

**WHAT ABOUT *WANJIKŪ*: THE PLIGHT OF LINGUISTIC DISCRIMINATION IN
COURTS IN RURAL KENYA**



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DECLARATION

I, **ASHLEY WANGARI KAMAU**, do hereby declare that this is my original work and that it has not been submitted for award of a degree or any other academic credit in any other University.

ASHLEY WANGARI,

Signed: *A.W.K.*

Date: 1 September 2025

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Mũrathimwo mũno!

DEDICATION

*To all linguists and language enthusiasts,
everyone who dreams of a different world,
and the late bloomers,
this is for you.*

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The UN International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

The Universal Declaration of Human Rights (UDHR), 1948

LIST OF ABBREVIATIONS

AU – African Union

FGM – Female Genital Mutilation

ICT – Information, Communication and Technology

IDIL – International Decade of Indigenous Languages

IEBC – Independent Electoral and Boundaries Commission

IYIL – International Year of Indigenous Languages

KNCHR – Kenya National Commission on Human Rights

KPS – Kenya Police Service

KSL – Kenya(n) Sign Language

NARC – National Alliance Rainbow Coalition

NCIC – National Cohesion and Integration Commission

PEV – Post-Election Violence

PWDs – Person(s) with Disabilities

TDRMs – Traditional Dispute Resolution Methods

UN – United Nations

UNESCO – United Nations Educational, Scientific and Cultural Organization

UNGA – United Nations General Assembly

WWII – The Second World War

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ABSTRACT

This project examines the often-overlooked plight of linguistic discrimination in the legal system. The study zeroes in on the courts in the rural areas of Kenya, particularly in the current decade (the 2020s). Despite language playing such an instrumental role in the administration of justice and in society at large, it is imperative that it is accorded the attention it deserves in the legal system.

Although the Constitution of Kenya assertively aspires to eradicate discrimination of all forms against the Kenyan citizens, linguistic discrimination continues to persist among the seekers of justice in courts in the rural areas of the country nevertheless. As a result, a domino effect is created whereby the language barrier between the administrators (such as the magistrates and the advocates) and the seekers of justice (such as the plaintiffs, defendants and witnesses) creates a discord in the comprehension of legal proceedings, which in turn creates an even wider barrier to the access to justice for its seekers.

This project is supported by two major theories. The Critical Discourse Analysis Theory of language (CDA), which posits that linguistic barriers in the politico-administrative system is a mechanism weaponized by the individuals who hold power. This is manifested through the continuous use of colonialist languages such as complex legal English, which is unjustified in many instances. In addition, the Rawls' Theory of Justice supports this research by affirming that total fairness (in this particular case, in courts) can only be achieved if all forms of discrimination are eliminated. The failure of the courts to prioritize the language needs of all seekers of justice, including the lack of provision of reasonable accommodation, is an indisputable barrier to access to justice.

To fulfil its purpose, this research utilizes the doctrinal legal research methodology. This methodology involves comprehensively using both primary and secondary sources of the law as the main points of reference, sourced from law reports (such as the Kenya Law Reports) and various academic publications. Referencing from primary sources involves analyzing, reviewing, and interpreting various constitutions such as the Constitution of Kenya, Acts of Parliament, statutes, common law and case laws, among several others. Moreover, referencing from secondary sources involves analyzing and reviewing works such as textbooks, journal articles, the World Wide Web, and any other source that may be useful to the topic, and adjacent topics that may be just as relevant to this study.

This project aims to add to the body of existing knowledge by shedding more light about this overlooked challenge from a discrimination point of view. It traces the roots of this particular setback, from its inception decades ago, following its journey to until the present day where it persists. Additionally, this research wishes to inspire optimism about eradicating linguistic discrimination in Kenya. It aims to inspire both aspiring and present legal practitioners in Kenya to prioritize the linguistic needs of the seekers of justice in their service in and outside of the courtrooms, and purpose to create long-lasting solutions that will ultimately put an end to this plight.

1.0: INTRODUCTION

General Overview

In an ideal world, many human beings desire to live in a world free from any form of discrimination. It is objective that human rights and fundamental freedoms are the birthright of all human beings, and their protection and promotion are the responsibility of all governments.¹ Despite (indigenous) languages being inseparable from humanity, linguistic discrimination is a form of discrimination that is often overlooked, even in multilingual countries such as Kenya. In the rural areas of the country, majority of Kenyans only speak and understand their ethnic languages.² However, Kenyan courts have little to no room for indigenous Kenyan languages due to their subjugation to other colonial languages.³ Consequently, a majority of the Kenyan population, which can be found in rural areas of Kenya,⁴ become the linguistic minority in such a courtroom, often to their detriment.

Statement Of the Problem

Although it is the aspiration of the Kenyan Constitution to eradicate discrimination of all forms against the Kenyan citizens, linguistic discrimination continues to persist among the seekers of justice in courts in the rural areas of the country nevertheless. As a result, a domino effect is created whereby the language barrier between the administrators and the seekers of justice

¹ P Kameri-Mbote, 'FALLACIES OF EQUALITY AND INEQUALITY: MULTIPLE EXCLUSIONS IN LAW AND LEGAL DISCOURSES' (2013) 1, 4.

² A Kibui, 'LANGUAGE POLICY IN KENYA AND THE NEW CONSTITUTION FOR VISION 2030' [2014] 89, 93.

³ Africa's Sources of Knowledge, 'Neville Alexander Lecture: "The Many Accents of Justice" by Hon. CJ (Rtd) Dr. Willy Mutunga' (23 September 2018) <https://youtu.be/DY_UFknjbYY?si=cHAoASmAnzpuhTVK> accessed 28 December 2024.

⁴ K Spernes, R Ruto-Korir, 'Medium of instruction in school: The indigenous language, the national language or the official language? A case study from multilingual deep rural Kenya' [2018] 41, 43.

creates a discord in the comprehension of legal proceedings, which in turn creates an even wider barrier to the access to justice for its seekers. This study intends to shed light on the plight of linguistic discrimination in rural Kenya, in an effort to bring more attention to it, which in turn inspires the spearheading of lasting solutions to alleviate this plight.

Research Objectives

To investigate the reasons why indigenous Kenyan languages are not the most preferred languages in courts in the rural parts of Kenya.

To analyze the comparison between the law on paper and the law in action pertaining to the use of indigenous (Kenyan) languages in courts.

Research Questions

Why are indigenous Kenyan languages not the most preferred languages in courts in the rural parts of Kenya?

What is the comparison between the law on paper and the law in action pertaining to the use of indigenous (Kenyan) languages in courts?

Hypothesis

This research will be based on a couple of hypotheses. First and foremost, the violation of the CoK's provision to promote the use of indigenous languages by the Kenyan legal system is deliberate in an effort to widen the barrier to access to justice, which further aligns with its interests that are antithetical to the public's interests. Secondly, the prioritization of indigenous languages in courts in the rural areas of Kenya will prove to be a tall order due to a myriad of systemic drawbacks, but with unwavering effort, it is an achievable endeavour.

Justification for The Study

This research wishes to contribute to the already-existing research and policies by illuminating the plight that is the limited use of indigenous languages in courts in rural Kenya, despite the social order in the areas and various legislative and institutional frameworks demanding so. It is a great injustice that the common use of the languages in the said areas is not automatically reflected in the courts for a manifold of reasons which ought to be discussed later.

Theoretical Framework

Rawls' Theory of Justice

John Rawls in this theory posits that the key factor in achieving justice is fairness and identifies two principles that are in line with this belief.⁵ Firstly, every person should have an equal right to the most extensive total system of equal basic liberties that is compatible with a similar system of liberty for all. Secondly, social and economic inequalities are to be arranged so that they both are to the greatest benefit of the least advantaged, and attached to offices and positions open to all under conditions of fair opportunity. Rawls believes that these two principles should be adhered to eliminate disadvantages as much as possible in order for every person receives the same benefits of justice.

The underuse of ethnic Kenyan languages as the languages of governance in courts in rural Kenya undeniably introduces a barrier to the access to justice as this makes the seekers of justice a linguistic minority. The unfair burden is placed on the seekers of justice to take extra steps in ensuring that they fully comprehend court proceedings. Furthermore, the failure of the courts to provide sign language interpreters for persons with hearing disabilities amounts to

⁵ D Brock, 'The Theory of Justice' [1971] 486, 490.

discrimination. In this context, fairness in the courtroom can only be ensured if all forms of discrimination are fully eliminated.

Critical Discourse Analysis Theory (CDA)

This theory traces its roots to early sociology, linguistics, ethnography and philosophy, but was spearheaded by a number of European scholars such as Teun van Dijk in the nineties.⁶ This theory views language as a tool of control, dominance, discrimination and power in any society. The CDA theory asserts that discourse is manifest at two levels, namely, the macro and micro levels. At the macro level of discourse are social concepts like social order, and inequality. They are abstract and they find expression at the micro level of discourse which deals with linguistic concepts like grammar. The findings of the proponents of the theory confirmed that there is indeed power asymmetry in any given courtroom through the language choices of the discourse participants (administrators and seekers of justice).

Albeit being a theory intended to be applicable in the Western society, African countries such as Kenya are not immune to language as a tool of control. This is heavily manifested in almost every facet of life in the country, from political rallies, to education, to informal interpersonal communication and even in the judicial system. This means of control is one that has adverse effects on humanity as language is at the heart of any social interaction. In rural courts in Kenya, this theory is best manifested through the use of colonial languages such as English even in areas where the languages are the most unpopular.

⁶ G Kiguru, 'A CRITICAL DISCOURSE ANALYSIS OF LANGUAGE USED IN SELECTED COURTS OF LAW IN KENYA' (2014) 1, 55.

Literature Review

Language is one of the most, if not the most, important tool of human interaction. It is through languages that human beings are able to communicate with one another, preserve the disparate traditions most beloved to them, and develop societal civilization.

Like several countries in the world, there are multiple languages indigenous to Kenya. Many countries around the world embrace and incorporate their indigenous languages in their legal systems. The Kenyan legal system, however, fails to turn the spotlight on theirs, despite the presence of existing policies and the CoK encouraging the promotion and use of the languages. This particular section of the study looks into various pieces of legislation and works by different authors pertaining to the question of language in Kenyan society within and away from the justice system. In addition, it identifies and creates gaps in the existing literature, upon which the study seeks to address.

The significance of language in a society

There are three approaches to language: formalist, instrumentalist and integrationist. To formalists, language is an abstract system, a formal grammatical structure, and a medium of conveying information. To instrumentalists, language provides a window on social processes and is a reflection of social contexts. Language plays a crucial role in influencing social order. Moreover, the integrationist approach combines grammatical details with social contexts of many kinds to display how language impacts upon various actors. This approach supports that the meaning of language is a collaborative effort between grammatical structure and social contexts. The study also argues that the last approach is crucial in analyzing how social processes can be heavily affected when there exists a variation in language use.

A plurilingual Kenya

As noted by Okombo, Africa houses over 2000 languages which represents nearly a third of the languages spoken worldwide.⁷ This gives an average of 40 languages spoken in 50 African languages with exceptions. In addition, Okombo is a proponent of multilingualism as seen in Kenya.⁸ He claims that the country reaps economic benefits through the promotion of trade and commerce within the country that is usually carried out in ethnic Kenyan languages. These languages also act as stepping stones towards career advancements such as employment opportunities. Similarly, ethnic languages are fundamental in social mobilizations such as health and political campaigns. In accordance with the sentiments of this study, a world full of human diversity is indeed a wonderful place to live, as a monotonous life is one that could breed a sense of unfulfillment.

As explained by Kibui, English and Kiswahili are unpopular among people in the rural of Kenya as many Kenyans are not fluent enough.⁹ This leaves indigenous languages to be the most preferred mode of inter-ethnic communication in the rural areas and in many instances urban areas as well. Moreover, KSL and Braille are well recognized as indigenous Kenyan languages that the law ought to promote and develop as they would every other language.¹⁰ While the study is right in that it is important for Braille to be promoted and developed, it is but a medium of enhancing communication for visually impaired persons. It ought not be categorized as a language, as such persons have the ability to communicate in their respective mother tongues,

⁷ O Okombo, *Language Policy: The Forgotten Parameter in African Development and Governance Strategies* (University of Nairobi, Nairobi 2001), 9.

⁸ O Okombo, 'APPROACHING MOTHER-TONGUE EDUCATION AS A PERSONAL AND SOCIETAL DEVELOPMENT STRATEGY' [2016] 5, 12.

⁹ A Kibui, 'LANGUAGE...' (n 1) 93.

¹⁰ Ibid 95.

unlike a majority of hearing-impaired persons. Jiseve's study explains that KSL is an independent language complete with its own rules of grammar and is not based on any spoken language.¹¹ Additionally, KSL is the first and often only language for deaf people.¹²

Sheng'

Based on Mugane's study, youngsters are jumping on the Sheng' bandwagon, as indigenous languages are becoming more and more frowned upon today.¹³ The lingua franca has its beginnings in the poverty-stricken areas of Nairobi, as a result of people speaking all sorts of languages finding their space in the city. This is owing to the fact that they are considered a hindrance to Kenya's elite circles. Indeed, classism has Kenyans living in the urban areas on a tight chokehold, as it is quite common for the youth to use words such as *ushamba* (to denote backwardness) in regards to speaking one's mother tongue or having an accent that reveals one's mother tongue. Iraki notes that Sheng' is very popular among people earning a living in the informal sector.¹⁴ The fact that more young people prefer to speak Sheng' over their indigenous languages poses a threat to the survival of the languages.

Kiswahili

Mazrui's study points out that English and Kiswahili are the most influential languages in East Africa.¹⁵ It also goes on to point out that English is a language that came with a dominant

¹¹ K Jiseve, 'FROM THE HANDS TO THE EYE; THE ROLE OF KENYA SIGN LANGUAGE IN REALIZATION OF THE RIGHT TO ACCESS TO JUSTICE FOR THE DEAF COMMUNITY IN KENYA' [2019] 1, 4.

¹² Ibid 11.

¹³ J Mugane, 'NECROLINGUISTICS' [2005] 159, 170

¹⁴ F Iraki, 'Language and Political Economy: A historical perspective from Kenya' [2009] 229, 240-241.

¹⁵ A Mazrui, A Mazrui, 'Dominant Languages in a Plural Society: English and Kiswahili in Post-Colonial East Africa' [1993] 275, 275.

colonial power.¹⁶ Further, Kiswahili became attractive to the colonialists in their quest for a solution to the "problem" of linguistic diversity that they encountered in East Africa to meet their colonial needs of communication with the natives. With the help of the colonialists, Kiswahili became an instrument of nation-building and colonial state formation in Kenya. However, the colonialists ought not to take all the credit as the growth of the language in the rise of trading activities and political structure was second nature. The colonialists' involvement and interest in Kiswahili alludes to the language being a colonial language.

The global linguistic galaxy

In the study, de Swaan likens the global linguistic system to a galaxy, where regional languages surround a national language the way satellites would a planet. In the midst of the galaxy, there exists a sun, the one conspicuous language central to all.¹⁷ The predominance of English is closely connected to the economic and political might of the United States, as it is the most central superpower nation globally. The study adds that the reason behind the success of the use of English is due to the jealous relations between indigenous language groups. As people expect the colonial language to continue to prevail and expect others to adopt it for the same reason, they opt for it too.¹⁸ Further, Mugane argues that despite English being the dominant language in Africa, it cannot escape the influence of indigenous languages.¹⁹ This is apparent through Creoles such as Haitian Creole, Nigerian Pidgin and our very own Sheng'.

¹⁶ Ibid 276.

¹⁷ A de Swaan, 'The Emergent World Language System: An Introduction' [1993] 219, 219.

¹⁸ Ibid 222.

¹⁹ J Mugane, 'The great English heist in African studies' [2018] 148, 152.

Language in the Kenyan legal system

English is the de facto language of the legal system in Kenya.²⁰ The CoK elevates English to the status of the ‘constitutional language’. It is worth noting that the CoK has no known translation to ethnic languages. English and Kiswahili are recognized by the CoK as the official languages of the nation, but only Kiswahili is recognized as the national language.²¹ Okombo avers that the CoK limits the use of ethnic languages to non-official domains preserving English and Kiswahili for official domains.²² This is very ironic because a lion’s share of Kenya’s population resides in the rural areas.²³ Moreover, KSL still lacks formal recognition in the legal system despite being given priority in the CoK. However, it is regarded as an official language of Parliament.²⁴ In the courtroom, the needs of deaf persons who need interpretation services are not met which leads to injustice on all fronts.

According to Oduor and Rotich’s study, there were two pieces of legislation that were in development and backed up by the CoK in relation to indigenous languages.²⁵ The Languages of Kenya Bill 2014 was developed, intended to promote and protect indigenous languages once passed into an Act of Parliament. Further, the Languages of Kenya Policy was developed pursuant to Articles 7, 10, 11, 35, 44, 53, 56, and 159 of the CoK. However, the current status is

²⁰ H Nandelenga, ‘Mother Tongue Injustice: Reflections on the Kenyan Justice System’ [2022] 1, 8.

²¹ Ibid.

²² O Okombo, ‘APPROACHING...’ (n 8) 10.

²³ Joseph Munene, Vivian Omariba, ‘Unlocking Rural Areas to Curb Rural-Urban Migration among Youth in Kenya’ (Blog for the Kenya Institute for Public Policy Research and Analysis 2023) <<https://kippra.or.ke/unlocking-rural-areas-to-curb-rural-urban-migration-among-youth-in-kenya/>> accessed 7 January 2025.

²⁴ H Nandelenga, ‘Mother...’ (n 19) 8.

²⁵ J Oduor, X Rotich, ‘THE STATUS OF MOTHER TONGUES IN KENYA AND CHINA: LESSONS THE TWO COUNTRIES CAN LEARN FROM EACH OTHER’ [2016] 14, 22.

that neither the Policy has been published nor the Bill passed, making the contents of these documents non-existent.²⁶

Kiguru's study avers that not all persons who appear before such courts are competent in the two national languages, putting them at a great disadvantage.²⁷ An interpreter has the ability to foster or cause a breakdown in the communication during a proceeding. Wangui's study points out that interpretation in Kenyan courts is mostly carried out by officers of the court.²⁸ However, this leaves room for information to get lost in translation as these officers might not be conversant with the ethnic language predominantly spoken in a certain rural area of Kenya. To buttress Kiguru and Wangui's points of view, some words in ethnic languages lack an English or Kiswahili equivalent, and vice versa. For instance, the word 'law' lacks a direct equivalent in many ethnic Kenyan languages. The closest the translation of the word from many of the languages to English and Kiswahili gets is 'a set of rules', which is what law is understood to be. Such semantic differences could turn out to be disastrous. Court proceedings are sensitive, and there should be no room for error or misinterpretation left.

TDRMs

Muigua and Kariuki aver that TDRMs have stood the test of time in African communities.²⁹ They are still widely used in the rural areas of Kenya since it is the most familiar way of solving disputes to the people. In addition, they are cheaper, drawn from the culture of the communities, and are more reconciliatory in nature as opposed to courts. The study also argues that TDRMs

²⁶ Ibid.

²⁷ G Kiguru, 'AT THE MERCY OF OTHERS' VOICES: AN ILLUSTRATION OF FREQUENT INTERPRETER LANGUAGE ERRORS IN KENYAN COURTROOMS' [2010] 1, 3.

²⁸ R Wangui, 'TRAINING AS A MINIMUM REQUIREMENT TO IMPORVE COURT INTERPRETATION IN KENYA: A CASE STUDY OF MILIMANI CHIEF MAGISTRATE'S COURTS' [2015] 1, 3.

²⁹ K Muigua, F Kariuki, 'ADR, Access to Justice and Development in Kenya' [2014] 1,5.

utilizes indigenous Kenyan languages in resolving disputes.³⁰ Perhaps these unique methods of dispute resolution are worth shining the spotlight on. They are indubitably a more efficient way of reducing backlog in courts, and the prioritization of indigenous Kenyan languages is simply icing on the justice cake.

Up until the present, the existing literature has failed to address the plight of linguistic discrimination in courts in rural Kenya. It is discernible that the use of these languages is widespread, and is only right they are used in courts in rural Kenya too. Needless to say, there needs to be a fervent effort to make this a reality, for this will enable access to justice to scale new heights.

Research Methodology

This research utilizes the doctrinal legal research methodology, which involves comprehensively using both primary and secondary sources of the law as the main points of reference, sourced from law reports and various academic publications. Referencing from primary sources involves analyzing, reviewing, and interpreting the CoK, Acts of Parliament, statutes, common law and case laws. In addition, referencing from secondary sources involves analyzing and reviewing works such as textbooks, journal articles, the World Wide Web, and any other source that may be useful to the topic, and adjacent topics that may be just as relevant to this study.

Limitations of the Study

This study, as do all other studies, has encountered certain limitations. This study uses a desk-based approach, which majorly relies on books, articles, scholarly writing, statutes and case laws.

³⁰ Ibid.

Chapter Breakdown

Chapter 1

This chapter provides an introduction to the study. It contextualizes the problem statement by highlighting the language situation in courts in rural Kenya, and introduces the research objectives and questions.

Chapter 2

This chapter will be focused on a multi-disciplinary view of the language use in the Kenyan society and subsequently Kenyan courts in Kenyan history. It focuses on the impact of the aforementioned history on the language use in courts in the rural areas of Kenya. This chapter aims to achieve the study's first research objective and answer the corresponding research question.

Chapter 3

This chapter intends to discuss the legislative and institutional framework of the language use of indigenous languages courts in (the rural areas of) Kenya on a domestic, regional and international scale. It seeks to critically examine whether these languages have a place in courts in the rural areas of Kenya.

Chapter 4

This chapter involves a critical review of case laws to provide an analysis of indigenous languages in courts in action. This chapter wishes to achieve the study's second objective and answer the corresponding research question.

Chapter 5

This chapter outlines further recommendations and concludes this research.

2.0: HISTORICAL BACKGROUND OF INDIGENOUS LANGUAGES IN KENYA

This particular chapter analyzes the historical context of the use of indigenous languages in Kenyan society. It is divided into four parts. The first part discusses the use of indigenous languages in pre-colonial Kenya. The second part discusses the use of indigenous languages in colonial Kenya. The third part discusses the use of indigenous languages after the attainment of independence but before the promulgation of the 2010 CoK. The final part discusses the use of indigenous languages after the promulgation of the CoK till date. Finally, the chapter concludes with some reflections on the place of ethnic Kenyan languages in Kenyan society.

Pre-colonial Kenya

Before the advent of colonialism in Africa that led to the discombobulation of the African ways of life, preservation of collective memory depended on oral transmission, thanks to griots, sages and older persons.³¹ They were admired for their mastery of language and through flowery expression and their mnemonic prowess.

Scholarship on precolonial Kenya suggests that the country was once a land that was diverse, loose, and relatively independent from political, economic and linguistic hegemony which would later be introduced by colonialism.³² The communities practiced different customs but lived in relative harmony nevertheless. These communities coexisted and interacted sans the geographical boundaries they are currently confined in.³³ Moreover, each ethnic community had

³¹ F Iraki, 'Language...' (n 16) 230.

³² Ibid.

³³ Ibid.

distinct education systems facilitated by the respective languages.³⁴ The education system during this period aimed at producing individuals who possessed independence, mindfulness of other peoples' welfare and spiritual holisticness. It is, therefore, presumable that ethnic Kenyan languages were already at the heart of societal progression during the precolonial times.

Colonial Kenya: Pre- and post-WWII

It is reasonable to expect that because language is an inalienable part of humanity, dehumanizing institutions such as colonialism and imperialism have perennially sought to undermine and destroy indigenous languages.³⁵ Through the lens of early historians and anthropologists (who were often white Europeans), the Black African man was deemed primitive and was indistinguishable from an animal.³⁶ Due to his "lack of intellectual abilities", the culture he practiced was nothing to write home about. Ethnic African languages and cultures were classified as inferior to colonial languages because they lacked written records like those found in Semitic and European texts.³⁷ This then offered the opportunistic white man the justification to introduce a new culture to the African man, with a view to exploiting him politically and economically.

The language situation in colonial Kenya can be mostly viewed from the lens of education. Colonial Kenya was characterized by colonial language policies implemented by the British as part of its colony.³⁸ This policy can be viewed from pre-WWII and post-WWII.

³⁴ D Barasa, 'Language ideologies, policies and practices within the multilingual Kenyan context' [2023] 1, 3.

³⁵ J Mugane, 'NECRO...' (15) 160.

³⁶ F Iraki, 'Language...' (n 16) 230.

³⁷ L Kaviti, 'EXPANDING...' (n 10) 5.

³⁸ A Kibui, 'LANGUAGE...' (n 2) 2.

Before WWII, a number of parties contributed to the policy that existed. Firstly, there were colonial government administrators who focused on controlled teaching of English to the Kenyans in order to obtain low-cadre staff. Subsequently, there were also the Christian missionaries who believed that the gospel would be better received in mother tongues. In addition, there were the British settlers, who were intimidated by the idea of the Kenyans becoming smarter through learning English. In 1909, the missionaries expressed a keen interest in venturing into colonial education.³⁹ They adopted an education policy where indigenous Kenyan languages would be used in the elementary stages of learning, and English to be used in the higher levels. Moreover, under immensely strict supervision of the colonialists, the locals were able to use ethnic languages in the production of creative works, which slightly hindered the spread of the English language.

The teaching of English petrified the colonial administrators, as it would interfere with their scheme of superintending a subordinate class of employees. This led to the review of the education policy to effect that under colonialism, it was imperative that a linguistic distance between master and subject was maintained. This proved that language plays a pivotal role in governance. Restricted instruction of the English language only fuelled Kenyans to master the language all the more as it was a sure ticket to employment. Therefore, the *Agikuyu* established independent schools that promoted African scholarship and taught English freely. The establishment of these schools also acted as a loud protest to the cultural imperialism of the British.⁴⁰ This was in defense of practices such as FGM within the community. In the 1920s, the

³⁹ Ibid.

⁴⁰ F Iraki, 'Language...' (n 16) 5.

Phelps-Stokes Committee was formed. The primary objective was to actively suppress and discourage the use of indigenous Kenyan languages.⁴¹

It is worth noting that English was the only official language of the higher courts; but the lower and "native" courts were almost exclusively the preserve of local languages.⁴²

Moreover, after WWII, Kenya began the struggle for freedom. This forced the British to create a Westernized upper class. The colonial language policy in Kenya around the year 1955 saw the support of English at the expense of indigenous languages. This was meant to quell the rising wave of Kenyan nationalism that was building itself around Kenyan languages, particularly Kiswahili.⁴³

The Kenyan political class, however, had a stellar mastery of the English language, such that they could engage in the freedom discourse comfortably with the British.⁴⁴ They were now on equal linguistic terms with the colonizers to demand for full sovereignty of the country from the British, which led to the Mau Mau rebellion in 1952. the British perceived the *Agikuyu* community as the most recalcitrant people during the rebellion.⁴⁵ The Gikuyu language was, in their view, a threat to British hegemony over Kenya. In the same year the State of Emergency led to the incarceration of the fighters, the main culprit Jomo Kenyatta, a Gikuyu speaker who was a vehement defender of African culture. This makes ethnic language a political risk in Kenyan

⁴¹ L Kaviti, 'EXPANDING...' (n 10) 4.

⁴² A Mazrui, A Mazrui, 'A Tale of Two Englishes: The imperial language in post-colonial Kenya and Uganda' [1996] 271, 287.

⁴³ A Kibui, 'LANGUAGE...' (n 2) 3.

⁴⁴ F Iraki, 'Language...' (n 16) 233.

⁴⁵ Ibid.

society.⁴⁶ In 1963, Kenya was finally free from the stranglehold of British colonial rule.⁴⁷ So she thought.

Post-1963 to pre-2010 CoK

With independence naturally came the first Constitution in 1963. Alongside all other official legal documents, it was written in English, making them inaccessible in indigenous languages.⁴⁸

The CoK provided that English be the official language, while Kiswahili be the National language.⁴⁹ This was an indication that Kenya was still under tight linguistic hegemony. The Ominde Commission of 1964 was the first attempt at a national language policy. As expected, the policy placed English on a pedestal over indigenous Kenyan languages. However, witnesses interviewed by the Commission expressed the need to promote Kiswahili in education for purposes of national and pan-African unity.⁵⁰ In Kenyan courts, English continued to reign supreme. The law was administered in the High Court and the Court of Appeal in the language, regardless of the fact that the majority of the accused who come before the courts have limited knowledge of it⁵¹

In 1975, Kenyatta ordered the replacement of English as the Parliamentary language to Kiswahili, but English retained the status of the official language in the Judiciary and the Executive.⁵² This rule was quickly weakened when Daniel Moi assumed the presidency a year later. The CoK was then amended to allow oral debate in the National Assembly to be conducted

⁴⁶ A Mazrui, A Mazrui, 'A Tale...' (n 39) 288.

⁴⁷ Public Holidays Act 2012 Section 2(1).

⁴⁸ A Mazrui, A Mazrui, 'A Tale...' (n 39) 288.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

in either Kiswahili or English in 1979.⁵³ Further, another amendment insisted that a Parliamentary candidate prove at the date of nomination that they have sufficient proficiency in both written and spoken Kiswahili and English to be an active participant in the National Assembly proceedings.⁵⁴ This immediately disadvantaged women who took a keen interest in the public sphere, since they were much less educated compared to their male counterparts.⁵⁵

Around the nineties well into the aughts, Sheng' began gaining traction among the youth especially in Nairobi. It developed due to a lack of a proper language policy in place.⁵⁶ In a country like Tanzania where Kiswahili serves as both the national and official language of the country, there is little to no room for the creation of a Sheng' phenomenon. Kenyan politicians, who are considered an elite class in the country, like to have their cake and eat it too. Despite Sheng' being frowned upon and deemed crass by the elites, these politicians prefer to employ it during the election period to garner votes, particularly those of the youth. In particular, in 2002, the NARC political party embraced the word *unbwogable* during the election campaign period, which was also used by the then President in his speech.⁵⁷ This affirms the CDA theory that language use by the political class is extremely deliberate and convenient.

Following the December 2007 general elections, the 2007-2008 PEV broke out.⁵⁸ This was a war that saw several dead and many others injured physically, emotionally and psychologically.

There were several determinants of the PEV, such as organized ethnic attacks and brutality of the

⁵³ Constitution of Kenya (Amendment) Act 1979 Section 3(1)

⁵⁴ A Mazrui, A Mazrui, 'A Tale...' (n 41) 289.

⁵⁵ Ibid 289.

⁵⁶ F Iraki, 'Language...' (n 16) 236.

⁵⁷ Ibid 237.

⁵⁸ J Ocho, 'UNDERCURRENTS OF POST-ELECTION VIOLENCE IN KENYA: ISSUES IN THE LONG-TERM AGENDA' (2010) 1, 9.

KPS. However, one key denominator in all the determinants was tribalism, influenced by the belief that ethnic language speakers different from one's own are malevolent. Tribalism is a divisive tactic introduced during colonialism that is still used by the political elite especially in African countries to stir unrest among the citizens.⁵⁹ This is also evidenced in the Rwanda Genocide of 1994, which saw the indiscriminate killings of the Tutsi and Twa people by the Hutu.⁶⁰ Till date, it is not uncommon for Kenyans to be distrustful towards other Kenyans that do not hail from their ethnic community, which disrupts much needed unity.

Post-2010 CoK

In August of 2010, the old Constitution that was in force was repealed to pave way for the promulgation of a new one, which prides itself in being a comprehensive framework for the recognition of human rights. The CoK has gone to pave the way for the implementation of several other Acts of Parliament and multinational treaties that are part of the laws of the country.

Summarily, this chapter has borne witness to the oppugnant relationship between indigenous Kenyan languages and the law, influenced by colonial rule. It is disheartening that the State continues to act as agents of colonialism, which results to the violation of several human rights and freedoms.

⁵⁹ Ibid.

⁶⁰ Ibid.

3.0: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK ON THE USE OF INDIGENOUS LANGUAGES IN COURTS

This chapter aims to describe, analyze, and evaluate various statutes and provisions governing the use of indigenous languages in courts and in the legal system at large. By doing so, it provides further contexts and assesses the impacts of the aforementioned, which will range from the national, regional and international scale.

Domestic legislative and institutional framework

The Constitution of Kenya 2010

Promulgated in August 2010 by President Mwai Kibaki in Nairobi, the CoK is considered the supreme law of the country, reflecting the values upheld by the Kenyan society. Thus, it declares its supremacy, to mandate that the State and citizens alike are subject to its adherence.⁶¹ It acknowledges Kenyans' pride in their ethnic and cultural diversity, and recognizes Kenyans' aspirations for a government that respects human rights and fundamental freedoms. Thereupon, the CoK asserts that customary law,⁶² the general rules of international law,⁶³ alongside any treaty or convention ratified by Kenya,⁶⁴ is part of Kenyan law.

However, Article 2(4) is particularly striking, and could give rise to a few different interpretations. On the one hand, at face value, it is reasonable to assume that all this clause is communicating is that no other source of law, domestic or not, could get away scot-free with violating the CoK. On the other hand, when zeroing in on the diction, it is apparent that the

⁶¹ Constitution of Kenya 2010 Article 2(1).

⁶² Ibid 2(4).

⁶³ Ibid 2(5).

⁶⁴ Ibid 2(6).

deliberate singling out of ‘customary law’ holds a negative connotation. The diction intends to subdue customary laws, leading to the subduing of indigenous Kenyan languages.

Notwithstanding, the fourth chapter of the CoK has been highly praised for its thoughtful Bill of Rights that sets new standards for the full realization of human rights. All State organs and all persons are bound by the Bill of Rights to ensure that every Kenyan enjoys their rights and fundamental freedoms to the maximum standard.⁶⁵ In a further Article, the CoK provides an interpretation of the word ‘State’.⁶⁶ When used as a noun, the word means the collectivity of offices, organs and other entities comprising the Kenyan government. It goes without saying that the Judiciary, responsible for all Kenyan courts, is not absolved from the onus to facilitate the realization of human rights.

The State is tasked with a duty to ensure access to justice for all persons.⁶⁷ Proper access to justice cannot be achieved without the State fulfilling its duty to actively incorporate indigenous Kenyan languages in the legal system, and courts in particular. Similarly, Article 27 governs all matters with respect to freedom from discrimination. It states that every Kenyan has the right to equal protection of the law as every person is equal before the law.⁶⁸ Moreover, the State ought not to discriminate directly or indirectly against any person, among other protected grounds, on the ground of language.⁶⁹ To reiterate, the State’s prioritization of the use of English and Kiswahili as opposed to indigenous Kenyan languages in courtrooms in the rural parts of Kenya leads to the indirect discrimination of seekers of justice who are not proficient in any of the two

⁶⁵ Ibid 20(1).

⁶⁶ Ibid 260.

⁶⁷ Ibid 48.

⁶⁸ Ibid 27(1).

⁶⁹ Ibid 27(4).

languages. Further, the State is tasked with a duty to take legislative and policy measures to redress any form of disadvantage suffered as a result of discrimination.⁷⁰

Additionally, the CoK contains a couple of provisions in relation to the use of indigenous languages. Article 7 governs the languages of Kenya.⁷¹ However, the use of the word ‘promote’ in the provision is compelling. It implies the State’s duty to be passive and rather supplementary. The passivity in this Article, in the most revered legal provision of the country, could be a driving force in the limited use of indigenous Kenyan languages in the justice system. Article 44 governs the right to participate in one’s culture and language.⁷² The provision places a negative onus on the State to allow for every Kenyan to use the language of their choice.⁷³ Worth noting is that the use of indigenous languages is recognized as a right. Therefore, the strained ability of Kenyans in the rural areas to use these languages violates their constitutional right.

The CoK in Article 54 enshrines the rights of PWDs in a bid to enable them to access various facilities and services. Part of this is that they are entitled to use KSL or other means of communication necessary to make accessing said facilities and services faster.⁷⁴ In addition, the State is tasked with a positive duty to put in place affirmative action programmes to enable PWDs to use their languages.⁷⁵

⁷⁰ Ibid 27(6).

⁷¹ Ibid 7(3).

⁷² Ibid 44(2)(a).

⁷³ Ibid 44(1).

⁷⁴ Ibid 54(1)(d).

⁷⁵ Ibid 56(c).

The Magistrates' Courts Act of 2015

This Act implemented in 2015 is intended to enable magistrates' courts, which form the bulk of courts in rural Kenya to facilitate justice as quickly and efficiently as possible.⁷⁶ Functionally, the courts ought to be guided by Articles 10, 159(2) and 232 of the CoK.⁷⁷ Moreover, the courts ought to exercise jurisdiction in criminal proceedings conferred by the CPC and other written laws.⁷⁸ However, the CPC demands that either English or Kiswahili is accepted as the language to be used in subordinate courts in Kenya, which often is the case in many Kenyan courts.⁷⁹ Once again, this results in indirect linguistic discrimination by the State, causing many Kenyans to suffer a great injustice.

The National Cohesion and Integration Act 2008

This Act, established after the PEV and before the 2010 CoK, seeks to promote national cohesion and unity while prohibiting ethnic and racial discrimination in the country.⁸⁰ It established the NCIC to address issues related to (racial and) ethnic tensions.⁸¹ Furthermore, the NCIC is mandated to promote national unity, peace and peaceful coexistence among ethnic Kenyan communities. It also aims to address hate speech, ethnic discrimination and other forms of inequality that could undermine national unity. This Act is relevant in combating linguistic discrimination as ethnic tensions are more likely to arise from non-urban areas in the country as witnessed before in history. A repeat of the PEV would be just as catastrophic as the first.

⁷⁶ Magistrates' Courts Act 2015 Section 4(1).

⁷⁷ Ibid Section 3.

⁷⁸ Ibid Section 6.

⁷⁹ Criminal Procedure Code CAP 75 Section 198(4).

⁸⁰ National Cohesion and Integration Act 2008 Section 3.

⁸¹ Ibid 15.

The Persons with Disabilities Act 2025

The newly-implemented Act, with a view to repealing the 2003 Act, brings forth a more comprehensive framework for the rights of PWDs in Kenya. The Act obliges both the national and county governments to develop and implement policies that call for the protection of the rights of PWDs in all areas of life.⁸² Both governments ought to ensure that every program and system is inclusive of PWDs as their exclusion amounts to discrimination.⁸³ The PWDA asserts that every PWD is equal before the law and is guaranteed equal and effective legal protection against discrimination on all grounds, including linguistic discrimination.⁸⁴ In addition, every PWD has a right to effective access to justice, inclusive of appropriate accommodations.⁸⁵ The Chief Justice is mandated to ensure that PWDs attending court are offered free sign language interpretation, among other relevant accommodations.⁸⁶

The Kenya Sign Language Bill 2024

The Bill was developed in 2024 to promote the use of KSL for the deaf community in accordance with Articles 7 and 120 of the CoK.⁸⁷ The Bill also intends to provide a framework for the inclusion of the Deaf community in Kenya in all aspects of society.⁸⁸ The Bill establishes the Kenya Sign Language Council.⁸⁹ The Council, according to the Act, is responsible for putting in place measures for the recognition and preservation of the use of KSL. It also ought to, among other outlined duties, to set and enforce standards for the training of KSL, alongside

⁸² Persons with Disabilities Act 2025 Section 4.

⁸³ Ibid 5.

⁸⁴ Ibid 6(1)(a).

⁸⁵ Ibid 28(1).

⁸⁶ Ibid 28(3)(b).

⁸⁷ Kenya Sign Language Bill 2024 Section 3(a).

⁸⁸ Ibid 3(b).

⁸⁹ Ibid 5(1).

undertaking extensive research in order to create as much awareness as possible on the Deaf community.⁹⁰ This Bill certainly holds some amazing prospects for the use of KSL in Kenyan courts and society at large once passed into an Act of Parliament.

In a nutshell, there still exists a gap between the law on paper and the law in action. It is not enough that the CoK and Acts of Parliament contain provisions that could be the key to achieving linguistic equality. It is imperative that the State walks the walk.

Regional legislative and institutional frameworks

The Banjul Charter 1981

This human rights treaty was adopted in the year 1981 in Nairobi, and entered into force in 1986, for the purposes of laying down principles and rules aimed at solving legal problems relating to human rights and fundamental freedoms upon which African governments may base their legislation.⁹¹ Kenya achieved ratification status in 1992, consenting to be legally bound by the Charter.⁹² The Banjul Charter asserts that every individual is equal before the law and is entitled to equal protection before the law.⁹³ Moreover, it guarantees every individual the entitlement to fully enjoy their rights and fundamental freedoms without discrimination on any basis including language.⁹⁴

⁹⁰ Ibid 7.

⁹¹ African Commission on Human and Peoples' Rights, 'African Charter on Human and Peoples' Rights' <https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights> accessed 14 April 2025.

⁹² Kenya Law Reports, 'African (Banjul) Charter on Human and Peoples' Rights', <https://kenyalaw.org/treaties/treaties/11/African-Banjul-Charter-on-Human-and-Peoples-Rights> accessed 14 April 2025.

⁹³ Banjul Charter 1981 Article 3.

⁹⁴ Ibid Article 2.

Similarly, the Banjul Commission, established by Article 45 of the Charter, adopted a resolution that aims to promote and preserve indigenous African languages in 2024.⁹⁵ The linguistic diversity of Africa is not lost on the Commission. It acknowledges that indigenous African languages are vital for the advancement of human rights, the protection of cultural diversity and fostering social cohesion. The Commission, therefore, calls upon AU member States to prioritize the promotion and preservation of indigenous languages through policies and programs in public administration. Likewise, it is necessary for State parties to work in tandem with indigenous language speakers to provide facilities aimed towards raising awareness and enhancing linguistic literacy.⁹⁶ Evidently, Kenya's effort to invest in indigenous languages in the legal system still falls short, despite the commitment made to do so by ratifying the Charter.

The African Disability Protocol 2018

Adopted in the year 2018 as a Protocol to the Banjul Charter on the rights of PWDs, the purpose of this Protocol is to promote, protect and ensure the full and equal enjoyment of PWDs on the African continent.⁹⁷ The Protocol asserts that all PWDs are equal before the law, with the right to equal protection and benefit of the law.⁹⁸ Every PWD is entitled to the enjoyment of the rights and freedoms guaranteed in the protocol without distinction of any ground, including language.⁹⁹ Furthermore, State parties ought to set in place specific and appropriate measures to guarantee PWDs freedom from discrimination.¹⁰⁰ This includes the provision of procedural and appropriate

⁹⁵ African Commission on Human and People's Rights, 'ACHPR/Res.615 (LXXXI) 2024', <https://achpr.au.int/en/adopted-resolutions/615-indigenous-and-local-languages-medium-learning-and-communication#:~:text=Urges%20States%20Party%20to%20prioritize,indigenous%20languages%20in%20the%20AfCFTA>, accessed 14 April 2025.

⁹⁶ Ibid.

⁹⁷ African Disability Protocol 2018 Article 2.

⁹⁸ Ibid 6(1).

⁹⁹ Ibid 5(1).

¹⁰⁰ Ibid 5(2)(b).

accommodations to facilitate their effective roles as participants in legal proceedings.¹⁰¹ The reality of the Kenyan legal system is antithetical to the provisions of the African Disability Protocol, despite Kenya agreeing to be legally bound by it.

International legislative and institutional frameworks

The UDHR 1948

The UDHR was proclaimed by the UNGA in 1948 as a common standard of achievement for all peoples and all nations.¹⁰² It sets out fundamental human rights to be universally protected. In addition, it is notorious for having paved the way for the adoption of beyond sixty human rights treaties applied today. The Declaration provides that everyone is equal before the law. Further, it asserts that everybody has a right to freely participate in the cultural life of the community.¹⁰³ This indubitably includes communication in the indigenous languages of the various communities. Kenya, being a member State of the UN, is considered to be bound by the principles of the UDHR among other treaties and provisions.¹⁰⁴

The ICCPR 1966

This treaty was adopted by the UNGA in 1966 in accordance with the UDHR and came into force in March 1976.¹⁰⁵ Kenya ratified the ICCPR in 1972, with a view to committing to protect

¹⁰¹ Ibid 13(1).

¹⁰² The United Nations, 'Universal Declaration of Human Rights' < <https://www.un.org/en/about-us/universal-declaration-of-human-rights> > accessed 11 April 2025.

¹⁰³ Universal Declaration of Human Rights 1948 Article 27(1).

¹⁰⁴ The United Nations, 'Member States' < <https://www.un.org/en/about-us/member-states#gotoK> > accessed 11 April 2025.

¹⁰⁵ The United Nations Human Rights Office of the High Commissioner (OHCHR), 'International Covenant on Civil and Political Rights' < <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights#:~:text=ratification%20or%20accession-.Article%2049, ratification%20or%20instrument%20of%20accession> > accessed 11 April 2025.

the civil and political rights of Kenyan citizens.¹⁰⁶ As per the ICCPR, State parties ought not to deny members of the various ethnic and linguistic communities of the country to enjoy their own culture or to use their own language.¹⁰⁷ The Kenyan legal system fails to act in accordance with this particular provision by restricting seekers of justice living in the rural areas to freely participate in legal proceedings. This is due to the language barrier created by English being the primary language of governance. Consequently, their human rights are violated, and access to justice is denied.

The ICESCR 1966

Alongside the ICCPR, the ICESCR is a treaty that was adopted by the UNGA in 1966 and entered into force in January 1976.¹⁰⁸ Kenya is among the States that have ratified the Convention, having done so in May 1972.¹⁰⁹ State parties have an obligation to guarantee citizens of the respective countries freedom from discrimination on account of their language.¹¹⁰ It is arguable, then, that the subsidiary use of indigenous Kenyan languages in the Kenyan legal system subjects Kenyans to discrimination on the ground of language. Furthermore, State parties are also obligated to recognize the right of everyone to take part in cultural life.¹¹¹ The use of indigenous languages is inseparable from participating in one's culture. The Kenyan legal system

¹⁰⁶ The Kenya National Council on Human Rights (KNCHR), 'Human Rights Committee reviews Kenya on its implementation of the International Covenant on Civil and Political Rights' (2021) 1, 2.

¹⁰⁷ International Covenant on Civil and Political Rights 1966 Article 27.

¹⁰⁸ The United Nations Human Rights Office of the High Commissioner (OHCHR), 'Background to the Covenant Committee on Economic, Social and Cultural Rights' < <https://www.ohchr.org/en/treaty-bodies/cescr/background-covenant#:~:text=About%20Treaty%20Bodies,-Overview&text=The%20International%20Covenant%20on%20Economic,States%20parties%20had%20ratified%20it.>> accessed 11 April 2025.

¹⁰⁹ The United Nations Human Rights Treaty Body Database, 'Ratification status of Kenya' https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN accessed 11 April 2025.

¹¹⁰ International Covenant on Economic, Cultural and Social Rights 1966 Article 2.

¹¹¹ Ibid Article 15.

diminishes this particular right when citizens living in the rural areas are forced to encounter a linguistic barrier that, in turn, hinders them from fully accessing justice.

The CRPD 2008

This treaty was developed with a view to creating a new rights discourse and rendering human rights more obtainable for persons with disabilities than any other time in history. It came to force in 2008, with Kenya ratifying it in the same year. In doing so, this created a shift in Kenya's policies and legislation which had previously treated persons with disabilities as objects of charity and medical intervention rather than as subjects with rights.¹¹²

Pursuant to the CRPD, accessibility is an absolute necessity in order for PWDs to live independently and enjoy their full rights and freedoms.¹¹³ It mandates State parties to take appropriate measures to eliminate all barriers to accessibility in the physical environment, through provision of ICT systems, and to open public facilities and services in the urban and rural areas. Similarly, State parties are tasked with the duty to provide forms of live assistance, including sign language interpreters, to facilitate accessibility to facilities open to the public.¹¹⁴ Other forms of assistance and support to ensure PWDs receive full access to information ought to be provided as well.¹¹⁵

A more specific form of accessibility, reasonable accommodation, is prescribed by the Convention.¹¹⁶ It requires different treatment for people on a case-by-case basis, as not all lived

¹¹² L Mute, 'FROM AFFIRMATION TO PRACTICE: ASSESSING A DECADE OF IMPLEMENTING THE CONSTITUTION OF KENYA 2010 FOR PERSONS WITH DISABILITIES' (2020) 1, 14.

¹¹³ Convention on Rights of Persons with Disabilities 2008 Article 9(1).

¹¹⁴ Ibid 9(2)(e).

¹¹⁵ Ibid 9(2)(f).

¹¹⁶ Ibid 2.

experiences of PWDs are the same. The treaty places a positive onus on State parties to take all appropriate steps to ensure that reasonable accommodation is provided.¹¹⁷ Consequently, denial of reasonable accommodation amounts to discrimination, so long as no undue burden would be suffered.¹¹⁸ Presumably, the State would not suffer any undue burden by providing reasonable accommodation for PWDs in courts to enhance access to justice, but alas.

The IDIL (2022 – 2032)

The UNGA proclaimed 2022 - 2032 as the IDIL. This is to draw attention on the critical situation of indigenous languages globally, and to impel stakeholders and resources for the preservation, revitalization and promotion of these languages. The proclamation of an International Decade is a key outcome of the IYIL in 2019, for which UNESCO leads global efforts. This Organization will continue to serve as lead UN Agency for the implementation of the International Decade, in conjunction with other relevant UN Agencies.¹¹⁹

To reiterate, the State continues to make a bare minimum effort in ensuring that indigenous Kenyan languages are prioritized in the legal system, despite being a party to international treaties and provisions that mandate its active effort.

4.0: CASE REVIEW

This chapter aims to analyze Kenyan and a couple of South African case laws that illustrate the linguistic discrimination in courts and the legal system at large. The latter cases only intend to

¹¹⁷ Ibid 5(3).

¹¹⁸ S Genga, M du Plessis, 'A CRITICAL ANALYSIS OF THE DUTY TO PROVIDE REASONABLE ACCOMMODATION FOR EMPLOYEES WITH PSYCHOSOCIAL CONDITIONS AS AN EMPLOYMENT ANTI-DISCRIMINATION OBLIGATION: A CASE STUDY OF KENYA'S LEGAL FRAMEWORK' (2022) 1, 11

¹¹⁹ The United Nations Educational, Scientific and Cultural Organization, 'Indigenous Language Decade 2022-2032' <https://www.unesco.org/en/decades/indigenous-languages> accessed 11 April 2025.

buttress the former cases. Access to justice hinges on free-flowing communication between the administrators and seekers of justice, therefore, when understanding is impaired through language, it yields grave consequences.

Kenya

Inshair v Republic (1973)

This case highlights potential translation and interpretation challenges that could arise in court.¹²⁰

The Appellant was charged with theft in a Magistrate's court in Wajir. He had no legal representation, was illiterate and spoke Somali as opposed to English, the language of the court. His plea of guilty, however, was recorded in English. The Court of Appeal held that it is crucial that a magistrate explains to the accused person all the relevant elements of a charge in the accused's language, or a language they can comprehend. Should the accused then affirm the plea of guilty, the magistrate could proceed to record the accused's words "as nearly as possible" in their words. Further it was noted that the word 'guilty' has no direct equivalent in indigenous Kenyan languages. Similarly, the word 'steal' has limited equivalents in the languages.¹²¹

As seen, the seemingly innocent substitution of words in various languages has the potential to change the entire trajectory of a case and subsequently a person's life. The notion that a magistrate is to record the words of an accused (and seekers of justice) as closely as possible to indigenous languages in English to fill in the "gaps" left behind creates two results. It places a seeker of justice at the mercy of the magistrate's translation of their account, and ultimately their odds of receiving justice. It then sends a message that indigenous languages are not worthy of

¹²⁰ School of Oriental and African Studies, 'Adan Inshair Hassan v Republic' [1974] 124, 125 <https://www.jstor.org/stable/744879> accessed 30 June 2025.

¹²¹ Ibid 126.

prioritization, leading to their subjugation to colonial languages. In addition, the prioritization of English in an extremely rural area of Kenya such as Wajir only affirms that the existing barriers of justice are avoidable, yet deliberately set in place to further maintain the status quo of inequality.

Macharia v Republic (2011)

This case emphasizes the importance of proper legal representation in criminal proceedings.¹²²

The appellant was subjected to a trial in respect of a criminal offence for which he was ultimately sentenced to death without affording him the benefit of legal counsel (at the State's expense). In this appeal, the court argued that the right to legal representation is key. Further, the court went on to quote Lord Denning's words in the case of *Pett v Greyhound Racing Association* that not every man has the ability to defend themselves in a court of law.¹²³ If justice ought to be done, he ought to have the help of a lawyer, especially if there are language difficulties, in order to avoid the occurrence of "substantive injustice". The case also affirms that the right to legal representation (at the State's expense) is in accordance with Article 50 of the CoK.¹²⁴

While it is important that the law is upheld and justice is served accordingly, this case brings out an interesting issue. Legal representation in this case would be helpful and yield the best results at achieving justice, only if an advocate has the informed consent of his client, in this case the accused person. For the consent to be informed, the advocate ought to be able to make an effort to meet their client where they are at linguistically. The accused person should have the facts of

¹²² [2011] KECA 406 (KLR) <https://new.kenyalaw.org/akn/ke/judgment/keca/2011/406/eng@2011-03-18> accessed 29 April 2025.

¹²³ Ibid.

¹²⁴ Ibid.

the case given to them in their indigenous language, if that is the language they understand best, to help both them and the advocate make an informed decision. It is tempting for an advocate to use complex legal English jargon that only bewilders the seeker of justice further, however, it is imperative the advocate does not perpetuate the language barrier that then widens the barrier to access to justice.

Sang v Attorney General (2014)

In this case, the claimant filed a claim against the KPS for termination of employment on the basis of disability. He claimed that this was an act of discrimination, violating Articles 28 and 54 of the CoK.¹²⁵ The judgement given in the case was that KPS indeed had a constitutional duty to take measures to reasonably accommodate an officer with a disability without having to suffer any undue hardship or prejudice as they possessed the economic power, facilities and logistics for accommodation. Furthermore, the court held that the Service had discriminated against the claimant, violating the claimant's rights guaranteed in Article 27 of the Constitution. His right to dignity guaranteed in the subsequent Article was violated as well.¹²⁶

The key takeaway from this case is that the State has a duty to provide reasonable accommodation to PWDs that need it. Buttressing the law, this precedent insists on the need for deaf seekers of justice to access well-trained sign language interpreters for proper facilitation of court proceedings. From the case, we can see that the State's reluctance to provide reasonable accommodation hints on their stance on disability rights. Similarly, the failure of the State to

¹²⁵ [2014] KEELRC 752 (KLR) <https://new.kenyalaw.org/akn/ke/judgment/keelrc/2014/752/eng@2014-02-06> accessed 29 April 2025.

¹²⁶ Ibid.

routinely provide sign language interpreters to deaf seekers of justice reveals their sentiments on prioritizing indigenous Kenyan language in courts.

Mwau v Republic (2015)

This case illustrates the manifestations of indigenous languages in a courtroom in collision with the official languages of the court.¹²⁷ The appellant was charged with infanticide in a Magistrate court in Machakos, and was sentenced to twenty years imprisonment. During the court proceedings of the appeal, the appellant gave her responses to her charge read in Kikamba in Kiswahili, alleging that she was unaware of what the language of the court actually was. Even though she could understand Kiswahili, the appellant makes people believe that she best understands Kikamba. In its defense of the ruling made, the court affirmed that the appellant was at liberty to respond in the language she understood best. That providing responses in Kiswahili was clear proof of sufficient comprehension of both Kikamba and Kiswahili.¹²⁸

It is not unreasonable to assume that the reason for the appellant to provide her responses in Kiswahili despite her charge being read out to her in her indigenous language was because she assumed that there was an unspoken obligation to do so. Even when indigenous languages are used in courts, it seems too good to be true because of the languages of governance in place. In high-pressure settings such as court proceedings, the desire to express one's emotions and thoughts in their mother tongues is natural. However, one could be compelled to shy away from doing so due to the fear of fanning the flames of an already-precarious wildfire. For this reason,

¹²⁷ [2015] KEHC 851 (KLR) <<https://new.kenyalaw.org/akn/ke/judgment/kehc/2015/851/eng@2015-12-08>> accessed 8 May 2025.

¹²⁸ Ibid.

deliberate measures such as a clear language policy implemented by the State are of the essence, to alleviate this linguistic plight impeding the quest for justice.

South Africa

Mthethwa v De Bruin (1998)

The lingering plague that is linguistic hegemony in the justice system is one that befell several African countries.¹²⁹ The applicant, a school teacher, wished to give his account in a court in *isiZulu*, but was denied by the resident magistrate the right to. The court held that the right to understand in Section 35(3)(k) of the South African Constitution does not entail the right to use indigenous languages if English was understood. As per Section 35(3)(k), every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or to have the proceedings interpreted in that language.¹³⁰

It is discernible that the court's decision to restrict this teacher to testify in his indigenous language continues to place English on an administrative pedestal. Another conclusion that could be drawn from this case is that the predominant use of the English language in the justice system in many African countries could be a deliberate attempt to lock out impoverished and illiterate persons, a huge populace of the rural areas in Africa, out of the gates of justice.¹³¹ In rural Kenya, illiteracy levels are quite high. The people barely understand English and indigenous languages are almost always used.¹³² This creates a double whammy for such people in terms of access to justice and standards of living.

¹²⁹ *Mthethwa v De Bruin* 1998 NO. 3 BCLR 336.

¹³⁰ Constitution of South Africa 1996 Article 35(3)(k).

¹³¹ N Ntlama-Makhanya, 'Revisiting the Debate on the Constitutionalised Status of Indigenous Languages as Language of Record in South African Judicial Proceedings' (2021) 1, 10.

¹³² A Kibui, 'LANGUAGE...' (n 2) 93

Williams v Minister of Police (2015)

A similar outcome is illustrated in this case.¹³³ Two police officers, one Black and one Caucasian, presented evidence of a crime in court. The white officer presented in English, whereas the Black officer presented in his indigenous language. The court was hesitant to believe the evidence given by the Black officer, as he was suspected to have given a rehearsed and dramatized account of the ordeal, which the court found unfit for admissibility. The white officer's testimony on the other hand was deemed credible and eloquent, bereft of exaggeration.

By doing so, the message that the court delivered was that indigenous languages were subjugated to English, the superior language of the judicial system. Moreover, deliberately or not, the Black officer was discriminated against on the grounds of both race and language, which violates the protected grounds provided in the South African Constitution.¹³⁴ This was through the implication that indigenous African languages are barbaric, a narrative that is believed about African and Black cultures historically.¹³⁵ This case could be applicable to the situation in Kenyan courts. While discrimination by race is a little less rampant in Kenya compared to South Africa, linguistic discrimination is alive and kicking in the Kenyan justice system. The mere fact that all legal documents are required to be in English, alongside the administrators of justice conducting court proceedings in the same, presents a massive setback for seekers of justice in Kenyan courts.

¹³³ *Williams v Minister of Police and Others* (7166/2013) [2015] ZAKZPHC 53 (7 December 2015) <https://www.saflii.org/za/cases/ZAKZPHC/2015/53.pdf> accessed 16 April 2025.

¹³⁴ Constitution of South Africa 1996 Section 9(3).

¹³⁵ F Iraki, 'Language...' (n 16) 230

5.0: CONCLUSION

It is the wish for this research to shed light on linguistic discrimination in Kenya and prove that this form of discrimination in courts is indeed a major drawback to the human rights of Kenyan seekers of justice in the rural areas. Despite the State severally making commitments to cherish indigenous Kenyan languages in the Kenyan society and the legal system, it is apparent that they are still the biggest perpetrators of the colonial concept of linguistic hegemony. By doing so, the status quo of inequality and injustice is kept alive.

This particular predicament is one that is reflective of a bigger one. The question that should be asked is whether it is possible to eradicate the colonial concept of linguistic discrimination in a legal system that is another colonial concept. It is possible in order to eradicate this plight, it is imperative that more conversations about the greater oppressive systems in place such as patriarchy, capitalism and imperialism are had. Perhaps the best solution is to axe the tree from its roots.

A collaborative effort from linguists and legal practitioners among other experts from various disciplines could help alleviate linguistic discrimination in Kenya. To reiterate, it is a plight that might prove a tall order, but it is possible. One way to spark these much-needed conversations is through education. Making the masses aware of this plight inspires thoughts that could be turned into solutions for this problem, and many other problems. Finally, we must not lose hope at any point in time. Seeing a change in the world is possible, but is a gradual and difficult process. After all, nothing good ever comes easy.

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