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Justice through Interpreting in Courts. A Case of Machakos Courts in Machakos County, Kenya

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Abstract: *The art of interpreting is unique and beyond changing a word to another language. It includes emotions, gestures, body language and facial expressions. This article, aims at bringing to the fore the flawed use of interpreting in Subordinate Courts. The article evaluates if interpreting in these courts is genuine or just a lip service. Through the descriptive study carried out, qualitative analysis of the data collected in interviews, questionnaires and observations was done. While witnesses and the accused filled questionnaires, magistrates and clerks were interviewed after being sampled purposefully from the court proceedings observed by the researcher. The findings were that during court proceedings, interpreters poorly do their job. The accused and witnesses use indigenous languages more comfortably than the official or national languages. The interpreter is mostly required not because no one understands the accused and the witnesses in their mother tongue, but because the language of the courts must be official or national language. Magistrates encounter barriers including, interpreters not knowing their indigenous languages, having no skills of interpreting, often allowing long utterances from accused persons and witnesses and ending up forgetting them, resulting in poor reporting, getting carried away by emotions, and not reporting exactly how and what the speaker said. These reasons render the use of interpreters unjust. It is recommended to have some members of staff from the dominant community as magistrates and prosecutors to enable more meaningful communication, train interpreters, and professionalize interpreting. Clerks to be employed as clerks and not double as interpreters.*

Keywords: *Interpreting, Interpreters, Justice, Proceedings, Courts*

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1. Introduction

Interpreting has been the norm in court proceedings. To interpret does not just involve getting a replacement word in the target language, but it also encompasses the meaning of expressions from all angles, including emotional, euphemisms, gestures and facial expressions. Gonzalez, Vasquez & Mikkelson, (1991) state that an interpreter is not just an individual with knowledge of two languages, but also an accurate and impartial professional that maintains confidentiality, and offers interpretation and not advocacy while ensuring to serve the interest of the court. Ngarambe and Ruvabana, (2023) add that the interpreter should have eight competences including, language competence, intellectual competence, research competence, technological competence , thematic competence, transfer competence, service provision competence and ethical competence in order to perform satisfactorily during a court proceeding.

This study is questioning the kind of interpreting done in this particular court and the interpreter's competence. It is an investigation on whether justice is served in a case's verdict when interpreting is poorly done. The purpose for sending a case to court is so that justice is served, and this can only happen if there is proper communication.

Everybody is entitled to fair trial as is an international human right. The Universal Declaration of Human Rights, Article 10 states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal (United Nations, 2015). Article 14 of the International Covenant on Civil and Political Rights further posits that free assistance of an interpreter is one of the minimum guarantees in the determination of any crime against a person. This right is further recognized in Article 6 of European convention on human rights as well as the African Charter of 1986 on human and people's rights, Article 7 which provides for a fair trial and provision of an interpreter.

Part Five of Chapter 75 of the Criminal Procedure Code and the constitution directs that the language of the high court shall be English, while the language of the Subordinate Courts shall be English or Kiswahili. Since not all persons who appear before the court are competent in both languages, where testimony is given in a language not understood by an accused person, the law requires that it be interpreted (Gatitu, 2009). All those at the court may not be competent in the languages used to interpret. The Mackay report (Republic of Kenya, 1984) found that most graduates schooled in English have poor command of Kiswahili and the rest of the indigenous languages. They therefore cannot articulate the knowledge and skills acquired to the general populace that does not speak English. The graduates cannot explain in their indigenous languages what they have acquired in the English medium (Ogechi, 2003). This presents the dilemma in the courts. There is a big divide between those that use English and Kiswahili and those that use only indigenous languages.

In Machakos County, Kikamba is the dominant language (Government of Machakos County, 2015). Machakos County has eight sub-counties, of which 52% of its population is urban and 48% rural. This means, Kikamba use is threatened by urbanisation and the other languages within the county. Unless the issue is addressed, Kikamba and its value among its users could be lost. This notwithstanding, it is however important to note that there are citizens that cannot use any other language apart from their indigenous languages. Kikamba therefore becomes very important in Machakos Subordinate Courts.

A Subordinate Court is where the majority of the judiciary cases are heard, for they are generally located in every Sub-County in Kenya, specifically the Magistrate Courts. English is the official language of the court and Kiswahili the national language as well as official language in the country. Indigenous languages are used only during interpreting for those that cannot use English or Kiswahili. The minority group that speaks only their indigenous languages cannot speak directly to the magistrate but through interpreting.

The subordinate courts are meant to serve everybody (Mbote &Akech, 2011). However, there seems to be a gap in terms of communication and interpretation. Poor or lack of communication is the result of lack of a language policy that accommodates everybody during court proceedings. English, which is the main language of the court (Muaka, 2011), is better known by the elite only. Interpreters may not interpret correctly. Conversations in court are therefore limited to the elite. The illiterate keeps quiet and watch until such a time the interpreter will be required to interpret. Odhiambo, Kavulani and Matu, (2013) found that illiterate people are given interpreters who, in most cases, are not competent in the use of indigenous languages.

This study aims to evaluate the current language policy and recommend interventions that will facilitate access to justice in language use in subordinate courts in Machakos County. This evaluation and recommendations will help the government to take care of the minority citizens to acquire justice that is usually denied because of poor communication. It will also give more information to researchers to open their eyes and right what is usually considered normal when it is indeed wrong about interpreting.

2. Literature Review

2.1 Why Interpret

Court interpreting is recognized globally and so provisions for it as a human right have been made in many countries' constitutions. Ngarambe and Ruvabana, (2023) made an analysis of such countries including:

> Europe where virtually all countries guarantee the right to an interpreter for litigants with low-language proficiency (LLP) (Mikkelson, (2017). In the United States, this right is guaranteed by the Constitution itself in its Fifth and Sixth amendments, which emphasize the right to "due process of law" and "to have the assistance of counsel" for the defense of the accused. The right to an interpreter is recognised in Title VI of the Civil Rights Act (1964), and, in line with this, the Court Interpreters Act of 1978 established a certification programme to ensure the competency of interpreters working in federal and in state courts (González et al., 2012). The same right is also guaranteed by Canadian legislation. In Section 14, the Canadian Charter of Rights and freedoms of 1982 states that "a party or witness in any proceeding who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right of assistance of an interpreter" (Government of

Canada, 1982). In Asian countries, some improvements have been made in guaranteeing the right to an interpreter, but this varies from one country to another. Some countries like Singapore are reported to have modernised their court interpreting systems by adopting video-conference interpreting (Mikkelson, 2017). In Australia, at state and federal levels, regulations have been put in place to govern quality and qualifications for court interpreters. More specifically, Hale (2011) refers to "guidelines and recommendations produced by the various Departments of Justice, Bench books, and state tribunal guidelines". At the federal level, she notes the existence of "specific guidelines for the different federal courts and tribunals" (Hale, 2011). The most recent of these documents are the *Interpreter Protocols* (ACT Courts and Tribunal, 2020). In Africa, some countries have regulated the practice of interpreting to accommodate multilingualism in their courts. This is the case of South Africa's Constitution of 1996, Chapter 2 on the bill of rights, and Kenya's 2010 Constitution, Chapter 4 (50).

The right to an interpreter is guaranteed in very many countries as proven above. However, how the interpreting is done remains questionable. Thus, there is a need to explore the practice of court interpreting in these courts and specifically Machakos Subordinate Court.

2.2 Courts' Language Management

Globally, to date, over 200 countries in the world recognise two or more official languages. Languages like Arabic, Bengali, English, French, Hindi, Malay, Mandarin, Portuguese, Russian and Spanish are spoken as second, third, fourth or later-acquired languages or used as lingua-francas, or languages of wider communication across the globe (see Singh et al., 2012). De Swaan (2001, in Singh et al., 2012) points out a global language system which he says, at the bottom is the world's many small languages - the peripheral languages, constituting 98%. The next level is about 100 central languages such as Chinese, Hindi, Russian, which are acquired as second languages by speakers of peripheral languages. These central languages become national or official languages and are used in politics, courts, education systems, television, textbooks and newspapers. Kiswahili in Kenya could fall under this category.

The principle of territoriality was introduced in 1921 and confirmed in 1930 and 1962. This principle is said to be flexible with a minority thirty percent speaking their mother tongues and expected to obtain services in their local languages. 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, whereby most of the constituencies have a dominant indigenous language.

English has remained the official language of law since Kenya attained her independence (Ogechi 2003). According to Ogechi (2003), Kiswahili may be used in the lower courts. As mentioned earlier, 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. Nevertheless, the criminal procedure code directs that the language of the high court be English while that of the subordinate courts shall be English or Kiswahili (Chapter 75 Part Five). A typical criminal court proceeding in a subordinate court features the prosecutor and the defense. The two parties appear before the presiding magistrate and orally present their side of the story by calling their witnesses to give their testimony. The magistrate is expected to take down in writing in the language of court all the evidence of each witness and record their demeanor. It is this hand-written account that constitutes the official court record (Gatitu, 2009). 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.

3. Methodology

This study was a descriptive case study carried out in the subordinate courts during court proceedings to collect data on the languages used and the languages participants would like to use for various reasons, as well as the intervening measures that should be taken to ease communication. The researcher employed qualitative research techniques to collect data from the different respondents. The study relied on purposeful sampling of magistrates, clerks, witnesses and the accused people. The sample involved court users of the days the researcher did the observation. Non-random sampling methods were therefore applied to select purposively a total of forty-four respondents. The respondents were grouped into three; the magistrates, the clerks and the …The consent of the individual respondents was first sort before data collection. Three chambers were selected on three different days to vary the respondents that gave a representation of a court serving people from all walks of life. The researcher visited these chambers in order to observe availability and the state of interpreting and how the interpreters were involved in the hearings.
The data was collected by means of Interview guides, questionnaires and observation on the magistrates and the

clerks that had participated in the court proceedings of the day. The study's data collection method, instruments and data analysis were informed by the literature review covered, the language management theory and the linguistic human rights paradigm used. The data was coded and processed following thematic areas then analysed following identified patterns and eventually came up with a narrative.

4. Results and Discussion

Magistrates reported that the languages they encounter during court proceedings include the official and national languages: English and Kiswahili and various indigenous languages, including Kikamba, Arabic and Somali from truck drivers along Mombasa-Nairobi Highway. Those brought to court use any language they understand but if it is not English or Kiswahili, interpreting is provided, even for sign language. There is also the use of Sheng' by the majority of the youth. The clerks added that among the indigenous languages used in courts are Kikuyu, Luyha, Kalenjin and Maasai.

All the magistrates interviewed agreed that for any proceeding, accused persons and witnesses have the upper hand in the choice of the language to be used. The court must ask accused persons and witnesses the language they are comfortable in. However, in the knowledge that one must be asked the language they would like to use, because of time limitation, the court assumes that people know Kiswahili and so dismisses interpreting. In addition, clerks confirmed that courts assume that the respondents understand Kiswahili, but they need to use a language that accused persons and witnesses understand. After all, just like Ngarambe and Ruvabana, (2023) put it, the defendant must be able to participate in their own defense by communicating effectively with the court or their counsel. In this context, the interpreter is the only person who can help to achieve the principle of fair trial when there is a language difference (African Commission on Human & People's Rights, 2019).

> **"…if it's an accused person, before reading the charges, you should be able to ask this person the language they would like to use. This person could be speaking 'swa', but because of time we don't even do these things. *Mtu anamsomea haraka haraka* you assume *lazima anajua Kiswahili, anasema ndio ama hapana,* but ideally you are supposed to ask them which language they are comfortable in. *Akisema anataka kusomewa na Kikamba,* it is the duty of the court to ensure that *amesomewa kwa* kikamba. It is supposed to be a language they understand, even as the trial goes on. They have a right to have interpretation whether he has an advocate or not, the case is not about the advocate. The accused must be comfortable with the language and must understand what is going on."**
>
> (If it's an accused person, before reading the charges, you should be able to ask this person the language they would like to use, this person could be speaking in Kiswahili but because of time we do not even do these things. They read the charges and verdicts very fast; you assume they definitely know Kiswahili, they only say yes or no. But ideally you are supposed to ask them which language they are comfortable in. If they say it is Kikamba, it is the duty of the court to ensure that they are ready to in Kikamba. It is supposed to be a language they understand, even as the trial goes on. They have a right to have interpretation whether he has an advocate or not, the case is not about the advocate. The accused must be comfortable with the language and must understand what is going on).

However, when accused persons or witnesses are represented, they do not have to talk and the court can use English, a language that they may not understand.

The magistrates reported that children would rather use their indigenous languages than use English or Kiswahili. According to the magistrates, their choice of indigenous languages is based on the fact that they are quite fluent in them, but they stammer a lot if and when they have to use English or Kiswahili. The magistrates said that the evidence and information flows well when a child is expressing himself/herself in their mother tongues. However, some children fail to respond in the presence of the offender out of non-linguistic reasons such as fear. But generally, those that respond use their vernaculars and so require interpreting.

> **"It may be a challenge when you are writing a judgment, especially when dealing with those small children; you have to write exactly what they are saying. Like last week, I had an incest case, the accused person is a minor, 16 years, and the nieces and nephews are five, four years. I struggled with those children like half of the day, and they ended up not speaking much. They were just crying one after another, because they didn't want to see the accused person and you see we don't have a witness protection box. So there is no way we will hide this person because he also has to hear what is going on. And all of them are at the Rescue Centre so they had to be taken back."**

The magistrates are supposed to record in English, but there are words that cannot be expressed clearly in English, so they would rather use indigenous languages. The magistrates end up writing verbatim what the witness and the accused persons have said.

> **"… but you know there are some words you cannot express clearly in English, especially the sexual offences. There are some words you just have to write verbatim what the witness states."**

Some magistrates were excited about how some participants are spoken to in Kiswahili but respond in their mother tongues.

> **"…Certainly, Kambas enjoy their language so much, they feel that they can express themselves better, yet some of them can speak Kiswahili so well, but they insist on speaking in Kikamba."**

Some clerks ironically claimed not to be conversant in their mother tongues, irrespective of them having been employed on that strength. An elderly lady clerk and their boss dismissed it as pretense. On reporting to her that some of her clerks said that sometimes the mother tongue is deep, they are unable to interpret, or they just avoid such terms and make out possible meanings of what they heard, she replied:

> **"…they should know, before we employ them. That is pretending, in fact, that is what I'm telling them, they are pretending. When they came for the interview, they said they are Kambas and there were questions on interpreting. So they must interpret their mother tongue. Saying that they 'go round', that's a mistake and if known, they can be sacked."**

Nevertheless, the majority of clerks and magistrates seem to want their children to know their mother tongues and use them in future. Some clerks, when interviewed on whether they knew their mother tongues in the first place, replied that they learnt their mother tongues in the villages and not in town, and they use them with their children, parents and others that know them (the mother tongues) in town. For those who do not know English or Kiswahili, it was felt that they needed interpreting.

Language Needs

During the interview, interviewee one expressed the view that many respondents want to express themselves in the language they know best. This was supported by interviewee three that they want to use a language that is not challenging. The respondents would express themselves better in their mother tongues. Interviewee three added that they enjoy their mother tongues very much, especially the Kambas and that the mother tongues are rich in meaning.

> **"Yes, and I find that very genuine. Kiswahili *naijua, lakini nitaweza kujiexpress* better in Kikamba. Because there are those words that come out better in the vernacular. They feel that is what they wanted to say"**
>
> (Yes, and I find that very genuine. I know Kiswahili, but I can express myself better in Kikamba. Because there are those words that come out better in the vernacular. They feel that is what they wanted to say).

Interviewee one pointed out that some other participants want to express themselves in a language they may not be proficient in, that is, English and Kiswahili.

> **"… you want to be somebody, you don't want to be ashamed of yourself because you don't know English, you feel inferior, but you can communicate because your purpose is to communicate."**

Interviewee one expresses that the vernaculars have been so demonized that children cannot identify with them. The children are embracing Sheng' and it seems to be developing very fast because the majority of the children are using it fluently to communicate their needs. Interviewee two's experience is that children would rather speak Kikamba in court than English or Kiswahili. She argued that they are proud of their mother tongues that they stammer when they speak in Kiswahili, but in their mother tongues, the information flows and evidence is acquired. Most of the clerks said that children like English and Kiswahili languages for reading. They would not wish mother tongues read in books but should be used purely for verbal communication. The reasons given for their wish to keep mother tongues away from books are that, according to them, mother tongues are difficult to use because of difficult words, they are out of fashion and out-dated. They would rather use Sheng' and English in all forms of communication.

Some participants would rather do with direct communication in mother tongues than have interpreting. Interviewee two dismissed interpreting because its effects include loss of a lot of important details, poor interpreting methods and many mistakes made during the process. She concluded that the purpose of a language is to

communicate, but this is not what is entirely achieved once there is interpreting.

> **"… and you know in a way you are a witness and you are speaking Kikamba as the interpreter. If you say in Kikamba "I went to hospital after the incident", the interpreter is not supposed to say *"anasema"* they are supposed to say the exact words, the way one has said it but you know they make mistakes *anasema hivi.* They also tend to seek clarification on behalf of the magistrates, which is wrong. They are supposed to say just what the witness has said, even if the witness is giving a wrong answer. You say it first, then the court will know what to say, but not for the clerk to start clarifying."**
>
> (And you know in a way you are a witness and you are speaking Kikamba as the interpreter. If you say in Kikamba "I went to hospital after the incident", the interpreter is not supposed to say "she says that…" they are supposed to say the exact words, the way one has said it but you know they make mistakes "she says this". They also tend to seek clarification on behalf of the magistrates, which is wrong. They are supposed to say just what the witness has said, even if the witness is giving a wrong answer. You say it first, then the court will know what to say, but not for the clerk to start clarifying).

Interviewee three responded just like interviewee one that they want to use a language that is not challenging. They would express themselves better in their mother tongues, and that they enjoy their mother tongues very much, for the mother tongues are rich in meaning.

Interviewee four felt that there are some words that a complainant or the accused person will use so as to pass information that they want, but the challenge will be that the interpreter may not want to pronounce such words and thus opts for euphemism. There will not be the intended communication. Magistrates sometimes will insist that clerks call a spade a spade and not a big spoon.

> ***"…, kuwa kuna* words *zingine kuzitoa kwako itakua….* so you don't exactly say that word. *Kuna* words *zingine hata wewe utasikia ugumu kuzisema Lakini kuna* magistrate *atakuambia* call a spade a spade."**
>
> (There are some words to pronounce them will be…shameful… so you don't exactly say that word. There are other words you will find it difficult coming from your mouth. But a magistrate will tell you to call a spade a spade).

But this only puts pressure on the clerks who cannot pronounce some of those taboo words.

Interviewee five felt that she is challenged by choice of words in mother tongue. Most of the times, clients challenge her that what she has interpreted into is not what they meant. She bases her challenge on the mother tongue dialects. But even then, her own dialect is equally a challenge to her

> **"Especially in mother tongue, you see we have mother tongues from Kitui, Makueni, you know, the mother tongue is different from that one of Machakos. So me I'm from Makueni , kikamba ya Machakos ni difficult…"**
>
> (Especially in mother tongue, you see we have mother tongues from Kitui, Makueni, (Kikamba dialects) you know the mother tongue is different from that one of Machakos. So, I'm from Makueni, and kikamba dialect of Machakos is difficult)

The same happened where a Salvadoran interpreter was interpreting for a Mexican farmer in a worker's compensation case where the word "cintura" was interpreted as "waist" instead of "lower back" as the farmer had attempted to communicate. Upon further questioning, the farmer said his back hurt, not his waist. The judge deemed the farmer's statements "inconsistent and evasive" leading the farmer to lose his hearing. In this situation, an inadequate language interpreter significantly impacted the farmer's access to justice and ability to recover damages for his injury (Ihimud, 2023).

Interviewee six felt that those people growing up in towns cannot use mother tongues to both communicate and interpret because they cannot really understand it. The problem is that the mother tongues are not available, and so one will not have anyone to practice it with in town.

> **"The problem is that kids are growing up in the town and you cannot use the mother tongues in town, so for a person growing up in town they cannot really understand the language, they are not in a situation *mtu anaeza elewa coz* really they are not using the language, but when you grow up in *shaggs* you need to learn it."**
>
> (The problem is that kids are growing up in the town and you cannot use the mother tongues in town, so for a person growing up in town they cannot really understand the language, they are

not in a situation one can understand because really they are not using the language, but when you grow up in shaggs (village), you need to learn it).

How effective is the implementation of the use of the current language policy?

As much as mother tongue use is allowed in courts, Interviewee one said that "it is a major challenge and a hindrance, especially if you are looking for justice". He reported that there is no satisfaction in interpreting, and the use of the official languages is mismanaged. This is especially with the assumption that everybody knows the languages, and so courts impose these languages on ignorant court users. The interviewee found fault with interpreting as he believed it brought a lot of confusion in court because some interpreters interpret totally different things from what has been said. They make mistakes such as not getting the correct words and generally giving wrong interpretation There are words that cannot be expressed clearly in English.

> **"These people are trying but in real sense something happens during interpretation. Things like feelings, those things you cannot bring out with words, like that lady that was amputated. She tried to explain how much pain she was feeling so she was using *kulalakwa na kwiw'a woo*".**
>
> (These people are trying but in the real sense something happens during interpreting. Things like feelings, those things you cannot bring out with words, like that lady that was amputated. She tried to explain how much pain she was feeling so she was using 'to have that severe burning sensation' and 'to be in pain').

Interviewee one complained that the way interpreters are appointed is inappropriate. This is because these appointments are based on if the appointees belong to those communities that an interpreter is required from, which is certified by one's name. But interpreters are not skilled on the kind of work to do. Most of them leave out a lot of information. The interpreters make the judges make poor judgments because either they are not audible enough or go in with a lot of attitudes such as getting angry with clients, getting over excited and questioning the clients for clarification, a job that is not theirs. The interpreter is supposed to say exactly what the client has said so that the magistrate can follow and ask questions where necessary. It is a challenge when all the information does not get to the magistrates. The magistrates expressed how they rely entirely on interpreters, so that, whatever the interpreter says is what they record and use to judge.

Interviewee two sounded like there was no help or solution to these problems when he said:

> **"So those are the problems that we encounter and I don't know how best to curb that, but these are some problems we have to live with".**

Clerks added that the indigenous languages have developed in such a way that the language of elderly people is not like a language nowadays. In some cases, a young person today cannot understand because some words are too deep, while other words are said with an attitude you cannot express as an interpreter. A lot is therefore lost during interpreting. A magistrate, interviewee one, says:

> **"I will not understand them the way a person who understands it would say it… there is that in-language that cannot come out in interpretation".**

Interviewee two complained that some people working as interpreters are neither interpreters nor workers in courts. These people are untrained workers that end up translating instead of interpreting. Unfortunately for the magistrates, advocates are supposed to correct errors of interpreting, but they do not do this for their own selfish gains. This is worsened by the way interpreters are appointed.

Interviewee three gives examples of such words in sexual offences. This was supported by the clerks**.**

Interviewee three also complained that interpreting is a long, but a very necessary process, but time-consuming. This is because the exchange between the interpreter and the speaker takes some time as compared to when it is a direct address.

Interviewees four and seven said that some words are not easy to pronounce in the mother tongue because they are either obscene or unfamiliar. The clerks therefore just paraphrase and end up not giving the court the correct information.

Clerks reported that language in courts is mainly English, especially for records. This is not any different in the world not just in Kenya. Globally, some states have simple policies that declare English as the state's official language, while others have designated English as the language of all "official public documents, records or meetings." Others have gone even further with laws stating that the government is "not required to provide documents" or information "in other languages," but they do allow state employees "to communicate in other languages" with the public (Ihimud, 2023). Following this argument, Interviewee five reported that some words are simply lost during interpreting, probably because it is a long sentence and the clerk is not able to recall everything. She also

reported that mother tongues have different dialects, so it becomes difficult if the clerk has a different dialect to interpret although they may understand what is being expressed. Most of the clerks reported that interpreting is poorly done.

On the question of use of English and Kiswahili in court, Interviewee five reported that a good number of people do not know how to use English or Kiswahili but insist on using it. They either end up not giving their intended information or switching back to their indigenous languages in order to communicate. This clerk feels that justice is served when English and Kiswahili are used, especially because the youth and the children today use them. Besides, everybody is asked which language they would wish used during the proceeding. So, to her, English and Kiswahili are the most appropriate languages to use in court, and not interpreting because it is not 100% done. Again, Interviewee five thinks that most people want to use English and Kiswahili because they have simply been made to believe that these are the most appropriate languages to use in public places for prestige. Most of them do not even know the languages well, yet they insist on using them.

On the question of how effective and efficient interpreting is, interviewee six said that she is unable to interpret correctly. She cannot be 100% correct. There are challenges due to age gap, language development and the intended meaning as manifested in the choice of a language.

> **"Not really 100%, may be some English words, as in you cannot get a direct interpretation, you cannot translate directly an English word to the mother tongue. So you kinda need to paraphrase."**

That,

> **"Yah! There are some words said, you know the language is kind of grown, there is the kind of mother tongue used by the old people that we really cannot understand some of the words."**
>
> **"In some cases, you cannot understand. There are some specific words that an old person can use, that are really deep mother tongue."**
>
> **"We just get what she is saying. The meaning, but even then, getting that meaning, there is still something you cannot get from the mother tongue. May be the attitude or... there is that thing you say in a particular language, but you actually mean the way you say it."**

Interviewee seven adds that some words are problematic to interpret, especially if they are closely related in meaning. Interviewee eight sums up the issue of interpreting by saying that most people do not trust interpreting. The clerks may interpret the exact thing but later the accused person or the complainant disowns what they had said and appeal on that ground. After all, most young people are not proficient in their mother tongues.

Recommending Intervening Measures

The intervening measures towards access to justice are the ways or solutions that the respondents felt could be applied to solve language barriers and the breakdown in communication. The magistrates felt that interpreting is not a hundred percent solution to the communication barrier because in many cases, it is poorly done.

Interviewee one suggested that there should be at least one Kamba judge, or a magistrate, and a Kamba prosecutor in the court, among others, so that they can listen directly to the proceedings. In order to achieve this, then indigenous languages should be made official in the counties where they are dominant. This will enable officers to use them the same way Kiswahili is used. The magistrates will be able to listen in their language and to record the proceedings in English. Once the indigenous languages have been made official, then the government will re-introduce mother tongue use for instruction in schools. The magistrates felt that rather than have the indigenous languages used for instructions only, they should also be educated just as the students do French, Chinese, German and Kiswahili. The students should have an opportunity to specialise in the indigenous languages even at higher levels of learning so that these languages are given value. In turn, the young generation will not feel shy or be ashamed to use their mother tongues, because it would have been given value by elevating their status.

However, in cases where interpreting is unavoidable, the magistrates suggested that interpreters should be trained and have interpreting in the job market as competitive as any other job. In the past, a qualification to become an interpreter, especially in larger ethnic groups, was based on one's maiden name or surname, and completion of high school education with above a C grade in the Kenya Certificate of Secondary Examination. Anybody could also be called upon to interpret as long as they know the languages involved. This practice, according to interviewees, is not correct because it leads to poor, wrong and unjust judgment, as the magistrate depends fully on the interpretation given. Lawyers and clerks should also be trained and take an interpreting course. There should be dictionaries to aid in getting appropriate meanings of difficult terms, especially in cases where interpreters are

challenged by synonyms and antonyms. Interviewee two, who is a Luhya by tribe working in Ukambani, understands the meaning of the word "kukwata" as used in sexual offences. He says:

> **"…because you will find that, what people do, they translate instead of interpret, that is when we have such problems. Like there is this word in Kikamba *'kukwata'*, others say *'alinishika* to mean he touched me. You know, the meaning is different, especially in sexual offences, when they interpret to '*alinishika'* when you use the kamba word, they actually mean that act eeh! But now the interpretation that you get, that *'alinishika'*, then you write 'he touched me' you see that it brings a totally different meaning. So those are the problems that we encounter and I don't know how best to curb that, but these are some problems we are living with. "**
> (…because you will find that, what people do, they translate instead of interpreting, that is when we have such problems. Like there is this word in Kikamba 'kukwata', others say 'alinishika (in Kiswahili) to mean he touched me. You know, the meaning is different especially in sexual offences, when they interpret to 'alinishika'(in Kiswahili) when you use the kamba word, they actually mean that act eeh! (to rape). But now the interpretation that you get, that 'alinishika', then you write 'he touched me' you see that it brings a totally different meaning. So those are the problems that we encounter, and I don't know how best to curb that, but these are some problems we are living with).

This only proves that a course in interpreting is necessary, and so are dictionaries. The people appointed should be specially and specifically trained in interpreting.

The magistrates also felt that if the use of these indigenous languages is extended to other sectors such as public offices like the county assembly, hospitals, Huduma Centres, just to mention, but a few, it would give indigenous languages more value and so officers in various sectors will be able to offer better services to everybody in the county. Interviewee one felt that there should be civic education for children to learn to be proud of their languages and culture, especially as shown by their wish to use English/Baptismal names other than their indigenous names. The magistrates felt that there is a need to support their identity.

> **"We are Africans are losing our identity. Actually, we are losing it. We want to be so westernized so that a child is so comfortable using French, another person's mother tongue. We are supporting other people's identity and not ours."**

To preserve our identity, the government needs to support indigenous languages, especially in school curriculum, and to elevate their status to regional (county) official languages.

Interviewee two felt that the use of vernaculars should be extended to police stations where statements of offences are made. The argument is that there are some police officers who are Kambas here though not necessarily from Machakos, so if a person wants to record a statement, they can do it in the language they understand best.

> **"So, if in that area can be allowed to use their languages in an official way, I think it can help us a lot and it is not just for justice, it is for even proper expressions and communication."**

The magistrate may also not see some aspects of communication like expressions that are not verbatim because usually, the magistrates write what is said all through and so have no time to look at the speakers. It is worse when the magistrate has to listen to interpreting. It would be better for the magistrates to hear these witnesses themselves to compensate for not being able to see because they are recording the proceedings. Interviewee two says:

> **"…the problem is that you are the judge, you have constantly been writing. So you cannot be writing and at the same time be observing the speakers during the proceedings. You can make comments and this will assist you in making the decision. You are allowed to do that but now you are busy writing. You have no time to look at the person speaking, so it becomes a problem…there are people who are comfortable speaking their own language so that if they are allowed to speak Kikamba, they will give all the necessary details, but if limited to Kiswahili, they might miss out on some important evidence. If they say it in Kikamba, they will say everything and I will get the information myself."**

The judiciary, according to the magistrates, should re-organise its language management during court proceedings. Interviewee three said that the judiciary is still adversarial, and so we are expected to sit and listen except for the vulnerable witnesses where they can interject. Interviewee three felt that it is wrong to listen to wrong interpreting and not correct it. The argument that magistrates will be considered partisan is only one-sided.

They solve a problem by creating an equally bad or worse one. In one instance, a litigant in a civil case repeatedly asked for and was denied a Polish interpreter for eight of the nine hearings at which she appeared. The court in all but one instance determined that she was able to understand and communicate in English, despite her clear inability to fully communicate or express herself in court. This defendant was representing herself and attempting to cross-examine the plaintiff's witness on her own. However, her inability to communicate effectively frustrated the court and she was accused of intentionally wasting the court's time despite her repeated pleas for a court interpreter. Following a judgment entered against her, the defendant appealed in her case. On appeal, the Supreme Court of Hawaii found that the district court had abused its discretion in denying the repeated requests for an interpreter when it failed to "adequately inquire" into the defendant's language access needs. (Ihimud, 2023). Interviewee two says:

> **"…they are looking at one aspect of justice and ignoring the likelihood of bias, but you know that if they look at the wider aspect of justice, we need to in co-operate these things."**

This was in reference to having a judge/magistrate who belongs to the community so that they can speak their mother tongues, and allowing them to intervene where the language becomes a problem.

> **"If you know the language you should be allowed to correct. You are the one in-charge, at the end of the day, it is your proceedings. You are the one hearing the case, you are the one making the decision, and so if something is wrong, you correct it."**

Interviewee three said:

> **"There is the beauty of being represented. But the advocate would not be for the accused person, if anything he is very happy when the right language does not reach the court. They would not point out that this interpreter is not pointing out what the witness is saying."**

This means that it is difficult to achieve justice if the people expected to help the accused person or the complainant and the witnesses are not willing to let there be proper communication. Interviewee three proposes all participants to use a language they all understand. She also proposed that interpreters be audible enough so that whatever they say may be understood by everyone in the court.

Interviewee four complained that in some court proceedings, complainants are even barred from speaking, especially by their advocates. The advocates take all the responsibility and assume that their clients would not need to speak because the advocates know all there is to be known and so can fully represent their clients. It is worse when clients do not know English because since they are not speaking, there is no interpreting. They are therefore excluded from hearing the proceedings. Some people insist on hearing what transpires in court. If the language is common, then justice would be better served. Because of this, Interviewee four felt that mother tongues should be given an official status so as to accommodate everyone involved.

Interviewee four said that it would be better for the accused person and the witnesses to speak directly without the interpreter, but the recordings be in English. Interviewee eight symphathised with the accused person and said that through interpreting, the magistrate's decision on the case at hand is at the mercy of the interpreter. It is better for the magistrate to hear for themselves. He comments that:

> **"And even when this complainant is explaining or giving a version of the experience that he or she went through in that mother tongue, and the magistrate understands that language, and are saying some very deep things there which ideally are supposed to inform the decision of the magistrate to make, it is better than when the magistrate sits there, this complainant is speaking a lot of deep things and because there is someone interpreting the magistrate is at the mercy of what this interpreter will tell them."**

Interviewee five justified why using Kikamba like we do Kiswahili is possible. She said:

> **"… you know with mother tongue; the proceeding takes a long time. You see this interpreting, may be the magistrate may not be a Mkamba and this complainant is a Mkamba, you see they have to speak Kikamba, then I interpret, so that the magistrate can record. But when they speak directly in Kiswahili he is able to record directly in English."**

She further said that it seems that it is unofficial to use mother tongues in court. Mother tongues are being spoken but must be interpreted for other people in the court to understand. This is why it is an open court; people who are not Kambas also want to know what is happening. She made this comment to support that it is acceptable to use mother tongues in court, but it is treated as if this is not the case. She adds that the other people in the court that are unable to understand the language being used, (mother tongue) need to hear, hence an interpreter. To this interviewee, speaking in their mother tongues during court proceeding is official and should be treated as such.

The court system may be pure British system but Interviewee five felt that English is poorly used and many do not even know what they are saying. The youth have reverted more to using Sheng'. It is only fair if they use their mother tongues if they do not know English and Kiswahili. But even then, if Sheng' is the best language that they can express themselves in, then they should be allowed to use it in courts. In fact, Interviewee six added that people should be motivated to use mother tongues even if it means grading them for employment.

The question on which language should be used by those who do not understand English and Kiswahili had varied responses. But majority of the clerks felt that for there to be justice, the magistrates should hear for themselves. Interpreting should be avoided. There should be a magistrate that knows the local language of that area as well as some other court officials. Interviewee six felt that if the magistrate was from the tribe, it would be easy for everyone to run the court proceedings.

Interviewee six also felt that the advocate could read in English to the court but speak to the clients in mother tongues, especially when those involved know the mother tongue. English is for purposes of recording. She reiterated that lawyers and advocates could be allowed to use Kikamba if it is made official.

> **"I think in that case, they would be allowed, if you can use Kiswahili as an example, I do not need to interpret Kiswahili, the lawyer uses Kiswahili and the magistrate too. It depends on the accused person. Actually, in most cases the simple legal things, or when the conversation is not long, they can address the accused person in Kiswahili, but when reading something long, maybe like a judgment, that is when I need to interpret. But the normal words like 'how are you' may be 'what do you want to tell the court' examples like those, you can use Kiswahili. So I am thinking if the magistrate can understand there is no need for interpretation. They will just note down in English".**

Interviewee six felt that mother tongues should be made official too because a lot is lost in interpreting. So they would rather use mother tongues directly.

Together with the languages being used in schools, interpreters need more training, especially specialization in their languages. According to Hale, (2020), many are quick to criticize the interpreter's performance, but few are willing to advocate rigorous pre- service university training, to provide adequate working conditions and to pay professional rates that are commensurate with the difficulty of the task. On the one hand, courts seem content to employ untrained bilinguals to act as interpreters at very little expense; on the other, they wonder why these poorly paid, untrained individuals are not performing satisfactorily. Only those people that really know and understand the languages and have been trained in interpreting should be involved. Interviewee six felt that learning mother tongues should be accompanied by a promise of mother tongue use in future to acquire jobs such as interpreting; news casting among others. Calling an elderly clerk to interpret when they find the language too deep to interpret is only a temporary solution. Hence, Court interpreters must be properly trained, the difficulty and importance of their work fully recognized, their pivotal role in the judicial process acknowledged and accepted by judicial authorities, and their compensation established in accordance with their responsibilities (Giambruno 2008).

Interviewee seven felt that when the magistrate is from the tribe and interpreting must be done, when the magistrate knows the mother tongue being used, interpreters cannot make mistakes and if they do, the magistrate will have heard the correct information. The magistrate may not speak in the complainant's language for fear of being deemed partisan. But certainly, they will have heard and understood the correct information. Hale, (2020) puts it clearly that a jury's attempts to evaluate the credibility of a witness can be frustrated by inadequate interpretation. A magistrate's evaluation of the evidence presented in another language will be flawed if based on inadequate interpretation. It is necessary therefore, for the magistrate to get the right interpretation. This applies even in cases where different ethnic groups are involved.

> **"…because now let us say I am a Mkamba and I accuse a Kikuyu, then how do you start talking to me as a magistrate in Kikamba, they will complain, say that the magistrate was talking to the client in his own mother tongue, somebody must interpret."**

On the question of promoting mother tongues to official status within their counties, in order to improve communication in subordinate courts, Interviewee seven felt that the media has already shown the way, so Kikamba should be promoted to the official status so that it can also be comfortably used in courts. Otherwise, she was opposed to the idea of using mother tongues, saying that there are some abusive and offensive words in mother tongues, especially in the Sex Offense Cases (SO) that can only be said in another language. She further reiterated that promoting mother tongues is good because we still have the elderly and the illiterate that need to use it in court. However, she pointed out that the coming generation may not have anyone that does not know Kiswahili. Besides,

there are many indigenous languages in Kenya (at least 42 tribes) and you cannot just use Kiswahili because law is very difficult in any other language other than English. There are things you cannot say in Kiswahili or Kikamba. It is easier to quote them in English. Interviewee eight felt that there is a need to make mother tongues official languages so as to avoid interpreting in which apparently some originality and some details are lost. If local languages are used, it will help solve a big deal with the services offered, the relations with the public, accommodating other languages, and the cognitive development of children. He felt that it is possible to have all court officials use the language of the accused person and the witnesses.

5. Conclusion and Recommendations

5.1 Conclusion

It is not worth interpreting when the people involved are not doing it correctly. Some interpreters do not know their indigenous languages. Some interpreters do not have skills of interpreting. Some often allow long utterances from accused persons or witnesses. They end up forgetting them, resulting in poor reporting. Others also get carried away by emotions, depending on the kind of a case or person at hand. Generally, some interpreters do not report exactly how and what the speaker has said. These reasons render the use of interpreters who lack skills of interpreting in the courts useless.

5.2 Recommendations

1. There is a need to have some members of staff from the dominant community in a county as magistrates and prosecutors to enable more meaningful communication.

2. That the judiciary should re-organise its language management during court proceedings and revise the adversarial mode of communication in order to allow freedom of speech and to avoid infringing on linguistic human rights.

3. Making dominant indigenous languages in each county official. The government should invest financial resources to enable the standardization, orthography and publishing of indigenous languages in each county in Kenya.

4. In an effort to have explicit written policies, there is a need for a law and court language policy. This policy needs to embrace a culture of constitutionalism, and should domesticate international conventions, treaties and agreements. Linguistic human rights should be guaranteed so that they are accessible and beneficial to everyone.

5. Indigenous languages should be used in other sectors, including police force and the school curriculum. This will give the language value and enable its users to use them without embarrassment.

6. Defining status of indigenous languages and foreign languages is necessary. The government should enact an indigenous language act that caters for various aspects of creation and implementation of a language policy. Policy makers need to clarify the place of official, national and official minority/indigenous language at a county level.

7. There is a need to have training for interpreters and interpreting to be professionalised as a job opportunity on its own. Clerks should be trained as clerks and not double up as interpreters.

8. Further research should be conducted in other domains to determine how language is used and to establish the need to promote indigenous languages in order to allow easy communication.

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