

## **PROMOTING GRASSROOTS MEDIATION AS A MECHANISM FOR PEACE REINFORCEMENT**

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### **ABSTRACT**

This study reports findings on ethnographic research done in three counties in Kenya from January to June 2023. Two levels of exploration were applied. First, based on participant observation of 31 local trials, the study reports on how the affable ways of settling disputes provide a stage-setting for peacemaking and reconciliation. Second, through 62 interviews, 10 of which were with jurists in Nairobi, and 52 with local mediators in the three research counties, descriptive accounts of the merits of mediation, including its harmony-focused goal, help to clarify and further substantiate the peacemaking perspective in criminology, which advocates understanding, compassion, peace, and social justice. The underlying focus of the study was to learn why Alternative Dispute Resolution, in particular mediation, resonates profoundly among a significant number of Kenyans. Some key reasons are the celerity, convenience, congeniality, and cost efficiency, among others, entailed in mediating cases. A few limitations of the study are reported, including a less-than-robust sample and the absence of interviews with litigants.

**Keywords:** Grassroots, Mediation, Alternative Dispute Resolution, Kenya, Peacemaking,

### **INTRODUCTION**

Building upon field research and the rapidly expanding body of literature on Alternative Dispute Resolution (ADR), this paper examines the time-honored tradition of settling disputes amicably through mediation and amplifies its widespread use in Kenya as a victim-offender centered approach to peace. Much has been written about the virtues of grassroots mediation as a more affordable,

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expedient, and convenient vehicle for amicable dispute resolution.<sup>2</sup> Susan Lee,<sup>3</sup> Lisa Denney, and Pilar Domingo<sup>4</sup> extol and advocate its usage as a method of bringing justice to the many who cannot get justice.

Globally, it is estimated that approximately 1.5 billion persons have unredressed legal issues, while about 253 million experience injustices without legal protections, and overall, about 5.1 billion are disproportionately affected by gaps in justice.<sup>5</sup> Corrective measures for these gaps have revolved around more institution building (police, courts, jails, and prisons) – an approach that fails to take into account some of the pressing issues that impede many from seeking justice in formal judicial settings. This approach also ignores possible cultural

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<sup>2</sup> Timothy Austin, 'Conceptual confusion among rural Filipinos in adapting to modern procedures of amicable settlement (1987) 11 Int Journal of Comp and Appl Crim Justice 242-251; W. Timothy Austin, *Banana Justice: Field Notes on Philippine Crime and Custom* (Praeger, 1999); Ernest Uwazie, 'Alternative Dispute resolution in Africa: preventing conflict and enhancing stability (2011) Africa Security Brief, No 16; Francis Karuiki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya' (2013) Broadening access to justice through ADR-30 years on Research paper 8/2014, <<https://www.kmco.co.ke/wp-content/uploads/2018/08/download1352184239.pdf>> accessed 25 October 2024; Jacqueline Nolan-Haley, 'Mediation and access to justice in Africa: Perspectives from Ghana (2016) 21 *Harvard Negotiation Law Review* 59-106; Kariuki Muigua, 'Legitimising alternative dispute resolution in Kenya: Towards a policy and legal framework' (2015) <[https://pprofiles.uonbi.ac.ke/kariuki\\_muigua/files/legitimizing-alternative-dispute-resolution-mechanisms\\_in\\_Kenya.pdf](https://pprofiles.uonbi.ac.ke/kariuki_muigua/files/legitimizing-alternative-dispute-resolution-mechanisms_in_Kenya.pdf)> accessed 13 November 2024; Karuiki Muigua, 'Institutionalizing traditional dispute resolution mechanisms and other community justice systems' (2017) <<http://Kmco.co.ke/wp-content/uploads/2018/08/institutioonalizing-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-justice-Systems-25th-April-2017.pdf>> accessed 10 October 2024; Peter Apuko-Awuni, 'Mediation as an option under Alternative Dispute Resolution: The Case of Ghana' (2022) 2 *University of Cape Coast Law Journal* 157-175.

<sup>3</sup> Susan Lee, 'Multiple doors to justice in Kenya: Engaging alternative justice systems' (2023) <<https://www.cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-justice-in-Kenya-2023pdf>> accessed 25 October 2024.

<sup>4</sup> Lisa Denny & Pilar Domingo, 'Taking people-centred justice to scale: the role of customary and informal justice in advancing people-centred justice' (2023) <<https://odi.org/en/publications/taking-people-centred-justice-to-scale-the-role-of-customary-and-formal-justice-in-advancing-in-people-centred-justice>> accessed 25 September 2024.

<sup>5</sup> Lee (n 2) ; Task Force on Justice, (2019) 'Justice for All – Final Report' *Center on International Cooperation* <<https://www.justice.sdg16.plu>> accessed 18 August 2024.

patterns that provide a foundation for the preference of alternative methods of settling disputes and the avoidance of governmental agencies of social control.<sup>6</sup>

As reported by Lee, Denney, and Domingo,<sup>7</sup> empirical evidence points to the fact that informal systems of justice are most widely used in societies where groupism or cohesive qualities are steeped in tradition, because they are accessible, convenient, integrative, and advance familism and filial piety. Much has been written about how courts create relational distance by constantly using vitriolic and accusatory language, and how they are, for some, inaccessible due to high costs, and how their excessive punitiveness is, at times, counterproductive.<sup>8</sup> These viewpoints cannot be furthered without discussing, even if cursorily, crime or breaches of the law, be it contractual or administrative, as they are dialectical to how they are addressed and controlled.

Crime plagues every society, some more than others, and crime types vary in both intensity and frequency worldwide. Hence, peace indexes use murder rates and political terror to measure safety levels in a country, but these are by no means the most bothersome crimes or issues. The everyday predatory crimes, drug and alcohol-related crimes, land disputes, neighbour and family disputes, and all those issues that arise from everyday mundane dealings with others fracture interpersonal relationships. Richard Quinney contends that the methods used to address crime do not work, and that making offenders suffer is like putting band aid on a sore, and that perhaps “more often than not, caring and support, rather than anger and pain, may make our justice system more just, more peace-giving, and more effective.”<sup>9</sup> Harold Pepinsky<sup>10</sup> shares Quinney’s ideas and furthers his

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<sup>6</sup> W. Timothy Austin, ‘Filipino self-help and peacemaking strategies: A view from the Mindanao Hinterland’ (1995) 54 *Human Organization* 10-19.

<sup>7</sup> Lee (n 4); Denney and Domingo (n 3)

<sup>8</sup> Raymond Paternoster, ‘How much do we really know about criminal deterrence?’ (2010) 100 *Journal of Criminal Law and Criminology* 765-824; Kinneret Teodorescu, Ori Plonsky, Shahar Ayal, and Rachel Barkan, ‘Frequency of enforcement is more important than the severity of punishment in reducing violation behaviors’ (2021) 118 *PNAS* 1-10; Juste Abramovaite, Siddhartha Bandyopadhyay, Samrat Bhattacharya, and Nick Cowen, ‘Classical deterrence

<sup>9</sup> Richard Quinney, ‘Peacemaking criminology’ 311 In Francis T. Cullen and Robert Agnew (eds) *Criminological Theory: Past to Present* (Oxford University Press 2011).

Richard Quinney, ‘The way of peace: On crime, suffering, and service’ (1991) In Harold E. Pepinsky and Richard Quinney (eds.) *Criminology as peacemaking* Indiana.

<sup>10</sup> Harold Pepinsky, ‘Peacemaking criminology’ (2013) 21 *Critical Criminology* 319-339.

viewpoint by stating that restorative justice and mediation constitute a perspective of criminology that he alludes to as peacemaking.

To promote human rights, access to justice is crucial, and while grassroots methods of administering justice assure justice at the community level, Kariuki Muigua,<sup>11</sup> advises that having a blended system of both informal and formal justice systems in a country opens up more avenues for justice seekers. Informal methods like reconciliation, mediation, arbitration, and other traditional methods used in settling disputes have their strengths. This paper, therefore, examines how mediation is employed in Kenya as a mechanism to reinforce peace, especially if formal courts have not claimed jurisdiction over a case, and why it is preferred over other forms of dispute resolution. This is relevant because addressing issues informally is more than just treading through difficult conversations; more importantly, it is about deciding issues in ways that end any further hostilities among disputants.

## **THEORETICAL FRAMEWORK**

The peacemaking perspective provides a different ambit from what traditional criminology offers in relation to crime control. As Quinney<sup>12</sup> muses, crime control focuses on punishing guilty defendants, peacemaking criminology focuses on how the structural set-up of society, for the most part, U.S. Society, creates inequities that generate suffering. Such suffering engenders criminogenic tendencies whose response by the justice system is retributive, rather than understanding and reconciliatory. Four main themes can be gleaned from Quinney's peacemaking rendition: 1. Awareness of human suffering, 2. Right understanding 3. Compassion and service 4. The way of peace and social justice. In a nutshell, Quinney contends that if we can recondition our perspectives through a spiritual awakening, we can thereafter become aware of the world - an awareness that will bring a right understanding of, and compassion to suffering, and a peaceful ending to it through social justice.<sup>13</sup> "Crime is suffering, and the ending of crime is possible only with the ending of suffering."<sup>14</sup>

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<sup>11</sup> Kariuki Muigua, 'Institutionalizing traditional dispute resolution mechanisms' (n 1).

<sup>12</sup> Quinney, 'The way of peace' (n 8).

<sup>13</sup> Ibid.

<sup>14</sup> Ibid 11.

Pepinsky, who also spearheads the peacemaking perspective, considers crime to be a social construct, a reflection of the poor treatment of the downtrodden, the remedy resting on more peaceful and restorative ways, rather than the conventional punitiveness.<sup>15</sup> Victim-offender mediation, among other restorative justice programs, according to peacemaking criminology, inspires conflict resolution and reconciliation. Pepinsky and Quinney<sup>16</sup> prescribe peace as a better response to crime and a better way of envisioning the future.

## SETTING AND METHODOLOGY

Strategies common to field research were employed in this work. The research combined in-depth interviews, participant observation, and document analysis from January 2023 - June 2023 in the Akamba counties of Makueni, Kitui, and Machakos, Kenya. A total of 62 interviews were conducted, 10 of which were with professionals/jurists in Nairobi, and 52 with local mediators in the three research counties. The researcher sat in on 31 local trials to observe the process of mediation. Content analysis of journal articles, documents, and books provided insights helpful in generating information pertinent to Alternative Dispute Resolution (ADR) in general and mediation in particular.

The population of Kenya is approximately 47.6 million persons, spread throughout 47 counties with Nairobi as its capital.<sup>17</sup> Besides the official languages of English and Swahili, about 69 other languages are spoken in the country. Makueni County has a population of approximately 987,653 persons.<sup>18</sup> Machakos County has a population of 1,421,932 persons<sup>19</sup> while Kitui County has a population of 1,136,187 persons.<sup>20</sup>

The reasons for making Kenya the situs for this research were:

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<sup>15</sup> Pepinsky, 'Peacemaking criminology' (n 9)

<sup>16</sup> Harold Pepinsky and Richard Quinney, *Criminology as Peacemaking* (Indiana University Publishing, 1991).

<sup>17</sup> Kenya National Bureau of Statistics 2019 <<https://www.knbs.or.ke>> accessed 4 July 2024.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

1. Its unique Constitution. Article 159 (2) (C) of the 2010 Constitution expressly advocates the right for Kenyans 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.

The Kenyan Constitution, therefore, provides guidelines both substantively and procedurally on how disputes should be adjudicated regardless of fora.

2. Familiarity with local authorities in Makueni, Machakos, and Kitui who had bona fide interest in the research and provided approval and guidance in conducting it.
3. Its 2019 Draft Alternative Dispute Resolution policy, which indicates that 90% of Kenyans prefer settling disputes out of court, and its 2020 Alternative Justice System Policy, which promotes other appropriate methods of seeking justice instead of court trials.

## **SAMPLE**

### *Interviews*

Of the 52 mediators who were interviewed, 25 were from Makueni, and they comprised nine chiefs, seven assistant chiefs, four elders, and five religious leaders. The religious leaders in Makueni included Christian leaders, Imams, and a Hindu priest. In Kitui, there were eight interviewees; six of them were religious leaders, and two were certified mediators. In Machakos, interviewees comprised three council delegates who were trained mediators, five chiefs, five assistant chiefs, three elders, and three religious leaders.

A purposive sampling method was used to obtain participants for the study. After obtaining a research permit from the National Commission for Science, Technology and Innovation (NACOSTI), License No: NACOSTI/P/23/2314, in Nairobi, a meeting was held in Makueni with the Council of Elders of the Akamba clan to discuss the research proposal and to get their consent to conduct research

in the three counties that form the Akamba clan. With their consent, phone calls were made to chiefs and other mediators throughout the counties. Only those who consented to be interviewed were included in the study. Informed consent forms and research questions were translated into Swahili, giving interviewees the option to read and sign either the English or Swahili version. At times, thumbprints were obtained in lieu of a signature. A translator who spoke English, Swahili, and Akamba was retained throughout the duration of the research. It must be noted that the Ethics Committee of a local university in Kenya scrutinized the proposal and survey instrument for this study and the informed consent forms in both English and Swahili prior to issuing the approval permit.

Each mediator was interviewed in their offices or at the venue where they conduct mediations. The questionnaire for the mediators comprised twelve questions. The questions were handed to each mediator, and invariably, each question was read out to them after a response to the previous question had been made. The results of the responses to all the questions are discussed in a different study. Of relevance to this study are responses to the last question: Why do many Kenyans prefer mediation over court trials? A litany of reasons was given, including cost effectiveness, convenience, accessibility, expediency, transparency, congeniality, satisfaction, and harmony, among others. Interviews typically took between 20 - 30 minutes, with a few chatty ones lasting about 45 minutes.

The ten professionals who consented to be interviewed comprised three judges, three law professors, two prosecutors, and two defense attorneys. A request and a follow-up request were made through the Kenya Bar Association for participants in the study; only ten agreed to participate. The interviews, which were mostly via Zoom, lasted between 15-20 minutes, except for one face-to-face interview that took about two hours because of how detailed the response was. Only the question of why many Kenyans prefer mediation and a follow-up question was posed to each professional. The basis for interviewing the professionals/jurists was to find out if their perspectives on mediation were different from those of mediators. As it turned out, there was synergy between the two sets of participants in the study.

In order to compile all the 62 interviews into comprehensive messages, a system of manual coding was applied, whereby responses were grouped into themes. In essence, a content analysis strategy (thematic analysis) was employed whereby

transcripts (handwritten notes) of each interview were carefully read and the message deciphered. Similar messages, were grouped into categories under a specific key word. Take for instance harmony (which is one of the themes and key word derived from the interviews), when an interviewee indicated that “the social set-up for Kenyans, and the relationships they maintain makes it such that people are not equipped to deal with strife that formal trials cause” and another interviewee stated, “many Kenyans are religious; people believe in forgiveness, so settling things through dialogue, or sitting together and discussing differences maintains harmony...” the researcher grouped these and other responses that conveyed similar messages under the broad heading “harmony.” This axial grouping of messages was used throughout, and from all, that is 100% of the interviews, six themes were discerned, and in 70% of the interviews, one theme was obvious (please see table 2 below), and other issues were discussed that were evident in fewer than 40% of the responses. To be sure that the researcher’s bias was not the basis for the sorting of messages, a colleague independently conducted a sorting process for me, and by and large came up with similar groupings.

#### *Participant observation*

In order to understand how grassroots mediation is carried out, the researcher sat in on 31 trials in the Akamba counties. There were 13 land disputes, three inheritance issues, three larcenous taking, one case of truancy, two cases of family feud, two unpaid debt issues, three spousal assault and battery cases, one case of defamation, two child neglect cases, and one case of unauthorized use of family property. These cases were held at the mediators’ offices in the villages where the issues arose. Three of the land disputes were held at the disputed property.

A signed consent or a thumbprint was sought by the researcher from all parties involved, the mediator, the complainant, and the respondent, before the commencement of any hearing. The mediator made it clear that the researcher was simply there to learn and had no say on the proceedings or the outcome. If consent was denied even by one party, the researcher left. When consent was granted, both the interpreter and researcher sat quietly and took copious notes, which were later compared for accuracy for those cases that were presided over in English. For cases presided in Swahili or the local language, reliance was placed on the interpreter’s notes and, at times, coupled with a briefing by the mediator.



Of the 31 trials observed, 25 mediators started things off with a prayer. Seven of the prayers were led by a witness or an elder sitting in support of the process, and the rest by the mediator. As explained to the researcher, prayers were a request to the Almighty for guidance and peaceful deliberation. Five mediators offered a prayer at the conclusion of the process as well. Upfront, mediators admonished the parties to be respectful to one another and not to interrupt each other.

The mediator remained neutral for much of the process, allowing each side to speak for as long as they wanted. When things got heated and tempers flared between the litigants, the mediator stepped in with words of caution. On five occasions, the mediator issued a recess to allow the parties a cooling-off period.

After both sides rested their case, the mediator summarized both sides of the case and asked the complainant what relief the complainant wanted. The respondent was asked to comment on the complainant's request, and in some instances, especially for cases relating to debts, the parties came up with a payment plan, and the mediator invariably asked the parties to sign the agreement. In a few instances, the mediator made suggestions, but left it to the parties to decide. In issues of inheritance and succession, the mediator deferred to Kenyan law for the outcome. At the end of each case, the mediator entreated the parties to forgive each other, to reconcile, and to live in peace. In seven of the cases, the parties were asked to shake hands as a sign of reconciliation. In one, the spouses were asked to hug each other.

The duration of case resolution varied according to the complexity of the issue. The simpler cases, like larceny, truancy, unpaid debts, defamation, and unauthorized sale of family property, took between one to three hours to dispose of. Cases of inheritance, Child neglect, and spousal abuse took about four hours to resolve since the mediators delved into long-standing issues. As noted, in one of the spousal abuse cases, given the recurrence and intensity of the violence, the mediator found it necessary to forward the case to the police for formal prosecution. For cases dealing with inheritance, the mediators invariably applied formal Kenyan law.

Land issues took longer to resolve. Of the 13 land cases in this study, only three were resolved on the day of trial. The rest received either partial verdicts and/or

were adjourned to between two weeks and two months, and that is because the mediator needed parties to bring more witnesses, family members, documents, and a surveyor.

## RESULTS

### Observations:

**Table 1**

Dispute Type	No. of Disputes	Duration	Outcome of Mediation
Land	13	Same Day	<p>1. Complainant retains land. The chief ruled that following Kenyan Constitution, complainant not his uncle was due the portion of his late mother's land. He, the chief will facilitate the process of demarcating the land, to ensure the complainant gets what parcel is due him.</p> <p>2. The family land that has not been sold should never be sold since it is the only piece of land the family has for their final rites and for their disabled sister, the Chief ordered.</p> <p>3. The 3-foot piece of land along the land boundary that was in dispute was to be shared in equal portions between the two litigants. The assistant chief and the elder will supervise the division of the land. The parties are to write and sign an agreement indicating the agreed settlement and their commitment to it. If anyone breaches the agreement, the chief will take the requisite action against him. After the division of the portion in dispute, a land succession process must be undertaken</p>
		Same Day, Partial Verdict	

			<p>immediately to enable the respond to get a title for his land.</p> <p>4. Each side to have a team of 4. The assistant chief will arbitrate. Each side to have all documents relating to the land, and to all developments done there. All parties will assemble at the disputed land. All valuations and measurements must be done, and then equitable division of the land. The team will meet in 2 months with the chief for a final settlement of the dispute.</p> <p>5. Assistant Chief to organize a meeting with the complainant and all of her children, with the clan elders present. A demarcation of the land would be carried out among all the children. The process should be done within one month. The litigants would then bring to him the chief, the report within two weeks of the demarcation for a final hearing. Requested other little issues like stray animals to be restrained, and for apologies to be issued to the mother for any unkind words said to her, and for the family to pursue peace.</p> <p>6. The chief, clan elders, surveyor, and all family members would have to be present, and following the law of succession, the land will be partitioned accordingly. That should be done within one month, and the report would be left at the chief's office to avoid further generational disputes.</p>
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		1 no hearing	
		2 adjourn 2 weeks	8. The mediator instructed the complainants to continue working in the space where their stalls were located. She said she could not ask them to vacate because, first, the space they occupied was a road reserve; second, the respondent was not using the land she claimed as hers; and third, there was a need to resolve the dispute on the land's ownership since another claimant had come into the picture. The mediator stated that in the event the matter was resolved in favor of the respondent, a decision would be made regarding the location of the complainants' stalls. This was because if the respondent built a business premise facing the main road, the only way to access the road would be
		1 adjourned 3 weeks	

			<p>through the space where the stalls were located.</p> <p>9. Parties to get separate valuations of developments on land, and they will be compared, and a middle ground agreed. They must seek a lawyer to draw up an agreement on what to do with the structure erected on the property. Parties to get back with the Chief in 3 weeks. Respondent to return 60,000 shillings owed to the plaintiff.</p> <p>10. More witnesses, land documents/title, surveyor are needed.</p> <p>11 &amp; 12. All family members must be present because the outcome of the hearing will affect the next generation of family members. Witnesses must also be present.</p> <p>13. Complainant and respondent should bring documents within three weeks that support each person's claim to the disputed land and bring witnesses who were present when the land sale was made.</p>
Inheritance	3	Same day	<p>1. Boy to inherit his late mother's property since his father had also died, not his uncle or other relatives.</p> <p>2. Woman to inherit her husband's property, not in-laws.</p> <p>3. Mom to inherit husband's property, not children. Children will, in turn, inherit from her.</p>

Larceny	3	Same day	<p>1. Respondent to pay the market price of the complainant's stolen farm vegetables.</p> <p>2. Respondent to return the DVD to the complainant immediately.</p> <p>3. Respondent to pay for stolen team soccer jerseys. Henceforth, jerseys are to be stored in the chief's office for safekeeping.</p>
Spousal assault and battery	3	Same day	<p>1. Severe reprimand to the spouses from the chief. He warned the couple of no second chance if any violent attacks happened again. The chief used discretion not to have police involved because the attack was provoked, but more importantly, the woman had a baby, and they were both completely dependent on the man, and worried about the impact of a prison sentence on the young man. The chief vowed to make frequent and random stops at the couple's home to monitor their well-being. Demanded a contrite apology from the respondent to the complainant and vice versa. Asked them to hug.</p> <p>2. Reprimand from mediator to respondent. Issued a fiat for the respondent to stop drinking and to have a counselor involved. Had the respondent sign an agreement to quit abusing his spouse. Instructed the litigants to take their children to school at the beginning of the following week.</p>

			<p>She asked them to talk to the teacher about allowing the children to study while they were looking for money to pay the school fees. If they failed to do so, she would take further action against them. He asked the respondent to stop drinking and to use whatever money he had to support the family. The litigants were asked to forgive each other and embrace a life of peace and harmony. The respondent was asked to stop harassing his wife and instead live well with her. The mediator instructed the two to write and sign an agreement committing themselves to keep the peace at home and in their marriage.</p> <p>3. The Chief recommended that the issue of domestic violence be turned over to the police for charges to be filed in court. Both parties were violent against each other. The Chief requested to have the Children's ministry involved to ensure the welfare of the children. The chief is to monitor any reconciliation plans between spouses. The chief gave the man and his wife two weeks to decide whether they would live together. He would monitor the progress on this matter to ensure the outcome is a reconciliation of the family where the man and his wife continue to live together peacefully.</p>
Child neglect	2	Same day	<p>1. Parents to accompany child to school the next day, where the chief will assist them in negotiating with the headmaster the tuition payment plan. The Chief demanded the father to quit drinking and</p>

			<p>to revoke the curse on his daughter's education.</p> <p>2. In this issue, the Chief decided that Children's Ministry would be involved to monitor children's wellbeing. Father to sign an agreement to take care of the children. Chief will make occasional visits to see that the children are being taken care of.</p>
Defamation	1	Same day	<p>The Chief asked the respondents to apologize to the complainant and for the complainant to forgive them. Warned respondents against continued rumormongering and defamation of other people. She told them that the next time it happened, she would report them to the police, and the law would take its course. Asked the accused to change their behavior and seek to live in peace with their neighbors. Warned all the parties present against discussing the verdict of that case anywhere outside of the chief's office.</p>
Unpaid debt	2	Same day	<p>1. Respondent to pay back loan in full within two months of date of hearing. Chief refused to impose interest.</p> <p>2. The Chief requested respondent to pay back loan within 30 days of hearing. Money to be paid through the chief. Complainant should make no contact with respondent within that time period and should refrain from spreading word around about the respondent's indebtedness.</p>



Truancy	1	Same day	Runaway girl living with an older woman ordered to live with biological mother who will provide adequate supervision of her.
Unauthorized sale of family property	1	Same day	Respondent had the right to sell family property to pay medical bills for a sick child. The cow that had been sold could not be reclaimed. It now belonged to the respondent's brother and his wife. The Chief, asked the brothers to stop harassing their siblings and to live harmoniously with each other. A record of the verdict was kept in the Chief's file for reference and enforcement.
Family feud	2	Same day	<p>1. Chief ordered that the feud and malice must terminate immediately. To assist in unifying the family, the assistant chief should assign the village elder to facilitate family meetings so that the elder can act as a go-between to ensure peace and harmony. Warned the complainant from excessive jealousy of his brother. Advised the youngest sister to seek judicial intervention so that she could get some inheritance.</p> <p>2. The assistant chief helped the family to accept the respondent's decision to move out of her mother's homestead for good and would only make periodic visits to check on the family's well-being. Her mother (complainant) accepted and respected her daughter's decision. She was happy about living with her grandson and would continue to live with him and his young family. She</p>

			considered him to be able to provide security to her. The assistant chief pleaded with the son and his mother to forgive each other, reconcile, and treat each other with respect. In the end, the mother and the son shook hands as a sign of forgiveness and reconciliation. The assistant chief told the other daughters they could visit their mother as they wished. It was, however, expected that they would treat her with respect, and if any of them thought they could continue misbehaving, the assistant chief would stamp his authority by acting against them.
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Overall, from a totally observational standpoint, litigants' interests in processing interpersonal discord through third-party mediation arise in part because villagers know, or know of each other, thereby appreciating the private or sometimes quasi-official, or official status of the mediator. Of immense importance to the success of the process is the connection of the parties to a harmonious core of citizenry. Such a cohesive web fostered by village life puts citizens on a path that facilitates cooperation.

As observed, chiefs are the closest persons of authority known to villagers. Further, elders and religious leaders garner as much respect given deep-seated tradition. What happens in these locales devoid of police presence aligns with Donald Black's and M. P. Baumgartner's thesis that "the withdrawal of formal police from a community creates opportunity for self-help patterns to flourish."<sup>21</sup> The drift towards informal methods of resolving conflicts has been linked to the absence of formal agencies of law enforcement throughout much of the research sites.

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<sup>21</sup> Donald Black and M.P. Baumgartner, 'On self-help in modern society' (In Donald Black ed, *The Manners and Customs of the Police*, Academic Press 1980) 274.

As well, courts in Kenya are not devolved; hence, locals have to go to the county capital or to the country's capital for formal adjudication of cases. This presents a myriad of financial and logistical problems to financially strapped people. Further, with the country's 2010 Constitution that promotes the use of informal methods of dispute resolution, and with the 2020 Alternative Justice Systems (AJS) Policy that advocates the coexistence of both formal and traditional justice systems as forums of justice, an air of formality is given to amicable dispute settlements.

**Table 2**

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%	70	70 %	
CONGENIALITY	25	8	19	100%	10	100%	
SATISFACTION	25	8	19	100%	10	100%	
HARMONY	25	8	19	100%	10	100%	

A variety of themes, including expediency, cost efficiency, transparency, convenience/accessibility, congeniality, satisfaction, and harmony resonated in interviewees' discussions.

*Expediency:* It is not unusual to have cases filed in court span years before a resolution is reached. That is a sharp contrast to what happens when cases are mediated. As seen above under Table 1, even in complicated land cases where more witnesses are needed, just a couple of months is needed before a final resolution of the issue. No wonder, therefore, that interviewees in this study were

quick to highlight the celerity with which cases are processed through mediation. An interviewee stated:

There is hardly any reason to delay the mediation proceeding, but in court, there is always a reason to delay a trial. The 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 years,” an interviewee noted.

Another interviewee stated:

Many Kenyans don’t have the gift of patience to deal with delays in formal courts, so they pursue mediation where their issues will be resolved expeditiously.

*Cost Efficient:* Costs incurred in mediating cases are minimal if at all, and they usually relate to a few shillings paid to the motorcycle person who provides transportation for those who are unable to trek to the mediation venue, or costs incurred due to lost wages by missing work that day or not going to the market to sell produce. Since Kenyan courts are not decentralized, litigants must travel to the county or the country’s capital, and this entails spending on transportation, lodging, and other incidental expenses, let alone lawyers and court fees. On the contrary, with mediation as an interviewee explained, “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 as they do in court. The mediator hears the case, and the parties go home and continue with their lives.”

Another interviewee summed it up this way: “It costs a lot to take a case to court; you must have a lawyer, and it is too expensive to hire one. The problem without representation is that one can be victimized more.”

*Accessibility/Convenience:* Having to travel out of town and experiencing all the hardships entailed in that; having to deal with the uncertainties of a trial are hardships that are avoided when cases are mediated. Interviewees emphasized the convenience of having mediators in the community. One of them stated, “Courts are open from 9.00 a.m. to 5.00 p.m., but mediation hearings can be done at any time, including in the evenings and on weekends.” Another stated, “With mediation, justice is at your doorstep; courts are far away.”

While another explained convenience this way: “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 also added that “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:* While 70% of interviewees expressed mistrust of law enforcement and the judiciary, that distrust helps to coalesce the people towards informal ways of dispute resolution. Quite discernible from many of the interviews was the enduring fact that, besides microsystems, that is, family, associates, and community, which in some way influence behavior and decision-making, macro systemic issues unexpectedly create an atmosphere that repulses people from formal structures of society to informal settings that meet their needs. A participant said:

Courts can be compromised; so many people do not have faith in them, one interviewee wryly stated.

While another stated:

In court, it is almost like a contest between the poor and the rich. There is always the feeling of the rich person buying justice. It is like a rat fighting an elephant, the social status of corruption.

Such scathing indictments of the judiciary give the impression that justice can mostly be guaranteed in informal settings, and by deductive reasoning, that might not be the case in courts. Responding to why people prefer mediation, one interviewee stated, “transparency! Mediation is done by people who understand each other so no cheating, no false allegations, judgement is given instantly, no delays, so people can move on.”

*Congeniality:* In explaining how mediation promotes congeniality, a number of factors was introduced including: a more toned-down rhetoric as opposed to the harsh and vitriolic language at times used by lawyers in court; the relaxed atmosphere at the mediator’s office or outside under a tree, or at a farm where land is disputed; the absence of a bailiff or police officer with a gun as seen in

courtrooms; an intimidating looking judge in a black regalia with a gavel, among other factors. One of the interviewees explained the human touch of mediation this way:

We pray before a trial not only for wisdom but for peaceful discussion, clear deliberation of the issues, and for a peaceful outcome so that everyone leaves satisfied. We don't want to scream at each other, and we don't want anyone to think what they say does not matter. Here, no one is above the other.

The absence of pomp and circumstance and the non-emphasis on proper etiquette make mediation appealing to many. Explaining why mediation is appealing, an interviewee said, "In mediation, there is justice irrespective of the status of the litigant. The mediator addresses each party similarly without including markers of privilege or of status." One interviewee stated, "The phobia of meeting a judge is eliminated [in mediation]. Everybody is given a level platform to express themselves in their dialect without the harsh reprimands that happen in court." Another stated that "courts use abrasive language which can leave litigants bruised for life." While another explained that courts create relational distance by posing questions such as "... did you do that, or at times, outright are accusatory." That, as the mediator explained, creates a deeper wedge between the parties when all they want is "harmony, not acrimony." As another interviewee explained, "the guilty verdict in a formal court carries some social stigma, which is absent in mediation."

*Satisfaction:* Virtuous as it is to deem mediation as a medium that fosters congeniality and harmony, Akambans also find profound satisfaction in mediating cases. Satisfaction in part stems from the fact that litigants themselves decide what forum to take their cases to, and for the most part, decide the outcome. An interviewee said, "The case is handled by people who know you well, a proper verdict is given based on what the litigants decided, and the verdict is not challengeable because there was no corruption."

The drift here is that in mediation, justice is blind, and because the parties themselves control the process, it is difficult to manipulate the process to one's own advantage. One of the interviewees explained:

Disputes mediated at the community level end with satisfactory outcomes, without beating around the bush, and they focus on the truth, but court trials at times end up with unreasonable verdicts – people are found guilty when they did not commit the crime. People are satisfied with how cases end in mediation. We handle cases in a Godly way because we follow the book of Isiah that requires people to come together and reason out issues. That makes people satisfied.

It is fair to draw the inference that this tradition of finding reasonable and pragmatic outcomes through mediation acts to increase clan cohesiveness.

*Harmony:* As Muigua notes, the predicate value of mediation in Kenya is to promote harmony.<sup>22</sup> All of the 52 mediators and 10 professionals/jurists in this study made clear that *ubuntu* or *utu* (I am because you are) is the basis of a healthy society and is one that Kenya is striving to achieve. As one of the interviewees stated:

Ubuntu relates to harmonious living among Africans. A child is raised by the entire village. Communal living, especially before colonialists imposed their system on us, was what we had. People lived with togetherness as a core principle and did their best to act in accordance with community values. Therefore, even when there was disagreement, they resolved the dispute in ways that maintained that collective way of looking out for one another, harmonious living. That way of existence is what we are striving to maintain, or to revert to by settling any discord we have through mediation.

In their different ways, interviewees extolled mediation as instrumental in retaining cohesiveness in society. One of the interviewees stated that “courts create animosity by ordering people to stay away from each other.” Another interviewee spoke about the social, religious, and cultural necessity for Kenyans to settle cases through mediation. It was clear from what he said that, because of consanguinity,

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<sup>22</sup> Muigua, ‘Legitimising alternative dispute resolution’ (n 1). See also Muigua (n 10).

affinity, religion, and the fear of curses, many Kenyans prefer to settle disputes in a forum whereby those ties to the community will remain intact. Another interviewee explained, “Communities trust their local system more. When you are having a conflict with family, ancestors are listening even from their graves, as it is believed, and people fear curses that may befall them, and so they do their best to settle any issue they have peacefully.”

Fear of curses to the locals seems to be a more effective restraint on personal aberrance, more so than judicial sanctions. To the Akambans, mediation is quite relevant to the intactness of the community, and as an interviewee cleverly reminisced, resolving a case in a brotherly way cultivates both personal and interpersonal harmony: “Mediation looks at a case from a human level.” Another stated, “mediation avoids vengeance, it maintains harmony”. It was also said by another interviewee: “The chief, as a mediator, knows his people very well, so he understands the root causes of issues and gives solutions.”

Some interviewees brought up other reasons that explain the preference for mediation among the Akambans of Kenya. About 35% for instance, spoke about how mediators try to understand the genesis of issues, and another 30% alluded to the relative ease with which mediators unravel complex issues, while about 25% discussed privacy as a compelling factor in the decision to mediate cases. The fact that mediation helps in easing up congested court calendars was raised by 40% of interviewees, and 15% discussed how specific issues relating to witchcraft that courts refuse to hear are settled by mediators.

## **DISCUSSION**

This study applied two levels of explorations. First, it observed how mediation is performed in three Kenyan counties and how the affable ways of settling disputes provide a stage-setting for peacemaking and reconciliation. Second, interviewees provided descriptive accounts of the merits of mediation and why many Kenyans prefer to settle disputes through mediation. The descriptive information help to



clarify and further substantiate the peacemaking perspective in criminology, which advocates understanding, compassion, peace, and social justice.<sup>23</sup>

Of primary theoretical importance here is the suggestion by Pepinsky that the conferencing style of resolving disputes promotes “a climate in which people gain control over violence rather than being controlled by it.”<sup>24</sup> As observed in this research, while mediators refrained from using the words “guilty” or “not guilty” or any accusatory words, it was clear that by having litigants get at the core of issues, a fact-finding mission was afoot that would prove if there was wrongdoing and by whom. Interpersonal conflicts reflect the basic focus of determining whether one party is at fault, and when fault is evident, like in some cases in this study, there was a lot of persuasion by the mediator for litigants to peacefully agree, to reconcile, and to get along.

Mediation actually proves favorable, and its remarkable durability in Kenya is obvious.<sup>25</sup> Clearly, familism, friendships, and other features of Kenyan daily life generate goodwill among the people. The conferencing style in mediation, and mediators sticking with their role and only becoming arbiters when Kenyan formal law had to be applied, for instance, in cases of inheritance, also helps project the peaceful and more amicable underpinnings of mediation.

One cannot ignore the fact that by entertaining cases involving spectral accusations, mediators are engaging in a peacekeeping mission. A woman banished from the village for being a witch because it had not rained in months could only find refuge in the forest since no other village welcomed her, as explained to this researcher by an interviewee. By explaining to the villagers how their allegations were baseless since the woman too suffered from the scourges of drought, the mediator was able to have the woman go back home, and decorum was restored.

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<sup>23</sup> Quinney, ‘The way of peace’ (n 11); John Woznaick, Towards a theoretical model of peacemaking criminology: An essay in honor of Richard Quinney’ (2002)48 *Crime and Delinquency* 204-231.

<sup>24</sup> Pepinsky, ‘Peacemaking criminology’ (n 14) 327.

<sup>25</sup> See the 2019 Draft Alternative Dispute Resolution policy that states that 90% of Kenyans prefer out of court settlements especially mediation.

In recent times, some prominent Kenyan jurists and law practitioners are championing the push to ‘sensitize’ the population by 2028 towards the use of ADR so as to free up courts for the more egregious cases.<sup>26</sup> Underlying this move is the spirit of ubuntu – the maintaining of togetherness – a *gemeinschaft* style of community living.

It is not that mediation or other informal methods of settling disputes are new to African communities; what seems to be happening is that there is a renewed appreciation of informal dispute resolutions as faster, less expensive, and less acrimonious ways of handling the multitude of cases that are brought to court daily. Not long ago, the Regional Head of the United Nations Office on Drugs and Crime (UNODC), Eastern Africa, made it clear that “Formal justice systems have their place, but Africans also have their ways of resolving disputes to promote reconciliation and integration...”<sup>27</sup>

In an earlier publication, Uwazie<sup>28</sup> explained that Ghana, Nigeria, and Ethiopia spearheaded the application of ADR in Africa, and that Ghana’s 2010 ADR Act 798, s. 82 is a thorough enunciation of the force attributed to ADR that makes decisions binding.

It seems clear that by not casting aspersions during mediation, wrongdoers are given a second chance to make it right with themselves and with others. They avoid the label ‘criminal’ or ‘convict’ that invariably befalls those found guilty of a crime in court, and that stalls prospects for gainful employment. Two other interdependent benefits are obvious in mediation: (a) it helps declutter court dockets (b) it eases prison crowding. Logically, mediation is beneficial for first-time low-risk offenders who may be susceptible to learning hardened criminal behavior due to carceral stay. These are points useful to policymakers.

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<sup>26</sup> see Day Break: Alternative Dispute Resolution, 2023

<<https://www.youtube.com/watch?y=9b78Dw48iu>> accessed 7 July 2024.

<sup>27</sup> United Nations Office on Drugs and Crime, ‘Alternative justice system as a catalyst for advancing access to justice in Kenya (2023)

<<https://undoc.org/easternafrika/en/stories/alternative-justice-system-as-a-catalyst-for-advancing-access-to-justice-in-Kenya.html>> accessed 5 October 2024.

<sup>28</sup> Uwazie, ‘Alternative dispute resolution in Africa’ (n 1).

The practice of mediation is not without its detractors. Some contend that because victims are heavily involved in the process, false expectations very easily may be catalyzed, and that the process is not suitable for all types of crimes, and certainly not helpful when there is a power imbalance between litigants<sup>29</sup>

As a research observer, it seemed obvious that because reconciliation is at the forefront of the process, the concept of deterrence is not consciously pondered in mediation, nor is retribution. Since the urge for social cohesion is foremost, one wonders if plaintiffs/complainants feel a sense of obligation to save face, so to speak, to agree to settlement terms even when they are aware that the agreements they entered into are dubious or absurd.

These may be needless worries since research utilizing self-report data on the use of mediation found that those who have their cases mediated are more likely to report satisfaction and a decrease in their use of court and law enforcement.<sup>30</sup>

## **LIMITATIONS AND CONCLUSION**

A more robust sample was anticipated, but as is evident in field studies, one can only conduct research among those who give consent. Not to be ignored is the fact that at times, roads to some of the villages were impassable, hence those areas were unfortunately not represented in the study. Nonetheless, the researcher was able to get a deep understanding of how mediation is conducted from 31 cases. As well, the interviews with 52 mediators and 10 professionals/jurists, etched in the researcher's mind an unforgettable and profound appreciation of mediation and the goals it seeks to achieve. It is not clear if anything new would have been learned with a larger sample since the mediation sessions and the interviews were drifting to redundancy, or to content saturation, especially since the majority of disputes were about land.

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<sup>29</sup> Sam Garkawe, 'Restorative justice from the perspective of crime victims' (1999)15 Queensland University of Technology Law Journal 40-56; George Pavlich, *Governing Paradoxes of Restorative Justice* (Routledge 2005); Patrick Gerkin, 'Participation in victim-offender mediation: Lessons learned from observations' (2009) 34 Criminal Justice Review 226-247.

<sup>30</sup> Lorig Charkoudian, 'Giving police and courts a break: The effect of community mediation on decreasing the use of police and court resources' (2010) 28 Conflict Resolution Quarterly 141-155.

Societies vary regarding their history, culture, and politics, among other attributes, so the intent of this study is not to generalize findings, and of course, the lack of robustness of the sample would not permit that even if the idea was conceived, but the purpose is to shine light on a practice that seems to be working in Kenya.

Regrettably, litigants were not interviewed; their perspectives could have fully informed this study, one would assume. A future study should incorporate the viewpoints of litigants since, ultimately, without them, the process of mediation would not be necessary.

The Kenyan emphasis on informal dispute resolution through mediation is an inexpensive and expedient way of resolving disputes without prolonging acrimony. As a benchmark for peaceful existence, it aligns well with the aims of the peacemaking perspective of criminology.

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