

**AN APPRAISAL OF MEDIATION AS ALTERNATIVE DISPUTE RESOLUTION IN
KENYA**

BY

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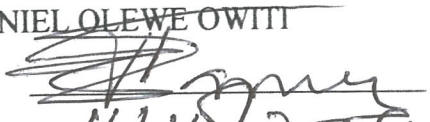
DECLARATION

I, Joseph Daniel Olewe Owiti hereby declare that this report is my original work and has not been submitted anywhere for any other award. I fully take responsibility for everything enclosed therein.

JOSEPH DANIEL OLEWE OWITI

Signature:

Date:


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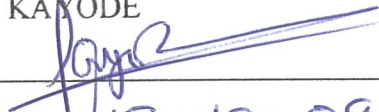
APPROVAL

I have supervised the student's report and find it deserving of a Master in Conflict Resolution and Peace Building.

DR. FAYOKUN KAYODE

Signature: _____

Date: _____


13-10-09



DEDICATION

This research paper is heartfully dedicated to my late mother Penina Atieno Owiti, dear wife Monica, sons Charles, Brian and Eugene, who encouraged me to pursue further education.

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It is my hope that knowledge gained during this research will enhance my capacity to be an effect conflict revolver and peace builder.

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ACRONYMS

ADR	Alternative Dispute Resolution
SPSS	Statistical Package for Social Sciences
FMCS	Federal Mediation and Conciliation Service

ABSTRACT

The purpose of this study was to appraise the different methods used in conflict resolution as opposed to litigation, and make recommendations to the Proposed Amendments to Introduce Alternative Dispute Resolution and Case Management in Kenya. This study sought to assess the views on mediation as an alternative method to dispute resolution, and also to consider whether mediation should be adopted as an alternative dispute resolution in judicial proceedings.

The research was a cross-sectional with both explanatory and descriptive approaches. The target population was the Judicial Officers; Administrators of institutions, local leader including faith based organizations and other citizens. The population of the study was 301 residents of Nairobi, Kenya. The study employed the purposive sampling of all groups because it was difficult to randomly sample public officials and the personnel involved in judiciary processes. The questionnaires were administered to the respondents by the help of trained research assistants. Data analysis method was based on qualitative and quantitative approach using Excel and Statistical Package for Social Sciences (SPSS) program. The results were presented in graphs, pie charts and frequency tables.

The major finding in the study was that there were several alternative methods of dispute resolution. The long period of time that court cases took before their conclusion was majorly due to corruption, misconduct of the judges, involvement of judges in politics and abuse of office by judges, as well as fewer judges as compared to the many cases in court, lack of evidence, and the nature of the civil case. Implementation of mediation was more effective than litigation, especially due to its simplicity, less cost involved, less time consuming and also promoted peace. Lack of awareness on the proposal to amend the civil procedures rules to provide for mediation as dispute resolution mechanism, resulted into most opinions that mediation be made voluntary. Corruption, injustices and unfairness of the judges as well as lack of reforms in courts were the main consequences of dissatisfaction on the outcome of court cases. As a result, the dissatisfaction led to the recommendation for Alternative Dispute Resolution (ADR).

CHAPTER ONE

INTRODUCTION

1.1 Background Information

Alternative Dispute Resolution (ADR) has gained widespread acceptance among both the general public and the legal profession in recent years, throughout the world. In fact, some US courts require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual(s) who will decide their dispute. Under Kenyan law, parties to a contract may opt to have any disputes arising settled in any jurisdiction and either through the courts of a foreign country or alternative dispute resolution mechanisms such as arbitration (Brearton et al, 1995).

Further, the reasons for the challenges facing the civil justice system in Kenya have been the subject of many studies. The delay in passing resolution of cases and dispensing of justice of discussion are often due to shortage of judges, delays by advocates, procedural and technical requirements relating to civil procedure and inflexibility of the law. All amidst allegations of corruption and other malpractices such as misplacement of files, inherent inefficiency, low morale, poor training of personnel, language and communication barriers, the hand recording of proceedings and the concomitant requirement for the presence of the person of the judge to mention a few.

ADR traditions vary by country and culture. ADR is of two historic types; resolving disputes outside official judicial mechanisms and informal methods attached to official judicial mechanisms. ADR includes formal and informal tribunals, formal and informal mediative processes. The classic formal tribunal form of ADR includes arbitration (both binding and non-binding) and private judges (either sitting alone, on panels or over summary jury trials). The classic formal mediative process is a referral for mediation before court appoints mediator or mediation panel.

The activity of mediation appeared in the very ancient times. Historians presume early cases in Phoenician commerce (but suppose it was used in Babylon, too). The practice developed in Ancient Greece which knew the non-marital mediator as a proxenetas, then in Roman civilization, starting from Justinian's Digest of 530 - 533 CE that recognized mediation. The Romans called mediators by a variety of names, including internuncius, medium, intercessor, philanthropus, interpolator, conciliator, interlocutor, interpres, and finally mediator. Some cultures regarded the mediator as a sacred figure, worthy of particular respect; and the role partly overlapped with that of traditional wise men or tribal chief (Boulle, 2005).

Tribal communities have also practiced mediation techniques for centuries. In China, for example, the People's Mediation Committees resolve over 7.2 million disputes annually are based on aged societal principles that have long supported peaceful coexistence. Additionally, Native Americans adopted their own dispute resolution procedures long before the American settlement. Recently, the Navajo (US) returned to the dispute resolution procedure named Hozhooji Naat'aanii, which they have not practiced since 1829, when the government first imposed its own judicial standards on their clans. In addition, mass employment of mediators came with the creation of the Federal Mediation and Conciliation Service (FMCS) in 1946, whose primary focus was to resolve labor disputes. In 1976, legal scholars met to continue with Roscoe Pound legacy by brainstorming possible improvements for the American legal system. The urgent need for alternatives to litigation materialized in the concept of the "Multi-door Courthouse," as well as the contrary notion of the Neighborhood Justice Center. Finally, the initial amendment to Rule 16 of the Federal Rules of Civil Procedure, altered conceptions of legal justice by recognizing mediation as a valuable practice (Sander, 1976).

Mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator; who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on the parties, but uses certain procedures, techniques and skills to help the parties to negotiate an agreed resolution of their dispute without adjudication, thereby maintaining good relations between the parties. Currently in Kenya, the following are the institutionalised methods of dispute resolution.



1.1.1 Litigation

This refers to an institutionalised system of dispute resolution with its own procedures as set out in the Civil Procedure Act. It involves the appointment of an adjudicator, normally a judge or magistrate. The proceedings are generally conducted in formal established courts of law. When a civil dispute arises, the aggrieved party is required to institute proceedings against the aggressor by filing a complainant setting out the nature of the claim for which s/he seeks intervention of the court. This is filed at the relevant court registry after court fees are paid. Litigation also attempts to fully rely on the law therefore the resolution is entirely up to the process.

1.1.2 Arbitration

In arbitration, the parties agree to submit their dispute to a neutral third party, usually an arbitrator or an arbitration panel. The arbitrator conducts a hearing in which each side presents evidence. The arbitrator then makes a determination on liability and/or renders a decision for resolving the dispute. Often the parties agree in advance whether the arbitrator's decision will be binding (Metzloff, 1992).

The parties privately choose an adjudicator who is paid by the disputants. The procedural rules may be statutory or imposed by the organization governing the conducts of Arbitration for example the Chartered Institute of Arbitrators. As it has been observed and studied, the Processes of Dispute Resolution: arbitration has tended to amalgamate with litigation and is often costly with the result that the problems of litigation remain unmitigated in dispute resolution (Murray et al, 1989). However, the decision of the arbitrator is subject to limited appellate review for procedural error, arbitrator bias, or fraud. Arbitration can be private, arising from the terms of a contract between the parties, or judicially mandated (court-annexed) by statute or rule (Brearton et al, 1995).

1.1.3 Negotiation

Negotiation, the most frequently used method of Alternative Dispute Resolution (ADR), is defined as the process whereby two or more disputing parties confer together in good faith so as to settle a matter of mutual concern (Brearton et al, 1995).

This is not institutionalized and is not compulsory. It has however been in existence in its informal form usually occurring at the pre-litigation stage as a natural procedure by the parties in their attempts to resolve the dispute before resorting to litigation. Once negotiation has failed litigation will usually takes over. Negotiation remains informal and has to remain as such as it is a social facility for human endeavour in resolution and cooperation in human interaction.

The approach to negotiation may be positional or principled. In positional negotiation, divergent parties incrementally concede their position until a compromise is reached. In principled negotiation, the parties generate options focused on their interests to arrive at an agreement based on objective criteria. Negotiation serves as the basis for mediation, an important ADR method used in dispute resolution (Fraser, 1997).

1.2 Statement of the Problem

Legal systems provide necessary structure for resolution of many disputes. However, some disputants will only reach a conclusive agreement through collaborative processes. Still, some disputes need the coercive power of the state to enforce a resolution. The inadequacies of the existing methods of dispute resolution have been much debated. The judicial system faces critical challenges in providing the delivery of services and the dispensation of justice in addition to moving with the times in view of the inevitable changes and developments in society.

There is a call for Judicial Reform in Kenya. There are debates on how conflicts and disputes are resolved in society and on how issues the existing methods can be improved upon. The present civil justice system is no longer meeting the needs of all Kenyans. There has been a

general dissatisfaction at the manner in which the courts have been run and people are looking for alternative dispute resolution methods.

The issue therefore is whether the Kenyan legal system and the Kenyan society should include mediation in the formal legal system of dispute resolution. It is against this background that this study focuses on appraising mediation as an alternative dispute resolution.

1.3 General Objective of the Study

1.3.1 General Objectives

The general objective of this study was to appraise the different methods used in conflict resolution as opposed to litigation, and make recommendations to the Judicial Commission of Kenya.

1.3.2 Specific Objectives

The study was guided by the following specific objectives;

- i. To assess views on mediation as an alternative method to dispute resolution,
- ii. To explore whether mediation should be adopted as an alternative dispute resolution in judicial proceedings.

1.4 Hypothesis

Due to dissatisfaction of the populace with the Kenyan Judicial Systems, many are turning to ADR as opposed to litigation. Many disputes could be resolved through mediation without going through litigation.

1.5 Rationale of the Study

The debate on Proposed Amendments to Introduce Alternative Dispute Resolution and Case Management in Kenya has now provoked an increasing interest in the use of Alternative Dispute Resolution methods. The term ADR was used in this study to describe the processes which galvanize a range of resources and mechanisms used to settle disputes. It was hoped that as opposed to litigation the findings of the study would contribute to the debate on judicial reforms and raise public awareness and knowledge on the ADR.

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

This chapter presents a review of literature on the study done on the aspect of Alternative Dispute Resolution methods.

2.1 Mediation

Mediation is an extension of direct negotiation between the parties, using a neutral third party to facilitate the negotiation process. As a facilitator, the mediator has no authority to impose a solution on the parties nor are the results of the process binding on the disputing parties. The mediator acts by identifying issues, proposing solutions, and encouraging accommodation on both sides (Fraser, 1997).

The advantages of mediation over litigation are its decreased costs, more confidential proceedings, and the degree of control enjoyed by the disputing parties over the process and outcome. In resolving allegations people favour mediation because it provides a forum in which they can express their concerns and may lead to an acknowledgment of the problem sometimes in the form of an apology (Grenig, 1997).

Mediation has its limitations. In many jurisdictions mediation is voluntary and can only be pursued if both parties agree to it. Mediators do not have the same authority as judges and therefore cannot compel the release of information nor can their decisions be imposed. The mediator has only as much power as the disputing parties permit and as such can go no further than the disputants themselves are willing to go (Grenig, 1997).

Some key elements of mediation are: Mediation is a voluntary process. Either party is free to end the mediation at any time and for any reason. Mediation encourages parties to work together to solve their dispute(s) and to reach the best agreement possible. With mediation, no rules, regulations or judgment is forced on any party. The parties can agree upon rules and reach their own agreement. By law, any statements or proposals for settlement made in

mediation are confidential. This is to encourage both sides to speak freely and share ideas for solving their dispute what they say cannot be used against them later in court or in some other setting outside the mediation. Neutrality: the mediator is responsible to help both parties reach their goals. The mediator cannot favour one party's interests over the others.

2.3 Dispute and Conflict

A dispute may be viewed as a class or kind of conflict which involves disagreement over issues capable of resolution by negotiation, mediation, or third party adjudication. D. Foskett Q.C. in *The Law and Practice of Compromise* says an 'actual' dispute will not exist until a claim is asserted by one party which is 'disputed' by the other. And that where no such dispute about an issue can be discerned, no subsequent agreement between the parties will be found to have compromised that issue" (Foskett, 2001).

There are obviously comparative advantages of mediation over litigation and all other adjudicatory methods of dispute resolution in terms of dealing with the dispute and its effect on human relationships. The second advantage is that mediation unlike negotiation for example can be incorporated into the national formal legal adjudicatory framework. This has been done, for example in the United Kingdom, the United States of America, Canada and Australia with observed advantages of all parties involved. It is dispute resolution with a human face.

Roscoe Pound, a leading sociological jurist, in his "Programme of the Sociological School" lays down similarities among sociological jurists to include; a study of the actual social effects of legal institutions, legal precepts and legal doctrines, a study of the means of making legal precepts effective in action and a sociological legal history. By this he means the study of the social background and social effects of legal institutions, legal precepts and legal doctrines, and of how these effects have been brought about (Pound, 1943).

Proponents of this school of thought are concerned with social justice. Pound was concerned with the effects of law upon society and he saw the task of a lawyer as a social engineer. In his work "The end or purpose of Law" he talks about a paradigm shift in the thinking of

jurists on the end of law. He postulates that jurists no longer consider the end of law as a maximum of self assertion, but as a maximum satisfaction of wants. One of the key factors to this shift, according to Pound, is an attempt at economic interpretation of legal history, by showing the extent to which law had been shaped by the pressure of economic wants (Pound, 1954).

Similarly, Selznick, another sociological jurist posits that "It is well to remember that although the law is abstract, its decision-making institution deals with a concrete and practical world. Recognition of basic truths about the world cannot be long denied. Moreover, the legal order is becoming increasingly broad in scope, touching more and more elements of society. This means that sociological studies research addressed to the important characteristics of society, and to the basic chances in it, will automatically have legal relevance. This relevance, of course, goes beyond bare description. It includes making the law sensitive to the values that are at stake as new circumstances alter out institutions.

R. Von Jhering placed great emphasis on the function of law as an instrument for serving the needs of society. According to Jhering, everybody exists for the world and the world exists for everybody. For him the task of bringing the legal order into closer touch with actual human needs was a matter for the legislature rather than part of the judicial function (Selznick, 1959).

Sociological jurisprudence developed by the above proponents on the role of law in society to the effect that law in society exists to serve society and therefore the legal order put in place should try as much as is possible to meet human needs and that law should be practical and it can be shaped to meet the present needs of society.

Conflict in society is generally accepted as a part of human existence. Society however seeks to as far as is possible contain and resolve the conflict without breaking the general threads that hold the society together. Arbitration has been applied in medical malpractice for more than 20 years. For instance, in the state of Michigan it is required by statute and in California by contract between managed care organizations and enrolees. Challenges to medical

malpractice arbitration awards in both states have been upheld by their highest courts. Despite this, arbitration remains an underutilized alternative dispute resolution method in dispute resolution across the country (Ladimer, 1995).

Numerous studies have been conducted on alternative dispute resolution as an option to the existing institutionalized forms of dispute resolution. There are a number of approaches to dealing with conflicts and disputes in society including conflict management and resolution. A group called the centre for the analysis of conflict has for example undertaken extensive academic research and practical intervention into conflict with the result that it has observed common patterns within and between interpersonal, community and inter-state conflict. It has developed an analytical problem-solving approach to conflict, identifying the most effective stage for dealing with conflict, (early in its development, rather than after the commencement of hostilities) and addressing criticism about its approach. There are views that neutral intervention might be a force against change, or that it might just constitute appeasement of aggression. The group continues to research on collaborative, analytical problem-solving as an alternative to traditional mediation (Mitchell and Bank, 1996)

Conflict management approaches have generally been divided into five categories. These are “forcing” where the facilitator asserts his or her authority, “avoiding” where the facilitator side-steps dealing with the issues “compromising” where the facilitator seeks an expedient solution irrespective of effectiveness: “accommodating” the facilitator treats harmonious relations as top priority; and “collaborating” which is a joint problem-solving method. The collaborative approach, while not appropriate for all situations, is described as the one that, when used appropriately, has the most beneficial effect on the parties involved.

Where conflicts assume the quality of disputes, where specific issues need to be addressed, a number of further approaches have been proposed. Some disputes may have to be resolved by adjudication. In such an event, the main questions may be whether litigation, arbitration or some other form of adjudication is the appropriate procedure to be used and whether the issues for adjudication can be clarified or narrowed. Other disputes may be resolved by negotiation, without any need for the assistance of a third party. In certain other cases, the

assistance of an impartial third party may facilitate and expedite resolution. The third party in such cases can introduce procedures for examining and, where appropriate, after the evaluation of the issues, for exploring interests, concerns and options, for dealing effectively with emotional and hidden factors, and for generally assisting the parties towards resolution of the issues David (Whetton, Kim & Woods, 1986).

Conflict resolution is described as “an outcome, in which the issues in an existing conflict are satisfactorily dealt with through a solution that is mutually acceptable to the parties, self sustaining in the long run and productive of a new, positive relationship between parties that were previously hostile adversaries” (Mitchell & Banks, 1996).

The debate on how conflicts and disputes are resolved in society and how the existing methods can be improved upon continues to gain pace. The present civil justice system is viewed as no longer meeting the needs of all Kenyans. There has been a general dissatisfaction at the manner in which the courts have been run from day to day. This is not news to anybody who practices law in Kenya or who has in one way or the other been involved in the same. People are looking for alternatives. This debate has by no means been limited to dispensation of justice in Kenya. The wind of Judicial Reform has generally been blowing world wide.

Conflict management or resolution usually seeks to deal with the conflict and seeking to deal with it by consensual means. In personal or family terms this may for example involve counselling or therapy; in organisational terms, this may involve management consultancy or task forces; in international terms, diplomacy. Some conflicts can be regulated by procedures such as litigation, arbitration or mediation; but conflicts are not necessarily amenable to resolution by dispute resolution processes (Mwagiru, 2000).

In recent times, there has been much debate on reforms in the Kenyan judiciary. It would seem that there is a growing realization by stakeholders such as the judiciary, advocates, and even the general public that the existing civil justice system could be improved to ease the congestion of civil cases filed for determination by the civil courts and expedite the



resolution process. The existing processes appear to be inefficient and not always appropriate.

There are certain disputes which proceed for determination by the courts which could be resolved out of court. An example is, a case relating to breach of contract, there could be certain undertones which result in a stalemate between the parties. These undertones do not necessarily need due process of the law for resolution of the dispute. Some of them may actually not be amenable to legal requirements and procedures in the due process. They could for example relate to matters of emotion, family relationships, perceptions, innuendos and attitudes which strictly in law, would not have a direct impact on the judgment of the court. Indeed, in evidence, these are often considered irrelevant and of no legal consequence yet, for the people involved, these issues are so real that until they are brought to the fore and dealt with, the dispute itself will not be resolved. This assumes of course that the due process of law is intended to resolve disputes among the national populace (Mitchell and Banks, 1996).

Mediation is an alternative to going to court. Many civil disputes and some criminal cases can be mediated. The only requirement is that the parties agree to participate in the process. Mediation is not limited to legal disputes. If one is experiencing problems communicating with someone else or are unsure how one should approach someone with whom one have a dispute, mediation may be of value. With some disputes, mediation may not be the best option. Also, a decision to try mediation does not prevent someone from going to court. If one participate in mediation and no agreement is reached, one can still file a lawsuit (Sweet & Maxwell, 1996).

Courts may require mediation in some types of cases, for instance family law disputes over child custody and visitation Attempts at actual reform are on going. Related to Alternative Dispute Resolution and specifically mediation, the Rules Committee which is created under section 81 of the Civil Procedure Act Chapter 21 of the Laws of Kenya currently embarked on an exercise aimed at soliciting views from the public for proposals to bring about practical and user friendly changes to the Civil Procedure Rules. Efforts are being made to positively

change civil procedure, and reorganise the courts generally. After a comparative analysis of the practice of alternative dispute resolution. In various jurisdictions worldwide the Chartered Institute of Arbitrators (Kenya Branch) in drafting the Rules proposed mediation should be passed as law in regard to Alternative Dispute Resolution.

The proposed amendment of the Kenyan Civil Procedure Rules seeks to incorporate and institutionalise mediation as mandatory for every suit instituted in court unless otherwise excepted by statute, rule or court order, or the suit involves constitutional issues, matters of public policy or has pending applications that seek to dispose of the suit in a summary manner or in cases where the trial court considers the case to be unsuitable for referral to mediation. . If the proposal becomes law, it will avail mediation structurally. To have effect and for the advantages above to be realised, the advocates would be critical in its implementation

However, the proposed rules are yet to become law. In a democratic process governance and leadership is by a social contract between the governed and the governors, it is important not just for this proposal, but for all laws that the views of the stakeholders be taken into account. By this, we mean that when a law is being promulgated or amended, the lawmakers must envision its effect on all stakeholders and at least to some extent its desirability to the stakeholders (Rousseau).

We could ask who the stakeholders are in the juridical process. For the purposes of this study, we see two categories of stakeholders who we want to call perhaps inappropriately active and passive stakeholders. By active stake holders, we mean professional officers of the court including advocates, judges, court clerks to mention a few examples, the administrators of justice for example the police, and the provincial administrators including, provincial commissioners, district commissioners, district officers and chiefs. The passive is generally the public who ordinarily go about their work with no cares of the juridical processes until they fall into the sub category of consumers. By the consumer category, we have in mind the plaintiffs, defendants, accused persons, complainants, witnesses and

assessors. The consumer can come from either the active or passive stakeholders who need the services of the judiciary or who come into contact with it.

At the end of the day, the society is one and the laws that are promulgated will potentially affect all persons. The stakeholder categories are therefore when all is said and done not fixed. From this, we can see that when you come to the consumer category, you begin to realise that the same people whether professionally involved or from the general public, can at any point become consumers. It would be highly democratic if all these people had an input in the process of judicial reform. It is recognised that some of this is achieved through representation. We also recognise the attempts of the Alternative Dispute Resolution Task Force to collect views for reform from stakeholders through public sittings around the country before embarking on the drafting of the proposed Rules (Stebbing, 2001).

It would be interesting to know the views of all the stakeholders with respect to all our laws as they are being promulgated or amended. This is however an amorphous task. At a lower level, it would be interesting to know how all the categories of stakeholders react to the proposals by the Alternative Dispute Resolution Task Force to amend the Civil Procedure Rules to make room for mediation as mandatory for nearly all civil cases instituted.

2.4 Mediation in Dispute Resolution and Management

The mediator helps the parties reach a complete understanding of the dispute, including the interests of both parties. The mediator is neutral. He or she is not an advocate for either party. The mediator helps both parties reach an agreement in which both parties achieve some, if not all, of their goals. The mediator helps both parties become clear about their expectations for an agreement and help them reach their goals. To do this, the mediator may ask tough questions for each party to reflect on. The mediator also helps each party see the big picture regarding the dispute. This may keep them from focusing on irrelevant facts or legal issues. The mediator also works with both parties to separate the people from the problems. Due to the potentially high emotional impact a dispute may have, a party may need a mediator's assistance in moving past negative feelings toward the other party so the parties can work together for a solution (Harlow and Rawlings, 1997).

Although mediators must be flexible and adapt their approach to the particular circumstances of a given conflict, it is possible to distinguish between and to compare the relative efficacy of different mediation styles and strategies. Evidence show that, it is possible to establish a causal relationship between the style and strategy of the mediator and the outcome of the mediation. Although the failure of a mediation effort is not necessarily attributable to the mediator, mediators can demonstrably antagonize the parties, inhibit progress and exacerbate the conflict (Burton & Dukes, 1990).

The efficacy of different types of mediation is closely related to the particular dynamics of the conflicts. The dynamics of conflicts are significantly different. For instance, Mediation in a civil war is "successful" when it leads to both a cease-fire and the advent of democracy. While a cease-fire alone can be viewed as a success on humanitarian grounds, instability and the threat of a resumption of hostilities are likely to persist in the absence of a democratic settlement. A democratic settlement will not eliminate all the causes of violence but it provides a platform for development and for managing normal social and political conflict in a consensual and stable manner (Brearton et al., 1995).

High intensity conflict evokes and is fuelled by a range of visceral emotions: fear, insecurity, anger, aggrievement and suspicion. These emotions make the parties resistant to negotiations and inhibit progress once talks are underway. They must therefore be managed in some fashion by the mediator (Nathan, 2005).

The key to effective mediation lies in understanding, managing and transforming the psychological dynamics of serious conflict that make the parties resistant to negotiations. the specific causes and features of a given dispute, these dynamics can be described in general terms: the parties regard each other with deep mistrust and animosity; they believe that their differences are irreconcilable; they consider their own position to be non-negotiable; and they fear that a negotiated settlement will lead to unacceptable compromises (Nathan, 2005).

These visceral concerns are acute where serious harm has occurred and where identity, security, freedom and justice are at stake. The concerns are both a product of dispute and, more importantly, obstacles to its resolution. They give rise to a profound lack of confidence in negotiations as a means to achieving a satisfactory outcome even when the cost of hostilities is high and the parties recognise that there is no possibility of victory. Mediation can mitigate the concerns through the presence and support of an intermediary peacemaker who is not party to the conflict, who enjoys the trust of the disputants, and whose goal is to help them to forge agreements they find acceptable. By virtue of these characteristics the mediator serves as both a buffer and a bridge between the antagonists, ameliorating the anger and suspicion that prevent them from addressing in a co-operative manner the substantive issues in dispute. The parties' common trust in the mediator offsets their mutual distrust and raises their confidence in negotiations (Mwagiru, 2000).

Confidence-building reflects the basic logic and utility of mediation. Whereas coercive diplomacy relies on leverage to pressurise the parties into a settlement, confidence-building mediation is a process of facilitated dialogue and negotiation in which a third party assists adversaries, with their consent, to manage or resolve their conflict by accommodating each other's fears and needs. The emphasis on building trust and promoting co-operative problem-solving does not derive from an idealistic assumption that the positions and conduct of the parties are legitimate. The key assumption of confidence-building mediation is entirely pragmatic: in the absence of outright victory, a peace agreement and its long-term sustainability require the consent and co-operation of the belligerents (Harlow and Rawlings, 1997).

As a result of the parties' mutual mistrust and their anxiety that negotiations may lead to an unfavourable outcome, their trust in the mediator is a critical factor. Above all, they expect the mediator to be non-partisan and fair. Any display of substantive or procedural bias by the mediator will be viewed as a breach of trust and may scupper the resolution initiative. Mediators can succeed when their credibility and authority derive from moral stature rather than formal power (Grenig, 1997).

It is similarly incorrect to claim that coercive leverage is an effective mediation strategy. A mediating body will lose the confidence and co-operation of a party against whom it threatens or applies sanctions or force. Punitive action destroys the mediator's credibility as an honest broker and makes the mediator a party to the conflict. It can embolden and thereby reinforce the intransigence of the favoured party. By heightening the insecurity of the targeted party, it can also make that party more intransigent (Mthembu-Salter, 2005).

Mediators are mistaken when they seek to win the parties' consent to their proposals and press for rapid results through a combination of persuasion and leverage. Agreements that are reached under duress will have scant value in the absence of a genuine resolution. The process by which dispute is addressed matters greatly because of the importance that the parties attach to their positions and because people resent being treated as the object of some other body's plans. The parties are usually motivated by an acute sense of aggrievement and the belief that their security or survival is at stake. They resist efforts to force a settlement on them, regardless of whether such efforts stem from their enemy or a mediator. Moreover, the desired outcome of a negotiated settlement is a democratic dispensation, which cannot be imposed on a society (Brearton et al., 1995).

Mediation cannot be undertaken in a mechanical fashion according to a fixed recipe that guarantees success. Disputes are dynamic processes and differ sharply from case to case. Unlike a chess player moving inanimate objects across known space and according to fixed rules, a mediator is confronted by social actors that have volition and their own agendas. Mediators must therefore be flexible, creative and responsive to changing conditions. Mediators will not be effective if they lack a comprehensive understanding of the peculiarities, intricacies and evolving dynamics of a dispute. They must have a fine grasp of background factors and be deeply familiar with the disputants (Honwana, 2005).

CHAPTER THREE

STUDY METHODOLOGY

3.0 Introduction

This chapter highlights the overall study methodology that was adopted for the study. It is organised in five sections, which include; the study design; population and sample; data collection; research procedures, data analysis and presentation.

3.1 Study Design

The study design was cross-sectional with both explanatory and descriptive approaches. The sampling was purposive, the respondents being determined by ease of accessibility.

3.2 Study Population

Because of the limitations of this study, we interviewed a small number of Judicial Officers; Administrators of institutions, local leader including faith based organizations and citizens. These groups formed active stakeholders and consumers' views on the review process. Specifically the study targeted the following groups of the population: the judiciary, key personnel in public administration, community leaders, the public in general, and the students.

The potential respondents targeted by the study were residents in Nairobi, Kenya. The inclusion of public as respondents enabled the researcher to measure the impact the mediation had in their lives and their perception of possible inclusion in litigation. The public administrators were included in the study population because they actively took a leading role in the resolving disputes. Community leaders resolved minor disputes before referring the major ones to the judiciary.

3.3 Sampling of Study Population

To obtain the sampling size, the formula below was applied (Mugenda & Mugenda, 2003:41-52)

$$n = \frac{z^2 pq}{d^2}$$

Where n= is the desired sample size when the population is greater than 10,000.

z= the standard normal deviate -1.96

p= proportion of the population who are female -0.5

q= proportion of the population who are male -0.5

d= level of statistical significance -0.05

Therefore

$$n = \frac{(1.96)^2 (0.5) (0.5)}{(0.05)^2}$$

However, in this case, the total population is less than 10, 000.

Therefore the formula below was applied

$$nf = \frac{n}{1 + n/N}$$

Where

nf= the desired sample size (when population is less than 10, 000)

N=the the desired sample size when the population is more than 10, 000 therefore 384.

It was difficult to randomly sample public officials and the personnel involved in judiciary processes. The researcher therefore sampled all the groups using purposive sampling.

3.4 Data Collection

The researcher collected both qualitative and quantitative data. The former was used in the descriptive discourse of various variables.

Other secondary data included journals and other publications from meetings and reports from institutions involved in conflict and peace building issues. The secondary source will also comprised review of other people's research in this area.

3.5 Data Analysis

The analysis of the collected data begun by editing and examination of responses of returned questionnaires. The data was coded, appropriately categorized and processed using Statistical Package for Social Science (SPSS). The study used descriptive statistics to analyze data collected. The data for each item was processed and reported through descriptive narrative. Analysis of the data was accomplished by use of frequencies, means, calculating percentage and tabulating them appropriately. This was followed by drawing of inferences which formed the basic of the research finding.

3.6 Study Limitations

The major limitation of the study was shortage time and limited resources to consult wider range respondents

CHAPTER FOUR

DATA ANALYSIS AND INTERPRETATION

4.0 Introduction

This chapter of the report provides a presentation of the study findings and data analysis. The data was gathered from the three hundred and one (301) primary sources through well structural, coded questionnaires.

4.1 Socio-demographic

4.1.1 Age

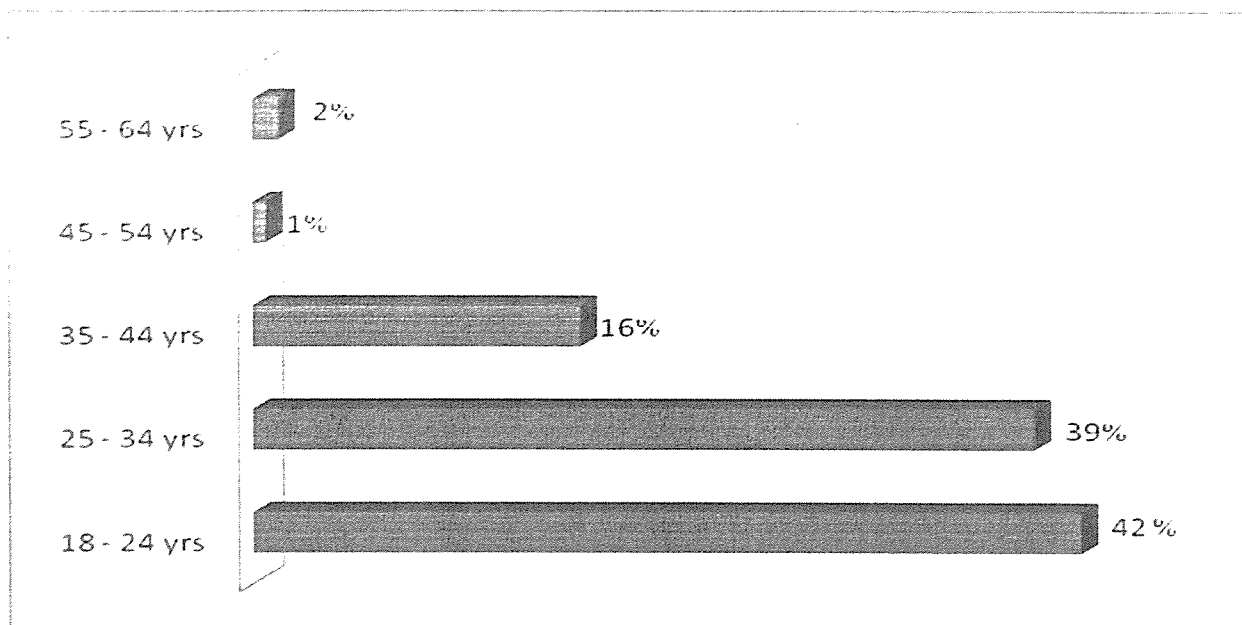
This section aimed at establishing the age of the respondents under study. Results are presented in table 1 and figure 1.

Table 1: Age of the respondents

Age of the respondents	Frequency	Percent
18-24	126	42
25-34	119	39
35-44	50	16
45-54	2	1
55-64	4	2
Total	301	100.0

Source: primary data

Figure 1: Age of the respondents



Source: primary data

From the study, it was revealed that, majority of the respondents were the youthful category, 42% aged between eighteen and twenty four years. Meanwhile, those who were aged between twenty five and thirty four years constituted 39% of the respondents. Still an age group, 35-44 years composed 16%. The elderly age group, 55-64 years, constituted only 2%.

4.1.2 Sex

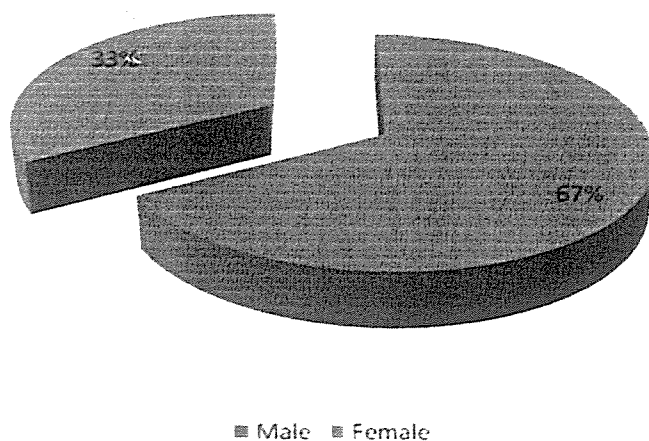
Respondents were categorized as being either male or female. There was gender imparity among the respondents as indicated in table 2 and figure 2, where by the males were more than females.

Table 2: Respondents' Gender

Gender	Frequency	Percent
Males	202	67
Females	99	33
Total	301	100

Source: primary data

Figure 2: Gender



Source: primary data

4.1.3 Education

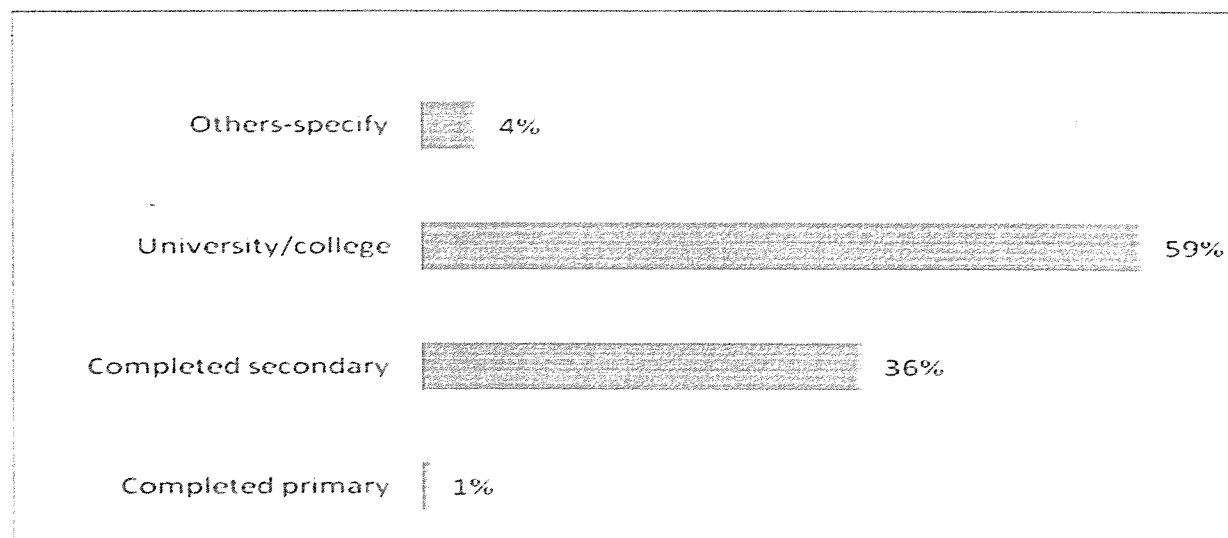
This part sought to establish the level of education of the respondents. The responses were as follows.

Table 3: Level of Education

Level of Education	Frequency	Percent
Other level of education	14	4
University/college level	177	59
Secondary level	108	36
Primary level	2	1
Total	301	100.0

Source: primary data

Figure 3: Level of education



Source: primary data

It was disclosed that majority of the respondents, 59% had their education up to the university/college level, being the highest stage. Those who had completed secondary level of education comprised 36%. Four percent of the respondents indicated that they had other level of education, while only 1% had their education up to the primary level.

4.1.4 Occupation of Respondent

Table 4: Occupation of Respondent

Occupation	Frequency	Percent
Salaried	108	36
Businessman/woman	67	22
Lawyer	15	5
Student	87	29
Unemployed	24	8
Total	301	100.0

Source: primary data

Table 4 above shows the findings on occupation where majority comprising of 36 % of the respondents were salaried, while 29% were students, and 22% businessman/woman. A proportion of 8% was unemployed, and a minority of 5% were lawyers.

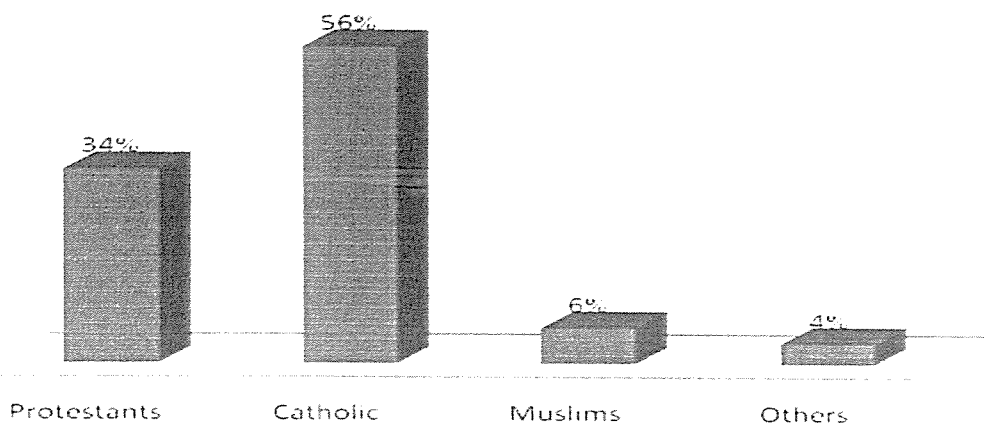
4.1.5 Religion

Table 5: Religion of respondents

Religion	Frequency	Percent
Protestants	103	34
Catholic	168	56
Muslims	19	6
Others	11	4
Total	301	100.0

Source: primary data

Figure 4: Religion



Source: primary data

Catholic religion was the most subscribed as shown by 56% of the respondents and this was followed by 34% who were Protestants. Muslims constituted 6% whereas the other religions were subscribed to by the minority, 4%.

4.1.6 Marital Status

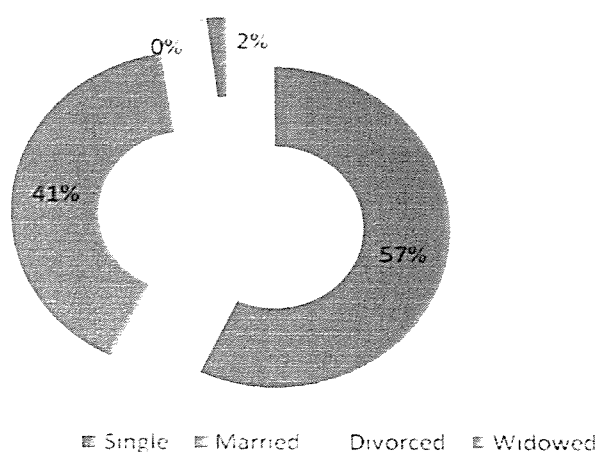
This section sought to establish marital status of the respondents. The results are as depicted in table 6 and figure 5.

Table 6: Marital Status

Marital Status	Frequency	Percent
Single	124	41
Married	172	57
Widowed	4	2
Divorced	1	0
Total	301	100.0

Source: primary data

Figure 5: Marital status



Source: primary data

Majority of the respondents, 57% of were singles, while 41% were married. A proportion of 2% were widowed and none was divorced.

4.1.7 Number of Years at Work

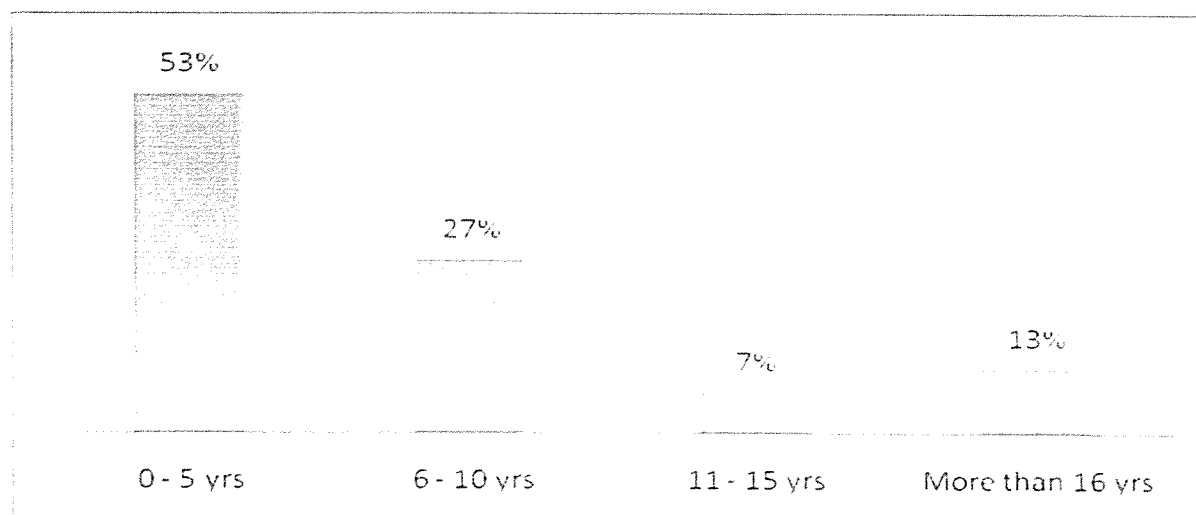
The respondents were asked to indicate how long they had worked. The results were as shown in table 7 and figure 6.

Table 7: Number of Years at Work

Number of Years at Work	Frequency	Percent
More than 16 years	31	13
11-15 years	20	7
6-10 years	82	27
0-5 years	160	53
Total	301	100.0

Source: primary data

Figure 6: Number of years at work



Source: primary data

The study findings revealed that the majority of the respondents, 53% had worked for a shorter period of less than five years. This was followed with 27%, who had worked for a period between 6 and 10 years. Meanwhile, 13% of the respondents had worked in the facility for the longest period of more than sixteen years. Those who had worked for a period between 11 and 15 years constituted the least proportion 7%.

4.2 Knowledge of alternative methods of disputes

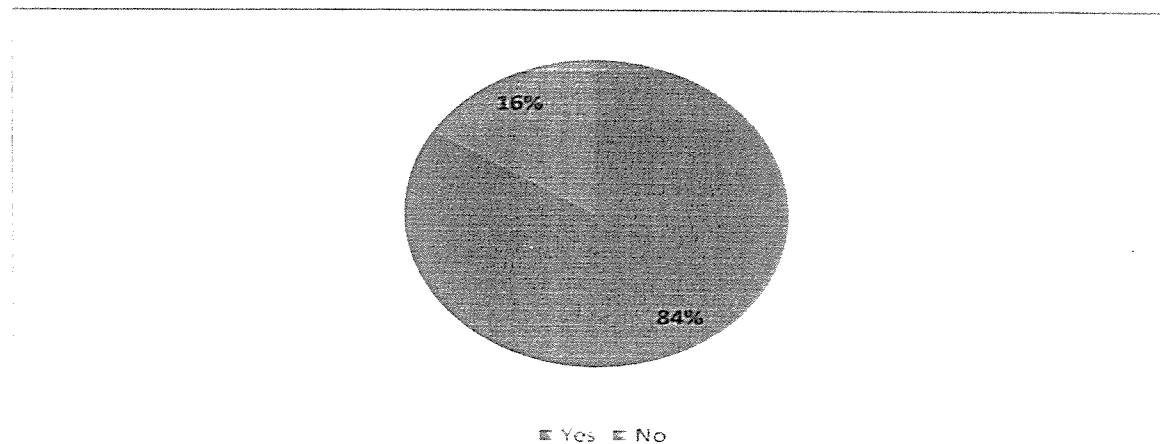
The respondents were asked to state whether they were aware of ADR. The responses were as presented in table 8 and figure 7.

Table 8: Awareness of ADR

Awareness of ADR	Frequency	Percent
Yes	253	84
No	48	16
Total	301	100.0

Source: primary data

Figure 7: Awareness of ADR



Source: primary data

The respondents, who admitted that they were aware of some alternative methods of dispute resolution constituted the majority, 84%. Only 16% admitted that they were not aware of some alternative methods of dispute resolution.

The respondents, who admitted that they were aware of some alternative methods of dispute resolution, were further asked to state the methods they knew. The responses were as presented in the table 9.

Table 9: Aware of any ADR * Method of ADR aware of Cross Tabulation

		Aware of any ADR				Total	
		Yes		No			
Method of ADR aware of	Type	Freq	%	Freq	%	Freq	%
	Negotiation	162	54	7	2	169	56
	Conciliation	27	9	18	6	45	15
	Arbitration	36	12	-	-	36	12
	Mediation	48	16	-	-	48	16
	Peaceful demonstration	3	1	-	-	3	1
Total		276	92	25	8	301	100

Source: primary data

The cross tabulation shows that majority of the respondents, 54% were aware of negotiation as an alternative method of dispute resolution. Meanwhile, 16% admitted that they were aware of mediation as an alternative method of dispute resolution. This was followed by 9% and 12% of the respondents who were aware of conciliation and arbitration in that order as the alternative methods of dispute resolution. Only a minority of 1% were aware of peaceful demonstration as an alternative method of dispute resolution.

The majority of respondents, 78% admitted that they had used the alternative methods of dispute resolution. Only a proportion of 22% denied having ever used these methods.

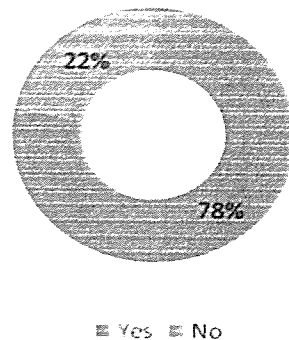
4.3 Usage of Methods of dispute resolution

Table 10: Ever used any of the above methods

Ever used any of the above methods	Frequency	Percent
Yes	235	78
No	66	22
Total	301	100.0

Source: primary data

Figure 8: Ever used any of the above methods



Source: primary data

4.4 Nature of Disputes

The respondents, who admitted that they had used the alternative methods of dispute resolution, were further asked to indicate the methods they used. The responses were as presented in table 11.

Table 11: Used any of the above method * which method Cross tabulation

		Used any of the above method				Total	
		Yes		No			
Which method		Freq	%	Freq	%	Freq	%
	Negotiation	126	42	2	1	128	43
	Conciliation	37	12	1	0	38	12
	Arbitration	16	5	0	0	16	5
	Mediation	20	7	0	0	20	7
	Peaceful demonstration	7	2	4	1	11	3
Total		206	66	7	2	213	68

Source: primary data

The cross tabulation shows that majority of the respondents, 42% had used negotiation as alternative method of dispute resolution. In the meantime, 12% admitted that they had used conciliation as an alternative method of dispute resolution. This was followed by 7% and 5%

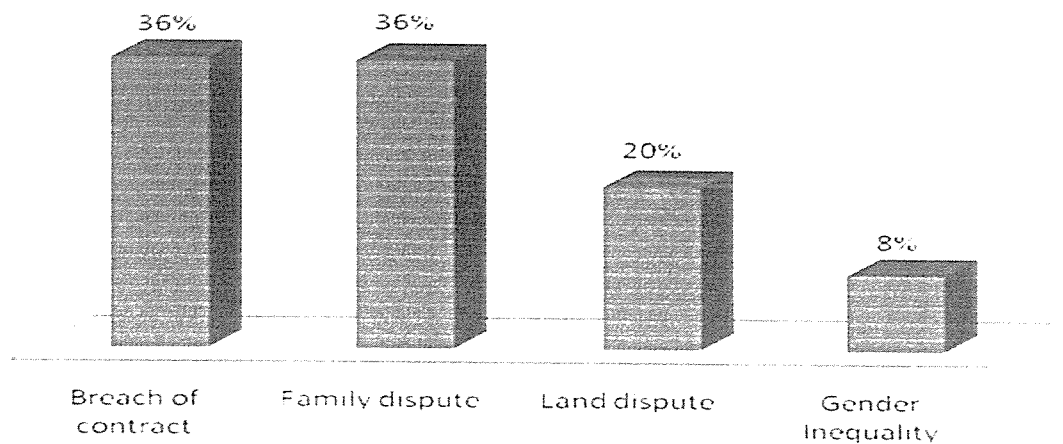
of the respondents who had used mediation and arbitration in that order as the alternative methods of dispute resolution. Only 2% had used peaceful demonstration as an alternative method of dispute resolution. A proportion of 32% did not comment on this.

Table 12: Nature of Dispute

Nature of Dispute	Frequency	Percent
Breach of contract	107	36
Family dispute	106	36
Land disputes	60	28
Gender inequality	28	8
Total	301	100.0

Source: primary data

Figure 9: Nature of dispute



Source: primary data

From figure 9, it was showed that the largest proportion of respondents, 36%, each were of the opinion that breach of contract or family dispute was the nature of dispute involved. Meanwhile, 20% of the respondents had solved land disputes while a minority of 8% had gender inequality disputes.

4.4.1 Dispute Resolution

The study found out that majority of respondents, 58% had managed to resolve the respective disputes they were attending to. Twenty five percent were unable to resolve the disputes they

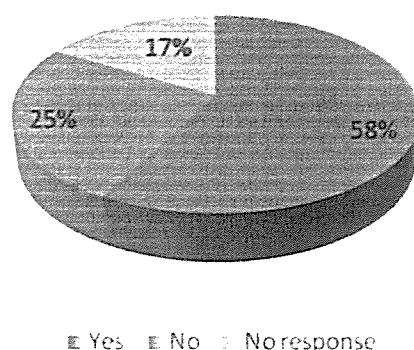
were handling. Meanwhile, a proportion of 17% did not give any response, probably due to the fact that they had no dispute to handle by then.

Table13: Dispute Resolution

Dispute Resolution	Frequency	Percent
Yes	175	58
No	75	25
No response	51	17
Total	301	100.0

Source: primary data

Figure 10: Dispute resolution



Source: primary data

4.4.2 Disputes not resolved

Some of the steps taken by the respondents who were unable to resolve disputes were; advice to the parties to seek help from the relevant authorities, allowed the litigation to still proceed, and some had vigorous and wide consultations amongst all the relevant stakeholders. Surprisingly, some respondents resorted to riots once defeated to resolve disputes. It was noted that some respondents did not respond on the steps they took when defeated to resolve disputes.

4.5 Proposal to Amend Civil Procedures

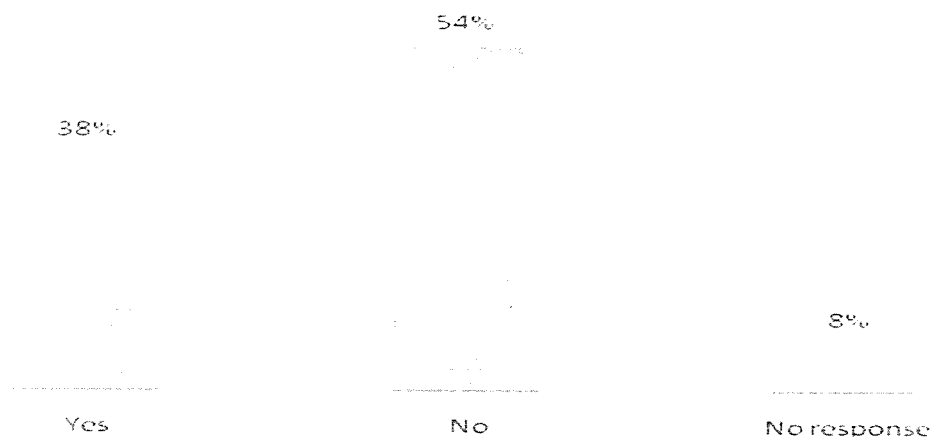
The study revealed that majority of respondents, 54%, were not aware of a proposal to amend the civil procedures rules to provide for mediation as dispute resolution mechanism. However, 38% of the respondents admitted that they were aware of a proposal to amend the civil procedures rules to provide for mediation as dispute resolution mechanism. No response on the amendment proposal was obtained from 8% of the respondents.

Table 14: Awareness of a Proposal to Amend Civil Procedures

Awareness of a Proposal to Amend Civil Procedures	Frequency	Percent
Yes	113	38
No	164	54
No response	24	8
Total	301	100.0

Source: primary data

Figure 11: Aware of a proposal to amend civil procedures



Source: primary data

4.6 Meaning of Mediation

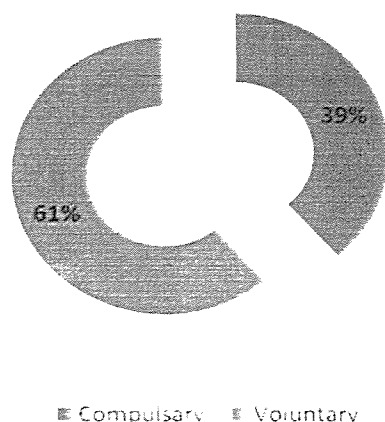
Whereas the majority of the respondents, 61% were of the opinion that mediation should be made voluntary, 39% stated that mediation should be made compulsory

Table 15: Voluntary/Compulsory Mediation

Voluntary/Compulsory Mediation	Frequency	Percent
Voluntary	184	61
Compulsory	117	39
Total	301	100.0

Source: primary data

Figure 12: Voluntary/Compulsory Mediation



Source: primary source

4.6.1 Reasons for mediation

The respondents were asked to explain their responses on the form of mediation they preferred, whether voluntary or compulsory. Those who were of the opinion of compulsory mediation, felt that the outcome would be positive and would help achieve a common goal. Further, parties may decide to quit if mediation is made voluntary. Meanwhile those who proposed voluntary mediation cited the freedom of expression. Also it helped to demonstrate the spirit of democracy among the citizens. The felt that parties should be ready to solve dispute and be in a position to bring peace, and therefore no need of compulsory mediation.

4.6.2 Effectiveness of Mediation

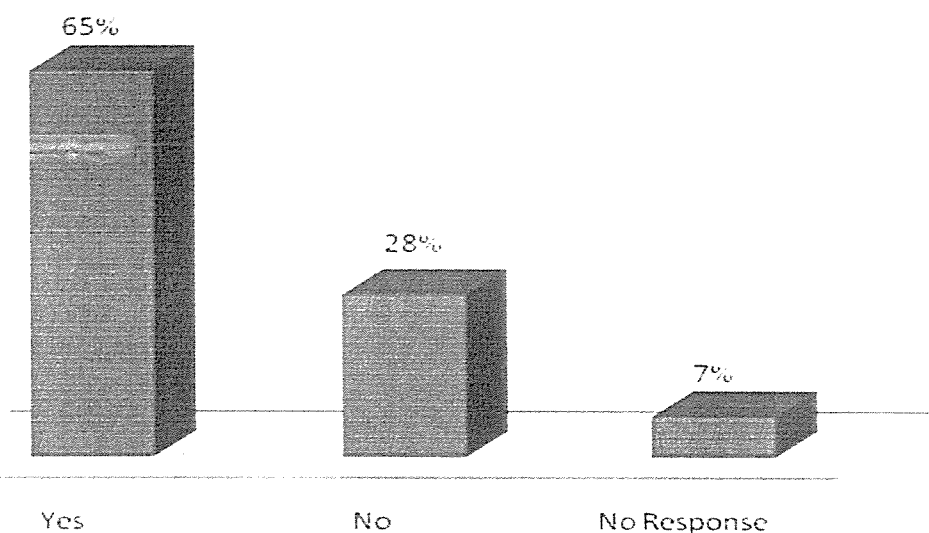
From the study, majority of the respondents, 65% admitted that implementation of mediation was more effective than litigation. However, 28% of the respondents denied that implementation of mediation was more effective than litigation. A proportion of 7% had no idea on whether implementation of mediation was more effective than litigation or not.

Table16: Effectiveness of mediation to Litigation

Effectiveness of mediation to Litigation	Frequency	Percent
Yes	113	65
No	164	28
No response	24	7
Total	301	100.0

Source: primary data

Figure 13: Effectiveness of mediation to Litigation



Source: primary data

4.6.3. Effectiveness of Litigation

The respondents who stated that implementation of mediation were more effective than litigation had the following reasons; litigation was viewed to be expensive, and also could easily lead to revenge among the disputing parties. Further, mediation consumes lesser time and also promotes peace. Litigation was seen to be ineffective because of corruption and its

nature of complexity. Those who were of a contrary opinion, that implementation of mediation was ineffective, cited reasons such as; the law had guidelines for resolving disputes well in litigation and also there were competent judges to handle litigation cases. Under this segment a few respondents did not comment.

4.6.4 .Duration of Civil Case

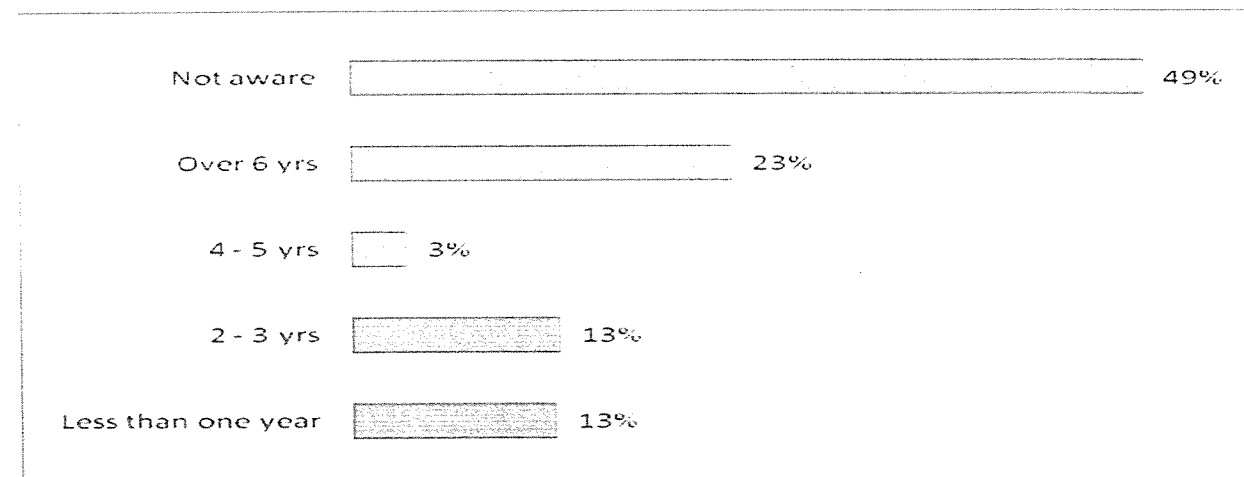
This segment of the study was carried out with an aim of finding out the duration of civil cases. The results are as shown in Table 17.

Table17: Duration of Civil Case

Duration of Civil Case	Frequency	Percent
<i>Not aware</i>	146	49
<i>More than 6 years</i>	70	23
<i>4-5 years</i>	10	3
<i>2-3 years</i>	38	13
<i>Less than one year</i>	37	13
Total	301	100.0

Source: primary data

Figure 14: Duration of civil case



Source: primary data

Most respondents, 49%, were not aware of the average duration civil cases took to be resolved. Those who were of the opinion that civil cases took more than six years to be resolved constituted 23%. To others, 13%, civil cases took between 2-3 years to be resolved. Thirteen percent of the respondents stated that it took the shortest time, of less than a year to resolve civil cases. The minority, 3% were of the view that civil cases took between 4-5 years to be resolved.

The main reason that was cited by the respondents to be behind the long period of time that court cases take before their conclusion was corruption among those directly handling the cases. Misconduct among judges, involvement of judges in politics and abuse of office by judges were some other reasons the respondents thought were responsible for the delay in conclusion of court cases. Still, there were fewer judges as compared to the many cases in court that were to be attended to. Lack of evidence or the nature of the civil cases was seen as factors contributing to the delay in court case conclusion.

4.6.5 Average Cost of Cases

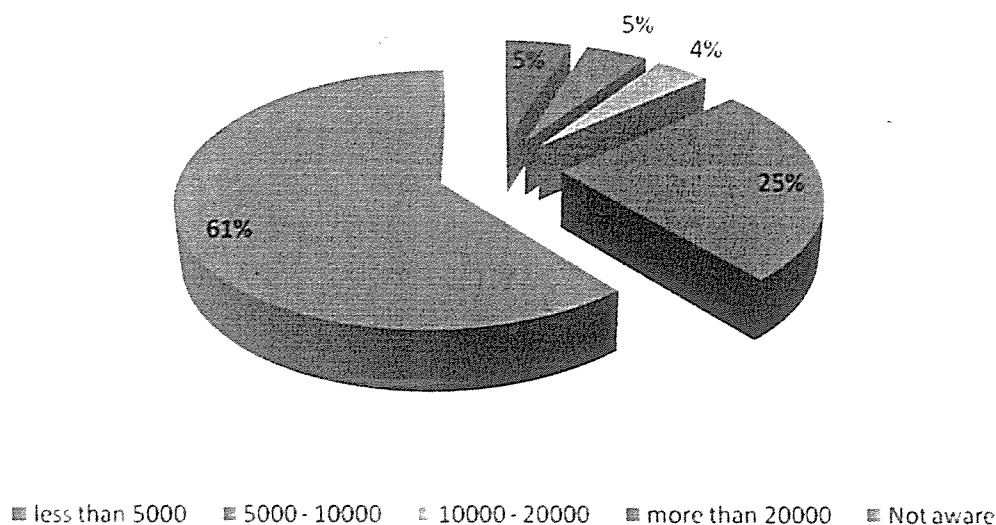
This segment of the study was done so as to establish the average cost of cases from start to conclusion. The results are as shown in table 18 and figure 15.

Table 18: Average Cost of Cases

Average Cost of Cases from Start to Conclusion	Frequency	Percent
Less than 5,000	15	5
5,000-10,000	15	5
10,000-20,000	12	4
More than 20,000	75	25
Not aware	184	61
Total	301	100.0

Source: primary data

Figure 15: Average cost of cases



Source: primary source

From figure 15, it was established that the largest proportion of respondents, 61% were not aware about the average cost of court cases from the start to the conclusion. However, 25% were of the opinion that court cases cost more than Ksh 20, 000. To some, court cases took less than Ksh 5,000, between Ksh 5,000-10,000, and between 10,000-20,000 from the start to the conclusion from the start to the conclusion, each represented by 5%, 5%, and 4% respectively.

4.7 Satisfaction derived

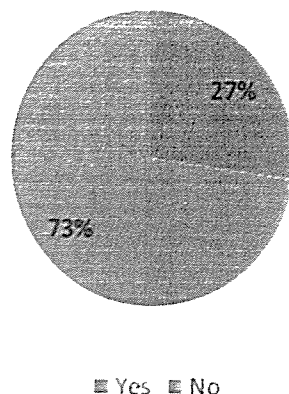
The study revealed that most respondents, 73% were not satisfied with the outcome of court cases. Only 27% admitted that they were satisfied with the outcome of court cases.

Table 19: Satisfied with outcome of court cases

Satisfied with outcome of court cases	Frequency	Percent
Yes	253	84
No	48	16
Total	301	100.0

Source: primary data

Figure 16: Satisfied with outcome of court cases



Source: primary data

The main reason as to why the respondents were not satisfied with the outcome of court cases was that the judges were corrupt as well as being unfair. Further, disputes took long to be resolved, high profile and prominent people were usually favoured, and consequently a lot of injustices done to the innocent poor. Still, lack of reforms in courts made the respondents dissatisfied with the outcome of court cases. The aspect of cases being determined by what the advocates presented in court, whether true or false contributed to the dissatisfaction. However, those who were satisfied with the outcome of court cases attributed it to the well trained judges.

4.8 Who Determines Courts Cases?

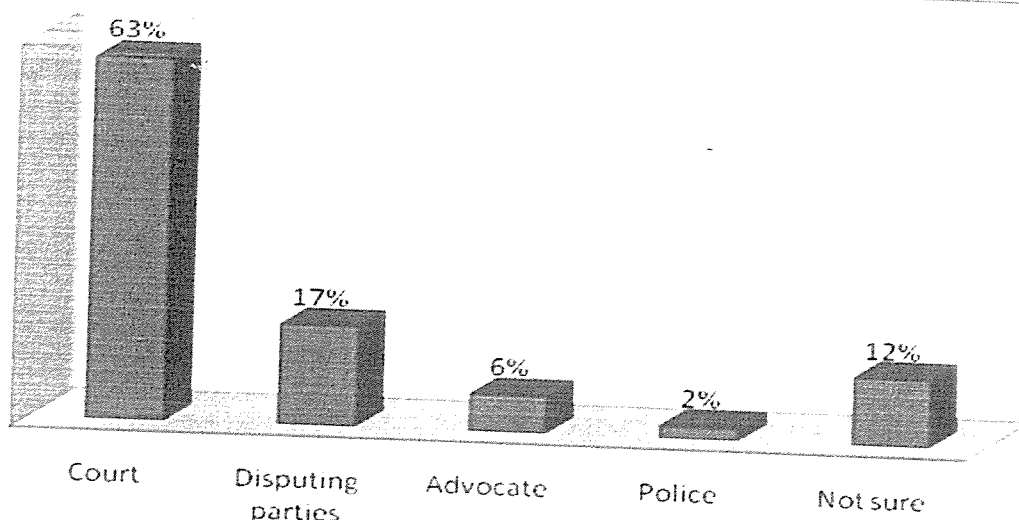
This part of the study was done so as to find out the determinants of cases in the court of law. The results are as shown in table 20 and figure 17.

Table 20: Case Determinants

Case Determinants	Frequency	Percent
Court	189	63
Disputing parties	52	17
Advocate	19	6
Police	6	2
Not sure	35	12
Total	301	100.0

Source: primary data

Figure 17: Case determinants



Source: primary data

Most respondents, 63% were of the view that the duration court cases took was determined by the court itself. Meanwhile, those who were of the opinion that the disputing parties determined the duration of cases from the beginning to the end constituted 17%. A segment of 12% was not sure on whose responsibility it was for determination of the period that court cases took. To other respondents, it was the advocate and the police that determined the duration of cases from the beginning to the end. This was constituted by 6% and 2% respectively.

4.9 Recommendation for ADR

The dissatisfaction among the widespread respondents was the centre of the respondents' recommendation for ADR. Moreover, seriousness of dispute, abuse of office by judges were key factors for the recommendations for ADR. The amount of money and time used guaranteed the need for ADR. The unnecessary strict and rigid rules of the judiciary being followed were seen to be a hindrance towards the delivery of cases by litigation and so the need for ADR. For justice and honesty to be achieved, there was need for an ADR. Further, the willingness of parties involved to adopt ADR instead of litigation was viewed as a factor for the recommendations for ADR. Post election violence that was witnessed in Kenya after the disputed 2007 elections contributed to the recommendations for ADR. Still, there was

need for speedy resolution of conflicts, cases dealt with immediately they are presented on board to avoid the many unsolved cases.

4.10 Type of Cases Recommended to ADR

The respondents were asked to indicate the type of cases they would recommend to ADR.

The responses were as shown in table 21.

Table 21: Type of cases to recommended to ADR

Cases recommended to ADR	Frequency	Percent
Minor cases	58	19
Corruption	37	12
Murder and robbery	31	10
Post election violence	28	9
Constitution	27	8
Divorce	27	8
Land disputes	20	7
Child abuse and rape cases	15	5
Unemployment	14	5
No Response	40	13
Total	301	100.0

Sources: primary data

From the table, it was found out that there were several cases that the respondents recommended for ADR. Majority of respondents, 19% mentioned minor cases, followed by corruption cases, 12%, murder and robbery cases, 10%, and post election violence cases, 9%. Still cases such as constitutional cases, divorce cases, and land disputes cases were recommended for ADR, each constituting 8%, 8%, and 7% respectively. A proportion of 5%, each represented the recommendation of child abuse, and rape cases, and unemployment cases.

CHAPTER FIVE

DISCUSSION, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter presents the discussion of findings, conclusions and recommendations of the study. It starts with a summary of the research findings, followed by the discussion, conclusion and recommendations. The research was cross-sectional with both explanatory and descriptive approaches. The target population was the Judicial Officers, Administrators of and institutions, local leaders and public in general being the residents in Kenya. The population of the study was 301.

5.1 Discussion

The findings on the factors specified in the objectives of the study are discussed below.

5.2 The Views of Mediation as ADR

The research findings revealed that majority of the respondents (84%), were aware of some alternative methods of dispute resolution, such as negotiation, conciliation, arbitration, mediation, and peaceful demonstration. The study revealed that majority of respondents (78%) had used the alternative methods of dispute resolution, with 42% having used negotiation, 12% used conciliation, followed by 7%, 5% and 2% of the respondents having used mediation, arbitration and dispute resolution in that order as the alternative methods of dispute resolution.

From figure 9, it was found out that the largest proportion of respondents (36%), each were of the opinion that breach of contract was the nature of dispute resolved. Meanwhile, 56% of the respondents had solved land disputes while a minority of 8% had solved gender inequality disputes.

There were several natures of disputes that the respondents had handled. Thirty six percent of the respondents had tackled breach of contract or family dispute, 20% land disputes while a minority of 8% solved gender inequality disputes. Fifty eight percent had managed to resolve

the respective disputes they were attending to. According to Mitchell and Banks (1996), there are certain disputes which proceed for determination by the courts which could be resolved out of court, an example being a case relating to breach of contract. Some of the steps taken by the respondents who were unable to resolve disputes were; advice to the parties to seek assistance from the relevant authorities. Some respondents allowed the cases to proceed to litigation. Further, vigorous and wide consultations amongst all the relevant stakeholders were adopted. Surprisingly, some respondents resorted to riots once defeated to resolve disputes.

The reason cited for the long period of time that court cases took before their conclusion was corruption among the people directly handling the cases. Misconduct among judges, involvement of judges in politics and abuse of office by judges were some of the other reasons responsible for the delay in conclusion of court cases. These findings were inconsistent with those of R. Von Jhering, who placed great emphasis on the function of law as an instrument for serving the needs of society. Still, there were fewer judges as compared to the numbers of cases in court that were to be attended to. Moreover, lack of evidence and the nature of the civil case were seen as factors contributing to the delay in court case conclusion.

For most respondents, (65%) implementation of mediation was more effective than litigation. The respondents who stated that implementation of mediation was more effective than litigation had the following reasons; litigation was viewed to be expensive, and also could easily lead to revenge among the disputing parties. Further, mediation was found to be less time consuming and also promoted peace. Litigation was seen to be ineffective because of corruption and its nature of complexity. The finding of this study was consistent with those of Grenig (1997) who postulates that the advantages of mediation over litigation were its decreased costs, more confidential proceedings, and the degree of control enjoyed by the disputing parties over the process and outcome. Those who were of a contrary opinion; that implementation of mediation was ineffective, cited reasons such as; the law has guidelines for resolving disputes well in litigation and also there were competent judges to handle litigation cases. This finding was inconsistent to that of Mwagiru (2000) who stated that the

disputing parties' common trust in the mediator offsets their mutual distrust and raises their confidence in negotiations.

5.3 Adoption of Mediation as an Alternative Dispute Resolution for Judicial Proceedings

The study revealed that 54% of the respondents, (54%), were not aware Proposed Amendments to Introduce Alternative Dispute Resolution and Case Management in Kenya which would explore ADR as an alternative dispute resolution mechanism. However, 38% of the respondents admitted that they were aware of the proposed review. This was affirmed by Rousseau who proposes that in democratic process governance and leadership was by a social contract between the governed and the governors. Whereas the majority of the respondents, 61% were of the opinion that mediation be made voluntary, 39% stated that mediation should be made compulsory. Sweet & Maxwell (1996) states that should one participate in mediation and no agreement is reached, one can still file a lawsuit. Those who proposed compulsory mediation felt that the outcome would be positive and would help achieve a common goal. Further, parties would decide to quit if mediation is made voluntary. Meanwhile those who proposed voluntary mediation cited the freedom of expression. Also voluntary mediation helps demonstrate the spirit of democracy among the citizens. Consequently, parties could be ready to solve dispute and be in a position to bring peace, and therefore no need of compulsory mediation. Conflict in society has generally been accepted as a part of human existence, although arbitration remained an underutilized ADR method in dispute resolution across the country (Ladimer, 1995).

In the present situation, most respondents, (49%) were not aware of the average duration civil cases took to be resolved. Those who were of the opinion that civil cases took more than six years to be resolved constituted 23%, while 13%, stated that it took the shortest time, of less than a year to resolve civil cases. On the aspect of the average cost involved in court cases, respondents, 61% were not aware about the average cost of court cases from the start to the conclusion. However, 25% were of the opinion that court cases cost more than Ksh 20, 000, while 5% stated that it took less than Ksh 5,000. These were costly for most of the rural poor who live on less than \$2 per day

The study found out that most respondents, 73% were not satisfied with the outcome of court cases, the main reason being that the judges were corrupt and also unfair. Further, disputes took long to be resolved, high profile and prominent people were usually favoured, and consequently a lot of injustices done to the innocent poor. Still, lack of reforms in courts made the respondents dissatisfied with the outcome of court cases. The aspect of cases being determined by what the advocates presented in court, whether true or false contributed to the dissatisfaction. However, those who were satisfied with the outcome of court cases attributed it to the well trained judges. According to Mwagiru (2000), some conflicts can be regulated by procedures such as litigation, arbitration or mediation; but conflicts are not necessarily amenable to resolution by dispute resolution processes.

For most respondents, 63%, the duration court cases took was determined by the court itself. Meanwhile, the disputing parties determined the duration of cases from the beginning to the end, constituting 17% of the respondents. A segment of 12% was not sure on whose responsibility it was for determination of the period that court cases took. To other respondents, it was the advocate and the police that determined the duration of cases from the beginning to the end.

The dissatisfaction among the respondents was the centre of the recommendation for ADR. The seriousness of dispute, abuse of office by judges were key factors for the recommendations for ADR. The amount of money and time used guaranteed the need for ADR. The unnecessary strict and rigid rules of the judiciary being followed were seen to be an hindrance towards the delivery of cases by litigation and so the need for ADR. For justice and honesty to be achieved, there was need for an ADR. Further, the willingness of parties involved to adopt ADR instead of litigation was viewed as a factor for the recommendations for ADR. Post election violence that was witnessed in Kenya after the disputed 2007 elections contributed to the recommendations for ADR. Still, there was need for speedy resolution of conflicts, cases dealt with immediately they are presented on board to avoid the many unsolved cases.

There were several cases that the respondents recommended for ADR. Respondents, 19% mentioned minor cases, followed by corruption cases, 12%, murder and robbery cases, 10%, and post election violence cases, 9%. Still cases such as constitutional cases, divorce cases, and land disputes cases were recommended for ADR, each constituting 8%, 8%, and 7% respectively. A proportion of 5% each represented the recommendation of child abuse and rape cases, and unemployment cases. However, the efficacy of different types of mediation is closely related to the particular dynamics of the conflicts (Brearton et al., 1995).

5.4 Conclusions

The following are major conclusion based on the discussions.

5.4.1 The Views on Mediation as an Alternative Method to Dispute Resolution

The study concludes that there were several alternative methods of dispute resolution, such as negotiation, conciliation, arbitration, mediation, and peaceful demonstration, as much as the numerous nature of disputes like breach of contract, family and land dispute, and gender inequality, of which the citizens had embraced. For the unresolved disputes, further steps were taken; advice to the parties to seek assistance from the relevant authorities, more time for the cases to proceed as well as vigorous and wide consultations.

It can be concluded from the findings that the long period of time that court cases took before their conclusion was majorly due to corruption, misconduct of the judges, involvement of judges in politics and abuse of office by judges, as well as fewer judges as compared to the many cases in court, lack of evidence, and the nature of the civil case. Implementation of mediation was more effective than litigation, especially due to its simplicity, less cost involved, less time consuming and also promoted peace.

5.4.2 Adoption of Mediation as an Alternative Dispute Resolution in Judicial Proceedings

Lack of awareness on the Proposed Amendments to Introduce Alternative Dispute Resolution and Case Management in Kenya for dispute resolution mechanism, resulted into most opinions that mediation be made voluntary. The study conclusion on the duration civil cases took to be resolved is that it took more than six years, and on the average cost involved

there was lack of information, although the opinion of a higher cost of more than Ksh 20, 000 was noted.

Corruption, injustices and unfairness of the judges as well as lack of reforms in courts were the main consequences of dissatisfaction on the outcome of court cases. As a result, the dissatisfaction led to the recommendation for ADR. On the duration court cases took, the court and disputing parties were key determinants.

5.5 Recommendations

5.5.1 Government

The government should come up with legislative measures that will help adopt policies for alternative methods of dispute resolution, such as negotiation, conciliation, arbitration, mediation, and peaceful demonstration to help resolve the numerous nature of disputes and thereby reduce the case congestion in the court. To curb the menace of longer time that court cases take before their conclusion, the Chief Justice should employ more advocates and judges. The shoddy work of the police should be discouraged by recruiting lawyers and advocates as prosecutors.

5.5.2 Civil Society Organizations.

The Civil Societies should carry out alternative dispute resolution awareness campaigns all over the country so that citizen can take note of merits and demerits of alternative dispute resolutions and litigations. On the aspect of gross corruption, misconduct of the magistrates /judges, and involvement of judges in politics should be reported to civil societies. They should also carry out awareness campaigns on Proposed Amendments to Introduce Alternative Dispute Resolution and Case Management in Kenya with other stakeholders such as government, churches, and local councils.

5.5.3 Local Community

The Local Authorities, being closest to the citizen should apply alternative dispute methods in their day to day conflicts with the people. It would be one way of propagating the method and reduce bureaucracy that local authorities are notorious of.

5.5.4 International Community

The International Community should put pressure on the government to make necessary institutional reforms in the judiciary and police that eventually would culminate in restoring the confidence of citizen to the two institutions, which would eventually deal with passed impunity that culminated in the 2007 violence.

5.5.5 General recommendations

The present civil justice system is no longer meeting the needs of all Kenyans and consequently loss of the confidence of the citizens, leading to dissatisfaction in the manner in which the courts have been run and dispute resolved. There is therefore need for reform of the entire judicial system so as to enhance the efficiency and effectiveness of the law services.

5.5.6 Recommendations for Future Research

The research was based on a cross-sectional approaches, future research should be based on a case study. Further, the impact of ADR on conflict resolution should be evaluated.

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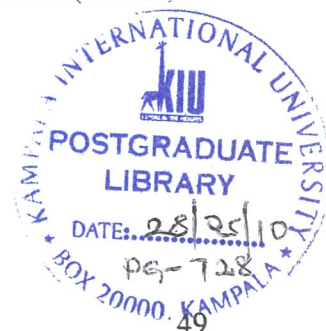
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APPENDICES
APPENDIX A
QUESTIONNAIRE

Hello. My name is Mr/Mrs I would like to ask you a few questions on the topic of mediation as an alternative dispute resolution in Kenya. The questionnaire will take about 10 minutes. The information you provide will be used in strict confidence and your name will not be attached to the questionnaire. The purpose of the questionnaire is to find out your knowledge and usage on mediation as an alternative dispute resolution. Please feel free to answer the questions as honestly as possible. I will give you an opportunity to ask questions or seek clarification at the end of the interview.

A. BACKGROUND INFORMATION

1. Title of Respondent _____

2. Age
- 18 – 24 years
 - 25 – 34 years
 - 35 – 44 years
 - 45 – 54 years
 - 55 – 64 years
 - > 65 years

3. Sex
- a) Male ☐
 - b) Female ☐

4. Level of Education

- ☐ Completed Primary
- ☐ Completed Secondary
- ☐ University
- ☐ Others (specify)

5. Occupation of Respondent

- ☐ Salaried
- ☐ Businessman/woman
- ☐ Lawyer

☐ Students Others

6. Religion

☐ Protestant

☐ Catholic

☐ Islam

☐ Others

7. Marital Status

☐ Single

☐ Married

☐

8. Number of years of work

0-5 years

6-10 years

11-15 years

More than 16

9. Are you aware of any alternative method of dispute resolution?

Yes

No

10. If yes, which method (s) you are aware of?

Negotiation

Conciliation

Arbitration

Mediation

Others (please indicate which one?).....

11. Have you ever used any of the above methods of dispute resolution?

Yes

12. If yes, please indicate which one (s)

Negotiation

Conciliation

Arbitration

Mediation

Others (please indicate which one?)

13. What was the nature of dispute of the dispute?

Breach of contract

Family dispute

Land dispute

Others (please specify) -----

14. Was the dispute resolved?

Yes ☐ No ☐

15. If no, what other steps did you take?

.....
.....
.....

16. Are you aware of a proposal to amend the civil procedure rules to provide for mediation as dispute resolution?

Yes ☐ No ☐

17. In your opinion, do you think mediation should be made?

- a) Compulsory ☐
b) Voluntary ☐

Please, explain briefly your response-----

18. In your opinion, do you think implementation of mediation is more effective than litigation?

Yes ☐ No ☐

Please briefly explain your response-----

19. In the present situation, how long do you think it takes a civil case to be resolved on average?

- a) less than one year ☐
b) 2-3 years ☐
c) 4-5 years ☐
d) Over 6 years ☐
e) Others (please specify).....

20. Why do you think the court cases takes that period of time to conclude?

.....
.....
.....

21. From your experience, what is the average cost for court cases from start to conclusion?

- a) less than Ksh 5,000 ☐
b) Ksh 5,000-10,000 ☐
c) Ksh 10,000-20,000 ☐
d) Ksh more than 20,000 ☐

22. Are you satisfied with the outcome of cases taken to court?

- a) Yes ☐
- b) No ☐

Please explain

.....

.....

.....

23. In your view, who is responsible for determining the duration of cases from the beginning to the end?

- a) The court ☐
- b) The disputing parties ☐
- c) The advocate ☐
- d) Others (please specify) ☐

24. What factors play a part in your recommendation for ADR?

.....

.....

25. What type of cases would you recommend for ADR?

.....

Thank you very much for answering the questions. You may ask any question or seek clarifications pertaining to the questions above.



APPENDIX B
LETTER OF INTRODUCTION



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