a plan or course of action suggested to be considered for effective interpretation. Interpreting in RSD needs an outstanding level of precision.<sup>196</sup> This high level of accuracy poses a dilemma to unqualified interpreters.<sup>197</sup> This paper established that it is vital for those interpreting to have some qualification in order to interpret accurately.<sup>198</sup> Trained interpreters tend to transmit accurate messages compared to those who are not trained.<sup>199</sup> On one hand, UNHCR in collaboration with the government of Kenya should provide training service. On the other hand, the asylum officers should ensure that qualified interpreters are available whenever they are needed. On improvement on the quality of interpretation, Chacha pointed out that; “they should be trained by a credible institution generally, interpreters need to be well trained about their subject matter and the context.”<sup>200</sup>

Zida commented that:

RSD processes should always be carried out by qualified interpreters with certification or accreditation from a reputable interpretation institution and therefore States need to invest in interpreters to ensure that the human resource is available and that training is of an acceptable quality. Like other mainstream professions such as law and accounting, interpreters should undertake continuous professional development so as to maintain and continually update their understanding and knowledge of the necessary proceedings and technical vocabulary that might be encountered during performance of their duties.<sup>201</sup>

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<sup>193</sup> Hammond (n171).

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Ghertner R, *Implementing of Meaningful Access: Language Access in New York City School*, Reports to the New York City Department of Education, (New York, 2011).

<sup>197</sup> Lee J, ‘A Pressing Need for the Reforms of Interpreting Services in Asylum Setting: A Case Study of Asylum Appeals Hearings in South Korea,’ (2013) (1) 27 *Journal of Refugee Studies*, 4-6.

<sup>198</sup> Christian O, ‘Experimental Studies into the Acquisition of Cultural Competences in Translator Training: Research designs and Methodological Issues,’ (2015) Vol 7 No 1 *Translation and Interpreting*, 90-91.

<sup>199</sup> Ibid.

<sup>200</sup> Interview with Chacha, Nairobi, Kenya, 28 December 2020.

<sup>201</sup> Zida (n61).

In his research, Gile states that training of interpreters is useful to anyone who wishes to be a professional interpreter in order to reach their full potential.<sup>202</sup> He believes that preparation helps interpreters improve their abilities more quickly than by field experience and self-instruction.<sup>203</sup> To him that requires a lot of trial and error.<sup>204</sup> The minimum requirement of training and certification should be expected of all interpreters.<sup>205</sup> Training offered by the government or UNHCR should include interpretation skill training, legal language training and language proficiency tests.<sup>206</sup> Professional interpreting executed by qualified and casual workers may probably be a tip of the iceberg as the problem may persist. There are so many languages spoken in Africa. These languages include local or vernacular languages and language alternation, hence the need for more specialized training. Koki said that:

My thoughts here are based from the experience in Kakuma camp. Several interpreters are not that qualified to properly handle the needs of the asylum seekers. This in my opinion is a problem to both the asylum seekers and the state.<sup>207</sup>

A National database of all certified interpreters should be kept by the Refugee Affairs Secretariat. This centralized database will enhance accessibility and sustainability of competent interpreters. Standardization and the accreditation of community interpreting are important.<sup>208</sup> RAS, UNHCR and other stakeholders like civil society should collaborate in drafting standards and guidelines for interpreters. That said, standardization can be achieved through education, legislation and specific interpretation guidelines.<sup>209</sup> According to Robert, the following conditions should be met:<sup>210</sup> streamlining the responsibility of community interpreters, educating them, having the instructors of community interpreters trained, training of officers working in RSD and certification of community interpreters.<sup>211</sup> Once it is understood that interpretation has

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<sup>202</sup> Gile, *Basic Concept and Model for Interpreters and Translators Training*, (Amsterdam and Philadelphia, John Benjamins, 1995) 283.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Lee J, *Court Interpreting*, (2016) 192-195.

<sup>207</sup> Koki (181).

<sup>208</sup> Roda B, 'Community Interpreting Today and Tomorrow,' (1994) 1 133-136, in Krawutschke, *Proceedings of the 35th Annual Conference of the American Translators Association*, (Medford NJ, Learned Information, 1994) 127-138.

<sup>209</sup> Ibid, 133.

<sup>210</sup> Ibid, 134.

<sup>211</sup> Ibid, 135.

a direct bearing in RSD decision, interpretation standards will be realigned to fit in with the goal of justice for all as advanced by the natural law theory.<sup>212</sup> Mumbi advised that:

Those that break the laws in regard to interpretation should be arraigned in the court of law and in found guilty be punished in accordance with the law. This would be a deterrent way to enforce the law. I however also believe that with proper training and oath taking, interpretation services would improve.<sup>213</sup>

Fahari remarked that:

Increase their numbers while at the same time providing sound training on their role within the context of the RSD process. Training helps them be conversant with the languages of the neighboring countries which are more likely to produce asylum seekers.<sup>214</sup>

Clearly, training does not necessarily mean formalizing interpretation as a career. Nonetheless, as argued in South African situation, officials working in public sector can be empowered with interpretation skills.<sup>215</sup> This can be done by ensuring that the workers in the respective sectors are given interpretations tips.<sup>216</sup> Further, it would give the officers greater acknowledgment for the language services they give in the course of their employment. For example, oral translation of written documents by police officers in police posts to help clients file complaints or fill in a form. By so doing every language of a country is considered in the course of interpretation.<sup>217</sup> Providing employees with basic interpreting skills in countries with many languages might enable organizations to become more efficient in their service delivery.<sup>218</sup> However, various trainings opportunities should exist in both formal and informal sectors. All parties in the legal system should be sensitized by the government and stakeholders like the civil society and Non-governmental organizations. Sensitization basically on the importance of interpretation and the effect it has on the judicial decisions.<sup>219</sup> Clear guidelines for interpreters should be established.

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<sup>212</sup> See Theoretical Framework, Chapter One, section 1.8.

<sup>213</sup> Mumbi (1).

<sup>214</sup> Fahari (n140).

<sup>215</sup> Ralarala K, 'Analyses of Critical Voice and Style in Transpreters Translations of Complainants and Narratives,' (2016) 2(1) Translation and Trans-language in Multilingual Contexts 142-166.

<sup>216</sup> Marais K, et al, 'Motivating the translation and development nexus: Exploring Cases from the African Continent,' (2019) 24(4) The Translator 380-394.

<sup>217</sup> Ralarala (n215).

<sup>218</sup> Cuvelier T, *Multilingualism for Empowerment* Pretoria, (Republic of South Africa, Van Schaik, 2013) 72-90.

<sup>219</sup> Gile D, *Teaching Conference Interpreting: A Contribution in Trainings for the New Millennium*, (Amsterdam, John Benjamins, 2005) 127-152.

Guidelines generally contain explicitly formulated norms to direct professionals.<sup>220</sup> Moreover, guidelines also help in addressing ethical concerns that come up at workplaces. Therefore, the government, UNHCR and the Civil Societies should incorporate values in interpreters' guidelines.

### 2.3.2 Setting High Standard in Interpretation

As defined earlier in this chapter, in essence, a standard is an agreed way of doing something. Quality of work is believed as one of the main challenge faced by International Association of Conference of Interpreters.<sup>221</sup> Despite the consensus on some elements of interpreting, there is still no distinct concept of what good interpreting is.<sup>222</sup> Users, as the consumers of interpretation services, their expectations and opinions are imperative in defining quality. Satisfaction by the audience is the main objective in interpreting.

Has absence of interpretation or inadequate interpretation ever influenced the nature of a case? Yes. A number of cases have been jeopardized by poor interpretation in courts. As demonstrated in the *State of Ohio vs Alejandro Ramirez*, a Mexican citizen who could not speak, or read English was interviewed by an incompetent interpreter.<sup>223</sup> The interpreter was not conversant with legal terms and made inaccurate renditions.<sup>224</sup> The accused person was convicted of murder but the decision was later overturned.<sup>225</sup> This has been a landmark case in relation to interpretation for LEP persons. It is vital for the Judiciary to ascertain that the available interpreter is competent.

Without an interpreter, a victim will not follow proceedings at RSD. It will be as if the person is voiceless. Failure to availing a qualified interpreter poses a risk to an individual's physical and psychological welfare. The first case to declare that interpretation is a basic right was in the *United States Negron v. State of New York*.<sup>226</sup> The Court of Appeals reversed the murder

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<sup>220</sup> Hoza J, 'Towards an Interpreter Sensibility: Three Levels of Ethical Analysis and a Comprehensive Models of Ethical Decision Making for Interpreters,' (2003) *Journals of Interpretation* 1-48.

<sup>221</sup> AIIC, 'Practical Guide for Professional Interpreters,' (1982) <<http://www.aiic.net/ViewPage.cfm/page628.htm>> Accessed 25 November 2020.

<sup>222</sup> Ibid.

<sup>223</sup> *State vs Ramirez*, 1999 No. 97-L-289.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

<sup>226</sup> 434 F.2d 386 (1970)

conviction of a Spanish speaking person because of poor interpretation.<sup>227</sup> Consequently, the Congress enacted the Court Interpreters Act of 1974. The law expects Federal Courts to appoint licensed and competent interpreters for criminal and civil matters.<sup>228</sup> The regulation outlines various classes of accredited and skilled interpreters.<sup>229</sup> According to the rules, the administrative office of the United States is authorized to approve the qualification of interpreters.<sup>230</sup> The law enumerates some forms of interpretation which are approved in United States. They include: concurrent, successive and sight translation.<sup>231</sup> On the aspect of setting high standards, Asimwe contended that:

Yes, in my opinion it will. It will incredibly improve the chances for accessing the refugee status to deserving refugees. Besides, anyone who goes through the Refugee Status Determination Process will go away satisfied that they were accorded a fair hearing. It will also portray to the international community of the willingness and readiness of Kenya to entertain refugees.<sup>232</sup>

Kareyo commented that:

Yes, it would. I think when high standards are set with an increase in salary scale there will be a change in attitude to the job. High standards in most cases create a sense of professionalism when handling a duty and with professionalism performance are likely to improve.<sup>233</sup>

Kip remarked that:

Setting high standards that are binding and implemented to the letter will improve the performance of interpreters, there is need for them to be bound by strict codes of conduct. It is important that they should be willing to faithfully follow the set standards. Setting a high standard will make the interpreters to understand the seriousness of their work and challenge them to improve their performance.<sup>234</sup>

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<sup>227</sup> Ibid.

<sup>228</sup> Carlos A, 'Comments on the Judicial Interpretation of the Federal Courts Interpreters Act, (1990) Vol 14 No 1 The Justice System Journal 103-109.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Isabel F, 'Getting it Right by Doing it Right: Mile Markers along the Roads across the Linguistic Divide,' (2003) unpublished article, Federal Interagency LEP Working Group on file with author.

<sup>232</sup> Interview with Asimwe, Nairobi, Kenya, 12 February 2021.

<sup>233</sup> Interview with Kareyo, Nairobi, Kenya, 16 February 2021.

<sup>234</sup> Interview with Kip, Nairobi, Kenya, 2 February 2021.



Qualified interpreters have the skills to swiftly determine when a cultural variation is affecting communication and act accordingly.<sup>235</sup> Interpreters who work for language service providers undertake a broad testing, training and continuing professional growth.<sup>236</sup> Language operations managers usually evaluate interpreter performance. They offer extra training as needed to ensure that interpreters comply with the professional Interpreter Code of Conduct.<sup>237</sup> By depending on language service providers that hire out interpreters, users in various contexts like RSD can feel confident with their interpreters. Such interpreters receive testing, training and undergo regular quality reviews. However, training as initially discussed goes hand in hand with other attributes. Other factors include competence in culture of the source language. Cultural competence helps in comprehensive interpretation of words. Shiko stated that:

Absolutely yes, the more we get accurate and credible information out of asylum-seekers relayed to us by interpreters, the more we help the asylum-seekers. The more transparent the system becomes and the faster the process of attaining refugee status.<sup>238</sup>

Terry agreed that:

Setting high standards leads to excellent level of interpretation. This superb interpretation can be achieved by using mechanisms such as assessment, training, hiring best performers, evaluation of the same performance, monitoring and possible future professional acknowledgment and development. It will also serve as a lesson to the general public. It will improve on professionalism of interpreters, because interpreters will fulfill their obligations and be more accountable in the course of their work.<sup>239</sup>

Out of 46 respondents, 83% [n=38] agreed that there is need to set high standards for interpreters. Interpreters need to possess above excellent abilities, skills and qualifications. These qualities need to be exhibited by interpreters because communication can be quite complex.<sup>240</sup>

Only 17% [n=8] claimed that setting high standards will discourage average interpreters to perform their duties. In some cases, parties might use legal and specialized terminology.<sup>241</sup>

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<sup>235</sup> Burkle CM, 'Assessments of the Efficiency of Language Interpreters Services in busy Surgical and Procedural Practice,' *BMC Health Serv Res* 17, 456 (2017) <<https://doi.org/10.1186/s12913-017-2425-7>> Accessed 21 January 2021.

<sup>236</sup> Gonzalez R, *Fundamentals of Court Interpretation: Theory, Policy, and Practice* (Durham, Carolina Academic Press, 1991).

<sup>237</sup> National Councils on Interpretation in Health Care: A Code of Ethics for Health Care Interpreters, A working paper for discussion, (2004) <[www.ncihc.org](http://www.ncihc.org)> accessed 18 January 2021.

<sup>238</sup> Interview with Shiko, Nairobi, Kenya, 7 February 2021.

<sup>239</sup> Interview with Terry, Nairobi, Kenya, 20 January 2021.

<sup>240</sup> Ibid.

<sup>241</sup> Shiko (238).

Asylum seekers might speak in a range of languages or use slangs and vernacular that provide differences in the meaning of the words. Therefore, interpreters should have the necessary skills to handle such needs.

A vital characteristic of a qualified interpreter is the ability to exhibit high ethical behavior. Interpreters are put in various positions in which they are told confidential information regarding a client. They not only have to keep this information confidential but they have to remain impartial.<sup>242</sup> More so, they are to refrain from inserting even a fraction of their personal opinions on matters being discussed.<sup>243</sup> Interpreters are to be emotionally intelligent and understand that they are there to act as a link that bridges language and cultural gaps. That being said, there should be no room for their emotions, thoughts or points of view. Interpreters should uphold a high level of moral standards in order to remain impartial and refrain from interfering in the course of their work. Failure to stay neutral makes interpreters to muddle intended meanings. A code of ethics gives “some values that regulate the behavior of members of a career as they execute their job.”<sup>244</sup> In other words, codes of conduct presents a road map for making decisions on the suitable and acceptable conduct in a given profession.<sup>245</sup> Standards are centered on the performance expected of an interpreter in the execution of his or her duty. It offers correct professional procedures and policies which facilitates adherence to the professional conduct of interpreters.

## **2.4 Conclusion**

Chapter two basically looked at the various qualities an interpreter should have. In this chapter the data collected was analyzed to answer the research question on the requirements for effective interpretation in RSD. It emerged that the RSD interpreters need to have some qualities to perform well. The chapter addressed the problem statement by noting that there is a variance in the law in books and the practice on ground. However, the chapter noted that training alone is inadequate to make an effective interpreter. This is because Kenya and Africa at large is highly

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<sup>242</sup> Elamin, Saadia, ‘Reflections on the Teaching of Interpreting: Languages and Translation,’ (2003) Journal of King Saud University 9-12.

<sup>243</sup> Ibid.

<sup>244</sup> The National Code of Ethics for Interpreters in the Health Care: The National Council on Interpreting in Health Care, 2004.

<sup>245</sup> Ibid.

multilingual.<sup>246</sup> Therefore, in some circumstances, interpreters with good command of the language, experience, practice and good personal traits are utilized for interpretation.<sup>247</sup> The chapter proved that effective interpretation depends on the qualities of an interpreter. Obviously, as already discussed, when an interpreter has lingual and cultural competence the interpretation service is more effective.<sup>248</sup> The study has also achieved the objective that for interpreters to do their job well, they need to possess some qualities. It is evident through the interviews carried out that the current minimum qualification for interpreters is knowledge of the two languages. There is no proof either of certification or training or any control mechanism. The impact that interpretation has on judicial or quasi-judicial decision has also been explored. Although training may be just but a tip on the ice berg, it vital for interpreters to have the skill required for effective interpretation.<sup>249</sup>

The study relied on Natural Law theory. According to natural law interpreters need to have qualities that will enable them to perform well. Their performance will then enable asylum seekers enjoy their inherent rights of a fair hearing.<sup>250</sup> The African theory on Community was also used to reinforce this need. Interpreters are expected to be guided by African values to enable asylum seekers have a fair process. African values put emphasis on the aspect of individual sense of belonging and co-existence. Further, it focuses on leniency in the African justice system for a fair process.<sup>251</sup> Finally, the Language Expectancy theory was used. Interpreters are expected to be conversant with the rules of language interpretation. The theory states that all languages have rules in place. It goes ahead to anticipate deviation from the language rules based on different needs of society.<sup>252</sup> The study proved that training and certification should be part of the requirement for interpreters. Further, language proficiency tests should be administered to ensure that the interpreters are proficient in their working languages.

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<sup>246</sup> Mwiria et al, *The Public and Private Universities and institutions in Kenya: New Challenges, Issues, and Achievements* (East African Educational Publishers Nairobi, 2007).

<sup>247</sup> Korir (n106).

<sup>248</sup> Maka (n33).

<sup>249</sup> Langthaler M et al, 'A Critical Reflections on Knowledge and Hierarchies, Languages and Developments,' (2012)6(4) *Multicultural Education and Technology Journal* 235–247.

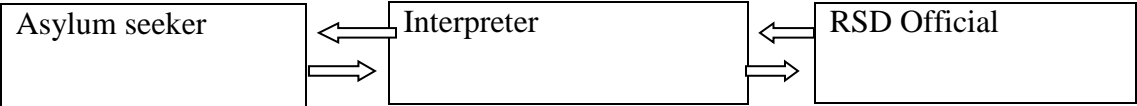
<sup>250</sup> John Mbithi S, *African Religions and Philosophies* (London, Heinemann Educationa Lagos l Books Ltd, 1982).

<sup>251</sup> Ocholla A, 'Traditional Ideologies and Ethics among the Southern Luos,' (1976) *The Scandinavian Institute of African studies Uppsala* 51-52.

<sup>252</sup> Dillard J, Pfau, *The Persuasion Handbook: Developments in Theory and Practices*, (California, SAGE, 2002) 62.

Also interpreters should perfect their skills by learning on the job. They should also have cultural competence beside the fluency in the source language. The next Chapter will then look at the Enforcement of Interpreters Legal Duty in Refugee Status Determination for effective interpretation.

**2.4.1 Ineffective Communication Process can be summarized as follows:**



The above diagram shows gaps in the communication process where the message does not flow straight from the asylum seeker to the RSD official. There are sub-dialogues between the asylum seeker and the interpreter on one hand and sub-dialogues from the interpreter and the RSD officials. As a result, the flow of communication is disjointed.

‘Unenforced law is fruitless.’<sup>1</sup>

## CHAPTER THREE

### MECHANISMS FOR ENFORCEMENT OF INTERPRETERS LEGAL DUTY IN REFUGEE STATUS DETERMINATION

#### 3.1 Introduction

Chapter two answered the question on the requirements of effective interpretation. The chapter reviewed the attributes that an interpreter should have, in order to fulfill the duty of effective interpretation. This chapter will answer the question on the mechanisms of adequate enforcement of laws with regard to interpreters’ legal duty. This chapter also explores the objective of the study, which seeks to create the nexus between enforcement of the law with regard to interpreters and their interpretation in RSD process. The problem the chapter seeks to address is why there is inadequate enforcement of the law on the interpreters’ legal duties in RSD. This chapter will establish why there is variance between the law and the practice on ground. The hypothesis to be proven in this chapter is that poor interpretation is caused by inadequate enforcement of interpreters’ legal duty. Despite the fact that there are laws with regard to interpretation in Kenya, there has been inadequate enforcement of those laws concerning the duty of interpreters.<sup>2</sup> Interpreters in USA and South Africa are controlled by the guidelines of the Interpreters Act of 1978 and professional standards.<sup>3</sup> In the same way, all interpreters in Kenya ought to be controlled and expected standards set. Interpretation in Kenyan is a constitutional right which needs to be exercised fully for the benefits of asylum seekers.<sup>4</sup> Wils commented that:

There is need for interpreters to adhere to some set rules, code of conduct, ethical standards and the laws of the land for them to comply with their obligations. They need to carry out their tasks well. Following some set standards will make them do their work with commitment.<sup>5</sup>

Fatuma stated that:

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<sup>1</sup> Interview with Fatuma, Nairobi, Kenya, 5 December 2020.

<sup>2</sup> Interview with Wils, Nairobi, Kenya, 9 December 2020.

<sup>3</sup> Kiguru G, ‘At the Mercy of Others Voices: An Illustration of Frequent Language Errors in Kenyan Courtrooms,’ (2010) University of Nairobi Journal of Language and Linguistics, 18-22.

<sup>4</sup> Onsongo B, ‘Effectiveness of the Language Interpretation in Case Management at the Chief Magistrates Court at Kisumu’ <<http://erepository.uonbi.ac.ke/bitstream/handle/11295/5919>> Accessed 17 September 2020.

<sup>5</sup> Wils (n2).

I think the laws are sufficient and clear for effective interpretation in RSD. However, having the law is less effective when they are not adhered to. For example it is important to have confidentiality as a law but if the interpreters do not hold themselves to such standards and are also not held accountable then the effectiveness fails.<sup>6</sup>

A respondent indicated that there is need for the law to guide interpreters. She said that the law in place is sufficient but enforcement is a challenge.<sup>7</sup> However, since there is scarcity of interpreters, little attention is given to compliance with the law.

### 3.2 Inadequate Enforcement of the Law

According to the African Theory on the Culture of Community, the African community was characterized by restorative justice.<sup>8</sup> Consequently, the aim was to restore the relationship and reconcile the individual with the community. This is opposed to retributive justice, which was intended solely to punish the individual.<sup>9</sup> While resolving conflicts, the accused was given ample opportunity to be heard. The aim was to reconcile the individual with the entire community.<sup>10</sup> This is a clear allusion to the fairness an asylum seeker is supposed to have in RSD. The African theory on community is an important pointer to the aspect of value of humanity, fairness and concern for people in a society. The theory advances the need for a fair hearing as a means of enforcing the law with regard to interpretation.

Berk-Seligson argues that constitutional guarantee to a court interpreter is the best obligation that the state can make in this regard.<sup>11</sup> In the absence of a constitutional provision for interpretation, legal provisions are made in different states in the USA.<sup>12</sup> The Director of the Administrative Office is required to certify qualifications of certified interpreters.<sup>13</sup> Berk-Seligson puts emphasis on constitutional guarantee as the best obligation for interpreters. Accordingly, this study shows that despite having a constitutional provision on interpretation, the right is not yet fully utilized in Kenya. Therefore, it is important to reinforce enforcement mechanisms.

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<sup>6</sup> Fatuma (n1).

<sup>7</sup> Ibid.

<sup>8</sup> Mdombi D K, 'African Theory on the Culture of Community', (2016) 16 (1) General Education Journal 36-48.

<sup>9</sup> Clifford W, 'A Primer of Social Case Work in Africa', (Oxford University press; Nairobi 1996) 76.

<sup>10</sup> Ifeanyi A Menkiti, *Persons, Community in African Traditional Thought* (Lanham MD, University Press of America, 1984) 171.

<sup>11</sup> Berk-Seligson S, 'Bilingual Courtrooms: Court Interpreters in the Judicial Processes,' (2nd Edition, Chicago, University of Chicago Press, 2002) 97-103.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

Baraka observed that:

Many interpreters are only concerned with doing work for money. They are not familiar with the laws and rules of interpretation due to lack of training, since the RSD officers are desperate for someone to interpret the language they do not know or understand, little attention is paid to whether the interpreter is following the rules or not. Provided they help them understand what the asylum seeker seems to say.<sup>14</sup>

The above description of interpreters in Kenya is an absolute deviation from their responsibilities.<sup>15</sup> Section 12 of Refugee Regulations provide for the requirement of an interpreter where necessary.<sup>16</sup> This is further emphasized by Article 50(2) (m), which provides for the right to an interpreter.<sup>17</sup> Essie remarked that:

Kenya is a state party to International Conventions relating to human and refugee rights [.] The international laws like Conventions are now domesticated in Kenyan laws via section 16 of refugee act [.] The act allows that every refugee and all their families staying in Kenya are entitled to the rights like employment, security among others and have the obligation to observe the state laws as well as international laws that that Kenya has ratified. The question is whether these laws are utilized.<sup>18</sup>

Although the Refugee Act has been in existence for over ten years, interpretation in RSD still faces the same challenges of poor quality of interpretation. Adequate enforcement of the law will probably be a way forward. According to some respondents, inadequate enforcement is as a result of the system being overburdened with considerable resource constraints.<sup>19</sup> However, apart from financial constraint there other reasons that contribute to inadequate enforcement of the law. Stringent measures should be implemented to make sure that interpreters are bound by their duty to provide honest and truthful interpretation.

The refugee status determination officers simply do not have enough time to carry out a thorough examination to obtain adequate details.<sup>20</sup> This attitude has also given rise to a sense of ‘I know it all’ among adjudicators. They developed a belief that they can tell if a person is deceiving.<sup>21</sup> Arguably, it can be concluded that the asylum officers have also contributed to the inadequate

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<sup>14</sup> Interview with Baraka, Nairobi, Kenya, 15 December 2020.

<sup>15</sup> González R et al, *Fundamentals of Court Interpreting* (Durham, North Carolina: Carolina Academic Press 1991) 8-12.

<sup>16</sup> Refugees (Reception, Registration and Adjudication) Regulations, 2009.

<sup>17</sup> The Constitution of Kenya, 2010.

<sup>18</sup> Interview with Essie, Nairobi, Kenya, 18 December 2020.

<sup>19</sup> Ibid.

<sup>20</sup> Resettlement Officer interviewed in Kakuma in July 1997.

<sup>21</sup> Ibid.

enforcement of the law. Proper procedures need to be followed since asylum seekers have a right to fair interpretation.

### 3.3 Laws on Interpretation

Kenya is a party to various international laws that are related to people seeking asylum.<sup>22</sup> For example, it assented to the 1951 Convention on May 16, 1966 and its 1967 Protocol in 1981.<sup>23</sup> The rule of non-return is the basis of refugee protection in the world. The obligatory principle is explained in Article 33 of the 1951 Convention.<sup>24</sup> Kenya is a signatory to the 1969 Organization of African Unity Convention. The republic of Kenya signed it in 1969 and ratified in 1992.<sup>25</sup> The OAU widens the definition of a refugee and focuses more on the intolerable and insecure situation which compels people to flee.<sup>26</sup> Further, Kenya ratified the 1984 Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment in 1997.<sup>27</sup> Other treaties to which Kenya is a signatory include the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.<sup>28</sup> These laws play a complementary function in enhancing the safety of asylum seekers. Article 1(3) of the UN Charter emphasizes the importance of respect for human rights and fundamental freedoms without discrimination. Towards this end, one of the crucial rights asylum seekers require is to express themselves in their own languages. Especially when submitting their stories before the RSD officials. Furthermore, Kenya does not have any reservations or interpretative declarations with regard to the implementation of the above treaties.

Kenya enacted the Refugee law and its supplementary legislation in 2006.<sup>29</sup> The Refugee Act and the Refugee Regulations deal with refugee status determination and highlight the need for an interpreter during RSD. The Constitution outlines that general rules of international law and

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<sup>22</sup> Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective,' (2007) 19 International Journal of Refugee Law 52-53.

<sup>23</sup> State Party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.

<sup>24</sup> Article I (1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

<sup>25</sup> See OAU Convention Governing Specific Aspects of Refugee Problems in Africa.

<sup>26</sup> Nicholas S, *Judicial Interpretation of Refugee Status*, (Athens, Baden-Baden, 1999) 67.

<sup>27</sup> United Nations Treaty Collection < [https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg\\_no=iv-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en) > accessed 1 January 2021.

<sup>28</sup> The International Covenant on Economic, Social and Cultural Rights.

<sup>29</sup> Sara Pavanello et al, 'The Hidden and Exposed: The Urban Refugees in Nairobi, Kenya,' (2010) HPG Working Paper, available on the Overseas Developments Institute <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5858.pdf>> accessed 28 September 2020.



treaties are part of Kenya's legal system.<sup>30</sup> However, courts have taken different positions on this provision. The Court in *Amina Said Abdalla & 2 others v County Government of Kilifi & 2 others* [2017] eKLR,<sup>31</sup> rightly observed that environmental law mainly regulates the sustainable use of natural resources according to the basic principles developed over the years through both national and international processes. While in the cases of *Re the Matter of Zipporah Wambui Mathara*,<sup>32</sup> *Beatrice Wanjiku & Another v Attorney General & Others*<sup>33</sup> and *Diamond Trust of Kenya Ltd v Daniel Mwema Mulwa*,<sup>34</sup> the plaintiffs, relying on Article 11 of the International Covenant on Civil and Political Rights,<sup>35</sup> challenged orders of their respective committal to civil jail for failure to settle monetary claims made against them. Two issues were raised in all those cases. The first one was with regard to the supremacy of Article 11 of the ICCPR. It was argued that since Article 2(6) is in the supremacy clause in the Constitution, therefore, treaties and, in this particular case, Article 11 of ICCPR, rank *pari-passu* with the Constitution and should therefore be regarded as part of the highest law of the land.

Koome J did not address that issue in the first case, but Justices Majanja and Njagi, who decided the second and third cases respectively, quite correctly dismissed that argument. They said mere situation of the international treaties in the supremacy clause in the Constitution does not accord them any primacy. If that were the case, like the American Constitution,<sup>36</sup> the Kenya Constitution could have expressly so stated. Justice Njagi held that the highest position Article 11 of the ICCPR can benefit from is to be positioned in equivalence with the Act of Parliament. It is evident from the cases so far decided that it has not been an easy task to determine the correct place of international law in Kenya with courts often taking various positions. Article 47 provides for a fair administration action that is procedurally just and fair.<sup>37</sup> In addition the Refugee Regulation provides for the need of a competent interpreter.<sup>38</sup> Rule 4 (1) of the Evidence (Out of Court Confessions) Rules 2009 allows the accused persons to use the language

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<sup>30</sup> Article 2(5), the Constitution of Kenya, 2010.

<sup>31</sup> ELC Case No. 283 OF 2016.

<sup>32</sup> *David Maina v Zippora Mathara Wambui*, Kangema SRMCC No. 19B of 2010.

<sup>33</sup> *Beatrice Wanjiku & Another v Attorney General & Others* Nairobi HCCC. No. 190 of 2011.

<sup>34</sup> *Diamond Trust of Kenya Ltd v Daniel Mwema Mulwa*, Nairobi HCCC No. 70 of 2002.

<sup>35</sup> *The International Covenant on Civil and Political Rights*, Vol 999 UNTS 171.

<sup>36</sup> *Constitution of the United States of America*, Article VI Section 2.

<sup>37</sup> *The Constitution of Kenya*, 2010.

<sup>38</sup> *Refugee (Reception, Registration and Adjudication) Regulations*, 2009.

they are comfortable with. Despite the above provisions, there are some challenges still faced by asylum seekers. The law in relation to interpretation is adequate. However, the challenge is the underutilization of the same law. Fatuma commented that:

Yes. The Kenyan Constitutional framework provides a sound basis upon which rights interconnected with the need for interpreters can be leveraged.<sup>39</sup>

Out of the 29 respondents interviewed, 79% [n=23] agreed that, if the Refugees Act and the UNHCR guidelines are implemented to the letter, it will result in effective interpretation. While 22% [n=6] said that more laws should be put in place to reinforce the work of interpreters. Toet observed that:

I think the law has developed tremendously over the years. Since 1951, we have seen that countries are more receptive to refugees. The rule of Non-Return is now accepted as an element of non- derogatory principle of international customary law. So many laws talk about asylum seeking today.<sup>40</sup>

Additionally, section 12 of the regulations gives the asylum seeker the right to a competent interpreter.<sup>41</sup> However, qualities of such an interpreter are not stipulated. Therefore, the results of this study will be particularly instrumental in interrogating the shortcomings of the existing refugee legislations and policies.

### **3.3.1 Enforcement Mechanisms**

Other Enforcement mechanisms could be understood to mean alternative methods which encourage compliance.<sup>42</sup> Interpretation is considered as unregulated career in most countries.<sup>43</sup> However, interpreters execute a demanding job in various contexts of legal profession, Health, and social work. Employees working in these domains usually undergo formal training for them to qualify. Later, they are hired to work with strict adherence to the Codes of conduct.<sup>44</sup> Candy remarked that:

When they face moral dilemmas in their work, they can access professional development so that they keep up to date. They must undertake regular refresher courses in ethics. Many interpreters rarely have access to this sort of ethical system. This places the

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<sup>39</sup> Fatuma (n1).

<sup>40</sup> Interview with Toet, Nairobi, Kenya, 3 January, 2021.

<sup>41</sup> Refugees (n38).

<sup>42</sup> Ouellet Julian, 'Enforcement Mechanisms: Beyond Intractability,' (2004) Conflict of Information Consortium, University of Colorado, Boulder Posted September.

<sup>43</sup> Lee J, Court Interpreting, (2016) 191.

<sup>44</sup> Ibid.

responsibility on interpreters to reflect on ethical aspects as they carry out their work in interpretation practice. They have to uphold both professional performance and social responsibility.<sup>45</sup>

Nina argued that:

They should create awareness amongst refugees, such that they are aware of their substantive right for interpretation. Individual responsibility among the interpreters and UNHCR should work hand - in - hand with the local agencies in charge of refugees to promote refugee welfare.<sup>46</sup>

Nema commented that:

There is need for construction of a database of persons as a verification process on interpreters that ascribe and meet certain standards. Interpreters are faced with many of possible options. They have to meet the required threshold to be declared as qualified. Also, they need to be guided by standards and ethics. At this point they need to be guided by morals<sup>47</sup>

Interpreters who belong to an organized system tend to perform better. Further, those from a background with a more developed ethical structures and legal framework have good practice.<sup>48</sup>

These include self-commitment and enhanced understanding of their responsibilities.<sup>49</sup> Nana said that:

To reward their good effort and hold them accountable when they fail to abide with the regulation is a step towards motivating interpreters to be effective. Proper training and continuous refresher courses would be helpful to acquire more skills, more work to be given to them, remuneration and appreciation<sup>50</sup>

Interpreters usually do their best.<sup>51</sup> They are honest in their work, and faithful to the testimony of foreign languages.<sup>52</sup> However, they are likely to make mistakes in the course of their work, if they do not have the necessary skills. That is why this study opines that training by RAS and Non-governmental organization is one of the requirements for effective interpretation in RSD. Those who interpret need to consider a number of factors for communication to be effective.<sup>53</sup>

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<sup>45</sup> Interview with Candy, Nairobi, Kenya, 21 November 2020.

<sup>46</sup> Interview with Nina, Nairobi, Kenya, 11 January 2021.

<sup>47</sup> Interview with Nema, Nairobi, Kenya, 10 January 2021.

<sup>48</sup> Ibid.

<sup>49</sup> Interview with Kezia, Nairobi, Kenya, 10 January 2021.

<sup>50</sup> Interview with Nana, Nairobi, Kenya, 14 January 2021.

<sup>51</sup> Berk-Seligson, *Bilingual Courtrooms: Court Interpretation in the Judicial Processes*, (2nd Edition, Chicago, University of Chicago Press, 2002) 97-103.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

They need to consider the body language, demeanor, in addition to the spoken words of the claimant.<sup>54</sup> Failure to recognize these factors during the interpretation process may be detrimental to a claimant's case. As a consequence, an asylum seekers' failure to testify may be due to failure to adhere to the mentioned aspects. This study argues that there is need for enforcement of legislation to direct the career of interpretation.

California State goes beyond creating laws and regulations to design a program for training. Examination is administered to those who wish to become Professional interpreters.<sup>55</sup> All interpreters have programs for annual renewals, continuing education and professional assignment standards defined by the California Judicial Council.<sup>56</sup> However, it is important to have adequate enforcement of regulations with regard to interpreters. As a result, asylum seekers will be in position to understand and follow the process despite their language differences.

Wils commented that:

Though it may sound unorthodox, interpreters should sign legal documents indicating that they are culpable for information they provide and if the information they offer is wrong, they should be prosecuted. The interviews should be recorded or taped so that everyone knows that he/she is responsible.<sup>57</sup>

According to Justice Hugo Black in *Oregon v Mitchell (1970)*, making use of a waiter as an interpreter was improper since the waiter served at the hotel where crimes were claimed to have taken place.<sup>58</sup> Court officers have a task to make sure that the interpreter is competent enough to do the job.<sup>59</sup> The asylum officer and interpreters need to agree on standards of operation procedures before the RSD process starts. Notably, an interpreter must remain impartial and accurate all the time.

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<sup>54</sup> Watermeyer J, 'She will hear me: How a Flexible Interpretation enables Patients to Manage the Inclusion of Interpreters in Mediated Pharmacy Interactions,' (2011) 26 Journal of Health Communication, 71–81.

<sup>55</sup> Judicial Council of California, Court Interpreters Program (2015) The Judicial Branches of California <<http://www.courts.ca.gov/programs>> Accessed 26 February, 2021. interpreters.htm

<sup>56</sup> Ibid.

<sup>57</sup> Wils (n2).

<sup>58</sup> 114 S. J. 86.

<sup>59</sup> Ibid.

Some respondents argued that good remuneration has always been a good motivation for good performance in any place of work.<sup>60</sup> Interpreters are professionals in the same manner as doctors, surgeons, lawyers, mechanics, and computer scientists. They have the right to fix their salary rate as they deem depending on the complexity of the work at hand.<sup>61</sup> Thus, commensurate remuneration for interpreters should be a matter of policy and not opinion. However, emphasis on remuneration may lead to use of incompetent interpreters as they may not demand much in terms of payment.

From the forgoing, there is need to assess the abilities and skills of bilingual staff besides their submission of credentials.<sup>62</sup> An assessment should be done to establish the credibility of the bilingual personnel.<sup>63</sup> There is need for officers and staff to be equipped with basic language tools and language access protocol. Further, the government should collaborate with faith-based organizations and charity organizations to collectively support the work of interpreters. RAS should also conduct in-house training for on-staff or employed interpreters. In addition, there is need for cultural awareness training sessions for asylum officers and interpreters. Finally, it is advisable to carry out community outreach programs to sensitize and reinforce collaboration with law enforcement institutions and the community.

### **3.3.2 Standards of Practice for Interpreters**

Standards refer to a compulsory act or regulation intended to help in enhancing conformity to a policy.<sup>64</sup> A standard is supposed to ensure that a policy is implemented.<sup>65</sup> In addition, standards are typically developed in accordance with regulations. Accordingly, they include suggestions, or administrative directives planned to attain a policy's objectives.

Following the provisions of the ICCPR, different countries have come up with measures to ensure that interpretation as a basic right is provided for.<sup>66</sup> For this study two judicial systems

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<sup>60</sup> Nema (n47).

<sup>61</sup> Nana (50).

<sup>62</sup> Wolfgang L, 'Bilingualisms and Translation Competences: A research project and its first results Universität Leipzig, Germany,' (2012) 27 *A Journal of Professional Communication*, 5-13.

<sup>63</sup> Ibid.

<sup>64</sup> *Merriam-Webster's Collegiate Dictionary* (10th edn, 1999) <<https://www.merriam-webster.com>> accessed 12 January, 2021.

<sup>65</sup> Ibid.

<sup>66</sup> Article 14(3) (a) of the International Covenant on Civil and Political Rights.

shall be discussed: the South African judicial system and the USA judicial system. These two countries have set different standards for their interpreters leading to efficiency in their judicial proceedings. A look at these Jurisdictions will show that there is need for adequate enforcement of the of interpreters' Legal duty. Kim advised that:

Interpreters need to comply with ethical standards, laws of the country coupled with adherence to ethical standards. They need to be accurate and reliable in order to interpret the words of the speaker well. By so doing they fulfill their obligations successfully.<sup>67</sup>

Tina emphasized that:

Correct and accurate communication of information between an asylum seeker with the officer who is unable to speak the language of the asylum seeker is vital, in order to facilitate the communication. Interpreter's ethics, competency is important to achieve efficiency in interpretation.<sup>68</sup>

In the selection of interpreters, it important to ensure that such interpreters are fluent. Most respondents agreed that there is need to set some standards to guide interpreters. However, due to scarcity of interpreters, some of the guidelines may hardly be adhered to. Out the 24 respondents, 83% [n=20] confirmed the need for some standards and guidelines to help interpreters. On the other hand, 8% [n=2] indicated that interpreters can learn on the job.

Lack of the laid down guidelines, as proposed by the language expectancy theory leads to a vacuum in the expected outcome.<sup>69</sup> Language expectations theory suggests that various languages have particular set of rules.<sup>70</sup> The rules are specifically put in place in line with the prevailing circumstances.<sup>71</sup> The theory states that, the preferred communication is based on the customs of a given community.<sup>72</sup> In addition, the theory maintains that there are specific standards and guidelines of speech that have already been established in various settings.<sup>73</sup> The words used in judicial proceedings are an example of the socially expected divergences from the

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<sup>67</sup> Interview with Kim, Nairobi, Kenya, 7 January 2021.

<sup>68</sup> Interview with Tina, Nairobi, Kenya, 7 January 2021.

<sup>69</sup> Burgoon M et al, 'Friendly or Unfriendly Persuasions: The Effects of Violations of Expectations by Males and Females,' (1984) 10 Human Communications Research 283- 291.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Burgoon M and Miller R, *Expectancy Interpretation of Languages and Persuasion* (London, United Kingdom: Lawrence Erlbaum Associates, 1985) 199–229.

<sup>73</sup> Dillard J, Pfau, *The Persuasions Handbook: Developments in Theories and Practice*, (California, SAGE Publications Inc, 2002) 64-75.

standard language.<sup>74</sup> The Language Expectancy theory points out that in some social setting, certain language variations are used.

In South Africa the failure to meet set standards is easily identified since the standards are established.<sup>75</sup> The legislation in USA checks the quality of interpreters.<sup>76</sup> It goes as far as grading the level of interpreters.<sup>77</sup> Hence, it establishes professionalism, compliance to rules and good performance by interpreters.

Nina stated that:

Interpreters are bound by codes of conduct and ethics that they should strictly abide by. Although I am unsure whether there are any international, regional or national standards and guidelines, different organizations and state agencies that regularly require the services of interpreters do adopt codes of conduct that these persons should adhere to. For instance, there is the United Nations High Commission for Refugees Interpreter's Code of Ethics. In summary, common requirements are that an interpreter must uphold confidentiality, impartiality, maintain a professional attitude.<sup>78</sup>

The code of conduct in the professional body of interpreters is necessary. This is because of the many pressures in the workplace that the interpreter faces in the line of duty.<sup>79</sup> In addition, the context of interpreting itself is not easy because of the many issues that arise while interpreting. However, an interpreter should maintain professional ethics.<sup>80</sup> The aim of a code of ethics is normally to set up a general knowledge on conduct required of the members of a professional group.<sup>81</sup> Qualified people are competent in making rational decisions. More so, they are capable of applying their skills in making an informed resolution in circumstances where the ordinary people cannot, because they are not qualified in the particular profession.<sup>82</sup>

US Citizenship and Immigration Services (USCIS) has developed detailed guidelines.<sup>83</sup> The guidelines help adjudicators, including Asylum Officers to evaluate the interpretation of

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<sup>74</sup> Berk-Seligson S, 'The Importance of Linguistics in Court Interpreting,' (1998) 14 (2) *La Raza LJ* 14 -16.

<sup>75</sup> Inggs, 'Current Developments in Court Interpreters Training in South Africa,' (1998) *Proteus*.

<sup>76</sup> Matthew G, 'Court Interpretation in the United States,' (2013) Retrieved from AIIC <<http://aiic.net/page/6595/court-interpreting-in-the-united-states>> accessed 4 April 2021.

<sup>77</sup> Ibid.

<sup>78</sup> Nina (n46).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Kotzé, Herculene, 'Educational Interpreting: Dynamics and Role models (2014) 43 *Stellenbosch Papers in Linguistics Plus*, 127-145.

<sup>82</sup> Ibid.

<sup>83</sup> The USCIS Manual Policy is the Agency's Centralized Online Repository for USCIS' immigration policies.

interviews.<sup>84</sup> USCIS has separate guidelines for its officers working with refugees and asylum-seekers to ensure accurate interpretation in asylum proceedings.<sup>85</sup> They have a training module on working with interpreters.<sup>86</sup> It comprises over forty pages of detailed guidelines, exercises, and additional recommended reading. The guidelines help adjudicators to evaluate the accuracy and adequacy of interpretation during the interview.<sup>87</sup> The existence of thoughtful and detailed guidance exhibits a clear commitment to ensuring language access.

Interpretation is regulated with moral principles that interpreters have to abide with, so as to efficiently carry out their duties.<sup>88</sup> These include: loyalty, secrecy, neutrality and honesty.<sup>89</sup> Adherence to such ethical standards by interpreters contributes to a fair process.<sup>90</sup> By and large, lack of information and inadequate prior knowledge negatively impacts on the renditions made by interpreters.<sup>91</sup> More so, inadequate information on linguistic code, specialized terminologies, overlapping or co-speech leads to poor interpretation.<sup>92</sup> Professional ethics requires the interpreter to transmit the speaker's words in an eloquent form in order to provide the equivalent information in another language.<sup>93</sup> Interpreters are to refrain from reproducing the incorrect version of the message that is different the original words.<sup>94</sup> Despite the increasing importance on the procedure of language and cultural interpretation, few countries appear to recognize the delicate position of the interpreters' task. In addition, there are ethical predicaments which are

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<sup>84</sup> US Citizenship and Immigration Services, 'Roles and use of Interpreters in domestic Field Offices' (2017) <<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-17-1-RoleUseInterpreters-PM-602-0125-1>> Accessed 28 December 2020.

<sup>85</sup> Laura Abel, 'Language Access in the Immigration Courts', (2011) Brennan CTR for Justice at <[https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language\\_Access\\_in\\_Immigration\\_Courts.pdf](https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf)> Accessed 29 December 2020.

<sup>86</sup> Alana M, Re-Victimization the Asylum Process: Jimenez Ferreira v Lynch: Re- Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility Assessment, 36 LAW & INEQ 315, 326 2018. 458

<sup>87</sup> Ibid.

<sup>88</sup> Morris R, 'The Moral Dilemmas of Court Interpreting: The Translators,' (1995) Volume 1, Number 1, 25-46.

<sup>89</sup> Ibid.

<sup>90</sup> Gonzalez et al, *The Fundamentals of Courts Interpretations: Theory, Policy, and Practices* (Durham: Carolina Academic Press, 1991).

<sup>91</sup> Ibid.

<sup>92</sup> Walker, Anne G, 'Languages at Work in Law: The Customs, Conventions, and Appellate Consequences of Court Reporting,' (1990) in Levi and Walker, *Languages in the Judicial Processes*, (New York and London, Plenum Press, 1990) 203-244.

<sup>93</sup> Ibid.

<sup>94</sup> Morris R, 'The Interlingual Interpreters: The Cypher or Intelligent Participant the Interpreter's Turn,' (1993b) VI (18) *International Journal for the Semiotics of Law* 271-290.



innate in interpretation.<sup>95</sup> According to the professional ethics, and for the purpose of precision, an interpreter is not supposed to interfere with the message authored by the asylum seeker.<sup>96</sup>

### 3.3.3 Asylum Seekers' Right to an Interpreter

Chapter one presented the Natural law theory.<sup>97</sup> According natural law, rights are natural and inherent in a human being by the fact that the person exists.<sup>98</sup> All human beings deserve a just treatment which is a universal requirement according to natural law.<sup>99</sup> Therefore, the requirement for effective interpretation in asylum hearing in Kenya is a universal right. Standards of natural law can only be determined by a rational being. Hence, it is an undeniable right and asylum seekers need to be aware of this right. RAS together with the civil society organizations should create awareness by sensitizing asylum seekers on this right.

It is apparently acknowledged that states keep information not for their own benefit but for the interest of their citizens.<sup>100</sup> Besides, government institutions should ensure that the public has access to that information.<sup>101</sup> This acknowledgment is replicated in the tremendous increase of regulations regarding access to information.<sup>102</sup> Many international organizations have resolutely recognized the importance of the right to access of information.<sup>103</sup> Towards this end, the call for sufficient laws to enhance respect for the right has been on the rise. These include international organizations such as the UN, the Organization of American States, the Council of Europe and the African Union.

According to UN, the right to freedom of information held by government institutions is a basic right and has to be implemented right from the national level.<sup>104</sup> This can be done through

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<sup>95</sup> Morris (n88).

<sup>96</sup> Ibid.

<sup>97</sup> See section 1.8.

<sup>98</sup> Omony John Paul, *Key Issues in Jurisprudence*, (law Africa, Kampala, 2004) 28 -31.

<sup>99</sup> Maurice Makumba, *An Introduction to African Philosophy: Past and Present* (Paulines Publication, 2007) 25.

<sup>100</sup> Maeve MC, 'The Right to Information in the International Human Rights Law' (2013) 13 (1) Human Rights Law Review, 1-4.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, 6-15.

<sup>103</sup> See UNESCO <http://portal.unesco.org/ci/> accessed 10 March 2021.

<sup>104</sup> Toby Mendel, 'Freedom of Information: Internationally Protected Human Rights,' (2012) <<http://www.article19.org>> accessed 7 February, 2021.

comprehensive enactment of laws based on the standard of utmost disclosure.<sup>105</sup> Hence, the assumption can be that states must avail information to the public subject to a few exceptions.<sup>106</sup> At the regional level, some systems on the right to access of information have been established within the Americas, Europe and Africa. The regions officially acknowledged the importance of access to information as a human right. According to the Organization of American States, the right is an essential element of democracy.<sup>107</sup> In a democratic governance, leaders have a responsibility to ensure that people who gave them authority have the right of access to information.<sup>108</sup> Furthermore, the people entrusted them with the power to make resolutions on public issues on their behalf.<sup>109</sup> It is to the people who delegate the management of public duties that belongs the right to information.

In 1981, the political decision-making body of the Council of Europe adopted recommendation no (81)19. The recommendation was basically on the right of access to information held by government officers. It stated that every person living within the boundaries of a country which is a member of the council, shall have the right to acquire on application information held by the public institutions.<sup>110</sup>

In 2002, under the organization of African Union, the African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression in Africa.<sup>111</sup> The statement evidently approves the right to access information held by public institutions. Further, it expressed that public entities are custodians of information held on behalf of the public. Therefore, all people have a right to access the information, subject to clear exceptions.<sup>112</sup> As discussed above, the law at international level on ATI is sufficient. However, the challenge is on each state to ensure that such provisions are ratified and domesticated. The international law on

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<sup>105</sup> Common wealth Freedom of Information Principles, as agreed by the 11th Commonwealth Law Ministers Meeting, Trinidad and Tobago, May 1999, Principle 2.

<sup>106</sup> Joint Declaration of 6 December 2004.

<sup>107</sup> Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, (16 April 1999, OEA/Ser.L/V/II.102, Doc 6 rev) Chapter III., p. 24.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> 25 November 1981, p. 2.

<sup>111</sup> Was adopted by the African Commission on Human and Peoples' Rights at its 65th Ordinary Session Held from 21 October to 10 November 2019 in Banjul, Gambia.

<sup>112</sup> Ibid.

FOI applies to both nationals and non-citizens. These laws can then fill the gaps that countries such as Kenya have in relation to the scope of applications of the domestic laws on ATI.

The Constitution of Kenya narrows the entitlement to the right of ATI to citizens. Article 35(1) clearly stipulates that only citizens have the right of ATI. However, there is a possibility of non-citizens using nationals like lawyers to request and obtain information from the country on their behalf.<sup>113</sup> Additionally, there are countries like South Africa and Nigeria which do not limit the right of access to information to citizens.<sup>114</sup> Nevertheless, there is hardly any practical evidence to show that those countries have had their national security compromised due to information given to non-citizens.<sup>115</sup> Asylum seekers are to be availed with competent interpreters. They have a right to choose an interpreter they prefer, one who meets their needs.<sup>116</sup> Besides, they need to be informed about their right to an interpreter. Bella commented that:

I do not think asylum applicants know their right to an interpreter during RSD. Programs by UNHCR and Non-Governmental Organizations that work with refugees have raised awareness of this right but sometimes the right is not realized and the asylum seekers do not know who to turn to, to ventilate their issues. For instance, some asylum seekers are not able to tell their stories in detail because of failure to understand the interviewer's dialect, although they are given an opportunity to have an interpreter.<sup>117</sup>

Ruffo stated that:

Most of them often do not know. This is mainly because they come from countries where individual rights are nearly non-existence or rather their governments have infringed on their rights.<sup>118</sup>

Alele contended that:

Some are aware of this right. However, from my experience, the asylum seekers often think that it is a favor or a kind gesture from organizations. Therefore, most of them are not aware because they lack proper education; hence they need to be sensitized.<sup>119</sup>

The importance of an interpreter was emphasized in the case of *R (on the application of Gashi) v Chief Adjudicator*,<sup>120</sup> the court decided that failure to avail a knowledgeable interpreter for G

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<sup>113</sup> Abuya, 'Promoting Transparency: Courts and Operationalization of the Right of Access to Information in Kenya,' (2017) Vol 46(2) Common Law World Review 119-120.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Section 12 of the Refugees (Reception, Registration and Adjudication) Regulations, 2009.

<sup>117</sup> Interview with Bella, Nairobi, Kenya, 18 January 2021.

<sup>118</sup> Interview with Ruffo, Nairobi, Kenya, 16 January 2021.

<sup>119</sup> Interview with Alele, Nairobi, Kenya, 16 January 2021.

amounted to a technical error because it was a means of obtaining evidence. RSD officers are supposed to make sure that the asylum seekers know their right to an interpreter. Furthermore, they need to ascertain that concrete measures are taken to provide interpretation services which meet the quality required under the law. It is possible to make informed judgments about the quality of interpreters' service before the questioning begins, by finding out qualifications and experience. On awareness of asylum's right, Uziru observed that:

Yes, in theory but not in practice. Documents exist that allude to the right but often the process is clogged, not allowing for the relevant persons to understand their right in this regard. Besides, they may not be aware due to ignorance or fear of being denied refugee status.<sup>121</sup>

On the need for interpretation, the court gave the criteria to assess this need in the *Brozicek* case (*Brozicek v. Italy*), it was stated that regard must be made to the specific suspect's ability to speak and understand the language.<sup>122</sup> The grasp should be to the level required in light of the details of the case. The police decision not to provide interpretation did not demonstrate that the suspect could speak the language. Therefore, the act of police contravened the directive that required them to ascertain the ability of the suspect to communicate effectively in the target language.<sup>123</sup> The court must, accordingly, promote the effectiveness of such directives by ensuring that its own decision is not contaminated by any infringement.<sup>124</sup> It should use means at its disposal such as issuing an order to repeat pre-trial in order to enhance a fair process. The court can refuse to rely on their results where interpretation needs were not adhered to.<sup>125</sup>

### **3.4 The Role of Stakeholders in Refugee Status Determination**

#### **3.4.1 Civil Society**

The World Bank defines civil society as a range of organizations. They include: community groups, non-governmental organizations, labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations.<sup>126</sup> Besides the law, the Government together with other stakeholders in society can find other alternatives

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<sup>120</sup> [2001] All ER (D) 262.

<sup>121</sup> Interview with Uziru, Nairobi, Kenya, 21 January 2021.

<sup>122</sup> ECHR 23, 10964/84 (Judgment of 19 December 1989).

<sup>123</sup> See Article 6(3) (a) of European Convention on Human Rights.

<sup>124</sup> [1989] ECHR 23, 10964/84 (Judgment of 19 December 1989).

<sup>125</sup> Ibid.

<sup>126</sup> The World Bank Civil Societies Engagement (Review of Fiscal Years 2010–2012). 1.

for enforcement of interpreters' legal duties. The African theory on the Culture of Community focuses on humanity. The values and rights advanced by the African theory can be actualized by the civil society.<sup>127</sup> The civil society groups should be able to ensure that interpreters facilitate justice for the asylum seeker. The constitution gives the freedom of expression to request, obtain or convey information.<sup>128</sup> Further, all people have the right to liberty and the right to take part in an association of any type.<sup>129</sup>

Fahari agreed that:

They should create awareness amongst asylum seekers, such that they are aware of their substantive right for interpretation and asylum seekers should certify that the interpretation services they are provided with were satisfactory.<sup>130</sup>

Bongo who works with Refugee Consortium of Kenya stated that:

UNHCR, Jesuit Refugees Services, Refugee Consortium of Kenya, Danish Refugee Council among other organizations should be part of the bodies to enforce the duty of Interpreters. They are better placed in creating awareness among asylum seekers and refugees. This is because we work directly with them and can help the government exercise its primary duty in RSD.<sup>131</sup>

The government of Kenya should collaborate with Civil Organizations to seek adequate funding. The funds will help to cater for training interpreters and managing interpretation programs.<sup>132</sup> In addition, such programs should target other languages other than Kiswahili and English. This can be through partnerships with International or National non-governmental Organizations.<sup>133</sup> The Catholic Church, through various organizations like Association of Sisterhoods of Kenya (AOSK), Jesuit Refugee Services, Talitha Kum, Caritas, Justice and Peace and CRS, has made some strides. They have been able to create awareness of rights among many vulnerable people in Kenya and beyond. The categories include asylum seekers, among others. Mariam explained that:

During Lenten season, we donate some items to the needy people. We manage to get donations from well-wishers, students, Christians, benefactors and others. What we do during the Holly week, we visit children's home, prisons and camps. That is how we

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<sup>127</sup> Mdombi D K, 'African Theory on the Culture of Community', (2016) 16 (1) General Education Journal 36-48.

<sup>128</sup> Articles 33, the Constitution of Kenya, 2010.

<sup>129</sup> Articles 36, the Constitution of Kenya, 2010.

<sup>130</sup> Interview with Fahari, Nairobi, Kenya, 18 January, 2021.

<sup>131</sup> Interview with Bongo, Nairobi, Kenya, 19 January 2021.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

distribute those items, in the course of our work we listen to their stories and guide them. Most of us are social workers. These people usually raise a lot of legal issues like their welfare needs, rights to better accommodation, food among others. We usually direct them to those who can help them especially the officers concerned.<sup>134</sup>

The government should work closely with various non-governmental organizations to discover the possibility of establishing regional or national teams of interpreters. Such organizations will eventually help in resource mobilization. Interpretation is an expensive venture in terms of training and service. Therefore, collective effort will yield some fruits.

### **3.4.2 Interpreters**

There is need for interpreters to be aware that all the details said by the interviewer or applicant must be interpreted.<sup>135</sup> It is not enough to sum up or embellish the message by filling in missing information.<sup>136</sup> Further, interpreters are not allowed to make any change on the words of the asylum seeker in order to sound more articulate, convincing or educated.<sup>137</sup> Interpreters should be trained to take notes during the asylum hearing in order to ensure the accuracy of what is being transmitted, and to write all the facts correctly.<sup>138</sup> Names of persons, places, or things must be spelled out for the sake of clarity and precision. Interpreters should allow the interviewer or applicant to ask questions where necessary. Finally, an interpreter is to remain both impartial and accurate without interfering with the decisions making process.

### **3.4.3 Refugee Status Determination Officials**

RSD officers are expected to read and understand the basic data, registration forms and other relevant testimonies.<sup>139</sup> They should translate if need be and scrutinize all copies of all documents received from the asylum seeker before the date of interview.<sup>140</sup> Accordingly, it helps them to prepare adequately and be in position to ask relevant questions. Further, adequate preparations enable officers to identify any missing, incomplete, inconsistent or unclear

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<sup>134</sup> Interview with Mariam, Nairobi, Kenya, 26 February 2021.

<sup>135</sup> UNHCR, 'The Handbooks on Procedures and Criteria for Determining Refugee Status determination,' (1992) 33-36.

<sup>136</sup> Interviewing Applicants for Refugee Status determination (RLD 4 1999) 4-5.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Robert Horselenberg et al, 'Interviewing Asylum seekers: A vignette study on the Questions asked to assess Credibility of Claims about Origin and Persecutions,' (2016) Journal of Investig Psych Offender Profil 1-2.

<sup>140</sup> Ibid, 3.

information.<sup>141</sup> A disorganized interviewer who appears uncertain as to the applicant's correct details is likely to be viewed with suspicion.<sup>142</sup> This can be a barrier to obtaining a honest explanation of the claim on which the decision of the application depend.

Sometimes an interpreter may be required during the asylum hearing. This may constitute an extra obstacle to accurate communication.<sup>143</sup> It is vital to brief the interpreter in advance about the interview to enable the person to make adequate preparations.<sup>144</sup> The interviewer has to explain how the interview will be conducted and the type of questions which will be asked.<sup>145</sup> Some information on the asylum process and common terminologies may also be helpful.<sup>146</sup> In all cases interpreters should be given directives regarding the code of conduct expected of them. It is particularly vital to emphasize on the principle of confidentiality of all information that pertains the asylum seeker. Further, it is imperative to ensure that the interpreter understands that he or she must remain impartial and objective during the RSD process.<sup>147</sup> If the interviewer is not contented with the interpreter's qualities then the interview should not proceed.

#### **3.4.4 Asylum seekers**

Asylum seekers have the duty to speak the truth and to fully cooperate in the interview process which means they must not distort, fabricate or omit details.<sup>148</sup> If they purposely distort, fabricate or omit facts, it may have an impact on the way their application for asylum will be considered and processed.<sup>149</sup> An interpreter may be made available if necessary so that the asylum seeker and the refugee status determination officer are able to communicate.<sup>150</sup> The interpreter is to remain both objective and accurate as he or she has no role in making decisions about the application. There is need for the asylum seeker to inform the RSD officials in case the applicant does not entirely understand the interpreter due to variations in dialect. Similarly, the asylum seeker should report cases of harassment in the course of interviews.

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<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Handbook (135).

<sup>144</sup> Ibid, 35.

<sup>145</sup> Ibid, 43.

<sup>146</sup> Ibid, 44-47.

<sup>147</sup> Checklists for the Opening of the RSD Interviews (2005) Procedural Standards for RSD under UNHCR's Mandate, 1 September.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

### 3.4.5 Refugees

In a case where refugee interpreters are utilized, there are some factors to be considered. First, a refugee should not be employed if he or she is closely related to the asylum seeker. Secondly, the refugee should not have connections with asylum seeker such as political party affiliation.<sup>151</sup> It is imperative to recall that the relation between the asylum seeker and the interpreter will affect the interaction between them.<sup>152</sup> There is need for the applicant and the interpreter to communicate freely and feel comfortable with each other.<sup>153</sup> The aim is to preserve the objectives of the interview process. Where asylum seekers or refugees are used to interpret, the interpretation services should be restricted to communication at the preliminary stage of reception.<sup>154</sup> RSD officers should make effort to obtain the services of a competent interpreter.

### 3.5 Availability of Interpreters

There are two official languages in Kenya. English and Kiswahili which are spoken together with other local languages.<sup>155</sup> Kenyans with some level of formal education are proficient in their mother tongue, Kiswahili and English.<sup>156</sup> The phrase mother tongue refers to the local language.<sup>157</sup> In most cases mother tongue is usually the first by sequential order of acquisition but not essentially the one in which an individual may be most fluent. The reason is that language acquisition in vernacular usually takes place informally.<sup>158</sup> Just like any other African country, languages in Kenya are spread socially, rather than geographically.<sup>159</sup> Mother tongue is basically used in the local communities particularly in rural areas. However, Kiswahili is casual inter-ethnic communication medium.<sup>160</sup>

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<sup>151</sup> UNHCR, 'Guidelines on the Field on Recruitment Procedures, Conditions of Service, Training and Supervision of Interpreters (IOM-FOM 005/2009).

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Blommaert J, 'Languages, Asylum, and the National Order,' (2009) 50 (4) *Current Anthropology* 415-441.

<sup>156</sup> Mbithi K, 'Multilingualism, Languages Policies and Creative Writings in Kenya', [2014] 4 (19) *Multilingual Education*, 1-9.

<sup>157</sup> Michieka M, 'Languages Maintenance among Kenyan University Students: Selected Proceedings of the 41st Annual Conference on African Linguistics,' (2012) *Association of Contemporary African Linguistics*.

<sup>158</sup> Ibid.

<sup>159</sup> Blommaert (n155).

<sup>160</sup> Ogechi N, 'On Language Rights in Kenya,' (2003) *The Nordic Journal of African Studies*, 12(3), 277-295.



The percentage of unqualified interpreters is higher in community interpreting than conference interpreting.<sup>161</sup> The rationale is that most international organizations consider the qualification and accreditation requirements before employing interpreters.<sup>162</sup> What about interpreters in RSD? By now we know the position. This study established that many interpreters working in RSD have not obtained formal training. In addition, there is need to have interpreters fit for the Kenyan context. By this I mean, interpreters who are competent in the asylum seekers language.

Interpreting has received recognition as a vital part of the judicial system.<sup>163</sup> Yet, the demand for interpreters has far exceeded their availability. Interpreters cannot relocate to where they are needed, because the need keeps changing locations.<sup>164</sup> That means they have to be ready to travel, or work via virtual interpretation platforms.<sup>165</sup> In community interpreting for instance, language needs vary as it follows the model of supply and demand.<sup>166</sup> Competent interpreters might be available for some language combinations but not for others.<sup>167</sup> Therefore in RSD, there is need to have many interpreters with various language combinations. Notably, Africa is highly multi-lingual more interpreters will be a way forward.

Ngazi contended that:

They are not always readily available. Sometimes they get interpreters on a need to need basis. This depends on the circumstances. For areas such as the Northern border of Kenya, there is more probability of getting interpreters of Somali and Sudanese origin as most asylum-seekers are from these countries. However, for those from other countries speaking other languages, it is a challenge getting an interpreter.<sup>168</sup>

Lega said that:

I think they are. UNHCR offices in Kenya are well staffed. Sometimes interpreters can be contacted on a need to need basis. It is the multi-lingual language barriers making them not to be readily available.<sup>169</sup>

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<sup>161</sup> Muylle N, 'Language Matters: Training of Translators, Conference Interpreters, Public Service Interpreters in Africa,' Technical Report, (United Nations Office at Nairobi 2008).

<sup>162</sup> Hale S, 'Community Interpreting,' in Pöchhacker *Routledge Encyclopedia of Interpreting studies*, (London, England, Routledge 2015) 65–69.

<sup>163</sup> Mikkelsen, *Introduction to Courts Interpreting*, (Manchester UK, Northampton MA, Jerome Publishing co, 2000) 106.

<sup>164</sup> Bella (n117).

<sup>165</sup> Ibid.

<sup>166</sup> Mustapha T, *Community Interpreting and Translations in the Arab World: Status quo and strategies for change* (John Benjamins Publishing Company, 2017) 60-61.

<sup>167</sup> Ibid.

<sup>168</sup> Interview with Ngazi, Nairobi, Kenya, 22 January 2021.

<sup>169</sup> Interview with Lega, Nairobi, Kenya, 27 January 2021.

In today's multicultural world, chances for interpreters to obtain career competence through training in order to work in specialized domains remain limited.<sup>170</sup> This is particularly in the so called 'uncommon languages' of current migrants.<sup>171</sup> Some respondents pointed out that, formal interpreters are inadequate.<sup>172</sup> This shortage of qualified interpreters for legal domains in times of increasing need sounds ironical.<sup>173</sup> Further, the need for training had a land mark precedent as early as the 1945-1946 Nuremberg Trials by the International Military Tribunal.<sup>174</sup> Therefore, Judges, legal practitioners, RSD, and UNHCR officials need to advance their skills of interpretation upon which justice depends.<sup>175</sup> Justice is based on the access information from the witnesses who are conversant in a language different from the one used by the institution.<sup>176</sup> It is also important to have more personnel in interpretation sector who meet some qualifications for effective interpretation. Wataka stated that:

Special legal interpreting scholarship should be made available for interpreters to study overseas to study proper interpretation skills. This will go a long way to help interpreters perform well in judicial and quasi-judicial cases and in this case, during the refugee status determination. The asylum seeker will be able to have his or her case heard well. Also, Local institutions of higher learning should consider offering relevant interpretation courses.<sup>177</sup>

The study found that, trained and certified interpreters are not easily found. Furthermore, those available do not meet the required standard, which affects the quality of interpretation offered.<sup>178</sup> Indeed, Kenya like other African countries, many citizens are unable to fluently speak their national languages. As such, a great number of interpreting users are nationals as well. Consequently, many African states have a large population of asylum seekers who require

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<sup>170</sup> Xin Liu, 'Ensuring Interpreting Quality in Legal and Courtroom Settings: Australian Languages Service Providers perspectives on their role,' (2019) *The Journal of Specialized Translation* 90-91.

<sup>171</sup> *Ibid*, 94.

<sup>172</sup> Ngazi (n168).

<sup>173</sup> Gaiba F, *The Origin of Simultaneous Interpretation: The Nuremberg Trial*, (Ottawa, University of Ottawa Press 1998).

<sup>174</sup> The trials were most outstanding for the prosecution of key members of the political, military, judicial, and economic leadership of Nazi in Germany executed, or otherwise participated in the Holocaust and other war crimes. The trials were held in Nuremberg, Germany, and decision made an impact on classical and contemporary International law. Further, interpreters were engaged in the trial process though many were untrained. The case became a notable point of reference.

<sup>175</sup> *Ibid*.

<sup>176</sup> Berk-Seligson S, *The Bilingual Courtroom: Court Interpretation in the Judicial Process*, (2nd Edition, Chicago, University of Chicago Press, 2002) 97-103.

<sup>177</sup> Interview with Wataka, Nairobi, Kenya, 4 February, 2021.

<sup>178</sup> Pöchhacker F, *Routledge Encyclopedia of Interpreting Studies* (London, England, Routledge, (2015).

interpretation during RSD. Interpretation is an important aspect in Africa since it allows people to access their public services. This indicates that interpretation in Africa is not connected mainly to the rights of asylum seekers. The citizens need it as well in order to access their basic needs of education, health and security among others.<sup>179</sup> However, training interpreters requires finances which are inadequate in many countries. Developing countries specifically, face financial hardships, and professionalizing interpretation competes with more critical needs which are a priority such as education, health care and security. Training interpreters is, therefore, just part of a complex equation which stands in parity with several significant needs in Kenya.

### **3.6 Measures for Enforcement of the Law**

The study identified measures with regard to enforcement of the laws for effective RSD process. Most respondents said that strict measures should be put in place. Of the 31 respondents, 77% [n=24] of the respondents agreed that there ought to be a basic manual updated regularly on the skills and training of interpreters. In addition, they said there is need to step up public interest litigation involving poor interpretation. However, 23% [n=7] indicated that the mechanisms in place suffice. It is necessary that those who misinterpret should be punished by the courts of law if found to be guilty.

Narsa said that:

There should be a consortium of interpreter in a country. Within them they can have a panel to deliberate on misconducts. It is from their deliberations and aspirations that we can come up with laws. This then can be incorporated into refugees act.<sup>180</sup>

Bena commented that:

The 1977 UNHCR recommendations by the managerial Committee in global safety of Refugees proposes that applicants should be availed with the essential to prepare their case for asylum interview as well as the availing the services of capable interpreters before giving their applications to the responsible officers. One of the ingredients of the right to a fair process, and to a competent interpreter should be a minimum standard in RSD that cannot be derogated from. This will mandate all RSD processes to mainstream and ensure the provision of interpretation services otherwise any decision arrived at is arbitrary, unfair and voidable.<sup>181</sup>

Bella advised that:

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<sup>179</sup> Hale S, 'Public Service Interpreting', in Malmkjaer and Windle, *The Oxford Handbook of Translation Studies*, (Oxford University Press, Oxford UK, 1998) 343-356.

<sup>180</sup> Interview with Narsa, Nairobi, Kenya, 27 February, 2021.

<sup>181</sup> Interview with Bena, Nairobi, Kenya, 13 January 2021.

Those that break the laws with regard to interpretation should be arraigned in the court of law and if found guilty be punished in accordance with the law. This would be a deterrent way to enforce the law. I, however, also believe that with proper training and oath taking, interpretation services would improve.<sup>182</sup>

Promotion of training and certification of interpreters in this career is needed.<sup>183</sup> Highly qualified interpreters are needed to work in legal settings like court and RSD. This is because such proceedings involve issues of personal freedoms and rights.<sup>184</sup> However, besides specialized training in interpretation, refresher workshops, multiple years of practice and experience has been a guide to Practitioner's improvement in this area of specialization. In Zimbabwe, those who join the career of interpretation are examined by the senior interpreters by use of formulated tests.<sup>185</sup> The candidates are later trained on the job by senior experts. Besides, the recruits are directed to read two books: One, a guide to interpreting in judicial proceedings,<sup>186</sup> and the second one is the phrasebooks for interpreters.<sup>187</sup> The two sets of books are available in three languages of Shona, Ndebele and Nyanja.<sup>188</sup>

It is important to have a compulsory pre-service training.<sup>189</sup> Pre-service training, as suggested by Hale, may not give assurance of absence of errors during interpretation, but it nevertheless gives some guidelines and standards for interpreters.<sup>190</sup> In many scenarios pre-service training typically refers to learning undertaken before employment.<sup>191</sup> For instance, one can do a course in legal interpreting in a college before the provision of interpreting service. In the case of full-time employees, pre-service training takes the module of in-house training.<sup>192</sup> Similarly, this happens after an interpreter has successfully completed the course and is later offered the job but before

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<sup>182</sup> Bella (n117).

<sup>183</sup> Mikkelson H, 'Towards a Redefinition of the Roles of Courts Interpreters,' (1998) Middlebury Institute of International Studies at Monterey 3-8.

<sup>184</sup> Gonzalez R, et al, *Fundamentals of Court Interpretation: Theories, Policies, and Practice* (Durham, Carolina Academic Press, 1991).

<sup>185</sup> Takimoto M and Koshiba K, 'Interpreters' Non-renditions Behaviour and its Effects on Interaction,' (2006) The International Journal for Translation and Interpreting Research 67-82.

<sup>186</sup> J Hoffmann (1994).

<sup>187</sup> G Feltoe (1993).

<sup>188</sup> Ibid.

<sup>189</sup> Hale S, *The Discourses of Court Interpreting* (Amsterdam, Philadelphia, John Benjamins, 2010).

<sup>190</sup> Ibid.

<sup>191</sup> Paul R, Svongoro, 'Court Interpreting in Zimbabwe: A Descriptive Study of Consecutively Interpreted Rape Trials in Regional Magistrates' Courts,' (2014) A thesis Submitted to the Faculty of Humanities of the University of the Witwatersrand's, Johannesburg, in partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in Translation and Interpreting, 250-255.

<sup>192</sup> Ibid.

he or she is deployed to work.<sup>193</sup> The existing culture of on-the-job training as earlier on discussed, should be augmented with pre-employment training.

There is need for interpreters' association in Kenya. Besides, there is need for regulatory framework for interpreters in Kenya. With regulations in place, then the next step is to develop a national code of conduct for all who belong to the profession of interpretation.<sup>194</sup> The South African Language Practitioners' Act of 2014 provides a regulatory framework for interpreters.<sup>195</sup> The absence of interpreters association and regulatory structure verifies Herbulot's idea that a career association protects the dignity of interpreters from being undermined.<sup>196</sup> According to the author, when the status is clearly asserted, other people will definitely respect the profession instead of it being taken as merely something that anyone can do. Further, active professional association is the best forum for interpreters to channel their complaints about their working conditions and terms of employment.<sup>197</sup>

There is need for installation of audio-recording equipment. Interpreters must be sensitized about the system, which serves as a guide against any interpreting errors. With this innovation, interpreters should do their best to ensure that their renditions communicate the applicant's message accurately.<sup>198</sup> It is imperative for them to rectify any error as quickly as possible. Further to this, interpreters should also be encouraged to constantly evaluate their own performance by playing back audio-recordings for cases in which they interpreted or those interpreted by their colleagues.<sup>199</sup> Authorities including RSD and RAS should occasionally permit interpreters to video-record their performance. This proposal is consistent with De Jongh's analysis that "video-tapes allow interpreters to critique their own work and to observe improvement made by the recruited ones."<sup>200</sup> Video recording enables a trainee to replay their performance besides watching the work of expert interpreters. Hence, some of the teaching given

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<sup>193</sup> Ibid.

<sup>194</sup> Herbulot F, 'The Roles of Professional Translator and Interpreter Associations: Towards Promoting the Interests of Language Workers,' in Kruger, *Language Facilitation and Development in Southern Africa* (Pretoria, Blue Chip Printing Services, 1998).

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Keratsa A, 'Court Interpreting: Features, Conflicts and the Future,' (2005) *Applied Linguistics*, 1-12.

<sup>198</sup> Ibid.

<sup>199</sup> De Jongh E, *An Introduction to Court Interpreting: Theory and Practices* (Lanham, University Press of America, 1992).

<sup>200</sup> Ibid.

to trainees should focus on the observation of senior interpreters at work through video recordings. The aim is to help interpreter trainers to point out any mistake they observe on the new interpreters as they perform their work.

The use of video-recordings is not only important for beginner interpreters.<sup>201</sup> Even experienced interpreters should occasionally video-record themselves while working. Later, they should be allowed to watch the video recording together with their coworkers for them to make a sufficient evaluation with the aim of perfecting their skills.<sup>202</sup> Video recordings should be adopted as a mechanism of monitoring interpretation to provide a platform for both interpreters and their superiors to assess performance.<sup>203</sup> More so, video shows the interpreter at work, so that whatever is not done well could be observed and evaluated properly for feedback which is an important aspect of mentorship. This serves to help the interpreters to remain impartial in their work. If they are aware that they may be video-recorded, they would struggle to do their best to avoid being victimized.

Why is it not proper to use someone already at the venue to interpret? There are a number of factors why it is unsuitable for children, friends, relatives or refugees to interpret at any law enforcement settings.<sup>204</sup> These persons may not be impartial. Further, they may have an interest in the decision of the claim or may be possible suspects themselves. They may not have been subjected to the language proficiency tests. In addition, they may lack the competence to maintain meaning while interpreting. More still, they may not be aware of the limit of their duty and may interfere with the meaning of the message given by the applicant.<sup>205</sup>

Law enforcement authorities are directed to observe communication between the interpreter and the applicant.<sup>206</sup> There are some useful strategies to ensure accuracy. Refugee status determination officers can consider the following steps: brief the interpreter on the nature of the

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<sup>201</sup> Devaux, Jerome, 'Technologies in Interpreter-mediated Criminal Court Hearing: An Actor Network Theory account of the Interpreter's perception of her role-space,' (2017) Unpublished PhD thesis, The University of Salford, Salford 99-123.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Anker D, 'Determining Asylum Claims in the United States: Executive Summary of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court,' in Howard, *Refugee policy: Canada and the United States* (Toronto: York Lanes Press, 1991) 268–281.

<sup>205</sup> Alicia E, *The Practice of Court Interpreting*, (Philadelphia PA, John Benjamins Publishing, 1995) 192.

interview before starting the process, check their perception by asking the applicant to explain in their own words their understanding of the message thus far. Interviewers can go over the questions in various forms to confirm response, observe the demeanor, and observe if there are major “gaps” in the interpreted version.<sup>207</sup> Also, interviewers need to be aware of regular pauses by the interpreter which may reflect some doubt as to meaning of words or vocabularies.<sup>208</sup> However, hesitation may indicate that the interpreter is taking the suitable time needed to make a good selection of words. Honesty is a vital element of effective interpretation. If there is any doubt or uncertainty, the interpreter is required to make clarification for the parties involved in the interview. Above all, refugee status determination officers should not allow secretive discussions between the interpreter and the asylum seekers.

Diva further stated that:

Local government through police should be actively involved. However, this requires the setting up local administration system within camps. Where the members of the hosting community, local government, and some refugees are involved in governance. This is what I call local government.<sup>209</sup>

On the other hand, there are instances when bilingual interpreters are used in churches, community meetings, hospitals, and offices among others. Pöchhacker argues that bilingual interpreters do not have a clearly specific role when interpreting.<sup>210</sup> Besides, they are more likely to make mistakes compared to professional interpreters.<sup>211</sup> However, in many cases non-professional interpreters are used in churches, meetings, funerals, weddings and others. Some of them have interpreted in many forums and have acquired experience. While others simply volunteer to do the job in good faith, some are chosen based on their record of good work. At times people in a given community recommend a particular person with good bilingual skills to interpret. It is worth noting that abandoning them will result into a communication gap since professional interpreters are not readily found.

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<sup>207</sup> Ibid.

<sup>208</sup> Barnett M, ‘Mind your languages: Interpreters in Australian Immigration Proceedings’ (2006) 10 University of Western Sydney Law Review 109–138.

<sup>209</sup> Interview with Diva, Nairobi, Kenya, 4 March 2021.

<sup>210</sup> Pöchhacker, Kadrick, ‘The Hospital Cleaner as Health Care Interpreter: A case study,’ (1999) 5(2) The Translator 161-178.

<sup>211</sup> Flores G ‘The Languages Barriers to Health Care in the United States,’ (2006) 355(3) The New England Journal of Medicine 229-231.

### 3.7 Conclusion

This chapter sought to establish the nexus between enforcement of the law with regard to interpreters and their legal duty of interpretation in RSD. The study found out that for effective interpretation, there is need for adequate enforcement of the law. The study responded to the research question on the mechanisms of adequate enforcement of laws with regard to interpreters' legal duty. From the fieldwork findings, the chapter affirmed that adequate enforcement of the law leads to effective interpretation. In addition, the chapter suggested some measures and enforcement mechanisms to be adopted for enforcement of the law in RSD. Further, from the data collected, the chapter confirmed clearly that poor interpretation is caused by inadequate enforcement of the law. The chapter addressed the problem of why interpreters do not comply with the law to fulfil their duty.<sup>212</sup> Some reasons for non-compliance were established. The chapter relied on the African Theory on the Culture of Community which focuses on fair hearing, restorative justice and community co-existence.<sup>213</sup> The Language Expectancy theory advanced the need for enforcement of law in RSD. The theory puts in place language rules during interpretation, however it goes ahead to give exceptions on the rules and guidelines.<sup>214</sup> The theory emphasizes that preferred communication is based on the customs of a given community.<sup>215</sup> Finally the Chapter used the Natural law to advance its arguments. According natural law: rights are natural and inherent in a human being by the fact that the person exists.<sup>216</sup> All human beings deserve a just treatment which is a universal requirement. The requirement for enforcement of interpreters' duty for effective interpretation in Kenya is therefore amoral obligation whose standards can only be determined by human reason.<sup>217</sup> Therefore, interpreters need adequate regulation and control. With these findings, this study will now conclude on the findings and make recommendations on the best way to enforce interpreters' legal duty.

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<sup>212</sup> Chapter one, 28.

<sup>213</sup> John S, *African Religion and Philosophies*, (New York: Doubleday and company 1970) 141.

<sup>214</sup> Burgoon, Miller, *An Expectancy Interpretation of Languages and Persuasion*, (London, United Kingdom, Lawrence Erlbaum Associates, 1985) 199–229.

<sup>215</sup> Dillard, Pfau, *The Persuasion Handbooks: Development in Theory and Practice* (California: SAGE, 2002).

<sup>216</sup> Omony John Paul, *Key Issues in Jurisprudence*, (law Africa, Kampala, 2004) 23-31.

<sup>217</sup> Mesembe E, 'The Natural Law: Theory in Traditional African Jurisprudential Thoughts,' (2014) Vol 26 Journal of Law, Policy and Globalization 47-54.



## **CHAPTER FOUR**

### **SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS**

#### **4.1 Introduction**

The aim of this study was to establish if enforcement of the laws with regard to interpretation would improve the quality of interpretation. The study was as a result of the realization that even though refugee law provides for interpretation in RSD, there is inadequate enforcement of this law. To achieve its aim, this chapter sets out to analyze various findings and proposals that can be adopted by Kenya to improve the process of refugee status determination. The study has adopted some best practices from USA and South Africa to ensure effective interpretation in Kenya.

This study therefore sought to address the inadequacy in the enforcement of the law relating to the duty of interpreters in spite of the challenges faced in the RSD process. The aim is to establish whether the obligations enshrined in the Refugee Act are adequately enforced. The goal is to ascertain that interpreters are capable of delivering their services effectively. This study is aware of the steps that the law has taken in ensuring compliance with interpretation but is not certain that the measures are adequate.

This study carried out interviews with respondents who were asylum seekers, refugees, officers working with refugees among others. This was to understand whether interpreters were aware of their important role in determining justice. The study aimed at establishing whether the respondents were aware of the duty of interpreters in the asylum seeking process and what their views were.

In the course of my research I identified some gaps in the enforcement of the law that hinder the enforcement of interpreters' duty. This study has therefore highlighted them. My interaction with RAS officers, interpreters, refugees and asylum seekers helped shed light on the obstacles and ways in which they can be overcome.

In the end, this study was able to establish the nexus between enforcement of interpreters' duty and their performance. That having a law and depending on enforcement officials is not

sufficient. Interpreters need to have some qualities and alternative measures of enforcement put in place.

#### **4.2 Summary of the Findings on Enforcement of Interpreters' Legal Duty in Refugee Status Determination in Kenya**

In response to the research questions of this study, the following are the findings.

1. This study found out that bilingual interpreters are usually employed in Kenya. The courts, RSD, churches, funerals, meetings and other fields require interpretation. Should strict measures of professionalization be stressed, then interpretation service will be limited.<sup>1</sup>
2. The study noted that when individuals are representing themselves and they are unable to speak a language fluently, the asylum officers are to decide whether or not they need an interpreter. Otherwise, the individual may not understand the proceedings, the failure to understand the process violates their right to a fair hearing.<sup>2</sup> Interpretation is vital where there is a language barrier. Therefore, interpretation is a crucial component in the delivery of justice.<sup>3</sup>
3. The study established that persons who have experienced persecution are likely to have experienced trauma. As a result, it inhibits their ability to articulate their stories. Interpretation inaccuracies can blend with other challenges to articulating a clear narrative, such as trauma, memory loss, inconsistencies and credibility issues, leading to a denial of relief.<sup>4</sup>
4. This study found out that most interpreters are not trained. However, they have been able to do some work to enable determination officers make decisions in RSD. It is important to promote the aspect of qualification for interpreters so that their services are more effective. However, there is no doubt that those who have worked longer as interpreters

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<sup>1</sup> See discussions in chapter 2.

<sup>2</sup> See discussions in chapter 3.

<sup>3</sup> See discussions in chapter 2.

<sup>4</sup> See discussions in chapter 2

have acquired some of the skills. Hence, expertise in interpretation can be obtained from experience.<sup>5</sup>

5. This study recognized that interpreters handle different categories of people in terms of education levels, social status, cultural backgrounds, nationality and age. Therefore, their knowledge of cultural diversity should be broad. This study observed that there is need for interpreters to have knowledge of legal terminologies, extensive vocabulary and an understanding of colloquial speech, nuances and jargons. Having the knowledge to detect verbal as well as non-verbal cultural traditions, customs, thoughts and beliefs is vital. These allows an interpreter to convey the intended message to a non-native speaker with ease and certainty.<sup>6</sup>
6. Competent interpreters will obviously perform better because they have met the requisite qualifications of interpretations. Further, due to their training, they understand the bare minimum regarding refugee law. Trained interpreters are capable of using their knowledge and abilities in conducting interpretation. They are less likely to express their opinions, or biases when interpreting. More so, they are in position to adhere to the code of conduct, neutrality, confidentiality and accuracy, which are components of their professional conduct.<sup>7</sup> The eligibility officers ought to establish that indeed the language can be spoken and to a level that is sufficient for interpretation. As discussed in the literature review, in judicial systems like that of the USA and South Africa, Proficiency tests are administered to establish competence among interpreters.<sup>8</sup>
7. The study discovered that speaking through an interpreter is considered a human right for asylum seekers. It is the duty of the host country to avail all essential services to asylum-seekers. In addition, the country of asylum should comply with all formalities, including availing competent and impartial interpreters. The study also found that it is important to

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<sup>5</sup> See discussions in chapter 2.

<sup>6</sup> See discussions in chapter 2.

<sup>7</sup> See discussions in chapter 3.

<sup>8</sup> See discussions in chapter 3.

provide basic interpreting skills for civil servants. This may help civil servants in highly multilingual countries to give their services effectively in appropriate languages.<sup>9</sup>

8. The study revealed that it is important to have pre-employment training compulsory. Pre-service training, as suggested by Hale, does not give assurance of absence of errors in interpretation, but it will nevertheless give some standards and guidelines for interpreters. Pre-service training is typically defined as training taken before employment. For instance, one can do a course in legal interpreting in a college before the provision of interpreting service. In the case of full-time employees, pre-service training is equivalent to in-house training. Similarly, this happens after a successful completion of a course by an interpreter and later given the offer of the job but before he or she is deployed to work. The existing practice of on-the-job training as earlier on discussed, can be augmented with pre-employment training.<sup>10</sup>
9. The results of the study showed that sometimes interpreters intervene openly. They paraphrase and filter the statements of the claimant and sometimes even attempt to weigh the validity of their communication. By so doing, the interpreter tends to bias the applicant's claim. Sometimes it is almost impossible to get equivalent words in interpretation. An interpreter should be sharp enough to get a word that is equivalent to the meaning of the original word, in order to maintain the meaning and intention of the speaker.<sup>11</sup>
10. From the interviews, it was reported that in most cases the RAS officials would distribute the application forms to asylum seekers and disappear into their offices. Sometimes they ask them to use the little English or Kiswahili they know to fill in the forms. Interpreters would then interact with asylum seekers and help them fill in the forms after listening to their stories.<sup>12</sup> Further, the feedback from fieldwork showed that some interpreters are harsh in the course of their work. Consequently, asylum seekers get confused and fail to express themselves freely.

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<sup>9</sup> See discussions in chapter 2.

<sup>10</sup> See discussions in chapter 3

<sup>11</sup> See discussions in chapter 3.

<sup>12</sup> See discussions in chapter 2.

11. Respondents revealed that there are challenges encountered by asylum seekers. Some found it difficult to communicate with their interpreters. Majorly because they spoke a language variety that is different from that of the interpreter. This is the case of one respondent from the Congo who stated that she had some difficulties with her interpreter. The reason was though Kiswahili is spoken in Congo, the Kiswahili version spoken in Kenya where the interpreter came from was quite different from that of Congo.<sup>13</sup>
12. The study revealed that proper interpreting requires good listening skills. A number of scholars define this type of listening as active listening. Further, they argue that active listening is different from other types of listening. Therefore, this type of skill needs to be learnt by the interpreter. Memory or the ability to remember is another essential quality which an interpreter needs to have. Regardless of the type of interpretation, memory and active listening are indivisible since one is a function of the other.<sup>14</sup>
13. Most respondents believe that there is need for the law to guide interpreters. They said that the law in place is sufficient but enforcement is inadequate. Section 12 of the Refugee Regulations provide for an interpreter in RSD. However, since there is scarcity of interpreters, little attention is given to interpreters' compliance with the law.<sup>15</sup> Furthermore, a vital characteristic of a qualified interpreter is the ability to exhibit high ethical behavior. Interpreters are put in various positions in which they are told confidential information regarding a client. They not only have to keep this information confidential but also have to remain impartial.
14. The study found out that there is need for interpreters' association in Kenya. Besides, there is need for regulatory framework for interpreters in Kenya. With regulations in place, then the next step is to develop a national code of conduct. For instance, the South African Language Practitioners' Act of 2014 provides this regulatory framework. The absence of active interpreters' association and regulatory framework confirms Herbulot's idea that a professional association protects the dignity and status of interpreters. When

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<sup>13</sup> See discussions in chapter 2.

<sup>14</sup> See discussions in chapter 3.

<sup>15</sup> See discussions in chapter 3.

this position is clearly asserted, other people will respect interpretation as a formal career.<sup>16</sup>

15. The study noted that the code of conduct in the professional body of interpreters is necessary. Interpreters face a lot of pressures in the workplace. In addition, the context of interpreting itself is not easy because of the many issues that come up during interpretation. Consequently, interpreters are to carry along general knowledge in every context they interpret. However, interpretation is not streamlined in many countries, yet interpreters perform difficult tasks in sensitive domains, such as the law, medicine and social work.<sup>17</sup>
16. The fieldwork revealed that good remuneration has always been and will always be a good motivation for good performance in any place of work. Interpreters are professionals in the same manner as doctors, surgeons, lawyers, mechanics, and computer scientists. These professionals have the full right to fix their professional rate as they deem depending on the complexity of their work. Therefore, commensurate remuneration for interpreters should be a matter of policy and not opinion.<sup>18</sup>
17. The study found out that there are many local languages spoken in Kenya. Further, there are two official languages which are English and Swahili. Nonetheless, the percentage of unqualified interpreters is higher in community interpreting than conference interpreting. Many companies which carry out conference interpreting employ trained and accredited interpreters.<sup>19</sup> However, the common practice in community interpreting is the use of bilingual interpreters.
18. Fieldwork study revealed that inadequate enforcement is as a result of the system being overburdened with considerable resource constraints. However, training interpreters and facilitating interpretation programs requires a lot of money which may not be readily available. Developing countries face a lot of economic hardships and financial constraints. Therefore, besides the need of formalizing interpretation, there are more

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<sup>16</sup> See discussions in chapter 3.

<sup>17</sup> See discussions in chapter 3.

<sup>18</sup> See discussions in chapter 3.

<sup>19</sup> See discussions in chapter 3.

pressing needs that many countries have to give priority to such as education, health care and security.<sup>20</sup>

19. The study revealed that, interpreters are not easily found. Furthermore, those available do not meet the required standard, which affects the quality of interpretation offered. Indeed, Kenya like many multilingual nations, a number of its nationals are unable to adequately speak the two official languages. Besides the asylum and migrant population, the overwhelming majority of interpreting users in Kenya are nationals. As such, many multilingual countries have a high demand of interpreters. Hence, interpretation is vital since it enables citizens to access their public services.<sup>21</sup>
20. The fieldwork research established that there is need to set high standards for interpreters. Interpreters should be competent with good abilities, skills and expertise. Communication can be quite complex during interpretation and very different from the casual conversation. At times, parties may use legal and specific terminologies, informal or formal speech. Applicants might also speak in a variety of languages or use slangs and jargons that provide different nuances in the meaning of the message.<sup>22</sup>
21. The study found out that there are numerous factors why it is unsuitable for children, friends, relatives, asylum seekers or refugees to interpret. Such groups of people may not be impartial. More so, they may have an interest in the claim of the case or they could be possible suspects. Further, they may not have been assessed to prove their proficiency and competence to interpret a given language. More still, they may not have been trained to retain meaning while interpreting and to adhere to the code of ethics. Consequently, they may fail to keep their boundaries in the course of interpretation and may interfere with the message from the asylum seeker.<sup>23</sup>
22. The study established the need for installation of audio-recording equipment. Interpreters must be sensitized of the system, which serves to help them avoid interpreting mistakes. Therefore, interpreters should work hard to ensure that they transmit the message

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<sup>20</sup> See discussions in chapter 3.

<sup>21</sup> See discussions in chapter 3.

<sup>22</sup> See discussions in chapter 3.

<sup>23</sup> See discussions in chapter 3.

accurately. It is vital for them to rectify any error as quickly as possible. Further to this, interpreters should also be encouraged to constantly evaluate their own performance by playing back audio-recordings for cases in which they interpreted or those interpreted by their colleagues. Authorities including RSD and RAS should periodically allow interpreters to video-record themselves.<sup>24</sup>

23. The study revealed that the use of video-recordings is not only important for new interpreters. Even experienced ones should occasionally video-record themselves while working. Later, they should be allowed to watch the video-tape together with their workmates in order to evaluate themselves with the aim of advancing their career. Video recordings should be a tool for quality-monitoring mechanisms. Further, video recording shows the interpreter at work. As a result, whatever is not done well could be observed and evaluated properly for feedback which is an important aspect of mentorship. The video recording exercise is an important practice which helps an interpreter to remain alert to the core rules of impartiality, confidentiality and precision. Further, the act of video recording motivates interpreters to strive to give accurate renditions.<sup>25</sup>

24. Asylum seekers are required to speak the truth and fully cooperate in the interview process. They must not twist, fabricate or exclude facts. If they purposely distort, fabricate or omit facts, such act may have an effect on the way their application for asylum will be processed. An interpreter may be made available if required so that the asylum seeker and the refugee status determination are able to communicate. The interpreter is to be both objective and unbiased as he or she has no role in making decisions about the application. There is need for asylum seeker to inform the RSD officials in case the asylum seeker does not communicate sufficiently with the interpreter due to differences in language. Similarly, the asylum seeker should report cases of harassment in the course of interviews.<sup>26</sup>

25. The study established that people who have vision, hearing, or speech disabilities use different ways to communicate. For example, those who are blind may give and receive

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<sup>24</sup> See discussions in chapter 3.

<sup>25</sup> See discussions in chapter 3.

<sup>26</sup> See discussions in chapter 3.



information audibly rather than in writing. For those who are deaf may give and receive information through writing or sign language other than speech. Therefore, there is need for expert interpreters for people living with disabilities.

#### **4.3 Testing of the Hypotheses and Presumptions**

This study was based on the following four hypotheses:

1. When interpreters perform their legal duty of bridging the communication gap well, the process of refugee status determination becomes effective.
2. Effective interpretation depends on the ability of an interpreter to transmit the exact message from the asylum seeker to the refugee status determination officer.
3. Poor interpretation is caused by inadequate enforcement mechanisms of interpreters' legal duty of accurate interpretation of asylum seekers' words.
4. For Kenya to improve on the process of refugee status determination there is need to adopt some proposals and best practices from other countries.

The first hypothesis was tested in chapter two of this study. The main variables in the hypothesis are the “performance of the duty” and “effective process.” The interrelation between the variables is that the role of an interpreter in RSD determines justice of the asylum seeker. This is the same in any judicial process where a decision has to be arrived at. Interpreters are set apart because of the stringent ethical and professional standards they must meet. They play a vital task in the administration of justice. Litigants, asylum seekers, victims, and witnesses depend upon their services. This hypothesis has been proven by the study in that interpreters determine the course of justice and lead to a fair decision when they perform their duty well.

The second hypothesis was also tested in chapter two of this study. The main variables in this hypothesis are “abilities” and “effectiveness.” The field and desktop research of this study established that effective interpreters are those that have the required qualities. Interpreters deal with people of various categories in terms of education levels, social status, cultural backgrounds, nationality and age. They need to have adequate knowledge on various cultural aspects. In addition, they should have abroad understanding of vocabularies, jargons, and good

grasp of colloquial speech.<sup>27</sup> These qualities make them effective in their work. The field and desktop research of this study proved the hypothesis by establishing that effective interpretation depends on the qualities of an interpreter.

The third hypothesis was tested in chapter three of this study. The main variables of the hypothesis are “inadequate enforcement of the law” and “poor interpretation.” The interrelation between them being that the inadequate enforcement of the law concerning the duty of interpreters is likely to negatively affect the performance of their duty. This hypothesis has been proven since there are inadequate enforcement mechanisms of the law. As a result, there is inadequate enforcement of the law with regard to the duty of interpreters. This study therefore recommends ways in which these challenges can be overcome.

The last hypothesis was tested in Chapter four. The main variables in this hypothesis are “improvement” and “proposals.” The nexus is that the system of refugee status determination will improve, if Kenya adopts some proposals and recommendations from progressive jurisdictions like USA and South Africa. This study proved this hypothesis by highlighting the need for Kenya to adopt some best practices from other jurisdictions.

#### **4.4 Conclusion**

This study sought to research on whether interpreters’ duty of effective interpretation in RSD is adequate to hold them responsible for poor interpretation. The study also sought to find out whether there are other enforcement mechanisms to ensure interpreters comply with the law. Further, to ensure that interpreters discharge their duties appropriately. This study sought to address the research problem on why there is variance between the law on interpretation and the practice in RSD. This study therefore sought to research into the enforcement of interpreters’ duty to ensure effective interpretation. It is very unlikely that the laws alone will bring about substantive change in the regulation of interpreters in Kenya. Though significant strides have been made through the case laws witnessed, more effort is needed to address the importance of

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<sup>27</sup> UN High Commissioner for Refugees, ‘Interpreting in a Refugee Context,’ (2009) ‘Self-Study Module 3 <<http://www.refworld.org/docid/49b6314d2.html>> accessed 28 April 2020, 17.

interpreters. Probably section 12 of Refugee regulations<sup>28</sup> should be improved upon to provide specific requirements and qualities that asylum interpreters should have.

The failure to adequately enforce the interpreters' duty could be due to a number of reasons. First, there are inadequate numbers of interpreters. As a result, adjudicators pay more attention on the availability of interpreters but not the quality of interpretation. Second, there are no relevant institutions of language interpreters in Kenya. It is also possible that determination officers do not want to discourage the few interpreters who make effort to learn other languages on their own. Africa where most asylum seekers come from is highly multilingual, hence any interpreter who is bilingual is hired. Besides, there is no national consortium of interpreter where their qualifications are monitored and services made available in the country. Further, there is no mechanism in place to evaluate the interpretation services. Finally, the question of ethics in interpretation often brings dissatisfaction to asylum seekers.

This study concludes that poor interpretation is attributed to insufficient enforcement of the law. The reluctance in the enforcement of interpreters' duty, the inadequate number of interpreters, the absence of qualifications and monitoring system are key factors as well. Watermeyer notes that those who interpret need to consider a number of factors for communication to be effective. They need to consider the body language, demeanor, in addition to the spoken words of the claimant.<sup>29</sup> Poor interpretation may go beyond inadequate enforcement of the law as other factors may as well contribute. However, with other mechanisms in place as suggested by this study, interpretation can be improved upon.

#### **4.5 Recommendations**

It is vital to consider the possibility of enforcement of interpreters' duty in RSD by adequate enforcement of the law. In light of that, this study makes the recommendations below.

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<sup>28</sup> Refugees (Reception, Registration and Adjudication) Regulations, 2009.

<sup>29</sup> Watermeyer J, 'She Will Hear Me: How Flexible Interpreting Styles Will Enables Patients to manage the inclusion of interpreters in mediated pharmacy interactions' (2011) 26 Journal of Health Communication, 71–81.

#### **4.5.1 Importance of Interpreters**

This study advocates that interpretation is vital where there is language barrier. Interpreters have a task to ascertain that asylum seekers who have a language barrier get accurate interpretation. The goal is to allow such asylum seekers to take part in the proceeding. Further, interpretation is a crucial component in the delivery of justice. Interpreters should ensure that a witness, a juror, a litigant, understand the proceedings fully, as if they spoke the target language fluently.<sup>30</sup>

#### **4.5.2 Attributes of a Good Interpreter**

This study proposes that the minimum requirement of training and certification should be expected of all interpreters. Interpretation skill training, legal language training and language proficiency tests are necessary. In addition, interpreters can perfect their skills by experience, on the job training, attending some workshop and internships. This is realistic because as the situation is in Kenya, there are no relevant training institutions. Additionally, training does not imply that the interpreters do not have knowledge of the language required. Simply put, training recognizes that interpretation is a skill that goes beyond simply knowing and speaking two languages.

Interpreters should have wide knowledge of cultural elements. They should have an extensive vocabulary, jargons, nuances as well as good command of legal terminologies.<sup>31</sup> They have an obligation to comply with their professional ethics. Notably, interpreters act as mediators. Hence, they contribute in bridging the language gap as well as the cultural gap. Therefore, they ought to uphold the basic principles of neutrality, confidentiality and accuracy which are key aspects of their professional ethics.<sup>32</sup>

An interpreter must have knowledge of immigration terminologies which is crucial. If the interpreter does not personally know the claimant, it will work very much in his or her favour. The reason is that the interpreter will be impartial, will remain professional and ensure accurate

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<sup>30</sup> Gile, *Basic Concepts and Models for Interpreters and Translators Training*, (Amsterdam, John Benjamins Publishing Company, 2009) 7-11.

<sup>31</sup> UN High Commissioner for Refugees, 'Interpreting in a Refugee Context,' (2009) Self-Study Module 3 <<http://www.refworld.org/docid/49b6314d2.html>> accessed 28 April 2020, 17.

<sup>32</sup> Ibid.

rendition of the story. Interpreters are guided by ethics to avoid the dangers of wrong interpretation.<sup>33</sup>

#### **4.5.3 Accurate Renditions**

Fieldwork study established that for interpreters to provide correct renditions at any judicial proceeding, they should have excellent understanding of the legal system. Knowledge and skills are essential for accurate interpretation.<sup>34</sup> It is argued that, interpreters' main duty is to transmit accurate and correct renditions. The interpreted message has to reflect the information in the original words of the speaker. Without any knowledge, interpreters may not be aware of such conditions. The study recommends the need for knowledge and skills to equip them with the ability to interpret the original message accurately.<sup>35</sup>

Studies have shown that usually lack of competence, knowledge gaps, and inadequate cultural information often leads to poor interpretation. The result is misguidance that leads to making poor judgments. Further, misinterpretation widens communication gaps and leads to wrong decisions.<sup>36</sup> One of the causes could be partiality, prejudice, or simply lack of deeper understanding.<sup>37</sup> Asylum officers need to ensure that interpreters are clearly assessed to perform well. This study proposes that interpreters must have sufficient knowledge on the language or speeches they deal with.<sup>38</sup>

#### **4.5.4 Measures**

As discussed in chapter two, this study recommends that a national database of all certified interpreters should be maintained at the national level. This will ensure that the services of

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<sup>33</sup> Ibid.

<sup>34</sup> See *Rasaratnam v Canada* [1991] 1F.C. 706.

<sup>35</sup> Keselman et al, 'A Mediated Communications with Minors in Asylum-Seeking Hearings,' (2008) 21(1) *Journal of Refugee Studies* 103–116.

<sup>36</sup> Hale S, 'The Challenges of Courts Interpreting: Intricacies, Responsibilities and Ramifications,' (2007b) 32(4) *Alternative Law Journal* 198–202.

<sup>37</sup> Ibid.

<sup>38</sup> Gile D, *Empirical Research into the Roles of Knowledge in Interpreting: Methodological Aspect, Knowledge systems of Translations* (Berlin, Mouton De Gruyter, 2005) 149-171.

trained interpreters are easily accessible sustainable. All parties to the RSD process should be sensitized on the importance of interpretation and the effect it has on the judicial decisions.<sup>39</sup>

This study suggests that employees in countries where many languages are spoken should be provided with basic interpreting skills. This may be a step towards enhancing effective communication in public institutions. It is important to note that Kenyans as well as asylum seekers need interpretation. Interpretation is vital in public services sectors like hospitals, banks, schools, and others. Not all Kenyans speak or understand English or Kiswahili perfectly. Various programs of training interpreters should be scheduled in the formal and informal sectors. The aim of the above plan is to make sure that all languages spoken in the country are considered for interpretation.

It is important to make pre-employment training compulsory. Pre-employment, as suggested by Hale, does not give assurance of absence of errors, but it will nevertheless give some guidelines and standards to direct interpreters. Pre-service training is typically defined as the training taken before employment.<sup>40</sup> For instance, one can do a course in legal interpreting in a college before the provision of interpreting service. In the case of full-time employees, pre-service training is equivalent to in-house training. Similarly, it happens after an interpreter has passed the tests and is later offered a job but before he or she is deployed to work. The existing culture of on-the-job training as earlier on discussed, should be augmented with pre-employment training.

There is need for interpreters' association and regulatory framework for interpreters in Kenya. With regulations in place, then the next step is to develop a national code of conduct.<sup>41</sup> The South African Language Practitioners' Act of 2014 provides this regulatory framework.<sup>42</sup> The lack of interpreters' association and regulatory framework confirms Herbulot's idea that there is

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<sup>39</sup> Interview with Koki, Nairobi, Kenya, 28 November 2020.

<sup>40</sup> Paul R, Svongoro, 'Court Interpreting in Zimbabwe: A Descriptive Study of Consecutively-Interpreted Rape Trials in Regional Magistrates Courts,' (2014) A thesis submitted to the Faculty of Humanities of the University of the Witwatersrand, Johannesburg, in Partial fulfillment of the Requirements for the award of the Degree of Doctor of Philosophy in Translation and Interpreting 250-255.

<sup>41</sup> Herbulot F, 'The Roles of Professional Translators' and Interpreters' Associations: Towards Promoting the Interests of Language Workers,' in Kruger, *Language Facilitation and Development in Southern Africa* (Pretoria, Blue Chip Printing Services, 1998).

<sup>42</sup> Ibid.

need to protect interpreters' dignity and professional status so that they are not undermined.<sup>43</sup> When they assert this position, other people will definitely respect their career. Further, active professional association is the best forum for interpreters to channel their challenges with regard to their working condition and terms of employment.<sup>44</sup>

It is vital to have installation of audio-recording equipment. Interpreters must be sensitized on the use of the recording which serves to help them improve their performance. Therefore, interpreters should work harder to interpret accurately.<sup>45</sup> It is imperative for them to correct any mistakes as quickly as possible. Further to this, interpreters should also be encouraged to constantly evaluate their own performance by playing back audio-recordings for cases in which they interpreted or those interpreted by their colleagues.<sup>46</sup> Authorities including RSD and RAS should occasionally allow interpreters to take their video in the course of their work. This proposal is in line with De Jongh's comment that "video-recording gives a chance to self-evaluation as a means of monitoring progress of newly recruited interpreters."<sup>47</sup> The advantage of a video recording is that it allows a replay, instead of just having the new interpreters observe the performance of senior ones.

The use of video-recordings is not only important for new interpreters.<sup>48</sup> Even experienced ones should frequently be allowed to video-record themselves while working. Later, they should be permitted to watch the video-tape together with their workmates to evaluate themselves with the aim of advancing in their career.<sup>49</sup> Video recording is utilized as a tool for quality-monitoring methods that gives a forum for interpreters to assess their performance. More so, video shows the interpreter at work, so that whatever is not done well could be observed and evaluated properly for feedback which is an important aspect of mentorship. This is an imperative measure to always remind interpreters on the basic principles of confidentiality, impartiality and accuracy.

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<sup>43</sup> Ibid.

<sup>44</sup> Keratsa, 'Courts Interpreting: Features, Conflicts and the Future,' (2005) *Applied Linguistics* 1-12.

<sup>45</sup> Ibid.

<sup>46</sup> De Jongh E, *An Introduction to Court Interpreting: Theory and Practices* (Lanham, University Press of America, 1992).

<sup>47</sup> Ibid.

<sup>48</sup> Devaux J, 'Technologies in Interpreter-Mediated Criminal Court Hearings: An Actor-Network, Theory Account of the Interpreter's Perception of her Role-Space, (2017) Unpublished Ph.D. dissertation, The University of Salford, Salford.

<sup>49</sup> Ibid.

When interpreters are aware that they may be video-recorded, they will definitely work hard to keep up with the standards and interpret accurately.

#### **4.5.5 Enforcement of the Law**

The African theory of community is an important pointer to the aspect of value of humanity, fairness and concern for people in a society. The theory advances the need for a fair hearing as a means of enforcing the law with regard to interpretation. Interpreters in USA and South Africa are controlled by the guidelines of the Interpreters Act of 1978 and professional standards respectively.<sup>50</sup> In the same way, all interpreters in Kenya ought to be controlled and expected standards set. This study proposes that stringent measures should be implemented by the government and UNHCR. These measures will help to ensure that interpreters are bound by their duty to provide honest and truthful interpretation. Those who interpret poorly should be punished by law enforcement authorities.<sup>51</sup>

The study proposes that asylum officers should evaluate the interpretation of interviews.<sup>52</sup> USCIS has separate guidelines for its officers working with refugees and asylum-seekers to ensure accurate interpretation in asylum proceedings.<sup>53</sup> Within the guidelines, there is a training module on working with interpreters. There are detailed guidelines, exercises, and additional recommended reading for asylum adjudicators. The module helps to ensure proper language access and evaluate the accuracy of interpretation during the interview. The existence of thoughtful and detailed guidelines exhibits a clear commitment to ensuring language access through training of its adjudicators.

Fieldwork suggested that that good remuneration has always been and will always be a good motivation for good performance in any place of work. Interpreters are professionals in the same manner as doctors, surgeons, lawyers, mechanics, and computer scientists. These professionals

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<sup>50</sup> Kiguru G, 'At the Mercy of Others Voices: An Illustration of Frequent Language Errors in Kenyan Courtrooms,' (2010) University of Nairobi Journal of Language and Linguistics 18.

<sup>51</sup> Interview with Baraka, Nairobi, Kenya, 15 December 2020.

<sup>52</sup> US Citizenship and Immigration Servs, 'the Role and use of Interpreters in domestic field office' (2017) <<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-17-1-RoleUseInterpreters-PM-602-0125-1>>Accessed 28 December 2020.

<sup>53</sup> Laura A, 'Language Access in the Immigration Courts,' (2011) Brennan CTR for Justice <[https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language\\_Access\\_in\\_Immigration\\_Courts.pdf](https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf)>Accessed 29 December 2020.



have the full right to fix their professional rate as they deem depending on the complexity of the work.<sup>54</sup> Thus, commensurate remuneration for good interpreters should be a matter of policy and not opinion. Hence, this study proposes that interpreters should be well remunerated.

The study proposes to have a consortium of interpreters. Fieldwork results the need for a consortium of interpreter in the country. Within them they can have a panel to deliberate on misconducts. It is from their deliberations and aspirations that we can come up with laws. This then can be incorporated into Refugees Act.<sup>55</sup>

Since some respondents indicated that inadequate enforcement is as a result of the system being overburdened with considerable resource constraints. The study recommends that the government of Kenya should collaborate with civil society organizations to seek adequate funding. Pooling resources together may help to pay for interpretation services and the expenses of running interpretation programs. There is need to develop programs for interpreters to acquire skills and knowledge. Such programs can target other relevant languages other than Kiswahili and English. This can be achieved through partnerships with international or national non-governmental organizations.<sup>56</sup>

The study strongly recommends that bilingual interpreters should be subjected to proficiency tests besides their academic credentials. Bilingual staff should be trained in basic interpretation and translation protocol. Officers and staff need to be equipped with effective language tools in order to adequately execute their duties and evaluate interpreters appropriately. Besides the periodic in-house training, there is need for cultural sensitivity training sessions for officers. The government should also carry out sensitization in communities where many bilingual interpreters are found.

Highly qualified interpreters are needed to work in a legal setting. This is because such proceedings involve issues of personal freedoms and rights. Therefore, promotion of training and certification of interpreters in this career is needed. However, besides specialized training in

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<sup>54</sup> Interview with Nina, Nairobi, Kenya, 11 January 2021.

<sup>55</sup> Interview with Narsa, Nairobi, Kenya, 27 February, 2021.

<sup>56</sup> Ibid.

interpretation, multiple years of practice and experience has been a guide to Practitioner's improvement in this area of specialization.

Language expectancy theory recommends that interpreters need to know the language rules of various societies. The reason being, language rules differ from one context to another. The study therefore recommends that to work as an interpreter in various domains, one needs to have general knowledge and rules in fields such as: medicine, law, engineering, architecture, survey, among others. Since the knowledge, skills and abilities needed to reproduce correct interpretation are not the same as those used in casual conversation,<sup>57</sup> one has to establish such competence in an approved assessment.

#### **4.5.6 Role of stakeholders**

##### **Civil society**

According to natural law theory, rights are inherent in a human being by the fact that the person exists.<sup>58</sup> All human beings deserve a just treatment which is a universal requirement.<sup>59</sup> The right of access to information (ATI) was officially declared in Kenya in 2010 after the enactment of the Constitution.<sup>60</sup> RSD officers need to ensure that asylum seekers know their right to an interpreter. Furthermore, they need to confirm that concrete measures are taken so that the services provided align with the legal requirements.<sup>61</sup> It is possible to begin making informed judgments about the quality of interpretation provided before the questioning begins. This can be done by finding out qualifications and experience of an interpreter. They should find out whether the asylum seeker is able to tell the story in the language of the host country. By assessing these abilities, the determination officer will be in position<sup>62</sup> to make a decision on the need for an interpreter. In other words, the asylum seekers right will be enhanced.

Bella stated that:

I do not think asylum seekers know that they can have their words interpreted during RSD. Programs by UNHCR and Non-Governmental Organizations that work with

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<sup>57</sup> Interview with Laura, Nairobi, Kenya, 8 March, 2021.

<sup>58</sup> Omony John Paul, Key Issues in Jurisprudence (law Africa, Kampala, 2004) 31-33.

<sup>59</sup> Maurice Makumba, *An Introduction to African Philosophy: Past and Present* (Paulines Publication, 2007) 25.

<sup>60</sup> Abuya, 'Promoting Transparency: Courts and Operationalization of the Right of Access to Information in Kenya,' (2017) Vol 46(2) Common Law World Review 115.

<sup>61</sup> Interview with Laura, Nairobi, 8 March, 2021.

<sup>62</sup> Brozicek v. Italy [1989] ECHR 23, 10964/84 (Judgment of 19 December 1989).

refugees have raised awareness of this right but sometimes the right is not realized and the asylum seekers do not know who to turn to, to ventilate their issues. For instance, some asylum seekers are cannot communicate their stories because they get interpreters who speak the similar languages but with a variation in dialect hence they cannot understand each other well.<sup>63</sup>

The African theory on the Culture of Community involves a special focus on concern for humanity which can be actualized by the civil society.<sup>64</sup> Civil Society organizations should ensure that interpreters facilitate justice for the asylum seeker. They should monitor and evaluate their services at the same time create awareness.

This study directs that there are numerous reasons as to why it is wrong for children, friends, relatives, asylum seekers or refugees to interpret.<sup>65</sup> These categories of people may not be impartial parties since they may have an interest in the decision of the claim or may be possible suspects. They may lack competence because of not being tested for language proficiency. In most cases, they may not have been trained to transmit the message accurately.<sup>66</sup> Further, they are likely to interfere with the message of the applicant since they do not know their boundaries as they execute their duties.

### **Interpreters**

Interpreters should know that whatever the interviewer or the asylum seeker say should be interpreted.<sup>67</sup> They are not supposed to summarize or interpret some words and embellish the rest of the information.<sup>68</sup> Interpreters are not allowed to change the meaning of words or alter the words or message of the asylum seeker to show their credibility.<sup>69</sup> They ought to be trained to take notes during the asylum hearing for the purpose of ensuring accuracy of what they interpret.<sup>70</sup> All details like names of persons, things or places must clearly be spelt out. The interviewers and asylum seekers should be allowed by the interpreter to ask questions for

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<sup>63</sup> Interview with Bella, Nairobi, Kenya, 18 January 2021.

<sup>64</sup> Mdombi D K, 'African Theory on the Culture of Community,' (2016) 16 (1) General Education Journal 36-48.

<sup>65</sup> Anker D, 'Determining Asylum Seekers' Claims in the United States: Executive summaries of an Empirical Study of the Adjudication of Asylum claims before the Immigration Court' in A Howard, *Refugee policy: Canada and the United States*, (Toronto, York Lanes Press, 1991) 268-281.

<sup>66</sup> Alicia Edwards, *The Practices of Court Interpreting*, (Philadelphia, PA, John Benjamins Publishing, 1995) 192.

<sup>67</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1991.

<sup>68</sup> Interviewing Applicants for Refugee Status determination (RLD 4 199) 4-5.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

clarification during the RSD process. Finally, the interpreter is to remain both impartial and neutral and he or she has no role in making decisions about the application.

### **Refugee Status Determination Officials**

It is important for the RSD officers to familiarize themselves with details on the basic data and registration forms and other related testimonies. They should translate and scrutinize copies of all papers received from the asylum seeker prior to the interview.<sup>71</sup> Accordingly, early preparations enables them to prepare relevant questions and spot out any information which may be missing, incomplete, inconsistent or unclear.<sup>72</sup> An interviewer should be well prepared with all the details of the applicant to avoid any uncertainty or suspicion.<sup>73</sup> This can be a barrier to obtaining a truthful story of the claim on which the decision of the case will be relied on.

In some cases, the asylum hearing takes place with the help of an interpreter. This may give rise to another barrier to effective communication.<sup>74</sup> It is significant for interviewers to brief the interpreter in time about the interview and what they are expected to do during the process.<sup>75</sup> The RSD officer should explain the details of the interview and the nature of questions to be asked.<sup>76</sup> Some clarifications on the refugee determination standards, common vocabularies and jargons may be useful.<sup>77</sup> At all times, the interpreter should be reminded about the professional conduct which he or she must comply with. It is vital to emphasize on the basic principles of interpretation which are: confidentiality, impartiality and accuracy.<sup>78</sup> If the interviewer is not contented with the interpreter's abilities then the interview process should not continue.

### **Asylum seekers**

Asylum seekers are required to speak the truth and fully cooperate in the interview process. That means they must not distort, fabricate or omit facts.<sup>79</sup> If they purposely distort, fabricate or omit

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<sup>71</sup> Robert Horselenberg et al, 'Interviewing Asylum Seekers: A vignette Study on the Questions asked to assess Credibility of Claims about Origin and Persecution,' (2016) *Journal of Investig Psych Offender Profil* 1–20.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1991.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> UNHCR Checklist for the Opening of the RSD Interview, *UNHCR Procedural Standards for RSD under UNHCR's Mandate*, 1 September 2005.

<sup>79</sup> Ibid.

facts, such acts may have affect the way the application for their asylum will be considered and processed.<sup>80</sup> An interpreter may be made available if required so that the asylum seeker and the eligibility staff are able to communicate.<sup>81</sup> This study recommends that an interpreter should be both impartial and neutral and he or she has no role in making decisions about the application. There is need for the asylum seeker to inform the RSD officials in case the applicant is unable to communicate effectively with the interpreter because of variations in the dialect. Similarly, an asylum seeker should report cases of harassment in the course of interviews.

## **Refugees**

Sometimes refugees are used to interpret. In case a refugee is utilized for interpretation purpose, the asylum officers need to ascertain that the refugee is not closely related to the applicant through family relations or other associations such as political party affiliation.<sup>82</sup> Asylum seeker and the interpreter are supposed to be free with each other and communicate freely. Therefore, any relationship may negatively impact on their freedom to communicate sufficiently.<sup>83</sup> The applicant and the interpreter should feel comfortable with each other.<sup>84</sup> This is essential to ensure that the objective of the interview is maintained. Where the RSD officers engage the services of asylum seekers or refugees, the interpretation should be restricted to conversations at preliminary stages when asylum seekers arrive in the country of asylum.<sup>85</sup> Otherwise, the RSD officers should work hard to obtain the services of a competent interpreter.

### **4.5.7 Evaluation of Interpreters**

RAS, RSD officials and UNHCR are directed to evaluate the work of interpreters and monitor their communication with the asylum seeker.<sup>86</sup> They should employ useful strategies to ensure accuracy. It is useful to brief the interpreter on the expectations required of him or her during the interview process prior to the hearing. The officers should assess the process by asking the asylum seekers to explain in their own terms their understanding of the communication thus far.

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Guidelines for the Field on Recruitments Procedures, Conditions of Service, Training and Supervision of Interpreters, (UNHCR, IOM-FOM 005/2009).

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

Questions should be repeated in various ways to prove the answers. There is need to assess the demeanor in order to gauge any relevant loophole in the interpreted version.<sup>87</sup> Also, they should be aware of recurrent pauses by the interpreter which may exhibit uncertainty as to terminologies or meaning of words.<sup>88</sup>

#### **4.5.8 Interpreting for the persons living with disabilities**

People living with disabilities like the blind need a qualified reader. The words should be in large print, Braille. Further, they should be provided with a computer screen-reading program or an audio recording of printed message.<sup>89</sup> People who are deaf, have hearing loss. They need qualified note taker, a qualified sign language interpreter, oral interpreter, cued speech interpreter, or tactile interpreter. Further, they also need real-time captioning, written materials, or a printed script of a stock speech. While those with speech disabilities may require a qualified speech-to-speech transliterator especially if the person speaks at length. Example, giving testimony in court, or just taking more time to communicate with someone who uses a communication board.

#### **4.6 Closing Statement**

This study has considered the interpreters' duty for effective interpretation, the requirements an interpreter should have and enforcement mechanisms. It has identified the gaps in interpretation and enforcement of the duty and made appropriate recommendations on how interpreters can improve on their performance in RSD within the existing legal framework.

Although interpreters' duty for effective interpretation is limited by absence of relevant training institutions, lack of required standards and inadequate enforcement of the law with regard to interpretation, with the guidance contained in this thesis, interpreters will definitely be guided to perform better. There is however need to carry out more research on how alternative enforcement measures can be executed. If the recommendations contained in this thesis are utilized, then we shall have an improvement in RSD. Hence, the study would have achieved its objectives. 'Having the law is less effective when they are not adhered to.'

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<sup>87</sup> Ibid.

<sup>88</sup> Barnett M, 'Mind your languages: Interpreters in Australian Immigration Proceedings' (2006) 10 University of Western Sydney Law Review 109–138.

<sup>89</sup> Ostergren J, *Speech-language pathology assistants: A resource manual*. (San Diego, CA Plural Publishing, 2014) 76.

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**APENDIX I: WORK PLAN**

<b>ACTIVITIES</b>	<b>OCTOBER - FEBRUARY 2020 - 2021</b>	<b>FEBRUARY- MARCH 2021</b>	<b>APRIL - JULY 2021</b>
<b>FIELDWORK (Data collection)</b>			
<b>Data coding and analysis</b>			
<b>Chapter One</b>			
<b>Chapter Two</b>			
<b>Chapter three and Four</b>			
<b>Submission and Defense</b>			

## APPENDIX II: RESEARCH PERMIT FROM NACOSTI

 <b>REPUBLIC OF KENYA</b>	 <b>NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY &amp; INNOVATION</b>
Ref No: <b>469561</b>	Date of Issue: <b>05/October/2020</b>
<b>RESEARCH LICENSE</b>	
	
<b>This is to Certify that Sr. HEDWIG NAFULA MUSE of University of Nairobi, has been licensed to conduct research in Nairobi on the topic: ENFORCEMENT OF INTERPRETERS' LEGAL DUTY IN REFUGEE STATUS DETERMINATION IN KENYA. for the period ending : 05/October/2021.</b>	
License No: <b>NACOSTI/P/20/6980</b>	
469561 Applicant Identification Number	 Director General <b>NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY &amp; INNOVATION</b>
Verification QR Code	
	
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### **APPENDIX III: QUESTIONNAIRE**

**Study Title:** Enforcement of Interpreters' Legal Duty for Effective Refugee Status Determination in Kenya

**Researcher:** Muse Hedwig

**Tel no:** 0716788174

**Email address:** blessings@students.uonbi.ac.ke

**Supervisor:** Prof. Edwin Abuya

### **INTRODUCTION**

Dear Sir/Madam,

Thank you for accepting to take part in this interview. I am a postgraduate student at the University of Nairobi pursuing a Master degree in Law. In partial fulfillment of my master degree, I am conducting a study on Enforcement of Interpreter' Legal Duty for Effective Refugee Status Determination in Kenya. This questionnaire is administered as part of my study in assessing the protection of Asylum seekers during refugee status determination. Please note that any information you give will be treated with utmost confidentiality and at no instance will it be used for any other purpose other than for academic purpose in this project. Your identity will be concealed. Your response will be recorded in the questionnaire. The interview is intended to take approximately 40 minutes. If you have any questions, please feel free to contact me.

Do you agree to participate in the study? Yes ..... No.....

## **SECTION A: BIO DATA**

1. Gender:   Male    Female
2. Occupation.....
2. Date of interview.....

## **SECTION B: REQUIREMENTS FOR INTERPRETERS TO FULFIL THE LEGAL**

### **DUTY OF EFFECTIVE INTERPRETATION**

1. Kindly explain what you understand by interpretation?
2. Do you think there are mistakes interpreters make? If yes, mention some.
3. What in your opinion are the qualities of an effective interpreter?
4. Do you think interpreters are important in Refugee Status Determination? If yes/No, give reasons.
5. Briefly explain the responsibilities of interpreters.
6. Are you aware of the consequences of poor/sub-standard interpretation?
7. In your opinion, do you think qualified interpreters perform better than unqualified ones? Kindly give reasons for your answer.
8. What in your opinion, needs to be done to improve on the quality of interpretation?
9. Do you know of any country that does better in interpretation during the refugee status determination? If yes, how is it done?

## **SECTION C: ENFORCEMENT**

1. What are some of the Standards and Guidelines that interpreters need to adhere to?
2. Do you think the law on interpretation is adequately enforced in Kenya? If yes/No, give reasons

3. Is the law in place adequate for effective interpretation in Refugee Status Determination? If no, what are some of the inadequacies?
4. What would you recommend to be done about enforcement of the law with regard to interpretation services in Refugee Status Determination?
5. In your opinion, other than the law, what else should be done to enforce interpreters' responsibility?
6. Are interpreters readily available in Refugee status determination? Kindly explain.
7. Are asylum seekers aware of their right to an interpreter during refugee status determination? Kindly Explain.
9. Do you think setting high standards for interpreters will improve their performance? Kindly give reasons for your answer.
10. Do you have anything else to add?

**APPENDIX IV: SCHEDULE OF INTERVIEWS**

**UNIVERSITY OF NAIROBI**

**MASTER OF LAWS PROGRAMME 2019/2020**

**RESEARCH TOPIC: ENFORCEMENT OF INTERPRETERS' LEGAL DUTY FOR EFFECTIVE REFUGEE STATUS DETERMINATION IN KENYA.**

**G62/34726/2019**

<b>NUMBER OF PARTICIPANTS</b>	<b>PSEUDONYMS</b>	<b>SEX</b>	<b>PLACE OF INTERVIEW</b>	<b>OCCUPATION OF THE PARTICIPANT</b>	<b>DATE OF THE INTERVIEW</b>
1.	Mambo	F	Nairobi	Social worker CRS	14/10/2020
2.	Kiki	M	Nairobi	Lawyer at JRS	17/10/2020
3.	Amani	M	Nairobi	Professor of law	20/10/2020
4.	Korir	F	Nairobi	Social work in a refugee camp	24/10/2020
5.	Lila	F	Nairobi	Catechist at a refugee camp	25/10/2020
6.	Mumbi	M	Nairobi	Officer at RCK	2/11/2020
7.	Tabu	F	Nairobi 138	Law lecturer	7/11/2020
8.	Pendo	F	Nairobi	refugee	11/11/2020

9.	Maka	F	Nairobi	Refugee	14/11/2020
10.	Shishi	M	Nairobi	Chaplain at a Camp	19/11/2020
11.	Candy	F	Nairobi	Counselor CARITAS	21/11/2020
12.	Koki	F	Nairobi	Program officer at JRS	28/11/2020
13.	Leru	F	Nairobi	Officer RAS	3/12/2020
14.	Zida	F	Nairobi	Executive Trustee CHTEA	5/12/2020
15.	Fatuma	M	Nairobi	Program officer Equality Now	7/12/2020
16.	Rufus	M	Nairobi	Magistrate	8/12/2020
17.	Wils	M	Nairobi	Officer UNHCR- Mogadishu	9/12/2020
18.	Baraka	F	Nairobi	Refugee	15/12/2020
19.	Essie	F	Nairobi	Director Catholic Care for Children	18/12/2020
20.	Chacha	F	Nairobi	Trainee KLRC	28/12/2020
21.	Toet	F	Nairobi	Director ASEC	3/01/2021



22.	Hilda	F	Nairobi	Pastoral department ACWECA	4/01/2021
23.	Tina	M	Nairobi	Director National Registration Bureau	7/01/2021
24.	Kim	M	Nairobi	Officer in charge Registration of Aliens	7/01/2021
25.	Yve	M	Nairobi	RAS Officer	9/01/2021
26.	Nema	F	Nairobi	Theologian Hekima	10/01/2021
27.	Kezia	F	Nairobi	Refugee	10/01/2021
28.	Nina	F	Nairobi	Police officer/advocate	11/01/2021
29.	Bena	F	Nairobi	Advocate	13/01/2021
30.	Nana	M	Nairobi	Teacher St. Aloysius Kibra	14/01/2021
31.	Ruffo	M	Nairobi	Jesuit Undugu Family	16/01/2021
32.	Alele	F	Nairobi	Norwegian Refugee Council	16/01/2021

				legal fellow	
33.	Bella	F	Nairobi	Comboni Missionary	18/01/2021
34.	Fahari	F	Nairobi	Social worker at Camp	18/01/2021
35.	Bongo	M	Nairobi	RCK	19/01/2021
36.	Terry	M	Nairobi	Salesian Missionary Kakuma	20/01/2021
37.	Uziru	F	Nairobi	KNCHR	21/01/2021
38.	Ngazi	F	Nairobi	Advocate	22/01/2021
39.	Lega	M	Nairobi	Journalist	27/01/2021
40.	Wataka	M	Nairobi	JRS- Nsambya	4/02/2021
41.	Shiko	F	Nairobi	Admin Kiryandongo	7/02/2021
42.	Asimwe	M	Nairobi	UNHCR Officer Arua (Ug)	12/02/2021
43.	Kareyo	F	Nairobi	JRS Congo/Interpreter	16/02/2021
44.	Mariam	F	Nairobi	AOSK	26/02/2021

45.	Narsa	F	Nairobi	Medical Missionaries	27/02/2021
46.	Laura	M	Nairobi	DCI (AHTCPU)	8/03//2021