



Transformation and Incorporation of the Gusii Indigenous Justice Practices into British Colonial Judicial Systems, 1906 to 1963

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ABSTRACT

Transformation and functionality of a judicial system in any country is mandated, driven and guided by the changing needs of the affected people. This legal endeavour forms part and parcel of the broad agenda of the transformation of the state and society. It aims at fundamentally getting rid of aspects that are irrelevant and introducing reforms that meets the current needs of governance structures of the society. In some cases, indigenous justice practices and precedence are often considered during transformation. This paper presents findings of the study that aimed at examining the transformation and integration of the Gusii traditional justice practices into colonial judicial systems in the period covering 1906 to 1963. Specific objectives of the study were; to examine the ways Justice was administered among the Abagusii prior to the Colonial period, to investigate how indigenous Gusii Justice was integrated into the colonial judicial system between 1906 and 1937 and to analyze the transformation and integration of Gusii indigenous justice practices into colonial judicial system between 1939 and 1963. The study employed two major theories. These were; Structural functionalism and participation theories. Gusiiland which covers the present day Kisii and Nyamira counties in Kenya, was the centre of focus. Respondents in the study were drawn from retired Judges, long serving magistrates, advocates, council of elders, clan elders and other knowledgeable individuals thought to have an understanding of trends in the history of justice systems among the Abagusii. The sample size consisted of 150 knowledgeable respondents. The study employed Purposive and snowball techniques to collect data. sampling research design. Non random sampling was used to select participants who the research Data collection instruments were; questionnaires and face to face interview schedules. Both primary and secondary sources were used to generate the information for the study. The study took a qualitative approach. Data was analyzed using the descriptive statistics. The study found out that some aspects of the Gusii traditional justice practices were incorporated in the British system. Some of these aspects are found even in today's judicial system. Through this study, it is hoped that African Governments bring changes or reforms in their judiciary systems in the administration of justice to allow greater flexibility by integrating traditional justice methods. This may help in reducing backlog of cases lying in the courts of developing African countries today. The study is also set to benefit historians by adding new knowledge for comparative studies.

Keywords: Transformation, incorporation ,Gusii justice ptractices, Colonial period.

INTRODUCTION

Background to the Study

In traditional African societies, indigenous justice system, which was community based had been in existence since time immemorial. It was human centered and employed restorative and transformative principles in conflict resolution. Restorative justice was negotiable and democratic; hence it empowered the community to



mediate in conflicts.¹ Ideally, African indigenous justice systems provided opportunities for dialogue among the victims, the offenders, their families and friends, and the community at large. Community Conflict provided opportunities for primary stake-holders to examine and bring about changes to the society's social institutional and economic structure.²

Prior to colonization of Africa, customary laws governed all affairs of the people of Africa. African customary laws were local in nature and jurisdiction over such laws and the institutions that administered them were historically ascertained on the basis of membership in an ethnic or tribal group. This meant that the affairs of the over eight hundred ethnic or linguistic groups which exist on the continent of Africa were governed by an equal number. At that time, indigenous justice system was therefore the only rule of law in operation in Africa. The same can be said of other parts of the world prior to their colonization by imperial powers. Indigenous justice system had customary laws which were both substantive and procedural and reflected the societal morals of the day and were administered by institutions such as councils of elders or tribal chiefs.

African indigenous justice system was also victim-centered, with victims, offenders, their families and the general community involved in defining harm and repair. As an inclusive system, it sought to address the interests of all parties to the conflict.³ The social solidarity and humane emphasis of the system was reflected in the treatment of offenders. In African set up, offenders were encouraged to understand and accept responsibility for their actions. Indeed, this was an organized way of dealing with conflicts among African communities and ensured peaceful co-existence among community members of the various African societies. Scholars from a variety of disciplines have discussed the various justice practices and their transformations in Africa. However, a study of this kind which deals with the transformation of the Gusii indigenous systems has not been done.

Gusii indigenous justice practices were mainly organized in informal legal institutions which started at the village level. Each village was headed by a village elder, *omogaka bwo omochie* (head of the homestead) who settled any dispute at that level. The second level was *Etureti* (elders of the sub- clan). Members of this council settled disputes involving of two or more homesteads. Next in the hierarchy, was *Egesaku* which was an informal court of appeal based at a cluster of related clans level and had powers to veto a ruling made at *Etureti* level. Finally, there was *Abakumi*, an informal supreme court for the whole of the Gusii people. Besides making laws affecting the whole community, *Abakumi* had powers to invoke the injection between the Gusii community and their ancestors. This was indeed a highly respected council.⁴

When the British came to Gusiiland they were not in hurry to introduce their judicial systems at once. Between 1900 and 1906 they left the Gusii people to continue with their administrative systems to avoid sharp resistance and to put in place the necessary colonial structures. Once the British were sure of their ability to control the Gusii resistances, the transformation of the indigenous justice practices through integration into the colonial judicial systems began in 1907.⁵ The Gusii people, just like most Africans through their leaders tried to resist but were eventually defeated in 1908. This then marked the beginning of effective colonial rule in Gusiiland and the long but gradual process of transforming and integrating indigenous justice system into colonial judicial system followed up when Kenya gained independence in 1963.

Statement of the Problem

Gusii indigenous justice practice is an aspect that has received minimal attention from scholars despite its historical importance and relevance. A few scholars who have attempted to study the Gusii community have focused mainly on the social, economic and political organizations. Presently, no scholar has made a complete

¹ S.Ottenberg *Leadership and Authority in African Society*, Washington, University of Washington Press, (1971). p.115.

² D. Onguitimish, *Conflict resolution in Traditional past and Modern times in Nigeria*, Lagos, Damns Press, (2004). P 7.

³ I. W.Zartam, *Inclusive Judicial System in Ghana; Traditional and Modern*, Michigan, Institute of Peace Press, ((2000), pp 45-54.

⁴ J.S. Akama and R.M. Maxon, *Ethnography Of The Gusii Of Western Kenya, Avaniishing Cultural Heritage*, Nairobi, (1986),p88.

⁵ W.R. Ochieng, *A Pre-colonial history of the Abagusii of Western Kenya C. AD 1500 – 1914*, Nairobi, East Africa Literature Bureau (1974).

study on transformation and integration of traditional justice practices among the Gusii people using a historical approach. In general, literature on traditional justice practices among many African communities the Gusii from historical stand points seems to be limited despite the numerous literature on judiciary and constitutionalism.

The 2010 Constitution of Kenya recognizes and embraces alternative dispute resolution which leans on indigenous justice system. Successful implementation on this part of the constitution heavily depends on the clear understanding of traditional justice systems of almost all the communities of Kenya. Each of these communities had unique aspects of justice system based on their social, economic and political backgrounds. Many of them relied on grass root leaders to resolve emerging disputes. This is in line with the target of the current constitution to expeditiously dispense justice.

When the British colonized Kenya they were not in a hurry to abolish indigenous justice system but opted to transform and integrate it into their judicial systems in a gradual process. The decision to integrate traditional justice practices was guided by its importance and effectiveness in administration of justice which the Africans were familiar with and used for decades. Between 1906 and 1963 the colonial government in the administration of justice in Gusiiland introduced numerous changes. However, it never ignored existence of indigenous mechanism of resolving conflicts. This study therefore, was set to interrogate historical developments of Gusii indigenous judicial systems and its transformation and incorporation into the British system of administration.

Objectives of the Study

The General Objective of the study was to evaluate the Transformation and Integration of the Gusii Indigenous Justice Practices into Colonial Judicial Systems. Specific Objectives of the study were;

1. To establish the evolution and development of Indigenous Justice Practices among the Gusii people in the pre-colonial period.
2. To examine how the British integrated the Gusii Indigenous Justice Practices into colonial judicial systems between 1906-1937.
3. To find out how Gusii Indigenous Justice Practices was transformed and incorporation into the Colonial Justice systems between 1937-1963.

LITERATURE REVIEW

Prior to colonization of Africa, customary laws governed all affairs of the people of Africa. According to the Oba people of Nigeria, customary laws were local in nature and jurisdiction over such laws and the institutions that administered them were historically ascertained on the basis of membership in an ethnic or tribal group. This meant that the affairs of the over eight hundred ethnic or linguistic groups which exist on the continent were governed by an equal number of different customary rites. At that time, Local Justice System was therefore the only rule of law system in operation in Africa. The same can be said of other parts of the world prior to their colonization by imperial powers. Traditional justice systems had customary laws which were both substantive and procedural and reflected the societal morals of the day and were administered by institutions such as councils of elders or tribal chiefs. The study lacked the aspect of the integration of the customary laws with local Justice System and this posed a challenge in community participation.

B.B Utne, in analyzing indigenous conflict resolution in Africa, agreed that traditional approaches to conflict resolution have been excluded in Africa.⁶ It is her contention that those traditional approaches are now in greater demand in the contemporary world, particularly in Africa.

⁶ B.B. Utne, *Recolonization of the African Mind*, Jomtien Thailand Routledge Press, (2000). PP 78-108.



Closely related to B.B. Utne, is B Ofuho's paper to the All – Africa Conference on African principles of conflict resolution and reconciliation. He showed the experiences of grassroots peacemaking efforts among the communities of Kidepo valley of Eastern Equatorial. The major conflict on the groups of people who lived in the Kidepo valley was cattle rustling. Whenever a problem of this nature occurred, the communities identified the problem, convened meetings that lasted for two or three days in the Forest where they deliberated over the issue and resolved it. In those conflict resolution meetings the role of opinion leaders and Council of elders was very critical. Apart from this, the elders used curse to deter young people from stealing cattle. Contrary to Ufuho, this study looked at the indigenous Gusii African justice systems and how they were integrated to colonial judicial systems. However, the roles of elders in administration of justice and use of curses in Gusii traditional justice system is similar to the communities of Kidepo valley of Eastern Equatorial as was presented by Ufuho.

Richard Lanek in his paper “*Mato oput*” the drinking of Bitter Herb,” concerned himself with integrating indigenous approaches with national and international mechanisms for conflict resolution and reconciliation. He went further to contrast the indigenous approaches, especially the Acholi approaches, with the Western legal ones. This study contrasted the Gusii legal approach to the British legal approaches in Kenya.

According to T. Ochichi the colonial experience of Africa began in 1885 after the Berlin Conference, in which Africa was partitioned into European spheres of influence. With the arrival of the Europeans, various ethnic groups were combined within arbitrarily formed territories and subjected to European laws and institutions that operated along the lines of these newly created regions. African customary laws and attendant institutions were thus greatly diminished as they were restricted in application to the extent allowed by formal and state sanctioned laws.⁷ Ochichi's works showed how customary laws were alienated during the inception of colonialism. Thus, Africa got a colonial legacy of legal pluralism or dual legal systems borne out of the effects of imposition of foreign laws of colonial powers.

M. Herbst supported the assertion of Ochich. He argued that imported foreign legal justice systems were applied with limited variations to account for local circumstances and the necessities of colonial rule. The net effect was to marginalize the application of pre-existing African customary law systems.⁸ Laws were made restricting the application of customary laws to matters of land disputes and personal law such as marriage, divorce and inheritance. Application of customary laws would also be subject to the ‘repugnancy rule’, that is, it should not contravene a sense of morality and justice as conceived in western world societies that is according to W.D Nabudere. Most Africans felt alienated from the imposed dual system of justice, as the foreign laws were not only culturally alien but also discriminative.⁹ There was a justice system for Africans and another for non-Africans. The reviewed literature above showed that the Africans had justice system which was based on their respective social, economic and political organization before colonialism just like that of the Gusii people.

According to B. Bowd, in Uganda, the British had recognized the traditional Kingdoms and allowed them to exercise judicial power in their courts. However, these kingdoms and their judicial tribunals were abolished in 1966 by the post-independence Government. Customary tribunals were reintroduced in 1986 when the National Resistance Movement (N.R.M) formed the Government and set up the Resistance Committee Councils and Courts at the village level.¹⁰ These courts were later renamed as Local Council Courts (L.C.C). The LCCs are an integral part of the Ugandan judicial structure from which cases are escalated to the formal courts and sometimes referred back for parties to apply community alternative dispute resolution mechanisms. Bowd's works dealt more of post independence which was outside the scope of this research.

⁷ T. Ochichi, *Colonial experience in Africa And It's Implications on Traditional Justice Practices in Northern Nigeria*, , Lagos , United Press, (2000). pp 23-38.

⁸ M. Herbst, *Customary laws Verses Common Laws in Marriages*; London (2009). pp122-130,180.

⁹ W.D. Nabudere, ‘The contribution of African traditional learning to mutual understanding’. Paper presented to the NASEDEC conference on "Learning in Intercultural Contexts", at SIDA conference Center Sando, Sweden, 30 Oct -2.Nov. 1997.

¹⁰ B. Bowd, *Community Alternative Dispute Resolution*, Ohio, Unesco Associated Press, (2009).P2-27



Sierra Leone is the best example in Africa where the integration of Indigenous African justice was well integrated into colonial judiciary. According P.Bohannan, today Sierra Leone customary law is enshrined in the 1991 Constitution which states that the common law of the country comprises African customary laws of her various ethnic groups. Customary justice is dispensed in line with the beliefs, customs and traditions of the inhabitants by local courts.¹¹ The local courts have a limited jurisdiction, regulating marriage and divorce, and adjudicating land disputes and minor criminal cases, limited to a maximum custodial sentence of six months or where a minimal fine is imposed. These Local courts dispose off a significant volume of minor criminal cases.¹² They are presided over by local elders proficient in customary law; no lawyers are present, but customary law officers assist in the proper application of customary law. The law these courts enforce is however unwritten, geographically dependent and often ad hoc. Fines are not standardized across courts, and in some, have become exorbitant. Despite these constraints, satisfaction with the courts remains high in both rural and urban areas.

According to Archie Mafeje, in Tanzania there are three systems that exist parallel to each other, that is, the formal criminal justice system, customary law and Islamic law. The Magistrates' Courts Act of 1963 abolished the criminal customary law, which was jettisoned in favor of English law. The significant role customary law played has been diminished by section 11 of the Judicature and application of Laws Act which although recognizing the applicability of customary law, limits it to civil matters.¹³ Although Tanzania does not have customary law courts, its primary courts may entertain evidence touching on matters of customary law. Robison's works dwelt more on formal criminal justice and leaves out African indigenous justice system which was the concern of this study.

S. Kenyanjui, in her works asserted that traditional African justice system was restorative. Her research examined three Kenyan communities for example Akamba, Agikuyu and Ameru. The Akamba's justice system hinged on the inescapable social ties that made the individual a part of the community, hence dictating individual's behavior. Social practices as well as the justice system governed individual's conduct.¹⁴ Restorative justice was fundamental and therefore had to be maintained as it formed the foundation of the Akamba community. The process of dealing with offenders was based on a hierarchical structure.

Before colonialism, the Agikuyu traditional justice system reflected the co-value system of the clan (*Mbari*).Within the *Mbari* grouping there was an established council of elders referred to as *Kiama Kia Mbari* .The elders' court was mandated to oversee social issues as well as to act as a judicial body.

Just like the Akamba and Agikuyu, the Ameru traditional justice system was governed by a council of elder's known as the Njuri Ncheke. The Meru traditional justice system was integrated with other social processes. In a nut shell, most African traditional justice system, the Gusii not exceptional, restorative justice was considered as a strategy for governing the conduct of individuals in their communities.

Jomo Kenyatta wrote extensively about traditional justice practices of Gikuyu before colonialism his works he clearly showed how the Agikuyu carried out their judicial practices which begun at the home homestead where the father acted as the judge. Just like the Gusii indigenous justice system when the head of the homestead could not settle some disputes he invited heads of the families within *Mbari* (Kin's fork) these were elders within the family who were known as *ndundu ya mocie* that dealt with the cases within precincts of their homesteads. No case could go to the next hierarchy of court before being tried by family council.¹⁵This was quite similar with the Gusii indigenous system. Jomo Kenyatta's works on Gikuyu justice system was able to

¹¹P. Bohannan, *Justice and Judgment among the Tiv*: London , Oxford University Press, (1999). P8

¹² P. Bohannan, (1999). Opcit, pp.12-16

¹³ A. Mafeje.“African Philosophical Projections and Prospects for the Indigenization of Political and Intellectual Discourse.” *Seminar Paper Series*, No. 7. In Harare November 1992.

¹⁴ S. Kinyanjui , “Restorative Justice In Traditional Pre-Colonial “Criminal Justice Systems In Kenya” A seminar paper presented in The University of Leicester.

¹⁵J. Kenyatta, *Facing Mount Kenya, the Traditional Life of the Gikuyu*, Nairobi , Kenway Publications Ltd, (1978).



reveal just like the Gusii justice system that there was no special court house, but there was special meeting places where the *kiama* or council of elders met in the open air under a tree.

Oathing among the Agikuyu was taken very seriously just in almost the same way Gusii people did. In Gukuyu society, oath or *odeal* was the most important factor that controlled court procedures. Its purpose was to prevent people from giving false evidence and also helped to bring the offender to justice through guilty conscience and confession. There were three kinds of oaths similar to that of the indigenous Gusii people. Besides oathing, the judicial procedure for both criminal and civil cases of both the Agikuyu and Abagusii were quite identical with an exception of so many ritual practices that were conducted by the Agikuyu which were not many among the Abagusii. The proper procedure of justice system for both the Agikuyu and Abagusii was dueling or fencing. In general Jomo Kenyatta's works on the Agikuyu traditional justice system benefited this study greatly because it provided a base for comparison of African.

J Akama and R Maxon, researched on the administration of local traditional justice practices among the Abagusii during the pre-colonial period. They showed how Gusii judicial system and customary laws were closely linked and intertwined with the people's social, economic, political and religious practices.¹⁶ According to Akama and Robert, the Gusii people never had centralized formal institution dealing with various legal issues, and following clearly structured and formalized regulations concerning law enforcement. The indigenous Gusii informal judicial system followed hierarchical informal structures that started from the lowest level, the family homestead, and progressed upwards to the clan level and eventually the whole Gusii community. At the homestead level the patriarchal founder of that homestead, *omogaka bwo' omochie* handled all judicial matters.¹⁷ In certain instances it incorporated people such as visitors known as *abamenyi*. The second level consisted of a cohort of informal courts called *etureti* that was usually made up of highly respected elders of the sub-clan. *Egesaku* was the next level of the informal court that acted as an appeal court. Most of the cases that were handled by *egesaku* courts were cases of appeal where litigants were usually not satisfied by the judgment the *etureti*. *Abakumi* was the last court which was a sort of a supreme court for the Gusii people. The *abakumi* were considered to have supernatural powers bestowed upon them by the ancestors. Anybody who went against their public pronouncement or ruling was cursed to death.¹⁸ Akama and Robert's works greatly benefited this study because it reveals and recognizes that the Gusii people had a well organized judicial system before colonialism. However, their works focused on the hierarchy of the pre-colonial Gusii justice practices but paid little attention on how actual justice was administered and how it was integrated into the colonial system.¹⁹

Closely related to J Akama and R Maxon's works is Gideon Were and David Nyamweya who wrote about the Gusii social-cultural profile and covered several aspects of Gusii pre-colonial justice practices. Unlike J Akama and R Maxon, Gideon Were and David Nyamweya elaborated on the criminal offences and their respective punishments. Some offences were against the individual while others were against the whole clan.²⁰ Before a ruling was passed a number of factors were taken into consideration among them was if the offences committed was willful referred to as *moeneno* or accidental referred to as *mosiabano*. When it was discovered beyond no reasonable doubt that the offence was by accident then no punishment was meted out and instead reconciliation (*ogosonsorana*) had to be done. Were and Nyamweya in their conclusion pointed out that when the British established their rule in Gusii land they integrated Gusii indigenous justice practice but in their literature they failed to show how this was done, an aspect this study dug into and documented.

According to the Annual Report (1982), accessed from the District Commissioner which bears the date of 1922, the Safari Book diary, gave background information on how and when Kisii started as a District. This

¹⁶J.S. Akama and R. Maxon, *Ethnography of The Gusii of Western Kenya, a vanishing Cultural Heritage*, Nairobi, (1986). pp81-102.

¹⁷Ibid. pp90-93.

¹⁸J.S. Akama and R. Maxon, *Ethnography of The Gusii of Western Kenya, a vanishing Cultural Heritage*, Nairobi, (1986). pp81-102.

¹⁹ Ibid.pp93-6.

²⁰ S. Were and D. Nyamweya, *Kisii District Social Cultural Profile*, Nairobi, University of Nairobi Institute of African Studies Press, (1989).pp156-162.



report was critical to the research because it revealed when and how the integration of local traditional Gusii Justice System began with the shift of the capital from Ugaya (present day Karungu) in 1906 to present site Kisii ,Boma as it was referred by the Luo of South Nyanza. This report further revealed that the integration process was gradual.²¹ Even after colonizing Kenya, the British never rushed to establish their justice system among the Abagusii .

Most important in the District Commissioner's report to this study is it's assertion that the early decades of colonization the Gusii people continued to take their disputes to *Abanyamaiga*, the wisdom of the elders respected by all.²² Yet if the individual refused to abide by a ruling of the *Abanyaiga*, the elders could do little other than, in the extreme cases, invoke a curse. This report further indicated that Northcote was appointed as Assistant District commissioner in 1907 and started the selection of influential individuals as the chiefs of sub-tribes and headmen for the various clans who will act as agents of colonial government in everyday life of the Gusii people. These chiefs were known as *Abakumi* (plural). This report was only limited in its information up to 1912 but useful in the initial establishment of the integration process.

Robert Maxon was able to show how Gusii resistance against the British in 1920 caused the British to drastically change colonial judicial systems by accepting traditional Gusii customary laws.²³ Roberts Maxon's works is quite brief and therefore does not provide much literature in the preceding years. That is why this study was necessary to dig out and get the information which was ignored.

B.L Shadle's research was more useful to this study because it demonstrated how the colonial government in 1923 established a new system of colonial tribunals. In 1923 the colonial government established a new system of central tribunals. A single central tribunal was set up to hear civil cases in Gusiland. The location tribunals continued to hear minor criminal cases but the new central tribunal heard all civil cases. The British administration made the change because it was felt that chiefs, elders, and headmen were deliberately encouraging litigation and demanding high fees, both in court and outside.²⁴

In 1926, the British colonial administration initiated judicial reforms which abolished the central tribunal and reconstituted a system of location tribunals for civil cases. Each location now had one tribunal instead of several as before 1923. A superior tribunal for appeals was later established for the Gusii Highlands and a further right of appeal existed to the district officer (DO) the title by which assistant district Commissioner would henceforth be known as District Commissioner (DC). This judicial structure was much more pleasing to most Gusii people than the short lived one of central tribunals.

B.L Shadle's works on "*Girl Cases*", *Marriage and Colonialism in Gusii land, Kenya, 1890-1970*, extensively covered on marriage related disputes and how they were handled through an integrated process of Gusii traditional customary laws and the British colonial judicial system.²⁵ In 1937 the tribunals underwent an overhaul in the whole of South Kavirondo District which had thirty-nine courts were consolidated into nine, two of which served Gusiland. The Gusii tribunals were known as *Amatongo*, one at Manga and the other at Ogembo. A third court was added fifteen years later at Gesima in 1952. The tribunals (*Ritongo* courts') jurisdiction did not cover more serious criminal cases such as murder. Otherwise the tribunals enjoyed authority over a whole host of disputes, from cattle theft to assault, boundary disputes, as well as elopement and adultery.

B. L Shadle futher revealed that the district commissioner who was the president of the local native council heard all appeal cases. Each tribunal of the first instance consisted of a president, the vice president and four

²¹ KNA/DC/KS1/1 South Kavirondo annual Reports 1908-1912.

²²KNA/DC/KS1/1 South Kavirondo annual Reports 1908-1912 .

²³ R.M. Maxon, (1989). *Conflict and Accommodation in Western Kenya; The Gusii And The British,1907-1963* London, Associated University Press,,pp26-59

B.L. Shadle, (2006). '*Girl Cases*'; *Marriage and Colonialism in Gusiland, Kenya, 1890-1970*, London, Heinemann Portsmouth, pp1-14.

²⁵B.L. Shadle, (2006). '*Girl Cases*'; *Marriage and Colonialism in Gusiland, Kenya,1890-1970*, London Heinemann Portsmouth , PP67-74.



panel of six each. Each panel sat for a month at a time in rotation. The Kisii appeal native tribunal had a president, a vice president and a panel of 8 each, and the Luo Appeal native Tribunal had a president, a vice president and a panel of 15 each. As the president the district commissioner heard the appeal cases and also handled labour matters. This was particularly after 1940s.²⁶

The Provincial Local Native Council and Local Native Council passed and amended laws which from time to time were forwarded to the tribunals (*Amatongo*) to enact. So far it is only Shadele's works which attempted to document the concept of the integration between the Gusii traditional justice practices and the colonial judicial system.²⁷ However, his main focus was on marriage disputes but it provided crucial background information on the third objective of this study which most scholars have not considered in their works.²⁸

Philip Mayer wrote about the Gusii bride wealth, law and custom which is an area so much related to this study. He extensively covered on matters to do with bride wealth laws in traditional Gusii. Marriage procedure and legal implications of the bride wealth laws in traditional Gusii was also well covered and in detail. However, only a scanty part of his works in chapter one would benefit this study. He noted that Gusii traditional judicial system had comprised arbitration at kinship level by elders of the family and the wider arbitration of judicial specialists called *etureti* extended over a neighborhood group. Later in the era of British administration, the judicial powers of the chiefs were restricted and system of native tribunals, with appeal to European officers was set up.²⁹

J. O Abai, in his works wrote so much about the Gusii people covering aspects such as the origin and migration, food (health) and plants, customs and traditions of the Abagusii people. However, his works only mentions a few isolated aspects touching on justice practices of the Abagusii. His works would benefit this study on the evolution of the eight clan system and their respective chiefs which eventually became eight early colonial locations that was a base of British judicial tribunals. Most of the author's works are general although the study leans more towards customs and traditions revolving around rites of passage such as initiation, marriage and death.³⁰

Robert Maxon researched on the Gusii Judicial systems in the period before the inauguration of colonial rule. He noted that within the family or individual home stead, decisions were made and disputes settled by the head of the house hold, usually by the eldest male, in quite authoritarian fashion.³¹ When the lineage elders sat as a court, they had no special agencies to enforce their decisions. In fact, they never arrested a person accused of crimes. There were however several ways in which the elders' judgment could be carried out. The respect of the local community for their age and the legitimacy of their role could not result in the enforcement of their decisions. Also, of considerable importance by Robert Maxon were the influence and the threat posed by the most wealthy and powerful men in the area. These individuals played a considerable role in the community decision making, particularly judicial proceedings. They normally had several wives and a number of sons whom they used as a military force to see that the decision of the court were carried out. Just like other examined works, Robert Maxon did not address the aspect of the integration of the Gusii justice practices into the colonial judicial system.

Theoretical Framework

In recognition of the complexity of transformation and integration of Gusii Indigenous Justice Practices into British colonial judicial system, no one theoretical approach was adequate to provide its in-depth understanding. Therefore, the study used two theories which are; Structural Functionalism and Participation

²⁶B.L. Shadle 'Girl Cases'; *Marriage and Colonialism in Gusiiland, Kenya, 1890-1970*, London, Heinemann Portsmouth, (2006), PP67-74.

²⁷Ibid, p 90

²⁸KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1923

²⁹P. Mayer *The Lineage principle in Gusii Bride Wealth Law and Custom*. London, Oxford University Press (1950).pp2-12, 35-50, 56-66.



Theories. Structural functionalism theory is a sociological theory. It attempts the various social institutions that make up society. Structural functionalism developed slowly over time with the help of many sociologists in different parts of the world. The most significant contributors to the initial development of this theory are Emile Durkheim, Radcliffe Brown and Herbert Spencer.

Herbert Spencer, who was an English sociologist, was the forerunner of formalized structural functionalism. He is best known for the phrase “survival of the fittest”. Herbert Spencer’s intention was to support a societal form of natural selection. One of the primary focus in Spencer’s work was societal equilibrium. Spencer argued that there is a natural tendency in society towards equilibrium. This is even when the conditions of the society are altered; the resulting changes to the social structure will be balanced out, returning the society to equilibrium.³² The indigenous Gusii Justice System played a crucial role returning the society to equilibrium. When disputes arose among the Gusii people, it led to an imbalance in the society as argued by Herbert Spencer. But this state did not remain forever because the elders intervened and settled disputes and finally the social structure balanced out, hence returning the society to equilibrium. Thus, even when the conditions of the society are altered by disputes there must be an equal measure to return the society into normalcy.

Another key characteristic of structural functionalism is that it views society as constantly striving to be at the state of equilibrium, which suggests that there is an inherent drive within human societies to *cohere* or stick together. This is known as the cohesion issue. Societies strive towards social equilibrium, not through dictatorial mandate by the leaders of society but rather because the social structure of societies encourages equilibrium.

The Jim Crow’s laws in the Southern United states were a formalized version of informal structural advantages that empowered whites. Because of the history of slavery in the Southern United States, whites had amassed wealth than blacks. During slavery, whites controlled the government and all the major institutions in the society. After the end of slavery, whites continued to control many of these institutions, but because they were outnumbered in some areas by blacks, threatening their dominance, they instituted formal laws, Jim Crow laws, that allowed them to maintain their structural advantages. The whites were able to pass these laws because they already controlled many of the social institutions instrumental in the passage of laws such as courts, government and business. Thus the advantage whites had prior to a change in society allowed them to maintain their advantage after change through both informal and formal means because of the structure of society.

As regards to the transformation and integration of Gusii traditional Justice Practices into colonial judicial system, when the British took control, they began the selection of influential individuals as chiefs, *abakumi* for the various clans in Gusii. They were to act as agents of the colonial state in the everyday life including administration of justice to the people. In laying the foundations of the British rule in Gusiiland, the District Commissioner decided that Gusii would be effectively accommodated in the colonial system by basing administrative as well as judicial divisions on the already existing sub tribal units. The council of elders who were custodian of the administration of justice during the Pre-colonial period were left to continue functioning as before. This effectively supported the Jim Crow’s laws explaining why certain aspects of society continue as they have always been, despite some phenomena being clearly less beneficial as whole like Jim Crow laws. However, structural functionalism fails short in explaining opposition to social structure by those being oppressed.

According to this theory participation by communities can be seen in a continuum. For example, Pretty *et al* have classified participation on the basis of why and how people participate in development. They provide a complete cycle of people’s participation in development. In the first part of their cycle, manipulative participation, passive participation, participation by consultation, and participation for material incentives, are the weak levels of participation and people have no power to plan or decide for their own development. In these levels of participation, the whole development programme is controlled and managed by external

³² Herbert Spencer, *Principles of Sociology*, Newyork ,(1996).



agents.³³ The second part of the project cycle includes functional participation, interactive participation, and self-mobilization participation which are comparatively the stronger levels of participation. At these levels of participation, beneficiaries are in a better position to control planning, decisions and resources. Pretty *et al* indicated that for the best results, the people should be involved in all stages of a project, from design to maintenance. If they are just involved in information sharing and consultation then, the result will be poor.

Another way of distinguishing different forms of participation was presented by United Nations Capital Development Fund (UNDP, 1997) According to this typology; participation has been classified on the basis of levels or degrees. This typology can be divided into two levels/stages. Level one contains manipulation, information, consultation and consensus building. This level is a very weak level of participation because at this stage all the beneficiaries are just manipulated, informed and consulted. However, this is a basic level and necessary for future participatory development of a project. The second stage of participation consists of decision-making, risk-sharing, partnership and self-management. This is the actual level where the beneficiaries are responsible to control, manage and share the decisions, risk, partnership and self-management of a development project.³⁴

Deshler and Sock also presented participatory levels ranging from pseudo participation, to genuine participation in which participation is empowered by having control over programme policy and management. This classification is also carried out on the basis of level. They divided the people's participation into two main levels such as Genuine and Pseudo Participation. At the genuine participatory level, the community is empowered and gains control over project planning, decisions and resources. Community partnership is more strengthened with the external agents of development projects. Thus, it is a very strong level of participation where people/community and project implementers have strong cooperation and share all project activities. At this level, communities are delegated more powers to become the owners of the development projects. At the pseudo participatory level, the beneficiaries are just invited, informed, consulted and manipulated with regard to project activities. There is one-way communication. All the project activities are controlled and managed by the project staff.³⁵

As regards to this study, indigenous justice practices are home-grown therefore easily acceptable by the people. Gusii traditional justice system was victim centered with victims, offenders, their families and the general community involved in defining harm and repair. As an inclusive system it sought to address all interests of all the parties of the conflict. Hence this level of participation provided a basis for future genuine participation.

RESEARCH METHODOLOGY

Research Location

The study was carried out in Gusiiland. The region is made up of two counties; Kisii and Nyamira Counties. The two Counties are made up of 14 Sub-Counties. Kisii County is made up of 9 sub- counties (districts) namely, Gucha, Nyamache, Kenyanya, Sameta, South Gucha, Kisii Central, Kisii South, Marani, and Masaba South. The five Sub- Counties that make Nyamira County include; Borabu, Manga, Nyamira Masaba North and Nyamira North. To the North, Kisii County is bordered by Homa Bay County, Nyamira County to the East, Migori County to the West and Narok County to the South. Nyamira County is bordered by the following counties; Bomet to East, Narok to the South, Kisii to the West, Homa Bay to the North, and Kericho to the North East .

Research Design

This research used a descriptive survey design. This design was appropriate to the study because it could be

³³ Pretty *et al* , Participation Theory by the Communities in Economic, Political and Social Organization, Monthil (1995).

³⁴ UNDP Typology participation of communities pg 43

³⁵M. Robinson, *Validity And Reliability Of Measurement Used In Research*, Kimberlin, Wintrestrein AG Associated Press , (2005).



used in collecting information about people's attitudes, opinions, habits or any of the variety of education or social issues. The study took a descriptive qualitative approach by looking at the history of pre-colonial Gusii justice systems and integration in colonial judicial systems. The behavior in that case was to be through the data collected from respondents.

The study targeted retired Judges/ magistrates (5), long serving Advocates (10), Council of Elders (20), Clan elders (60) and elderly people (55) who lived during the pre colonial and colonial period in Kenya particularly Gusiiland. Purposive sampling was used to select individuals from who had specific information desired for the study. . Purposive sampling was employed in selecting retired judges/magistrates in Gusiiland. Precisely, the study adopted snow ball sampling which was an approach of purposive sampling where existing participants recruited future participants among their acquaintances. Snowball sampling was designed to identify people or locating informants with particular knowledge, skills or characteristics that were needed in the study. Using this approach; a few potential respondents were contacted and asked whether they knew of anybody with the characteristics that one was looking for in one's research. Council of elders, Clan elders and elderly people were selected using this approach.

The researcher employed stratified sampling to classify Gusiiland into Kisii and Nyamira Counties. The same sampling technique was used to classify the various sub-counties into the County they belonged. On this basis, Gucha, Nyamache, Kenyeny, Sameta, South Gucha, Kisii Central, Kisii South, Marani, and Masaba South were stratified to belong to Kisii County while Borabu, Manga, Nyamira, Masaba North and Nyamira North fall under Nyamira County. A sample was taken from each stratum and when the stratification achieved a greater precision given that the strata had been chosen so that members of the same stratum were as similar as possible in the respect of the characteristics of interest. In that regard, the researcher used stratified sampling to select the Council of elders, Clan elders and elderly people for the study.

Data Collection and analysis

In this study, data was obtained through the use of a structured questionnaire, interview guide and data collection from secondary sources. Interview guide allowed respondents to express themselves and gave room for the development of dialogue between the researcher and the respondents, thus creating a more natural form of exchange which allowed the respondents the freedom to express their views more meaningfully. As far as secondary sources were concerned, data was obtained from relevant resources such as books, theses, journals, government archival reports, administrative records, court records, legislation, customary law documents, missionary records, parliamentary report and magazines. Both primary and secondary sources were subjected to analysis to confirm their precision. The tape recordings from oral interviews were transcribed and analyzed to avoid misinterpretation of meaning that could have originated from paraphrasing. Accuracy, completeness and homogeneity of data was achieved through appropriate editing of data. Field data was analyzed using thematic content analysis and integrated with secondary data, then thematically organized according to into central themes and sub themes .

STUDY FINDINGS

The study found out the following information which is arranged according to themes.

Gusii People's Indigenous Justice Practices During the Pre-Colonial Era

The Gusii people are part of Bantu communities of Western Kenya .Many scholars of history agree that this community through their migrations had settled in their present homeland by 1850. By this same historical period, they had evolved their systems of settling disputes which was based on their social and political ways of life. Their justice system was organized based on informal hierarchy of courts that started from the lowest level, the homestead, *omochie* and progressed upwards to the entire Gusii community. However, when the Europeans came and colonized Kenya, in Gusiiland, they introduced their system (western style) of administering justice through a gradual process of transforming and integrating the indigenous Gusii justice practices into their system. Therefore, below is a critical analysis of how the Gusii people administered justice in the pre-colonial period.



Hierarchy of Courts

The homestead, *Omochie* was the lowest level of settling disputes among the Gusii people prior to colonialism. At the homestead all disputes were presided over by the patriarchal founder of the homestead, *Omogaka bwo omochie*. A homestead was basically made up of the head of the family; his wives, married sons, their wives and the other unmarried children in the homestead. In certain instances some visitors, *abamenyi* were incorporated in the homestead.³⁶

The head of the homestead was highly respected by all members of the homestead and he commanded a lot of prestige and authority over his people. All members of the homestead were supposed to abide by the orders and guidance provided by family patriarch on various aspects of Gusii life. Most importantly, the head of the homestead had to settle all forms of social, political and economic disputes that confronted his family. In most issues the head of the homestead applied egalitarian principles of equity, consensus building and the law of natural justice³⁷. When dealing with important disputes, such as those involving usage of various family resources including land and payment of bride wealth, the head of the homestead had to carefully consult widely and wisely.³⁸

The people who were consulted were perceived as men of great wisdom and therefore, were highly respected and held in high esteem by the community. Their respect was based on their previous experience where they managed to settle various family disputes amicably without showing any partiality. It was considered disrespectful for the head of the homestead and disgrace to the whole family if a member appealed or took any dispute to the next level without the knowledge of the family head. Usually the head of the homestead commanded a lot of respect if no cases or few cases were taken or appealed at the council of elders; *etureti*. This respect was also extended to his entire homestead particularly for any future leadership consideration at higher levels. That is why all members were keen not to let any matter of dispute to get out of their way before exhausting all available avenues.³⁹

The council of elders(*Etureti*), was the second level of informal hierarchy of the traditional Gusii court system which consisted of a cohort of informal courts called *etureti*. When one was not satisfied with a ruling made at the homestead, he/she moved to *etureti*. The decision to take the dispute to this level was guided by the hope of getting justice assumed denied at the homestead and therefore supported by a popular Gusii saying; “*Ekina Kigiasinya inka berekera (tunya) Keore na Ombere Omwabo*.”⁴⁰ The reasoning behind this was that if a dispute cannot be settled justly at the lower level, it can be taken to the council of elders who were neutral and wise in making fair judgment.

The elders who were appointed to be members of these informal courts were usually people who had managed to personify and portray themselves as Gusii elders. They were also perceived as role models whose behavior and conduct was supposed to be emulated by other members of the community, especially the young men aspiring to become future community elders. The other criteria that was used in selecting elders to be members of the *Etureti* was how successful they themselves were in settling various disputes in their respective homesteads. Equally important, was their considered level of wisdom as people who were supposed to make impartial and wise judgment on disputes involving the whole clan. At the sub-clan level, the *Etureti* was supposed to handle not only appeals from the homestead but also important judicial issues involving members of two or more homesteads, and other important social and political issues involving the sub-clan.⁴¹

³⁶J.E. Abai, *A History And Traditions of Abagusii People Of Kenya ;Mwanyagetinge*,Metro Graphics INC. Congress Office(2013). p47

³⁷J.S. Akama and R.M. Maxon, *Ethonography Of The Gusii Of Western Kenya, Avanishing Cultural Heritage*, Nairobi ,(1986). p88.

³⁸ Ibid p89.

³⁹ O. I with Musa Matunda , a member of Council of Gusii elders, at Ramasha market on 7/7/2015.

⁴⁰ O I with Nyamache Getenga at Nyaguta on 14/7/2015.

⁴¹J.S. Akama and R. Maxon, *Ethonography Of The Gusii Of Western Kenya, a vanishing Cultural Heritage*, Nairobi (1986).p89



At the *Etureti* level, the complainant was supposed to report his/her case to the senior most members of the *Etureti* who was seen as the upper leader among equals. Before the elders started hearing the evidence from various concerned parties, the senior elder was usually supposed to have briefed the other elders on the nature of the case before them. After the *Etureti* receiving litigant and defendants' point of view, they also received evidence involving the case from various witnesses. After receiving all the information and evidence involving the case, the elders conducted consultations among themselves and they also sometimes allowed members of the public who had important information on the history and nature of the case to join them in consultation process before making a ruling. Most of the cases that were handled by the *Etureti* involved issues concerning witchcraft, boundary disputes, theft, assault and family inheritance injustices. In cases involving land disputes among homesteads for instance, the elders fixed the right boundaries or ordered the immediate destruction of any structure that had been put up on disputed land. The *Etureti* had the authority to impose specific fines commensurate to the nature of the offence.⁴² Equally, the elders also had authority to reprimand an offender. This was supposed to serve as a warning to the offender and the offended that it should not be repeated in future. Alternatively, the elders used their traditional authority to invoke a curse and or take an oath, *emuma*, to oblige the culprit to pay the required fine.⁴³

Oath Taking

Oath taking in traditional Gusii community was always taken seriously because it was the basis of getting the truth and its consequences were believed to be disastrous.

Before the complainant and the defendant gave evidence or testimony, they took an a general oath that they would tell the truth. The oath taken was on the premise that should the complainant or defendant tells a lie, lightning was to strike such an individual to dead. Such an oath was usually taken by holding particular traditional regalia or touching a specific tree called *omotembe* that had ritualistic value while uttering specific words. *Omotembe* was never used as firewood by anybody except by elderly women who had stopped giving birth. These forms of magical –religious oaths were usually taken very seriously.⁴⁴

In case one was accused of rape, the man was to pass through the thighs of the complainant. Normally, if the lady was lying she could not allow the accused to pass through her thighs because of the fear of the consequences which included being barren or having a continuous flow of monthly period. At the same time the man could not also pass through the lady's legs for fear of devastating consequences among them becoming insane or his pens failing to erect forever.

When a man was accused of having sex with a married woman and persisted in denying it even when thought to be guilty by the *etureti*, they blocked the flow of the water of a given river. The man was to pass between the thighs of the woman who then washed in this river. The man swore that he did not do it, and the water was allowed to flow. The claimant was also asked to take an oath affirming the truth of his claim. The consequences for lying were similar to one who lied for rape.

When one was accused of arson and maintained his innocence and the general consensus was that he was guilty, an oath was administered .The ash of the burnt property was mixed with an alcoholic beverages, *amarua* He or she was compelled to drink the mixture and swear that he/she did not do it. There after, the ash was brown to a big river and it was assumed that if the accused was lying he or she could drawn.⁴⁵

The various consequences associated with any failure to give true information before *etureti* instilled fear and therefore made all who appeared before it to say the truth or face devastating consequences.

⁴² Ibid,p90

⁴³S. Were and D. Nyamweya, *Kisii District Social Cultural Profile* Nairobi, University of Nairobi, (1986). p 159

⁴⁴J.S. Akama and R. Maxon , *Ethnography Of The Gusii Of Western Kenya, a vanishing Cultural Heritage*, Nairobi, (1986).p90

⁴⁵S. Were and S. Nyamweya(1986). OP.Cit p160



Handling Offenses and Punishment

Certain conduct was regarded as offensive to an individual whereas some other conduct was regarded as offensive towards the whole clan. This meant that even if an offence was committed against an individual it was still considered to have affected the whole clan and therefore was the responsibility of the clan elders to take appropriate action. Some offenses once committed even if the culprit was forgiven, cleansing rites only performed by the elders was mandatory. Offensive conduct could also be against a person's property. Such offences may end within the affected individuals and therefore may not require the attention of the whole family or clan. These were taken to be minor or petty offences.

Murder was considered as the most serious crime and was classified into two for instance willful murder, *mweneno* and manslaughter, *mosiabano* or accidental killing.⁴⁶ When a person killed another willfully, he was regarded as cursed. He was required to pay the bereaved family two cows and one goat if the person killed was an adult. These animals were used as bride wealth payment for a woman to be married into the family. Besides, in certain instances sacrifices had to be offered to chase away the evil spirit so that such a tragedy would not recur. However, if the person who had willfully killed was confronted by member's family of the deceased and in retaliation they, killed that person, the dispute was settled and this was called *egesiomba*.

When a person was killed accidentally, *mosiabano*, no punishment was meted out. When a person of a different clan was murdered, a reconciliation ceremony, *ogosonsorana*, had to be performed in order that the two clans could live in peace. If not so the other clan avenged the death of one of their members.⁴⁷

Assault was common in the form of fights amongst age-mates. In cases of common assaults, as this may be classified, the warring parties were asked to make peace, *omorembe*. Where assault caused actual bodily harm, *orogoma*, the assailant was asked by *etureti* to compensate the injured party by giving them two goats. If need be, the animals could be used to pay for treatment, especially where an operation was needed. The parties were also made to eat together, *ogosonsorana*, as a token of peace.⁴⁸ If the parties involved in the assault belonged to different clans, then *etureti* could not settle the matter. The matter was left for the aggrieved clan to decide on the course of action to be taken, either to let the matter lie or to ask that compensation to be paid. It was common for the other clan to retaliate. In some instances, a representative of the clan through *etureti*, conducted sacrificial ceremonies so that there could be peace between the clans. This was because when a clan member was assaulted by a person from another clan, it became a clan matter or an offence against the clan.

In case of rape, if a rapist was apprehended in the act by a member of the family of the female, such a person was killed and that settled the matter. Where the rapist, or if he was caught and not killed and was found guilty by *etureti*, he was fined one cow and one goat which was given to the family of the female.

In case of elopement, *okobasa*, the man was fined one cow and one goat for ruining the honor of the girl and that of the father.⁴⁹ Adultery was another offence that was condemned more strongly with respect with women than to men. A man in the Gusii culture was considered to naturally polygamous. A man was at liberty to kill any man caught in the act of adultery with his wife. It was common for clans to fight to resolve a dispute when a married woman was obstructed on her way for some reasons by members of a different clan.

If the head of a household caught a man in his compound that had the intention of having sexual relations with any women in his household, he was at liberty to kill such a man. When a man had sexual intercourse with

⁴⁶J.E. Abai, *A History And Traditions of Abagusii People Of Kenya*; Mwanayagetinge, Metro Graphics INC. Congress Office (2013). p114.

⁴⁷ O I With Nyamache Getenga at Nyaguta market on 15/7/2015

⁴⁸J.E. Abai, *A History And Traditions of Abagusii People Of Kenya*; Mwanayagetinge, Metro Graphics INC. Congress Office (2013). pp 129-131.

⁴⁹P. Mayer, *The Lineage principle in Gusii Bride Wealth Law and Custom* London , Oxford University Press, (1950). p.95



married women, he was made to give one cow and one goat. The married women had to give her husband one cow and two goats. In such instances a cleansing ceremony had to be performed.

Stock theft was an offence committed against members of a different clan as it was considered that the stock of a person was the wealth of the clan. When a person was caught in the act of stealing stock, he risked instant death. Such a killing was excusable if the person was not caught in the act but later known and if the cattle belonged to a different clan, he could keep the animals only if the clan from which the stock was stolen knew of it, the animals had to be returned; otherwise there would be fights as a form of settlement. In that case, the animal had to be returned. Otherwise the clan from which the animals were stolen will fight in retaliation. Normally, stock thefts between the clans resulted in fights as a form of settlement. If the stock was from within the clan, the thief had to return the stolen animals to the owner. If the animals had been consumed, then he had to return substitutes.

If a defendant was caught stealing, the owner of the property or any member of the public was at liberty to kill such a person. If the defendant was not killed, he was compelled to return the stolen property or a substitute if he had disposed of the stolen property.

In the case of arson when a defendant was caught committing the offence or adjudged to have committed the offence, he had to repay the damage. That is he had to be responsible for the erection of the house or replacement of the property.

Claims of civil nature were handled by the *etureti* in the same manner as claims of criminal nature. Such claims were related to land such as inheritance, boundaries, ownership, rights of user, debts, and return of bride wealth. Generally, when the *etureti* found that the defendant owed the complainant the property so alleged, he was asked to return the property. In all the decisions made by *etureti*, it was up to the *etureti* to see that its decisions were complied with, and the head of *etureti* had the power personally to make the awards given effective.⁵⁰

There was no distinction between criminal and civil complaints in the mode of settlement, especially with respect to awards granted. Any remedy given by the court was meant to put the complainant in the same position he was in before the event which had caused him loss. This normally meant payment for damage in monetary terms or the award of specific performance by the defendant where possible. It cannot however be said that an award of damages could completely make good the loss, and Abagusii went further by attempting reconciliation of the parties.

Egesaku was a sort of an informal Court of Appeal that was based at clan level. The elders who sat at this court were chosen using similar criteria to the one applied in selecting the elders who served at the *etureti*. However, in most instances the people who constituted this court were usually selected from the senior-most elders of the various *etureti* within the clan.

Most of the cases which *egesaku* elders' courts handled were appeals from *etureti* elders' courts. They could as well decide on disputes involving more than one *egesaku* with the *egesaku* elders of another clan. This was therefore a kind of final court in any given location as it could reverse the decision or any form of ruling that had been made by the *etureti*. The *egesaku* court could even order demolition of houses or boundaries and make fresh ones.⁵¹

Although *egesaku* courts was a higher court than *etureti*, there were some cases which could not go beyond *omochie* or *etureti*. For example fratricidal or incest, it was the clan elders who had the power to decide the line of action to be taken. In most cases the clan elders, *etureti* on this matter directed the sacrifices, *ekengwanso* to be performed to appease, *Engoro* (God), and the ancestors. Disputes which *egesaku* handled mainly revolved around land or border disputes between two or more clans, fratricide and incest.

⁵⁰P. Mayer, OP. Cit P 96

⁵¹J.S. Akama and R. Maxon, „*Ethnography Of The Gusii Of Western Kenya, A vanishing Cultural Heritage*, Nairobi i, (1986). p96.



The Gusii people had a traditional informal Supreme Court called *Abakumi*. Elders who managed to acquire the status of *abakumi* or *abanguru* (Lord) obviously qualified to become members of these courts. These were extremely rare individuals who finally become part of community legends. Normally, their recognition, respect and authority usually went beyond the clan level and extended to all Gusii clans. This was based on their unique leadership qualities and major achievements, such as having high quality military skills and they were usually given the rare honor to declare war against an external aggressor. They were honored more if they managed to lead people successfully to repulse the external aggressor and finally win the war.⁵² People with immense wealth in terms of children and livestock were considered as having a lot of wisdom in dealing with issues affecting the whole Gusii community.

As a symbol of recognition to his authority, a person who became *Omokumi* was supposed to receive various traditional regalia or items that symbolized the level of magical –religious powers and prestige that the individual commanded in the whole Gusii community. These forms of regalia included a ritualistic staff or walking stick called *enyimbo ya omogambi* special stools, and a ritualistic head cap known as *Egobia ya abagambi*.⁵³

The *Abakumi* had special legal roles which they played that had significant implications to all Gusii people. These included declaration of war against external aggressors. The clans could not go to war singly with neighboring ethnic groups without the approval of the *Abakumi*. When deliberating on important legal issues that had significant implications to all Gusii people, *Abakumi* were required to use the ritualistic items such as the staff, walking stick, special stool and head cap. Some of the legal functions of *Abakumi* included matters involving inter-location or inter- ethnic disputes which were never handled by neither *Etureti* nor *Egesaku*'s courts. Such matters were settled by the *Abakumi* of the affected locations or by the *Abakumi* of the Gusii and the other ethnic groups' involved. Similarly; *omokumi* allocated any land acquired by war for his location.⁵⁴

The fact that *abakumi* had the supreme administrative and Judicial power in their location made them overall in settling boundary locations, cattle wrestling, and other civil as well as criminal cases with other locations. Similarly, *Omokumi* allocated any new land acquired by law for his location. He was also responsible for the welfare of his people and for peace and war. The *Abakumi* were supposed to have supernatural powers bestowed upon them by the Gusii ancestor and Supreme Being, including the invocation of the ultimate curse of death on anyone who went against their public pronouncement or rulings regarding issues affecting the Gusii people.

In Bogetutu clans, the position of *omokumi* differed from the other Gusii locations. It had clearly evolved despite the feuds that had began between the different sub-clans of Abagetutu. By the time the British colonized Gusii, Bogetutu had been divided into two opposing but not mutually exclusive factions. The two sections were *Mwakibagendi/Mwagichana* in the west and *Mwa bogonko* in the east of the location. According to Akama and Maxon, it was his sixteen wives, scores of sons and great herds of cattle which made Bogonko famous and hence the conflict between him and his uncle (Kibagendi and Gichana) over leadership of Bogetutu.⁵⁵ However, when elders from either side were interviewed as to which of the two factions contained elders who were in the father-son relations with the others and therefore responsible for heading and performing sacrifices, both sections said it was that of the west. Based on this, Angwenyi the son of Gichana, was appointed chief of Bogetutu. It was the Bogetutu chiefs' genealogy that the British used to determine the time when Abagusii might have settled in their present country.

The hereditary pattern that had taken shape before colonialism was maintained and continued in Bogetutu during the colonial period. The chiefs were picked from the most senior survivors of the leading clan families in the male line. When Nyakundi, the founder of Bogetutu died, leadership in his location passed on to his

⁵² Ibid. p 89

⁵³ J.S.Akama and Maxon, *Ethnography Of The Gusii Of Western Kenya, vanishing Cultural Heritage*, Nairobi, (1986).p.97

⁵⁴ J.S. Akama and R. Maxon, *Ethnography Of The Gusii Of Western Kenya, vanishing Cultural Heritage*, Nairobi, (1986). P 92

⁵⁵ Ibid,p92



eldest son Barare. The latter was killed early in his chieftainship by the Joluo cattle rustlers at Nyakongo near present day Kisii town. It was when Barare's brother Kibagendi took over the leadership that the problem began with his nephew, Bogonko, son of Barare. Ideally succession was based on the eldest son of the *omokumi*'s first wives who was appointed by him prior to his death would take over. If the *omokumi* had made no such a selection, the elders selected a suitable son, but if they considered no son suitable they could select his assistant or any other suitable elder.⁵⁶

The other Gusii locations do not seem to have had elaborate systems of hereditary Chieftainship. So during the colonial rule there was no question of chieftainship moving from one brother to brother as was the case in Bogetutu until about 1980. But the other locations might have had some vague character called *omokumi* or group of recognized elders who performed the judicial functions which the *omokumi* of Bogetutu handled.

When the British took over administration of the District, they appointed chiefs who had not existed among Abagusii in the past. These chiefs together with the district officer and district commissioner were seen as representatives of a foreign dominion. However, most of the chiefs cleverly balanced the interests of the British against those of their people to prevent direct conflict with either side.

Abakumi's Supreme Court rulings on Bride wealth or dowry payment was one of the judicial issues that linked all the Gusii clans together where the informal rules and regulations that controlled the amount of cattle that was required to be paid as bride wealth. The Gusii people attached a lot of significance to the bride wealth as a means of giving legitimacy to any form of Gusii customary marriage. According to the Gusii elders from 1800 to 1890, the number of animals that were paid as bride wealth usually consisted of six cows, one standard bull and not more than twelve goats.⁵⁷

At the turn of the 20th century, however, the number of animals that were being paid as bride wealth started to rapidly increase as a consequence, by the 1940s most Gusii families were paying as many as sixteen cows, one standard bull and several goats. Over time, there appeared to be general consensus among most Gusii people that the rate at which the payment for bride wealth was being inflated was quite unhealthy to the overall social-economic and cultural well being of the Gusii community. This upward trend of bride wealth rates was particularly causing forced bachelorhood among many young men who were eligible to marry. Unfortunately, instances of young men abducting young unmarried women begun to emerge. The men then forced the women to cohabit together without the payment of bride wealth. Moreover, some young ladies unlawfully eloped with young men causing their parents to miss the payment of bride wealth, which was quite embarrassing and socially unacceptable. Bride price automatically went up during this period. As a consequence, these negative effects that were brought about by the bride wealth led to a general consensus among the Abagusii people that common action should be undertaken before the situation got out of hand.

Although there used to be a strong urge for bargaining over the number of animals to be paid as bride wealth, in most instances, the number of animals that were eventually given at any particular period depended largely on the prevailing rates at that particular time. This condition of bride wealth payment uniformly applied in the whole Gusii community without any form of discrimination based on the level of family wealth or any other socio-economic factor. The main reason for this situation was the fact that the bride wealth that was received for a girl was similarly handed over in its entirety for the marriage of one of the sons of the bride's immediate family. Consequently, this form of Gusii customary regulation stipulated that the number of animals that were paid as bride wealth were to be relatively the same for all Gusii families. It came about as a practical experience that the cattle that was expected as bride wealth for a married sister was, in most instances, the only source of bride wealth for her brothers who were eligible to marry. However, it was natural that the rate of bride wealth had to rise during periods when the overall economy was doing well and livestock was in plenty. Likewise the rate inversely went down during periods of scarcity, such as when there was an outbreak of cattle epidemic or during periods when the people incurred heavy losses of cattle due to Maasai and Kipsigis cattle raids.

⁵⁶S. Were and D. Nyamweya, *Kisii District Social Cultural Profile* Nairobi, University of Nairobi, (1986).

⁵⁷ P.Mayer, (*The Lineage principle in Gusii Bride Wealth Law and Custom* , London, Oxford University Press (1950).



The Gusii always undertook deliberate measures to create a state of equilibrium or control over the rates of bride wealth from time to time depending on the existing economic situation. These measures were mainly spearheaded ahead by distinguished and influential Gusii elders who were perceived as people with a lot of wisdom and who also had a lot of wealth in terms of cattle and children. They were also successful in managing various affairs of their respective homesteads. In most instances, elders who managed to acquire this highest level of social, political and economic status, in any given time, were usually few in number and their authority and influence usually transcended the clan level. The elders who managed to reach this social status were referred to as *abakumi* or *abanguru*. Such elders automatically became members of the informal Gusii Supreme Court of *Abakumi*.

Decisions which were made by *Abakumi* elders on important issues such as customary marriage regulations, rates of bride wealth payments, land disputes involving more than one clan and declaration of war against external aggression carried a lot of weight. Therefore, most Gusii people accepted these decisions. Such important decisions were usually based on the principles of consensus building and popular community agreement, especially among those respected in the other Gusii clans.⁵⁸

On various occasions when there was general communal consensus on various important issues, such as the need to reduce or raise the rate of bride wealth at a particular time, the *omokumi* from the senior most Gusii clan had the authority to call for a meeting consisting of all the *Abakumi* from the other Gusii clans. Also, other influential individuals, particularly those people who conducted important magical –religious Gusii rituals such as rainmakers and traditional wedding priests or priestesses were also invited to such meeting.

It was during such occasion that *Abakumi* from different Gusii clans constituted the informal Gusii Supreme Court, *Abakumi*. At such meetings, there was usually a lot of consultation among all the elders present on the issue at hand. It was only after these consultation and consensual agreement that *Omokumi* from one of the senior most clans of the Abagetutu clan made a public pronouncement of the agreed decisions or rulings. Such public declarations were always accompanied with specific sanctions against any transgressor to the agreed ruling. These sanctions involved the performance of magical-religious ritual that was supposed to bind all Gusii people to follow the agreed decisions.

Towards the end of the nineteenth century the rate of bride wealth had tremendously increased to over eighteen cows, one standard bull and several goats. Bogonko, who was the *Omokumi* from the Abagetutu clan (one of the senior most Gusii clans), invited all the *Abakumi* from the other clans to attend a meeting to deliberate on the issue of the rapidly increasing rates of bride wealth. The meeting was held at a place called Sensi in Kitutu. At the meeting, Bogonko (whom most Gusii elders concur was a belligerent leader), made an announcement that the number of cattle to be paid as bride wealth should be reduced to ten animals.⁵⁹ The other *Abakumi* who were present demurred; they started making murmurs opposing the unilateral decision made by Bogonko, who himself had already married off most of his daughters at inflated bride wealth rates. Bogonko went ahead and made a public declaration on the reduction of bride wealth and he also issued a magical-religious sanction by performing a ritual involving invocation of a curse to the effect that ‘all the people who went against his pronouncement, their cattle will ‘become skins’- *amayo* , will die. Indeed, most Gusii elders attribute to Bogonko’s curse the cause of the plague of the outbreak of cattle diseases of late 1890s where most of the cattle in Gusii land were wiped out.⁶⁰ However, it is interesting to say that, ironically, the cattle plague eventually brought down the rate of bride wealth during the late 1890s to as low as one cow.

In 1906, Ogeto, who was also *Omogaka* from the Abagetutu clan, summoned all the other *Abakumi* to attend a meeting that was held at Getuanyasi in Kitutu. All the elders present took part in carrying out a magical-religious ceremony that was aimed at consensus building concerning the reduction of the number of animals paid as bride wealth. After discussion, all the elders present took part in carrying out a magical religious ceremony that was aimed at consensus building concerning the reduction of the number of animals paid as bride wealth. After discussion, all the elders reached a consensus on the issue. Ogeto made a public declaration

⁵⁸ O.I with Nyangaresi Mogire (clan elder and former ritongo asikari) at Gesusu Market on 25/7/2015.

⁵⁹ P. Mayer, *The Lineage principle in Gusii Bride Wealth Law and Custom* , London , Oxford University Press, (1950). PP 98-99

⁶⁰ O I With Matundura Araka at Gusii Cultural office on 12/7/2015



that “due to the prevailing economic situation in the whole of Gusiiland, the number of animals to be paid as bride wealth was to be reduced from six to three cows, one standard bull and not more than four goats.” All the other elders present voiced their agreement to the pronouncement by shouting in union *eee twanchire* (yes, all of us have agreed). A magical-religious sanction was also declared against any transgressor. In conducting the magical –religious ritual, Ogeto was assisted by his eldest wife who was a famous wedding priestess, *Omokundekane*. They both declared “let us all now agree to three cows and may any man die who disobeyed this order”. According to Gusii elders Ogeto’s declaration was faithfully followed by most Gusii clans for more than five years.

By the 1920s, once again the rate of bride wealth had increased substantially to over eight cows. Inchwari, who was also *Omokumi* from the Abagetutu clan, accompanied by a famous rainmaker called Obwoge and his brother who was a wedding priest, summoned the *Abakumi* from other Gusii clans to a meeting in Kitutu. After reaching consensus, all the elders present declared that, “bride wealth should once again be brought down to three cows and one standard bull.” As was usual when elders reached a consensus in such a meeting, they all shouted in unison *ee twanchire* (yes, all of us have agreed) and a magical religious ritual was conducted by Inchwari assisted by the rainmaker and his brother. They also made a proclamation to the effect that, “let the people [sprout] and become wealthy, let the Gusii country be healed from Ogeto’s curse and let the number of cattle to be paid as bride wealth be reduced to three.” It is still recalled by Gusii elders that Inchwari’s directive also remained effective for duration of over five years.⁶¹

Incorporation of Gusii Indigenous Justice Practices into Colonial Judicial Systems Between 1906-1937

The Gusii were one of the last sedentary Bantu speaking peoples of Kenya to come under British rule. The establishment of British colonial rule in East Africa after 1894 had little immediate effect on Gusiiland. It was in the years 1900 to 1906 that the initial contact between the British and the Gusii took place. Gusiiland was part of the larger South Kavirondo District during the colonial period. The colonial headquarter of this district was at Ugaya (present day Karungu or Sori). In 1906, the capital headquarter was shifted from Ugaya to the present site of Kisii Town then referred as Boma by the Luo and Getembe by the Gusii people. From then on, this site became the capital of South Kavirondo District from which the British administered this region⁶². The colonial government took the move of transferring the headquarter to Gusiiland mainly because of the regular resistances against the British. This was considered as a strategy of checking such resistances.

The establishment of colonial rule over Gusiiland was strongly resisted by many Gusii people especially the Gitutu clans.⁶³ The British administration actually began in the first half of 1907. Early in that year, R.W Hemsted and Northcote who had been appointed District Commissioner (DC) and Assistant District Commissioner respectively of South Kavirondo

District.⁶⁴ The two colonial administrators visited the Gusii inhabited highlands and chose a site for a government station. They initiated the beginning of the construction of Kisii as the new headquarter of the district.

By end of 1907 after laying the foundations of British rule in Gusiiland, Northcote who was the D.C began the selection of influential individuals as chiefs of the sub-tribes and headmen for the various clans. They were to act as agents of the colonial state in the everyday life including administration of justice to the people. It also involved building up the authority of those installed as chiefs and headmen and encouraging all Gusii people to bring criminal and civil cases before the administration.

In laying the foundations of the British rule in Gusiiland Northcote, the district officer, decided that Gusii would be effectively accommodated in the colonial system by basing administrative as well as judicial

⁶¹J.S. Akama and R. Maxon *Ethnography of The Gusii of Western Kenya, a vanishing Cultural Heritage*, Nairobi, (1986). P 97.

⁶²W.R. Ochieng, *A Pre-Colonial History of Gusii of Western Kenya C.A D 1500-1914*, E A L B, Nairobi, (1974). PP 112-130

⁶³ R.M. Maxon *Conflict and Accommodation In Western Kenya; The Gusii and The British, 1907-1963*, London , Associated University Press, (1989).pp 26-50.

⁶⁴ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1923



divisions on the already existing sub tribal units. The selection of chiefs was not an easy task. This was because it was extremely hard to know who from among the several prominent clan chiefs (headmen) was most influential. By the end of 1907 Northcote had appointed seven chiefs from Gusiiland. The pattern was set for division of Gusiiland into locations based upon on the sub-tribes.⁶⁵ However, because of the hostility he received from Kitutu, no chief was chosen from there.

The chiefs who were selected were appointed on account of their supposed medicinal or magical powers, or as being the principal or one of the richest elders or because of some personal characteristics appreciated by the local people. The ones who had been friendly and collaborative were also appointed as chiefs.⁶⁶ Ombati from Kitutu and Ndubi from North Mugirango who had a good reputation in the British eyes were appointed as chiefs. Most of the remaining men appointed chiefs were either pointed out to Northcote as *Abakumi* (Plural of *Omokumi*) as was the case with chief Nchore of Bassi, or came forward themselves and impressed him with their influence ability. Others with similar qualities included chiefs Nyamwamu of Nyaribari, Oyugi of Wanjare and Nyamusi of Majoge. In South Mugirango Obara son of Nyawanga, one of the first elders from the area to contact administration was made chief. However, he was soon replaced in December 1907 by O'Kech a clan chief because it was discovered that he had never been an *Omokumi*.⁶⁷

In most cases, the first colonial chiefs of Gusiiland were *abakumi*, men of considerable wealth and influence. Once he had chosen chiefs (*abakumi*) and head men, *abatureti*, Northcote's next task was to make them carry out administrative orders and most importantly, bring disputes to him for settlement. This was seen as one way of controlling

Early Challenges of Incorporation of Pre-colonial and Colonial Chiefs, *Abakumi* in New Judicial Roles

The British's intention of using the men appointed as chiefs, *abakumi* and headmen to settle disputes at first was not successful because they found it difficult to adapt to the new role that the British wanted them to play. They failed to carry out orders that required forcing other Gusii people act, a type of political coercion which they were not used. This took them time to adjust to the new concepts of political and judicial activities that the British administration brought.⁶⁸

According to Kenani and Were, as time went on, in late 1908, Northcote had more success in integrating the chiefs and headmen in his preferred way rather than having them in the traditional way. From then on cases were being brought before the assistant district commissioner in Kisii and during his travels. By early 1909, a large number of disputes were being brought before Northcote; these even involved events that took place before the British effectively took control of Gusiiland. To avoid being overburdened, Northcote was forced to make an agreement with the chiefs of Majoge and Wanjare that no disputes between these two sub-tribes dating from before April 1907 would be heard by the District Commissioner.⁶⁹

Up to 1911, the District Commissioner and Assistant District Commissioners (later district officers or DOs) served as magistrates in both civil and criminal cases, with the help of the chiefs and headmen. However, it became difficult for the individuals appointed as chiefs, *abakumi* to accommodate themselves to new judicial system. They only proved suitable to the British. Virtually, all the men chosen to fill the position of chief and headmen were being asked to play an unfamiliar role. It was a position, the powers and responsibilities of which were in some ways greater than those achieved by any *Omokumi* in pre-colonial Gusii society. The chiefs were given powers to settle disputes with the assistance of the headmen within their locations. Giving these greater powers to the chiefs and headmen tended to provide some with the opportunity, as in other parts of Gusii, to harass and oppress the people under their jurisdictions. One such example was chief Ositu Otieno

⁶⁵ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1923

⁶⁶ W.R. Ochieng, *A Pre-Colonial History of Gusii of Western Kenya C.A D 1500-1914*, E A L B, London (1974). PP 132

⁶⁷ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1923

⁶⁸ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1923

⁶⁹ Ibid.



of South Mugirango who was chosen to succeed his father, Okech upon the latter's death in 1912. He was severally reprimanded by the DC for taking fines and not reporting them to the administration.⁷⁰

On the other hand, some chiefs proved themselves unable to exercise any of the judicial powers granted to them. Instead of executing their new authority, they made almost no use of it. Chief Nchore of Bassi was one such chief; as a result of his ineffectiveness in British eyes, he was retired in 1911. Gusii chiefs were now required to rule more than just their own clan which became a new phenomenon.

Resistance to the New Colonial Administration

The new and unfamiliar colonial system of administration was not well received by the Gusii people. The Kitutu clans were not ready to accept the new colonial justice system altogether. Very few cases were brought before the District Commissioner because foreign domination had not been accepted by many. During the Kitutu peoples' resistance, Otenyo (a warrior) wounded the assistant district commissioner in January 1908. This incident made the colonial government to send a punitive expedition which carried its operations that left many of Kitutu people killed and a lot of cattle confiscated. Angwenyi who was a headman, negotiated for peace after bringing Otenyo to Kisii colonial station. In February 1908 Angwenyi was made chief, *Omokumi* of Kitutu. He was made chief because he had helped considerably in bringing down hostilities between the Kitutu people and the colonial government.⁷¹

The Native Authority Ordinance of 1912 and Administration of Justice Through Chiefs

From 1912 to 1914, a new policy which was inaugurated in East Africa protectorate, at the initiative of the new governor, Sir Percy Girouard. The aim of this new law was to get the chiefs to act more in conjunction with local elders in administering their areas more particularly on issues of administering justice. The Native Authority Ordinance of 1912 allowed for a council of elders to be appointed. However, its main effect was to strengthen the work of the single gazetted headman by granting him for the first time a substantial number of legal powers. This system proved successful in Gusiiland by 1914 because the influence of the elders in settling disputes was more widely felt. The colonial administration began to correspond more closely to that of pre-colonial times when the authority of elders of a clan was recognized.

According to the annual report of the District Commissioner, Kavirondo south district, the Native Councils in 1913 were able to carry out their duties with regard to civil cases quite satisfactorily. The decisions of the Native Councils were rarely appealed against. Many of the cases handled in this year were cattle theft cases. During the latter part of 1913, cattle-thefts became very frequent because of the outbreak of rinderpest which killed many animals. To reduce cattle theft cases, the Native Councils were under instruction from the District Commissioner to heavily punish the culprits. The councils were instructed to assemble twice monthly to dispose off as many cattle theft cases as humanly possible. Special meetings of councils were also called by the president of the court to settle any urgent and important matters.

North Mugirango location's chief and Native Court Councils were reported to be ineffective in handling disputes. This necessitated the District Commissioner to send the colonial native agent, Kasuku to stay there for one month. He was to instruct the chief and council of elders their new judicial duties. After that, improvement was realized Kasuku returned back.

Native Tribunal Rules of 1914

Under the Native Tribunal Rules of 1914, Judicial powers formerly exercised by chiefs were somewhat widened, and their exercise was granted not to chiefs alone but to council of elders as may be recognized by the governor. The council of elders (Tribunals), besides receiving more powers over civil cases, the rules made provision for the levying of fees by these local courts. The colonial government also allowed the exercise of appellate jurisdiction by superior court of elders. Appeal to the DC and the PC was also provided.

⁷⁰KNA/DC/KSI/2; Op.Cit

⁷¹ W.R. Ochieng', *A Pre-Colonial History of Gusii of Western Kenya C.A D 1500-1914*, E A L B, Nairobi, (1974). P 40



A superior court of elders with seventeen members which were officially called Native Council of Elders was established in Gusiiland. The chiefs and headmen remained members of the council, but their influence was proportionately less. Though this new judicial structure was hailed by the South Kavirondo District colonial administration but did not prove effective. According to the DC's quarterly report of 1911/1912, this was because the chiefs and the councils were reluctant to exercise their powers.⁷² Only a few cases were tried by them in which punishment was inflicted. However, these councils established by the British were not as in other parts of Kenya because they were able to fulfill the role expected of them in criminal related cases but not different concepts of justice. Gusii councils of elders in pre-colonial times handled cases over a more limited geographic area than those of the British. These councils were usually dominated at the clan level by the *Omokumi*, but with the possible exception of Kitutu, these men had limited powers of enforcement. More importantly, the sanctions that the traditional Gusii councils could invoke were quite different from those that the colonial state wished them to use in criminal cases⁷³.

Collective Fines

In 1914 a large number of stock thefts were reported in South Kavirondo District. Many of these cases affected the Kisii region. Efforts were made to apprehend the culprits but very few were successfully apprehended and heavily fined by the Native Council as per the orders of the District Commissioner. To stop rising theft cases, the colonial government directed the Native Council courts in the affected locations to apply collective fine. Collective fine meant forcing all the people where theft was suspected to have taken place to collectively pay to replace the lost animals. During the year three collective fines were sanctioned as follows:

- i. Wanjare location under chief Oyugi, a fine RS 1300/= on account of stolen cattle traced to this location. It was paid by the people of this location in full.
- ii. Kitutu location under Headman Mairura clan called Boyeka. A fine of Rs 500/= on account of a stolen cow traced to the location.
- iii. North Mugirango location under headman Mweberi's Kiochora clan. A fine of Rs 300/= on account of a massacre of two women accused of witchcraft.

In 1914 the chiefs and headmen constantly usurped the functions of the Native Council Courts' proper functioning. They discharged criminals without prosecuting them before the native courts or counseled some required evidence in the courts. They also ignored to execute the ruling made by the native Courts. In the long last such uncalled for behaviors interfered with the administration of justice. Therefore the elders' court became reluctant in performing their duties effectively as expected by the DC.

In 1915 the District Commissioner of South Kavirondo District on his regular visit to the Kisii locations barred the natives (Africans) from presenting petty complains to his office or his officers on safari. He instructed the residents to refer all their disputes of the first instance to Native Council's courts. He particularly instructed the headmen to ensure that those who refuse to obey the edicts of the Native Council Courts to be punished appropriately. This was to empower the Native Courts and make the people avoid overlooking the importance of these courts.

By 1920, there was only one magistrate with second class powers, the District Commissioner in the whole of South Kavirondo. Previously, they used to be two, one covering the locations in the Kisii region and the other covering the Luo locations. Practically the appeal cases from the location tribunals were taken by the District Commissioner himself. In this year there were no collective punishment inflicted. The number of appeal cases from location tribunals increased from 109 in 1919 up to 180 in 1920.

In 1921, the colonial government encouraged the payment of court fee which in essence was aimed at increasing the source of revenue to the government. The headmen were asked to encourage their people to take their disputes to their location tribunals. The tribunals were also encouraged to enforce penalties within

⁷² R. M. Maxon, *Conflict and Accommodation In Western Kenya; The Gusii and The British, 1907-1963*, London , Associated University Press, (1989).p52

⁷³ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1923



their powers especially on breach of native customs. An educated court clerk was made in charge of every location tribunal to collect the court fee and keep relevant records.

Reorganization of Local Tribunals

During the latter part of 1923 the colonial government instituted a new system of single, Central Tribunal for civil cases. Although the old location tribunals continued to exist, they could only settle small criminal cases and breaches of the native laws and custom. In the whole of Gusii there was only one Central Tribunals which could conduct its sittings in Kisii station. The first sitting was held in 15th august 1923. The colonial administration introduced these changes because it was felt that court elders, chiefs and headmen were deliberately encouraging litigation and demanding high fee, both in and outside court. The new Central Tribunal heard cases every alternative Monday. A roster of registered elders was kept and the number of cases heard at each meeting was limited to sixty⁷⁴.

The central tribunals were divided into four panels, each with its presidents and had separate court House. A certain number of cases were allotted to each panel. Litigants could not know which panel was going to attend to his or her case until the actual hearing. Corruption of elders which was reported to be common previously was prevented. By between 15th august 1923 and 31st December 1923, 992 cases were heard and decided by the Kisii Central Tribunals. There were 99 application for revision and 47 cases, the judgment of the tribunals was upheld in 14 cases revision was made and in 26 the original judgment was quashed by the appeal court.⁷⁵

In 1926, the people petitioned the colonial government for the abolition of the Central Tribunal for civil cases and return to locational tribunal system for civil cases. At first the District Commissioner was reluctant to give in to people's request. But with the favor of the district administration for the cause of reforms, the colonial state abolished the Central Tribunal for Gusii land. A new system of locational tribunal for civil cases was reconstituted. Each location now had one tribunal instead of several as before 1923. A superior tribunal for appeals was started later established for Gusii highland, and a further right of appeal existed to the District Commissioner. This judicial reformation was much more pleasing to most Gusii people than the short-lived Central Tribunal.

In 1928 it was realized that the proper functioning of location native courts (Tribunals) depended on regular supervision by an officer. Headmen were required to give a report on monthly basis outlining how their respective tribunals were working. Where there was a problem, an officer on safari could be sent to investigate and take appropriate action.

During August 1929, the District Commissioner of South Kavirondo District held a large meeting of Kisii elders to decide the custom with regard to the payment of bride price. It was noted that the high number of cases related to stock thefts was due to the high bride price that was being paid. Evidence was given that at the time of chief Angwenyi, as *Omokumi*, the bride price was as low as two head of cattle.⁷⁶ The elders in this meeting unanimously agreed that the Kisii Native Custom in regard to bride price should be established at three female stocks of cattle, one bullock and six goats. This was hoped to cause a large drop in the number of stock thefts as the young men will not have to resort to stealing in order to get married.

In 1932 the colonial government instituted an appeal *baraza* in the whole of Gusiiland just like there was one in locations of Luo region in South Kavirondo District. A paid president and secretary were appointed⁷⁷. Elders from each location sat as members. They all received money from a division of the court fee. This court sat monthly for 2 to 3 days and about 30 cases were heard each time. The appeal fee was Kshs. 12/= . The *Baraza* was reported to work well but it was unpopular with the people (the natives). In 1932, a total number of 12 cases from the locational tribunals were appealed to the Appeal *Baraza*. 29 were dismissed 18 were appealed

⁷⁴ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1932

⁷⁵ B.L. Shadle, 'Girl Cases'; *Marriage and Colonialism in Gusiiland, Kenya, 1890-1970*, London, Heinemann Portsmouth, (2006). pp 29-31

⁷⁶ P. Mayer, *The Lineage principle in Gusii Bride Wealth Law and Custom.*, London, Oxford University Press, (1950). p62

⁷⁷ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1932



to the DC while 7 were returned to the location. At the DC's appeal 3 decisions were reversed while 15 were upheld.

Most chiefs and headmen in the Kisii locations were reported to have worked well in their respective locations especially in matters of administration of justice. Those who were inefficient were either removed or forced to resign. A record of each chief's work was kept so that those with outstanding performance were rewarded accordingly. In 1933, Musa Nyandusi of Nyaribari Location and Assistant Chief Aoga of Gitutu were regarded by the colonial administration as the most outstanding. South Kavirondo District Annual Report of 1934, Musa Nyandusi's efficiency in controlling crime as well as in the field of economic development in his location was rewarded with the award of the King's Medal for Chiefs.⁷⁸

In 1934 the colonial government of South Kavirondo District made some changes which affected all the chiefs, headmen and clan elders, *mlango* of all locations of Gusii region. The changes were as follows;⁷⁹

Kitutu

Chief :Onsongo

Assistant Chief; Ooga Morando

Village elders (*Mlangos*)

Monari Munaru, Osoro Nyakundi, Ochwangi Borura, Mwebi Kinara, Monyoncho Maina, Omara Kingoina, Omabi Kiraa, Otuori Atambo, Nyariki Orango, Nyabwera Machoka, Bogonko Nyamongo, Maroro Angwenyi, Onger Kitate, Riri Motaariki, Oyunge Kiage, Kerandi, Gabriel Onsongo, Mekenye Moriasi, Moakya Nyaga, Okenyuri Mokaya, Ondieki Makori, Petro Omwenga, Chego Onyiego, Mandere Omweri, Nyabiage Bosire, Orero Nyakoi, Bara Ongondo

North Mugirango

Chief: M. Maina

Assistant Chief :Agwata

Village elders *Mlangos*

Kireki Kisiora, Enock Arogo, Mobe Kimatingwa, Nyagechanga, Nyonga Mesa, Osea Mayoyo, W. Ndemo, Rioba Ontweka, Nyandagwa, Nyabuti Oginda, Sabuni Mantia , Monda Ouya and Mosigisisi Masira

Nyaribari

Chief: Musa Nyandusi

Village elders, *Mlangos*

Mageto Atandi, Mautia Mogere, Kibwesi Kwaba, Nyasetia Ikwaba, Nyasetia Orero, Nyangera Nyasae, Ondieki, Salimu Mkuu, Menge Mimbi, Sururru Beri, Nyaosi, Nyangoto Giturengia, Zakaria Siocha, Mokua Ondari, Matagaru Murumbi and Nyayiemi Okoyo

d) i) Wanjare

Chief Onsongo

⁷⁸ R.M. Maxon, *Conflict and Accommodation In Western Kenya; The Gusii and The British*, London, 1907-1963, Associated University Press, (1989). pp 184-187

⁷⁹ KNA/DC/KSI/2; South Kavirondo District Annual Reports 1913-1932



Assistant Chief : Nyabaro

Village elders, *Mlangos*

Sianyio Omambia, Ogetakara Ayieko, Keana Onyango, Magige Okemwa, Maobe Nyanganya, Manyanya Machera, Ongoncho Chauro, Daniel Akeri, Maroro Nyaanga, Saboigo Mamwacha, Mbiri Makiya and Domisfano Nyangute.

South Mugirango

Chief :Keraro

Village elders, *Mlangos*

Ondieki Ombasa, Nyagwasa Ocharo, Kui Oseko, Nyagilo Nyamwaro, Aunga Nyakigosi, Keuya Ongori, Morondo Miyiencha, Onyoni Kiboyo, Orogio Magara, Moracha Nyamondo, Osiemo Bonyi, Monyerera Okwiri, Orondo Nyokongi, Kiteya Rambeka and Morichondo Kichondo.

Majoge

Chief: A. Nyakweya

Village elders, *Mlangos*

Paudi Mangondi, Nyangau Michiera, Ongeri, Okenyuri Kyamamba, Mogusu Ogembo, Onywoki Ogero, Onsando Oguta, Mogei Ketubo, KiyondiMongare and Nyambegeera

Bassi

Chief:Oirere

Village elders, *Mlangos*

Nyaega Nyanguru, Orwokera Anunda, Motari Saboke, Onchiri Ayieko, Maronga Mainga, Mochama Nyaringo, Abusa Nyagetiria, Onkwani Nyakinda and Kibwege Nyariki.

The South Kavirondo District colonial administration, between 1935 and 1937 did not introduce any major judicial reforms. Most disputes involving natives continued to be handled by locational tribunals after they were appealed from *etureti*. A further appeal was made to the African court of Appeal at Kisii and to the D C and final court of Appeal at Kisumu under the Provincial Commissioner.

Incorporation of Indigenous Gusii Justice Practices into the Colonial Judicial Systems 1937-1963

The colonial government from time to time continued transforming its judicial system so that a more acceptable system to both the Gusii people and the British was put in place. By 1926 the colonial government had abolished the Central tribunals for Gusii and reintroduced a system of location tribunals which had existed before. In the process of transforming Gusii justice practices and integrating it to fit its judicial systems, the colonial government initiated more reforms in late 1930s and continued all through until 1963 when Kenya gained independence.

The British recognized the importance of African courts which they called, 'the cornerstone of indirect rule'.⁸⁰ That is why the colonial government sought for the customary laws of each tribe they wished to rule. They argued that indirect rule worked best if officials (colonial administrators) could implement laws recognized and accepted by the ruled people.

⁸⁰ S K D AR 1933



In 1937 the colonial government made an overhaul of the judicial tribunals. The whole of South Kavirondo District which had thirty-nine location tribunals (African courts) were consolidated into nine, two of which served Gusiiland. The Gusii tribunals were known as *amatongo*, one at Manga and the other at Ogembo. A third court was added fifteen years later in 1952 at Gesima. These tribunals (*Amatongo*)'s jurisdiction did not cover more serious criminal cases such as murder or civil cases involving business matters or Christian marriages. The tribunals enjoyed authority over a whole host of disputes, from cattle theft, assault to boundary disputes, as well as elopement and adultery, abduction and indecent assault.⁸¹

From the first sittings of the tribunals, *amatongo* began flexing their muscles, exercising their new powers over women and junior men, often with the encouragement of the colonial government. They were encouraged by the DC to use their authority to punish breaches of native customs, especially those relating to marriage. The District Commissioner who was the president of the local native council presided over all appeal cases from the tribunals, *amatongo*. In 1938 construction of permanent African Tribunals courts was started at Ritongo Manga and Ritongo Kuja. This enabled the elders who were judges in these courts to be accommodated. Ritongo Manga which Oginga Odinga was contracted to build by the end of the year was complete.⁸²

By 1952, there were three Gusii local tribunals (courts) called *amatongo*. These were African courts established by the colonial government to settle disputes from individual Africans who were not satisfied with the decisions made by Gusii traditional courts of first instance. These were *etureti* (council of elders) and *egesaku* (clan elders) hierarchy of courts.⁸³

Each of the three *amatongo* courts had three panel of judges who were elders carefully selected from all locations of Gusiiland. Normally the quality of consideration to be selected was previous membership in the *etureti* council of elders, one's wisdom and influence in the community. In the late 1940s people who had acquired basic education and most of them had worked as teachers replaced the old guards as they retired. People with wealth of experience on many issues concerning the Gusii people and their social and economic life styles were also made judges in *amatongo* African courts. These courts had three to four clerks whose work was to record the proceedings of the court. The clerks were people who were able to read and write in Kiswahili. These courts also had interpreters whose main work was to interpret during court proceedings. Each court had a cashier whose main work was to collect court fee and all the fines. The court cashiers were supposed to remain within the courts all the time unlike the judges and recording clerks who regularly went out in the field for land dispute settlement.

Amatongo courts handled a wide range of cases categorized as criminal, civil and land cases. Some of the common civil cases included murder, robbery and rape among others. Once the case was reported the litigant paid the required court fees, the court clerks organized for sermons (done by court servers) and a day for hearing was fixed. All land cases were heard at the site of the disputed land.

During the hearing the litigant was given an opportunity to say his/her part without any interruption from any quarter. But after finishing his or her submission some questions were allowed to clarify some issues. After that, the defendant was also given a similar opportunity as the litigant to say his/her part. Witnesses were also given time to give their evidence. The judges cross examined both the litigant and the defendants after that the judges consulted and made a ruling based on the evidence. If any party was not satisfied with the ruling made by the tribunals, it was at liberty to make an appeal at the African court of Appeal which was in Kisii town. The tribunal *asikaris* (police) were charged with the responsibility of executing all court judgments but closely worked with the headmen and village elders popularly known as 'MM', *Mtaa wa Mlango*.⁸⁴

⁸¹ R.M. Maxon, *Conflict and Accommodation In Western Kenya, The Gusii and the British, 1907-1963*, London Associated University Press, (1989).pp 143-155

⁸² O I with GeeKe Nyaito at Kebirigo Market (former Ritongo Court Clerk) on 18/07/2015

⁸³ B.L. Shadle '*Girl Cases*'; *Marriage and Colonialism in Gusiiland, Kenya, 1890-1970*, London Heinemann Portsmouth, (2006). pp 31-39

⁸⁴ O. I. With Osoo Gesicho ,former magistrate of Ritongo Gesima Court at his home Tindereti in Masaba North sub county on 2/07/2015



In 1938 the colonial government initiated some changes in the implementation of tribunal rulings. The Tribunals African police, “*Askaris*” were made more responsible for execution of attachments instead of the chiefs. The aim was to make the Tribunals responsible for all their own activities and avoid frequent complaints that the tribunals gave judgments which the chiefs refused to execute.⁸⁵

The chiefs and their *askaris* were still expected to assist in executing attachments fees. These changes were to be carried out gradually to avoid demolishing the chiefs who had a lot of influence over the people. This was also to be seen by some chiefs as one way of reducing their judicial powers. After four months this change became acceptable and hence recognized as a big improvement.⁸⁶

The organization of the African or native Tribunals worked satisfactory well in 1939. However, many of the appeals from the divisional courts *amatongo* to the District officer accumulated or remained unattended during the first part of the year. This worked against the Appeal Tribunals because the people’s confidence in appeals was eroded for they were not sure if their cases could be heard in time. The colonial government organized for a tribunal magistrates and court clerks’ course for one week in March 1940 under Mr. N. Swetman, a District Officer. This increased efficiency in the tribunals’ work and hence reduced appeals to the District Officer.

During the war period some new developments and changes occurred in judicial system of Gusiiland. In 1945 the Luo and Gusii Appeal Tribunals in South Kavirondo District were combined to form a single Tribunal of Appeal for the whole district. The appeals elders sat at Kisii station. Extra native (African) clerks were trained and engaged for judicial work. Double numbers of elders were recruited in order to attend to many appeal cases from the location tribunals. The number of panels of elders was also added. Many of the cases which were handled by the consolidated appeal tribunal were on land disputes. The British administration of South Kavirondo District was increasingly concerned with judicial work in Gusiiland. The war years witnessed a great rise of litigation in Gusiiland and especially large increase in appeals. In 1942 there were 895 Gusii civil appeal cases whereas in 1943 there were 1066. By 1945, appeals had nearly tripled.⁸⁷

In 1946, the colonial administration began an attempt to involve the traditional Gusii *etureti* leaders in the judicial process. It was hoped that by encouraging the *etureti* elders to take part in the arbitration of relatively minor local disputes, those would not have to come before the regular tribunals. This attempt was successful to some extent because by 1946, there was a reduction in the number of cases handled by the tribunals.⁸⁸ In 1946, all original tribunals began to record full evidence in both civil and criminal cases in writing which was a significant step forward in judicial procedure on the local African courts.

In 1952, the colonial administration of South Kavirondo District realized the need of establishing another local tribunal, *ritongo* in Gusii. The District officer in his monthly visits to the two local tribunal at *Ritongo* Manga and *Ritongo* Kuja noted that the number of cases that the elders handled was less than half of the one they were expected. The District Officer (D.O) encouraged the Gusii headmen to stop petty offences from being brought to the tribunals, *amatongo* especially that of *ritongo* Manga which had more cases that remained unattended for quite some time. In 1951, the District Officer (D.O) directed that the council of elders, *etureti* should be encouraged to settle all petty disputes within their respective clans. In June 1951 the panel of elders in the Gusii tribunal *ritongo* Manga was increased from three to four ostensibly to reduce the congestion of cases especially on land. This attempt did not solve the problem of distance covered by people travelling to seek justice from the courts at Manga and Kuja tribunals. This therefore necessitated the need to establish a third court at Gesima which was selected based on its proximity to the other Gusii tribunals of Kuja and Manga.⁸⁹ In March 1952, the work of the construction of *ritongo* Gesima began and before the end of the year this court had began to exclusively handle land cases.

⁸⁵ S K D AR 1933-1939

⁸⁶ Ibid

⁸⁷ R.M. Maxon, *Conflict and Accommodation In Western Kenya, The Gusii and the British, 1907-1963*, London Associated University Press, (1989). pp 167-89

⁸⁸ K N A/DC/KSI/1/8 South Kavirondo District Annual Report, 1946

⁸⁹ K N A/DC/KSI/1/8 South Kavirondo District Annual Report, 1946



The total number of cases which were filed in the magistrate's court in 1947 was 1078. There was no permanent first class magistrate's court but these cases were heard by resident magistrate Kericho who held court sessions of two days in kisii on alternate weeks. There were so many cases pending in courts. However, there was a proposal that one senior district officer to be granted first class powers and two other district powers and two officers have second class powers. In this same year, there was an increase of appeals from the original tribunals to South Kavirondo District Appeal and appeals from South Kavirondo District to District Officer remained constant. More people appealed to the provincial commissioner from the DO's Court. According to the South Kavirondo District Commissioner' Annual Report of 1950, there was need to restructure the justice system with a view of settling disputes at what the District Commissioner (D.C) referred as 'source'⁹⁰ meaning at *Etureti*. Marriage cases took the lion's share in the cases that were handled during this period of time as can be seen in the two tables below.

Table 1: Ritongo Manga Marriage cases

Year	Months of register extent	Marriage cases	Total criminal cases	%
1943	2	35	161	22
1944	0.5	19	89	21
1955	2	43	213	20
1956	1.5	52	163	32
1957	3.25	80	372	22
1958	1	20	121	17
1960	1.75	32	183	17
1961	5	66	553	12
1962	8.5	147	935	6

Source: Ritongo Manga Criminal Court Registers

Table 2: Ritongo Manga and Ritongo Kuja marriage cases November 1952-Feb 1953

Year	Court	Marriage cases	Total	%
Nov. 1952	Manga	15	68	22
	Kuja	24	67	34
Dec. 1952	Manga	7	32	21
	Kuja	16	37	42
Jan-53	Manga	6	28	21
	Kuja	11	23	47
Feb-53	Manga	2	22	9
	Kuja	9	15	33

Source : Ritongo Kuja Criminal Court Registers

In Kisii locations of South Kavirondo District both *etureti* and *egesaku* elders continued to exercise a considerable degree of influence. When the District Commissioner (D.C) attended a public meeting, *baraza* in July 1955 at Nyamusi in North Mugirango location, he praised the *etureti* for implementing the Indigenous Authority Act.⁹¹ *Etureti* handled land or family disputes as official arbitration tribunals of first instance. If the decision of *etureti* was challenged, it was common for one *egesaku* elders to be called in a sort of court of appeal.

⁹⁰Ibid

⁹¹ Ibid



In 1956 all the African courts worked well although there was a periodic lack of confidence in court elders and the chiefs and sub-chiefs. The conflicts were mainly caused by the courts' tendency of arbitrarily dismissing cases or to inflict trivial fines in cases brought to them by chiefs and sub-chiefs. This made the chiefs and their assistant reluctant to institute prosecutions in the African courts. However, confidence was restored after arrangements were made by the District Officer (D.O) for the meetings which were held between the courts elders and the chiefs and sub-chiefs on the monthly inspection days at the African courts.⁹² Divisional District Officers attended these meetings and presided over. Issues causing frictions were discussed and ironed out. There were also frictions between the lower courts and the Appeal Court. The former considered that far too many of their judgments were being reversed on appeal.⁹³ The Provincial African Courts Officer visited Kisii and guided court elders on how to handle cases fairly and justly to restore and maintain people's confidence. This also reduced a number of the elder's rulings being reversed by the Appeal Court.

The annual statistics for the African courts revealed that the volume of litigation in 1956 and 1957 on land was on the rise in the district. This was more noticeable at Ritongo Manga and Ritongo Kuja Courts. Most land cases were centred in high agricultural potential areas.⁹⁴ Early part of June 1957 court elders and the clerical staff of African courts attended a course on instruction. The emphasis of the course was the taking and assessment of the evidence in civil and criminal cases, the form of judgment and the hearing of customarily law cases.⁹⁵ In the course of the year, the provincial African Courts officer visited Kisii three times to hear applications for submission of cases to the court of Review. The year's figures revealed a reduction in application with respect to civil cases.

Towards the end of the year, a re-organization in line of the administrative control of the courts took place. The aim was to bring the courts more close in line with Divisional administration. Duties hitherto exercised by district officer exclusively concerned with the courts were delegated to Divisional Officers with the exception of policy control and certain duties more suitably dealt with at District headquarter. These were transferred to the senior District Officer.

On account of the transfer to the central Government of financial responsibility there were considerable staff changes in 1958. The aim was to reduce, the folio cost of the District on the African Courts system. This also went along with a general improvement in average standards of court personnel. More training was done to the personnel in this courts as well as a selective dismissal of those less suited to the duties performed. These changes were reflected in the statistics of appeals from these courts which reduced.

In 1959, the colonial government observed that the Luo indigenous elders had maintained considerable authority over tribal and customary officers. Through this indigenous authority government and African District council projects were started. However, the Kisii Indigenous elders had less influence of effective customarily authority. The colonial government was committed to see that all sections of the community were consulted in the promotion of progressive measures and the *Egesaku* and *Etureti* leaders still had their part to play. Such matters included commonages and water courses which had to assist the law panel to bring Kisii law into alignment with modern conditions. The colonial government allowed all indigenous authorities of all tribal groups to be consulted in land disputes and by consent of the parties act as arbitrators in an attempt to reach settlements out of court.⁹⁶

The *etureti* elders continued to play a useful part in the life of the district in settling of minor civil and land

⁹² K N A/DC/KSI/1/8 South Kavirondo District Annual Report, 1950

⁹³ O I With Osoro Gesicho, former magistrate of Ritongo Gesima Court at his home Tindereti Masaba North sub county on 2/07/2015

⁹⁴ R.M. Maxon *Conflict and Accommodation In Western Kenya, The Gusii and the British, 1907-1963*, London Associated University Press, (1989), p.180

⁹⁵ K N A/DC/KSI/1/8 South Kavirondo District Annual Report, 1957.

⁹⁶ R.M. Maxon *Conflict and Accommodation In Western Kenya, The Gusii and the British, 1907-1963*, London Associated University Press, (1989). p109



disputes. The *etureti* in judicial matters also continued to preside over all Gusii customary related cases⁹⁷.

Apart from regular courses which were sponsored by the colonial government, arrangements were also made for most of the *etureti* members to attend adult education courses to bring them up to-date. Mr. Cotran of the school of African and oriental studies revisited Kisii in 1961. He met the law panel of African Elders. They made draft codices of Kisii and Luo customary law.⁹⁸ It should be noted that the Process of the British transformation and incorporation of Gusii traditional Justice Practices into colonial judicial system was a long one with a number of challenges. Nevertheless, the two justice systems were successfully blended in gradual manner to serve the administrative needs and interests of both the Europeans as well as the Gusii people to some levels.

Specific Gusii justice Practices that were incorporated into the Colonial Judicial System

Among the Gusii (Kisii) of Kenya, it was found out that several indigenous judicial practices continued to operate under the British colonial rule and were incorporated either formally or informally into the colonial Native Courts system. The major examples include; First, Elders' councils (*abagambi*) Senior clan elders, who traditionally heard disputes, investigated facts, and helped determine appropriate remedies. In this case, British authorities relied on such elders in Native Courts because of their knowledge of customary law and local communities. Secondly, there was Mediation and reconciliation whereby Gusii dispute settlement emphasized restoring social relationships rather than simply punishing an offender. Courts could encourage parties and their families to reach an agreement, a practice that influenced the handling of customary disputes. Third, Compensation rather than imprisonment was embraced. For many offenses, especially disputes involving injury or property, customary remedies included compensation to the injured party or their family. Colonial Native Courts retained considerable authority to order compensation in matters governed by customary law.

Fourth, Clan and family responsibility was retained. Some disputes were treated as matters involving families or clans rather than only individuals. Elders could involve relatives from both sides in negotiations and settlement, a feature that remained important in customary proceedings. Fifth was the payment of livestock or other property. In this case, cattle and other livestock could be used as compensation in customary settlements, particularly in disputes involving personal injury, death, or damage to property. Native Courts could recognize customary claims and remedies where colonial law permitted. Sixth, oaths and traditional forms of evidence was also considered. Indigenous proceedings could use oaths and community testimony to establish the truth of disputed claims. Some customary evidentiary practices continued in Native Courts, although British courts increasingly regulated which forms of evidence were legally acceptable. Seventh, there was the aspect of public hearings and community participation. Disputes were traditionally dealt with in the presence of members of the community, with elders questioning the parties and witnesses. The Native Courts system similarly depended heavily on locally recognized authorities and community knowledge.

It is important to distinguish incorporation from simple continuation. The British colonial administration did not simply adopt Gusii law wholesale. It created and regulated Native Courts, and customary law was generally recognized only insofar as colonial authorities considered it applicable and not contrary to colonial law or notions of justice

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

This study is about the transformation and integration of the Gusii indigenous justice practices into the British judicial systems was divided into three historical periods that was based on the three objectives which were well realized. By 1850, the Gusii people, had settled in their present homeland and had developed a system of settling disputes based on their social political ways of life. This system had a hierarchy of courts that started from the lowest level, the homestead and progressed upwards to the entire Gusii community where *abakumi* was like the Supreme Court. In the homestead, *omochie*, all disputes were presided over by the patriarchal founder, *omogaka bwo omochie*. All the members of the homestead brought their disputes for settlement to the

⁹⁸ P. Mayer, *The Lineage principle in Gusii Bride Wealth Law and Custom*, London Oxford University Press, (1950). p55



head of the homestead. No member of the family was allowed to take his or her dispute to the next level without the knowledge of the head of the homestead.

The next cohort of the informal court was called the council of elders, *etureti*. The elders, who formed this court, were usually people with ability to make impartial rulings and had a reputation of successful management of their homesteads. A number of cases of appeal from the homestead were handled at this court. Oath taking was conducted as a way of making litigants, defendants and witness to say the truth for fear of devastating consequences in case of lying. There were forms of magical religious oath taking which involves holding special regalia under a special tree called *omotembe*.

Egesaku, was the next level of traditional Gusii courts after *etureti*. This acted like a court of appeal. This court, decided on disputes appealed from *etureti* and also disputes involving more than one *egesaku*. This was therefore a final court in any given location.

The traditional Gusii Supreme Court was called *abakumi* or *abanguru*. Elders who managed to acquire this status were normally very rare. *Abakumi*'s main legal role, were to declare war against other tribes and also make a ruling on the number of cattle to be paid as bride wealth that linked all the Gusii clans. There were some historical rulings made by major elders of the *abakumi*. These included Bogonko, Ogeto (1906) and Inchwari (1920) s.

Gusiiland was part of South Kavirondo District during the colonial period. The establishment of colonial rule over Gusiiland was resisted by many Gusii people especially the Kitutu clans. However, when the head quarter of South Kavirondo District was transferred from Ugaya to Kisii in 1906, the British effectively took control of Gusiiland. This marked the beginning of transforming and integrating Gusii justice practices into British colonial judicial system. This process began gradually with the appointment of *abakumi* of the various clans of Gusii lands as agents of British administration of justice. Although there were early challenges of integration, but because of the integration, the process went on smoothly. In 1912-1914, tribunal rules formally exercised by chiefs were somewhat widened. In 1915, petty offences and minor cases were allowed to be heard at location tribunals under the *etureti*. In 1923, the colonial governments re-organized the judicial system where single tribunals for all civil cases in Gusii were heard. In 1926, the people petitioned the colonial government to abolish the central tribunals for civil cases and return to tribunal cases. In 1929, a superior tribunal for appeals was started at the DC to hear all appeals from the locational tribunals. In 1932, the colonial government instituted an appeal Baraza in the whole of Gusii land. A paid president and secretary of the court were appointed. Elders from each location sat at this court for two to three days monthly. In 1936, the colonial administration of this district made a total clean up with all the chiefs and headmen in Gusii land to ensure that all those who were able to carry out judicial roles as headmen were to be retained and new ones were selected.

Between 1937-1963, the South Kavirondo District colonial government initiated a number of judicial changes which began with the establishment of new tribunal courts called *amatongo*. In this same year, Ritongo-Manga and Ritongo-Kuja at Ogembo were started. Elders from various clans of all the locations in Gusii land were appointed as judges. These courts, heard and settled cases such as land disputes, civil and criminal cases. Appeals from these courts were taken to the African court of appeals which was in Kisii. In 1945, the colonial government made further changes on the judicial system where a single tribunal of appeal for the whole of South Kavirondo District was established at Kisii. The appeal elders sat at this court. In 1952, another locational tribunal court was started at Gesima which was mainly established to ease pressure which Ritongo-Manga was experiencing then. Therefore, *Ritongo-Gesima*, was started to hear mainly land cases which were many at the time. In 1954, the indigenous authority act was passed where the elders from *etureti* and *egesaku* continued to exercise considerable degree of judicial influence. In 1955, conflict occurred between the chiefs and the tribunal court judges. The DC intervened and ensured that the two groups continued carrying out their judicial roles mainly in the interest of the Gusii customary laws. In 1957, the land cases increased and this made, the African clerks to be trained on new administrative court role. In 1959, colonial government introduced indigenous authority act which empowered the elders in their judicial roles. This extended up to 1961. By 1963, when Kenya gained independence, the colonial government had transformed and integrated the



Gusii traditional justice practices into its judicial system. The two periods are important because they mark different stages in the transformation of Gusii indigenous justice under British colonial rule.

This study focused on two important periods. 1906-1937 and 1939-1963. 1906-1937 is an important period because it represents the early interaction between the traditional Gusii justice system and the British colonial administration. Therefore, this was a period of transition from predominantly indigenous dispute settlement toward a colonial-controlled system that incorporated selected customary practices. The period between 1939–1963 witnessed Consolidation and development of the Native Courts system. This period is important because customary justice became more institutionalized and closely connected to the colonial legal system. By the time of independence in 1963, Gusii customary practices had already been incorporated into, modified by, and sometimes displaced by formal colonial institutions.

In conclusion, the recognition of the Gusii indigenous judicial system by the colonial government assisted in making integration of Gusii traditional justice practices into colonial judicial systems easier since they had a base upon which to model theirs. Adoption of colonial judicial system devoid of ritual oath-taking could be attributed to rise and escalation of cases in the second and third epoch due to unclear consequences in the new judicial systems. Subsequently, leading to rise in number of appeal cases. Transition management of indigenous colonial judicial systems was greatly hampered by lack of requisite skills. When new administrative models were put in place, the Gusii people little understood it hence led to resistance. The colonial judicial system was quick to have interventional measures in response to challenges hampering its administration of justice system. Through its feedback mechanism, it was to organize training courses for its judicial staff.

In general, the transformation and integration of traditional justice practices into colonial justice system was gradual and consistent with the whites manipulating and altering Gusii judicial system and acting as protagonist whereas pre-colonial indigenous justice system was systematically, relegated to the periphery.

RECOMMENDATIONS

The study recommends that:

1. The historical perspective and latitude of Gusii traditional justice system be comprehensively understood as one key pillar on which colonial rule and its judicial system were anchored. This will dispel Western distortions and wrong notions purporting that Gusii indigenous justice system was non-existent or inferior
2. The 2010 Constitution of Kenya recognizes alternative methods of dispute settlement. This study will be instrumental in integration of indigenous justice system into the modern judicial system to handle some minor disputes instead of using mainstream courts. This will help reduce backlog of cases in Kenya's courts.
3. There be recognition and appreciation of traditional justice practices of the Gusii people that existed even before the colonial period. Oathing for instance ensured quick and prompt dispensation of justice for cases that would otherwise require in depth investigations thus leading to backlogs as the case is in our modern judicial systems currently.
4. There is need to capacity build indigenous justice practitioners in the light of modern judicial practices so that they are mutually complementary rather than at variance/ competition with present judicial establishments.

This research study was only limited to Gusii land which covered only two counties of Kisii and Nyamira. It is important that similar studies should be carried out in other communities of Kenya. This therefore, will provide a basis for comparative studies as far as the indigenous legal system and the integration into colonial judiciary is concern.



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