Grassroots Mediation Among the Akamba of Kenya: An Ethnographic Study

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Abstract

This study examines mediation as a type of dispute resolution prevalent among the Akamba of Kenya. On-site observations and interviews were employed to understand and learn why a significant faction of the population prefers settling disputes through mediation despite the existence of other avenues of conflict resolution, including courts. Harmony, cost effectiveness, convenience, expediency, among other virtues, are the attractive qualities of mediation discerned from the research. How community building, filial piety, and brotherhood can be maintained and fostered remains the cornerstone of mediation. From a theoretical stance, the peacemaking perspective in criminology provides clarification of the objectives of mediation. Retributive justice is not working as peacemaking theorists contend, therefore community justice that is tempered with healing is more restorative and perhaps a more effective solution to criminality.

Key words: Mediation; Akamba; Kenya; Harmony; Peacemaking.

Introduction

Scholars interested in Alternative Dispute Resolution (ADR) will find Kenya to be an excellent research situs because of its diverse perspectives on effective social controls and its heavy reliance on 'informal' methods of settling disputes. Publications on ADR in the country usually take the form of legal reports, journalistic commentaries, and scholarly publications most of which do not contain empirical findings or are based on secondary data.[1] Few like Irene Nyamasi, Kariuki Muigua, Celestine Nyamu-Musembi, have conducted

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1 Francis Kariuki, Applicability of Traditional Dispute Resolution Mechanisms in Criminal cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* (2015). Kariuki Muigua, Legitimising alternative dispute resolution in Kenya: Towards a policy and Legal Framework (2015). Susan Lee, Multiple doors to justice in Kenya: Engaging alternative justice systems (2023).

field studies on various aspects of ADR.[2] While these studies provide useful knowledge on different aspects of ADR, their objectives are different from the current study as footnoted below. Muigua's study closely aligns with the current study in methodology and findings on the merits of mediation. What is missing in Muigua's study is how the process of mediation is carried out and how the process imbues peacemaking. In an effort to partially fill the research void, this essay provides empirical accounts of why grassroots mediation is not only preferred by many in the Akamba counties, but the reason is a vehicle for peacemaking in the community.

It is not that crime is pervasive and out of control in the country, rather, a steady interest in having people access justice expeditiously and satisfactorily appears to be the catalyst for the ADR movement. The usual legal and social science responses to crime have been to ramp-up institution building – police, courts, jails, and prisons. This familiar normative approach seems not to be working anywhere since crime rates seem to rise, remain stagnant, or show marginal decline,[3] and courts appear not to have the capacity to handle the burgeoning number of cases, or are inaccessible due to costs, or are not trusted to dispense justice.[4]

In Kenya, for instance, a steady increase of crimes has been reported since 2016, with over 69, 000 crimes reported to the police in 2020.[5] Concomitantly, access to justice through courts in the country seems to be on a decline despite reported high marks they get with regard to both the process and results.[6] However, courts do not fare well when other variables such as costs entailed to

2 Irene Nyamasi, Research Report on Awareness, Perception and Uptake of Alternative Dispute Resolution in Kenya (2021), is a complied report for the Nairobi Centre for International Arbitration that focuses on the level of awareness of ADR in Kenya. Kariuki Muigua's non-referred robust study covers four counties and 81 interviewees in the western part of Kenya with analysis and findings on the level of understanding of ADR, its advantages and disadvantages, and other issues relevant to implementing policy in the country. Celestine Nyamu-Musembi's field study in Makueni county in 1998-1999, focused on informal dispute resolution relating to gender equality within the family concerning title to land (2002).

3 Harold Pepinsky and Richard Quinney, opine that excessive incarcerations are not working to curb crime (1991);The sentencing Project explains that there is a weak relationship between incarceration and crime (June 2024).

4 See for instance reports by Hill.org. Justice Needs and Satisfaction in Kenya, Bureau of Statistics (2017). Simon Templer Kodiaga and Paul Kamau, "Most Kenyans seek-and find-justice outside formal court system," Afrobarometer Dispatch (16 April 2021).

5 Statista, Number of reported homicides in Kenya 2011-2020).< https://statista.com> Statista Research Department (3 June 2025).

6 Hill.org, *ibid*, 4.

resolve disputes, the exceedingly slow pace at which cases are processed,[7] and lack of trust in dispensing justice, are factored in.[8]

Reportedly, only about 3% of Kenyans seek justice through courts,[9] and according to the 2019 Draft Alternative Dispute Resolution Policy, 90% of Kenyans resolve disputes out of court through ADR. Factors that account for this exodus from courts include (1) the community-style living - ubuntu, that predates colonization, and continuous to be appealing. This style of living entails filial obedience and a wholehearted trust of the elders and chiefs in a community to mediate conflicts that arise close to their point of origin. These elders and chiefs with trappings of authority, some normative, others acquired and legitimized by government pursue their duties with considerable aplomb. (2) Kenya's Alternative Justice Systems Policy, 2020 (AJS Policy), which among several provisions and guidelines also explores how the application of AJS could help alleviate court crowded dockets.[10]

(3) Kenya's unique Constitution: Article 159(2)(c) of the 2010 Constitution gives Kenyans the right to use "alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms" as long as the terms stipulated in article 159(3) are adhered to which include: (*a*) no contravention of the Bill of Rights (*b*) whatever method of dispute resolution is not repugnant to justice and morality or results (*c*) [or not] inconsistent with the Constitution or any written law."

(4) A 2021 report of the Nairobi Centre for International Arbitration that reveals a positive perception of ADR by a significant number of Kenyans.[11]

Equipped with this, this essay provides explanation through empirical findings why grassroots mediation seems not only resilient despite urbanization which notoriously is known to fracture social bonds and to create relational distance,[12] but thrives alongside formal organs of social control in Kenya. From a theoretical stance, the peacemaking orientation is evident. Harold Pepinsky and Richard Quinney's peacemaking perspective[13] provides a stage setting for

7 *Ibid*.

8 Simon Kodiago and Paul Kamau, *ibid*,4.

9 *Ibid*.

10 See Lee, *ibid* 1.

11 See Nyamasi, *ibid* 1. According to the report, 99% of research subjects had an 'impressive positive perception" of ADR.

12 See Daniel Litcher and Kenneth Johnson, Urbanization and the paradox of Rural Population Decline: Racial and Regional Variation (2023). <https://doi.org/10.1177/23780231221149896>

13 Harold Pepinsky and Richard Quinney, *Ibid*,3.

analyzing informal systems of social control. Central to this research is the question, Why do many Kenyans of the Akamba ethnic group prefer mediation over court trials? An overview of how mediation is performed by Akamban mediators will be incorporated in the discussion.

Theoretical Underpinning

Peacemaking criminologists advocate non-violent methods of resolving conflicts in society. Retributive justice that focuses on accusatory language, fault-finding, and retaliation is not working, Richard Quinney contends.[14] If anything, they deepen discord. As peacemaking criminologists assert, community justice that focuses on root causes of issues, that are leavened with humanistic principles of decency, religion, healing, and social justice are more restorative, more forward looking, and more likely to be the answer to the crime problem.[15] Suffering is generated by a lopsided structural set-up of society that creates entrenched inequities, and such a state of affairs that advertently or inadvertently sparks criminogenic responses to suffering.[16] "Crime is suffering and the ending of crime is possible only with the ending of suffering." [17] For Harold Pepinsky, crime simply mirrors society's treatment of the oppressed, the marginalized, and as he explains, conventional punitiveness is not the panacea to crime, instead, more restorative justice programs, victim-offender conferencing, mediation, and reconciliation should be the focus.[18]

Sample

This research was conducted in the Akamba counties of Kenya that comprise Makueni, Kitui, and Machakos, from January 2023 to June 2023, although the process of applying for a research permit began in August 2022. The three counties combined have a population of approximately 2,545,782 persons.[19] A small part of the research was conducted among jurists and legal scholars in the capital city of Nairobi. In all, 62 interviews were conducted, 52 of which

14 Richard Quinney, "The way of peace: On crime, suffering, and service." In Harold Pepinsky and Richard Quinney (eds.), Criminology as Peacemaking (1991).

15 Harold Pepinsky and Richard Quinney, *ibid*, 3,11.

16 Richard Quinney, *ibid* 12.

17 *Ibid*. page 11.

18 Harold Pepinsky. Peacemaking criminology. *Critical Criminology* (2013).< https://doi.org/10.1007/s10612-013-919193-4.>

19 Kenya National Bureau of Statistics, 2019. A breakdown of the population according to Kenya National Bureau of Statistics, 2019 is: Makueni = 987,653; Kitui = 1,136,187; Machakos, 1,421,932.

were with mediators in the three Akamba counties, and 10 with jurists and legal scholars in Nairobi. The researcher sat in to observe 31 local trials. The mediators comprised chiefs, assistant chiefs, elders, religious leaders, and certified mediators.[20] Phone calls were made to arrange interviews with potential interviewees, and ultimately, only those who gave consent were interviewed, thus making it a purposeful sample.

Methods

Strategies common to social science research were utilized including interviews and participant observation. Archival reports remained an invaluable part of the research as well. Ultimately, content analysis was determined through inductive identification of themes common in interviewees' responses.

Initial entry to the research site was only possible after a government research permit was issued, and after a generous introduction to the Council of Elders of the Akamba clans.[21] With their approval, a research team was then put together that stayed with the researcher throughout the duration of the research to help with translation, videotaping, arranging appointments and other logistics.

Informed consent forms were in both English and Swahili to give litigants and mediators the option to read, sign or thumbprint the forms in their preferred language. It was common practice for the forms to be read out to the participants and also translated in Akamba language. Only mediators who consented were interviewed, and the researcher only sat in to observe cases for which consent was given by the litigants. Interviews were held in the mediators' office or at an appointed location, which invariably was at the site of a land dispute.

The twelve prepared questions posed to each mediator were intended to understand the role of a mediator, what informs their decisions, if and how cases could be appealed, and more importantly, the focus was to get an understanding of why many Akamba prefer mediation over court trials. The duration of each interview was usually between 20-30 minutes with some more engaging mediators talking for about 45 minutes or more.

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20 In Makueni there were 25 mediators, 8 in Kitui, and 19 in Machakos.

21 Accessing a field setting or "getting in" at times requires first going through some bureaucratic institutions. In this instance, the Council of Elders had to give approval for an outsider to conduct research in their setting. Going through this process was facilitated by a former schoolmate and friend, who is a native Akamba.

To get the jurists and legal scholars to participate in the study, the research proposal along with the informed consent forms were sent to the Kenya Bar Association, and a follow-up request was made. In all, 10 agreed to participate in the study. Interviews which were mostly via zoom took between 15-20 minutes with the exception of one face to face interview that lasted almost two hours due to the knowledge and interest of the interviewee on the subject and in the research.

The rationale for including jurists and legal scholars in the study was to find out if there would be a congruence of their minds with those of the local mediators regarding the preference of mediation over court trials. As it turned out there was in almost all of the issues. At times, it was necessary to probe questions or responses.

Table 1

MEDIATORS					PROFESSIONALS	
	N = 52					N = 10
	Makueni N= 25	Kitui N= 8	Machakos N= 19	Total = %	Professionals	Total = %
EXPEDIENCY	25	8	19	100%	10	100%
COST-EFFECTIVE	25	8	19	100%	10	100%
ACCESSIBILITY/ CONVENIENCE	25	8	19	100%	10	100%
TRANSPARENCY	20	4	13	71%	7	70%
CONGENIALITY	25	8	19	100%	10	100%
SATISFACTION	25	8	19	100%	10	100%
HARMONY	25	8	19	100%	10	100%

*** Note that only 71% of mediators and 70% of professionals brought up the issue of corruption in formal courts and its absence in mediation.

Discussion

As shown in the table, seven main themes stood out during the interviews, and not surprising, these reasons for preference of mediation were brought up by most interviewees on their own, with just a few, after probing. Themes that were introduced by less than the majority of the interviewees are discussed in another study.[22]

To categorize interview content, an axil coding system was employed following a method of identifying traits or characteristics of messages. A colleague's grouping was used to ensure objectivity, that is, to confirm or corroborate that researchers groupings were not subjectively derived but stemmed from the interviews. The criteria of selection of themes were rigidly applied for each interview. To arrive at 'Expediency' for instance, when an interviewee stated that "many Kenyans don't have the gift of patience to deal with the delays in courts, so they pursue mediation where their issues will be resolved expeditiously," and another stated, "people value their time. They want to avoid delays that happen in court," those messaging and others similar were categorized under 'Expediency.' This type of grouping was employed in all interviews to derive the various categories discussed below.

Expediency: Mediators approach to hearings are limited to persuasion. Equipped with clout and some expertise, and a keen understanding of the situation and local conditions, they know how to move proceedings along even if there is semblance of a deadlock. Seldom do hearings get carried over, except in more nuanced land and inheritance cases where more witnesses, surveyors, or documents are needed. By and large, cases are disposed of on the same day, and even when hearings must be adjourned, a reasonable time frame of a month or two is set for a hearing. As a mediator stated, "there hardly is any reason to delay the mediation proceeding, but in court, there is always a reason to delay a trial, average time before a case in court is heard is two years, and you must be lucky if your case is delayed only for two." A jurist explained things this way, "many Kenyans don't have

22 For instance, 30% explained that mediators are able to resolve complex issues. As Chief Clement stated, "sometimes, some cases do not need too much lawyers' way of looking at it, just commonsense and community values are all that is needed to resolve the issue."

Another issue that was discussed by some, was the fact that mediators do not only settle disputes, but they also delve into the root causes of why someone became a violator. About 35% of interviewees brought this point up. A mediator, for instance, commented that when he mediates a case, he tries to understand why the person committed the crime. He stated, "I don't only try to solve the problem that is brought to me. I try to understand why the person committed the act. I do that so I can find a way to help the person not go down that road again."

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Cost-Efficiency: Costs are kept at a minimal in mediation especially since there are no lawyers' fees, no court fees, and incidental costs like getting on a motorbike to the chief's office are kept at a minimal. The chief does everything in his power as intimated to the researcher, to convene litigants to minimize missed days from work, and usually resolutions are arrived at in one sitting.

Kenyan courts are not devolved; therefore, litigants must travel out of their communities to the nearest court. Further, court trials seldom get adjudicated in one day, hence more costs accrue for travel boarding and meals. This point was eloquently explained by an interviewee, "Mediation is not costly because the litigants don't travel far to have their cases heard, they don't go to a mediator only for them to be sent back home like they do in court. The mediator hears the case, and the parties go home and continue with their lives." One of the legal scholars had this to say, "by not decentralizing institutions, the only manifestation of authority that people in rural areas see is the chief, and since by distance this is the closest person of authority they have, they take their disputes to him or her. That also saves them the expense of paying transportation to the town where the court is located and cost of accommodation in motels or hotels." One mediator caustically stated, "some cases are a waste of time because they are easily decided. Why pay court's cost especially when you are poor?"

Accessibility/Convenience: Distinctively different points explain what accessibility in mediation alludes to. It relates to the ease of having a dispute settled without making a trip out of town to a court, the convenience of having the issue resolved in a timely manner in the area where the issue occurred, the convenience of not making significant changes in one's daily routine or one's lifestyle, and not incurring expenses relating to filing cases, or not burdened with much paperwork. One mediator explained convenience this way, "mediators live among us, they know the customs and traditions, and they apply them in ways that satisfy us. We don't need to travel to a place where we will spend money and don't get satisfaction." Another mediator explained convenience as follow: "in court, they want you to come neat, many people don't have good clothes. For mediation, we understand the problems of our people and we just settle the case and don't look at how someone is dressed." He added, "lack of how to proceed with court proceedings makes many people prefer to bring their cases for mediation. You don't have all that paperwork to file."

Transparency: Rule bending, deference to persons with clout, taking sides, receiving bribes for favorable outcomes, yielding to markers of privilege, are

usually not attributes associated with mediation. Mediators are facilitators, and when true to their roles, they let disputants lead and pilot the process. An interviewee intimated:

> people pursue alternative forms of dispute resolution, especially mediation because irrespective of the status of a litigant, mediators address them similarly, and treat them equally. All those markers of privilege based on status are absent in mediation, calling someone by their profession like Dr. X or Professor Y, are not applied in mediation. If you are an older person, the mediator can simply refer to you as *Mzee*, which is a common way that elderly folks are addressed in Kenya. The process requires a dialogue between both parties. They air out their grievances and they come up with a resolution. The mediator is there just as a facilitator, so it would be unwise to think of bribing a mediator because he is for the most part not the decision maker. This is not the case in court. Starting from the police, one can bribe their way to victory in a court case.

Congeniality: In coding congeniality, various points of reference were made including the tone and choice of words, the absence of finger pointing, the atmosphere itself that was free of courtroom accoutrements (bailiff with a gun, judge in a black robe and a gavel), no demand for proper etiquette or air of formality. These aspects are appealing to litigants in mediation who may not have been exposed to more palatable or refined language expected in court. In mediation, litigants speak in their preferred language, while in court, at times, they must speak properly in the official language, or speak only through their attorneys. As one of the mediators opined, "courts sometime use abusive language and that stays in the mind of the abused. The tone used by a mediator is usually gentle and understanding, no harshness and no belittling, and since mediation deals with issues and emotions, mediators make sure they listen carefully for as long as a litigant speaks without interruptions."

Satisfaction: At the core of grassroots justice is the successful resolution of issues and to bring the feuding parties back to the relationship they had before the stalemate took hold. The fact that parties at times shook hands or embraced each other projected even if temporarily the semblance of satisfaction with the process. Noteworthy is the fact that the parties themselves steered the direction of the hearing, and satisfaction entailed not only the outcome, but also other factors like if they had their voices heard, and if they were treated with respect. As a chief explained:

> some of the parties are relatives or live close to each other. They eat together and celebrate births and deaths together, they want to continue that so mediators respect that, and that is why mediators try to resolve their disputes in ways that lead

> both sides to shake hands. The mediator does not disrespect anyone, we understand the struggles of our people and all we want is for both sides to tell us they are satisfied with the outcome.

Harmony: Perhaps of primary interest to the people as the interviewees recounted, is the desire to maintain an integrative force of familism and friendship. It is not in anyone's interest to fester hostility toward another especially since litigants remain in close proximity with each other in the same or nearby community. As one of the jurists in the study summed things up, "in mediation, the spirit of ubuntu, or we sometimes refer to it in Kenya as utu (I am because you are) is applied. This keeps the people in a tight cohesive society where they listen to each other and look out for each other's well-being."

Observation

In all, 31 trials were observed to gain knowledge on how processing cases through mediation works and what makes it an attractive method of settling disputes.[23] Several points were noted.

Even when there was obvious strife, it appeared for the most part that people had faith in maintaining decorum and good behavior in the presence of the authority who mediates. Within these local settings it was difficult to miss the fact that resolving conflict is integrated within other auxiliary interests such as maintaining filial piety, brotherhood, and to create an enduring pattern of familism and localism.

Getting to the root causes of issues for instance, is better identified and tackled at the grassroots level, hence in more unexpected ways serious issues such as recidivism and graduating to a life course of crime or vagrancy are at times prevented thereby rendering the need for more institutional building – police, courts, jails, and prisons, minimal. Mediators at times do not only settle disputes, but they also intercede in ways that stifle disorder. In a child neglect case for instance, the quick and rational thinking of the mediator to help the parents work out a payment plan for their daughter's tuition with the headmaster prevented the student from dropping out of school, and that act may have prevented further possible social issues down the line for the girl.

Even as the Kenyan population expands and modernizes, the acceptance of out of court appropriate dispute resolution has not curtailed nor made

23 13 land disputes; 3 cases on inheritance; 3 larcenies; I truancy; 3 spousal abuse and battery; 2 child neglect cases; 1 defamation; 2 unpaid debts; 1 authorized sale of family property; 2 family feuds over miscellaneous issues.

ineffectual the use of formal judicial institutions. If anything, the quest for utu or ubuntu seems to be serving the society well. After all, one must not neglect the fact that mediation cases like formal trials are influenced by the zeal to do the right thing which is to orient people to abide by the laws of society.

Perhaps it is this desire to abide by, and apply the laws of society, that influences the need to provide some training, even if minimal to mediators. Such training usually centers on an understanding of the legal foundations especially in land and inheritance disputes. As observed by this researcher, in land disputes and cases on inheritance, deference was given to Kenyan codified laws.

While mediators are to turn over criminal cases such as assaults and battery to the police for formal processing, it was striking to see a mediator use discretion to handle a spousal battery case himself. The mediator's reason was to prevent a family from spiraling out of economic control. Had the breadwinner been turned over to the police, his wife and infant child would have had no source of income. With a stern reprimand and an order for apologies and lessons on anger management, the chief vowed to monitor the family himself. This kind of discretionary use of power allows the focus to remain on early intervention, education, and prevention, and curbs any trickle-down economic benefits from a community whose meagre thriving can only stretch this far.

Mediators are mostly listeners and at times persuaders, but for the most part remain less voluble while letting their presence be the force of influence. Clearly, they have knowledge of a case beforehand and this knowledge coupled with initial investigation of the issues lends hand towards a more acceptable and appropriate resolution. Their keen understanding of community affairs enables them to address spectral issues that have no nexus between facts proven and ultimate conclusions, as for instance, clarifying to the people that a presumed witch who had been declared persona non grata could not be the cause of drought because she suffered from the devastations of heat similarly. Deciding such issues restores decorum in the community.

To doubters of the efficacy of grassroots mediation, perhaps it is worth mentioning that mediators, regardless of their educational background are conversant of the fact that other professionals in some instances, may be better equipped to address a situation, and they usually without equivocation, refer litigants to such professionals. As for example, in child neglect cases, mediators referred children to be counseled by Children's Ministry or a social worker, and for land disputes, the expert opinion of a surveyor was always sought.

For detractors too, it may appear that sometimes litigants accept terms of reconciliation to save face, to not seem like a troublemaker or a community outlier. Even if this were the case, it is clear that there are avenues for appeals and certainly, mediation is not imposed. Litigants are at liberty to take their cases to arbitration, court, or any appropriate dispute resolution avenue they deem fit.

It was also observed that mediation at times required parties to formally sign agreements they reached. Such signed documents and mediators' notes are stored in files in the mediators' offices. Computers and basic data entry training will enhance and facilitate an otherwise laborious process and will ensure better safe keeping for posterity.

The peacemaking perspective of criminology undergirds this study. From the researcher's observations, it was undoubtedly clear even without articulation that much of the spirit and intent of mediation is to maintain peace in the community, to resolve issues in ways that not only maintain harmony but cultivate and foster a sense of community. Many mediators kicked off the process with a prayer, and some also concluded the process with one. Intercessory prayers, as explained to the researcher are a summon to God for guidance and blessings for peaceful resolutions to issues.

It was also not uncommon to see mediators issue a recess when litigants' tempers flared, and to entreat them to calm down and let cool heads and good reason prevail – peacemaking at its best.

Of further relevance to peacemaking is the more conciliatory format of the process, the absence of harsh accusatory verbiage, and the understanding of suffering and social justice. Addressing underlying issues before they magnify and tear community asunder, have far-reaching consequences, for instance: (*a*) preventing petty offenders from getting a stint with carceral stay which may impact their life course, (*b*) preventing peripheral law breakers from associating with seasoned criminals in prison, and thereby increasing the likelihood of re-offending, (*c*) easing court case crowding, (*d*) offsetting costs relating to imprisonment.

Conclusion

If fault may be cast on this study, it is perhaps the absence of a more robust sample. But as those familiar with ethnographic studies are keenly aware, researchers can only venture into spaces for which tacit consent is given. Further, data saturation set in when the majority of cases tended to be land cases

and when interviewees tended to horn home the same points. As Patricia Fusch and Lawrence Ness remind social scientists, sample size is tangential to research findings, what is germane is a sample that enables data saturation.[24]

With its liberal stance on opening up different avenues of dispute resolution, Kenya remains a laboratory for social scientists for inquiries in dispute resolution, penology and correction that are not within the confines of the formal legal system. For researchers planning on generalizing findings, it would behoove them to engage in more elaborate fieldwork that spans several more counties and more study subjects.

24 Patricia Fusch and Lawrence Ness. Are we there yet? Data saturation in qualitative research. (2015). The Qualitative Reporter, vol. 20.