



**UNIVERSITY OF NAIROBI
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(CASELAP)**

**ASSESSING THE ROLE OF TRADITIONAL JUSTICE SYSTEMS IN RESOLUTION
OF ENVIRONMENTAL CONFLICTS IN KENYA**

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DEDICATION

This thesis is dedicated to my dear parents: Dad Mr. Jairus Owino Obong'o and Mum Mrs. Catherine Sitawa Owino.

You are my true heroes.

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TABLE OF CASES

Wangari Maathai versus Kenya Times Media Trust (1989)1 KLR (E&L) p 164

Maathai and 2 others versus City Council of Nairobi and 2 others (1994)1 KLR (E&L) p 188
Civil Case No. 72 of 1994

Peter K Waweru versus Republic e(KLR) 2006 Civil Appln No 118 of 2004

LIST OF STATUTES AND CONSTITUTIONS

Civil Procedure Act Cap 21, Laws of Kenya

Environment and Land Court Act No. 19 of 2011

Environmental Management and Co-ordination Act, Act. No. 8 of 1999

Land Disputes Tribunal Act, 1990 (Now repealed)

The Constitution of Kenya 2010, Government Printer

The Constitution of the Republic of South Africa

LIST OF ABBREVIATIONS

EMCA	Environmental Management and Coordination Act
ADR	Alternative Disputes Resolution
TJS	Traditional Justice System
TDR	Traditional Dispute Resolution
ICTR	International Tribunal for Rwanda
SPSS	Statistical Package for Social Science
NEMA	National Environment Management Authority
PCC	Public Complaints Committee
NET	National Environment Tribunal

ABSTRACT

The thesis details the traditional conflict resolution mechanisms and institutions among various traditional African communities and their relevance in Kenya today. It argues that these conflict resolution structures and institutions are rooted in the culture and history of African people, and are in one way or another unique to each community. The overriding legitimacy and resilience of traditional conflict resolution structures amongst these communities justifies an inquiry on how they can be adapted to resolve environmental conflicts under modern law.

The paper outlines the various types of environmental conflicts that obtain in Kenya today, the current methods of conflict resolution in use and their shortcomings. The research goes ahead to assess in line with Article 159(2) (C) of the Kenyan Constitution, Section 18 and 20 of the Environment and Land Court Act the role of traditional mechanisms in resolving environmental conflicts in Kenya.

The traditional methods discussed here are not novel; they have been with us from time immemorial only that they were not known with their current names. Examples include negotiation, mediation and the use of elders. The institutions of conflict management among the traditional communities include, the family, the extended family, the clan, the council of elders and the tribe

The paper critically examines these institutions and mechanisms in the context of making a case for the enhanced use of traditional conflict resolution mechanisms in conflict management today. In conclusion the research focuses on some of the African countries that have adopted the traditional justice systems. Field survey was also conducted to find out the effectiveness of the legal and institutional framework for traditional justice systems, the applicability of the framework to resolution of environmental conflicts in Kenya and the reforms needed in order to enhance the use of traditional justice systems in resolution of environmental conflicts in Kenya.

CHAPTER ONE

1. INTRODUCTION TO TRADITIONAL CONFLICT RESOLUTION IN KENYA

Traditional conflict resolution mechanisms are now well entrenched in the Constitution of Kenya, 2010 through Article 159. These mechanisms are to be promoted by the courts and tribunals established. This research therefore seeks to assess the role of traditional methods of conflict resolution in resolving of environmental conflicts in Kenya in view of article 159 of the constitution of Kenya. The author of this thesis argues that where traditional methods of conflict resolution have been used in managing conflicts they have been effective since the methods are closer to the people, flexible, expeditious, fosters relationships, voluntary and cost-effective¹.

1.1 Background

Before the advent of colonialism, communities living in Africa and Kenya in particular had their own conflict resolution mechanisms. Whenever a conflict arose negotiations could be done. Among the Kikuyu for example “the elders acted as arbiters and their duty was to point out the recognized tradition and custom of the family to be followed”.² In other communities such as the marakwet and the pokot the Council of elders is referred to as *kokwo* and is the highest institution of conflict management. It is composed of respected wise old men who are knowledgeable in the affairs and history of the community. The elderly men and women act as third parties in the resolution of the conflict. Moreover, disputants could be reconciled by the elders and close family relations and advised on the need to co-exist harmoniously. As such traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence among the Africans³.

¹Muigua Kariuki, “*Alternative Dispute Resolution and Article 159 of the Constitution*” available at www.kmco.co.ke/attachments/article/107 accessed on 16/11/2012

² Kenyatta Jomo, *Facing Mount Kenya*, school edition (EAEP) 1938

³Supra Note 1

Therefore, the existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others in Kenya is enough evidence that these concepts are not new in this country as discussed above. They are practices that have been in application for a very long period.⁴ Consequently the recognition given to traditional dispute resolution mechanisms in article 159 (c) of the Constitution is thus a restatement of customary jurisprudence⁵.

In any given family or community there is bound to arise conflicts either among the members themselves or between members and people from outside their families or communities. Conflicts would stem from incompatible goals and differences over access and control of valuable resources such as water, land, grazing fields, minerals and so on. To clearly bring out the meaning of conflicts, the author of this thesis examines the difference between a conflict and a dispute as two major concepts in conflict management.

1.1.1 Conflicts

The word conflict has been defined as a struggle, fight, serious disagreement, argument or controversy.⁶ “Conflict is part of dynamic capitalism and an integral part of commercialism...”⁷ Conflict is present when two or more parties perceive that their interests are incompatible, express hostile attitudes, or take to pursue their interests through action that damage the other parties. In other words, conflict is an expressed struggle between at least two interdependent parties who perceive incompatible goals, scarce resources and interference from others in achieving their goals.⁸ Conflicts are issues about values which are non- negotiable, these needs and values are shared by the parties. Needs or values are inherent in all human beings and go to the root cause of the conflict. Since the conflicts are about certain underlying values, conflicts are normally resolved hence the phrase “*conflict resolution*”⁹

⁴ Muigua Kariuki, *Traditional Dispute Resolution Mechanisms under article 159 of the Constitution of Kenya 2010*. available at www.kmco.co.ke/attachments/article/111/ Accessed on 06.04.2013

⁵Supra note 1

⁶ Oxford Advanced Learner’s Dictionary, Oxford University Press, 4th edition

⁷ Peter Fenn, “*Introduction to Civil and Commercial Mediation*”, Chartered Institute of Arbitrators Workbook on Mediation, CIARB London, 2002, pg. 8

⁸ Wilmot W and Hocker J, *interpersonal conflict* (McGraw-Hill publishers) 2007 page 9

⁹ Muigua K. *Resolving Conflicts Through Mediation in Kenya*, Glenwood publishers Ltd, Nairobi, 2012 pp. 56-65

1.1.2 Disputes

Disputes develop when conflicts are not or cannot be effectively managed.¹⁰ Disputes arise where two or more people or groups, who perceive their rights, interests or goals to be incompatible, communicate their view to the other person or group. Similarly disputes can be based on the interests, rights or the power imbalance in the society. These interests or issues can be negotiated and even bargained about.¹¹ Interests or issues are superficial and do not go to the core or the root causes of the conflict. As such disputes can be settled hence the phraseology “*dispute settlement.*”¹²

1.2 Environmental Conflicts

“Environmental conflicts” could refer to the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests among others. Various groups, communities, developers, government and other organizations have differing ideas of how to access and utilize environmental resources. Laws and policies which have a conflict generating capacity are often pursued by the various groups leading to further friction among them.¹³

For instance, the Registered Land Act¹⁴ provides for sanctity of titles under sections 27 and 28. The provisions therein are to the effect that when a person is registered as the proprietor of land, absolute ownership is vested in him or her and that title shall not be defeated except as by law provided. Thus when a person acquires title to land that was occupied by other persons without title, this breeds conflict between the two interested persons or group of persons as they fight to control or access the resource. The Registered Land Act has since been repealed by the Land Act.¹⁵

¹⁰ Makumi Mwangi, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi) 2008 pp. 36-38

¹¹ A.B. Fetherston, “*From Conflict Resolution to Transformative Peacebuilding: Reflection from Croatia*”, Centre for Conflict Resolution- Department of peace studies: working paper 4 (April, 2000)

¹² Muigua K. *Resolving Conflicts Through Mediation in Kenya*, Glenwood publishers Ltd, Nairobi, 2012 pp. 56-65

¹³ Muigua Kariuki, *Environmental Conflict Management in the Kenyan context - enhancing the use of alternative dispute resolution mechanisms* A paper presented at the Nairobi Club on 27th March 2009. Available at www.kmco.co.ke/attachments/article/82/082 accessed 06.04.2013

¹⁴ Cap 300 laws of Kenya (now repealed)

¹⁵ Act No. 6 of 2012

"Environmental conflicts manifest themselves as political, social, economic, ethnic, religious or territorial conflicts, or conflicts over resources or national interests, or any other type of conflict. They are traditional conflicts induced by an environmental degradation.¹⁶

Environmental conflicts therefore are conflicts that occur as a result of unequal distribution in terms of access and utilization of obtaining environmental goods and services. Among the most dominant forms of environmental conflicts are those conflicts that occur between pastoralists and farmers, among pastoralists, trans boundary conflict over access to resources, and between local communities and powerful external interests such as multinational corporations over indigenous resources especially minerals and oil.¹⁷ The conflicts could be violent or none violent.

1.2.1 The nature and sources of environmental conflicts

Broad conceptions of conflicts recognize that in most social contexts, conflicts stem from incompatible goals and differences over access and control of valuable resources such as water, oil and mining of minerals. Given their ubiquity and universality, conflicts, however, can make people to be creative in order to manage them. This forces the construction of institutions to manage the efficient and orderly allocation of resources while also minimizing incompatible objectives. Conflict mitigation and avoidance institutions are also necessary to reduce violent conflicts, which epitomize the destructive and extreme forms of competition.

The constitution of Kenya in article 159 is a good example of creativity. It incorporates alternative dispute resolution methods that include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. This is meant to ensure access to justice at all levels.

Most of these conflicts reflect competition for and also space in the management of resources among poor communities and the encroachment on their livelihoods and resources by actors such as the state, private individuals and even private corporations. Among the most dominant forms

¹⁶ Mason S A, Spillmann K R, *Environmental Conflict and Regional Conflict Management*. Centre for security studies and conflict research, Swiss Federal Institute of Technology, Zurich. Available at www-classic.uni-graz.at/vwlwww/steininger/eolss/1_21_4_5_text.pdf accessed on 06.04.2013

¹⁷ Khadiagala G M, Mati J M *Migration and Global Environmental Change, PD 11: Conflict Management Mechanisms in resource constrained African communities*, University of Witswatersrand, Johannesburg, S. Africa October 2011

of conflicts are those between pastoralists and farmers; among pastoralists; trans-boundary conflicts over access to resources; and between local communities and powerful external interests such as multinational corporations over indigenous resources, especially minerals and oil. Some of these conflicts may not generate significant movements of people, but nonetheless reflect resources and environmental vulnerabilities as the drivers of social turbulence. These conflicts are not necessarily fuelled by resource scarcity. On the contrary, it is the politics of governing resource abundance, especially oil and mineral resources that precipitates conflicts.¹⁸

For instance today human/wildlife conflicts have reached levels that require government intervention in terms of formulation of appropriate policies to deal with the conflicts and the strengthening of the legal framework. This alone is not enough as even where policy is in place, the conflicts of the resources continue to persist. The Maasai community has co existed with the wildlife in the greater Mara for generations. In the last few decades, there has been an increase in large scale farming in the areas around the Mara and heavy human settlement. This has reduced the grazing areas, encroached on wild animals' habitat and also closed down animal migration corridors. This has brought conflict between the herders and animals on one hand and between herders and farmers on the other.

Conflict in Kenya has caused tremendous harm to civilians particularly women and children and increased the numbers of internally displaced persons in the country.¹⁹ In areas where the conflicts prevail development programmes have been disrupted or obstructed and resources re-directed to less productive uses. There has been deterioration in the quality of life, the weakening of political and economic institutions and the discouragement of investment. Not only have the prevailing conflicts occurred within Kenya's borders but some have spilled over borders lowering regional stability and the growth and prosperity of the region generally.²⁰ The Standard newspaper for instance reported that warlords have been known to organize joint cattle raiding

¹⁸Ibid.

¹⁹ Adan M, Pkalya R Edited by Muli E, *Conflict Management in Kenya, towards policy and strategy formulation* practical action, 2006

²⁰ Ibid

operations, involving thousands of Turkana and Pokot warriors, into Uganda, Sudan and Ethiopia and vice versa.²¹

Kenya has over the years been faced with conflicts over natural resources such as water, forests, minerals and land among others. There are existing legal and institutional mechanisms that are meant to deal with environmental conflicts but have not offered much in stemming the prevalence of environmental conflicts. Environmental conflicts in Kenya are still present and a cause of much concern.²²

1.2.2 Legal and Institutional Framework for Environmental Conflicts Management in Kenya

The constitution of Kenya under Article 70 provides that incase a person alleges that his/her right to a clean environment as recognized and protected under Article 42 has been or is about to be violated then the person can apply to court for redress. The court is being made a place of conflict resolution.

Under Article 162 the Constitution requires parliament to establish a court of the status of a high court with the responsibility to hear and determine disputes related to environment and use of and occupation of, and title to land. This provision is intended to equate environment and land court to the High court.

The constitution of Kenya recognizes the TJS as some of the conflict management mechanisms. Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. One of these principles is that of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the Bill of Rights,

²¹ Standard newspaper of 17th November 2012

²²Supra note 4

they are not repugnant to justice and morality or result to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.²³

The Environment and Land Court Act²⁴, is an Act of parliament enacted to give effect to Article 162(2) (b) of the constitution²⁵ to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of and title to land and to make provision for its jurisdiction functions and powers and for connected purposes. Section 20 of the Act provides that nothing contained in the Act may be construed as precluding the court from adopting and implementing, on its own motion or with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with article 159(2) (c) of the Constitution. The court is also obligated to stay proceedings where ADR mechanism is a condition precedent to any proceedings before the court until the condition is fulfilled.²⁶

Environmental Management and Coordination Act also guarantee the right to a clean and healthy environment. Section 3 provides that should that right be infringed upon then the person can apply to the high court for redress.

The Land Disputes Tribunal Act²⁷ is another law that created the land disputes tribunal though now it is repealed. The Land Control Act²⁸ creates the provincial and central land appeals boards which are statutory tribunals of dispute resolution²⁹ and the recently established Environment and Land Court.³⁰

Under the institutional framework, the Environmental Management and Coordination Act also establish other quasi judicial mechanisms such as the National Environment Management

²³ Article 159 (2) (c) of the Constitution of Kenya 2010, *Government Printer*, Nairobi

²⁴ Act Number 19 of 2011, available at www.kenyalaw.org

²⁵ Constitution of Kenya 2010

²⁶ Environment and Land Court Act, N0.19 of 2011 Section 20(2)

²⁷ Established under the now repealed Land Disputes Tribunals Act 1990

²⁸ Cap 302 Laws of Kenya

²⁹ Patricia Kameri-Mbote, *Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention*, IELRC Working 2005-1, available at <http://www.ielrc.org/content/w0501.pdf>

³⁰ Established under the Environment and Land Court Act, Act No. 19 of 2011

Authority (NEMA), National Environmental Tribunal (NET)³¹ and Public Complaints Committee (PCC).³²

The 2011 Environment and Land Court Act repealed the Land Disputes Tribunal Act of 1990; this resulted in extinction of land disputes tribunals that had provided adjudication mechanisms over land disputes since 1990. Since these tribunals were responsible for adjudication over environmental conflicts arising from land, they form bedrock of the jurisprudence that this research is investigating. In the next section the research analyses land disputes tribunals specifically to determine how they intersected with the traditional justice mechanisms, why they did not work and to glean out lessons pertinent to developing another framework.

1.2.3 Land Disputes Tribunals

The *Land Disputes Tribunals Act* provided for the establishment of Land Disputes Tribunals³³ in every administrative district and a Land Disputes Appeals Committee in every province.³⁴ They were a hybrid, quasi-judicial mechanism that utilized some elements of the formal system in their procedures and decisions, which were reached with considerations based mainly on customary concepts. They were mandated to adjudicate cases involving, *inter alia*, disputes over the division of land, the determination of boundaries to land, and claims to occupy or work land and trespass of land.

Technically, Land Disputes Tribunals were to base their decisions in accordance with recognized customary law. There is, however, no elaboration as to what recognized customary law is. The Act pointed to elders as sources, yet they are appointed largely on advice from chiefs. This means that decision makers in this process are as in the communal process the power holders at the community level.³⁵ The method used by the Minister in appointment of the elders was not

³¹ *ibid*, Part. XII sections 125-136

³² *Ibid.*, section 31

³³ Established under the now repealed Land Disputes Tribunals Act 1990

³⁴ Districts and Provinces Act is now repealed.

³⁵ Elders refers to persons who are recognized by custom in the community or communities to which the parties raising the issue belong as being, by virtue of age, experience, or otherwise, competent to resolve issues between the parties. Land Disputes Tribunal Act, sec. 2.

often transparent. The tribunals were therefore not independent in their operations as they would be required to be since the Minister and the provincial administration wielded a lot of influence on them especially their composition.

In practice, Land Disputes Tribunals did not have a good record protecting women's access to land, not least because their rulings were based on local informal concepts and practice. On the one hand, this allowed them to grant locally legitimate decisions, legitimate because they represented communal norms and values; on the other hand, Land Disputes Tribunals tended to root those decisions in local, male-dominated power structures and thereby perpetuated asymmetric power arrangements that excluded women from accessing land. Land Disputes Tribunals also negated the application of formal laws like the Law of Succession Act that grants women greater rights and protections. Despite the fact that Land Disputes Tribunals decisions could have been highly biased against women, there was no right of appeal unless a question of law existed.³⁶

The magistrate's courts also had influence on the decisions of the tribunals in the sense that they are the ones that validate the decision of the tribunals and ensured enforceability.

The assessment of the above analysis brings the Act to a point of convergence with the traditional justice systems. In both instances there was involvement of elders although the mode of appointment was different, both systems applied the customary law in the adjudication process and decisions were arrived at by a majority vote of the elders involved.

Kariuki Muigua argues that some of these dispute resolution mechanisms discussed above under the legal framework have not been very effective in resolving or managing environmental conflicts. Courts, for instance, are formal, inflexible, bureaucratic and expensive to access. They

³⁶ Andrew Harrington and Tanja Chopra, *Arguing Traditions: Denying Kenya's Women Access to Land Rights*, justice for the poor research report no.2 of 2010 available at www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/01/15/000333038_20100115005527/Rendred/PDF/526740WP0P11101on1Harrington1Chopra.pdf

address strict legal rights rather than the interest of the parties. The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties.³⁷

Thus, whether due to confusion regarding the various procedures, roles, and mandates and a lack of means to navigate them, or a lack of knowledge of and confidence in Land Disputes Tribunals and their propensity to reinforce existing power imbalances at the expense of disputants, or a combination of all these factors, most disputants were not engaging Land Disputes Tribunals. At present, the Environment and Land Court Act of 2011 repealed The Land Disputes Tribunal Act and replaced it with Environment and Land Court.

The Constitution of Kenya 2010 in article 22 grants every person the right to institute court proceedings where his or her right or fundamental freedoms have been denied, violated or infringed or is threatened. The article also allows a person to act in their own interest and also in the interest of others and the general public interest. Article 70 of the constitution as well as section 3 of EMCA³⁸ gives a person capacity to bring an action notwithstanding that such a person cannot show that the defendants' act or omission has caused or is likely to cause him any personal loss or injury. The only qualification is that the action should not be frivolous, vexatious and an abuse of the court process. This means that *locus standi* is no longer necessary in environmental litigation.

Locus standi is the right to bring an action or to be heard by a given forum, prior to the implementation of the Constitution of Kenya 2010 article 22 and 70 and EMCA section 3, *locus standi* was a major barrier to environmental justice for the Kenyan public.³⁹ In order to be heard, there had to be a showing that the person had a direct personal interest in the matter, usually established by demonstrating harm or damage to property.⁴⁰ This often precluded public interest

³⁷Supra note 9

³⁸ The Environment management and Coordination Act, Act No 8 of 1999

³⁹ The well-known case of *Wangari Maathai v. Kenya Times Media Trust Ltd.*, (Civil Case No. 5403, High Court of Kenya at Nairobi, Dec. 11, 1989) exemplifies the barriers to redress by a judiciary when it narrowly applies standing rules in the case of public interest litigation.

⁴⁰Charles Okidi, Patricia Kameri-Mbote & Migai Akech eds., *Environmental Governance in Kenya: implementing the framework law* 2008.

litigation from being successful.⁴¹ A key accomplishment of the framework law was the lessening of the burdensome standard of proving *locus standi*. Section 3(3) of the Act provides that “any person who alleges that his or her entitlement to a clean and healthy environment is being or is likely to be contravened may apply to the High Court for redress.” This creates an express right to standing without having to show a right or interest directly violated beyond a threat to a clean and healthy environment. Creating this right to standing should provide the public with better access to redress and slowly build accountability and responsibility for the environment.

The courts have reacted to the developments attributed to Article 70 of the constitution and section 3 of EMCA by engaging in what is referred to as judicial activism; this was very evident in the case of *Peter K Waweru vs. Republic*⁴² where the court addressed environmental issues on its own motion. It must be appreciated that *Peter K Waweru vs. Republic* case predates the constitution of Kenya which was enacted in 2010 way after the case that was determined in 2006. EMCA however was enacted before the case in the year 2004.

With locus standing eliminated as a barrier, court fees and costs; party and party as well as security for costs are now barriers to access to justice in litigation generally. The constitution however in article 22 does away with fees for commencing proceedings to enforce a right or a fundamental freedom in the bill of rights. This makes it easier for anyone wishing to file a case under article 22 since no fees will be required.

There is in Kenya what is referred to as Alternative Dispute Resolution (ADR) methods. They include mediation, conciliation, arbitration and negotiation and the Traditional Justice systems⁴³. These are yet to be fully utilized to realize the elusive tranquility that comes with equitable resource sharing between communities, which is much sought after. The nexus between the environmental conflicts and the state of the existing dispute resolution mechanisms for resolving

⁴¹ See *Wangari Maathai v. Kenya Times Media Trust Ltd*, (Civil Case No. 5403, High Court of Kenya at Nairobi, Dec. 11, 1989) (denying standing to private citizen to suit for violations to the environment where the general public is affected); *Wangari Maathai v. City Council of Nairobi*, (Civil Case No. 72 ,High Court of Kenya at Nairobi, Mar. 17, 1994) (denying standing to public interest plaintiffs challenging the transfer of development of municipal land).

⁴² (2006) eKLR

⁴³ Mohamed Adan, Ruto Pkalya, Elizabeth Muli eds., *Conflict Management in Kenya, towards policy and strategy formulation* Practical Action, 2006

environmental conflicts has not been adequately explored. The institutional and legal mechanisms for resolving environmental conflicts now in place in Kenya apparently have not eliminated environmental conflicts. The issue then is: Why have the existing formal institutional and legal mechanisms been ineffective in the face of the ever increasing conflicts?

Therefore, in this research the author seeks to examine how traditional justice mechanisms would reinforce existing legal and institutional frameworks in resolving environmental conflict, as required by Constitution of Kenya.

The constitution of Kenya 2010 in Article 159(2) (c) emphasizes that in exercising judicial authority, the courts and tribunals shall be guided by alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted however this is subject to clause (3) which limits the application of ADR if they:

- a) Contravenes the Bill of Rights
- b) Is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or
- c) Is inconsistent with the constitution or any written law

These Constitutional provisions are critical because; firstly they are set out in Chapter Ten on judicial mechanisms as the foundational principles for exercise of judicial authority in Kenya within the administration of justice; secondly, this is the first Constitutional recognition of Traditional Justice Systems in Kenya, because previously during the colonial period and post-independence they were banned and considered unlawful; and thirdly, it provides a strategic opportunity for their evaluation and modification to comply with the constitution and current circumstances of the society in order to supplement the judicial system in resolving conflict.

1.3 Statement of the research problem

Environmental conflicts in Kenya have continued to pose a great challenge to maximum sustainable utilization of our natural resources. The conflicts over natural resources have discouraged long term development in natural resources. The existing mechanisms for resolving such disputes are either based on the formal adversarial legal system or the political will of the

executive arm of the government. ⁴⁴ Writing about the English system, Andrew Harding⁴⁵ identifies several issues that make that system inimical to public interest environmental law. These include the adversarial as opposed to inquisitorial nature of the English legal system which makes it most effective for safeguarding individual rights, especially property rights rather than group rights which encompass environmental rights. The substantive and procedural rules also reflect this ideological bias and do not promote environmental cases except in situations where property rights and environmental protection coincide. In this kind of system group rights or environmental rights are regarded as “political” matters best sorted out not through courts of law but through the ballot box.

Courts, for instance, are formal, inflexible, bureaucratic and expensive to access. They address strict legal rights rather than the interest of the parties. The court system is adversarial in nature with limited room for negotiation and agreement on issues of interest to the parties.

Traditional system of justice is not perfect either; there is need for reform in order to improve accessibility for both poor and vulnerable groups. Their challenges include:-

- Conflicts with the principles of human rights
- Lack of inclusiveness (gender biased)
- Weak linkages to formal institutions
- Assessing and building of both legitimacy and accountability

The logic behind access to environmental justice is that there is need to make it easier to resolve environmental conflicts at the informal level since the formal level has proved inaccessible by the poor as well as the marginalized groups in Kenya?

Therefore, in this research paper the author sought to assess the role of Traditional Justice Mechanisms in resolving or managing environmental conflicts in Kenya.

⁴⁴ Muigua David Kariuki, *Resolution of Natural Resource Conflict Through Arbitration and Mediation*, LL.M Dissertation University of Nairobi, 2005

⁴⁵ Harding, A Robinson, D. & Dunkley, J. (ed) *Public Interest Perspectives in Environmental Law*, Wiley Chancery, 1995.

1.4 Research Questions

The following questions guided the study

- i. How effective is the legal and institutional framework for Traditional justice systems?
- ii. To what extent is the framework appropriately applicable to the resolution of environmental conflicts in Kenya?
- iii. What reform measures need to be undertaken to effectively enhance the use of Traditional justice system?

1.5 Research Objectives

The study had the following objectives:

- a) To critically evaluate the existing legal and institutional framework for traditional justice systems in Kenya and how they have been used in the resolution of environmental conflicts.
- b) To determine the challenges the frameworks face and recommend improvements, especially with regard to application of traditional Kenyan values.
- c) To propose an agenda for reform with regard to enhancing the use of traditional justice systems in the resolution of environmental resources based conflicts as envisaged in Article 159(2) of the Constitution and Section 20 of the Environment and Land Court Act that recognizes traditional disputes resolution mechanisms.⁴⁶

1.6 Research Justification

Conflicts over environmental resources have become a constant reality in the lives of people all over the world. There is uneven distribution of limited resources in the world. Access by various contesting groups is neither guaranteed nor equitable. Kenya has experienced many conflicts over the diverse categories of natural resources found in various parts of the country. Many

⁴⁶ Constitution of Kenya, 2010 Article 159(2)

people have lost their lives and livelihoods shattered in these conflicts. The existing dispute resolution mechanisms do not seem effective in resolving the conflicts.⁴⁷

Currently there is an increasing recognition that there are significant advantages of local people engaging with traditional justice system. However there is a view from some Kenyans and specifically the lawyers that justice should only be accessed through the formal justice systems and that the correct approach to access justice is to focus solely on making the formal legal systems more accessible, accountable, equitable and transparent.

Those who oppose the use of informal justice systems often cite the disadvantages associated with the traditional justice systems and suggest that engaging with them will simply perpetuate the inequalities and injustice inherent in such systems. The majority view however is that the long term goal of enhancing the formal state legal system should go hand in hand with a more immediate and positive engagement with informal and customary legal systems.

This research therefore was carried out with the main aim of seeking to clarify and to understand the role played by traditional justice systems in resolving Environmental Disputes and to understand their place within the Kenyan society.

1.7 Conceptual Framework

Kenya as a country has and continues to experience significant violence. A good example is the ethnic clashes between various tribes such as amongst the pastoralists and between pastoralists and the farmers. Since the year 1991 the clashes between the Kalenjins as well as other pastoralists and the Kikuyus have become more acute. These clashes have had devastating effects on the lives of thousands of individuals to date.

Environmental and demographic stresses have often precipitated these episodes. Growing populations combined with unsustainable ecological practices have resulted in a significant

⁴⁷ Supra note 36

depletion of available resources, which in turn has led to impoverishment, migrations and clashes over access to remaining resources.⁴⁸

These conflicts eventually require management. The conflict management options available include formal and traditional (non formal) mechanisms.

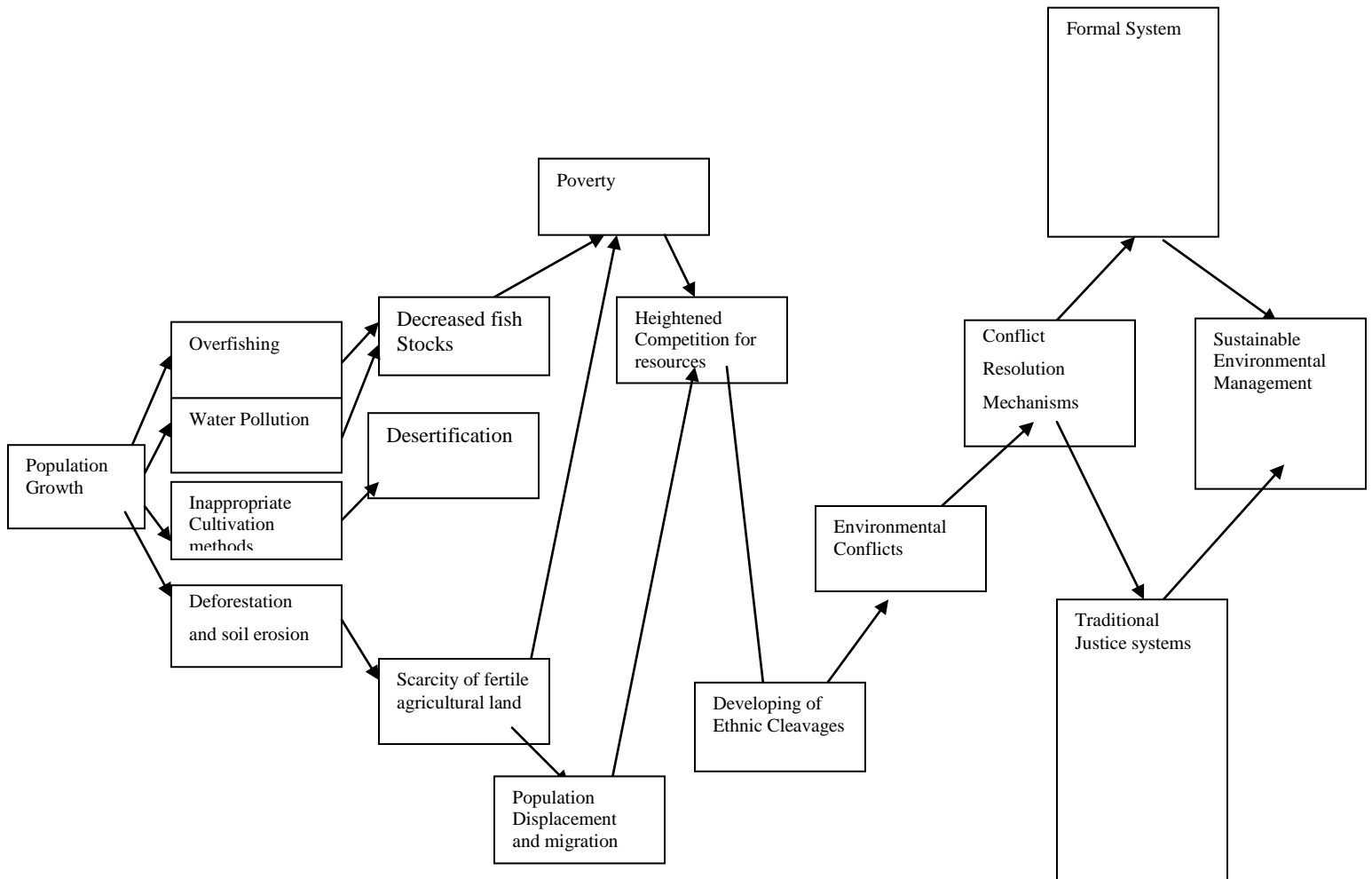


Table 1: a summary of the causes, manifestation and effects of environmental conflicts and the resulting resolution mechanisms available

⁴⁸ Schwartz, Daniel and Singh, Ashbindu. *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection*, UNEP 1999

1.8 Methodology

The research methodology requires gathering of relevant data from the specified documents and field research and compiling databases in order to analyze the material and arrive at a more complete understanding in order to assess the effectiveness of traditional conflicts resolution methods in environmental conflicts in Kenya. The research hopes to shed light on the research questions.

1.8.1 Methods and Study Design

The method of study that was used in this research was sample survey method. The sample survey research method was deemed as the appropriate method of gathering data from respondents who were thought to be representative of some population using an instrument composed of closed structure and open ended questions.

The survey method had distinct characteristics. First, the purpose of survey was to produce quantitative descriptions of some aspects of the study population. The analysis was primarily concerned with relationships between variables and with projected findings descriptively to a predefined population. This research also used qualitative method requiring the standardized information from and or about the subjects being studied which subjects were individuals.

The main way of collecting information was by posing questions to people. The questions were both structured and predefined questions. The responses obtained constituted the data that was analyzed.

1.8.2 Study site

The study was carried out in Kiserian, Rangau and Ngong'areas in Kajiado County as well as Butula area in Busia County. These are settlements in the former Rift Valley and Western provinces respectively.

This choice was justified on the basis of the presence of varied land ownership systems, availability of grazing fields, forests and rivers in the location and the cosmopolitan nature of the

residents. Most residents of the areas within Kajiado County who are predominantly Maasai and the Kikuyu continue to carry out with the traditional way of life; this also informed the choice of the study site for this research.

1.8.3 Data needs, types sources and data collection

This study relied both on primary and secondary data. The main source of primary data was information obtained from various respondents; this was achieved by use of questionnaires. The questionnaire was designed to capture closed and open ended responses. It consisted of structured and semi structured questions for cases where an elaborate response was required from the respondents.

The other source of data collected was through desk study of primary and secondary materials including the Constitution, the Land and Environment Court Act, books, journals, articles, conference papers, the internet among other materials.

1.8.4 Sampling procedure

A purposive sampling method was used for the study taking into account presence of the characteristics of interest and the scope of the study. This method was adopted because it allows the researcher to use cases that have the required information with respect to the objectives of his or her study. The research sampled Kiserian, Rangau and Ngong' areas within Kajiado County and Butula area of Busia County on the basis of the presence of a varied land ownership systems, availability of communal grazing fields, forests and rivers in the location.

1.8.5 Data processing and analysis

Data processing is an important part of the whole study operation. It included manual editing, coding, data entry, data cleaning and consistency checking. Statistical package for social science software (SPSS) was used to analyse quantitative data while qualitative data was analysed thematically.

Quantitative data is the type of information that can be counted or expressed numerically, this data will be used to express the field research findings in graphs, histograms tables and charts.

1.8.6 Thesis Structure

The thesis has eight chapters. Chapter One discussed above contains the background of the research. Chapter Two discusses Literature Review and the Theoretical Framework. Chapter Three discusses the role of both Legal and Traditional Justice Systems in resolution of environmental conflicts. Chapter Four discusses the concept of Access to justice through Traditional Justice Systems. Chapter Five is about the Field Research and Findings. Conclusion and Recommendations makes up Chapter Six while References and Annexes form Chapters Seven and Eight respectively.

CHAPTER TWO

2. LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.0 Introduction

At the heart of the requirement for peaceful settlement of disputes is the belief that disputes and conflicts cannot always be avoided and that should they arise they should be settled peacefully rather than through war. Article 2(4) of the Charter of the United Nations outlaws war as a basis for relations between states.¹

The peaceful methods of settlement specified in the Charter of the United Nations include, judicial methods, arbitration, negotiation, conciliation and mediation. States are however free to use other methods of their choice so long as they are peaceful. The methods of peaceful settlement can be classified as either coercive or non-coercive. Coercive methods include judicial settlement and arbitration, conciliation also has elements of coercion. The other way of classifying these methods is according to whether they lead to the settlement or resolution of conflict. Judicial methods lead to settlement whereas negotiation and mediation are resolution processes. Conciliation has elements of both settlement and resolution of conflicts.²

However the works discussed below have been identified as relevant to this study.

2.1 Settlement and Resolution

To clearly understand the process of Conflict Management, it is important to distinguish settlement and resolution of a conflict. Makumi Mwangi says that settlement of a conflict is based on power and specifically on the power relationships between the parties. In settlement parties engage in bargaining. Since the process is power based the stronger party during the bargaining is able to secure the better bargain. However, there is a possibility of the conflict erupting again should the power relationship between the parties change. Settlement is based on win-lose outcome.³ In a conflict then a settlement implies that the parties have to come to

¹ Makumi Mwangi, *Diplomacy Documents, Methods and Practice*, IDIS Publication on International Studies 1,2004

²Ibid.

³Ibid.

accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing the process becomes a contest of whose power will be dominant. Power therefore defines both the process and the outcome in a settlement.⁴

A.B. Fetherston⁵ has observed that settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes which are important aspects for peaceful co-existence. Consequently, the causes of the conflict in settlement mechanisms are prone to flare up again in future leading to conflicts.⁶ Settlement is a potentially damaging half-measure which leaves the causes of the conflict unaddressed and hence the possibility of the conflict later flaring up while a resolution addresses the root causes of the conflict.⁷

Resolution on the other hand addresses the causes of conflict and the attitudes of the parties towards each other. Resolution process rejects power as the basis of conflict management. It instead prefers the search of legitimate outcomes, these are the outcomes that parties reach voluntarily and which they believe to be right and just. Resolution is thus is not based on power but on negotiation between parties. Resolution reaches outcomes which are enduring since parties perceive them as legitimate outcomes. Resolution entails win-win outcome where both parties are winners.⁸ Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.⁹ The outcome of conflict resolution is enduring, non coercive, mutually satisfying,

⁴ Claire Baylis and Robyn Carroll, "*Power Issues in Mediation*", ", ADR Bulletin, Vol. 7, No. 8 [2005], Art. 1, p. 135

⁵ A.B. Fetherston, "*From Conflict Resolution to Transformative Peace building: Reflections from Croatia*", Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4 (April, 2000), pp. 6-8

⁶ Ibid.

⁷ J. Bercovitch, "*Mediation Success or Failure: A Search for the Elusive Criteria*", Cardozo Journal of Conflict Resolution, op.cit. 296

⁸ Mason S A, Spillmann K R, *Environmental Conflict and Regional Conflict Management*. Centre for security studies and conflict research, Swiss Federal Institute of Technology, Zurich. Available at www-classic.uni-graz.at/vwlwww/steininger/eolss/1_21_4_5_text.pdf

⁹ David Bloomfield, "*Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*", op. cit., p. 153.

addresses the root cause of the conflict and rejects power based out-comes.¹⁰ A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.¹¹

2.2 Traditional Dispute Resolution Mechanisms

Before the advent of colonialism communities living in Africa and Kenya in particular had their own conflict resolution mechanisms. Whenever a conflict arose, negotiations could be done. In other instances the elders such as the Council of elders or the elderly men could act as third parties in the resolution of the conflict.

Moreover, disputants could be reconciled by the elders and close family relations and advised on the need to co-exist harmoniously. As such traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence among the Africans.¹² Traditional conflict resolution mechanisms have been very effective in resolving conflicts especially natural resource-based conflicts among the pastoralist communities in Kenya. Such conflicts are intractable with complex cultural dimensions and the formal mechanisms of conflict management may not address the underlying causes of the conflict. Traditional justice mechanisms are flexible, cost-effective, and expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus most appropriate in enhancing access to justice closer to the people and help reduce backlog of cases in courts.¹³

¹⁰ Kenneth Cloke, *"The Culture of Mediation: Settlement vs. Resolution"*, The Conflict Resolution Information Source, Version IV, December 2005

¹¹ Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, op. cit., p. 42; See generally David Bloomfield, *"Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland"*, op. cit., p. 153.

¹² Muigua Kariuki, *"Alternative Dispute Resolution and Article 159 of the Constitution"* available at www.kmco.co.ke/attachments/article/107/a paper on alternative dispute resolution and article 159 of the constitution.pdf. Accessed on 16/11/2012

¹³ *ibid*

Pkalya et al¹⁴ argues that customary indigenous governance mechanisms can provide a solid framework for building a community's conflict resolution mechanisms, enhancing local people's potential and rediscovering elders' wisdom, knowledge and other resources. Pkalya et al...cites the case of pastoralists' conflicts over the control, use and access of pasture, grazing land and water resources have been contained largely by the existence of a strong traditional natural resource governing mechanisms such as the elders.

Traditional conflict management and resolution mechanisms use local actors such as the elders and traditional community as opposed to modern community based judicial and legal decision making mechanisms to manage and resolve conflicts within or between communities. Such framework will have to be rooted in customary principles of 'war and peace' as embedded in traditions and social structure of a community.¹⁵

Traditional conflict resolution structures are closely bound with sociopolitical and economic realities of the lifestyles of the African communities. These conflict resolution structures are rooted in the culture and history of African people, and are in one way or another unique to each community.¹⁶ Bolaji Owasanoye argues that resolution of disputes was a major function under the indigenous system of governance.¹⁷ The importance of the role of culture in conflict resolution and governance has become increasingly more prominent. In particular, one growing school of thought argues that indigenous cultural practices and traditional structures of leadership have a vital role to play in the building of sustainable peace in Africa.¹⁸

2.2.1 Negotiation

In negotiation parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. Negotiation is thus voluntary. It allows

¹⁴ PkalyaR,M Adan, I Masinde, *Indigenous Democracy, Traditional Conflict Resolution Mechanisms,Pokot,Turkana,Samburu and Marakwet*.Intermediate Technology Development Group-Eastern Africa, January 2004

¹⁵Ibid.

¹⁶ Ibid.

¹⁷ Paper written following a UNITAR sub regional workshop on Arbitration and Dispute Resolution (Harare,Zimbabwe 11to 15 September 2000) published in Geneva March 2001

¹⁸ Africa Peace and Conflict Journal, University for Peace, Volume 2, Number 1 June 2009

party autonomy in the process and over the outcome. It is non-coercive thus allowing parties' room to come up with creative solutions. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.¹⁹

Negotiation focuses on parties' common interests and not their relative power or position in the society. The aim in negotiation is to arrive at a "win-win" solution to the dispute at hand. Negotiation is an informal process and one of the most fundamental methods of dispute resolution; it offers parties maximum control of the process.²⁰ It has been said that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.²¹

2.2.2 Mediation

Mediation in traditional dispute resolution is a very informal process. It is a continuation of the negotiation process by other means whereby instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.²² Mediation is thus a continuation of the negotiation process in the presence of a third party. Bercovitch defines mediation as a method of conflict management where conflicting parties gather to seek solutions to the conflict with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement. Since mediation is, in essence a form of assisted negotiation it does not have any direct legal basis.²³

The agreement reached does not have to be in writing. It is binding because the parties have undertaken to voluntarily negotiate the conflict. Article 33 of the Charter of the United Nations outlines various conflict management mechanisms that the parties to a conflict or dispute may

¹⁹ See generally, "Negotiations in Debt and Financial Management", United Nations Institute of Training and Research, (UNITAR), December 1994; Roger Fischer and William Üry, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Books, New York, 1981, p.4.

²⁰ Muigua Kariuki. *Settling Disputes Through Arbitration in Kenya*, Lodana publishers, 2012

²¹Supra note 11

²² Ibid.

²³Supra note 7

resort to which includes mediation among others.²⁴ Mediation is also recognized by the Constitution of Kenya in Article 159 as one of the mechanisms for managing conflicts in Kenya, the constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the bill of rights, they are not repugnant to justice and morality and if they are inconsistent with the constitution or any written law.²⁵ The constitution therefore has elevated the importance of mediation and the other traditional conflict resolution mechanisms in resolving conflicts in the Kenyan context. This means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging mediation and other traditional means of conflict management as opposed to the formal mechanisms.²⁶

It is voluntarily entered into, parties exhibit autonomy in the choice of the mediator, over the process and the outcome. It is effective, efficient, depicts fairness and addresses power imbalances among parties. Such mediations result in a resolution of the conflict as opposed to a settlement.²⁷ Traditional mediation is effective in dealing with interpersonal or inter - community conflicts.²⁸

2.2.3 Council of Elders

This is a common institution in almost all communities in Kenya. Their role differed from community to community ranging from cultural, economic, socio-political organization to conflict management in the community. It is ordinarily the first point of call when any dispute arises in a community and since most Kenyans lives are closely linked to environmental

²⁴ United Nations, *Charter of the United Nations*, 24 October 1945

²⁵ Article 159(2) (c) of the Constitution of Kenya 2010, *Government Printer*, Nairobi

²⁶ Muigua Kariuki. *Resolving Conflicts Through Mediation in Kenya*, Glenwood publishers Ltd, Nairobi, 2012

²⁷ Muigua D.K *Resolution of Natural Resource Conflict Through Arbitration and Mediation*, LL.M Dissertation University of Nairobi, 2005

²⁸Supra note 1

resources; it is not surprising that most of the issues the elders deal with touch on the environment.²⁹

Among the Pokot and Marakwet for example, the council of elders is referred to as *kokwo* and is the highest institution of conflict management and socio-political organization. It is composed of respected, wise old men who are knowledgeable in the affairs and history of the community. The elders are also good orators and eloquent public speakers who are able to use proverbs and wisdom phrases to convince the meeting or the conflicting parties to truce. Every village is represented in the council of elders. Senior elderly women contribute to proceedings in a *Kokwo* while seated. Women however participate as documentalists so as to provide reference in future meetings. They also advise the council on what to do and what not to do citing prior occurrence and or cultural beliefs and before a verdict is made the women are asked to voice their views or opinions. The *Kokwo* observes the rules of natural justice.³⁰

Among the Agikuyu community they were referred to as *Kiama*. *Kiama* used to act as an arbitral forum or mediator in dispute resolution.³¹ The power to decide land disputes was vested in the councils of elders, who conducted all land transactions³².

The *Kokwo* amongst the Pokot and Marakwet, the *tree of men* amongst the Turkana and *Nabo* among the Samburu communities are perhaps the most important governance institutions amongst these communities. The elders in the three communities form a dominant component of the customary mechanisms of conflict management.³³

From the above literature it is clear that a lot has been written about the traditional justice systems in Kenya, looking at the same literature the focus has been on how the systems operate

²⁹ Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *IELRC Working Paper 2005-1*, p. 3, available at <http://www.ielrc.org> (accessed on 18/11/2012)

³⁰ Ruto. P, Mohamud .A, Isabella .M Betty Rabar & Martin Karimi, (eds.) *Indigenous Democracy: Traditional Conflict Resolution Mechanisms. The Case of Pokot, Turkana, Samburu and Marakwet communities*, ITDG, Nairobi, 2004

³¹Supra note 26

³² Kenyatta Jomo, Facing Mount Kenya, school edition EAEP 1938

³³Supra note 14

generally. It is acknowledged that traditional justice systems play a major role in resolving many other conflicts including environmental conflicts. Research has however not been able to document the effectiveness of these mechanisms in resolving environmental conflicts.

This research therefore attempts to fill some gap and documents the effectiveness of traditional justice systems in resolving environmental conflicts. The research focuses on at various traditional justice systems that deal with environmental conflicts and further assesses the level of usage of these mechanisms and finally explores whether this mechanisms actually assist in access to justice or if the obstruct the access to justice in environmental conflicts.

2.3 Theoretical Framework

2.3.1 Traditional Justice Theory

Before the advent of colonialism the communities living in Africa had their own conflict resolution mechanisms. Those mechanisms were geared towards fostering peaceful co-existence among the Africans. Existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Africa. Conflict resolution among the traditional African people was anchored on the ability of the people to negotiate. However with the arrival of colonialists came the common law that brought with it the court system which, being adversarial greatly eroded the traditional conflict resolution mechanisms. The court system is the main conflict resolution mechanism in Kenya today. There are however many barriers to accessing justice through the court system including, among others high fees, complex rules of procedure, geographical location of courts that does not reflect the demographic dynamics, cultural, economic and socio-political orientation of the society, lack of financial independence and selective application of laws.

Due to the above cited hurdles, many African states Kenya included tend to adopt the traditional conflict resolution mechanisms in their legal systems.³⁴ The role of culture as the foundation of the nation and that all forms of national and cultural expression shall be promoted is now

³⁴ Article 159(2) (c) of the Constitution of Kenya 2010

constitutionally guaranteed.³⁵ Traditional conflict mechanisms have been effective and their declarations and resolutions have been recognized by the government. This is exemplified for instance by the Modogashe Declaration in which community members from Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socioeconomic problems, identifying role of peace committees among others.

The Traditional justice system is inquisitorial and restorative in nature while the Common Law system is adversarial and punitive justice. Traditional Justice is a peace building initiative that creates community awareness and development in a given community. It is closely linked to culture in terms of thoughts, feelings, attitudes, materials, traits and behaviour of the group of people. These characteristics are manifested and shared by the group through symbols, communication, judicial, economic and social patterns. Where there is a dispute, restoration and community harmony is paramount.

The elders in traditional African societies form a dominant component of customary mechanisms of conflict management. They have three sources of authority that make them effective in maintaining peaceful relationships and community way of life. They control access to resources and marital rights, they have access to networks that go beyond the clan boundaries, ethnic identity and generations; and possess supernatural powers reinforced by superstitions and witchcraft.³⁶

However, each Traditional Justice System differs from one ethnic group to another due to their peculiar historical, social and economic experiences and the environment they live in.

It is due to the above cultural notions that Traditional Justice is premised on the principles of restorative justice which encompasses justice that seeks to correct historical or past wrongs committed against individuals with an impact on the community. Restorative justice implies that the existing wrong has disrupted or impaired the community relationships in the society between those directly implicated or affected by the wrong (that is the perpetrator and victim) and the entire community. It is fundamentally concerned with restoring social relationships and re-

³⁵ Ibid. Article 11

³⁶ Ibid

establishing equity based on its values. It therefore punishes the individual while reconciling the entire group or community concerned. The aim is to attain both equity and equality before the traditional law and offer remedies that are deterrent and progressive to all. This brings healing, action by itself which may lead to individual punishment and also civil remedies like restitution.³⁷ This theory forms a basis on which the research seeks to evaluate the role performed by the traditional justice systems in resolution of environmental conflicts.

2.3.2 Constitutionalisation of Traditional Justice System

The Constitution³⁸ has an unprecedented inclusion of Article 44 (1) which provides that 'Every person has the right to use the language and to participate in the cultural life, of the person's choice' and Article 159 (2) (c) provides that 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute mechanisms shall be promoted...' These articles begin to form the Constitutional framework for Community Justice Systems which are culturally based and act as an incentive to negotiate cultural justice notions with those who do not belong to that particular cultural heritage.

Article 159 (3) provides bench marks that, 'traditional dispute resolution mechanism shall not be used in a way that -

- a) Contravenes the Bill of Rights;
- b) Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
- c) Is inconsistent with the Constitution or any written law.

These Constitutional provisions are critical because; firstly they are located in Chapter Ten of the constitution as part of the judicial mechanism within the administration of justice; secondly, this is the first Constitutional recognition of Traditional Justice Systems in Kenya, previously during the colonial period they were banned and unlawful; and thirdly, it provides a strategic platform

³⁷Jedidah Wakonyo Waruhiu, Florence Gachichio And Ezra Rotich, Africa: *Constitutional Community Justice Systems in Kenya* <http://allafrica.com/stories/201105121013.html?viewall=1> published 12 May 2011,

³⁸The Constitution of Kenya, 2010

for their administrative and immediate enhancement to complement the Common Law system of justice.³⁹ The research herein though guided by the above theories was mainly aligned to the traditional justice theory. This is because the research sought to assess the role of traditional justice systems in resolution of environmental conflicts in Kenya.

2.4 Conclusion

Kenya has suffered significantly as a result of inter-community conflicts and of basic concern is how those conflicts have affected the communities noting that in most instances the repercussions have been dire. This has therefore pushed community members to address the conflicts.

³⁹ Established under the Environment and Land Court Act, Act No. 19 of 2011

CHAPTER THREE

3. ROLE OF FORMAL/JUDICIAL AND TRADITIONAL JUSTICE SYSTEMS IN RESOLUTION OF ENVIRONMENTAL CONFLICTS

3.0 Introduction to the concept of access to justice

With the enactment of the Constitution in 2010, the dream of realizing access to justice has become more evident than ever before. The constitution creates various avenues for enhancing access to justice in Kenya. There are now several provisions specifically providing for access justice, public participation, ADR and traditional dispute resolution mechanisms and the overhaul of the judicial system. Access to justice can be defined as the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.¹ Access to justice is ‘ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’. Access to justice is a fundamental human right for any given community in the world.²

In Kenya access to justice has been hampered by many factors. Some of these factors are the high court fees, geographical location, complexity of rules and procedure and the use of legalese. The courts’ role is also dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves. There is also lack of awareness of ADR mechanisms and traditional justice systems. These reasons make access to justice in Kenya difficult to many people.³

¹ UNDP Justice System Programme, *Access to Justice Concept Note*, February, 2011

² FIDA Kenya, *The Peoples Version, Informal Justice System simplified guide*, 2011

³ Muigua Kariuki, *Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies*. Available at www.kmco.co.ke

In this chapter the author discusses access to justice and how the same can be enhanced through formal/judicial and traditional justice systems with specific reference to the Constitution of Kenya, 2010 and the Environment and Land Court Act.

3.1 The Constitution of Kenya

Traditional dispute resolution mechanisms are now recognized and protected in the supreme law of the land. They have been recognized as some of the mechanisms for managing conflicts in Kenya. Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or result to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.⁴

From Article 159 (1) judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora), disputes are resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system as they are very informal. It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation.⁵

Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the constitution.

⁴ Article 159 (2) (c) of the Constitution of Kenya 2010, *Government Printer*, Nairobi

⁵ *Ibid*, Article 11

Traditional conflicts resolution mechanisms have been very effective in resolving conflicts especially natural resource-based conflicts among the pastoralist communities in Kenya. Such conflicts are intractable with complex cultural dimensions and the formal mechanisms of conflict management may not address the underlying causes of the conflict. Traditional justice mechanisms are flexible, cost-effective, and expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus most appropriate in enhancing access to justice closer to the people and help reduce backlog of cases.⁶

The only limitation to the application of these mechanisms is that they shouldn't be used in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality. Justice and morality are however not defined in the constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality.

Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law, for instance disinheriting women in a succession dispute.

3.2 The Environment and Land Court Act

The creation of environmental courts and tribunals worldwide has been accelerated by concerns about how non-specialized court systems handle environmental and land issues reflecting the need to provide expeditious and cost effective justice, and the challenges facing ordinary courts including accessibility, delay, cost, complexity, lack of legal and technical expertise and quality of decisions.⁷

⁶Muigua Kariuki, "*Alternative Dispute Resolution and Article 159 of the Constitution*" available at www.kmco.co.ke/attachments/article/107/a_paper_on_alternative_dispute_resolution_and_article_159_of_the_constitution.pdf. Accessed on 16/11/2012

⁷Odotte C, *Country report: Kenya Constitutional Provisions on the Environment*. IUCN Academy of Environmental law e-journal issue 2012(1)

The Environment and Land Court Act⁸, is an Act of parliament enacted to give effect to Article 162(2) (b) of the constitution⁹ to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of and title to land and to make provision for its jurisdiction functions and powers and for connected purposes. Section 20 of the Act provides that nothing contained in the Act may be construed as precluding the court from adopting and implementing, on its own motion or with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with article 159(2) (c) of the Constitution. The court is also obligated to stay proceedings where ADR mechanism is a condition precedent to any proceedings before the court until the condition is fulfilled.¹⁰

The situations above are a great contrast of the situation that obtained in Kenya in relation to resolution of environmental conflicts before the enactment of the Constitution in 2010. These conflicts were dealt with under the normal court system by both civil and criminal law in addition to National Environment Tribunal (NET) established under the Environmental Management and Coordination Act which had limited jurisdiction.

3.3 The adversarial nature of the Kenyan justice system

There are two major systems of conflicts resolution in the world, the adversarial system and the inquisitorial system. In Kenya for example the adversarial system as opposed to the inquisitorial system has been adopted. The constitution in article 70 brings out the adversarial nature of litigation. It provides that anyone who alleges that his or her right has been infringed than it is incumbent upon that person to apply to court for redress.

Civil litigation under the Civil Procedure Act¹¹ has an inherently adversarial character and is widely perceived in society as a tool of confrontation and unnecessary harassment. Especially in instances where parties are otherwise well-known to each other, their involvement in lengthy and

⁸ Act Number 19 of 2011, available at www.kenyalaw.org

⁹ Constitution of Kenya 2010

¹⁰ Environment and Land Court Act, N0.19 of 2011 Section 20(2)

¹¹ Civil Procedure Act Cap 21 laws of Kenya, revised edition NCLR, 2010

acrimonious civil suits can do irreparable damage to their mutual relationships. Under such conditions, judges can use their discretion to direct the use of ADR methods under their supervision. Similarly, the Environment and Land Court Act gives the court *suo moto* jurisdiction in adopting and implementing any other appropriate means of alternative dispute resolution, but this has to be in agreement with the parties to the dispute or conflict.

In broad terms, an adversarial system of conflict resolution refers to the common law system of conducting proceedings in which the parties and not the judge have the primary responsibility of defining the issues in conflict, for investigating and advancing the conflict.¹² In Canada for example, the system of justice is based on the adversarial model. In this model two parties assume opposite positions in debating the guilt or innocence of an individual. In this scenario, the judge is required to be neutral at the contest unfolding before him or her. The role of the judge in this arrangement is to ensure the trial proceeds according to the procedural rules of trial or due process of law and that evidence entered is done so according to established rules and guidelines.¹³

In an inquisitorial legal system, the court is actively involved in determining facts of the case as opposed to the adversarial proponents system. Proponents of the adversarial system often argue that the system is fair and less prone to abuse as it allows room for the state to be biased against the defendant. It allows most of the litigants to solve their issues amicably through discovery and pre-trial settlements in which non contested facts are agreed upon and not dealt with during the main trial where the court plays the role of an impartial arbiter between the litigants.

In addition, adversarial procedure defenders argue that the inquisitorial court systems are overly institutionalized and removed from the average citizen. Although many concede that the adversarial system is imperfect and that it may be subject to abuse and manipulation, the majority still believe that by giving all parties and their advocates the opportunity to present

¹² Ogangah A. Claris, *Assessing the role of informal justice system in resolution of succession disputes*. LL.M term paper, University of Nairobi, 2010

¹³ Adversarial and Inquisitorial Legal Systems Article, available at <http://chatt.hdsb.ca/~mossutom/law/Handouts/Unit%203-Handout%20Adversarial%20and%20Inquisitorial%20Legal%20Systems.htm> accessed on 03/03/2013

evidence and arguments before an impartial judge, it provides a free and pluralistic society with the best available means of settling disputes.¹⁴

The goal of both the adversarial and inquisitorial systems is to grant justice. The adversarial system seeks truth by pitting the parties against each other in the hope that the competition reveals it, whereas the inquisitorial system seeks justice by questioning those most familiar with the events in dispute. The adversarial nature applies to environmental conflicts, here the parties are expected to define issues in dispute and advance their case in a way that will convince the judge to decide in their favor.¹⁵

3.4 The challenges with adversarial nature of the justice system

The finding of evidence rests on the resources of the two parties which may be unequal. The adversarial system makes the adversaries responsible for digging out the facts on which a decision will be based. The adversarial system works on the theory that the two opponents in a case, or their lawyers, will work harder than anyone else to produce evidence favourable to his/her side; no one else has as strong a motive. At the very core of the adversarial system, in fact, is the belief that the individual is responsible for preserving individual rights. That is not to say that our method of trying cases by vigorous pro and con argument is perfect. In earlier days verdicts, both civil and criminal, usually favoured the client with financial resources. The evidence might have suggested otherwise, but this client could afford the very best in lawyers than the other poor litigant could hire. With the arrival of legal aid, the situation improved, but was still skewed in favour of the wealthy.

Parties only provide evidence favorable to their arguments. The evidence and witnesses that are called are left up to the two arguing parties, the defense counsel and the crown. The Kenyan equivalent of the crown is the State. The state only takes part in criminal cases, and civil cases where the state is a party. In both scenarios the judge is not involved in what is presented to the court. If the state wishes not to call certain evidence or individuals as witnesses even though it

¹⁴ Supra note 12

¹⁵ Ibid.

may help shed light on the case, the judge cannot intervene. This leaves the two parties in charge of the case and the direction it takes.¹⁶

3.5 Conclusion

Resolution of environmental conflicts whether through the formal/judicial or traditional justice systems are meant to ensure that the beneficiaries get justice irrespective of the resolution method that is used. For the people who opt to have their environmental conflicts dealt with under the traditional justice system then they should be resolved in line with the national laws of the land. Culture and customs should not be used to deny any party to the conflict justice.

Traditional justice systems tend to make the process of conflict resolution faster, easier and cheaper. This traditional mechanisms should be strengthened in order enhance the use in resolution of environmental conflicts in Kenya. By doing so it will help address a number of conflicts that have contributed to case back log in Kenyan courts

¹⁶ Supra note 13

CHAPTER FOUR

4. ACCESS TO JUSTICE THROUGH THE TRADITIONAL JUSTICE SYSTEMS

This chapter discusses the concept of access to justice using the traditional African institutions and mechanisms and their relevance in Kenya. It is argued that the traditional African communities had institutions and mechanisms that were used in conflict resolution. The institutions and mechanisms were effective in handling and managing conflict among the people. This is because they reflected the socio-political orientation of the African people. These mechanisms addressed all the social, political and economic conflicts among the African people.¹

Traditional conflict resolution mechanisms have deep roots in traditional African communities' conflict resolution mechanisms. Being informal resolution mechanism makes it flexible, expeditious and speedier. It fosters relationships and is cost-effective. It means that parties exhibit autonomy over the process and the outcome. The outcome is usually acceptable and durable. Similarly TJS addresses the underlying causes of conflicts thus preventing them from flaring up later.²

4.1 A look at how the Traditional Justice Systems work

Access to justice has been defined as the people's ability to effectively arbitrate disputes through both formal and informal mechanisms. In rural areas, customs and tradition still regulate day to day life and as such most people living in rural areas only access justice through informal justice systems³.

In most African countries,⁴ the formal (state) justice systems function alongside the Traditional and informal (non state) justice systems. Formal justice system is tied to the legal traditions and

¹ Muigua Kariuki. *Resolving Conflicts Through Mediation in Kenya*, Glenwood publishers Ltd, Nairobi, 2012

² Ibid

³ FIDA –K, *Traditional Justice Systems in Kenya: A study of Coast Province in Kenya*

⁴ *Access to Justice in Africa and Beyond: making the rule of law a reality* Penal Reforms International and Bluhm legal clinics of Northwestern University School of law,. Accessed at http://books.google.co.ke/books?id=u_i6PDL3vIoC&prints on 22/01/2013

values inherited from the colonial past, the English common law system in East Africa and parts of central Africa. Traditional systems are tied to the traditions and values passed down from generation to generation as customary law regulating life in the village communities. Informal systems are non state justice systems like the Alternative Dispute Resolution fora established by the non-governmental organizations or faith based groups.⁵ In most places the three systems operate side by side blithely ignoring one another. In all places however people (especially in rural areas where most people live) have recourse to the traditional or customary law for a first to settle their disputes, grievances and minor criminal matters.⁶

Traditional approaches vary considerably from society to society, from region to region, from community to community. There are as many different traditional approaches to conflict transformation as there are different societies and communities with a specific history, a specific culture and specific customs. There is no one single general concept of “traditional conflict transformation”. Rather, traditional approaches are always context specific.⁷

From a traditional point of view, conflict is perceived as an unwelcome disturbance of the relationships within the community. Hence traditional conflict transformation aims at the restoration of order and harmony of the community. Cooperation between conflict parties in the future has to be guaranteed. Traditional conflict management is thus geared towards the future. Consequently, the issue at stake is not punishment of perpetrators for deeds done, but restitution as a basis for reconciliation. Reconciliation is necessary for the restoration of social harmony of the community in general and of social relationships between conflict parties in particular. The aim is “not to punish, an action which would be viewed as harming the group a second time. Re-establishing harmony implies reintegrating the deviant members ... The ultimate matter is ... restoring good relations”. This is why traditional approaches in general follow the line of restorative justice instead of (modern, western-style) punitive justice. Restorative justice has to

⁵ Ibid

⁶ Ibid

⁷ Volker Boege, *Traditional Approaches to Conflict Transformation — Potentials and Limits*. Berghof Research Centre for Constructive Conflict Management. Accessed at <http://www.berghof-handbook.net> On 22/01/2013

be understood “as a compensation for loss, not as a retribution for offence. The ultimate aim of conflict transformation is the restoration of relationships.”⁸

The modern formal justice system of the post-colonial state has been and still is perceived by many people as an alien system the rules of which are hard to understand: it is far away from the people, very time-consuming, costly and highly formalistic, with confusing procedures and unpredictable outcomes, focused on individual culpability and on the punishment of the individual. This in the view of many people in traditional societies is not what justice should look like. Many people have little faith in the fairness and efficiency of the introduced formal system of justice. Formal justice “failed to appeal because it excluded ordinary people from participation. It also created further divisions through its adversarial character. Taking disputes to court became a way of making money (through compensation claims) for many parties and led to further disagreements and conflict.”⁹

The conflicting parties can directly engage in negotiations on conflict termination and in the search for a solution, or a third party can be invited to mediate; in any case the process is public, and the participation in the process and the approval of results is voluntary. It is carried out by social groups in the interest of social groups (extended families, clans, village communities, tribes, brotherhoods, etc.); individuals are perceived as members of a (kin-)group, they are accountable to that group, and the group is accountable for (the deeds of) each of its members.

The process is led by the (male or female) leaders of communities, such as traditional kings, chiefs, priests, healers, big men, elders (“elder” being a social, not a biological category) and others. These authorities are the mediators, facilitators, negotiators, peace makers. They are highly esteemed for their knowledge of custom, myths and the history of the communities and the relationships of the parties in conflict. Their rich experience in conflict regulation, their skills in setting (and interpreting) signs of reconciliation and their skills as orators as well as their social capital as leaders of the community/ies empower them to negotiate a resolution to the conflict that is acceptable to all sides.¹⁰

⁸ Ibid at p. 7

⁹ Ibid at p. 8

¹⁰ Ibid at p. 9

4.2 Traditional Conflict Resolution Methods

Kenyan communities have varied traditional methods for conflict handling. The methods have complemented the government efforts in dealing with protracted violence in some parts of the country. In some situations, institutional structures built on these processes have had their declarations and resolutions enforced by the government for example the Modogashe Declaration in the former North Eastern Province¹¹. The methods vary from one conflict environment to the other. Some examples include the following:

4.2.1 Negotiation

In negotiation parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. Negotiation is thus voluntary. It allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties' room to come up with creative solutions. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.¹² As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. Consequently whatever outcome is arrived at in negotiation it is one that satisfies both parties and addresses the root causes of the conflict and that's why negotiation is a conflict resolution mechanism.¹³

¹¹ Adan M. Pkalya R .(Ed. Muli E) Conflict Management in Kenya Towards Policy and Strategy Formulation, Practical Action 2006 at p.9

¹² See generally, "*Negotiations in Debt and Financial Management*", United Nations Institute of Training and Research, (UNITAR), (December 1994); Roger Fischer and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Books, New York, 1981, p.4.

¹³ Muigua Kariuki, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010* available at www.kmco.co.ke Accessed on 18/02/2013

4.2.2 Mediation

Mediation in traditional dispute resolution is a very informal process. It is a continuation of the negotiation process by other means whereby instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.¹⁴ Mediation is thus a continuation of the negotiation process in the presence of a third party. It is voluntarily entered into, parties exhibits autonomy in the choice of the mediator, over the process and the outcome. It is effective, efficient, depicts fairness and addresses power imbalances among parties. Such mediations result in a resolution of the conflict as opposed to a settlement.¹⁵ Traditional mediation is effective in dealing with interpersonal or inter - community conflicts.¹⁶

Local mediation typically incorporates consensus building based on open discussions to exchange of information and clarify issues. Conflicting parties are more likely to accept guidance from these mediators than from other sources because an elder's decision does not entail any loss of face and is backed by social pressure. The end result is, ideally, a sense of unity, shared involvement and responsibility, and dialogue among groups otherwise in conflict.¹⁷

4.2.3 Conciliation

Conciliation is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together , clarifying perceptions and pointing out misperceptions. The difference between mediation and conciliation is that the conciliator, unlike the mediator who is supposed to be neutral, may or may not be totally neutral to the interests of the parties. Successful conciliation reduces tension, opens channels of communication and facilitates continued negotiations. Frequently, conciliation is used to restore

¹⁴ Makumi Mwagiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006),p.115

¹⁵ Muigua D.K *Resolution of Natural Resource Conflict Through Arbitration and Mediation* , LL.M Dissertation University of Nairobi,2005

¹⁶ Makumi Mwagiru, *Diplomacy Documents, Methods and Practice*, *IDIS Publication on International Studies 1*,2004

¹⁷ See generally a report by PkalyaR,M Adan, I Masinde (eds. B. Rabar & M. Karimi) *Indigenous Democracy, Traditional Conflict Resolution Mechanisms,Pokot,Turkana,Samburu and Marakwet(.ITDG-EA). January 2004* p 4

the parties to pre-dispute *status quo*, after which other alternative dispute resolution methods are applied. Conciliation is also used when parties are unwilling, unable or unprepared to come to the bargaining table.¹⁸

Having looked at the concept of access to justice using the traditional justice systems, the traditional justice systems are dictated by the custom and traditions of the people. It is passed down from generation to generation as a way of regulating life of the people in the community the basic logic being to maintain harmony and good relationships among the people. The examples of traditional conflict resolution methods have been discussed; we now focus on the advantages and benefits of using traditional justice systems, doing a case against engaging with traditional justice systems and analyzing traditional institutions that are used in conflict management.

4.3 Advantages and Benefits of using Traditional Justice Systems

In Kenya, there is increasing reliance on traditional conflict management mechanisms due, in part, to lack of faith in the judiciary and the sheer expense of court procedures – not to mention the general inability to pay advocates’ fees due to poverty.¹⁹

Traditional approaches provide for inclusion and participation. In the same way as all parties (and every member of each party) are responsible for the conflict, everybody also has to take responsibility for its solution. A solution can only be achieved by consensus. Every side has to perceive the resolution as a win-win outcome, compatible with its own interests – which are not confined to the material sphere, but also comprise issues such as honor, prestige, saving one’s face.²⁰ A good illustration is the Pokot community. Some punishments are meted out collectively; this places the role of preventing conflicts at the family and clan level enlisting the support of everybody in the clan.²¹

¹⁸Supra note 1 at page 13 & 14

¹⁹Supra note 11 at p. 8

²⁰Supra note 7 at p. 11-15

²¹Supra note 17

In a non-adversarial atmosphere, communication between alienated parties can be restored, leading to increased mutual understanding. interested parties that are involved in the issues at stake bring to the bargaining table a much deeper understanding of the technical and institutional dimensions of the problem than an external judge would, and are in a better position to explore different solutions and analyse their consequences.²²

In contrast to the adversarial environment of the courts, non adversarial dispute resolution facilitators are impartial and work with all the parties to a dispute which helps bring about an effective resolution that satisfies their respective interests. In the same spirit a facilitated non adversarial dispute resolution process gives the parties control over costs and the potential to settle earlier than you could in adversarial litigation, which gets more expensive the longer it takes. The wide range of non adversarial dispute resolution techniques available and their adaptability make them a very flexible vehicle for the resolution of many different types of disputes that could arise among parties. Facilitated non adversarial dispute resolution allows disputing parties to discuss and clarify their respective needs and concerns informally and to resolve underlying issues in their relationship. This enables them to preserve and sometimes even enhance their relationships.

Litigation carries a high level of uncertainty and risk over which the parties to a dispute have little control. Facilitated non adversarial dispute resolution puts the parties in control of the process with greater certainty that a mutually satisfactory solution will be reached. Since the interested parties retain control, substantive issues of importance to them can be discussed and the roots of the problem tackled.²³

These are major attributes of traditional non adversarial conflict resolution mechanisms. By their very own characteristics, there has to be a spirit of co-operation, a passive stance, the parties should be willing to reach a mutually satisfying resolution to a problem and most importantly, there has to be persuasion as opposed to coercion.

²²Supra note 7

²³ Ibid

The prospects for successful implementation of the decisions/solutions produced by the interested parties themselves are enhanced and, as they have a better understanding of and a greater investment in the settlement, any subsequent problems that do arise can often be expeditiously resolved, rather than becoming the subject of further litigation (lawsuits breed more lawsuits).²⁴

Informal justice systems are often more accessible to the poor and the disadvantaged people and may have the potential to provide a quick, cheap and culturally relevant remedies. Informal justice systems are prevalent throughout the world, especially in developing countries. They are the cornerstone of dispute resolution and access to justice for the majority of populations, especially the poor and disadvantaged in many countries, where informal justice systems usually resolve between 80 and 90 percent of the disputes.²⁵

They focus on consensus, reconciliation and social harmony: the goal often is not just to punish the perpetrator, but to compensate the victim for their loss, to prevent the accused from committing the crime again, and to reintegrate both the victim and the offender back to the community. The type of justice promoted by these systems may be the most appropriate option for people living in a close-knit community whose members must rely on continued social and economic cooperation of the neighbors.²⁶

They enjoy social legitimacy, trust and understanding of local problems: informal justice systems often reflect local social norms and are closely linked to the local community. Community members often have a sense of ownership towards their respective system. Informal justice actors have local legitimacy and authority that is not always afforded to formal operators. Informal justice systems tend to work well where the community is relatively homogenous, linguistically, culturally and is bound by ties of mutual dependency. In this setting one often defines one's identity as being inextricably part of networks: familial networks, cultural networks, religious networks and strong sense of bounded communities. Informal justice actors often understand local problems and are capable of finding practical solutions to their problems.

²⁴ Ibid.

²⁵ FIDA Kenya, The Peoples Version, *Informal Justice System simplified guide* (2011)

²⁶ Ibid

They are sometimes regarded to have supernatural powers, enhancing their capacity to resolve local disputes and ensure enforcement.²⁷

The traditional conflict resolution methods are often preventive and deterrent measures of conflicts both within and without the community. Most of the rituals performed during conflict management process are horrifying, strenuous and expensive and as such are avoided. This has been reinforced by cultural beliefs, taboos, norms and superstitions that further make the mechanisms binding and adhered to. The penalties, fines and compensations imposed by customary courts are very severe and prohibitive making it a perfect mechanism of preventing intra and inter-ethnic conflicts and crimes. The collective nature of some of the punishments places the role of preventing conflicts at the family and clan level enlisting the support of everybody in the clan.²⁸

They are easily accessible and devoid of bureaucratic hitches that have marred the modern court system. In case of a dispute, elders can easily convene anywhere in the villages and solve the problem. It is a quick and effective way of administering justice.

The traditional methods are also culturally accepted and adhered to. Customary law is based on societal norms, taboos and beliefs. The verdict of informal court sittings is taken as a direct reflection of the cultural norms and customary law. The customary law is reinforced by a strong belief in curses.²⁹

4.4 Shortcomings of the Traditional Justice System

It is important however, to note that the traditional justice systems are not perfect. Some of the shortcomings facing the system include:

The fact that they lay emphasis on societal support for execution rather than laying emphasis on accountability, in general, traditional justice systems are not accountable (although they are

²⁷ Ibid

²⁸ Supra note 17

²⁹ Ibid.

usually conducted in public view). The right to appeal is integral to an accountable and transparent legal system but is not always present in informal justice system.³⁰

The rulings depend on the knowledge and moral values of individual mediator. Generally there are no minimum standards that have to be followed. As such fairness of proceedings is up to the person conducting them.³¹ There is also the lack of documented reference on customary law, norms and taboos. This has been cited as either slowing down or hindering the work of customary courts. It is difficult to refer to preceding cases for guidance while handing down a sentence. This deficit slows customary court proceedings. It is also hard to pass on such customary knowledge and practices to future generations.³²

The community elders are generally not elected, but are rather appointed or take their office based on descent or standing in society. Thus there are no checks or balances in place as generally exist in formal system for selection and appointment of judges. Informal justice actors with the authority to resolve conflicts may abuse their power to benefit those who they know or who are able to pay bribes. They are often insufficiently paid or not paid at all and may rely on gifts and bribes for an income, influencing the outcome of the hearing. Nepotism is also a problem – informal justice actors are often selected on the basis of who they know or who they are related to. Leaders may favour certain parties depending on their political allegiance or power in terms of wealth, education or status, where not to do so might pose a threat to their own authority.³³

Traditional approaches may contradict universal standards of human rights and democracy. If councils of elders for instance broker peace deals between conflict parties and if these councils actually consist of old men only, this type of gerontocratic rule is problematic by modern democratic standards, all the more so if the young and the women who are excluded from decision-making processes become the subjects of these decisions. Women often are the victims of customary conflict resolution processes that are dominated by males in order to resolve

³⁰ FIDA Kenya, The Peoples Version, *Informal Justice System simplified guide* (2011)

³¹ Ibid.

³² Ibid. at p. 74

³³ Ibid.

conflicts between males, e.g. swapping of women between conflict parties or gift of girls as compensation, or compensation negotiated by male community leaders and exchanged between males for the rape of women or girls.

The role and efficacy of traditional conflict resolution mechanism has been greatly eroded, marginalized and diminished by modern civilization and development thinking. This system is regarded as an archaic, barbaric and outdated mode of arbitration. The emergence and institutionalization of modern courts system has greatly marginalized traditional conflict management system.³⁴ Customary law is said to belong to the old generation and not the 'learned' generation.

Lack of proper and efficient enforcement instruments and mechanisms has reduced the relevance of traditional customary methods of dispute administration. Apart from mainly curses, there is no prescribed system of enforcing rulings by the council of elders' courts.³⁵ There is a general lack of a framework or approach to enforce its rulings. After the traditional court has made its ruling, it is socially and culturally assumed that the concerned will just abide by it. However lack of a community police to enforce the rulings has weathered down the role and efficacy of the customary methods of conflict resolution.³⁶ They are often non-binding and rely primarily on social pressure.³⁷

The customary system of arbitration is regarded as gender insensitive since women are culturally not allowed to contribute to the proceedings. This practice has denied women their rights to assembly, speech and natural justice.³⁸

According to the Turkana for example, deterrent methods of conflict prevention are only applicable to Turkana community members and are inefficient in other communities. It is

³⁴ Supra note 17

³⁵ Ibid.

³⁶ Ibid.

³⁷ See a report by FIDA Kenya, The Peoples Version, *Informal Justice System simplified guide* (2011)

³⁸ See generally report by PkalyaR, M Adan, I Masinde (eds. B. Rabar & M. Karimi) *Indigenous Democracy, Traditional Conflict Resolution Mechanisms, Pokot, Turkana, Samburu and Marakwet* (ITDG-EA). January 2004

believed that you cannot curse people from other communities. This belief limits the efficacy, scope and impact of the traditional conflict resolution mechanisms.³⁹

It is the researchers view that since communities are bound by societal norms, the norms would only be applicable to the members of that society only, none members belong somewhere else where they have their descent and their set of norms where they are duty bound to adhere to.

4.4.1 Analysis of the *Njuri Ncheke*

The Meru have since the 17th Century been governed by elected and hierarchical councils of elders from the clan level right up to the supreme *Njuri Ncheke* Council. The council has its seat at *Nchiru* and is the only traditional judicial system recognized by the Kenyan state. The *Njuri Ncheke* is composed of male subjects who are elders by virtue of their age and have gone through formal initiation into this council of elders.

The *Njuri Ncheke* adjudicates cases where there is harm occasioned against a victim who then seeks justice against the offender. The ultimate aim in settling cases in the Meru community is promoting reconciliation. In minor cases, parties are required to discuss the case and reconcile on reaching a settlement. However, if they disagree, the *Njuri Ncheke* is approached to adjudicate the matter. The practice is that once a date is set for hearing the matter, then all the members of *Njuri Ncheke* are duly informed and called upon to attend. In effect, the *Njuri Ncheke* is akin to a pool of judicial officers who are routinely called upon to adjudicate over matters. The significance of the *Njuri Ncheke* in the administration of justice lay in the challenge posed to the elders during initiation to promote cohesion within the community. The outcome of all cases adjudicated upon by *Njuri Ncheke* is always geared towards promoting unity in the community.⁴⁰

On the day set for hearing the matter the *Njuri Ncheke* and the litigants congregated at a designated location. The victim sets out the facts of his claim and the accused person is given an

³⁹ Ibid.

⁴⁰Dr. Sarah Kinyanjui, *restorative justice in traditional pre-colonial "criminal justice systems" in Kenya*. Available at <http://tij.unm.edu/volumes/vol10/kinyajui.pdf>

opportunity to present his side of the story. The aim of the “hearing” is to determine whether an accused person did commit a wrong. A wrong is found to have been committed where the victim suffered harm, regardless of whether the accused had a guilty intent. Payment of compensation to the victim is normally the outcome of the hearing. Victim compensation principle underscores the centrality of restorative justice in the community. Through compensation, justice is seen to be done to the victim. As much as possible, the practice of compensation seeks to restore the victim. Moreover, the compensation as acknowledgement of the wrongdoing done to the victim is restorative in and of itself; a sense of belonging is reaffirmed for the victim whose welfare is taken into consideration. At the same time, the offender is given an opportunity to make good his wrong by compensating the victim. This gave him or her opportunity to be restored back into the community. Restoration of community relations was important to offenders bearing in mind that they were part of a community that idealized community ties.⁴¹

4.5 Institutions of Conflict Management under TJS

This section discusses traditional institutions of conflict management among the traditional African societies in Kenya today. These mechanisms have been used for quite a long time, one can say as long as the existence of humanity.

4.5.1 The Family

The family has been a key institution in conflict management⁴². Among the Pokot for example, a family consists of the husband, his wife/ wives and children. The husband is the head of the family and his authority is unquestionable. He is the overall administrator of the family matters and property including bride price, inheritance and where applicable land issues.⁴³

Among the Samburu community, the man is the unchallenged head of the family institution and all family issues and disputes are under his jurisdiction. This in essence means that the man has the primary role in the family of solving conflicts that might arise in the family set up. He is the

⁴¹ ibid

⁴² Supra note 1

⁴³ Supra note 11

first point of call should there be a conflict and thus his input is very crucial as all family members look up to him to provide leadership that include conflict management.

4.5.2 Extended Family and Neighborhood

The extended family is made up of the nucleus family, the aging parents, in-laws, relatives and other dependants. It forms the basic socio-political institution and mechanism of conflict management. Among the Turkana for example it is the first institution of conflict management.

All matters that transcend the nucleus family are discussed at the extended family level. Among the Marakwet, the extended family serves as an appellate court to family matters. In some instances neighbors are called to arbitrate family disputes or disputes between neighbors⁴⁴.

4.5.3 The Clan

The clan is another institution in management of conflicts traditionally. Both Turkana and the Agikuyu consider it one of the most important socio-political organizations that knit together distant relatives facilitating a feeling of rendering mutual support in all important matters in the interest of the clan. Clan members are also guided by certain rules and regulations that are key in avoiding conflicts, for instance that member of the same clan cannot inter-marry but can marry from other clans.⁴⁵

4.5.4 Council of Elders and Local Elders

In almost all communities, the institution of ‘Wazee’ (Elders) exists. It is ordinarily the first point of call when any dispute arises in a community and since most Kenyans’ lives are closely linked to environmental resources. It is not surprising that most of the issues the elders deal with touch on the environment. The operations of elders’ courts are ad hoc and typically involve only

⁴⁴Supra note 17

⁴⁵ Supra note 1

older men excluding women and youth. The procedures may lead to trampling upon people's human rights yet people accept these and can explain and rationalize it.⁴⁶

Among the Rendille for instance, the two most important organs of the community are *geeyi makhabaale* and *nabo*, both of which are an exclusive male preserve and whose mandate is among others strategizing for the community and resolving disputes.⁴⁷

Among the Pokot and Marakwet the council of elders is referred to as *kokwo* and is the highest institution of conflict management and socio-political organization. It is composed of respected, wise old men who are knowledgeable in the affairs and history of the community.⁴⁸

Among the Agikuyu, the power to decide land disputes was vested in the councils of elders (Kiama), who conducted all land transactions.⁴⁹

The *Kokwo* amongst the Pokot and Marakwet, the *tree of men* (Ekitoe Ng'ekelio) amongst the Turkana and *Nabo* among the Samburu communities are perhaps the most important governance institutions amongst the study communities. The elders in the three communities form a dominant component of the customary mechanisms of conflict management. The Elders command authority that makes them effective in maintaining peaceful relationships and community way of life. The authority held by elders is derived from their position in society. They control resources, marital relations and networks that go beyond the clan boundaries, ethnic identity and generations.⁵⁰ Other notable councils of elders include the Njuri Ncheke of the Ameru Community discussed above in detail and the Luo council of Elders among the Luo community.

⁴⁶ Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," IELRC Working Paper 2005-1, p. 3, available at <http://www.ielrc.org> (accessed on 18/11/2012).

⁴⁷ *ibid*

⁴⁸ *Supra* note 17

⁴⁹ Kenyatta J, Facing Mount Kenya, school edition EAEP 1938

⁵⁰ *Supra* note 17

4.5.5 The Tribe

The tribe is perhaps the highest socio-political organization and hierarchy of the Turkana community for example. The tribe is the highest organ and Supreme Court in the land. The tribe is mandated to broker inter-community peace pacts, negotiate for peace, grazing land, water resources and compensation arrangements. The tribe is the custodian of community land, resources and customary law.⁵¹

4.5.6 The Age – Set / Age Grade

The age set is another common institution for conflict resolution. It is a form of socio – political organization among many communities in Kenya. People in a given age set regard themselves as brothers and sisters respectively. They are expected to behave in a certain way in the community. The age-set is supposed to regulate its members and where necessary punish troublemakers.⁵² Age-set system was an effective conflict management institution among the Maasai. Among the Maasai the panel that mediate the matter comprised mainly leaders of the offender’s age set, who were chosen in their youth and led that particular age group for their life time. The aggrieved party would lodge a complaint with the offender’s age group leader who would then call upon the offender to appear before his/her peers. Each party would then state their case and the age group members would try and have the parties resolve the conflict.⁵³

4.6 Countries that have adopted Traditional Justice System

The traditional justice system is not only a phenomenon practiced in Kenya but its popular and widely accepted way of resolving disputes in many countries across the world.

⁵¹Ibid.

⁵²Ibid.

⁵³Supra note 1

4.6.1 African Countries

Various countries within the African continent and other parts of the world continue to adopt various ways of conflict resolution without necessarily adopting the formal/judicial systems. Conflicts are resolved through bodies either created by communities or even through the initiative of the government. Examples of African communities that have adopted use of Traditional justice systems in resolving conflicts including environmental disputes are discussed below.

In **Rwanda**, more than a decade after the genocide of 1994, Rwanda remains engaged in post conflict reconstruction. The international community responded to the atrocities in Rwanda with a call for accountability and an end to impunity. This resulted in the creation of the International Criminal Tribunal for Rwanda (ICTR). This tribunal, plagued by institutional shortcomings, has been an insufficient and inappropriate response to criminalizing mass violence. Rwandans have tired of its inefficiencies and feel its principles are at odds with their views of justice and reconciliation.⁵⁴

With the judicial infrastructure destroyed and most prosecutors and judges killed in 1994, there was no chance that the national court system could prosecute all those responsible for such crimes. Even now, after years of rebuilding, the national courts cannot handle such a high volume of cases. In response to the ineffectiveness of the tribunal and the incapacity of its national court system, the Rwandan government has revived a traditional form of dispute resolution called *Gacaca*. The *Gacaca* courts will try genocide suspects in the communities where their crimes were committed. The epicenter of post-genocide Rwandan society and politics has been the need for reconciliation to assuage ethnic tensions and end a culture of impunity.

In 2001 the Rwandan government enacted the *Gacaca* Law to give indigenous courts a mandate to deal with cases of individuals who had committed atrocities in their communities during the

⁵⁴ Alana Erin Tiemessen, *African Studies quarterly, the online journal for African Studies* Vol. 8, Issue 1 (2004) available at <http://www.africa.ufl.edu/asq/v8/v8i1a4.htm>

genocide. *Gacaca*, means "judgement on the grass." *Gacaca* is a traditional mechanism of conflict resolution originally practiced among the Banyarwanda, who use it to resolve disputes at the grassroots level through dialogue and a community justice system. It is an intricate process based on custom, tradition, and social norms. *Gacaca* is one of the largest community-based restorative justice processes in post-genocide Rwanda.⁵⁵ The principles and process of these courts hope to mitigate the failures of "Arusha Justice" at the tribunal and seeks to punish or reintegrate over one hundred thousand genocide suspects. Its restorative foundations require that suspects will be tried and judged by neighbors in their community.

Gacaca represents a model of restorative justice because it focuses on the healing of victims and perpetrators, confessions, plea-bargains, and reintegration. It is these characteristics that render it a radically different approach from the retributive and punitive nature of justice at the ICTR and national courts. Great hope has been placed in the ability of restorative justice to contribute to reconciliation at the individual and community level.⁵⁶

The architects of the ICTR, the international community, have constructed a tribunal that follows the rules and procedures of retributive justice in seeking an end a culture of impunity. Retributive justice is punitive, focusing on the defendant and the adversarial relationship between defense and prosecution. Success can be measured by the fairness of the process and the equality and proportionality of the sanctions. Furthermore, crimes are addressed by legal professionals who are not connected to the parties in dispute. This type of justice has been deemed by the international community to be an appropriate response to the Rwandan genocide. It follows as part of an atrocities regime that converges international criminal law with crimes against humanity and human rights abuses. Despite its mandate to promote reconciliation, it is designed to satisfy its architects by exacting punitive measures against the elite criminals of the genocide. Thus, the politicized nature of retributive justice has allowed for the architects of the ICTR to also be its only beneficiaries, leaving Rwandans essentially unaffected by its process.⁵⁷

⁵⁵ Africa Peace and Conflict Journal, University for Peace. Volume 2 Number 1, June 2009

⁵⁶Supra note 54

⁵⁷ Ibid

Restorative justice is the alternative to retributive justice. The goals of restorative justice are to repair the harm, heal the victims and community, and restore offenders to a healthy relationship with the community. Success is measured by the value of the offender to his/her community after reintegration and the level of emotional and financial restitution for the victim(s). The process requires that crimes should be addressed in and by the community. Furthermore, restorative justice can be differentiated from retributive justice with its focus on reintegrative shaming over guilt and its impact on reconciliation: "Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens."

Gacaca offers a pragmatic and community based solution. It is expected to relieve the congestion in Rwandan prisons that are the source of many human rights violations. Additionally, the reintegration of suspects back into the community and the truth-telling nature of confessions offer hope for reconciliation. *Gacaca's* positive attributes lie in its characterisation as a model of restorative justice.

In its precolonial form, *Gacaca* was used to moderate disputes concerning land use and rights, cattle, marriage, inheritance rights, loans, damage to properties caused by one of the parties or animals, and petty theft. *Gacaca* was intended to "sanction the violation of rules that are shared by the community, with the sole objective of reconciliation" through restoring harmony and social order and reintegration of the person who was the source of the disorder. Additionally, compensation could be awarded to the injured party. *Gacaca* occurred at a meeting that was convened by elders whenever there was a dispute between individuals or families in a community and was settled only with the agreement of all parties.⁵⁸

The *Gacaca* courts are expected to have a community impact when Rwandans become participants as judge and jury of genocide suspects. A consensus is needed among the participants to either find someone guilty or allow them to be reintegrated into their society. Unlike those convicted by the ICTR, many *Gacaca* defendants will most likely be reintegrated into the community immediately or within several years if the plea bargain system is

⁵⁸ *ibid*

widely used.⁵⁹ There are additional benefits that *Gacaca* brings to the reconciliation process that differentiates it from the norms of retributive and international justice. One such benefit is the recognition of a specific demographic, namely women, in the justice and reconciliation process.

In sum, the *Gacaca* courts subscribe to the restorative justice paradigm most diligently in the elements that liken it to its indigenous form. The emphasis on reconciliation and reintegration over punishment is evident in the confession and plea bargain procedures. Furthermore, the array of participants is widely extended in *Gacaca* to include all those affected by the crimes and also those who will be affected by the suspect's return to the community. These characteristics of restorative justice are also indicative of the purpose of *Gacaca* in its traditional form. *Gacaca* carries enormous potential for reconciliation if it remains true to the principles of restorative justice.⁶⁰

There is tremendous hope attached to *Gacaca* for its potential contribution to a reconciled and reintegrated Rwandan society. However, there exist many elements in the principles and practices of the *Gacaca* trials that render it a dangerous venue which refuels ethnic tensions. The processes of *Gacaca* are highly politicised and the participants racialised by assumptions of guilt based on ethnic group membership. The nature of 'modernised' *Gacaca* is most dramatically a departure from its indigenous form as it represents a state-imposed model of justice that threatens the community based principles of restorative justice. The modernised elements of *Gacaca* serve the interests of a government that can be characterised as a Tutsi ethnocracy. The end result could be the imposition of a victor's justice that is wrought with the ethnic tensions of pre-genocide Rwanda.⁶¹

This discussion brings out the strong points associated with *Gacaca* which are akin to traditional justice systems used in Kenya today.

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ *ibid*

In **Tanzania**, the Wamakua, Wamwera, the Wamakande and Wayao people historically belong to the same blood community and they all crossed River Ruvuma from South Africa into Tanzania in the latter part of the 19th century after the incursions of Shaka Zulu.⁶²

The four tribes believe in the existence and effectiveness of the spirits of the dead that is "*Mahoka*" a name given to people when they die. They believe that these *Mahokas* are supernatural beings that can intercede for human beings to God and can also punish human beings for their wrongdoing. These tribes believe that God comes first and the *Mahoka* comes second.⁶³

In case of conflict over a farm boundary or over a child, the council of elders must establish the facts of the case and provide a solution. This may take several days to decide and later the two parties are reconciled. A meeting for reconciliation is convened and the parties involved are summoned together with the witnesses. Each of the two parties takes a calabash of water and sits on haunches in front of the crowd and then sips from it, and promises to abide by the decision made by the council of elders. Taboos are also customary ways of telling people what to do and what not to do. Any breach of a taboo is punishable in one way or another.⁶⁴

In **Nigeria** amongst the Yoruba people the title *Sarki Sabo* has generally passed from father to son. Whereas the *Sarki* is ultimately responsible for the dispute settlement, it is the 'second in command', the *Wakili* who handles most disputes. The *Wakili* is chosen by the *Sarki* and is currently the *Sarki's* younger brother. He represents the *Sarki's* interests in other Hausa settlements in Southwestern Nigeria, over which the *Sarki Sabo* has been recognized as having paramount control. The *Sarki Sabo* also appoints *Shugabas* (Local Heads) whose main functions is to settle disputes between Hausa and other ethnic groups in their region. "The *Shugabas* or leaders are responsible for hearing matters and discharging matters. If the *Sarki* cannot settle the matter (only) then it is taken to court".⁶⁵

⁶² *African Traditional Methods in Tanzania: A case study of the Wamakua, Wamwera, Wamakande and Wayuao*. A paper presented by A.M Hokororo, Senior lecturer at the centre for foreign relations in Dar es Salaam, Centre for Conflict Resolution (CECORE)

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ Oganga A C. *Assessing the Role of Informal Justice Systems in Resolution of Succession Disputes*. LL.M term paper. University of Nairobi, 2010

In **South Africa** traditional courts have been established under the constitution⁶⁶ to deal with disputes that involve two people. The chief or the head man is the only person authorized by the constitution to pass judgments in such disputes. Only adult male are allowed to assist the chief in his duties and only adult men can participate in the dispute by cross examining the disputants. In these cases the biggest attempt is reconciling the parties. The said courts are created to deal with disputes at local levels. There have however been complaints against these courts ranging from mob bias to instances of brutality without determining the cases on their merits

4.7 Examples of Environmental Cases Resolved through traditional justice system

Traditional justice systems are resolution mechanisms. Where they have been employed they have been effective in managing conflicts and their declarations and resolution have been recognized by the government. This is exemplified for instance by the Modogashe Declaration in which members of Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socioeconomic problems, identifying role of peace committees among others. It also outlined decisions made by the community around these issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.⁶⁷

4.8 Conclusion

The reality is that there shall always be quite a number of conflict resolution systems. This would include the judicial, informal and traditional justice systems among others. To ensure an increased uptake in the use of traditional justice systems there is however need to establish a clear institutional linkage with the judiciary. This would allow for routine reviews that would end up preventing gross violations of the laws. This would be done in a similar fashion the superior courts of record do by routinely reviewing decisions and pronouncements of the lower or subordinate courts. There is further need to enhance capacity of members of these bodies in

⁶⁶ See Section 211 of the Constitution of South Africa

⁶⁷ Supra note 1 at p.22

order to further their understanding the spirit and the intent of the constitution and the Environment and Land Courts Act to enable them apply the principles envisaged under them.

CHAPTER FIVE

5. FINDINGS FROM THE FIELD SURVEY

The study was carried out in Kiserian, Rangau and Ngong'areas in Kajiado County as well as Butula area in Busia County. These are settlements in the former Rift Valley and Western provinces respectively. This choice was justified on the basis of the presence of a varied land ownerships, forests and rivers in the location and the cosmopolitan nature of the residents. This is outlined in chapter one of this thesis.

Kajiado County is predominantly inhabited by the Maasai and the Kikuyu Communities while Busia County Luo and Luhya are the main communities. Therefore the focus of the study was on the major communities in Kneya namely Kikuyu, Luo, Luhya and Maasai which were deemed to be representative of the larger Kenya.

5.0 Introduction

The method of collecting data that was used is the sample survey method. It was used to capture the choice of justice system the people preferred to resolve their environmental conflicts in Kenya.

The research was guided by the following questions:-

- 1) How effective is the legal and institutional framework for Traditional justice systems?
- 2) To what extent is the framework appropriately applicable to the resolution of environmental conflicts in Kenya?
- 3) What reform measures need to be undertaken to effectively enhance the use of Traditional justice system?

The aim of answering the above questions was to find out whether the Traditional justice system is a barrier to accessing justice or it acts to complement the justice system in Kenya. The research went on to find out the reform measures that might improve the access to justice for the Kenyans seeking to resolve environmental conflicts.

The findings are divided in four sections. First it will provide the characteristics that provide the topography of justice for most Kenyans. Secondly how the traditional justice mechanisms meted

out justice and the characteristics of its practitioners and its main limitations. Thirdly how Kenyans perceive their main justice options, the formal and traditional justice systems. Finally it will discuss how all these findings determine how Kenyans choose to go about resolving their environmental conflicts.

5.1 Demographic characteristics

There were 48 respondents in the survey that was conducted in Kiserian, Rangau and Ngong' areas of Kajiado County and Butula area within Busia County. The respondents were aged between 28 to 86 years old. The respondents in Kajiado County were predominantly comprised of Maasai and Kikuyu communities while in Busia County they comprised of Luhya and Luo communities. The composition of the respondent was deliberate to ensure the three dominant communities in Kenya are represented in the study. Majority of the respondents were men constituting 89.58 percent followed by 10.42 percent who were women.

5.2 Problems facing the judiciary

On a scale of 1 to 10 where 1 is the most serious problem while 10 is the least serious problem, respondents were asked to rank the various problems facing the judiciary in Kenya. From the figure below, the most serious problem facing the judiciary is corruption of court officials with a ranking of 47.9 percent followed by the problem of cost of backlog of cases with 37.5 percent. The least comparative problem cited was the complexity of the court language with 2.1 percent.

The respondents here were more comfortable with resolution mechanism that are friendly to the people with disabilities noting that most courts are yet to adopt to the needs of users with disabilities.¹

The other issues that affected peoples' choice of the judiciary were the costs of hiring lawyers and filing of court cases with 8.3 percent and 4.2 percent respectively. The other issues were the accessibility to courts of persons with disabilities, knowledge of court procedures, and

¹ In an interview with one of the respondents, he said that people with disability for example require assistance from other persons to access courts since the courts have not been modified to cater for their needs e.g. the blind, deaf, crippled etc

inaccessibility of courts due to distance and enforceability of court decisions. For environmental conflicts for example it's especially difficult to enforce courts' decision when parties are from the same community.²

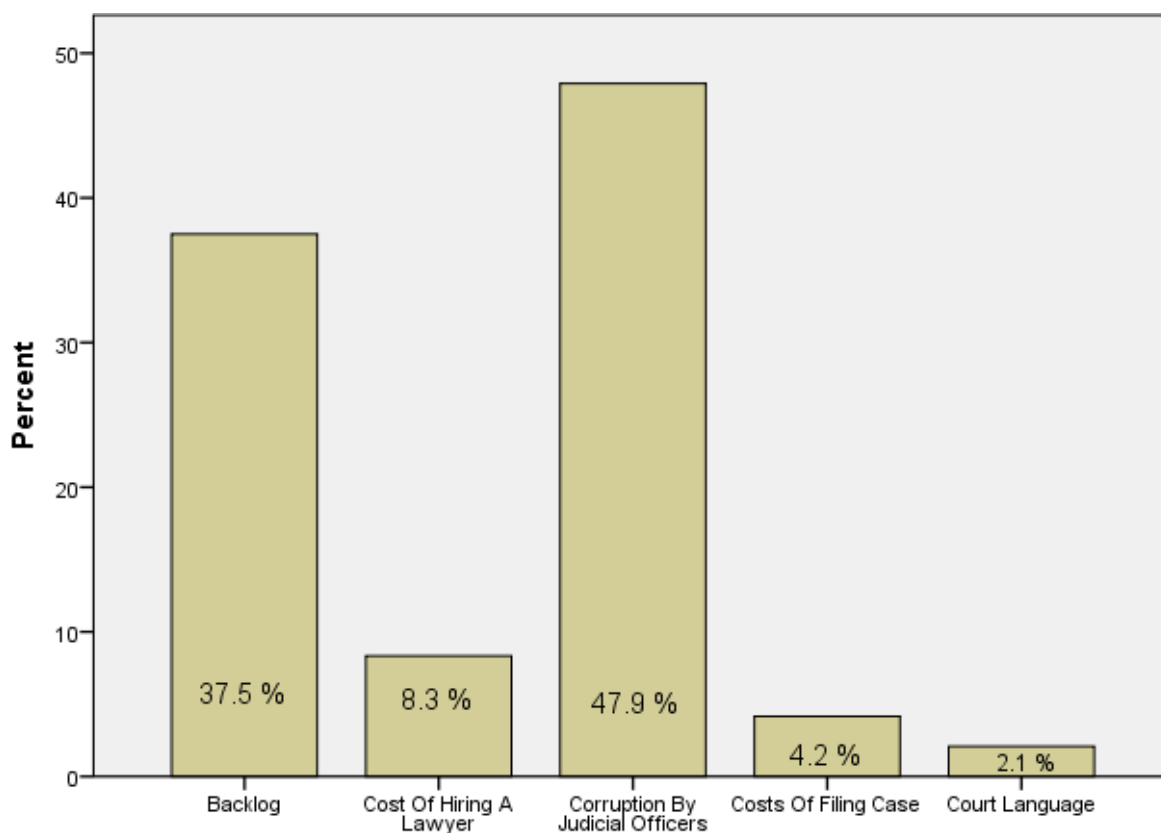


Table 02: Problems facing the Judiciary

²Interview with Mzee Gabriel Sakuda a 50 year old Maasai elder on 13th March 2013 at Oloosios village in Ngong' area

5.3 Confidence in the courts resolving environmental conflicts

About the peoples' confidence in the courts resolving environmental conflicts cases, 54.2 percent of the respondents indicated that they were not confident at all that the courts could resolve environmental conflicts followed by 39.6 percent who indicated that they were highly confident and 6.2percent who felt fairly moderately confident that the courts could solve environmental disputes as indicated in the table below.

Those respondents who said they did not have confidence with courts resolving environmental conflicts indicated that the court process resulted into strained relations between and among the parties. They also felt that the court process was favorable to the rich who would easily corrupt the system in order to obtain favorable decisions of the courts.

They also suggested that the best system of conflict resolution should be one that is close to the people cheap acceptable and without biasness among the locals such as the use of community elders.

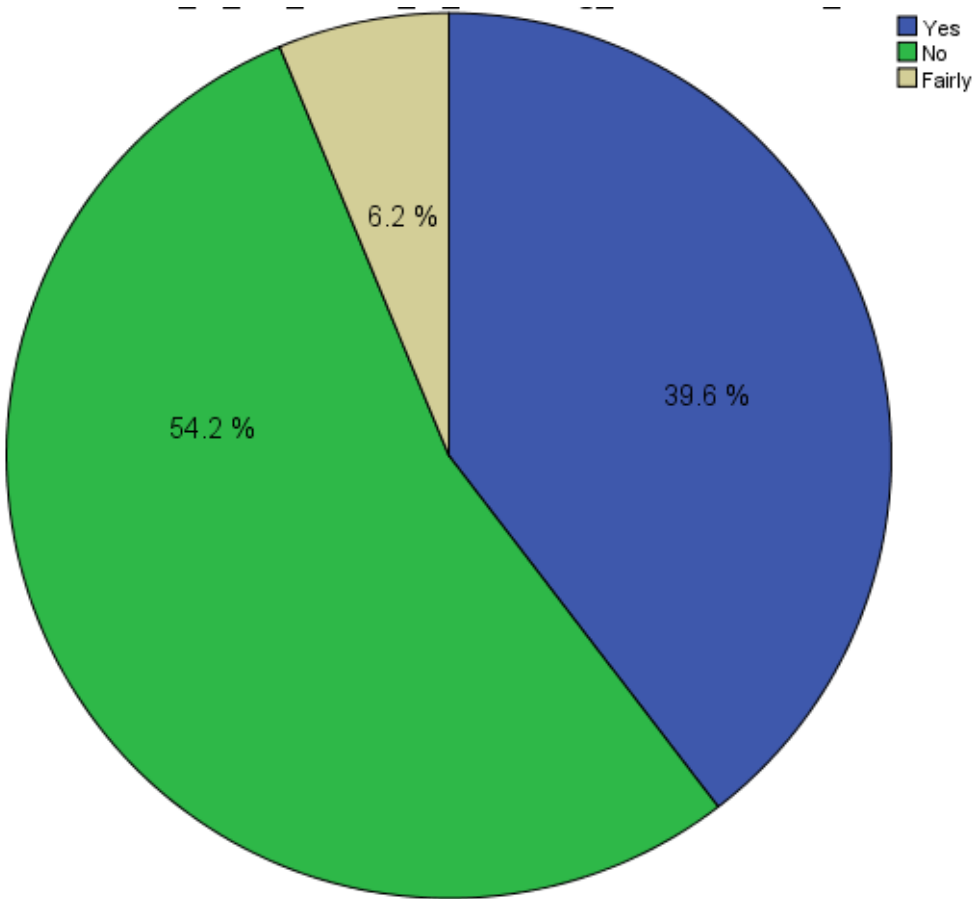


Table 03: Confidence in the courts in resolving environmental issues

5.4 Knowledge in judicial procedures of conflict management

The respondents' level of knowledge in judicial procedures is represented by 54.2 percent for those who have clear knowledge; however 2.1 percent of the responds had a moderately less clear knowledge of the judicial procedures. Despite the fact that a good number of respondents have knowledge of the procedure they however acknowledged that the procedures were quite complex and lengthy besides being unpredictable. Those who lacked knowledge completely comprised of 43.7 percent of the total respondents interviewed.

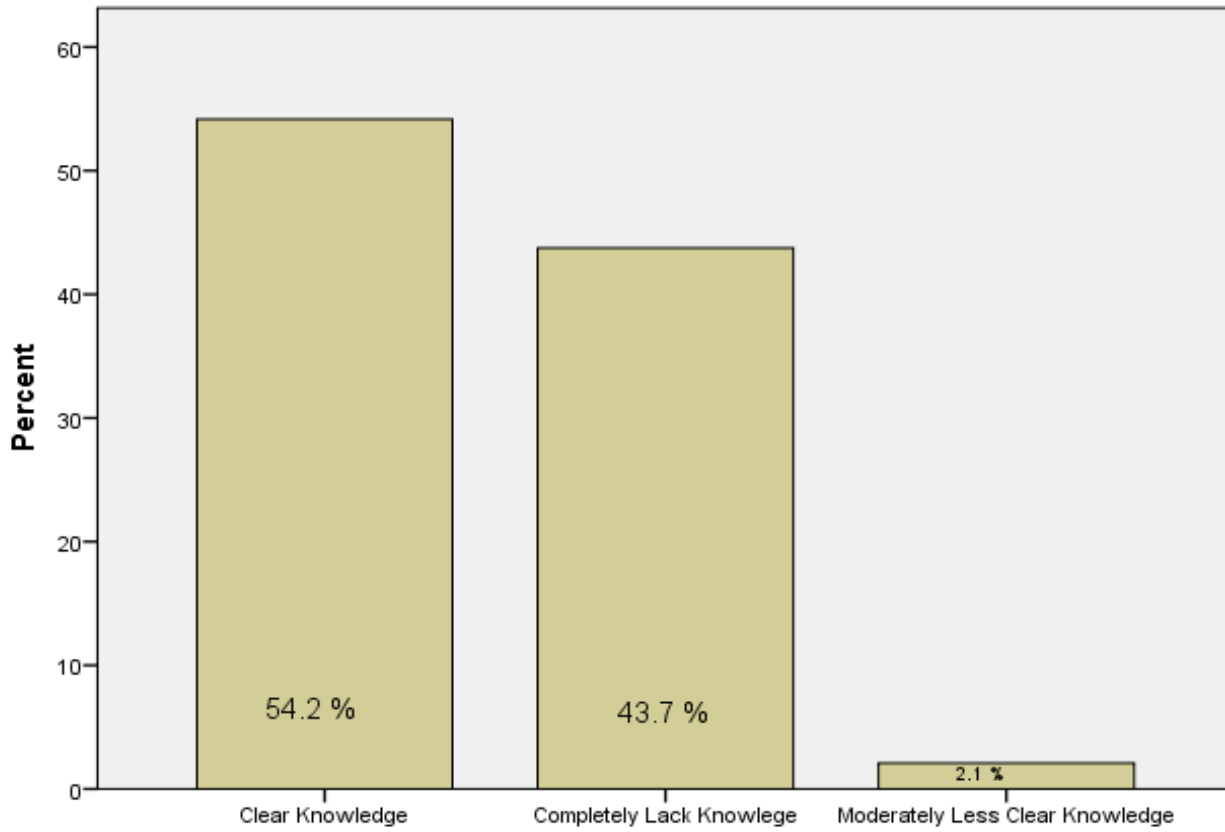


Table 04: Knowledge in judicial procedures of conflict management

5.5 Environmental Conflicts

When asked if they have been party to environmental conflicts, 45.8 percent were in the affirmative while 54.2 percent indicated they had never been involved in an environmental conflict.

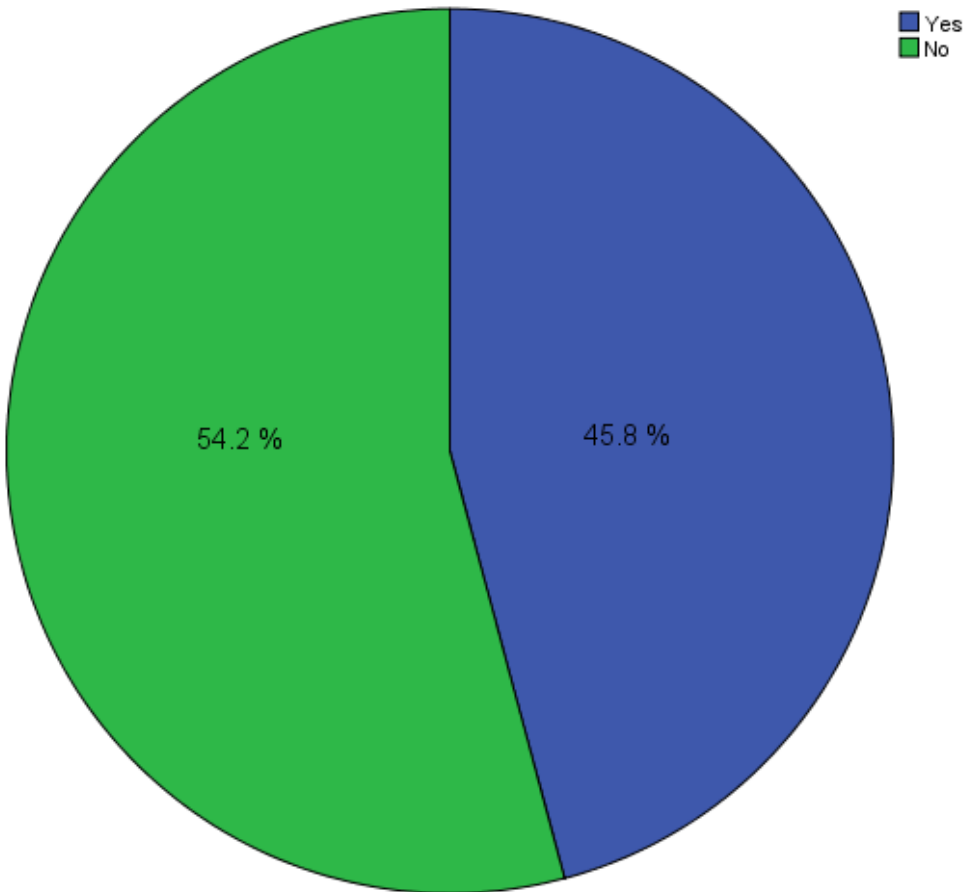


Table 05: Involvement in environmental conflicts

When those who had been involved in an environmental conflict were further asked to rate the effectiveness of the court procedure, the verdict was 66.7 percent were satisfied while 33.3 percent were not satisfied.

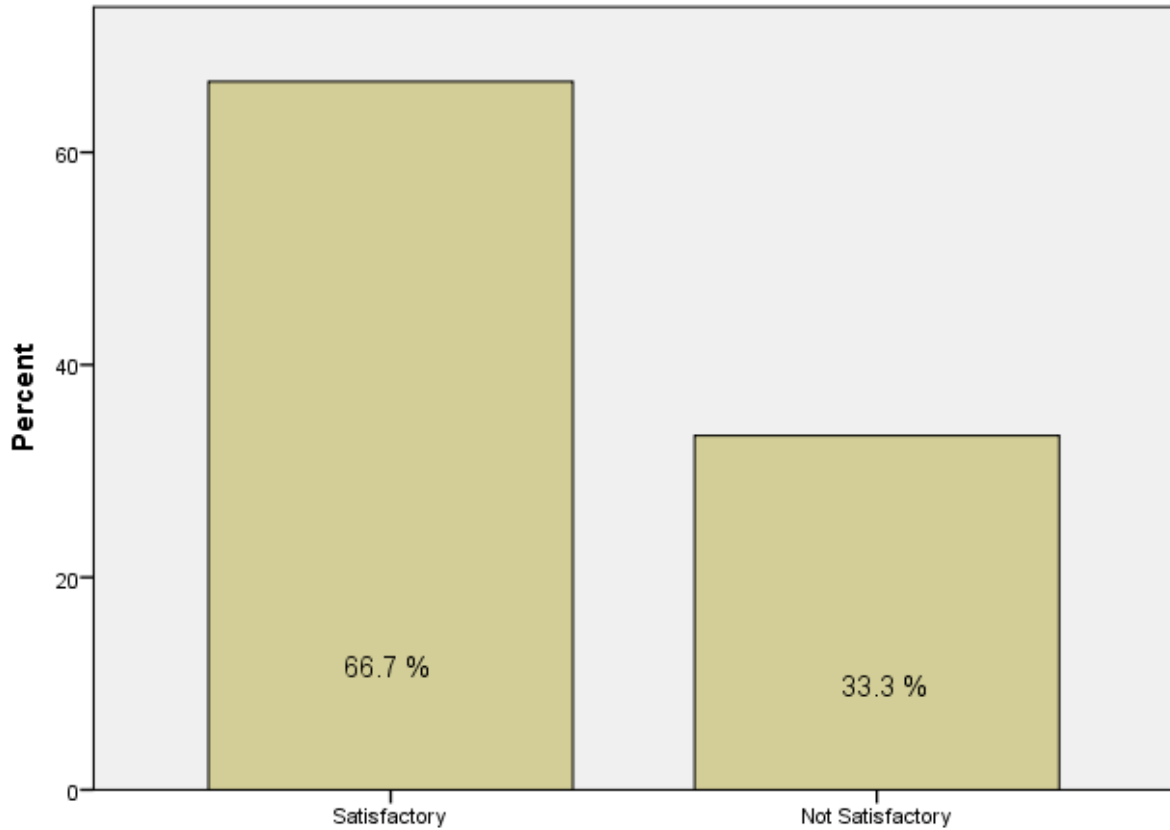


Table 06: Effectiveness of the court procedure

The respondents were further asked whether the courts dealt fairly with environmental conflicts, 29.2 percent were affirmative while 64.6 percent were of the opinion that courts did not deal fairly with environmental conflicts. 6.1 percent of the respondents were not sure.

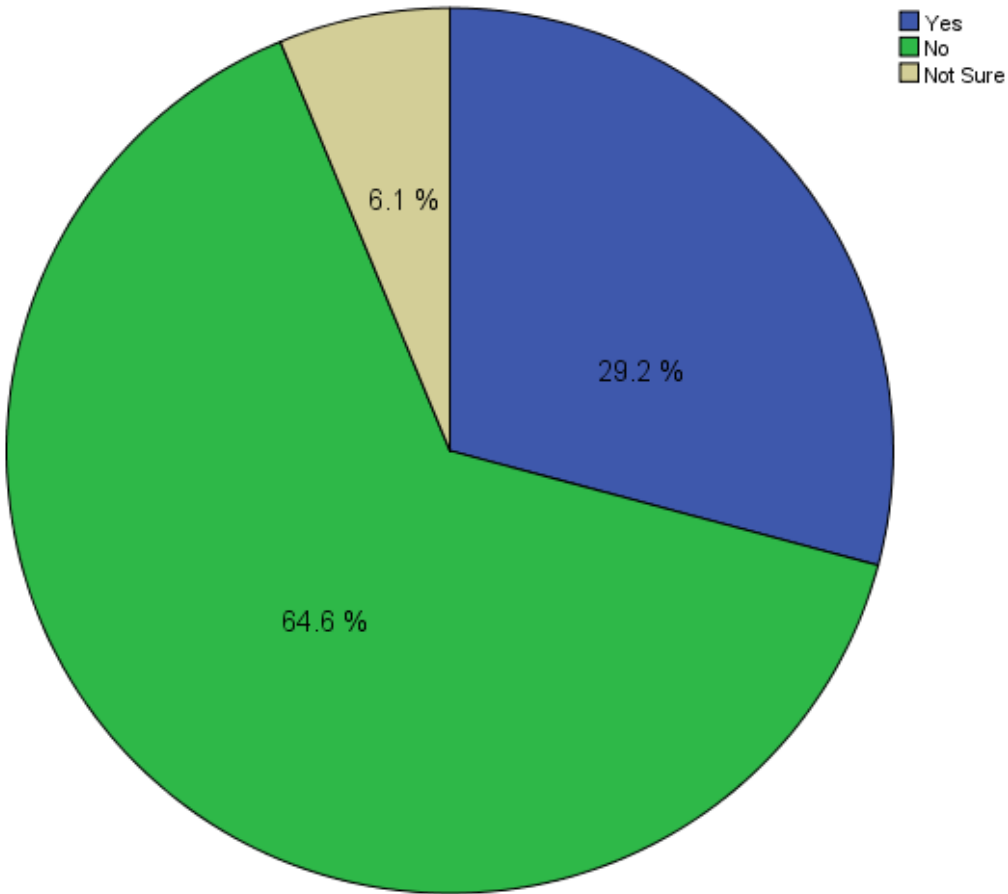


Table 07: Court fairness in dealing with environmental conflicts

Those who polled that the court was fair gave a number of reasons; the enforcement of the courts judgments coming top, the courts were fair in their verdicts, the courts focused on evidence / facts and not history as is the case with traditional mechanisms.

On the other hand 77.1 percent of the respondents indicated that they used traditional methods to resolve the conflict, they extended the following reasons for their choice; that they were easily accessible since the elders were members of the community, they were cheap and nobody was required to pay for the services of the elders, elders were not biased in their decisions, parties to the disputes were involved to reach an amicable solution that is acceptable to them, elders were

people who lived among the parties therefore they had firsthand information concerning the conflicts and the method was culturally acceptable by the community members.

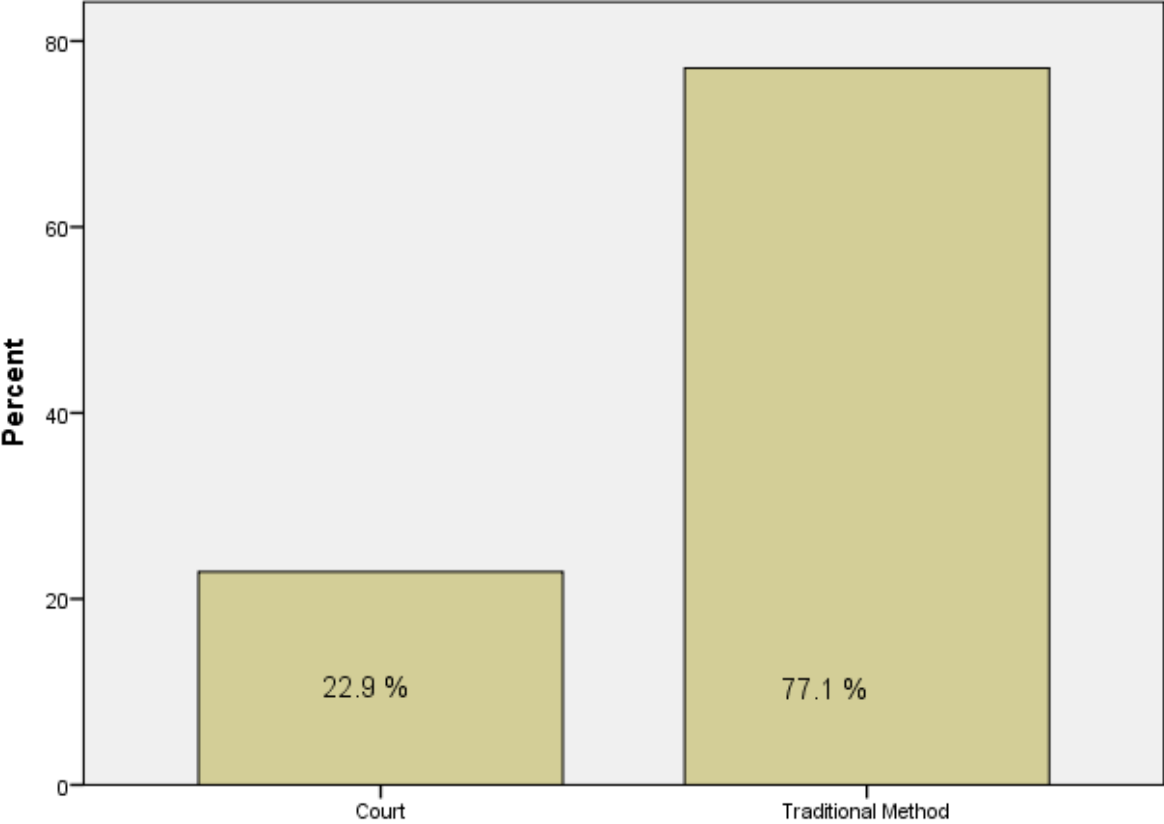


Table 08: Methods used to solve conflict

5.6 Use of Traditional Justice System

Asked if they were aware that environmental conflicts could be solved through the use of traditional justice system, 66.7 percent of the respondents said they were aware while the remaining 33.3 percent responded that they do not know.

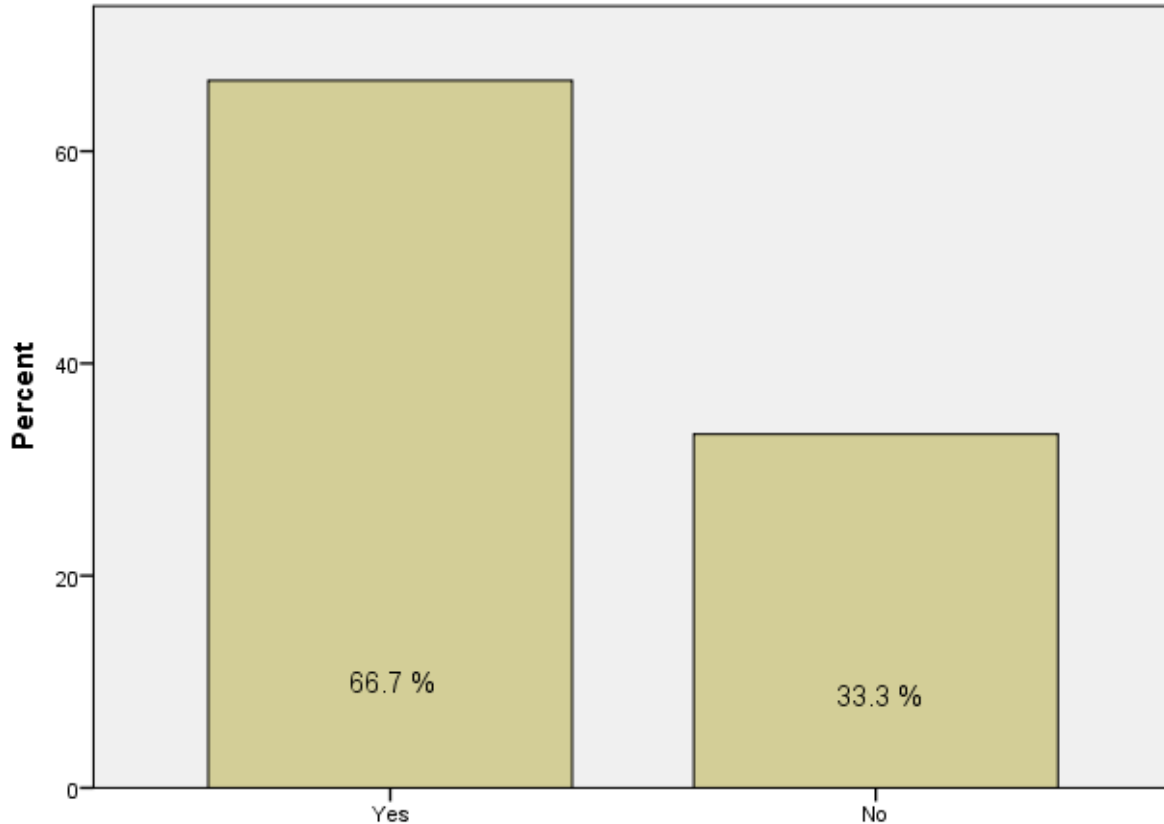


Table 09: Awareness of traditional methods of solving conflicts

Most of the respondents said the composition of the traditional justice system included the Elders from communities, the area chief and community members. They contended that the system was not all inclusive since women and the youth who form majority of the community members were not represented in those organs contrary to the provisions of the constitution.³

³ Constitution of Kenya 2010

On effectiveness of the traditional justice system, 56.3 percent of those were aware that environmental conflicts could be solved through the use of traditional justice system and answered in the affirmative while the remaining 43.7 percent responded that the system was not effective at all.

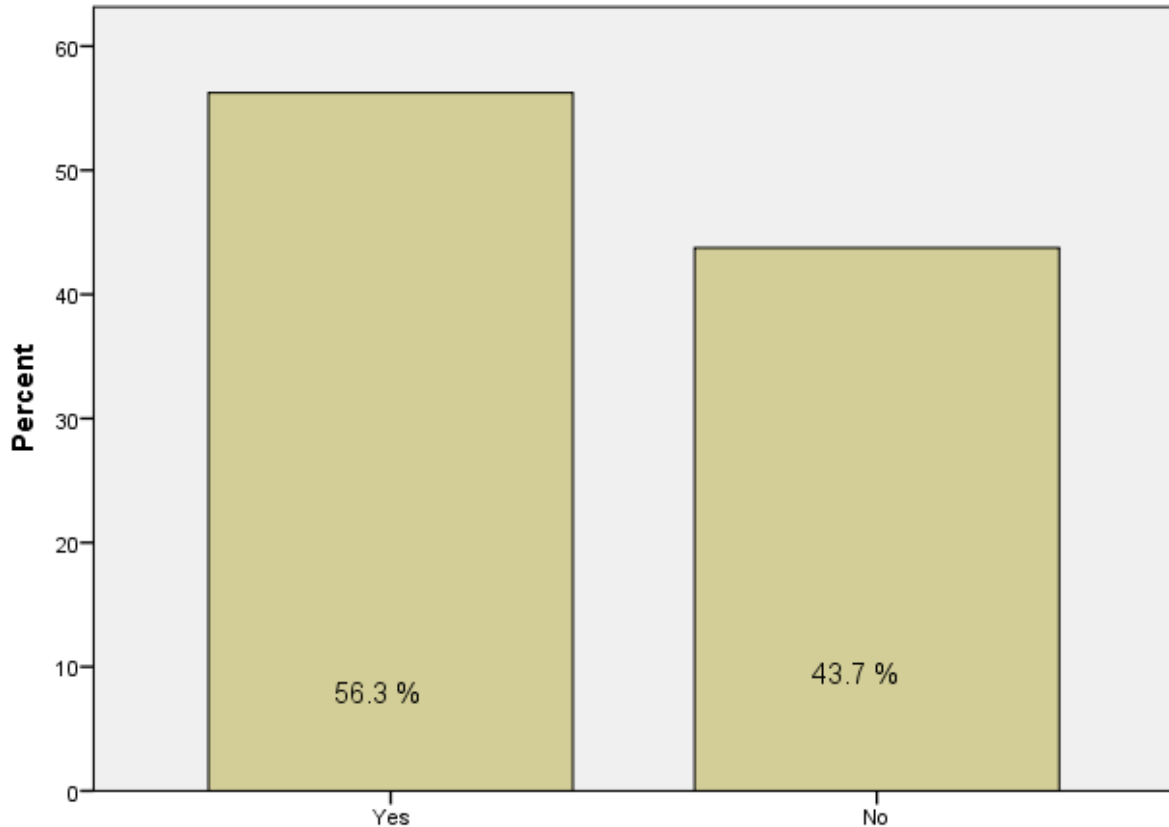


Table 10: Effectiveness of traditional method of conflict resolution

Traditional justice systems by contrast to the courts of law have many positive dimensions. They are seen to be fair (lacking biasness), they dispense justice faster since the Elders and the chief are always available, the parties to the conflict are normally satisfied with the solution arrived at as their participation is considered, payment if any would be in non-monetary terms which was flexible and affordable by the parties and lastly the relations between the conflicting parties would be restored at the end of the conflict since they were involved in finding the solution that is acceptable to all of them.

5.7 Service satisfaction

As represented in the figure below more respondents are satisfied with traditional justice system as compared to those who prefer the formal courts. It's represented by 81.3 and 18.7 percent of the respondents respectively.

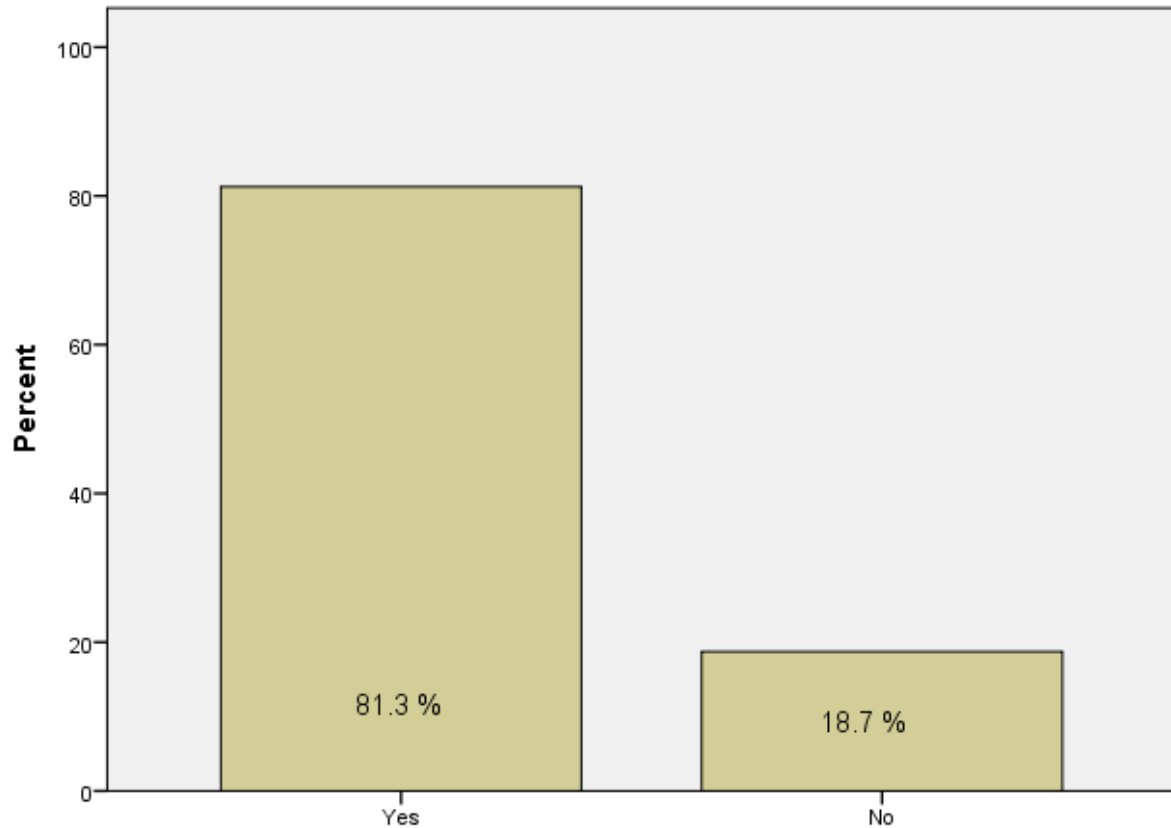


Table 11: Satisfaction with traditional justice system

The main reasons for satisfaction with the traditional justice systems stemmed from the fact that they are cheap since there is neither lawyers' fees nor filing fees required, they are perceived to be corruption free since elders with integrity managed them, they were easily accessible to all as they were near to the people, they conducted their affairs transparently and that they were culturally acceptable in the communities.

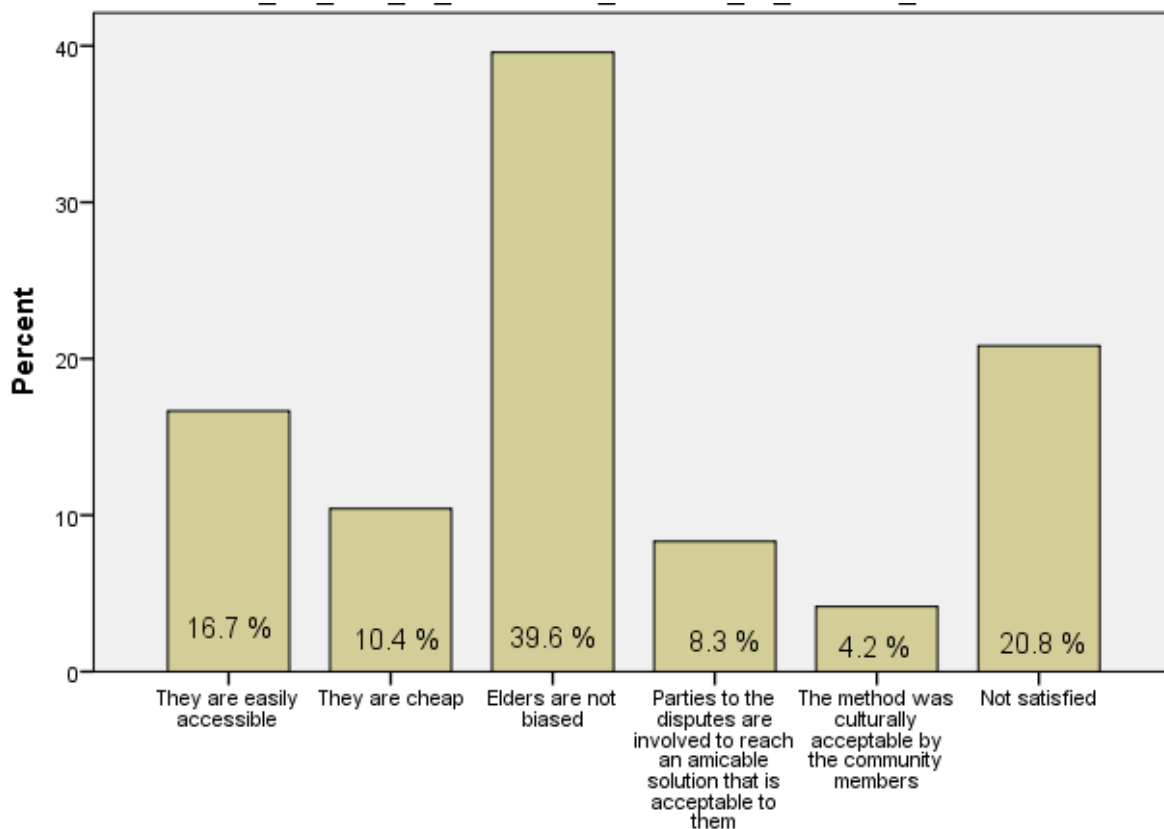


Table 12: Reason for use of traditional method to resolve conflict

Those who were dissatisfied with the traditional justice systems cited lack of enforcement mechanisms as a major setback, they also contend that the system is not all inclusive as women and youth are excluded and some mainly the educated folk consider the systems outdated and primitive.

5.8 Suggestion for improving traditional justice system

The majority of the respondents appreciated the fact that traditional justice system was not perfect. Among the weaknesses of the system pinpointed included; lack of enforcement mechanisms, male dominated to the exclusion of the women and youths and lack of proper structures that would ensure fair and transparent ways of electing the members.

The respondents did note that the government has a role to play in regards to regulating the activities of the traditional justice systems. Conflicts over land, water resources and grazing land were cited as the bulk of cases that are dealt with by the traditional justice systems.

It was also suggested that the government should consider making it mandatory for people involved in an environmental disputes to first explore the use of traditional justice systems as a court of first instance before proceeding to formal courts in case the conflict was not resolved. In doing this, the government will minimize instances where the conflicts would re-occur among the same parties as the traditional justice systems focuses on the root causes of the conflict.

Proper training and educating the elders on the need to be all inclusive in composing those bodies was also cited as another area that needed to be improved. By the very nature of the African societies, they are male dominated in most aspects. Women and the youth who form the majority of the members are excluded from these very important conflict resolution bodies as only male elders are engaged.

5.9 Conclusion

The findings herein revealed that when faced with environmental conflicts, Kenyans have an option either to go to formal/judicial mechanisms or to resolve their conflicts by using the traditional justice systems. Many factors influenced the choice of the conflict resolution mechanism adopted. This is well discussed above. What came out clearly is the fact that the conflict resolution mechanisms are used alongside each other both judicial and traditional mechanism.

CHAPTER SIX

6. CONCLUSION AND RECOMMENDATIONS

6.0 Introduction

The purpose of the study was to assess among others:-

- a) How effective is the legal and institutional framework for Traditional justice systems?
- b) To what extent is the framework appropriately applicable to the resolution of environmental conflicts in Kenya?
- c) What reform measures need to be undertaken to effectively enhance the use of Traditional justice system?

Further, the research was also done to find out the forms of environmental conflicts within and among communities and their causes, the methods adopted by the communities to prevent conflicts both inter and intra – community.

6.1 Is the legal and institutional framework for traditional justice systems effective?

The findings above indicate that a significant number of the people interviewed have been party to environmental conflicts. The majority of the respondents who used the traditional systems of justice to resolve environmental conflicts were very confident that the system was effective, they extended the following reasons for their choice; that they were easily accessible since the elders were members of the community, they were cheap and nobody was required to pay for the services of the elders, elders were not biased in their decisions, parties to the disputes were involved to reach an amicable solution that is acceptable to them, elders were people who lived among the parties therefore they had firsthand information concerning the conflicts and the method was culturally acceptable by the community members.

6.2 To what extent is the framework appropriately applicable to the resolution of environmental conflicts in Kenya?

Most of the respondents were aware that environmental conflicts could be solved through the use of traditional justice system. They were fully aware of the composition of the traditional justice

system and pointed out that it included the Elders from communities, the area chief and community members. However there was a feeling that the system was exclusive since women and the youth who form majority of the community members were excluded.

Traditional systems of conflict resolution was evidently applicable among the interviewed communities in resolution of conflicts touching on land ownership including boundary conflicts, water points and grazing land (pastures) for livestock.

6.3 What reform measures need to be undertaken to effectively enhance the use of Traditional justice system?

The traditional justice system has a number of weaknesses. They range from lack of enforcement mechanisms, male domination to the exclusion of the women and youths to lack of proper structures that would ensure fair and transparent ways of electing the members. The following are recommendations on reform measures;

It is suggested that the National Assembly should consider passing legislation on traditional justice systems making it mandatory for people involved in an environmental conflict to first explore the use of traditional justice systems as a ‘court’ of first instance before proceeding to formal courts in case the conflict is not resolved. In doing this, the government will in the long term minimize instances where the conflicts would re-occur among the same parties as the traditional justice systems focuses on the root causes of the conflict. The legislation should cover issues such as allocation of resources to traditional justice system, the criteria to be used to identify the practitioners such as the elders, the mechanisms of enforcement and guidelines that touch on the jurisdiction of the traditional justice systems so as to ensure compliance with the rule of law and the constitution.

It will also be proper for the government to enhance capacity of traditional justice systems practitioners through training and educating the elders on the need to be all inclusive in composing those bodies was also cited as another area that needed to be improved. By the very nature of the African societies, they are male dominated in most aspects. Women and the youth who form the majority of the members are excluded from these very important conflict

resolution bodies as only male elders are engaged. This should be an immediate plan noting that the Constitution already provides for TJS.

6.4 Conclusion

It now appears that the traditional justice systems continue to gain more acceptances across the entire globe. They are playing a major role in ensuring the citizens access justice.

The traditional justice systems remedies are considered to be restorative and they encourage mediation and reconciliation as opposed to the adversarial approach normally taken by the formal courts of law. The idea of restoration actually endears the communities to traditional justice systems.

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8. ANNEXES

ASSESSMENT QUESTIONNAIRE OF THE ROLE OF TRADITIONAL JUSTICE SYSTEMS IN RESOLUTION OF ENVIRONMENTAL CONFLICTS IN KENYA.

I am a student of Master of Arts in Environmental Law Degree at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), University of Nairobi. I am carrying out research entitled, “**Assessing the Role of Traditional Justice Systems in Resolution of Environmental Conflicts in Kenya**” for partial fulfillment of the requirement for my degree. The information that you will provide in this questionnaire will be kept confidential while using the information for research activities. So, I humbly request you to mention your own reality in this questionnaire with full confidence. Please feel free to express your personal opinion.

Eugene Owino Wanende

Registration Number Z51/69727/2011

Questionnaire number:

Date:

Name of respondent:

Age:

Gender:

Village:

Sub-location:

Location:

Division:

District:

Interviewer:

CONSENT FORM

As the respondent I would like to be named / to remain anonymous in the thesis (please cross where appropriate).

Sign.....ID No.....

1. a) Describe the forms of conflict that arise in your community, both at intra – community and inter-community levels?

b) Please describe briefly what fuels or causes such conflicts?
2. Is there anything that the government or leaders have done either in the recent times or in the past that has fuelled the conflict?
3. Are there any underlying issues pertaining to the conflict that you feel that those outside the community and or the government representatives do not know or understand?
4. What are the methods or measures taken by your community to prevent conflicts?
 - a) Within your community

 - b) Outside your community
5. In case conflicts do occur between members of your community and members of other communities:
 - a) What traditional methods were used or still being used to resolve the conflicts?
 - b) Describe ceremonies or rituals that were or are performed during resolution of conflicts?

- c) Describe any inter community conflict incidence (date, place, participants) and how the communities solved it?
-
- 6. What roles do the following groups of community members play in causing, preventing, managing conflicts or negotiating for peace?
 - a) Women
 - b) Youth (warriors, girls)
 - c) Elders (soothsayers, opinion leaders)
 - d) Government Agencies/ officials
 - e) Faith-based bodies.
-
- 4. What makes traditional conflict resolution methods/ institutions binding and adhered to?
-
- 5. Between the traditional and modern methods of conflict management, which do u prefer and why?
-
- 6. Have traditional institutions used in preventing and resolving conflicts been successful in your view?
-
- 7. a) What are the weaknesses of traditional conflict resolution mechanism in your view?
-
- c) What are the weaknesses of modern conflict resolution mechanisms in your view?

8. What do you suggest to improve the efficacy/ efficiency of traditional systems of resolving conflicts both within and without your community?
9. Do you understand the judicial procedures of conflict management?
10. In your view, do u have confidence in the Courts resolving environmental conflicts?
11. What are some of the problems facing the judiciary in your opinion?
12. Rank the various problems facing judiciary in Kenya (On a scale of one out of ten, where one is the highest score)
 - a) Backlog
 - b) Cost of hiring a lawyer
 - c) Knowledge of court procedures
 - d) Corruption by judicial officers
 - e) Costs of filling case
 - f) Access to persons with disability
 - g) Court language
 - h) Distance to courts
 - i) Enforceability of courts decisions
13. What do you suggest to improve the efficacy/ efficiency of modern judicial systems of resolving conflicts both within and without your community?
14. Are you aware that environmental conflicts can be solved through traditional justice system?
If yes, how is the panel composed? Is it effective and why? Are they all inclusive (women, youth etc)?
15. How has the traditional conflict management systems linked with the modern formal judicial system of conflict management?

16. Have you been party to environmental conflict? (yes/ No)
 - a) If yes, how did you solve it? (Court / Traditional methods)
 - b) If court, how effective was it?
 - c) Do courts deal fairly with environmental conflicts? (Yes/ No)
 - d) If the answer is yes, why?
 - e) If traditional method, why? And who were the actors?
17. What more can we learn from the traditional conflict resolution system and institutions?
18. Are you satisfied with traditional justice system of conflict management as compared to formal courts? Yes or no and why?