

# Improving Traditional Somali Justice Based Conflict Resolution Mechanisms in Garissa County, Kenya

Zacchaeus Mboche Wanyoike<sup>1</sup>, Pontian Godfrey Okoth<sup>2</sup>, Kennedy Onkware<sup>3</sup>

<sup>1,2,3</sup>Masinde Muliro Universities of Science and Technology, Department of Peace and Conflict Studies

DOI: 10.29322/IJSRP.8.10.2018.p8218  
<http://dx.doi.org/10.29322/IJSRP.8.10.2018.p8218>

**Abstract-** The Traditional Somali Justice Based Conflict Resolution Mechanisms have been an important aspect of peace building processes among members of the Somali community of northern Kenya. Based on this systems of alternative dispute resolution mechanisms members of this community have lived together in harmony for a long time. However, modernity the system has faced a variety of challenges hence calls for improving the system. This study therefore is aimed at improving effectiveness TSJBCM to make more effective. The study was conducted in Dujis constituency in Garissa County where the respondents were mainly ethnic Somalis. The results of the study reveal that the system can be strengthened if among other things there is structured cooperation with formal government conflict transformation mechanism, training TSJBCM practitioners in some conflict areas and defining specific areas of competence for TSJBCM and formal conflict transformation actors.

**Index Terms-** Justice, Conflict resolution, Traditional Somali Justice

## I. INTRODUCTION

Colonial regimes discouraged the use of traditional conflict resolutions techniques and instead advocated for the establishment of Court systems similar to those operating in the colonizing states (Agatha,2016). Many post-independent African regimes continue to use judicial systems inherited from the colonizers. Unfortunately, many countries largely ignore traditional justice based mechanisms (Oko *et al.*, 2010). As Pkalya *et.al* (2004) contend, independent African states continue to perpetuate the colonial mentality that viewed local conflict resolution mechanisms as archaic, barbaric and thus lack a place in the modern global village. As a result, the governments fail to appreciate, collaborate, and complement the traditional methods of resolving Conflicts (HRW, 2008).

Article 159 (1) (c) of the Constitution of Kenya provides for the promotion of alternative dispute resolution (ADR) mechanisms like reconciliation, mediation and arbitration (CoK, 2010). The recognition of the mechanism by the supreme law of Kenya is a big boost for TSJBCM, a traditional Somali justice based mechanism that has been the sole recourse to justice for the Somali community resident in the Northeastern Counties of Kenya. Although the Constitution has recognized ADR, its processes remain undocumented and it operates outside Kenyan Judicial system. Thus in North Eastern and other places where traditional justice based mechanisms are prevalent; they operate

parallel with the formal judicial processes (Alie, 2008). Consequently, traditional justice based mechanisms remain at the periphery of official dispute resolution mechanisms and lack resources to develop them and minimizes their potential to complement the government's conflict resolution functions.

## II. THEORETICAL FRAMEWORK

The study was guided by the restorative theory of punishment. In the recent past, scholars, activists and peace practitioners have questioned the efficacy of formal judicial systems as represented by the courts in transforming conflicts. Discontent with courts has arisen with increasing cases of 'miscarriage of justice', the inability of retributive justice to deal with mass atrocities like genocide and the incompatibility of retributive justice with traditional or alternative mechanism for justice. Consequently, there is a move to adopt a different approach, thus the emergence of restorative justice embodied in the restorative theory of punishment (Maigua,2012). The theory is more inclusive and places the victim of crime at the core of punishing the offender as opposed to the retributive system where the state is the complainant on behalf of the victim and the latter takes unilateral decisions affecting the offender on behalf of the victim. Restorative theory attempts to make a cohesive process more consensual, transparent, constructive and communicative (Dzur, 2003).

## III. METHODOLOGY

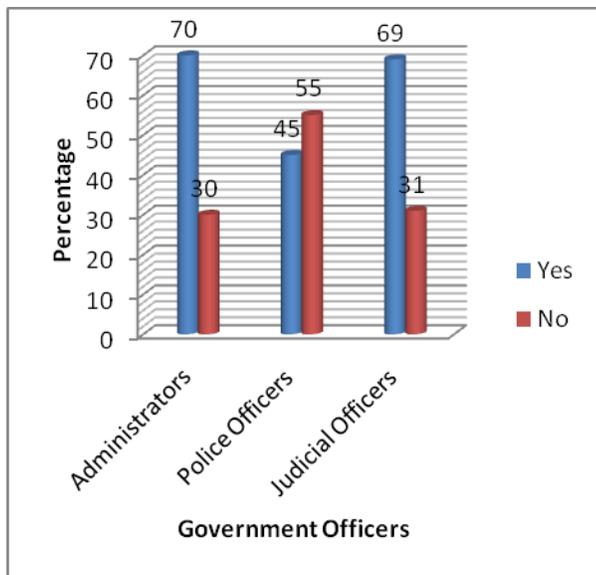
The study used Dujis constituency as the case study and adopted descriptive statistics approach in collecting data from different households within the area. The strength of case study lies in its ability to collect both quantitative and qualitative data and covers a very limited geographical region or number of respondents who provide the required detailed and representative data (Zainal, 2007). By using, a descriptive case study technique, an accurate profile of persons, events, or account of characteristics, for instance behavior, opinions, and knowledge of particular individual, situation or group are captured (Kothari, 2009). The study area was Garissa Township Sub-County, Garissa County. It is one of the six Sub-Counties in Garissa County. The study involved surveys of the existing indigenous conflict resolution mechanisms, conduct interviews with *xeer* elders, administrators, police officers, judicial officers men and women. The researcher also held plenary

discussions within the study community. The experiences from various respondents provided divergent perspectives thus played a significant and leading role in the fulfillment of the study. Data was collected through questionnaires, interviews and Focus Group Discussions. Data analysis was done through SPSS, qualitative data was transcribed and analyses through thematic techniques. Data was presented in form of graphs, charts narrative and narrative reports.

#### IV. STUDY FINDINGS AND DISCUSSIONS

##### 4.1 Government Officers Support to Improving workings of TSJBCM (police, administrators and judicial officers)

The study sought to establish whether or not, the government officials including administrators, Police officers and Judicial officers supported the work of the TSJBCM. The Results were as indicated in Figure 4.1



**Figure 4.1 Whether or not the TSJBCM Workings should be Improved**

**Source: Field Data**

The results in figure 4.1 revealed that 70% of administrators, 45% of police officers and 69% of Judicial officers were in support of improving the work of the TSJBCM. In this regard therefore, it was evident that the TSJBCM had support of various government institutions that were responsible for peace building in the study area.

Administrators generally agreed that TSJBCM are vital avenues of dealing with conflict among the Somali in Garissa County. That granted, data showed that administrators would rather there was a structured manner in which TSJBCM practitioners and administrators would work together. That will define clear areas of cooperation and thus facilitate maximization of skills and expertise by both sides. Where the need may arise, administrators advocate for joint determination of disputes with TSJBCM practitioners. A local chief noted that he has designed a

way in which he uses the expertise of TSJBCM practitioners in handling conflict that arise in his area of jurisdiction. He averred: *I always use elders to help me determine cases that are brought to me. Their involvement is very important because if one of the parties fails to honor whatever commitments that are imposed during the determination of the conflict, the elders will help in applying pressure on them. I make sure that I use elders who are either related to the parties to a conflict or those who are respected within their communities. Religious leaders are another important group that I use to determine disputes. Our people are God-fearing and take advice from religious leaders very seriously.*

Administrators also vouched for the establishment of a recording system for TSJBCM. That will not only provide future reference points but will also minimize inconsistent decisions and create predictability, a very important consideration for conflict transformation. This view is rendered valuable by observations of an Assistant County Commissioner (ACC) working in the research area.

*I wish to point out that there are many good things with maslaa. For one, many petty disputes are handled by elders and by and large community members abide by the rulings. The challenge especially for us administrators is to get to know these strengths. Since most of us expect disputes to be handled by trained officers or judicial personnel, when one works among the Somali, it requires a bit of time to get used to how things are done. This challenge is compounded by the fact that maslaa decisions are never recorded and are mostly presided over by old and illiterate people. It would make our work easier if these proceedings were recorded and made available to administrators. Otherwise good aspects of the maslaa system will only be known among practitioners themselves or locals at large and administrators will have to cultivate some patience before appreciating the true value of maslaa.*

Equally administrators felt that TSJBCM practitioners are insufficiently equipped with the skills and knowledge to embrace emerging governance and conflict transformation good practices like gender mainstreaming and integrating the dangers of the HIV/AIDS work in conflict transformation work. They decried the fact that TSJBCM were primarily controlled by adult males although females had been incorporated in the recent past. Below is an extract from an interview conducted with a serving Deputy County Commissioner (DCC)

*The government is very concerned with the manner in which traditional Somali conflict mechanisms handle serious offences. For instance, the law is very punitive when dealing with sexual offences with penalties ranging from ten years in prison or even a life sentence. Yet, local elders casually treat sexual offences. Their standard approach is to impose some penalties that are paid by the clan of the accused and the matter is settled there. What they do not seem to appreciate is the fact that contemporary sexual offenses have attendant and emerging dangers. Would you for instance appease a rape victim by fining their attacker who has infected them with HIV/AIDS which is a long term illness that almost always leads to death? Unless such matters are brought to the attention of traditional conflict handlers with the view of changing their attitude towards sexual violence, the vice would continue and many victims will suffer.*

Another important concern raised by administrators was the treatment of individual acts that cause harm as clan offences. They felt that whereas certain offences like land disputes and disputes over watering points can be viewed and resolved at the communal level, some wrongs like sexual violence have a severe and direct impact on individual victims and thus cannot be handled as communal wrongs. They noted that sexual violence related trauma affects the entire lifetime of victims and clan restorative tendencies often ignore the victim who has to individually cope with the resultant effects of sexual violence. Administrators noted therefore that such crimes ought to be treated with caution and one way of achieving that would be to equip TSJBCM practitioners with counseling skills or facilitating victims who have resolved their differences through TSJBCM to access government counseling services.

Police officers were generally dismissive of the role of TSJBCM in conflict transformation mechanisms. They perceived the mechanism as an irritant to law enforcement. The police who participated in the study felt that efforts must be commenced to ensure that traditional conflict practitioners are stopped from unduly interfering with legal processes.

Although the police felt that arresting non-cooperating parties to a dispute as a way of ensuring that they cooperate with TSJBCM processes was not a prudent way that the former can enhance the work of the latter, a reasonable balance between what level of cooperation by the two systems would help mitigate the level of mistrust, especially held by the police towards TSJBCM. When asked how the police would help traditional justice practitioners to improve their work a raft of recommendations were given as demonstrated in figure 4.2. The most notable way that would be achieved was aiding in investigations and effecting arrests. As noted earlier police officers were apprehensive of arresting offenders reported by traditional justice operators because they felt that they were being used to serve the interests of TSJBCM which were not necessarily the interests of justice.

Judicial officers averred that TSJBCM lack competence to deal with serious crimes that if adjudicated through the courts will attract a custodial sentence. They also felt that complex civil matters that require specific technical skills are beyond the realm of TSJBCM practitioners. Hence, judicial officers advocated for the practitioners to limit their conflict adjudication practices to petty community offences and leave the others to the courts as the latter possess the requisite competencies.

The resident magistrate in Garissa pointed out that the Judiciary was in the process of rolling out reforms in the sector to strengthen the role of alternative dispute resolution. This she reiterated will go a long way in streamlining the role of traditional conflict handlers in the wider justice system. This development has been attested by a series of reforms that were being undertaken by the judiciary in ensuring that there was wider access to legal redress by inculcating local wisdom in conflict transformation which was advocated for in the work of Doak (2015) where it was revealed that reforms in the judiciary are a crucial element of a smooth judicial process.

The introduction of Court annexed mediators and the deployment of senior judicial officers within the area that these have been introduced demonstrates the importance that the Judiciary is attaching to local wisdom in conflict transformation.

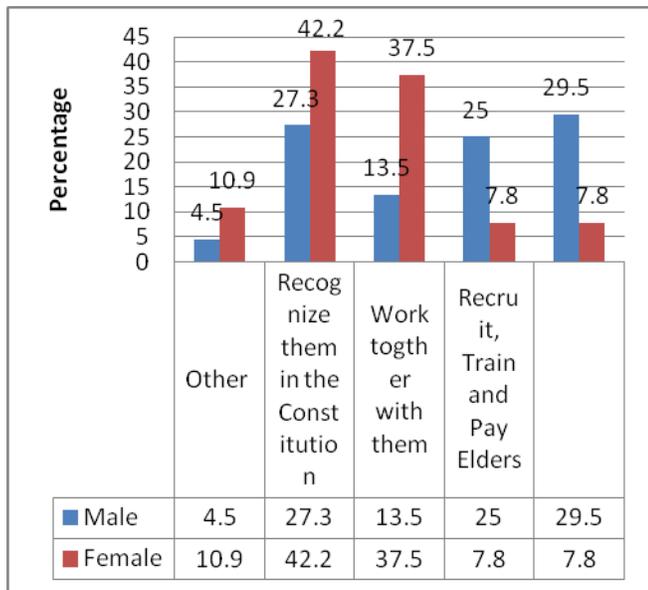
That is one of the steps that the Judiciary is taking to bring effect to Article 159 of the Constitution that advocates for the recognition and use of alternative and traditional dispute resolution mechanisms. Indeed the Courts have been persuaded by this transformative trend adopted by the Judiciary as was witnessed in the case of Mohamed Adow. In that case the Court dropped a case against the accused that had killed after having submissions from the prosecution pleading for the termination of the case since parties had been subjected to a traditional mechanism and agreed to compensate the family of the deceased.

The ruling of the Adow case has been reaffirmed in another High Court Case, the matter of *Republic v Denu Lallafa Omar [2016] eKLR*. In that Denu case just like the Adow case, the High Court in Garissa accepted the request of the prosecution to drop proceedings after the prosecution presented an agreement between the family of the deceased and the family of the accused. The agreement was a commitment of the families to help raise the children of the deceased as well as for the family of the accused with the support of the clan to pay compensation in the form of twenty head of cattle to the family of the deceased.

#### **4.2 Recommendations on Improving TSJBCM from the practitioners**

TSJBCM practitioners were of the view that the effectiveness of their work would significantly be improved if the police would share their crime investigation findings with them. They noted that police officers had the skills and equipment to investigate crime and since community members generally accepted TSJBCM decisions, if the latter had the benefit of the skills and equipments of the former, it would contribute towards fair adjudication of conflicts. TSJBCM were asked how best their work would be enhanced, and many felt that they needed some formal recognition in government circles.

As demonstrated in figure 4.2, many traditional justice practitioners felt that their work needed to be recognized in the constitution. That desire may be grounded on ignorance since traditional justice resolution mechanisms have been constitutionally recognized by article 159 of the Constitution of Kenya 2010. Others expressed the desire to work hand in hand with judicial officers whereas others advocated for the training and paying traditional justice practitioners. Further still, others felt that the role of traditional justice elders should be limited to clan and family matters.



**Figure 4.2: Improving TSJBCM in modern legal system**  
Source: Field Data, 2018

Traditional practitioners also reflected on what they would do as a group to enhance their work. When asked the question what they would do to improve their work, they recommended among other things undergoing training on the Kenya Constitution, peaceful coexistence, conflict resolution and fair justice. That evaluation points to a possibility that some TSJBCM practitioners felt that they needed to do more work in promoting peaceful coexistence among communities. That was an apparent admission that perhaps they were caught with belligerent behavior that compromised their work. Female TSJBCM practitioners on their part alluded to the fact that traditional justice mechanisms remained captive of old biases and practices that needed to be cast away to facilitate the inclusion of modern realities and approaches to conflict transformation.

## V. CONCLUSION OF THE STUDY

Traditional Somali justice based conflict resolution mechanisms are an important component of conflict management within the Somali community of Garissa County. Despite that, the system faces certain challenges if addressed will go a long way towards improving its efficacy. As reflected by the analysis of responses given by administrators, police officers, judicial officers, TSJBCM practitioners and ordinary men and women, the system can be strengthened if among other things there is structured cooperation with formal government conflict transformation mechanism, training TSJBCM practitioners in some conflict areas and defining specific areas of competence for TSJBCM and formal conflict transformation actors.

## VI. RECOMMENDATION OF THE STUDY

The study recommends Inclusion of youths into the TSJBCM work as this will open up opportunities to integrate knowledge gained in formal education into the process as well as allow for inclusion and diversity as the Somali community in Garissa County is currently mixed with people from other communities settling there.

## REFERENCES

- [1] Agatha, A. (2016). Traditional Wisdom in Land Use and Resource Management among the Lugbara of Uganda: A Historical Perspective . <http://us.sagepub.com/en-us/nam/open-access-at-sage>: Sage Open .
- [2] Alie, J. A. (2008).Reconciliation and traditional justice: tradition based practices of the Kpaa Mende in Sierra Leone. In L. Huyse, & M. (. Salter, Traditional Justice and Reconciliation after Violent Conflict: Learning from African Perspectives (pp. 123-148). Stockholm: Intrenational IDEA.
- [3] CoK. (2010). The Laws of Kenya . Constitution of Kenya. Uraia Trust
- [4] Doak, J. (2015). Enriching trial justice for crime victims in common law systems: Lessons from transitional environments. *International Review of Victimology* Vol. 21 (2) , 139-160.
- [5] Dzur, A. W. (2003). Restorative justice and civic accountability. *Polity* , 36 (1) 3-22.
- [6] HRW. (2008). Law and reality: progress in judicial reform in Rwanda. New York.: Human Rights Watch.
- [7] Kothari, C. R. (2009). Research Methodology: Methods and Techniques . . New Age International Pvt Ltd Publishers.
- [8] Maigua, K. (2012). Setting Disputes through arbitration in Kenya. Nairobi: Glenwood Publishers.NCCK.
- [9] Oko, E., Morris, S. V., & Schauer, E. J. (2010). Restoring Justice (Ubuntu): An African Perspective . *International Criminal Justice Review* Vol. 20 (1) , 73-85.
- [10] Pkalya, R., Adan, M., & Masinde, I. (2004). Indigeneous Democracy. ITDG-EA.
- [11] Zainal, Z. (2007). Case study as a research method. *Jurnal Kemanusiaan* (9).

## AUTHORS

**First Author** – Zacchaeus Mboche Wanyoike, Masinde Muliro Universities of Science and Technology, Department of Peace and Conflict Studies, P.0 BOX 190-50100, KAKAMEGA  
**Second Author** – Pontian Godfrey Okoth, Masinde Muliro Universities of Science and Technology, Department of Peace and Conflict Studies, P.0 BOX 190-50100, KAKAMEGA  
**Third Author** – Kennedy Onkware, Masinde Muliro Universities of Science and Technology, Department of Peace and Conflict Studies, P.0 BOX 190-50100, KAKAMEGA