

---

# STRUCTURAL SILENCE, EXCLUSION, AND ACCESS TO JUSTICE: A CASE STUDY OF AN INDIGENOUS GIRL IN NORTHERN KENYA

---

Oscar MMBALI<sup>1</sup>

**Abstract:** *Even though child marriage is a human rights abuse, the practice persists in many developing countries. About 39,000 young girls are married each day amounting to 15.1 million a year. In the past, half of these cases have occurred in Asia, while a fifth in Africa. While this remains a major challenge, there are limited studies focusing on the attempts by the victims to free themselves. Therefore, this study sought to examine socio-cultural and institutional factors that hinder marginalized persons to access justice. This is a qualitative case study of an indigenous girl who disappeared while seeking to free herself from forced marriage. The study shows that: conflict between customary values and mainstream justice values; negligence on the side of the local provincial administration; lack of concern from society; and interrelationships between poverty and family as well as culture and wealth constitute part factors that hinder access to justice. The study suggests that to be able to address the problem of access to justice effectively; there is need to reduce inequalities by empowering local communities with alternative to justice mechanisms which take into account the transformation of indigenous knowledge in order to make it competent enough to advance the development needs of the marginalized people in a globalized.*

**Keywords:** *structural silence; exclusion; access to justice; Kenya*

---

## Introduction

Even though child marriage is a human rights abuse, the practice persists in many developing countries. By 2010, about 67 million women aged between 20-14 years had been married while young. About 39,000 underage girls are married each day amounting to 15.1 million a year, a trend estimated to continue till 2030. About 50

---

<sup>1</sup> PhD (candidate) and researcher at Center for Philanthropy and Civil Society, NIDA, Thailand, e-mail: - mmbali76@gmail.com.

million girls are at risk of being married before age 15 this decade. The trend indicates that if nothing changes, approximately 142 million young girls will be married in developing countries by 2020. In the next decade, 151 million more young girls will be married if the conditions remain the same. Lack of access to education, living in rural areas, and poverty largely contribute to child marriages (United Nations Population Fund, 2012).

While Kenya is not among the most prevalent countries in the world (United Nations Population Fund, 2012); cases of child marriages are still a major challenge in the country. About 26.4% of girls in Kenya are married before 18 years (UNICEF, 2012). Most of these child marriages occur among indigenous communities which are largely marginalized. Indigenous communities in Kenya have their own geopolitical context, socio-political and historical realities that influence the way they are marginalized. The Samburu people of Northern Kenya for instance live in a region which was largely excluded from development since colonial times. Northern Kenya unlike other parts of the country is a rural remote semi-desert with limited infrastructure and complex geographical terrain.

During the colonial period, communities in Northern Kenya resisted colonialism by armed resistance. In response the colonial Outlying Ordinance Act of 1902 restricted movement into and out of Northern Kenya, except by special pass. Special District Ordinance Act of 1934 gave colonial provincial administrators power to adjudicate over criminal and civil affairs in the region, including arrest, detention, restrain, and seizing of property. Over time, provincial administrators became more powerful and took central roles in settling civil and criminal disputes in the region, including ordering collective punishment. This led to the institutionalization of discrimination of the people of Northern Kenya. After independence, the Indemnity Act of 1970 passed under Kenya's emergency laws provided public officers in Northern Kenya immunity from prosecution if they committed any act, deemed in good faith, or in public interest (Republic of Kenya, 2010). Lack of accountability measures in regard to the application of this Act led to lack of accountability and transparency regarding the way public officers in Northern Kenya were doing their work.

The marginalization of indigenous communities was not only rooted in the Acts of Parliament or bureaucratic culture, but also in the absence of constitutional measures to protect the indigenous communities. Since indigenous communities are minority groups, they had little political influence on public policy. As a result, not much was done through legislation to address the problems of indigenous communities until the 2010 new constitution came into effect. The table below based on Abraham (2012) shows that Kenya's constitutions remained largely silent or was largely skewed against provisions for minority groups. This indicates a major historical setback for the minority groups seeking to compete for public policy benefits in modern Kenya. The table also indicates lack of intent or political will to effectively focus on the challenges affecting the minority groups.

**Table 1:** Indigenous Communities issues in Kenyan Constitutions

<b>Rights Issues</b>	<b>Independence Constitution, 1963</b>	<b>Constitutional Changes 1967-2009</b>	<b>New Constitution (2010)</b>
Land rights	Silent	Only property rights (section 75,114-117)	Community land tenure (Article 63)
Political participation	Regional assemblies & quota system	Reserved seats for special groups & regional assemblies abolished	Minority Representation in the Senate, National & County Assemblies
Revenue allocation	By executive but no specifics	By Parliament approval but no specifics	0.5% for marginalized areas & additional 15% country governments
Affirmative action	silent	silent	For minorities (Article 56)
Gender issues	silent	silent	Section 27 (8), gender representation secured. But no provision for women from minority groups

*Source: Abraham (2012).*

The new constitution of Kenya (Republic of Kenya, 2010) recognizes the rights of women, particularly gender equity including social justice, parity and fair representation. The constitution seeks to realize essential values of human rights, equality, freedom, democracy, social justice and the rule of law. According to Article 2 (4) any law, including customary law that is inconsistent with this Constitution is void, while according to clause (6) any international treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution. Article (10 (2b) provides for national values such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; while (2c) provides for principles of good governance such as integrity, transparency and accountability. The Bill of rights applies to all laws and binds all state organs. Article 21(3) provides for all public officers a duty to address the needs of vulnerable groups in society including women, minority groups, older members of society, and persons with disabilities, children, youth, and members of particular ethnic, religious, and cultural communities. Furthermore, Article 47(1) provides for the right of the individual to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In response to these provisions, the constitution requires the Judiciary to ensure that all people have equal access to justice. These reforms are partly redistributive. This means that they are aimed at providing justice to marginalized communities that did not have access to justice before.

In the midst of this transition from the old constitutional order to a new constitutional dispensation; Samburu people continued to rely on their traditional dispute resolution mechanisms. This community has a well-functioning customary justice system, which they rely on in times of dispute. The Samburu community is ruled by council of elders. Decisions are made at village level. If the situation is more critical decisions are made at clan or tribe level (equal to a district in modern terms). Customary law demands that elders be consulted for any undertaking in the community (Lanyasunya, 2009).

Authority over the community to mediate in disputes is vested in the councils of elders who also regulate the way of life in the community and run customary courts, as an intervention into issues affecting the members of the society. Members of the community have been socialized to legitimate the customary courts by obeying the traditional laws, and by promoting such obedience through social expectation. As a result, adherence to customary rule of law prevails across social-economic disputes whether civil or criminal (Karimi, 2004). However, the continued exposure of the community to modern lifestyle indicates a gradual shift from the customary system, or a mixture of customary and mainstream legal elements (Cheserek, et. al., 2012). This indicates an opportunity to examine potential convergence between customary justice system and the mainstream justice system, particularly how marginalized people will interact within the two systems in their search for justice.

According to Karimi (2004) a man is allowed to marry many wives. Girls are married soon after circumcision. This usually occurs at the age of 12 years. When there is a dispute, participants in the dispute resolution are: one's family; extended family; the neighborhood; peers; and the council of elders. When settling disputes, elders function as the court. They hear cases, interpret evidence, impose judgment, and manage the process of reconciliation, punishment or restitution. Court sessions follow open deliberation procedures, where both parties in disputes are heard, witnesses and evidence examined, past cases reviewed; crime site visits conducted, private consultations made, and public opinion sought. Sometimes decisions are made on the spot, while in other cases further consultations are made. Resolutions made in these sessions are largely enforced by social pressure.

Kenya's 2010 constitutional reforms brought into the lives of Kenyans especially indigenous communities values such as human rights which did not exist in these communities before. These values were crafted from the universal human right values and are intended to transform indigenous communities through mainstream justice systems. Some of these values for example the right of an individual to most fundamental decisions about life such as marriage, education, health, and freedom have far reaching implications since they determine the difference in development at personal, local, national, and international level. For indigenous communities in Kenya; these values come at a time when: (1) International norms and values are internalized in the international development strategies and discourse as part of a wholistic or sustainable international development agenda; (2) As a result of globalization choice of particular set of values could increase or reduce inequalities given that values are linked to opportunities and resources for development at all levels; (3) To be competent in a globalized arena; strategies for success involve transformation of value and knowledge

systems in ways that gives the individual competitive advantage to compete effectively with others in different contexts.

The purpose of this study is not to challenge the universal or customary values; but to explore the experiences of individuals seeking justice in this context with conflicting value systems; and to highlight areas that require change in order to empower the individual for development. This is a qualitative case study of an indigenous girl among the Samburu of Kenya who was seeking freedom from early marriage; a practice which is socio-culturally acceptable in this society. The girl did not succeed. Later on she disappeared. The Study seeks to answer the following questions: (1) What are the contextual factors limiting marginalized persons to access justice? (2) What larger ramifications (if any) emerge from this study?

## **The Incident and the Response**

The incident occurred in June 2013. Lona (not her real name), the victim, was in her first year in high school when she returned home for mid-term break and found her parents making the final arrangements for her arranged customary marriage. She had learned that her parents were preparing to circumcise her then marry her off to a wealthy man in the village. The man had already paid some of the dowry, an unknown amount some of which her father was using to prepare for her circumcision ceremony. In response, she ran away from home to seek assistance at a nearby missionary station. The station had previously provided her with high school tuition scholarship. It also provided occasional temporary shelter for children or women at risk of domestic/communal violence. Before joining high school, Lona was among the bright girls in her district. She had often times told the missionaries that she wanted to become a doctor so that she could help her community achieve better health outcomes.

The first people to respond to Lona's case were two missionaries. One was Cara (not her real name), a white woman while the other was Isaac (not his real name) an African man from the local community. After hearing Lona's case; Carra wanted to call the children's department, human rights commission or the police but Isaac who was the head of the mission, and who came from the community refused the idea. Isaac argued that because of the larger relationship between the mission and the community; the suitable government authority to inform was the chief. The chief is a local provincial administrator, a civil servant appointed by government but also a member of the local community. Isaac argued that the chief would hear the case, talk to the parents, and determine whether to take the case to the police, inform the children's department, or the human rights commission. He observed that chiefs settled community disputes and mediated between government and the people. Therefore he was confident that the chief would fairly address the matter.

Isaac also thought that if they called the police, the police would arrest Lona's parents and beat them, the community would see that and distrust the mission, and Lona's parents would curse Lona. If they called the chief, the chief would settle the matter through dialogue and would warn the parents not to do so again. A day later, they reported the case to the chief who came to the mission and heard the case. He then asked them to report to his office the following day for a preliminary hearing.

On this day, a council of elders sat to hear the case. The chief first met separately with few elders, before he asked all people to gather under the tree, where the hearing was usually held. The hearing began with a traditional prayer to *Nkai* the god of the Samburu people. The men sat in the inner circle while Carra, Lona, Lona's mother and other women sat in the outer circle, according to the tradition. Isaac presented Lona's case before the elders, while Lona's father spoke for himself. He told the council that he was fulfilling his traditional and moral obligation to arrange a marriage for his daughter. He said it was a blessing that had been misunderstood.

While Isaac was still speaking, he was cut short by one elder who asked whether Isaac, one who had abandoned the traditions and joined Christianity had come back to them, with a case that he expected them to rule against their own traditions and beliefs. Elders were furious; some argued that the presence of Carra, a white woman was an insult to the reverence of their traditional council. The chief abruptly ended the meeting and called Lona and her parents in his office. After a short while, Lona's parents left with Lona. The chief remained in the office and did not come out to address the people. An administration police officer on duty did not allow Isaac or Carra to enter the office. Instead, he told them to go home because the case was over.

When Carra asked about the chief's judgment, the officer told him that he did not know Samburu traditions because he was not a Samburu, and that the best thing Carra would have done was to ask Isaac who knew well these traditions. When Carra insisted, the police officer told her, "Don't just blame the hyena for eating the goat. Blame the goat as well for wandering in the wilderness." Isaac later said this statement meant that Lona's parents were to blame for accepting dowry just as the wealthy rural man was to be blamed for bringing to an end a girl's education.

Elders continued to speak to each other under the tree as they looked at Carra and Isaac who stood that the door of the chief's office. The police officer soon got frustrated and furious asked them to leave. Isaac walked away to his truck, started the engine, and asked all people who had come from the mission to get in and go. "It's over, you can't do anything. You can't fight here" Isaac told Carra as they drove off. Later on they learned that Lona had disappeared.

## Methodology

The study began four days after the incident and continued for six months. It took into account the following ethical considerations: informed consent; privacy; confidentiality and anonymity. The costs and benefits of the participants were discussed and mutually settled before the research begun (Boeije, 2010). Participants in the study were two missionaries who had tried to help Lona and thirteen members of the community who took part in the community council that handled Lona's case. Between three and fifteen participants are adequate for the study of an event narrative (Creswell, 2013, p.78-79). Give that this was a qualitative case study, secondary literature for example government records and research reports were included. The scope of the case was limited to the occurrence of the incident and how different actors responded to the case.

Participants were informed that this was not an investigation; but an academic inquiry that was meant to understand what happened and its implications to access to justice. The description of the incident and its interpretation was verified by providing the final draft to the participants who gave their feedback. In this case, participants were asked: to remark on the description and interpretation of the incident; whether the themes and interpretation was consistent with what they witnessed; and whether there were other issues left out which they wanted included in the account. To access participants, culture brokers were used. Culture brokers are selected based on their knowledge of the subject (Chilisa, 2012, p.169-170). The role of culture brokers is to recruit potential participants, link the researcher and the participants, and help interpret or clarify issues related to, or values of the participant's culture. They also help reduce misunderstandings (Liamputtong, 2010, p. 61-73).

Problem centered Key Informant Interviews technique was used to collect data from the participants. The method has been used mainly by German psychologists to study people or groups of people. Problem Centered Key Informant interviews are used by researchers to pursue a deeper understanding of a particular problem or issue. The interview is designed in a way that the informant is able to answer questions directly or by telling stories (Witzel, 2000 in Flick, 2006, p.161-162). Story telling approach was good for the study because the story was told in form of oral event narratives. Oral narratives take into account personal reflections of the individuals as story tellers (Creswell, 2013, p.70-73). When conducting research using storytelling, the main focus of the story is what happened and how the participants felt. Story telling sessions took between 1 to 1 ½ hours.

In storytelling, the researcher treats the story as a window through which the experience of the individual can be captured. The most important thing is the experience gotten from the story and not the story itself (Bernard & Ryan, 2010, p. 247-263). Therefore, the experience of the story teller is the main focus (Sarantakos, 2005, p. 279-281). This tool guides the researchers' understanding of the social process and can help explain events (Bachman & Schutt, 2012, p. 234-238). Story telling as case provides wisdom, insights, and engages the intellect and emotions in a way that people naturally learn by identifying with the situation (Simons, 2009, p.150). This largely occurs where the narrator has gone through particular struggles and has gained some insights or experiences to share (Gibbs, 2007, p.68).

Data comes from what people say, the thoughts and feelings expressed in what they say. Some data occurs naturally hence the researcher does not need to invoke such for example incidents and the way people react to it overtime (Loseke, 2013). To construct such data into a narrative, the researcher collects stories about the same phenomenon from different individuals, and then reorganizes the stories by focusing on: (1) the experience captured from the story (Bernard & Ryan, 2010, p. 247-263); (2) retelling the stories in a way that captures personal reflections; events and their causes (Creswell, 2013, p. 70-73); and (3) engaging the mind and the emotions of the reader (Simons 2009, p. 150).

Data analysis was based on hermeneutics as a qualitative approach to inquiry. Hermeneutics is also called interpretive analysis. It is based on the idea that the

meaning of a text can be obtained by interpreting the text through the lens of the historical and contextual conditions (Fernandez 1967 in Bernard & Ryan, 2010, p. 257-258). Interpretation involves linking experiences of the events in the text to the wider context in order to read out the meaning of the text, particularly in a different way than the phenomenon under study is usually understood. In this case, the text is Lona's story as narrated by participants. Therefore, interpretation focused on exposing factors that hinder marginalized persons to access justice; as opposed to the prevailing assumption that changing the constitution alone would be a panacea for providing access to justice for marginalized persons, through mainstream justice system. By describing and interpreting Lona's experience, this study adds the voice of the victim to the discussion about access to justice for marginalized persons.

## **Factors hindering Marginalized Persons to access Justice**

The following issues were identified as factors affecting marginalized persons to access justice: conflict between customary values and mainstream justice values; negligence on the side of the local provincial administration; lack of concern from society; and interrelationships between poverty and family as well as culture and wealth constitute part factors that hinder access to justice.

### ***Interrelationships between poverty, family, culture and wealth***

Lona learned about the plan to marry her off as soon as she returned home for mid-term break. Her parents happily informed her of the decision to marry her off and asked her to immediately join the preparations. The man to marry her had financed the ceremony. Her parents were poor. They could not finance her high school education. As a result, she had been given a grant by the mission to pursue high school education. Lona represented the hope of those who are lifted from poverty to realize their dreams.

When she was informed of the marriage arrangements, she reluctantly accepted, but after a few hours of deliberation, she sneaked out and fled to the mission. In this remote region, Lona saw the mission as the safe place to run to. For years, this mission has helped hundreds of girls to secure their lives from early marriages, through cultural transformation programs. Usually, this programs use dialogue and education to encourage wiling indigenous families to educate girls. Like Lona, some girls are sponsored for secondary education.

Marrying at this age was a moral obligation for the family. It was a fortune too and through the eyes of the tradition; it represented successful parenting. Lona's parents would be honored on the wedding day. It was a great honor which would give them higher status in society. They had not acquired much wealth in their lifetime. "Successful parenting" meant a lot for them. It was going to be a kind of self-actualization. The bridegroom was an elderly wealthy man in the village. He had acquired wealth and had attained traditional reputation. He was influential, person members of the community would have wanted not to disappoint. He was known to the chief, the mission, and the members of the customary court. Lona was his choice; a young girl for old age. She mirrored a life renewed. However for Lona, this was death



to her future, the dream to complete high school, go to college, and become a doctor. This kind of future did not matter for those who had power to make decisions over Lona's life.

### ***Conflict between customary values and mainstream justice values***

While some of these traditional mechanisms help resolve civil cases; they lack values for the rights of the individual, particularly when they are used to handle cases in ways that are contrary to the constitution and other Kenyan laws. This was one of such cases where the values of the decision makers in Lona's case contradicted the values of law which required that in such events Lona should be protected and supported in order to complete her education. By asserting the right of the individual, Kenya's constitution assumes that the individual should be protected when his or her rights are at risk. It assumes that those who make judgments about rights whether experts or lay will have understanding enough to respect the rights of the individual. However, customary values do not clearly differentiate between the individual and the community. The individual is not independent of the community. The individual and the community are interwoven. In some cases such as this, the will of the tradition prevails over the will of the individual. These conflicting realities played in the case of Lona. Lona wanted her individual rights to prevail, while the customary courts and her parents wanted customary law to prevail. They interrupted Lona's plea and won the case by socio-cultural pressure.

### ***Negligence on the side of the local provincial administration***

"It is a case of a chief, a local provincial administrator who upon receipt of the sad news chose to take the case back to traditional elders, instead of taking it to the court and reporting it to the children's department or Human rights commission." Said a participant. This is a typical case of bureaucratic adjudication in local disputes. The chief chose to ignore the criminal elements of the case which meant that the parents in their action contravened the right of an individual, a child to pursue education. While child marriages are in fact illegal in Kenya; it remained unclear whether the chief in his intervention applied any orders protect the victim. There were no reports indicating how such orders if any, would have been enforced and monitored effectively and with transparency and public accountability, especially given the fact that they could have represented anti-customary values. Inquiries into the case after the incident did not bring to light what happened to the victim; since participants did not have access to such information. What was certain was that the girl, a complainant against her parents was returned into full custody of those who had attempted to commit injustices against her without measures to ensure that such an act would not happen again. A participant observed that the chief warned the parents that cases of this kind were becoming risky for everyone, since the government was getting interested. Afterwards the victim did not return to school and she went missing in the community.

This is an incident in which the girl disappeared and could not continue with studies, because her efforts to seek justice were thwarted under the watch of a provincial administrator, who chose to ignore public policy, and failed to observe justice and fairness, because he wanted to be loyal and bound to the tradition. The chief was a

member of the local community who derived his legitimacy from the community by demonstrating respect or tolerance to the traditions, even though some of the traditions contravene the law. The case points to the scenario that in the event community values in which the civil servant was socialized conflict with the legal values which the civil servant is required to uphold; there is a possibility the civil servant may choose to uphold the customary traditions even though government has given such an officer authority and resources to act otherwise.

The experience of the victims shows that how justice works depends on factors outside the control of the marginalized persons. Interviews with the participants indicated: the absence of infrastructure; lack of information and knowledge of rights; lack of judicial support mechanisms; difficulties in accessing the courts; unresolved entrenched inequalities; discrimination; prejudice; conflicting cultures in the pursuit of justice; inability to enforce the law; lack of legal aid; impunity; and failure to provide basic amenities prevails. In response, marginalized people tended to resort to traditional alternative mechanisms of dispute resolution.

### ***Conflict of Interest***

When social institutions such as families fail to protect the individual; belief in customary or mainstream justice would assume that the victim would get relief from the community institutions, government, or other agencies such as civil society and religious institutions. However, this was not the case for this victim since all institutions she accessed did not help her. The mission that often intervened in community disputes as part of its spirituality and work traded the well-being of the victim with its interest to pursue 'a soft' approach to the ills in the community; even if such ills would cost a child's education and future. While there was no unanimous consensus over this decision, the preference of the head of the mission prevailed even though there were doubts that such a decision would secure the victims rescue. The head of the mission when taking the case to the council of elders and the chief hoped that customary council which had ordained child marriages from ancient times would contradict itself in this particular case. That was most unlike to hope for but it would boost the image of the mission in the community and would avoid community distrust in the work of the mission. The victim was definitely not a priority factor in the decision that finally handed her to those who had intended to end her education-those she was running away from all along. The community council upheld its tradition against the victim's new found values and against the norms of mainstream justice. The chief who had powers to rescue the victim and secure her education chose a tolerant path to return the victim to the offenders blended with a warning. Community support for the offender was overwhelming. The victim's voice was not heard. The victim in this case lost her case and dream in life as the mission watched helplessly, because the head of the mission compromised the girl's future fearing that if he defended the girl, the church would become unpopular and hence would get few converts among the community.

***Lack of concern from society***

Cara's efforts to call the police and the children's department went futile since they did not respond to her request to intervene. The victim's story sunk into silence day after day. Members of the community did not follow up on the case to find out what happened afterwards. Soon Cara gave up because the mission did not have the capacity and mechanisms to pursue the case. "It's over, you can't do anything. You can't fight here" Isaac had told Cara. Even in the presence of government authority, the police and the provincial administration; the law of culture prevailed. At the age of 15 years, in first year of high school, the victim's education sadly came to an end. Lona did not access justice because justice here was difficult to find under these circumstances. Her story reflects what other girls of her kind go through if and when they choose to pursue their rights against the will of the community; and when government and other institutions which ought to help are reluctant to do so.

**Concluding Thoughts and Implications for Practice**

This study presents only a slice of the factors that hinder marginalized persons to access justice in Kenya. However, this study means that it is difficult to access justice in Kenya because:

1. There are visible and invisible socio-cultural and institutional barriers which stand between the individual and the justice system.
2. The value for politics and the bureaucratic interests is higher than the value for the constitution even though the constitution is the highest law of the land.

The effects of historical marginalization particularly socio-political and economic exclusion strongly influence the approach to justice among indigenous communities for instance in this case. One of the ways marginalized people have attempted to address such challenges is to blend aspects of traditional dispute resolution with aspects of civil and criminal procedures stipulated in the law. While this may work at times, there are cases where such an approach becomes an impediment to justice. This may occur, when the decision makers have a strong interest in, or preference for the traditional approach to dispute resolution, either in its entirety or part of it. When this happens the one who seeks intervention from the justice system risks losing the case, because the goals and values of the traditional dispute resolution mechanisms do not always resonate with the goals and values of the mainstream justice system.

When the new constitution was promulgated in Kenya in 2010, the aspirations of the marginalized persons were raised. It has since then attracted public expectation that courts shall protect marginalized people, women, children and individuals who cannot defend themselves, because they are vulnerable to exploitative forces in society. However, it is not only the courts, but the entire justice system, which includes the provincial administration and internal security agencies. The Bill of Rights binds all organs of the state and provides for individual citizens and various non-governmental organizations like civil society to intervene in the affairs of the individual and provide assistance in order to promote rights-based-life.

However, as this case has shown, changing the constitution is not a panacea for marginalized persons to access justice. This case has shown that there are several invisible and visible barriers that stand in the way of marginalized people who try to seek justice from the mainstream justice system. This case raises awareness of the existing socio-cultural, economic, and bureaucratic barriers that stand between the courts and the individual. By doing so, one can hope to mobilize the reader around the narrative about the importance of breaking the identified socio-cultural and structural barriers, so that the courts can play a more effective role in enforcing rights and settling disputes in society as intended. One way of doing so is to seek a path to transform indigenous knowledge in order to make it competent enough to advance the development needs of the marginalized people in a globalized world. By doing so, indigenous systems especially customary courts can provide alternative to mainstream justice by upholding universal norms that have mutual benefits to the community, the individual, and the global society. This will help implement the Bill of Rights among indigenous societies where implementation fails due to socio-cultural barriers emerging from value difference and historical exclusion and inequalities.

This study also shows the influence of the contextual conditions on policy compliance. Based on the Kenyan experience, the story shows a case where the context largely had a negative than a positive influence on policy compliance because of among other things historical exclusion. These findings are similar to other cases where constitutional measures were used to address access to justice as a redistributive policy to address historical inequalities and injustices. In South Africa for instance, socio-economic conditions like poverty, cultural diversity, and the legal systems may make it difficult for marginalized persons to attain justice (Cornwall and Molyneux, 2006, p. 1175-1191). This story is an invitation to think of rights as democratic values beyond mere majority rule, and to look beyond populist democratic rhetoric (Jowell, 2007, p. 3). It is also an invitation to look at rights not as merely what has been written in the constitution, but what is actually practiced in public life.

In most cases, the justice system is made up of the police, who investigate cases, make arrests, and initiate civil or criminal procedures; the courts where the cases are heard and determined; and the department of corrections. But in the British post-colonial states like Kenya, another institution, the provincial administration is part of the justice system. Provincial Administration is an institution that was created in the Office of the President to among other things assist in intelligence gathering and coordinate internal security operations. Because of these roles and direct accountability to the Office of the President; this institution has for decades grown powerful to the extent that it provides bureaucratic adjudication in matters of security and justice. The institution is also criticized as repressive, unaccountable, and corrupt (Bagaka, 2010). In most parts of Kenya, provincial administrators adjudicate civil matters such as marriage, land, and even petty crimes. In this story, the local provincial administrator's adjudication is part of the reason Lona did not get justice. Therefore, this story is one of the silent critiques to negative colonial legacies that have been enhanced in post-colonial Kenya.

## References

- Abraham K.S. 2012. Kenya at 50: *unrealized rights of minorities and indigenous peoples*. Report by Minority Rights International. [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MRG\\_Annex1\\_Kenya\\_HRC105.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MRG_Annex1_Kenya_HRC105.pdf) (8/25/2014)
- Bachman, R. & K. Schutt, R.K. 2012. *Fundamentals of Research in Criminology and Criminal Justice*. Los Angeles: SAGE
- Bagaka, O. 2010. *Restructuring the Provincial Administration: An Insider's View*. Nairobi: Society for International Development (SID). **Error! Hyperlink reference not valid..**
- Banard, H. R. & Ryan, G.W. 2010. *Analyzing Qualitative Data*. Los Angeles: SAGE
- Boeije, H. 2010. Analysis in *Qualitative Research*. Los Angeles: SAGE
- Cheserek G.J, Omondi P, Odenyo V.A.O. 2012. Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences (JETEMS)*, 3 (2): 173-179.
- Chilisa, B. 2012. *Indigenous Research Methodologies*. Los Angeles: SAGE
- Cornwall, A. & Molyneux, M. 2006. The Politics of Rights—Dilemmas for Feminist Praxis: an Introduction, *Third World Quarterly*, 27 (7), 1175 – 1191
- Creswell, J. W. 2013. *Qualitative Inquiry and Research: Choosing Among Five Approaches*. 3<sup>rd</sup> editions. Los Angeles: SAGE
- Flick, U. 2006. *An Introduction to Qualitative Research*. 3<sup>rd</sup> edition. London: SAGE
- Gibbs, G. 2007. *Analyzing Qualitative Data*. Los Angeles: SAGE
- Jowell, J. 2007. Why is Bill of Rights Important? CRS Round Table Discussion 15 November 2007 Grand Cayman. <http://www.constitution.gov.ky> (11/2/2012).
- Karimi M. 2004. Indigenous Democracy and Traditional Conflict Resolution: Pokot, Turkana, Samburu and Marakwet. [http://practicalaction.org/docs/region\\_east\\_africa/indigenous\\_democracy.pdf](http://practicalaction.org/docs/region_east_africa/indigenous_democracy.pdf) (4/24/2014)
- Lanyasunya, P. 2009. The Samburu Community Protocol about the Samburu Indigenous Livestock Breeds and their Rights to their Indigenous Livestock Genetic Resources and Role in Global Biodiversity Management. [http://naturaljustice.org/wp-content/uploads/pdf/Kenya-Samburu\\_Community](http://naturaljustice.org/wp-content/uploads/pdf/Kenya-Samburu_Community) (4/25/2014).
- Liamputtong, P. 2010. *Performing Qualitative Cross-Cultural Research*. Cambridge: Cambridge Press
- Loseke, D. 2013. *Methodological Thinking: Basic Principles of Social Research Design*. Los Angeles: SAGE
- Republic of Kenya. 2010. Kenya National Assembly Official Record (Hansard) <http://books.google.co.th/books?id=Z3w27-3oeK> (8/25/2014).
- Sarantakos, S. 2005. *Social Research*. 3<sup>rd</sup> edition. New York: Palgrave Macmillan
- Simons, H. 2009. *Case Study Research in Practice*. Los Angeles: SAGE
- UNICEF. 2012. Kenya: Statistics. [http://www.unicef.org/infobycountry/kenya\\_statistics.html](http://www.unicef.org/infobycountry/kenya_statistics.html) (8/25/2014).
- United Nations Population Fund. 2012. *Marrying Too Young: End Child Marriage*. New York. UNPF. [www.unfpa.org](http://www.unfpa.org) (8/24/2014).