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Mother Tongue: A Nuisance or A Developmental Tool? Case of Machakos Subordinate Court

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Abstract: *Choosing the best language is the key to achieve any development goals. This article aims to explore languages used in subordinate courts and recommend intervening measures that will facilitate access to justice through appropriate language use in those courts in Machakos County, Kenya. The language policy excludes many of those that know only their indigenous languages. Some court users do not know English or /and Kiswahili, and interpreting is poorly done. A case study was conducted to examine these linguistic issues and challenges found in the subordinate courts and the opportunities that manifest themselves during court proceedings that can be utilized to access justice hence enable development. To evoke the respondent's attitudes towards the languages available during court proceedings and interpreting as the solution to language barrier, questionnaires were administered to 13 defendants and defense council, 13 witnesses and 18 members of the public in the court. Interviews were conducted on 3 magistrates and 7 clerks/interpreters. The researcher observed court proceedings. Having used a mixed method, the data was triangulated. The findings show that not all the respondents were comfortable using English, Kiswahili or interpreting to attain justice. They preferred their mother tongues. Mother tongues are therefore not a nuisance, but a developmental tool. The respondents language attitudes are against restriction to use a particular language during a subordinate court proceeding. The study recommends promotion of mother tongues to official status within their resident counties hence allowing them to be used directly among English and Kiswahili in the subordinate courts.*

Keywords*: Language attitude, Language use, Mother tongues, Indigenous languages, Developmental tool, Justice*

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1. Introduction

Kenya was a colony of the British and ever since, it assumed the British legal system as well as language. The language of the court has remained English. The Criminal Code, Part Five of Chapter 75 directs the language of the High Court to be English, while the language of the Subordinate Courts to be English or Kiswahili (The Republic of Kenya, 2010). The indigenous languages in courts are used with interpreting by those that do not know English or Kiswahili.

According to Mbote and Aketch, (2011), Kenya Justice Sector and Rule of Law is as a result of the realization of Vision 2030 which seeks to transform the country from developing to a medium-income economy by the year 2030. In an effort to attain this vision, the courts are expected to chip in and especially where the citizen is limited in economic development. Communication and specifically language is such a limiting factor. The Vision

seeks to create a just, cohesive society with equitable social development as well as realize the rule of law by aiming for democratic political system that ensures among others all the rights and freedoms of every individual in society (Mbote & Aketch, 2011). The linguistic human rights and freedoms are at times suppressed by those in power, and ignored by the powerless. Language choice and language use are not easily accessible as these can imprison or free an individual who is the user of a language (Mabule 2018). Social development is attainable if all the members of the society are treated equally, with accessibility to a language they know best. English especially, and Kiswahili belong with the elite, but the lower carder could be disadvantaged when communication is in these two languages. Sustainable development is seen as concerned with harnessing the indigenous knowledge and initiatives of the African people to enhance both current and future potentials to meet human needs and aspirations (Mikail and Umar, 2018). It is for that reason that mother tongues are crucial languages in a nations development.

This study hopes to explore means and ways in which indigenous languages can be elevated to the official status so as to accommodate every other person in the society. The study also hopes to make an important contribution to the literature on issues concerning multilingualism and language management on the co-existence of official and indigenous languages. The uniqueness of language management by subordinate courts, especially of the language needs of court users, their use patterns and preferences has, to the best of my knowledge, not been captured widely in scholarly discourse. This study seeks to help fill the gap.

The court proceedings in Kenya run mainly in English and Kiswahili languages. Interpreting is also done for those that cannot use the official languages. However, some litigants are disadvantaged because they do not know English and/or Kiswahili. The interpreters are not good enough in their job description. Just like Malan (2016) points out, in many cases, interpretation leads to distortion of information. The accuracy of communication during court proceedings is therefore inhibited. Ethical standards for interpreting have not been followed and hence the reason for loss of trust in interpreting. This leaves the indigenous languages without a strong base for their use in the judicial system and justice is unattainable in such a situation.

The research questions include, one, which languages are used and how are they selected during a Subordinate Court case proceeding in Machakos County, and two, what are the intervening measures towards access to justice in language use in Subordinate Courts in Machakos County?

2. Literature Review

In Belgium, Dutch, French and German are used as court languages. The constitution of Belgium has demarcated language areas alongside these three languages, making them obtain an official character. Bambust et al. (2012) point out that it is a constitutional right to use any language in Belgium; and that this right may be limited only by legislation and only for acts of public authority or for legal proceedings. The Belgium situation of territoriality matches the idea of constituencies in Kenya that has mostly a dominant indigenous language. If the three languages can work for Belgium territories, then the dominant language/s in each constituent in Kenya can be an official language specific to that constituency. This will result in the indigenous languages being used as court languages.

The Canadian courts' language policy is based on language rights. The justice system is said to be unique in the world because it has two official languages, English and French, and two legal traditions, common law and civil law that co-exist (Canada department of Justice, 2017). Lubbe (2008) brings forth the importance of language rights to the accused person in a court in Canada. Through the Supreme Court in Canada, in a case where Beaulac is accused of murder and his request to be tried in French is rejected at the magistrate Canadian courts, judge Bastarache interjects that the language choice of an accused persons is a substantive right and not a procedural one that can be interfered with. Language choice is very important to an accused person if justice is to be served. The Supreme Court pointed out that language rights in all cases must be interpreted purposively such that they are consistent with the preservation and development of official language communities in Canada. Therefore a language used in court should be an official language. Indigenous languages made official get to enjoy that preference.

In Australia, language policy is based on principles such as the recognition of Australian English as a national language, the rights to use community languages other than English, including languages and language systems of the deaf. They also recognise indigenous languages and the unique status of Aboriginal languages, Torres Strait Islander languages and Australian Creoles (Lo Bianco, 1990). In essence, Australia has no official language, but it recognises Australian English as the main language, indigenous languages, minority languages, and sign languages, and other Aboriginal sign languages. 70% of the population speaks English at home (Sawe, 2018). According to Lo Bianco (1990), the question of interpreters in court proceedings is necessary but not a very welcomed idea. It seems to have many questionable results. Hence the solution to this problem for the Australians, especially the 30% that do not use English as their home language could be a direct redress of the court in their languages (Lo Bianco, 1990). The problems found in interpreting during court proceedings are not unique to

Australia. They may be the same in other countries, including Kenya.

In South Africa, linguistic separation was used as a way of protecting cultural and linguistic hegemony of the ruling elite, and was justified in order to maintain Afrikaner identity, and to preserve the intrinsic qualities of the African culture (Batibo, 2015). Thus, South Africa made eleven indigenous languages official (Bambust et al., 2012). This means that the majority of South Africans can express themselves in any language of their choice in most of their domains whether literate or not. When an accused person's right to a legal representation with whom he could communicate in his own language, whether directly or through the services of an interpreter, is not properly explained to accused persons, this failure is a breach of his or her right to a fair trial (Lubbe, 2008; Bambust et al., 2012; Malan, 2016). Language policy in courts in South Africa has moved from being glued to the English language. The Kenyan court's language situation still favours the English language as the main court's language and the sole language of records. The nine indigenous languages are along municipalities in South Africa, a setting that is very similar to the Kenyan counties.

Gatitu (2009) notes that English remains the language of power and elitism, while Kiswahili is associated with low prestige, and indigenous languages with tribalism in the Kenyan society. Some of the participants may not understand the language of the court while the interpreters may not interpret the language of the non-speakers of the court's official languages correctly. The power that the court interpreter wields is immense. The success or failure of communication, and the ultimate outcome of the trial in such a case where a large part of the population that attends court, especially in the rural areas, does not understand English or/and their fluency in Kiswahili is limited, is totally dependent on the accuracy of the interpreting (Gatitu, 2009). The question would then be how accurate these interpreters are! Malan (2016:12) disapproves and dismisses interpretation of evidence because in many cases, it leads to distortion of information. To him, this is a risky exercise which leads to unfairness and outright wrong court decisions detrimental to accused persons, complainants, witnesses and the integrity and repute of the justice systems.

2.1 Theoretical Framework

Language management theory (LMT) was developed by Jiri Neustupny in 1978 in his work on "Outline of a Theory of Language Problems". In this theory, Neustupny bases macro language planning on the theory of language problems. Particular interactions are recognized as the source of language problems and so the language planning activity takes a process. The process begins with identification of a language problem in an individual interaction, followed by adoption of a measure by the institution, then implementation of that measure in individual interactions to correct the problem. Language Rights and Linguistic Human Rights (LHRP) are defined as human rights which have an incidence on language preferences of or used by state authorities, individuals and other entities (Office of High Commissioner for Human Rights, 2017). Linguistic human rights are about the rights to one's own language in legal, administrative and judicial acts. The rights can be human or civil. In this study, the courts' language problems are identified and following the linguistic human rights need to be solved.

3. Methodology

A theoretical perspective guided the entire design. This research is a descriptive survey of language management as far as language uses and language preferences are concerned. It describes the linguistic and social phenomena in the interactive dynamics of court proceedings. Concurrent procedures, the observation, interviews and questionnaires in which the researcher converged qualitative and quantitative research methods in order to provide a comprehensive analysis of the research problem were used. The researcher collected both quantitative and qualitative data at roughly the same time. The time of non-participant observation enabled the researcher to identify other participants for the interviews and the questionnaires. Some participants offered to take the interviews there and then, while others were booked for a later date. Others agreed to fill in the questionnaires immediately after the cases while others carried them away and were collected later.

3.1 Sampling and participants

The Subordinate Courts are divided into three chambers. In any one sitting during a court proceeding in the Subordinate Courts, there are about fifty people, including magistrates, defendants and defense counsels, witnesses, clerks and interpreters, and the public. They form the target population of the study. Due to the heterogeneous nature of the population, the researcher used purposive sampling and had varied counts of the study sample in five categories. Three magistrates, thirteen defendants or defense counsels, thirteen witnesses, five clerks or interpreters and eighteen members of the public making a total of fifty two. Since the exercise was spontaneous, those that were requested to respond did so making it a hundred percent return rate.

The study employed purposive selection of the court proceedings, magistrates and interpreters/clerks that were interviewed, as well as defendants/defense counsels and witnesses that filled the questionnaire. The researcher engaged members of the public who were willing and able to participate on each particular day; hence convenience sampling. The researcher had no control over the court

calendar but observed the long court proceedings as prescribed for the day by the court in a chamber for ten days. Quantitative data were analysed using descriptive and inferential statistical procedures. Qualitative data were analysed using coding to develop themes and categories. The qualitative data were transformed by assigning codes using predetermined templates, and then grouped into themes and categories. The integration of both quantitative and qualitative data occurred during data analysis from data collected concurrently, while analysing the data and reporting the results.

3.2 Validity and Reliability

The researcher established content validity by checking clarity of items to avoid ambiguity and established that the research objectives were adequately addressed. It was established that the instruments would provide the anticipated data, and problems likely to be experienced by respondents while using the instrument were identified by piloting the study. Credibility was attained through repeated field experiences, while transferability was through the thick rich description of data. Instruments such as non-participant observation schedule, interview guide and a questionnaire were used before by other scholars and proven to be reliable. The reliability of instruments has further been ensured by the use of multiple methods of data collection, analysis and interpretation (Mouton & Marais 1988).The results were similar to those of other scholars such as Muaka, (2015; 2011) and Malan, (2016).

4. Results and Discussion

4.1: Languages used and how they are selected during a subordinate court case proceeding

Table 1: How do you speak the languages you know?

Language	Not at all	With great difficult	With some difficult	Easily
English alone		2.3%	15.9%	81.8%
Kiswahili alone		2.3%	11.4%	86.4%
Mother Tongue alone		2.3%	25.0%	72.7%
Sheng	68.4%	10.5%		21.1%
Sign Language	83.3%	7.1%	2.4%	7.1%

English is spoken easily by 81.8% of the respondents. This being a bigger percentage than that of those that speak it with difficult shows that though many know English, probably because of schooling, there is 18.2% of the population that does not know English very well. Though everyone has an idea, a minority group may not handle court cases in English. Kiswahili is "easily spoken" by 86.4%, a greater percentage than that of English, and nobody "does not at all speak it". Again this leaves a minority group of 13.6% of the population that cannot handle cases in Kiswahili. There is not a single person among the respondents that cannot speak a bit of their mother tongues, though some with difficulty. But majority of them, 72.7%, easily speak their mother tongues. This could mean many respondents can handle court cases in their mother tongues, a few cannot. Majority of the respondents, 68.4% and 83.3%, cannot at all speak Sheng'(slang language) and Sign language respectively, at all. A few, 21.1% and 7.1% however can speak easily in Sheng' and Sign language respectively. 10.5% only try to speak Sheng' but with great difficulty. From this question, how one speaks the languages with ease or difficulty or not at all shows the capability of the use of these languages in court. It further informs on the attitudes litigants may have towards the use of certain languages. What one reports about, what they think about and their language use, may not necessarily be the case on their actual language use. On listening to the magistrates, they reported that some litigants are spoken to in one language but answer in another. The comfort they get in using that particular language makes them respond in it. During court proceedings, the researcher observed a lady that was spoken to in Kiswahili and insisted on answering in mother tongue even though it seemed she knew Kiswahili very well. These attitudes are further clarified by the next question.

The second question asked if the respondents were ashamed or shy of using their mother tongues. Table 2 shows how this was addressed.

Table 2: Are you ashamed or shy of using your mother tongue?

	Feeling ashamed				Feeling shy		
Factors	**Very much**	**Not very Much**	**Not at All**		**Very much**	**Not very much**	**Not at All**
Defendant/Defense counsel	10%		90%		10%	10%	80%
Member of Public			100%				100%
Witnesses		5%	95%		5.6%	11.1%	83.3%
Total	**2.9%**	**2.9%**	**94.3%**		**6.1%**	**9.1%**	**84.8%**

A small group of defendants and defense counsels forms 2.9% of the whole population that are very much ashamed of using their mother tongues. 6.1% of the total population is very much shy of using their mother tongues. These two categories are among the elite in the society that consider mother tongues a backward language. They would rather use English and Kiswahili so as to belong to a higher social class. 94.3% are very comfortable using it for they are not ashamed at all, while 84.8% do not shy away from using mother tongues. This group can use mother tongue anywhere, anytime if permissible. It includes both the literates and illiterate people. Majority of the defendants and defense counsels, all members of the public present in the court and majority of the witnesses are not ashamed or shy using their mother tongues. How often they use their mother tongues contributes a lot to their comfort in the use of the language.

Question three asked how often they used their mother tongues and table 3 shows how it was addressed.

Table 3: How often do you use your mother tongue?

	Rarely	**Sometimes**	**Often**	**Always**
Defendant/Defense Counsel		62.5%	25%	12.5%
Member of Public		40%	60%	
Witnesses	11.8%	47.1%	35.3%	5.9%
Total	**6.7%**	**50%**	**36.7%**	**6.7%**

The frequency with which one uses a language can also make one more comfortable to use it in an official set-up. For instance, being in the rural areas enables one to often use indigenous language unlike when they are in urban centres. The setting also determines whether one is going to be ashamed or shy using the language. A half of them, 50%, use mother tongues "sometimes" while 36.7% use them "often" and then an equal percentage of 6.7 "always" and "rarely" use mother tongues. The number that always use mother tongue is minimal as well as those that rarely use it. This is an indicator that though English and Kiswahili are widely used, there is still that minority group that communicates purely in the mother tongues only.

The fourth question asked which languages they thought were most suitable to use in court. Table 4 shows how this was addressed.

Table 4: Which language(s) do you think is/are the most suitable to use in the courts

Language	**Number**	**Percent**	**Percentage of cases**
Mother Tongues	23	16.3%	42.6%
Kiswahili	35	24.8%	64.8%
English	28	19.9%	51.9%
Mixed Languages	32	22.7%	59.3%
Sign Language	23	16.3%	42.6%
Total	**141**	**100.0%**	**261.2%**

Though there is the frequency with which languages are used by an individual in their day to day activities, there is also that language that individuals find most suitable in certain situations and places. The highest percentage proposed was 64.8 for Kiswahili, followed by 59.3% for mixed languages and then 51.9% for English. Sign language and mother tongues received the least support of 42.6% each. Kiswahili, which is both a national and an official language, got the highest preference probably because it is known by almost everyone. In Ukambani,

where this study was conducted, Kiswahili is easy to understand because it is a bantu language just like Kikamba language, hence its selection. Mixed languages meant that all languages and any other language that one knows best should be the most suitable. That is to say, if one understands mother tongues best or Kiswahili best or can even code switch, then that is the most suitable language to use in court. English is seen as the most appropriate language of the court, but it has a selected few that can comprehensively use it.

Intervening measures towards access to justice through language use

The aim of the question was to get proposals to ways in which the courts can adjust in order to reach a justifiable decision on language policy. This is with the knowledge that when linguistic rights are acknowledged, the full participation of the minority groups in all national activities such as judicial and administrative proceedings, civil service, examinations, voting and public employment is guaranteed (Mutasa, 2004).

The magistrates recommended that there be at least a speaker of the dominant language among magistrates and prosecutors in a court. This would help those that are not conversant with the official language by the magistrate listening to them directly. The observations made show that in interpreting, the right words are not always available in the other language, the intensity of meaning is not availed, some interpreters are emotionally influenced by speakers, recalling what has been said is not always easy, and sometimes, the age-gap as well as the age of the speaker may be counterproductive to the interpreter.

The respondents felt that the indigenous languages should be made official in the counties where they are dominant. This would enable officers to use them the same way in which they use Kiswahili. The respondents suggested the use of these indigenous languages to be extended to other sectors such as public offices, including police stations. The magistrates felt that at the time of apprehension, the police make the victims write statements in languages they do not know. A translation is done and most of them are distorted because the idea of translation, and interpreting, is not professionally done. The judiciary system should re-visit the idea of English language as the language of the court, and embrace the use of the language well known by the accused persons. This will have considered their rights as accused persons and will reduce the tension that builds in legal confrontations. Malan (2016) argues, "…a language policy must account for the fact that the average person's confrontation with the criminal justice system is a rather frightening experience."

5. Conclusion and Recommendations

5.1 Conclusion

The study concluded that mother tongue is not a nuisance but a developmental tool. This was based on the findings that there is a linguistic discrepancy that needs sorting out in Machakos Law Courts because the language of the court is not the language of the accused persons and witnesses.

It also concluded that the chance to use indigenous languages in courts provided by the language policy of the country, has not been properly utilised, and interpreting is poorly done by officers who are not professionals, and who do not know their mother tongues, as well as ethics and tenets that go with interpreting. Hence, there is poor communication.

The results were an affirmation that there can never be any justice when the court proceedings are carried in a language barrier-stricken court. Litigants may wish to use their mother tongues because they are often using them comfortably in the other day to day domains, but be restricted by the language-use position taken by the court.

A minority group of people is left out when assumptions to use Kiswahili or English at the expense of mother tongues are made. The study concluded that all the languages including mother tongues, Kiswahili, English, Sheng' and sign language are used by the litigants at different levels of proficiency and competence. The languages should therefore be easily available to them. This will improve inclusivity of all citizens irrespective of whether or not they are educated, poor, living in the rural areas or otherwise.

5.2 Recommendation

The study made the recommendation that indigenous languages be elevated to official status in their dominant counties so that they may be used at the same level as Kiswahili, and that all the three languages, Kiswahili, English and mother tongues can be given equal chance in court proceedings. The study also recommended that interpretation be limited in subordinate courts and that there be personnel belonging to the dominant community to enable freedom of expression in a language that the litigant knows best.

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