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Customary Laws of Wrongs in Kenya An Essay in Research Method

INTRODUCTION

The literature on the customary laws of Kenya is probably more extensive than that for any other country in East or Central Africa. The Restatement of African law project has been able to compile a bibliography of approximately seven hundred entries touching on the subject.¹ In reviewing this literature preparatory to embarking on field-work,² I found sufficient material concerning the larger tribes—Boran, Elgeyo, Embu, Gusii, Iteso, Kamba, Kikuyu, Kipsigis, Kuria, Luo Luyia, Masai, Meru, Mijikenda, Nandi, Pokot, Samburu, Taita, and Turkana—to permit me to construct for each a broad working outline of the more limited field of customary wrongs. And yet the published descriptions I read seemed terribly lifeless. Charles Dundas, an early administrative officer in Kenya, wrote a detailed analysis of Kikuyu and Kamba customs which strikingly illustrates this characteristic. The following passage is typical:

In Ukamba, if a man strikes a corpse, he is liable for full blood money; in Kikuyu he must pay approximately half (but in Ndia one-third). The same payments are due if he should take any part in a fatal fight, although he may have inflicted only the slightest wounds, and in such cases he must observe the ordinary ceremonies required for purification.³

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¹ *Restatement of African Law Project, Draft Bibliography for East Africa (Kenya, Somali Republic, Sudan, Tanganyika, Uganda, Zanzibar, n.d.)* (cyclostyled) 83 + iii pp. See also Abel, "A Bibliography of the Customary Laws of Kenya (with special reference to the laws of wrongs)," II *African Law Studies* 1 (1969).

² I did the preliminary work on this subject in London during the two years I was a Marshall Scholar from September 1965 to September 1967. I would here like to thank Professor A. N. Allott and Mr. Eugene Cotran, of the African Law Section, School of Oriental and African Studies, for allowing me access to the files of the Restatement of African Law Project.

³ Dundas, "The Organization and Laws of Some Bantu Tribes in East Africa," 45 *J. Roy. Anthropol. Inst.* 234, 263-64 (1915).

Do such statements in fact tell one anything about the nature or operation of a legal system? When would a man strike a corpse: in anger, in despair, contemptuously? Would it be the corpse of an enemy, a friend, a relative? What would the reaction of others be? How would the alleged compensation be claimed, and by whom, and in what forum? The second rule invites similar questions: under what circumstances might a fatal fight occur; what actions would be considered to constitute "taking part"? What is a slight wound? The rules offered by Dundas are so dehumanized as to be almost absurd. Indeed, some are absurd:

[The law of homicide does not consider the accused's state of mind.] So strict is this broad rule that Kikuyu elders have told me that if a man were seized by a lion, and his friend wishing to save him were to throw a spear, he would be liable for compensation if he inadvertently struck the man instead of the lion.⁴

My own legal syntheses, constructed upon such data, therefore consisted of totally disembodied propositions, mere abstracts of abstracts. I find in my notes a schedule of compensation among the Kikuyu for bodily injuries: for loss of an eye, amounts ranging from ten to sixty goats; for loss of a tooth, from one sheep to ten goats and a ram. These conflicting assertions cannot be reconciled by particularization to the circumstances in which the injury was inflicted because such information is simply not available anywhere in the vast body of ethnographic description.

I am increasingly convinced that the reason for these failings is that few, if any, of the numerous ethnographic accounts contain any descriptions of actual cases. Either investigators failed to observe or to inquire about cases,⁵ or else they deleted all information about the actual controversies from their reports.⁶ Instead, many appear to have proceeded by asking informants, believed to be especially knowledgeable about the customary law, to make conclusory statements about the consequences of a particular course of action.⁷ This procedure seems inevitably to elicit rules empty of content, of which Dundas' writing is a particularly egregious, though not atypical, example. Anxious to avoid these pitfalls, I considered an alternative approach to fieldwork—the case method—suggested by my training in the common law tradi-

⁴ Ibid.

⁵ See, e.g., Hamilton, "Some Notes on Native Laws and Customs," *I E. Afr. Prot. L. Rep.* 97 (1906); Leakey, "Some Notes on the Masai of Kenya Colony," 60 *J. Roy. Anthropol. Inst.* 185 (1930).

⁶ See, e.g., Kenyatta, *Facing Mount Kenya* (1938); P. Mayer, *Gusii Bridewealth Law and Custom* (1950); Ngala, *Nchi na Desturi za Wagiriana* (1949); Orchardson, *The Kipsigis* (1961); Othieno-Ochieng', *Luo Social System, with a Special Analysis of Marriage Rituals* (1968).

⁷ See, e.g., Bostock, *The Taita* (1950); Snell, *Nandi Customary Law* (1954).

tion.⁸ This technique appears to possess several distinct advantages for the study of customary law, which can best be demonstrated by contrasting the kinds of rules produced by the two methods.

These rules may be tested by two criteria: whether they adequately portray the full range of experience within the society; and whether they are distorted by bias in the investigator or the informant. Satisfaction of the first criterion may in turn be judged according to several subordinate standards, among which are:

(1) *Specificity*. Statements by an informant will often be vague and general: "our rule is that a murderer is killed." There are many reasons for this lack of specificity: ignorance of the detailed variations of a rule in different factual situations; inability to think about, or to express, the rule in terms of situational variables;⁹ or simply response to an overbroad question, such as: "what is your rule for murder?" This last difficulty is not easily avoided. No outsider can be sufficiently familiar with a society to be able to formulate as a hypothetical problem every occasion on which the type of wrong might occur in that society. The alternative solution, using the elements of the wrong taken from another legal system—for instance, the English law of homicide—as the source for hypothetical questions, distorts the significant detail, lending the data a false specificity.¹⁰ It is this lack of culturally significant detail which makes many reported rules absurd: certainly all "murderers" are not, in fact, killed. The case method avoids these dilemmas by deriving rules from disputes. Rules are thus specified by the factual details of a real controversy, so that each significant variable may be identified, and no fictitious variables are introduced by the interrogator's questions. Specificity no longer depends on the knowledge or

⁸ I certainly claim no originality in the use of this method. Indeed, the most venerable guide to anthropological methodology emphasizes that the investigator must concentrate on eliciting concrete instances of reputed customs. Roy. Anthropol. Inst. of Great Britain and Ireland, *Notes and Queries on Anthropology* 36-37 (6th ed., 1951). But in view of the widespread agreement on the value of case materials, their neglect by legal researchers is that much more striking and unforgivable.

⁹ See A. L. Epstein, "The Case Method in the Field of Law," in *The Craft of Social Anthropology* 205, 210 (Epstein ed. 1967): "In my own fieldwork among the Bemba, and later in the African urban courts of the Copperbelt, I found that court members could expound the points involved in a case they had just been hearing with great command and infinite patience, but they were much less at home in the discussion of hypothetical issues which I would sometimes have to put to them. This was not because they were unintelligent or lacking in legal insight and imagination, but because their mode of legal thinking was particular rather than abstract: the rules of law they expounded were not conceived as logical entities; they were rather embedded in a matrix of social relationships which alone gave them meaning."

Bohannan appears to be making a related point when he says: "Tiv have 'laws' but do not have 'law'. . . . In Tivland there are *atindi* or 'rules,' but they have not been especially organized for jural purposes." *Justice and Judgment among the Tiv* 57-58 (1957).

¹⁰ Cf. Roy. Anthropol. Inst., op. cit. supra note 8 at 36 (criticizing the use of questionnaires). But cf. Poirier, *Questionnaire d'ethnologie juridique appliqué à l'enquête de droit coutumier* (1963).

abilities of the informant since the decision maker, the source of data, is forced to fashion a rule to meet the disputed issues, and need not know how variant situations would be resolved.

(2) *Comprehensiveness*. If rule-directed interviews fail to uncover the details of any single rule, they are also inadequate to explore the full range of legal prescriptions governing a society. The experience of any individual is necessarily limited, and his memory imperfect. Consequently no informant, nor even any group of informants, can be expected to know all the rules of conduct.¹¹ Further, they are not likely to be able to give a spontaneous recitation of all the rules they do know. The investigator is then brought up against the dilemma suggested above, of his own incomplete knowledge of the society under scrutiny, and the danger of ethnocentric bias in the use of questions based on a model drawn from another society. The case method circumvents these difficulties by permitting an investigator, even one substantially ignorant of the scope of the indigenous legal system, to obtain as comprehensive a report as he desires merely by continuing the collecting of cases until repetition convinces him that all but the most aberrant situations have been identified. It is probably true for African societies, as Holmes has said of American,¹² that most, if not all, possible controversies occur within the history of a single generation.

(3) *Representativeness*. Rule-directed inquiry appears to seek for broad principles rather than the unique example. As a result, the rules it produces acquire an undeserved façade of generality. But in fact an informant may have based his conclusory statement on a single, unrepresentative instance. Multiplying informants does not avoid the risk that all may in fact be relying on the same atypical situation. The danger is inherent in the method which fails to discover, and consequently to disclose, the factual experience underlying the asserted prescription. It may lead the investigator to accept unquestioningly a proposition which is absurd on its face. Goldschmidt, writing recently about Sebei law, asserts: "one informant indicated that the middle child of triplets *always* [my italics] is squeezed by his siblings and dies."¹³

¹¹ See Hall, "The Study of Native Court Records as a Method of Ethnological Inquiry," 11 *Africa* 412, 413 (1938) (example of rule discovered from study of cases which had not been reported by previous investigators); cf. Herskovits, "The Hypothetical Situation: A Technique of Field Research," 6 *Southwestern J. Anthropol.* 32, 36 (1950) (informants may omit vital information because they take for granted that everyone knows it).

¹² Holmes, "The Path of the Law," 10 *Harv. L. Rev.* 457, 458 (1897): "The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view." Cf. Hall, "Nyakyusa Law from Court Records," 2 *Afr. Stud.* 153 (1953): "It would indeed have been surprising if there had been any aspect of Native law not covered by the Courts, since the annual average of civil cases heard over the years 1936-1940 has been 5,450."

¹³ Goldschmidt, *Sebei Law* 95 (1967).

How many triplets could the informant have been familiar with?¹⁴ Certainly not enough to justify the conclusory adjective "always." By contrast, when research focuses on actual cases it is immediately clear whether a stated rule is evidenced by numerous, mutually confirming, applications, or is merely the reflection of isolated, and therefore suspect, happenstance.

Not only must the rules be adequate—specific, comprehensive, representative—they must be the right rules. I have already suggested above several ways in which the structure of an interview can condition the nature of the product:

(1) Asking the wrong questions. Unless the investigator is willing to produce an incomplete record of the customary law he must model the questions he asks not on the indigenous social structure, which he knows incompletely or inaccurately, but on a legal system—real or analytic—with which he is familiar. The questions he then asks, for instance: "what happens when a son murders his mother," may be meaningless in indigenous terms, and the informant will frequently answer: "that never happens." An investigator who refuses to accept such a reply may finally elicit a rule, but it will be a rule designed to fit the analytic system, not one derived from indigenous experience. "It never happens" is in fact a truer description. A study of cases will uncover the fact that it never happens and accept that fact as a highly significant element in the description of what actually does happen.

(2) Asking questions in the wrong way. Just as the subject of a question may demand information about a course of conduct that has no social reality, so the form of a question will prefigure the way in which actual conduct is analyzed. An investigator may ask: "Is a man liable for abuse uttered when he is drunk" and receive the reply: "no." He can only understand that reply in terms of the question, which was in turn drawn from an analytic system in which "intoxication" is a significant category. He will then derive a rule that intoxication is a defence in abuse cases. The informant may in fact be answering the question by reference to an indigenous category: there is no liability for abuse when it is part of a non-serious exchange of insults, and the fact that the defendant was drunk can only mean that he was at a drinking party, one example of such a non-serious occasion. The case method would use as its data instances of abuse, including drinking parties, from which the analyst would have a better chance of seeing those categories which are significant in indigenous terms.¹⁵

¹⁴ Triplets occur statistically about once in every 5,800 births, see Guttmacher, *Pregnancy and Birth* 214 (rev. ed. 1962) (statistic for black Americans) or, among the 24,000 Sebei, no more than a handful of times a generation. In a society lacking mass communications the rule could not have been based on personal knowledge of more than one or two instances.

¹⁵ See Bohannon, *op. cit. supra* note 9, at 4-5.

The informant may introduce further distortions, in addition to those discussed above.

(1) Bias against indigenous practices. In any interview situation the subject is under pressure to give those answers he believes the investigator wishes to hear. These pressures are intensified where, as in contemporary Africa, the investigator is of a higher social status than the informant, and often of a different race. It is widely known that Europeans, and many educated Africans, condemn a practice like infanticide, disapprove of bride-wealth payments, and disbelieve in witchcraft. An informant may conceal or misreport actual practices in order to win the investigator's approval, and perhaps also to protect those practices from change.¹⁶ Decisions in actual disputes are, of course, just as subject to the pressures of modernization as is the testimony of informants. But use of such disputes as data insures that the investigator will be recording real changes in the customary law, and not just a façade of change erected to appease the perceived biases of the researcher.

(2) Bias in favor of traditional practices. This is to some extent the obverse of the above danger. Instead of exaggerating the extent to which customary law has altered to meet modern conditions and new values, the informant may glorify the pre-colonial experience, refusing to admit that any change has occurred. The likelihood of such bias is often substantially increased by the choice of informant, for today only the older men in many communities retain any extensive knowledge of customary law. The use of actual cases eliminates this bias, since every rule may be specified chronologically by the date when the dispute occurred.

(3) Ideal rather than actual rules: the is/ought distinction. The two biases already mentioned—modernity and traditionalism—can be generalized as a defect inherent in rule-directed inquiry: the possibility that replies may refer to ideal rules rather than actual behavior, to what the law ought to be rather than what it is. Statements of ideal behavior are certainly an important element in the culture of any group, but they are not law. To paraphrase Holmes¹⁷ again, the prophecies of how disputes will be decided in fact, and nothing more pretentious, are what I mean by the law. Perhaps the most significant merit of the case method is its insistence upon concentrating on actual controversies without being misled by the prescriptions of ideal morality.

In view of the advantages claimed for the case method, why has it

¹⁶ See Herskovits, *supra* note 11, at 37; cf. Barnes, "Some Ethical Problems in Modern Fieldwork," 14 *Brit. J. Sociol.* 118, *passim* (1963). But see Roy, *Anthrop. Inst.*, *op. cit.* *supra* note 8, at 29-30.

¹⁷ Holmes, *supra* note 12, at 461: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

not been used more extensively? Fifty years ago, at the time Dundas was writing, an explanation might have been found in the prevailing legal philosophy, whether explicitly held by the investigator or adhered to unwittingly. "Legal absolutism"—the term is Jerome Frank's—denied to mere controversies any significant value as evidence of the law: "The decision of a court, determining a particular controversy . . . can in no sense be regarded in itself law, whether it be the doom of an ancient monarch, the decision of a popular court, or the judgment of a modern tribunal."¹⁸ But today we are all more or less legal realists, accepting Holmes' emphasis on cases as the starting point of legal research. Significantly, it was the leading proponent of this school, Karl Llewellyn, who joined with an anthropologist, E. Adamson Hoebel, to execute the first broad study of customary law based entirely on what they called "trouble cases."¹⁹

That this approach was not immediately imitated is therefore probably due more to the practical difficulties it posed than to any jurisprudential aversion, for the case method places a far greater burden on the fieldworker. An interviewer, once he identifies a cooperative, knowledgeable informant, can survey an entire legal system in the course of discussions occupying a few days. It is true, of course, that an equally comprehensive collection of cases may be obtained with little more difficulty from an informant.²⁰ But if reliance is not to be placed on the incomplete and warping memories of men then disputes must be recorded contemporaneously, which demands extended residence in the community, as well as considerable technical abilities.

The investigator cannot know in advance where, when, or by whom a dispute will be mediated. Even in those societies possessing formal agencies for settlement adjudication is not conducted according to a predetermined calendar. But in many tribes the very identity of the participants in the settlement process depends on the relationship of the litigants and the circumstances of the controversy. The investigator can insure his presence at the discussions only by being in the vicinity, "on call" when the dispute first erupts. And then he must in addition be fluent in the vernacular or work through, or with the assistance of, interpreters who have that ability. Only the anthropologist has combined the dedication and patience required to observe actual disputes with the technical skills necessary to translate observation into under-

¹⁸ Beale, *Treatise on the Conflict of Laws* (1916) quoted in Frank, *Law and the Modern Mind* 53 (6th ed. 1949).

¹⁹ Llewellyn and Hoebel, *The Cheyenne Way* (1941). See also Hoebel, "Fundamental Legal Conceptions in Primitive Law," 51 *Yale L. J.* 951, 966 (1942). For a more recent assertion of the realist position, see Seidman, *Research in African Law and the Processes of Change* 12-13 (1967).

²⁰ This was in fact the method whereby Llewellyn and Hoebel collected their case materials during the course of two summers. Op. cit. supra note 19, at viii.

standing.²¹ Other investigators—settlers,²² travellers,²³ missionaries,²⁴ early administrators²⁵—have been limited to rule-directed interviews.

In recent years, however, the development and modernization of African legal systems has created a significant new resource for the study of customary law. Judicial structures, recognized or created by the colonial regimes to administer indigenous law and retained by the independent states with some modifications, are increasingly producing written records of their proceedings, possessing ever greater detail and comprehensiveness.²⁶ These materials have for some time been used by administrators,²⁷ who perhaps are favorably predisposed since they often sit at the appellate level of this judicial hierarchy. But other disciplines, while allowing court records a limited value, appear reluctant to use them extensively. Although some anthropologists have supplemented observation with written data,²⁸ many appear to view both the courts and their records with suspicion.²⁹ And it is unques-

²¹ See Epstein, *op. cit. supra* note 9 at 222-23. Anthropologists have, in consequence, written the classic works in the jurisprudence of customary law and the judicial process in Africa. See, e.g., Bohannan, *op. cit. supra* note 9; Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (2nd ed. 1967); Gulliver, *Social Control in an African Society* (1963); Fallers, *Law without Precedent* (1969). Few anthropologists working within Kenya have turned their attention specifically towards legal problems, but an outstanding example of the use of case materials to illuminate the nature of authority and the process of dispute settlement is Spencer, *The Samburu* (1965).

²² See, e.g., Shaw, "Some Preliminary Notes on Luo Marriage Customs," 45-46 *J. E. Afr. & Ug. Nat. Hist. Soc.* 29 (1932); Augustiny, "The Tribes of Ukamba, their History, Customs, etc.," 2 *E. Afr. Q.* 405-13 (1905).

²³ See, e.g., Gregory, *The Great Rift Valley: being the narrative of a journey to Mount Kenya and Lake Baringo* (1896); New, *Life, Wanderings, and Labours in Eastern Africa* (1897).

²⁴ See, e.g., Cagnolo, *The Akihuyu* (1933); Stam, "Bantu Kavirondo of Mumias District (near Lake Victoria)," 14-15 *Anthropos* 968 (1919-20).

²⁵ See, e.g., Beech, "Sketch of Elgeyo Law and Custom," 20 *J. Afr. Soc.* 195 (1921); Massam, *The Cliff Dwellers of Kenya* (1927).

²⁶ Again, I must acknowledge that I am merely following the lead of earlier investigators in utilizing this source. See, e.g., Allott, "Methods of Legal Research into Customary Law," 5 *J. Afr. Admin.* 172, 173 (1953); Hall, *supra* note 12; Hall, *supra* note 11; Lewin, "The Recording of Native Law and Custom," 37 *J. Roy. Afr. Soc.* 483, 485 (1938); African Studies Branch, Colonial Office, "Methods of Recording Native Customary Law," 1 *J. Afr. Admin.* 130 (1949).

²⁷ See, e.g., Penwill, *Kamba Customary Law* (1951) (District Commissioner, Machakos District); Edgar, *Notes on Kipsigis Customary Law* (1958) (cyclostyled; copy in Law Courts, Nairobi) (District Officer, Kericho). Nevertheless, though both authors state explicitly that they rely on court records, neither quotes the facts of a single case. Compare Howell, *A Manual of Nuer Law* (1954) (Ass't Dist. Comm'r, Zeraf Dist., Sudan; extensive quotation of cases).

²⁸ See, e.g., Bohannan, "Homicide and Suicide in North Kavirondo," in *African Homicide and Suicide* 154 (Bohannan ed. 1960); Wilson, *Luo Customary Law and Marriage Law Customs* (1961); LeVine, "Gusii Sex Offences: a Study in Social Control," 61 *Amer. Anthropol.* 965 (1959); cf. Lloyd, *Yoruba Land Law* (1962); Crawford, *Witchcraft and Sorcery in Rhodesia* 1-8 (1967).

²⁹ See, e.g., Goldschmidt, *op. cit. supra* note 13, at 21: "On the whole, however, these court cases are the least satisfactory of my data, not only because it is difficult to assess the influence of other cultures on actions taken, but because they were always frag-

tionably true that courts are an alien institution which modify traditional custom as they apply it. Lawyers, initially more attracted to court judgments by their similarity to the subject matter of orthodox legal research,³⁰ seem to have been disenchanted for a reason just the obverse of that of the anthropologists. Customary courts, to lawyers, are insufficiently like their European models—generally highly informal and frequently tainted with corruption—and their judgments are sadly lacking in judicial reasoning.³¹

In preparing my own research plan, I knew beforehand that I lacked the skills to observe actual cases. Persuaded by the complementary objections of anthropologists and lawyers to court records, I anticipated that I would concentrate on rule-directed interviews. Instead, my initial exposure to court records convinced me that here was

mentary. . . . I find that court cases are relatively unimportant to the analysis, and I have used them with caution." Cf. Cory, *Sukuma Law and Custom* (1953) (Tanganyika Government Sociologist).

³⁰ See, e.g., Kerr, *The Native Law of Succession in South Africa* (1961); Elias, *The Nature of African Customary Law* 3 (1956). In discussing the methods he employed to determine the rules of customary law, Elias refers to "the increasing volume of recorded judicial decisions of statutory courts established in many areas of the Continent—by far the most reliable source of information for the legal theorist no less than for the professional lawyer." Nevertheless he does not quote or cite a single such case in his extensive treatise.

³¹ See, e.g., Allott, *supra* note 26, at 173: "The potential investigator should be warned that: (i) records of proceedings are frequently imperfect (perhaps containing little more than the claim and the decision without any reasons therefore), or unintelligible, or not in English; (ii) native court records are often disappointing for one seeking a statement of the rules of customary law (it may be necessary to read the whole case, including the evidence as recorded to get an idea of the point at issue); (iii) bias or perversion of justice may intrude into a decision. . . ." Compare Allott, *Essays in African Law* 84-94 (1960); Park, *The Sources of Nigerian Law* 83-97 (1963). See also Cotran, *Report on Customary Criminal Offences in Kenya* 2-6 (1963) (no use made of case materials); Cotran, *Restatement of African Law, Kenya*, vol. 1: *The Law of Marriage and Divorce* (1968) (no use of the vast bulk of case material from the primary and appellate courts). But anthropologists have recognized, and demonstrated, how legal principles can be derived from a study of the entire body of testimony when read in conjunction with the judgment of a case. See, e.g., Fallers, "Customary Law in the New African States," in *African Law: New Law for New Nations* 71, 82 (Baade ed. 1963). Nevertheless, the most recent evaluation of the utility of primary court decisions, representing a consensus of lawyers and anthropologists, has been generally unfavorable. See Allott, Epstein and Gluckman, "Introduction," in *Ideas and Procedures in African Customary Law* 1, 8-9 (Gluckman ed. 1969): "First, how far can a clear rule of law, in its full context, be derived from a single judicial decision? Where one has only a short statement of a decision, without full presentation of the arguments and judicial reasoning, it is difficult to see how the decision was arrived at to fit the particular set of circumstances before it. . . . Secondly, since only a few, or even no, cases in certain areas of dispute may occur in any period of time, information has to be collected by discussions both with customary judges and with ordinary citizens, on remembered disputes and on cases stated, varied as much as possible, as well as on statements of what customary rules were and are."

It will be clear from my previous discussion of research methods that I question the theoretical underpinnings of the techniques advocated. I hope that the case analyses presented below will answer some of the criticisms of the case method which this quotation expresses.

an invaluable source of information on customary law, far superior to any other accessible to me. Consequently, I devoted almost the entire year I lived in Kenya to the selection and summary of case reports, collecting a total of more than 4,000 from about forty courts. I found it necessary to supplement these materials in only one significant respect, with data on out-of-court arbitration, in order to place the role of the courts within the wider perspective of conflict resolution.

The purpose of this paper is to describe the case materials available for the study of customary law in Kenya, with illustrations from the data I gathered, and locate them within the context of the judicial and extrajudicial structures for dispute settlement. In the process I will try to demonstrate how these resources justify the claims of the case method, and to answer the criticisms of anthropologists and lawyers. Although my research was restricted to Kenya, I hope this analysis of techniques and materials will have some value for those engaged in similar work elsewhere, especially in those parts of anglophonic Africa which possess comparable legal systems.

II. JUDICIAL SYSTEM

As early as 1897,³² only two years after the declaration of the East Africa Protectorate³³ (as Kenya was then known), the British administration formally recognized certain indigenous agents of dispute settlement by granting jurisdiction to existing "courts" of local chiefs and councils of elders.³⁴ Although avowedly based on traditional institutions, these courts were an integral part of the unitary judicial system of the Colony.³⁵ Five years later the administration moved a step

³² For a comprehensive history of the primary courts of Kenya up to 1945, see Phillips, *Report on Native Tribunals* (1945). More recent descriptions are: Phillips, "The African Court System in Kenya," 4 *J. Afr. Admin.* 135 (1952); Carson, "Further Notes on the African Courts System in Kenya," 10 *J. Afr. Admin.* 34 (1958); Cotran, "Kenya," in *Judicial and Legal Systems in Africa* 89 (Allott ed. 1962); Watts, "The Court of Review. The Appeal System: African Courts. Chapter II of the Laws of Kenya," 2 *E.A.L.J.* 151 (1966); Cotran, "Integration of Courts and Application of Customary Law in Kenya," 4 *E.A.L.J.* 14 (1968). See generally Colony and Protectorate of Kenya: Native Affairs Department, *Annual Report (1925-47)*; Colony and Protectorate of Kenya: African Affairs Department, *Annual Report (1948-57)*; Mungeam, *British Rule in Kenya, 1895-1912: The Establishment of Administration in the East Africa Protectorate*. (1966).

³³ On July 1, 1895. Hardinge to Salisbury, 2 July 1895, F.O.C.P. 6761; *London Gazette*, 15 June 1895. Cited in Low, "British East Africa: The Establishment of British Rule, 1895-1912," in 2 *History of East Africa* 1, 6 (Harlow & Chilver eds. 1965).

³⁴ Native Courts Regulations, 1897, No. 52, §§2(b), 46 (East Africa Protectorate). At the same time, the government established the beginnings of what it hoped would be a system of direct rule, in the form of Native Courts presided over by European officers. (§2(a)). Nothing ever came of this idea, and it was abandoned about 1908. See Phillips, *Report on Native Tribunals* 7-10 (1945).

³⁵ See Phillips, *op. cit. supra* note 34. Lawyers were also allowed to appear. Native Court Regulations, 1897, No. 52, §81 (East Africa Protectorate); Rules for the Ad-

further from tradition, strengthening the powers of those chiefs already recognized,³⁶ and delegating additional judicial authority to the newly instituted official headmen.³⁷ In 1910, noting the erosion in the influence of indigenous elders as a result of the novel powers conferred on chiefs and headmen, the new Governor, Sir Percy Girouard, sought to reaffirm their position, guided by the principle of indirect rule.³⁸ But little was changed until 1930, when a major revision separated the judiciary from the executive powers of the chief or headman and further segregated the African judicial machinery from the structure serving the rest of the population.³⁹ Revitalized panels of elders, explicitly constituted "in accordance with the native law or custom of the area"⁴⁰ now formed the base of a judicial hierarchy in which appeal lay to Native Appeals Tribunals,⁴¹ and then to District⁴² and Provincial Commis-

ministration of Justice in Native Courts under the East Africa Order in Council, 1897, §52 (Oct. 21, 1899); Native Court Practitioners Rules, 1899 (Oct. 23, 1899) (East Africa Protectorate).

³⁶ East Africa Native Courts Amendment Ord., No. 31 of 1902. Section 2 authorized the Commissioner to proclaim any district a special district to which the 1897 Regulations would not apply; he made such a proclamation that same day with respect to all the provinces apart from the coast: Ukamba, Naivasha, Kisumu, Kenya, and Jubaland. However, §15(1) of the Ordinance perpetuated the chief's courts: "Nothing herein to affect the power of the Commissioner to recognize the jurisdiction of a tribal Chief over the members of his tribe, or the exercise by such tribal Chief of such authority as may be lawfully vested in him, or may be granted to him by the Commissioner."

³⁷ Village Headman Ord., No. 22 of 1902 §6 (East Africa Protectorate): "The Commissioner may make rules conferring upon any headman or any body of headmen in any village or group of villages the power to hear and determine petty native cases to such extent and upon such conditions as to appeal and procedure as the Commissioner may determine." The jurisdiction of both types of court was limited to members of the tribe, and in some cases only of the village, in which the court sat. Courts Ord., No. 13 of 1907, §10(1) (East Africa Protectorate); Rules Under Section 10 of the "Courts Ordinance, 1907," §§2, 9 (Mar. 30, 1908).

³⁸ Native Tribunal Rules, 1911, §2(1) (Apr. 4, 1911) (East Africa Protectorate): "The powers conferred by these rules shall be exercised only by such Councils of Elders as *are constituted under and in accordance with Native law and custom* and are recognized by the Governor." [italics added]. Native Authority Ord., No. 22 of 1912, §2(1) (East Africa Protectorate): "The Governor may appoint any Chief or other Native or any Council of Elders to be Official Headman or Collective Headmen. . . ." See Phillips, *op. cit. supra* note 34, at 13-15. This emphasis on indirect rule appears to have been short-lived, for the italicized words in the 1911 Rules were eliminated two years later by the then Governor, H. C. Belfield. Native Tribunal Rules, 1913, Government Notice No. 43, §§2, 3 (Feb. 6, 1913) (East Africa Protectorate). See also Courts Ord., Laws of Kenya, cap. 5, §11 (1926).

³⁹ Native Tribunals Ord., No. 39 of 1930 (Kenya). Advocates were now excluded. §24. Authority was extended to all causes of action arising within, crimes occurring within, or defendants residing within, the jurisdiction of the court. §§10, 11.

⁴⁰ §4.

⁴¹ §33(1). The Provincial Commissioner, with the approval of the Governor, could appoint a Native Tribunal, presided over by a headman, or senior elder, or composed of three selected elders, to be a court of appeal. In Coast Province, the Moslem liwali or mudir was later included as an intermediate appellate authority, Native Tribunals (Amendment) Ord., No. 38 of 1940, §§6-8.

⁴² §34(1), (2). Appeals were later transferred to the District Officer. Native Tribunals (Amendment) Ord., No. 31 of 1933.

sioners.⁴³ On the recommendations of the Phillips report⁴⁴ this structure was reformed in 1951.⁴⁵ A start was made toward assimilating the judicial system of the African community to the pattern of that principally used by non-Africans:⁴⁶ tribunals were renamed African Courts and ultimate judicial review was transferred from the Provincial Commissioner to a newly created Court of Review.⁴⁷ Later, a single level of lay magistrates replaced both the African Courts of Appeal⁴⁸ and review by administrative officers.⁴⁹ Finally, seventy years after the introduction of a plural legal system in Kenya, the Magistrate's Courts Act⁵⁰ substantially eliminated the remaining dualism, transforming African Courts into District Magistrate's Courts,⁵¹ competent to hear cases involving all residents of Kenya,⁵² with a single route of appeal to First Class⁵³ or Resident Magistrates,⁵⁴ then to the High Court⁵⁵ and in the last resort to the Eastern Africa Court of Appeal.⁵⁶

A. *Primary Courts*

Cases heard by the indigenous institutions recognized by, or novel tribunals created under, enactments predating 1930 were not recorded,⁵⁷

⁴³ §34(3). Provision was made for ultimate review in the Supreme Court by means of a case stated, §34(4), but none was ever taken. See Phillips, *op. cit. supra* note 34 at 5; Watts, *supra* note 32 at 156.

⁴⁴ *Op. cit. supra* note 34.

⁴⁵ African Courts Ord., No. 65 of 1951.

⁴⁶ In establishing these courts, the Provincial Commissioner was no longer bound to follow native law and custom, but could determine the constitution of the court, order of precedence, method of deciding in cases of dispute, limits of jurisdiction, quorum, and use of assessors, §6.

⁴⁷ §43. This court consisted of a chairman appointed by the Governor, the Chief Native Commissioner, the African Courts Officer, and an African appointed by the Governor (Shadrack Malo, a former President of the Central Nyanza African Court of Appeals). African Courts Ord., No. 65 of 1951, §4(2). In 1962 the Chief Native Commissioner was replaced by a second African. African Courts (Amendment) Ord., 1962, No. 50 of 1962, §4(1).

⁴⁸ By an amendment to the African Courts Act, about 1964.

⁴⁹ African Courts (Amendment) Ord., No. 50 of 1962, §38.

⁵⁰ No. 17 of 1967.

⁵¹ §§8, 43(1), Second Schedule §2.

⁵² Compare Magistrate's Courts Act, No. 17 of 1967, §§9, 10, with African Courts Ord., No. 65 of 1951, §9.

⁵³ Appeals from a Third Class Magistrate's court in civil cases are to a First Class Magistrate. §12.

⁵⁴ Appeals from a Third Class Magistrate's court in criminal cases are to a Resident Magistrate. §4.

⁵⁵ Appeals from a Second or First Class Magistrate or a Resident Magistrate are to the High Court in both civil matters, Civil Procedure Ord., Laws of Kenya, cap. 5, §65(1) (1948), and criminal, Criminal Procedure Code, Laws of Kenya, cap. 75, §347(1) (rev. ed. 1962), as amended by Magistrate's Courts Act No. 17 of 1967, §30.

⁵⁶ Criminal Procedure Code, *Laws of Kenya*, cap. 75, §361(1) (rev. ed. 1962); Civil Procedure Ord., *Laws of Kenya*, cap. 5, §72 (1948).

⁵⁷ See Watts, *supra* note 32 at 155. At that time, this was thought to be too obvious to require expression in the legislation, but it may be seen indirectly in the fact that European administrators, in exercising their powers of revision, were to treat the

and hence are lost to scholarship except as they may be studied through the memories of informants. The 1930 Ordinance reorganized these disparate bodies into several hundred native tribunals,⁵⁸ each consisting of as many as fifty or more elders. These, like their predecessors and successors, were instructed to apply "the Native Law and Custom prevailing in the area of the jurisdiction of the tribunal."⁵⁹ The elders were presumed to know this customary law as an integral part of their inherited tradition, a reasonable presumption since they were men of little education, few European contacts, and served exclusively within their own tribe.

During the next three decades the administration gradually attempted to restructure these tribunals according to a European model. Their numbers were reduced to a fairly stable figure of just over a hundred in 1966.⁶⁰ The membership of each court was transformed from a large group of elders participating irregularly for nominal pay to a much smaller, more professional body, earning substantial salaries for fixed duties, and hearing individual cases in panels of no more than ten;⁶¹ by 1966 few courts had more than four members. Although the Native Tribunals Ordinance did not make explicit provision for the recording of proceedings, the literate clerks attached to these courts were encouraged to do so as far as they were able; useful records began to appear in the 1950's, and improved dramatically in the next fifteen years.⁶²

controversy as an original case and hear it de novo. See, e.g., Rules under Section 10 of the "Courts Ordinance, 1907," §5 (Mar. 30, 1908); Native Tribunals Rules, 1913, Government Notice No. 43, §14 (Feb. 6, 1913).

⁵⁸ In 1943 there were 139 tribunals, already a substantial decrease from the situation ten years earlier. See Phillips, *op. cit. supra* note 34, at 6. Between 1930 and 1937, in Kavirondo Province, for instance, seventy-eight locational tribunals were reorganized into twenty divisional courts. *Id.* at 17.

⁵⁹ Native Tribunals Ord. No. 39 of 1930, §13(a). Similar provisions can be found in all legislation pertaining to the judiciary, from the earliest, Native Courts Regulations, No. 52 of 1897, §4 (Aug. 12, 1897), to the most recent, Magistrate's Courts Act, No. 17 of 1967, §§2, 10(1)(a); Judicature Act 1967, No. 16, §3(2).

⁶⁰ See Phillips, *op. cit. supra* note 34, at 13-15; Watts, *supra* note 32, at 155. See also the warrants establishing each court, which state when the court was created, when abolished, and list its personnel. These are kept in the offices of the Provincial Commissioners and in the Law Courts, Nairobi.

⁶¹ See generally Phillips, *op. cit. supra* note 34, *passim*. In Kavirondo Province, for instance, by 1943, elders were earning as much as sixty-five shillings a month, and the tribunal president up to one hundred and fifty shillings. *Id.* at 20. In Kisii District panels of six elders chosen from a pool of eighteen heard individual trials. *Id.* at 29.

⁶² See Watts, *supra* note 32, at 155. The 1930 Ordinance omitted the requirement, contained in earlier enactments, that appeals be heard de novo. By 1950 parties were requesting copies of the record and judgment with sufficient frequency to require the setting of a fee for this service. Native Tribunals (Fees & Fines) (Amendment) Rules, 1950, Government Notice No. 867 (July 21, 1950). The African Courts Ordinance, No. 65 of 1951, provided for revision based on the record alone, §39(1)(a). During the 1950's a series of handbooks for the guidance of African Courts gave detailed instructions concerning the recording of evidence and the writing of judgments. See [Watts], *Standing Orders for African Courts*, §§23-28, 104-18 (1956); Tennent, *Notes and*

The Magistrate's Courts Act of 1967⁶³ completed this process, eliminating several more courts to leave a total of ninety, each staffed by one to four magistrates sitting individually.⁶⁴ Because these were men of superior English literacy, often clerks of the former African Courts, their reports of cases developed from a mere listing of the names of parties and the result to a full, if not verbatim, record of the evidence followed by a reasoned judgment. These lay magistrates are currently receiving intensive instruction in law emphasizing the basically English procedure and Kenya substantive legislation they must apply. Training in customary law is limited, even though familiarity with it can no longer be taken for granted.⁶⁵ The present younger generation of magistrates have often been isolated from their homes at an early age, attending boarding school, living in urban areas, and later at university. Furthermore, some are now being posted outside their tribal jurisdiction altogether. The rules they administer are therefore going to bear a diminishing resemblance to traditional practice.

How does this structure function, and what information does it provide about the administration of customary law? A rough estimate suggests that in 1966 the primary courts decided about 50,000 civil and nearly 200,000 criminal cases.⁶⁶ Civil cases were almost all governed by customary law, i.e., an unwritten rule whether traditional or modern.⁶⁷ But legislation figured prominently in most criminal prosecutions.⁶⁸

Instructions for the Guidance of African Courts 2-7, 11-14 (1959) (Kakamega District); *Notes and Instructions for the Guidance of African Courts* 36 (1959) (Machakos District). While the above were merely advisory, the Chief Justice promulgated, under the authority of African Courts Ord., No. 65 of 1951, §62(h), binding rules requiring the recording of evidence and a reasoned judgment. African Courts Civil Procedure Rules §§42, 49 (n.d.); Criminal Procedure Rules for African Courts §§54, 59 (n.d.).

⁶³ No. 17.

⁶⁴ §8(1).

⁶⁵ §18: "A magistrate's court may, if it thinks fit, call for and hear evidence of the African customary law applicable to any case before it."

⁶⁶ The last official statistics available are those for criminal cases in 1961, when 153,441 cases were decided. Republic of Kenya, Judicial Department, *Report*, 1961-1963, at 17 (1965). But I abstracted from the annual returns of each court, kept in the Law Courts, Nairobi, some data on the quantity of litigation for 1966. My own totals, perhaps somewhat inaccurate, show 51,225 civil and 191,914 criminal cases. These figures have steadily increased in the recent past.

⁶⁷ The only civil statute which the courts were authorized to administer was the Affiliation Ord., No. 12 of 1959, Laws of Kenya, cap. 12, §2 (rev. ed. 1962), since repealed. In 1966 my notes show 789 affiliation proceedings. The Magistrate's Courts Act No. 17 of 1967, does, however, anticipate a general civil jurisdiction, either under the customary law, §10(1)(a), or, subject to a jurisdictional limit determined by the amount in claim, under the common or statutory laws of Kenya, §10(1)(b).

⁶⁸ In 1966, when courts had authority to punish customary crimes during the first six months, they heard only 2,049 cases, or about one percent of all prosecutions. Hence even prior to 1966 customary criminal law was not very significant. However, the percentages varied greatly from area to area. In Nyando African Court, a Luo tribunal, for instance, violations of the Penal Code were only three times more frequent than customary crimes. But in Siosot African Court, in Kipsigisland, Penal Code prosecutions were more than one hundred times as frequent.

Indeed, the Constitution abolished all unwritten criminal law as of June 1, 1966.⁶⁹ Moreover, little more than a tenth of all prosecutions were brought under the Penal Code,⁷⁰ the remainder consisting of contraventions of administrative regulations concerning trespass,⁷¹ boundary markers,⁷² markets,⁷³ licensing,⁷⁴ taxation,⁷⁵ stock movement,⁷⁶ production or consumption of alcohol⁷⁷ or narcotics,⁷⁸ or non-compliance with the orders of administrative personnel.⁷⁹ Nevertheless, the primary courts can⁸⁰ and do award compensation to the victims of criminal offences according to what is basically an unwritten law, derived, at least in part, from the customary law of wrongs.⁸¹ An individual court, on average, may hear about 500 civil⁸² and 1,000 criminal⁸³

⁶⁹ Kenya Order in Council 1963, S.I. 1963/791, Schedule 2, The Constitution of Kenya, §§8(8), 8(16). This section was implemented by African Courts Officer, Circular No. AC 13/1/11/70 (June 18, 1966) which instructed African Courts to terminate all pending prosecutions under customary law, with leave to the complainant to file a civil suit upon payment of additional fees. See, e.g., Maseno African Court Criminal Case 454/66 (July 22, 1966) (prosecution for removing a married woman from the custody of her husband under Luo customary law; plaintiff informed he can pay 50/- in addition to the initial 16/- fee and sue for the return of his wife).

⁷⁰ My total for 1966 shows 22,875 prosecutions under the Penal Code, or just about twelve percent of all criminal cases.

⁷¹ Trespass Ord., No. 48 of 1962, *Laws of Kenya*, cap. 294 (rev. ed. 1963).

⁷² Land Adjudication Act, *Laws of Kenya*, cap. 283, §35(4)(a) (rev. ed. 1964), as amended by Land Adjudication Act 1968, No. 35 of 1968, §34(d); Registered Land Act, *Laws of Kenya*, cap. 300, §24 (rev. ed. 1964).

⁷³ Marketing of African Produce Ord., *Laws of Kenya*, cap. 320 (rev. ed. 1962).

⁷⁴ Traders Licensing Ord., *Laws of Kenya*, cap. 497 (rev. ed. 1962).

⁷⁵ Personal Tax Ord., *Laws of Kenya*, cap. 470 (rev. ed. 1962).

⁷⁶ Animal Diseases Ord., *Laws of Kenya*, cap. 364 (rev. ed. 1962).

⁷⁷ African Liquor Ord., *Laws of Kenya*, cap. 122 (rev. ed. 1962).

⁷⁸ Dangerous Drugs Ord., *Laws of Kenya*, cap. 245 (rev. ed. 1962).

⁷⁹ Native Authority Ord., *Laws of Kenya*, cap. 128 (rev. ed. 1962).

⁸⁰ African Courts Ord., *Laws of Kenya*, cap. 11, §§19(1) 22, 23 (rev. ed. 1963); Magistrate's Courts Act, No. 17 of 1967, §9(1); Criminal Procedure Code, *Laws of Kenya*, cap. 75, §§175, 176 (rev. ed. 1962).

⁸¹ See, e.g., Kosele African Court Criminal Case No. 33 of 1966 (Jan. 20, 1966) (court ordered accused to pay the customary compensation of a heifer for virginity in a prosecution for indecent assault, Penal Code, §144); Bungoma District African Court Criminal Case No. 493 of 1967 (June 22, 1967) (court ordered accused to pay customary compensation of a sheep in a prosecution for common assault, Penal Code, §250). The following abbreviations will be used hereafter in citing cases: African Court—AC; District African Court—DAC; African Court of Appeal—ACA; District Officer—DO; Appeal Magistrate—Mag; Court of Review—COR; Civil Case—CC; Criminal Case—CrC; Civil Appeal—CA; Application—Appl. Each case will be cited by number and year, e.g., 234/65, followed by the presiding judge, where significant, and date of decision, where available, e.g. (Ainley, C. J., Jan. 1, 1966). Although it is customary to cite cases by the names of the parties, I have omitted the names in all the citations that follow in order to preserve the anonymity of the individuals involved, since the case numbers provide adequate identification for anyone wishing to do further research in this area.

⁸² The numbers range from 93 for the Kilgoris African Court, in the Masai area of Narok District, Rift Valley Province, since closed down, to 1,694 in the Kavujai African Court, serving the Luyia of Western Province.

⁸³ The statistics range from 146 in the Kapkatet African Court in the Kipsigis area of

cases each year. Court records generally date back several decades, sometimes to the 1930's, though physical condition of course deteriorates radically with age. All are stored in the office of the court which passed judgment, unless the case has been appealed.⁸⁴ Although none are in vernacular many, especially in Coast, Nyanza and Western Provinces, were recorded in swahili, at least until very recently.

CASE STUDIES

In light of this sketch of the quantity of material available, the value of information obtainable from illustrative cases may be placed in proper perspective. The following case⁸⁵ is quoted in full, as far as possible in the same form as the original record. The parties are all Luo.⁸⁶

Plaintiff: Augustino, Kanyawegi village, Kisumu location, Central Nyanza District, Nyanza Province.

Defendants: Isabella w/o Onyango
Atieno w/o Onyango } same residence

Claim: 200/- damages for defamation (filed Aug. 18, 1966).

Plaintiff (Male, Christian, duly sworn states): The defendants said on 13 August [1966] that I am a witchcraft man, that I have killed their son, that I am a *jadak*⁸⁷ in their area and should go to Nyakach⁸⁸ which is my original home (*loka* [in dholuo]). The reason for this is that their son, Ogalo Onyango disappeared from their home; he was searched for and finally a report was received that he had died. Then the defendants broke out with cry (sic) with my name that I killed him; they cried in their *boma*⁸⁹ in the absence of their husband. When Onyango returned he collected money and went to search for his son in Sakwa.⁹⁰ But later it was revealed that Ogalo is

Kericho District, Rift Valley Province, since closed down, to 3,231 in the Kapsabet African Court, Nandi District. In the urban areas totals are much higher, e.g., Tononoka African Court—17,714 (Mombasa); Makadara African Court—10,087 (Nairobi).

⁸⁴ See African Courts Officer, Circular No. 1 of 1963 (Jan. 25, 1963) amending Standing Order No. 180 (case file to be kept in highest court which has passed judgment). Compare African Courts Civil Procedure Rules §§77-79 (n.d.) (case file to be returned to court of first instance).

⁸⁵ Kisumu DAC CC 299/66 (Aug. 31, 1966). Because of limitations of space I have had to select shorter cases. To preserve the anonymity of the parties and witnesses I have used what I hope are appropriate pseudonyms, and have deleted the name of the village.

⁸⁶ A Nilotic tribe numbering just over a million and occupying most of Central and South Nyanza Districts of Nyanza Province. See Kenya, Ministry of Economic Planning and Development, Statistics Division, III *Kenya Population Census*, 1962, at 36 (1966) [hereinafter cited as *Kenya Census*, 1962].

⁸⁷ "An unrelated person who is given land on a permanent usufruct which is determined by his fulfillment of customary obligations." Wilson, *Luo Customary Law and Marriage Laws Customs* 12 (1961).

⁸⁸ Name of a Luo lineage (or tribe), and also of a location, in Central Nyanza, between the Nyando and Sondu Rivers; about twenty-five miles southeast of Kisumu location and lineage, where the defendants live.

⁸⁹ A swahili word, literally meaning fort, but widely used for home. Among the Luo it refers to the living area surrounded by an *ojuok* (euphorbia) hedge.

⁹⁰ Luo lineage (or tribe) and location in Central Nyanza, about forty miles west of Kisumu.

alive, and living up the hill at Kapotman.⁹¹ I did not see Ogalo myself when he returned—he stayed just one night—but my boys told me. Then Ogalo went back to where he is living in order to escape the summons of the court, for he has been accused by another boy. (examined by Atieno): There was no outstanding grudge between me and Ogalo. (examined by court): I am only a few yards from the boma of defendants. I went there on bicycle quickly alone. I saw Omolo and Oburu standing there; they also heard the defamation. I did not report the defendants to the *joduong' gweng'*⁹² before suing them here because I was angry.

Plaintiff's witness, Oburu (17 years old): On Saturday, 13 August, I was in the *boma* of Onyango when the defendants, returning from the lake (*nam* [in dholuo]) broke out into a cry for their son who was alleged to have died. Atieno entered the *boma* carrying a *karai*⁹³ and a basket (*odheru* [in dholuo]) and threw them down and said: "Aaa. Augustino, how have you killed the son of Onyango so badly like this." Isabella began to cry: "Augustino, let all your wives give birth to many children and name them after Ogalo." Then she said: "let Onyango take any cattle he would have slaughtered for the people who came to the funeral (*joliel* [in dholuo]) and use them to employ a clever man to take revenge against Onyango for killing his son."

(examined by Isabella): When you came from the lake I was in the house (*simba* [in dholuo]) of your son Odhiambo.

(examined by court): Augustino was present in the *boma* at the time that the defendants started crying.

Defendant 1 (Isabella) (Female, Christian, duly sworn states): I did not defame Augustino's name. I only said that it is ridiculous how the boy Ogalo has died in a far place where we do not know.

(examined by Augustino): We only received a letter which informed us that Ogalo is vomiting blood and is likely to die, but we did not cry.

Defendant 2 (Atieno) (Female, Christian, duly sworn states): I did not defame Augustino's name. We had no grudge against him which could make us mention his name. I did not see him come to our boma at all.

(examined by Augustino): Our son did not die, but we received a letter saying that he is likely to die, but we did not cry. I went to Sakwa where my son died and slept there on 13 August.

Defendants' witness, Mathias: A letter came from Sakwa on 13 August to say that defendants' son was beaten there. So the two defendants went there that very day to see him. I never heard them cry anything.

(examined by court): I live in the *boma* of defendants because they are the wives of my uncle (*nera* [in dholuo]).

Defendants' witness, Otieno: I live near the defendants. When I entered their *boma* I heard them say, why had their son Ogalo died outside? They were only talking, not crying.

Judgment [The court awarded the full claim, and 32/- costs.] Plaintiff's evidence was corroborated by the testimony of his eye-witness, but defendants offered mere denials. The court does not believe that the defendants contented themselves with the mild words they state now. Always when the mother received information that her son or daughter has died she usually cried very loud according to Luo customs.

⁹¹ In Nandi District, Rift Valley Province, and thus outside the jurisdiction of African Courts or Administrative Police in Central Nyanza District, Nyanza Province.

⁹² Elders of a locality. See Wilson, *op. cit. supra* note 87 at 13.

⁹³ I believe that this is a knife or spear, probably used in fishing.

The total sequence of events in this case can be reconstructed in outline. Ogalo, the son of one of the defendants (co-wives of Onyango) got into a fight away from home, in which both he and his adversary were injured. He fled the scene and hid to avoid prosecution, but a letter reached his home, where people were already alarmed by his prolonged absence, which contained an inflated rumor that he was dead or dying. The defendants immediately burst into a lament, blaming the tragedy on Augustino's witchcraft. Augustino heard their cries, and when he came to investigate the accusations were repeated. The women then rushed off to see the dying boy, but failed to find him, as did their husband in a later search. In fact, Ogalo did not die but was merely hiding to escape justice and when he revisited his family the witchcraft accusation was dropped. Augustino then went straight to court, filing his complaint five days after the incident, as soon as he was able to collect the necessary 32/- fees.⁹⁴ He failed to submit the dispute to arbitration because, in his anger, he wanted quick action. In the event, he received his full claim less than three weeks after the incident.

There is little to be learned from the three sentence opinion taken in isolation, and this paucity of reasoning, typical of many primary court judgments, may be one reason for their neglect by lawyers. But when the court record is read as a whole, patterns of assertion, adversarial response, and judicial determination (whether implicit or explicit) may be discerned which identify the sources of conflict and illuminate the way in which controversial conduct is defended and evaluated. Let me try to demonstrate this through a detailed analysis of the relatively simple facts of this case, with the aid of Luo ethnography.

Although Augustino stated his claim as one for defamation,⁹⁵ thus dignifying it with the prestigious terminology of the English common law, the gravamen of his complaint was in fact that the defendants had spoken words which were insulting to him. Both Isabella and the court demonstrated this by focusing their questions on the critical failure of Augustino and his witness to allege that Augustino was present at the incident, an essential ingredient of the cause of action where the injury is personal affront but not where it is damage to reputation.⁹⁶ By far the more serious of the two insults alleged was the

⁹⁴ Court fees in most civil cases are proportioned to the amount claimed. A demand for 200/- requires a fee of 26/-, plus 6/- for service of an additional defendant. See African Courts (Fees and Fines) Rules, *Laws of Kenya*, cap. 11, Subsidiary Legislation, Schedule, §§2, 3 (rev. ed. 1963). Many rural Africans would not have that amount available in cash, and would have to borrow or sell some produce.

⁹⁵ Augustino is in fact illiterate, as shown by the fact that he signified his acceptance of the record of his testimony by a thumb-print rather than by signing his name. Therefore it is likely that it was the court clerk who filled out the forms, and introduced English legal terminology.

⁹⁶ Augustino and his witness concurred in this characterization by affirming on examination that Augustino had been in the defendants' *boma* at the time. Further, neither argued that the words were published outside the *boma* or that Augustino's reputation was damaged.

first—that Augustino was a witch who had killed the defendants' son. This accusation was made explicitly by Atieno, but was also given more subtle utterance by Isabella in her cry that Augustino's wives should bear children named after Ogalo. One form of restitution for homicide in Luo customary law is for the clan of the murderer to provide a girl to bear progeny to the name of the deceased.⁹⁷ It is important to recognize that the defendants, in placing responsibility for the death of their son on Augustino's witchcraft, were not denying that the physical injury had been incurred in an ordinary fight with another man; rather, witchcraft was invoked to explain why Ogalo had become involved in the fight in the first place, and then why he had suffered such egregious harm. Widespread belief in witchcraft among the Luo has not greatly changed in the last sixty years,⁹⁸ as illustrated by the readiness with which these women—nominal Christians, if illiterate—resorted to it in trying to comprehend their tragedy. Because witches are so greatly feared they are generally avoided, and Augustino was at least threatened with ostracism if the accusation was believed. Indeed, Isabella urged more drastic action—the use of anti-witchcraft medicine⁹⁹ to take revenge for the death of her son.

The second insult alleged—that Augustino was a *jadaḱ*, or tenant, who should go back to his clan's home—was much milder. *Jodaḱ*¹⁰⁰ are members of foreign lineages who have been granted land for purposes of cultivation but who suffer from insecurity of tenure and an inferior status in society.¹⁰¹ To call attention to this in public is clearly derogatory.¹⁰² Moreover, the two insults are interrelated. Augustino, as a *jadaḱ*, was subject to immediate and automatic expulsion from his lands if the community found him to be a witch.¹⁰³ But quite apart from the possible consequences of the accusations (which would have been more significant had the action been grounded in defamation) the insults were intrinsically injurious to dignity and had to be redressed. In

⁹⁷ See, e.g., Othieno-Ochieng', *Luo Social System* 9-10 (1968); Southall, *Lineage Formation Among the Luo* 22 (1958). Where the slayer and victim are of the same lineage, so that this solution is precluded by the rules of exogamy, the slayer may himself marry a girl whose children are named after the deceased. Butt, *The Nilotes of the Anglo-Egyptian Sudan and Uganda* 109 (1957). Isabella appears to be urging this latter remedy, which is surprising since it accepts Augustino as a member of her son's lineage, precisely the fact she was denying in calling him *jadaḱ*.

⁹⁸ Compare Northcote, "The Nilotic Kavirondo," 37 *J. Afr. Soc.* 58, 63 (1907) with Wilson, "Homicide and Suicide Among the Joluo of Kenya," in *African Homicide and Suicide*, 179, 185, 188-89 (Bohannan ed. 1960).

⁹⁹ According to one informant, such medicine can cause witchcraft to turn against a man who uses it aggressively, and kill him.

¹⁰⁰ Plural of *jadaḱ*.

¹⁰¹ See Wilson, *op. cit.* supra note 87, at 56-62.

¹⁰² See, e.g., Kisumu DAC CC 180/66 (June 13, 1966) (300/- damages for being called *jadaḱ*, among other things). See also Evans-Pritchard, "Luo Tribes and Clans," 7 *Rhodes-Livingstone Journal* 24, 37 (1949): "*jadaḱ* is a harsh word." It was not, however, defamatory because it was apparently true.

¹⁰³ See Wilson, *op. cit.* supra note 87, at 87-88.

seeking to do so Augustino was not only preserving his own self-respect but also that of the ancestor after whom he was named and whose spirit was believed to inhabit Augustino's body:

A person tends to be sensitive about his *juok* [ancestor name] and "spoiling a name" is a serious matter. An insult is not merely an insult to ego, it is also an insult to the ancestors with who [sic] ego shares a common *juok*, and if the insult is not avenged, they will be angry and punish the insulted man. While the origins of the belief are now largely forgotten by the young, the sensitivity remains. . . .¹⁰⁴

Luo do feel that the obligatory response to abuse, if honor is to be protected, is counter-abuse or physical violence.¹⁰⁵ That Augustino did not indulge in either may be due to a combination of causes including fear of legal liability,¹⁰⁶ and a recognition that his accusers were only women, irresponsible in the absence of their husband. But because honor requires a vigorous reply to abuse the traditional mode of arbitration by local elders is even less appropriate than violence since these arbiters are ultimately powerless to extort redress. In the circumstances of the instant case, moreover, Augustino may have apprehended that the clan elders would be biased against him, as an outsider. For these reasons a demand for substantial civil damages¹⁰⁷ allowed him to vindicate his name promptly and effectively.

Augustino presented a strong case to the court. His own testimony contained a clear, detailed, and internally consistent statement of the facts on which he based his claim. More important, he produced an independent eye-witness who generally corroborated his evidence. Despite minor contradictions—Augustino and his witness differed, for instance, as to whether Augustino was present in Onyango's *boma* at the start of the incident—Oburu's testimony carried conviction through its wealth of additional detail, for example, the precise words

¹⁰⁴ Whisson, *The Will of God and the Wiles of Man* 4-5 (1962) (cyclostyled paper read at a conference of the East African Institute for Social Research at Limuru, Kenya, in Jan. 1962). See also Southall, *op. cit.* supra note 97 at 25.

¹⁰⁵ See Malo, *Insult as an Offence in African Customary Law* (n.d.) (microfilm, library of African Law Section, School of Oriental and African Studies, London).

¹⁰⁶ The development of African Courts has thus 'created' the civil action of insult in two ways. Alternative methods of redress which were traditionally acceptable, counter-abuse and violence, are no longer permissible, and compensation, for which there is no precedent in tradition, is available.

¹⁰⁷ The amount claimed was largely arbitrary, though comparable to that requested in similar cases. The range is generally between one hundred and five hundred shillings. See, e.g., Kisumu DAC CC 8/66 (Feb. 8, 1966) (150/-); Kisumu DAC CC 5/66 (Jan. 12, 1966) (500/- against each defendant). Because the action is not founded in custom there are no real standards. Courts will generally award the amount claimed, as in this case, although judgments are sometimes reduced where the insult is trivial or in some way justified. See, e.g., Kisumu DAC CC 394/66 (Nov. 24, 1966) (claim of 500/- reduced to judgment of 100/- because defendant was a young boy unable to pay the full amount).

of the defendants, and what Atieno was carrying. This confirmation gained probative force from the fact that Oburu was required to wait outside the court until he spoke: failure to obey this rule would have led to his disqualification as a witness.¹⁰⁸ Against Oburu, the defendants could only counterpose two very weak witnesses, one of whom the court quickly revealed as their close relative and member of their *boma*. In relying on plaintiff's eye-witness and discounting the testimony of the parties as well as that of defendants' relative the court was making the implicit judgment, frequently found in the reasoning of primary courts, that interested persons and their relatives can be expected to lie.¹⁰⁹ Equally significant is the court's observation that, whereas the plaintiff specified the particulars of defendants' wrongful conduct, the defendants contented themselves with general denials. Facts, the court appears to have reasoned, must be met with facts, not mere conclusions. The defendants may well have anticipated this criticism for they offered an alibi, which was repeated by the first defence witness. But the story they chose—that they had gone to Sakwa to see their son immediately on hearing of his misfortune—was irrelevant since they could easily have insulted Augustino before they left.

In assessing the evidence the court did more than simply weigh the quantities of independently corroborated factual detail on each side. It employed as evidentiary rules perceptions about modal behavior in Luo society, comparing conflicting allegations with the conduct which it believed could be expected in the circumstances.¹¹⁰ Both defendants

¹⁰⁸ African Courts Civil Procedure Rules, §33 (n.d.): "The presiding member shall then order the witnesses to withdraw from the court and shall ensure that no witnesses hear the evidence given by the plaintiff, defendant or any other witness." See Kericho DAC CC 16/66 (Mar. 10, 1966) (defense witness disqualified because present during hearing).

¹⁰⁹ Cf. African Courts Civil Procedure Rules, §49 (n.d.): "The judgment shall show . . . the evidence that the court believes and the evidence it does not believe."

¹¹⁰ In the analysis that follows I must acknowledge a debt, which anyone writing in this field shares, to Max Gluckman, for introducing the fertile concept of the "reasonable man" into legal anthropology in *The Judicial Process Among the Barotse of Northern Rhodesia* (1955). However, I believe that Gluckman's use of the term suffers from some confusion between an evidentiary test of credibility and a substantive standard of right conduct. He writes: "Legal truth involves the assessment of what happened in terms of both legal and moral norms. For the judges have to find out who has conformed with the law, and who has broken it . . . it is by these norms that the judges examine and attack evidence." *Id.* at 82. It is the primary task of a judge to determine whether the defendant has conformed to the law. In doing so the court may also make normative comments about the conduct of other parties and witnesses, and these may well be as important in their social effect as the formal judgment. But surely a judge does not make an "assessment of what happened" by measuring testimony against "legal and moral norms" such as those quoted: "respect and help your father," "treat your wife well." *Ibid.* The credibility of testimony rests on whether the conduct asserted is typical behavior under the circumstances, not whether it is morally correct. The evidentiary standard I employ, therefore, is one drawn from *modal* behavior. Indeed, the perceptions about modal behavior that I find in the court's

admitted receiving the news that their son was dead or dying, but denied uttering cries of grief. The court explicitly rejected this contention as inconsistent with its own experience: mothers always cry when they hear of the death of their children.¹¹¹ Thus the women, by foolishly alleging a course of behavior that was inherently incredible, destroyed the cogency of their subsequent defence. In answering this defence the court relied on two further implicit perceptions. The first, that mothers in their grief accuse those they believe responsible for their misfortune,¹¹² was not contested. But Atieno forcefully challenged any inference that she or her co-defendant would tend to name *Augustino* as being responsible. And, even granting the court's first two perceptions, what reasons were there for the defendants to malign Augustino? He himself proffered none, and was forced to admit, in response to Atieno, that he and Ogalo had harbored no grudges against each other which could cause the defendants to suspect him. Nor, according to Atieno, did she bear Augustino any hatred which would lead her to accuse him falsely; she further contended that he had never entered her *boma*, and hence could not have stimulated a spontaneous accusation.

Although the court never spoke to this issue, an explanation of the defendants' motives is implicit in Augustino's allegation that he was called a *jadak* as well as a witch. A *jadak* is by definition an alien, a member of a foreign lineage; as such he is a potential enemy, viewed with considerable suspicion.¹¹³ The defendants, themselves members of foreign natal clans by reason of the rules of exogamy,¹¹⁴ also occupied somewhat insecure positions,¹¹⁵ and thus had additional incen-

evaluation of the evidence are clearly not standards of right conduct. Nevertheless, I still think that Gluckman's normative use of the concept of a reasonable man has great value in understanding the nature of substantive standards in customary law. Furthermore, he has since refined the concept of the reasonable man to recognize this distinction. See *Id.* at 393 (2d ed. 1967).

¹¹¹ Cf. Kisumu DAC CC 484/66 (Jan. 6, 1967) (court believed plaintiff's evidence that defendant, at the funeral of her brother, accused plaintiff of having killed that brother, another brother, and a brother's son by witchcraft). But cf. Kisumu DAC CC 371/66 (Oct. 25, 1966) (first defendant, husband of deceased, alleged to have cried out accusations of witchcraft against plaintiff when he heard of death, but the court believed the evidence of defendants that they merely expressed their sorrow over the death).

¹¹² See Whisson, *The School in Present Day Luo Society* 44, 47 (unpublished Ph.D. thesis, Cambridge, 1963): "Death, it was said, could not be wholly for natural causes. . . . Anyone with whom he [the deceased] had been in conflict might be cited as having been responsible for the death. . . . Death was caused by supernatural means and by the same means it should be avenged. The more important the man and his connections, the greater the number of explanations for his death and the wider the range of accusations would be. If the death was sudden and unexpected, more stories would be spread."

¹¹³ "Distant clans were regarded as being close to enemies. In times of peace they were treated as foreigners and in case of invasion they fought with spears [rather than clubs]." Othieno-Ochieng', *op. cit. supra* note 97, at 4.

¹¹⁴ See Southall, *op. cit. supra* note 97, at 20; Wilson, *op. cit. supra* note 87 at 137.

¹¹⁵ See Southall, *op. cit. supra* note 97, at 22: "the groups with which marriage is

tive to fix the blame on Augustino. Moreover, at least one of the defendants was the co-wife of Ogalo's mother, a relationship typically characterized by rivalry.¹¹⁶ Misfortune suffered by the child of one wife is most commonly attributed to the jealousy of another,¹¹⁷ in this case the defendant, unless a more suitable suspect can be found. This Augustino provided, not only as an outsider, but as the occupier of badly needed land. Central Nyanza, one of the most densely populated areas of Kenya,¹¹⁸ suffers from a significant land shortage. By accusing Augustino, a *jadaḱ*, of witchcraft, the women provided a ground for his subsequent expulsion by the local clan. Thus they sought to shift suspicion from themselves by appealing to the revanchist sentiments of their husband's group.¹¹⁹ They may even have stood to benefit materially from the redistribution of Augustino's holdings, since they were his close neighbors. For this combination of reasons a *jadaḱ*, often the object of witchcraft accusations, was a particularly suitable target here;¹²⁰ the court may well have considered this in ignoring Atieno's protestations that she lacked any motive to accuse Augustino.

Having found that the defendants did utter the insulting words in plaintiff's presence, the court next had to pass on possible defences. The defendants and their witnesses appear to have sought to convey the impression that Ogalo had actually died, for it was only on cross-examination that Atieno admitted that this did not in fact occur. Augustino clearly feared that the court might be deceived on this point, and conclude therefrom that the abuse was justified, for he took great pains to emphasize that Ogalo was still very much alive and missing from the village only because he was a fugitive from justice. However, the court was not misled and hence did not have to answer the very difficult question whether that death was caused by Augustino's witchcraft. Moreover, the court was never confronted with the less controversial issue, which was raised by the facts, whether a good faith or reasonable belief by the women that Augustino had killed Ogalo would constitute a defence. The defendants could not propose

possible tend to be those between whom hostility is the usual attitude. The Luo recognise this correlation, and regard *oche* (in-laws) and *wasigu* (enemies) as almost interchangeable terms. . . ."

¹¹⁶ Id. at 20.

¹¹⁷ See cases cited in Wilson, op. cit. supra note 98, at 191-92.

¹¹⁸ 359 persons per square mile. This compares with a national density of 39. Nyanza Province is the most densely populated of the whole country. See *Kenya Census*, 1962, at 19, 20.

¹¹⁹ "[W]e find today in the overcrowded tribal areas considerable interlineage enmity about land." Evans-Pritchard, op. cit. supra note 102, at 38.

¹²⁰ It should not be thought, of course, that *jadaḱ* are intentionally singled out for false accusations of witchcraft in general or by the defendants in this case. Rather, a functional interpretation of witchcraft requires not only that a belief in the existence of supernatural phenomena be given an explanation in terms of social rather than physical phenomena, but also that the identities of accuser and accused be understood in the light of stresses in the social structure.

this argument because they refused to concede that they had accused Augustino, and to plead the defence merely hypothecating such a concession would probably appear to a legally unsophisticated court to constitute that very admission. Nevertheless, the reiteration in the testimony of defendants and defence witnesses that defendants did receive a letter warning of their son's imminent death, and did believe it to the extent of going straight to Sakwa to investigate (a journey of many hours) may be seen as an attempt to put forward evidence of at least a good faith belief in their son's death. In ignoring this belief as a possible defence, the court may have been following Augustino's implicit distinction between the precipitate, and thus unjustified, charges by the two women and their husband's more cautious reaction in organizing a careful investigation of the incident at Sakwa.

When viewed against the background of available ethnography this case report is a fertile source of hypotheses about law, though of course these must still be tested against numerous other disputes before general principles can be induced. Where a rule-directed inquiry might have produced an abstract statement of the wrong—"compensation is paid for abuse"—attention to the details of this case illuminates the social environment in which the wrong occurred. We learn that the "mothers" of a young man, upon hearing that he had been suddenly injured and might die, uttered witchcraft accusations against a near neighbor who is a *jadak*. Available remedies are not merely listed as fungible alternatives: counter-abuse, assault, arbitration, civil action for damages; the choice made under the circumstances of this case provides some data indicating when certain remedies are chosen, and why.¹²¹ Existing biases cannot be dispelled by a mode of inquiry, but the case method does help to reveal them and thus avoid their consequences. An investigator working, perforce, with an elderly informant who reported only traditional conduct might never have learned of the wrong of insult even though it constitutes a substantial portion of the work of the primary courts. On the other hand, the case lawyer is immediately alerted to the prestige accorded anything connected with English law by these courts. But this negative ethnocentrism, unlike the elder's blindness towards change, is a significant element of the contemporary legal system, and an analysis of the case reveals the precise extent of English influence: the language may be that of the common law, but the elements of the action are unmistakably indigenous. An interrogator might well have been too easily content with the discovery that his

¹²¹ See A. L. Epstein, "The Case Method in the Field of Law," in *The Craft of Social Anthropology* 205, 227-28 (Epstein ed. 1967): "the problem is not merely to distinguish and classify the various types of sanction, but to establish the relationship between them. In what kinds of situation is a particular kind of sanction likely to be invoked and why, indeed, within one social system are so many different kinds of redressive mechanism necessary?"

terminology—defamation—coincided with that of his informant to inquire further. Finally, the case suggested indigenous formulations of other legal rules, auxiliary to the general principle of compensation for abuse, which an investigator might not have thought to elicit nor an informant to volunteer. These were both evidentiary: how is conflicting testimony to be balanced, how is credibility to be tested; and substantive: what constitutes justification for abuse.

Wrongs are not only redressed by the payment of money compensation; other remedies are also significant. The following two cases illustrate how a husband employed the traditional remedy of witchcraft to control an unfaithful wife, and how she then sought protection from the primary courts by means of an action for divorce and a private prosecution for witchcraft. The participants are all Gusii.¹²²

Plaintiff/Complainant: Agnes, Kitutu location, Kisii District
 Defendant/Accused: Barnabas, Kitutu location, Kisii District

CASE 1¹²³

Claim: divorce. (Filed August 24, 1966)

Plaintiff: Barnabas married me and we had good love. After I had stayed with him for three months they started to show me witchcraft documents. Barnabas' mother told me to listen to her but I refused. When the witchcraft exhibit was brought down from the house called *irongo* it was a skull in a basket. I went out of the house and started saying that I am not listening to them. Barnabas took my underwear and hid it. Then he told me he did not want me because I would not listen to him, and he chased me and said he would come and ask for his cattle. My father told him to wait until I remarried. When Barnabas chased me I stayed with my sister. Barnabas and three others came and took me by force; I agreed to go because he was my husband. When we reached his home he caught me and shaved my head and pubic hair and then they chased me. I did not sleep that day. I returned to my father and told him what they had done.

(examined by defendant): You showed me witchcraft at midnight when you called me in your mother's house. There were two of you who shaved me at home.

(examined by court): I cried out when they were shaving me but no one came because it was 7 p.m. and raining. The child does not belong to Barnabas because I was pregnant when I went to him. I stayed with him for eight months. They had some dried out skulls and some fresh heads.

Plaintiff's witness, Mosei: I agree that Agnes, my daughter, should divorce Barnabas. They showed her witchcraft documents (*ibinio biorogi*); he shaved her hair even on her private parts. Since I have been [alive?] I have never seen people doing such practice. I asked Barnabas to go and bring the clothes which he took from my daughter, and the hair which he shaved off her. He took her young child from her but returned it after three days.

¹²² The Gusii are a Bantu tribe which numbered just over 500,000 in 1962. See Kenya Census, 1962, at 36. They live in Kisii District (a European corruption of the tribal name), Nyanza Province, between the Luo on their west, and the Kipsigis and Masai on their north, east and south. Again, for reasons stated earlier, see note 81 supra, I have deleted the village and sublocations of the parties, and replaced the names of parties and witnesses by what I hope are appropriate pseudonyms.

¹²³ Kisii DAC CC 342/66 (Oct. 5, 1966).

(examined by defendant): My daughter's hair which you took was very long. You were three people when you shaved her.

(examined by court): The child does not belong to Barnabas because when my daughter went to him she was pregnant.

Defendant: I do not want to divorce my wife. One day when I returned from school I found her missing. Then I heard that she had been taken by someone. I went to her father who said she was with her sister. I went there and took her home. But she left after one day, leaving her child behind. I sent my boy to take the child to her.

(examined by plaintiff): I never helped my mother to bring down the basket which contains witchcraft documents.

Judgment: It is very bad for a man to marry a girl and then show her witchcraft unknown to her parents. According to Kisii Law Panel Minutes 3(b)(1)¹²⁴ divorce shall be granted if one of the parties practices witchcraft. This was proved by the plaintiff who saw the witchcraft documents. The divorce is granted with [66/-] costs. The defendant can claim the child in a civil suit.

Court: the case is adjourned a week. The defendant is to bring the clothes and hair which he took. He will be prosecuted for failure to comply. [A week later the defendant had failed to bring these articles and was prosecuted by the court.]

CASE 2¹²⁵

Charge: pretending to exercise witchcraft, contra section 2 of the Witchcraft Act.¹²⁶ (Filed September 6, 1966.)

Complainant: I was at my sister's home. The accused came and took me to his home. He was with two other men, Nyamao and Oroko. He took me on 2 September. He is my husband. He bought the men *pombe*.¹²⁷ After drinking the *pombe* the defendant caught hold of me while Omwayo shaved me. He shaved my head and my pubic hair. He shaved me with a pair of scissors. The accused kept the hair. The accused chased me that night at 10 p.m., after taking my child from me. I went to my home. After two days I came to charge him. He shaved me at 7 p.m.

(examined by accused): You chased me at night after the other men left.

(examined by court): You can see that my head is shaved. I did not tell anybody at the accused's home about this. I told my father. I accused him so that he may return my hair and knickers to me.

Complainant's witness, Makore: Agnes is my sister-in-law [wife's sister]. She had gone to visit me. After two days the accused came to collect her on 2 September. He took her away. At about 7 a.m. the next day she returned to me.

¹²⁴ Kisii Law Panel, Minutes of Meetings held at Kisii on Dec. 10-11, 1962, C, Law of Marriage; 7, Dissolution; A, Divorce; 3, Grounds; (a) by wife; (1) witchcraft (Oborogi). "A woman may divorce her husband if he is a witch as understood in the Kisii sense, or if he has been convicted of witchcraft under the Witchcraft Ord." See Cotran, *Restatement of African Law: Vol. 1: Kenya: The Law of Marriage and Divorce* 69 (1968) [hereinafter cited as Cotran].

¹²⁵ Kisii DAC CrC 1288/66 (Oct. 19, 1966).

¹²⁶ *Laws of Kenya*, cap. 67 (rev. ed. 1962). "Any person who holds himself out as a witch-doctor able to cause fear, annoyance or injury to another in mind, person or property, or who pretends to exercise any kind of supernatural power, witchcraft, sorcery or enchantment calculated to cause such fear . . . shall be guilty of an offence and liable to imprisonment for a term not exceeding five years." The Kisii District African Court, by its warrant, was not permitted to impose sentences of imprisonment exceeding twelve months.

¹²⁷ Native beer (Swahili).

Her head was shaved. She told me that the accused and two other men had shaved her.

Complainant (re-examined by court): The accused said he did not want me, but that the hair was his cattle.

Accused: Agnes left my home on 25 July. I discovered this when I returned from school. She took her bedding and utensils. On 28 July she went and eloped [sic]¹²⁸ another man, Mosigisi. I found her there. The man is here in court. Mosigisi wanted to fight me. They chased me. Agnes ran away and returned to her sister's. On 2 September I went and collected her. The next day at about 7:30 a.m. she left me and returned to her parents. She left the child behind. I did not shave my wife.

(examined by complainant): You wanted to hit me with a piece of piping.

Accused's witness, Nyamao: We collected Agnes from her sister's. The next morning Barnabas told me that she had deserted.

(examined by complainant): We did not shave you.

[Accused's witnesses, Orokoro and Omwayo gave the same testimony as Nyamao.]

Judgment. When Agnes appeared before the court on 4 October her hair was quite short. Her sister's husband testified that her hair was shaven when he saw her on 3 September. The accused does not deny that Agnes was shaved. We have no doubt that she was shaved. She was deserting her husband. He took her back to him. It was on this evening that he shaved her head and private hair to frighten her so that she may not leave him. Agnes would be afraid of being bewitched by the accused if she left him. He would use her hair to bewitch her. This has been a practice with the Kisii husbands whose wives tried to desert them. This court can infer that this is the practice the accused employed to frighten his wife. We find him guilty.

Sentence: 40/- fine or two months imprisonment, and to pay 16/- court fees to the complainant. [Barnabas paid the fine in full.]

As in the Luo case the entire record, here of two interrelated controversies must be analyzed as a whole. This time I will be less concerned with unravelling the reasoning of the court, which is plainly stated, and more intent to appreciate the legal tactics employed by each party to advance facts and imply interpretations favorable to his case. A brief chronology of events whose occurrence was not contested may be a useful preface to the wildly divergent stories told by husband and wife.

December 1965: Barnabas and Agnes were married

July 25, 1966 : Agnes left Barnabas

August 24 : Agnes sued Barnabas for divorce

September 2 : Barnabas took Agnes from her sister's husband's home

¹²⁸ African dialect usage of English verbs can sometimes be quite revealing about the nature of responsibility for the act described. The effect here is to transform the woman—in English a passive accomplice who “elopes with” a man—into a responsible agent who “elopes” the man. This is particularly remarkable in light of the fact that most dialect changes emphasize the active role of the man. In Kenya a man “wombs,” “pregnants,” or “conceives” a girl; proper usage would speak of a woman becoming pregnant, or conceiving. Similarly, in Kenya, a man “engages” a girl; in English she becomes engaged. These modifications may be a consequence of assimilating English to Swahili grammar. In the latter, a man marries a woman (ku-oa, an active verb), but she is married by him (ku-olewa, a passive form); both men and women marry in English.

- September 3 : Agnes returned to her father
 September 6 : Agnes filed a private prosecution against Barnabas under the Witchcraft Act
 October 5 : Divorce granted
 October 19 : Barnabas convicted under the Witchcraft Act

Agnes had no children at the time of her marriage to Barnabas which itself suggests that she was quite young and that she had almost certainly not been married before. Gusi girls marry early, so that Agnes was probably no more than fifteen.¹²⁹ Nevertheless, she alleged that she had become pregnant before marriage. This may well have been true since premarital intercourse is common.¹³⁰ Indeed, her parents may have rushed her into the marriage in order to conceal such a pregnancy which could, if discovered, reduce the bridewealth they were expecting¹³¹ and might have even more serious consequences if her lover were of her own exogamous group.¹³² But whether or not the allegation was true it is surprising that Agnes should have made such an embarrassing admission in court, and even more so that her father should corroborate testimony apparently impugning his daughter's character. The most likely motive for the assertion was to establish that Barnabas was not the father of the child, and thus to defeat the right a man usually has upon divorce to the custody of children born to his wife during marriage.¹³³ Although Barnabas was clearly anxious to keep the child he did not challenge the allegation. Perhaps he was too preoccupied with avoiding the divorce and hoped that his wife's admission would constitute some evidence of her promiscuous character, on which he planned to base the justification for the acts with which he was charged. His caution did no harm for the court, following common practice,¹³⁴ deferred the issue of paternity to another case, recognizing that there were enough complications already.

¹²⁹ R. LeVine and B. LeVine, *Nyansongo: a Gusi Community in Kenya* 41 (1966) [hereinafter cited as *Nyansongo*]. A man is at least eighteen to twenty when he marries—older if his father is poor and cannot afford the high bridewealth—which would make Christopher considerably more mature; there is also some evidence that he was a schoolteacher, and thus educated and westernized.

¹³⁰ *Ibid.*

¹³¹ P. Mayer, "Bridewealth Limitation among the Gusi," in *Two Studies in Applied Anthropology in Kenya* 19, 21 (1951).

¹³² *Nyansongo* at 42-43.

¹³³ P. Mayer, *Gusi Bridewealth Law and Custom* 57-58 (1950); cf., COR Appl. 5/53 (Dec. 11, 1953).

¹³⁴ The approach of primary courts contrasts strikingly with that of traditional councils of elders in this regard. In the past, any arbitration called to decide a single issue would quickly be expanded to consider all outstanding disputes between the parties and among their relatives in an effort to promote a more general and lasting settlement. Contemporary primary courts, because of their greater powers of enforcement, do not need to obtain the agreement of the litigants to the decision. Therefore, they seek to narrow the issue as far as possible so as to limit the evidence and facilitate decision. See, e.g., Kiambu Mag. CA 188/66 (Mar. 22, 1967), allowing appeal from Limuru AC CC 626/66 (n.d.). Plaintiff brought a claim for compensation for illegitimate pregnancy

Agnes conceded that she had lived happily with Barnabas for three months, but complained that he and his mother had then begun instructing her in the unnatural mysteries of witchcraft. When she tried to protect her innocence by refusing to listen he used his nefarious powers to threaten her, taking underwear which he could use to bewitch her.¹³⁵ Did any of this actually happen? LeVine, an anthropologist who spent two years in Gusiiland, observes that it is difficult to determine the empirical foundation of beliefs in witchcraft activities because witchcraft is almost never admitted by those accused, and rarely even discussed openly. His conclusion is:

there are some women who believe themselves witches and perform some of the acts customarily attributed to them. However, even if this is true of certain Gusii women, it seems obvious that the beliefs and images of the average Gusii concerning witches go far beyond the facts which can be empirically ascertained.¹³⁶

Whether Agnes actually perceived the acts she described, or offered a naive and fearful interpretation of ambiguous behavior, or simply invented a fictitious story, there were substantial reasons why she should feel considerable hostility towards her husband and his mother, and why she should express it in terms of witchcraft. A girl's first months of marriage are a time of great strain. She has been uprooted from her home, family, and friends while still young, probably for the first time, and sent to live in a foreign clan (*eamate*) among people she has been brought up to regard as enemies.¹³⁷ There she is placed under the control of her husband's mother, on whom she is dependent for food and in whose home she must cook and eat. Although she is treated courteously her insecurity is manifest in her eagerness to do household and agricultural chores so as to earn the approval of her new home.¹³⁸ Sexual relations with her husband are probably unhappy for he has consummated their marriage on the first night with a prodigious display of sadistic virility and continues to view coitus as an occasion for inflicting pain.¹³⁹ There are few outlets through which a newly married wife can express the hostility thus generated. Physical aggression is quite generally condemned in Gusii culture,¹⁴⁰ and unthinkable

with respect to three children allegedly fathered by the defendant with plaintiff's daughter. He conceded that defendant had paid some brideprice, which defendant sought to raise as a setoff against the claim. The court nevertheless deferred this counterclaim to another case.

¹³⁵ R. LeVine, "Witchcraft and Sorcery in a Gusii Community," in *Witchcraft and Sorcery in East Africa* 221, 228 (Middleton and Winters ed. 1963) [hereinafter cited as *Witchcraft*].

¹³⁶ *Id.* at 229-30.

¹³⁷ P. Mayer, *The Lineage Principle in Gusii Society* 10 (1949).

¹³⁸ Nyansongo 51-52.

¹³⁹ *Id.* at 47-48, 54, 191.

¹⁴⁰ *Id.* at 156-57.

towards a husband or mother-in-law, whom a wife must treat with respect and obedience.¹⁴¹ The same norms inhibit the display of aggression through abuse, though less strongly;¹⁴² but vituperation is in any case an unrewarding weapon where one's audience is unfriendly and withholds its support.

Two alternative means remain to the Gusii wife to express her unhappiness. The first is an accusation of witchcraft. Although this would fall within the category of impermissible abuse if made before the general public,¹⁴³ it is privileged if made to an appropriate authority;¹⁴⁴ Agnes was careful here to confine her charges to the courts in which she brought her two actions. Gusii give recognition to the predicament of a young wife in their belief that such women are generally subjected to the lure of witchcraft by their mothers-in-law. Instruction in witchcraft partakes of all the horror of the practice itself. Gusii assert that it is difficult to resist an invitation to learn, and that to interrupt tutelage once begun may lead to illness or insanity. Yet to attain the status of a witch is even more terrible, for a novice is required to sacrifice her own child to the greed of her fellow-witches, and ultimately gains her infernal powers only at the expense of all friendship and respect in the community.¹⁴⁵ Agnes' accusation of her mother-in-law was thus culturally sanctioned. Her accusation of Barnabas followed naturally, for a witch is even more successful in seducing her own children to the craft than she is in enticing her daughters-in-law.¹⁴⁶ These allegations also laid the foundation for the other, more total

¹⁴¹ *Id.* at 21-23, 51-52.

¹⁴² *Id.* at 157.

¹⁴³ See Kisii DAC CC 64/66 (Feb. 14, 1966) (100/- compensation awarded against defendant on his admission that he had called plaintiff a witch who had killed his child). But see Kisii DAC CC 47/66 (Mar. 16, 1966) (plaintiff alleged that defendant had called her an adulteress, and claimed 200/- compensation; the court dismissed her claim as based on mere vulgar abuse uttered during a quarrel).

¹⁴⁴ See Kisii DAC CC 87/66 (Oct. 19, 1966). The defendant here believed that plaintiff had killed one of his children by witchcraft, and that two others were threatened with a similar fate. He reported this to the sub-chief, and repeated the charge at public meetings called by the sub-chief, at which plaintiff refused to appear. The court dismissed plaintiff's claim of 400/-, stating: "The sub-chief is a government servant who, when he receives a report of anything, is under a duty to investigate. . . . when the defendant's three children died [sic] he suspected that man [the plaintiff] and reported to the sub-chief. The sub-chief summoned the parties and investigated. Then the two other children of defendant, who were seriously ill, recovered. This is no defamation of name. For example, if the defendant could go and announce this matter where there were many people and not including the sub-chief, the court might think that the defendant defamed plaintiff's name. But on this we have found that the defendant did not use the name of plaintiff in a bad way." LeVine notes that appeal to authority as the preferred means of dispute settlement is an integral part of the Gusii personality structure. *Nyansongo* at 186.

¹⁴⁵ *Witchcraft* at 229.

¹⁴⁶ *Id.* at 228.

solution to the conflicts in Agnes' position, to which she was later driven, namely divorce.¹⁴⁷

Not only did Agnes' description of her marital discord tally with Gusii conceptions about the early course of marriage, but the details in her recitation of the witchcraft practices of her affines—the midnight tryst, a basket containing fresh heads and dried out skulls—also coincided with the ascribed behavior of such persons.¹⁴⁸ Indeed, Agnes appeared to rely on the archetypicality of this part of her story to convince the court, since she offered little other persuasive evidence. Her father's testimony about the "witchcraft documents," like his confirmation that Barnabas had taken Agnes' underwear, could clearly be no more than hearsay repetition of Agnes' own story. She also failed to call the only eye-witness, Barnabas' mother. Even so, her father's support for charges of witchcraft likely to result in a divorce, to which he would normally be opposed, did carry some weight. And she could draw upon the later threats of witchcraft, for which there was considerable evidence, to lend credence to this earlier incident. In offering all this testimony Agnes' primary intent was to portray herself as an innocent dutiful wife, tormented without provocation by husband and mother-in-law even to the point of being seduced into and threatened with witchcraft.

This was not at all the gloss put upon events by Barnabas. His testimony, questions and witnesses tended to show Agnes as a disobedient, unfaithful wife and himself as the indulgent, forgiving husband. Her accusations of witchcraft were simply a fabrication intended to justify a divorce and leave her free to chase other men. Barnabas could find some evidence that the allegations had been concocted as a justification after the fact in Agnes' delay in making them: she remained with him five months after learning about the witchcraft, and waited yet another month after deserting before suing for divorce. At the same time, Barnabas did not unequivocally deny these charges. Though he disavowed participation in his mother's midnight witchcraft practices he did not deny that they occurred. Perhaps he feared to diminish the force of his argument by opposing such a widely held belief that women teach their daughters-in-law witchcraft; moreover, his mother's character by itself could not sustain a divorce or penal sanctions. But this cannot explain his failure to controvert his wife's allegation that he had taken her underwear. The contrast between Barnabas' outright denial of any part in the first witchcraft incident and his admission by default of the second suggests that there might have been a distinction

¹⁴⁷ Divorce is quite common during the first year of marriage, which is viewed as a trial period. A wife generally visits her parents within the first three months, and often tries to persuade them then not to send her back to her husband. *Nyansongo* at 49; P. Mayer, *Gusii Bridewealth Law and Custom* 50-51 (1950).

¹⁴⁸ *Witchcraft* at 226-28.

in his mind, which he was trying to imply to the court, between un-motivated, purely malicious witchcraft, and the justified use of witchcraft. If he had taken Agnes' underwear it was not to coerce her into becoming a witch but to deter her from adultery and desertion. In support of this construction Barnabas offered persuasive evidence that Agnes had not been driven from his home but had run away voluntarily. She had left in his absence and had taken all her belongings, something which no husband would allow¹⁴⁹ and which indicated that she did not intend to return. Barnabas had gone to her father to ask her to come back only to learn she was not there but had, after an indecently short time, gone to live with another man. This couple were now so morally depraved that when Barnabas went to demand his wife both of them violated fundamental Gusii norms, Mosigisi offering a fight and Agnes threatening her own husband with a piece of pipe.

Agnes, naturally, did not allow this story to stand unchallenged. She had not run away, though the presence and threats of witchcraft might well be reason to do so. It was her husband who had told her to leave because she would not become a witch. He had further asserted that he would reclaim his bridewealth cattle, and after driving her away had visited her father for this sole purpose. Her father could hardly compel her to remain with such a man and agreed to the divorce which Barnabas had demanded.

Although an unqualified choice cannot be made between the competing interpretations, the evidence on balance appears to support Barnabas. Agnes must have left voluntarily, without her husband's knowledge, since she did not deny taking her belongings. Moreover, had he chased her, he would not have followed her to her father's after only three days. There is good reason to believe that she had formed an attachment with another man, either prior to her departure or shortly thereafter. She seems in fact to have been living with him, since she was not at her father's, and her allegation that she stayed with her sister was contradicted by her sister's husband, who testified that she had been there only two days when her husband recovered her. While living with this man she sued her husband for divorce. Though most Gusii fathers would try to preserve a daughter's marriage¹⁵⁰ so as to retain the brideprice, Moseti advocated a divorce. He may well have been motivated principally by a genuine fear for his daughter's safety, but this sentiment by itself would probably not have

¹⁴⁹ See, e.g., Kisii DAC CC 3/66 (June 17, 1966). Plaintiff sued defendant for taking certain clothing. Defendant admitted doing so; he had eloped with plaintiff's sister and when the girl left him she had stolen the clothing, which he had gone and taken back. See also Kisii DAC CC 131/66 (May 9, 1966). Plaintiff here sued the sons of his former wife for assisting her in taking her goods when she deserted him one night.

¹⁵⁰ *Nyansongo* at 49.

been sufficient to overcome pecuniary considerations without the expectation of a second brideprice.¹⁵¹

Why, then, did Barnabas not make a more determined effort to prove Agnes' adultery with this man, thereby justifying himself? Why did he fail to call Mosigisi as a witness since he claimed that Mosigisi was actually present in court? The reason lies in the legal dilemma in which Barnabas found himself. He wanted to keep his wife, and yet any defense he made to her charges could lead the court to grant the divorce. If he argued that Agnes had left him for Mosigisi then the court might reason, as it in fact did, that Barnabas had chosen the response of a typical Gusii husband and threatened his wife with witchcraft. The court might then dismiss Agnes' story of the pot of skulls, but would still find grounds for divorce in Barnabas' threat to use his wife's underwear to bewitch her. If Barnabas concealed his suspicions of adultery, then the most probable cause of her desertion was that he and his mother were witches. Were this to be believed, Barnabas would not only lose Agnes, but find it nearly impossible to obtain another wife.¹⁵² And if Barnabas successfully convinced the court that Agnes had had no reason to leave, it might conclude that he had chased her away, another adequate ground for divorce.¹⁵³ Barnabas compromised with this problem by offering a weak presentation of all three possibilities. Agnes, too, was in an ambiguous situation. If she insisted on her moral purity, then the only evidence of witchcraft was her uncorroborated testimony of the midnight ceremony. If she admitted that her husband's use of witchcraft was motivated by her own unfaithfulness, then the court might disregard her whole complaint as the fabrication of an adulteress seeking the freedom to run after other men. Agnes chose to maintain her own innocence; fortunately, the court did not believe her.

When Agnes left Barnabas, he followed her to her father after a few days, seeking an early reconciliation. But upon learning that she had gone to live with another man he took no immediate further action, obeying Gusii norms which urged that he avoid a confrontation that

¹⁵¹ Brideprice or bridewealth is a transfer of property from the family of the groom to the family of the bride which, among the Gusii, is essential to the validity of the marriage and necessary to establish a man's rights to his wife's children. In 1951 the amount was 12-16 cows, one bull and 12-18 goats. P. Mayer, "Bridewealth Limitation among the Gusii," in *Two Studies in Applied Anthropology in Kenya* 19, 25 (1951). The assurance of another suitor for Agnes meant at least that Moseti would suffer no loss from the divorce. He might even have anticipated a gain, for Mosigisi may have been prepared to pay a higher amount than Barnabas has given. In any case, Moseti would have had the temporary use of two brideprices and might, like many Gusii fathers, delay considerably before completing the return of the first. See *Nyansongo* at 49.

¹⁵² *Nyansongo* at 45-46.

¹⁵³ See Kisii Law Panel, *op. cit. supra* note 124, at C.7.A.3.b.4.

could only lead to an open conflict.¹⁵⁴ Time might work a solution, and Agnes might return to him on her own. Notice that she had filed an action for divorce showed this hope to be vain. Threatened with the permanent loss of his wife, he surprised the couple and in a heated controversy succeeded in driving Agnes away from Mosigisi. He traced Agnes to her father and then to her sister's husband and took her back to his home. However, harmony could not be re-established, and she left him again.

The versions which the litigants gave of the events of the nights of September 2-3 were consistent with the legal strategies each had adopted. Agnes alleged, with apparent inconsistency, both that she went with her husband voluntarily and that he and two other men took her by force. Either situation could be turned to her advantage: the former to show her as the obedient wife, the latter to dramatize her husband's wrongful intentions. After the men had drunk beer to nerve themselves her husband held her while his brother shaved her. Then the other men left; her husband took the child from her and drove her out into the night. Barnabas admitted that he had brought his wife home, but not that he had shaved her. She had persisted in her disobedience and had run away again the next morning, abandoning her child, which he voluntarily returned three days later.

Agnes' evidence was considerably more persuasive. First, there was the indisputable fact that her head had been shaved. The court could see this for itself, and indeed commented on her short hair. Real evidence often has a disproportionate effect in primary courts:¹⁵⁵ for instance, cattle trespass may be proved by producing a broken maize plant, or an assault by the rock alleged to have been thrown. The shaving was also corroborated by witnesses; not only Agnes' father, who could be expected to lie in her behalf, but also her sister's husband,

¹⁵⁴ *Nyansongo* at 76-78: "unsociability . . . is itself a reaction to aggression, and the preferred method of handling it."

¹⁵⁵ See, e.g., Kisii DAC CC 103/66 (May 17, 1966); Kisii DAC CC 39/66 (Feb. 4, 1966). In the first case plaintiff claimed compensation for bedding and clothing which he alleged defendant's cattle had eaten. He produced in court the remains of a blanket and sheet, and stated that another blanket and two shirts had been entirely consumed. The court allowed damages only for the articles shown to it, stating: "We cannot assume that the same cattle had eaten the [other] blanket and shirts." In the second case, plaintiff sued defendant for assault, seeking compensation for a torn shirt and vest. He testified that his wife had used the shirt to make clothing for his children. The court dismissed the action, stating: "Although he [plaintiff] alleged that his shirt was torn, he did not produce the shirt itself, but he showed a shirt of his child which had been sewn by his wife from that which had been torn." See also Tononoka AC CC 180/66 (Oct. 10, 1966). Plaintiff sued defendant for assault, claiming that defendant had bit off part of her ear. She produced the piece in court, which clearly impressed the judges, who stated: "Since the ear was normal before the fight and it is not shown that it was injured apart from the fight, the court finds that defendant did bite it. The court has examined the ear and found that a portion is bit off." The real evidence here appears to have shifted the burden of proof from plaintiff to defendant.

member of another lineage and hence less biased, who in addition had seen Agnes just before and after the incident. All that remained was a link between Barnabas and the shaving, which the court itself was able to deduce from circumstantial evidence combined with its knowledge of the modal behavior of Gusii husbands. Second, it was clear that Agnes had been driven away by Barnabas that same night. There were no eye-witnesses, since his brother and friends had already left, but again circumstantial evidence was conclusive. That her departure had occurred at night was confirmed by her brother-in-law, Makore, who testified that she arrived at his home at an hour which would have required her to travel during the night. Gusii are extremely fearful of being out alone at night, when witches are omnipresent.¹⁵⁶ Agnes would not have ventured to do so voluntarily under normal circumstances; the coercion must have been considerable for her to brave the dark immediately after being threatened with witchcraft. Furthermore, Agnes left her infant child behind; few mothers would do so freely, and none would willingly entrust her baby to a man she believed to be a witch.¹⁵⁷ Barnabas' answer was extremely feeble. He did not even attempt to deny that his wife had been shaved. His bare disavowal of personal responsibility was merely reiterated by his alleged accomplices, all of which testimony was suspect as being self-exculpatory. The allegation that Agnes had deserted the following morning could not even draw upon such self-serving declarations; his witnesses only repeated what Barnabas himself had told them.

The motivation and significance of an act is inevitably more ambiguous than the act itself, but the evidence available here does permit an interpretation of the events of this case, based on the above reconstruction. Barnabas took his wife home on September 2 impelled by a complex of conflicting emotions: he sought to reassert his authority, challenged by her elopement with Mosigisi; to punish her disobedience; and to frighten her into future submission. His ultimate aim was reconciliation, a return to the "good love" they had had originally. Agnes' willingness to accompany him must have encouraged this hope. But his strategy backfired, frightening Agnes into revulsion rather than submission. Threat and repulsion fed on each other until Barnabas was driven to employ a technique which, past experience suggested, would terrify her. He shaved her hair and kept the shavings, exuviae traditionally capable of being used to bewitch the person from whom they come.¹⁵⁸ This was the most potent means he possessed to

¹⁵⁶ *Nyansongo* at 146; *Witchcraft* at 226.

¹⁵⁷ The attachment between a mother and child is very strong, and mothers generally make vigorous efforts to retain their children upon divorce, as shown by the number of appeals dealing with this issue which reach the highest court. See, e.g., COR Appl. 4/53 (Dec. 10, 1953); COR Appl. 5/53 (Dec. 11, 1953).

¹⁵⁸ *Witchcraft* at 128.

retain his wife. In addition, the act had symbolic value. As the court observed, such shaving is a practice among Gusii husbands. A woman with a shaved head would be publicly branded by the Gusii equivalent of a "scarlet letter" as a disobedient wife and suspected adulteress. The same construction could be expressed by another symbolic route. 1. A woman who has committed adultery must acknowledge the error to her husband in order that she may be purified before she sleeps with him again; failure to do so may cause his death.¹⁵⁹ 2. The head of a widow is shaved.¹⁶⁰ Agnes' bald head may thus have stigmatized her as a prospective widow, a woman who had sought to kill her husband by willful refusal to admit her adultery. Shaving Agnes' pubic hair, however, was an act without traditional precedent. Even her father testified with horror that he had never heard of such a practice. I can find no direct explanation in the ethnographic literature with which I am familiar.¹⁶¹ Analogies with the shaving of her head and with the retention of her underwear suggest strongly that these cuttings too were to be used to threaten witchcraft more specifically contingent upon a recurrence of adultery.

Barnabas himself indicated an additional symbolism of the shaved hair: it was his cattle and represented the return of bridewealth. Yet despite this implicit act of divorce Barnabas' efforts were consistently directed at keeping his wife. Even when she was driven by his behavior and threats to seek protection from her relatives he retained her child in the hope of enticing her back. Only when Agnes prosecuted him for witchcraft did he begin to perceive that strong-arm tactics produced terror, not respect. Then he surrendered the child, fearing that his custody might be construed as one more attempt to threaten its mother, and further that any misfortune to the delicate infant would constitute ultimate proof of his witchcraft.

For Agnes to bring a private prosecution against her husband under the Witchcraft Act was a highly unusual step for several reasons. First,

¹⁵⁹ *Nyansongo* at 100-01. In Kisii DAC CC 47/66 (Mar. 16, 1966) plaintiff sued defendant for defamation alleging that defendant had accused her of committing adultery, and thereby killing her husband through supernatural means. The court accepted that this accusation of "amasangia" was recognized by Gusii belief, but found that plaintiff had not proved that the accusation had been made.

¹⁶⁰ *Nyansongo* at 94.

¹⁶¹ One incident, however, is suggestive. As mentioned earlier, sexual relations among the Gusii are permeated by aggression. Not only does a man seek to inflict pain during intercourse, a wife generally tries to avoid intercourse, and in particular attempts to frustrate it on her wedding night. LeVine tells of a girl who was found to have knotted her pubic hair so that her husband was unable to achieve penetration for a week, until this was discovered and the hair cut with a razor blade. *Nyansongo* at 48. Assuming that Barnabas and Agnes had not escaped the endemic sexual conflict, shaving Agnes' pubic hair may have been another expression of sexual hostility, perhaps symbolic of her accessibility to other men. The presence of Barnabas' brother and friends was also a means of shaming Agnes, for Gusii women are generally extremely modest. *Nyansongo* at 142-43, 170-72.

the practice of witchcraft is commonly dealt with by traditional, extra-legal methods; only the circumstances of this case rendered these procedures inappropriate. In the past, when a community had been able to reach agreement on the guilt of a witch, it might act together to kill him or drive him away.¹⁶² But today resort to self-help is illegal, and consequently increasingly rare.¹⁶³ Moreover, a woman who married into the village from a foreign lineage could never instigate such action against her own husband. Agnes could have obtained the assistance of certain quasi-legal specialists in anti-witchcraft medicine: the sorcerer (*omonyamosira*) who kills the witch by magic, or the witch-smeller (*omoriori*) who discovers and removes witchcraft substances.¹⁶⁴ Yet such men were impotent here, since Barnabas had subjected his wife to the threat of witchcraft, but had not yet exercised his powers. Second, the easiest and most effective way for a wife to protect herself against affines she believed were bewitching her was desertion and divorce. But pursuit of this remedy had only infuriated her husband, driving him to increase his threats and thus aggravating her terrors rather than relieving them. Third, married women do not frequently resort to the courts, and almost never sue their husbands, except for divorce.¹⁶⁵ But Agnes' legal representative under ordinary circumstances, her husband, was of course disqualified. In marital disputes a woman's agnatic kin may conduct an informal arbitration with her affines; Agnes' father, on at least two occasions, did seek to persuade Barnabas to abandon his threats. But persuasion was ineffective, and a court action can only be initiated by the person wronged. Finally, the Witchcraft Act is itself an unsatisfactory compromise between English scepticism about witchcraft and African demands that it be controlled.¹⁶⁶ Only the pretense of possessing or using witchcraft to

¹⁶² See South Nyanza District Law Panel, Kisii Section. Minutes of a Meeting held on December 12-14, 1950, No. 38. "Any person convicted of causing the death of [persons] by means of witchcraft was polted [sic] or stoned by a crowd of his relatives until he was dead." See also *Witchcraft* at 231.

¹⁶³ *Nyansongo* at 83.

¹⁶⁴ *Witchcraft* at 233-39.

¹⁶⁵ Women do sometimes sue their husbands for assault, but only when divorce is pending or has been granted. See, e.g., Kisii DAC CC 13/66 (Feb. 8, 1966); cf. Kiambu Mag. CA 117/65 (July 5, 1967), dismissing appeal from Githunguri AC CC 330/64 (June 22, 1964) (Kikuyu). A divorced woman may also sue her former husband for the return of property which he has retained. In Kisii DAC CC 193/66 (June 30, 1966) plaintiff claimed that she had been "eloped" by defendant, and then sent away by him four months later. She sued for the value of her labor during the time she was living with him. The court rejected her claim as contrary to customary law.

¹⁶⁶ Very few prosecutions are brought under the Act. In 1966 there were only 464 in all of Kenya, or a mere .2% of all criminal cases. Convictions are difficult to secure. See, e.g., Kisii DAC CrC 1313/66 (Sept. 20, 1966) (accused acquitted because the prosecution failed to prove the three essential ingredients of the offence under section 5: the articles must be ones usually used in the exercise of witchcraft; they must be carried for the purpose of causing fear or annoyance; the accused must have them without reasonable excuse. The accused here claimed that the medicine was for his

cause fear, annoyance or injury is punished, not the possession or practice itself. Yet it was precisely this pretense that Agnes wanted terminated. She was not concerned to punish her tormentors for she accused only Barnabas, who had custody of the materials used to frighten her, but not his equally culpable accomplices. Rather, she prosecuted her husband for the same reason that she sought to divorce him, "so that he may return my hair and knickers to me." It is ironic that the inadequacy of traditional remedies against this form of witchcraft compelled Agnes to turn for protection to the 'agnostic' state which had the power to do just this.¹⁶⁷

The court encountered little difficulty in reaching a decision on the basis of the evidence presented in these two cases. Any ambiguities in Barnabas' behavior were resolved by his shaving of Agnes, which unmistakably identified his entire course of conduct with the common Gusii syndrome of husbands using witchcraft to control unfaithful wives.¹⁶⁸ Consequently, the court's examination of Agnes and her witnesses was most perfunctory. It was easily satisfied with her responses to questions of fact; there could be little doubt that the possibility of informal reconciliation had been exhausted; the issue of custody was postponed to another case. Even though Barnabas had voluntarily testified under oath,¹⁶⁹ his statements were so little worthy of credence that the court would not even take the effort to question him. Nor did Barnabas exert himself greatly on his own behalf; he failed to bring any witnesses in the divorce case. To the extent that he was relying on Agnes' adultery to justify his resort to witchcraft, his hopes were vain. Adultery was certainly wrong, but a husband has other remedies: he could chastise his wife by beating,¹⁷⁰ he could claim compensation from her father for the adultery,¹⁷¹ he could prosecute her

own protection against devils). Even when the accused is proved guilty sentences are relatively light. See, e.g., Kisii DAC CrC 1029/66 (July 21, 1966) (150/- fine or three months imprisonment); Kisii DAC CrC 1006/66 (July 26, 1966) (30/- fine or one month extra-mural penal employment; charms to be destroyed). This attitude is in sharp contrast with the concern which Africans demonstrate about witchcraft in the numerous defamation cases which concern such accusations. See, e.g., Kisii DAC CC 298/66 (Sept. 13, 1966) (claim of 200/- compensation for being called a witch); Kisii DAC CC 241/66 (July 21, 1966) (claim of 200/- for being called a witch).

¹⁶⁷ Witchcraft Act, Laws of Kenya, cap. 67, §5 (rev. ed. 1962): "the charm or other article [usually used in the exercise of witchcraft for the purpose of causing fear] shall be forfeited and destroyed or otherwise dealt with in such a way as the magistrate may direct."

¹⁶⁸ As in the Luo case, this court's perception that Gusii husbands use witchcraft to control errant wives was a statement about modal, not normative behavior; it was not a statement of what the "reasonable" Gusii does, or should do. Cf. note 110, *supra*.

¹⁶⁹ The accused may elect to give a sworn statement, in which case he is subject to cross-examination; or an unsworn statement, in which case he is not; or no statement at all. See Criminal Procedure Rules for African Courts, §50 (n.d.).

¹⁷⁰ *Nyansongo* at 22.

¹⁷¹ The wife's father was liable to pay compensation of a cow worth 200/-, and to provide a goat worth 30/- to cleanse his daughter. See Kisii District Law Panel, Special Meeting to Record Customary Criminal Offences, §1 (Aug. 16, 1961).

paramour¹⁷² or sue him civilly for the return of the woman,¹⁷³ or in the end he could divorce her.¹⁷⁴ That witchcraft had traditionally been used by Gusii husbands in such circumstances did not legalize the practice. Witchcraft was far too extreme a response to this kind of misbehavior, and was in any case now illegal.

Having concluded that Barnabas had employed witchcraft threats, the court still had to determine the proper remedy. Since witchcraft has always been sufficient ground for divorce, Agnes' first plea clearly had to be granted. Moreover, divorce is almost never refused when it has the support of a girl's father. Moseti's advocacy of his daughter's cause may have served a selfish motive, but his eloquence clearly showed that he honestly shared her fear that she would be bewitched and was seeking to protect her. To award the divorce, however, did not itself secure that protection. The court therefore accompanied its decree with an order that Barnabas relinquish the materials by means of which he wielded his unlawful power. In doing so it hoped to avoid recourse to penal sanctions which could only intensify Barnabas' anger and resentment, and thus augment rather than mitigate Agnes' danger. But this command merely placed Barnabas in a further legal dilemma: if he defied the court's mandate he risked the penalties of the law; if he surrendered Agnes' clothing and hair he stood confessed as a witch. The severity of social sanctions against witches apparently proved more fearsome than punishment for contempt, even when contempt made inevitable a conviction in the criminal case. Thus, in effect, the traditional power of a husband to discipline an unfaithful wife by witchcraft was preserved, in defiance of courts and modern law, at a relatively small price.

The substantive law for which this case stands can be stated very simply: a husband who threatens his wife with witchcraft may be divorced by her, and may also be fined 40/-. The rule could easily have been elicited from any informant. But I hope my analysis has shown that a great deal more can be learned from the case. First, the

¹⁷² Id. §§1-2. Both adultery and removing a married woman without the consent of her husband were customary offences for which the penalty was a fine of up to 500/- and/or imprisonment of up to six months. See, e.g., Kisii DAC CrC 117/66 (Feb. 23, 1966) (350/- fine or four months imprisonment for removing married woman). See also Cotran, *Report on Customary Criminal Offences in Kenya, Appendix A* at 10 (n.d.) (Cyclostyled; copy in possession of author). These offences were abolished as of July 1, 1966. See reference cited note 69 supra.

¹⁷³ See, e.g., Kisii DAC CC 327/66 (Sept. 7, 1966) (plaintiff claimed for and received his wife from the defendant). The husband may also claim for the expenses he incurred in tracing and retrieving his wife. See Kisii District Law Panel, op. cit. supra note 171, §2. Those criminal cases which were pending on July 1, 1966 were often transformed into civil claims for the return of a wife. See, e.g., Kisii DAC CC 280/66 (Nov. 25, 1966), transferred from Kisii DAC CrC 692/66 (originally filed on May 17, 1966). See Cotran at 68. See also note 69 supra.

¹⁷⁴ Kisii Law Panel, Minutes of Meetings held at Kisii, Dec. 10-11, 1962, C.7.A.3.a.(3). Habitual adultery (obutomani). See Cotran at 70.

genesis of the dispute is discovered in the strains inherent in the early stages of Gusii marriage. Second, the choice of a means of expressing this conflict is illuminated. A young wife is deprived of most outlets for her hostility, and hence must speak through the language of witchcraft to justify her desertion and lay the foundation for a divorce. Moreover, she must address the appropriate authority—here the courts—and hence is constrained by the form of colonial legislation. Thirdly, once the parties are in court the judicial process is seen to be more than the mere mechanical application of rules to a clearly perceived factual situation.¹⁷⁵ The evidence is too inconclusive for this. Although Agnes had the benefit of the real evidence of her shaved head, Barnabas could point to the absence of eye-witness testimony. In the end both litigants and court had to rely on perceptions of modal behavior to resolve conflicts in the circumstantial evidence—creating inferences of fact, coloring actual incidents, and discrediting inconsistent testimony. Thus Barnabas could suggest that, when an absconding wife takes her belongings with her, she has probably deserted voluntarily. But Agnes could reply that when she runs off into the night leaving her infant behind she has certainly been driven away. The court could accept both propositions, finding that when a woman does desert, with the connivance of her father, there is likely to be another prospective suitor involved; and that Gusii husbands have in the past been driven by jealousy to resort to witchcraft to control errant wives. Finally, the product of these evidentiary principles—the judgment—must itself be subjected to scrutiny, for it is seen that though Agnes had the benefit of the court's decision in each case, both judgments were ineffective to counteract the threat of witchcraft. The skeleton of substance—the anatomy of the law—is thus fleshed out with an understanding of how that skeleton functions in the settlement of disputes—the physiology of law.¹⁷⁶

B. *Appellate Courts*

The materials examined so far have been drawn entirely from the primary courts, an approach which may appear unusual to legal scholars accustomed to analyze appellate decisions. This portion of the paper, therefore, will consider the extent to which African circumstances justify, and perhaps require modification of the techniques of

¹⁷⁵ Cf. Epstein, *op. cit. supra* note 121, at 212: "few disputes center upon the application of a single unequivocal rule, and the more usual content of a dispute is a dialogue of norm and counter-norm."

¹⁷⁶ Cf. Radcliffe-Brown, "On Social Structure," 70 *J. Roy. Anthrop. Inst.* (1940), reprinted in *Structure and Function in Primitive Society* 188, 195 (1952): "Besides this morphological study, consisting in the definition, comparison and classification of diverse structural systems, there is a physiological study. The problem here is: How do structural systems persist? What are the mechanisms which maintain a network of social relations in existence, and how do they work?"

conventional scholarship. Reliance on appellate judgments appears to derive from three interrelated assumptions. Central among these is the belief that lawyers should focus their attention on the interpretation and development of legal rules. Procedures for the preliminary determination of the facts to which these rules are applied are of secondary interest, relegated largely to the restricted field of evidence. In the American judicial system, indeed, issues of fact are generally entrusted to the jury, about whose functioning astonishingly little is known. Second, granting this concern, appellate judgments contain a better discussion of substantive rules, for two reasons. Since they are uncomplicated by factual controversies, issues of law are presented more sharply and in greater detail. Moreover, the level of judicial analysis is higher because there is an assumed correlation between talent and rank in the appellate structure. Finally, reliance on the judgments of the highest court is both permitted and required by the hierarchical nature of our judicial system: permitted because decisions of an appellate court are binding on the subsequent actions of an inferior tribunal; required because deviant behavior in a primary court does not accurately reflect the "real" law enshrined in appellate decisions.

The following diagram summarizes the earlier description of the Kenya appeals system and will help in assessing the relevance of these principles to Kenya.

Judicial Structure of Kenya, 1930—present

1. Civil cases: High Court (1967—present)
 Court of Review (1951-67)
 Supreme Court (1930-51)
- Criminal cases: High Court (1964-67)
 Supreme Court (1930-64)
2. Provincial African Courts Officer (1951-67)
 Provincial Commissioner (1930-51)
3. Resident, or First, or Second Class District Magistrate (1967—present)
 Appeals Magistrate (1962-67)
 District Officer (1932-62)
 District Commissioner (1930-32)
4. African Court of Appeal (1951-64)
 Native Appeals Tribunal (1930-51)
5. Third Class District Magistrate (1967—present)
 African Court (1951-67)
 Native Tribunal (1930-51)

Can the central assumption of conventional legal scholarship—concern with the analysis of legal rules—be retained in this judicial environment? I think not. Of the several thousand cases which I read, very few of those decided by African Courts or Appeals Magistrates involved controversies about the identity or desirability of rules. Though parties might emphasize different rules they rarely challenged those advanced by an opponent, or urged judicial modification of an existing

rule. Nor did courts engage in the development of substantive law on their own initiative. Rather, as the two case analyses already presented should indicate, attention was directed toward the determination of disputed facts. It was within this process of fact-finding that substantive rules played their role, being invoked by a litigant to strengthen his own evidence and discredit that of an opponent (as in the Gusii case), and being utilized by the judge to choose between inconsistent stories (as in the Luo case). The Kenya decisions thus seem to provide striking confirmation of Jerome Frank's contention that "fact-uncertainty" is the principal source of legal uncertainty.¹⁷⁷ If this view of the judicial process is correct, then surely legal scholarship should be concerned primarily to discover the critical rules governing the determination of facts and not allow itself to be limited by conventional preoccupations to the study of substantive principles which are relatively clear and static because they are isolated from the stress of controversy which might force them to develop.

Conventional scholarship was best served by the examination of appellate decisions. To the extent that appellate courts in Kenya share with their English or American counterparts a devotion to the explication of rules, the radical change in focus just suggested may demand a re-evaluation of the utility of such decisions. In actuality, however, appeals in Kenya were conducted differently. Until recently reports of primary court proceedings were not adequate to allow an appellate court to restrict its review to the record alone. Hearings by African Courts of Appeal were always *de novo*, and District Officers and Appeals Magistrates often heard a great deal of additional testimony.¹⁷⁸ However, subsequent appeals to the Provincial Commissioner, Provincial African Courts Officer, and Court of Review, were based entirely on the record and suffered from that limitation. But though it seems that the higher the judge the less opportunity he had to consider vital factual issues, may this disadvantage not be outweighed by his superior judicial ability? The answer is unclear. A judge's rank in the

¹⁷⁷ Frank, *Law and the Modern Mind* xiv (6th ed. 1949). Although Frank, of course, made his assertion about the American legal system, his observations may be even more illuminating in the African context. Factual disputes are pervasive in the primary courts of Kenya because standards of veracity are extremely low. Litigants offer self-serving testimony and witnesses are expected to support the party who called them. In the course of a year of leafing through tens of thousands of cases, I came across only one prosecution for perjury (actually a citation for contempt by an irate judge). Issues of law receive relatively less attention, perhaps because there is no professional bar with a vested interest in raising them.

¹⁷⁸ That this was the practice despite explicit instructions to the contrary is some index of the inadequacy of many primary court judgments. See Waller, *African Courts Handbook: Guide to Hearing of Civil Appeals by District Officers* 1-2 (1961): "hear only such *additional* evidence as may be necessary to elucidate any 'issue' or may be necessary in the light of the appellant's statement. It may often happen that no additional evidence is necessary at all; do not start to record all evidence 'de novo.' You are hearing an appeal, not a case of the first instance; . . ."

judicial hierarchy may well be correlated with his legal skills, but unfortunately such rank also appears to have varied inversely with knowledge of, and tolerance for, customary law and its social background. There was little difference in terms of these criteria between primary court judges and those who sat on the African Courts of Appeal, except perhaps in length of experience, since personnel circulated between the two. The rest of the appellate structure may be divided into two categories. The first, and by far the largest, was the expatriate bench. Prior to independence this included the District Officers, Provincial Commissioners, Provincial African Courts Officers,¹⁷⁹ Court of Review,¹⁸⁰ and High Court. Today, Asians and Europeans still occupy most of the higher levels—as Resident Magistrates¹⁸¹ and judges of the High Court.¹⁸² With significant exceptions the upper echelons of this group, though legally sophisticated, possessed little or no understanding of customary law. The attitude of the lower strata varied greatly, depending on term of duty and personal inclination, but few had any legal training.

The African bench is almost entirely confined to the primary courts and, since the early 1960's, the first level of appeal—formerly the Appeals Magistrates and now the First Class Magistrates. Although the latter are a heterogeneous group they share certain advantages. All possess, as part of their culture, a sensitivity to customary legal thought and a familiarity with local behavioral patterns. As members of the educated elite, they have benefited from a superior secondary education and often have received some legal training as well. Nevertheless, the value of cultural affinity is largely lost when these magistrates are posted outside their own community, as is often the case.¹⁸³ Though customary legal systems may be uniform in general principles, detailed rules vary widely; magistrates must then apply these alien rules to an unfamiliar sociocultural environment. Moreover, they must often work through interpreters. And education is also of ambiguous value: the greater eloquence obtained may only be used to express a condescending rejection of customary law which exceeds, in cultural bias, the opinions of expatriate judges. Yet despite these drawbacks, I found that on balance many Magistrate's Appeals were both superior in evidentiary record and legal analysis to the decisions of the primary

¹⁷⁹ There are exceptions, for instance S. R. Karunditu, who was for some time acting Provincial African Courts Officer for Central Province.

¹⁸⁰ One African, Shadrack Malo, a Luo, did sit on the Court.

¹⁸¹ There have only been two African Resident Magistrates: Mr. N. K. Nyang'era, a Gusii, who sat at Kisii, and Mr. Sidi-Okumu, a Luo, who recently resigned from the Machakos court.

¹⁸² The first African, Mr. Mwendwa, was appointed to the High Court as Chief Justice in 1968.

¹⁸³ Of the seventeen Appeals Magistrates about whom I have information, only nine were posted exclusively within their own communities.

courts, and at the same time more valuable than the judgments produced by subsequent reviews.

Even if appellate decisions possess no advantages for the scholar, their use may be mandated by a hierarchical system which endows them with a more authoritative voice in the statement of legal principles. But again the Kenya judicial system, though formally hierarchical, does not function this way. Superior courts can exert authority over inferior tribunals in two ways: by reversing erroneous judgments in the relatively small number of cases actually appealed, and by requiring that the vast number of cases which do not reach them be governed by appellate precedent. Appellate courts in Kenya do indeed reverse, and enforce their reversals, but too small a proportion of the body of litigation is appealed for this first method to have any substantial impact on the legal process. Of the approximately 250,000 cases decided by primary courts in 1966, no more than two or three thousand, or about one percent, were appealed to a magistrate, and only one percent of this latter group reached the Court of Review. Nor is this lack of direct impact adequately supplemented by the influence of example. Appellate decisions fail to compel that degree of obedience from the lower courts which they secure in England or America for two reasons. First, they are simply not known. None of the opinions of the Appeals Magistrates are published and only a small selection of those of the Court of Review. Only the lower court whose decision is being altered is notified, and even it receives a mere statement that the appeal has been allowed, unenlightened by reasoning. Communication from the top of the hierarchy is largely restricted to occasional circulars from, and personal contact with, the African Courts Officer.

An extreme example may help to dramatize the importance of this point. In 1961 Nehemiah removed a girl from the school where she was studying and took her to live with him.¹⁸⁴ Josphat, the girl's father, sued under Luyia "customary law" since both parties were of that tribe, and claimed repayment of the school fees he had expended for his daughter's education, a total of 1175/-. The Lurambi African Court awarded Josphat 800/- for school fees,¹⁸⁵ and though this was

¹⁸⁴ Lurambi AC CC 227/61 (Apr. 19, 1961), appeal allowed, Kakamega ACA CA 83/61 (June 3, 1961), appeal allowed, Kakamega DO CA 83/61 (Nov. 27, 1962), appl. to COR allowed, Kakamega District Registry Appl. 12/62 (May 15, 1964), appeal allowed, COR Appl. 1/64 (Ainley, C. J., n.d.). The names used for the parties are pseudonyms.

¹⁸⁵ It gave no explanation for this figure. The girl had completed Standard VI at Intermediate School. Josphat agreed to accept brideprice but defendant refused to pay it. The court reasoned that defendant had taken the girl from school and now refused to pay brideprice for no reason. Defendant had previously been prosecuted for the customary crime of removing an unmarried girl and had been fined 100/-. Lurambi-AC CrC 578/60 (n.d.). At that time he had agreed to pay six head of cattle brideprice but had since failed to do so.

reversed by the African Court of Appeal,¹⁸⁶ it was reinstated by the District Officer.¹⁸⁷ However, the Court of Review reduced the judgment to a heifer, worth 250/- which it found was all that customary law allowed. It relied on a memorandum by the African Courts Officer which stated:

As the girl lived with Nehemiah for some time, the father can claim one heifer as Luhya customary compensation for deflowering the girl which is presumed in a case of elopement. The claim for return of school fees even though interpreted by the District Officer as general compensation is untenable in this customary claim for compensation.

In another case, less than two years later, Adagala sued Isaya and his father, Shidula, because Isaya had impregnated Adagala's daughter Zibora while they were in school together.¹⁸⁸ He claimed compensation for the 990/25 in school fees which he had spent for his daughter. The Hamisi African Court, located only a few miles from the Lurambi African Court, appeared to be ignorant of the Court of Review's decision, and granted Adagala 661/- for the fees he had been able to prove. Only Shidula appealed and the Appeals Magistrate, who had by then succeeded the District Officer, allowed this appeal on the limited ground that a father cannot be held liable for pregnancy caused by an adult son. The African Courts Officer happened to see this decision and wrote an irate letter:¹⁸⁹

What exactly does your judgment mean? Have you set aside the decision of the Hamisi African Court against both father and son, or only against the father? May I remind you and all Western Province African Courts that the Court of Review has already decided that there can be no claim for refund of ALL a girl's education costs because she becomes pregnant. She does not lose her education because she has a child. A parent can of course recover school fees paid in advance for the period the girl does not attend school as a result of her pregnancy.

¹⁸⁶ The Court of Appeal found for defendant because he had agreed to pay seven head of cattle brideprice and subsequently produced five head, which plaintiff had refused on the ground that they were too young. This excuse was unsatisfactory because plaintiff could have asked the elders to require defendant to produce better animals.

¹⁸⁷ The District Officer stated: "I consider that plaintiff has a justifiable claim to compensation for a clear departure from native custom. . . . Compensation is fairly assessed at school fees paid out to prepare the daughter for marriage to a good class husband. This girl cannot expect to get any but an inferior husband."

¹⁸⁸ Hamisi AC CC 8/66 (Jan. 18, 1966), appeal allowed in part, Kakamega Mag. CA 89/66 (Aug. 26, 1966), re-hearing ordered by ACO (letter of Dec. 3, 1966), appeal allowed in part, Kakamega Mag. CA 89/66 (Dec. 22, 1966). The names used for the parties are pseudonyms.

¹⁸⁹ Letter of African Courts Officer to Kakamega Appeals Magistrate, Oct. 26, 1966.

The Magistrate justified his failure to allow an appeal by Isaya on the grounds that Isaya had not taken an appeal, and replied plaintively:¹⁹⁰

Adagala and Shidula are satisfied with my judgment, and Isaya with the judgment of the Hamisi African Court, since they have not complained. They are satisfied with it though it may be against the ruling of the Court of Review that there can be no claim for refund of all a girl's education costs. I was not informed of this ruling except when you wrote to me on 26.10.66 [the above letter]. If it is against the ruling of the Court of Review of which I was not aware then I can see no justification when you say that you are NOT satisfied with the manner in which this appeal was tried. Please you as my Senior Officer and as the African Courts Officer if my work does not satisfy you, say so and I am ready to accept any other duties that you may assign me.¹⁹¹

More important than the impassioned tone of this exchange is the fact that once again its contents were not communicated to those primary courts in Western Province which were supposed to be bound by this ruling. Both before and after the letter from the African Courts Officer, in the Lurambi court whose judgment had originally stimulated the decision by the Court of Review, in the Hamisi court whose judgment was here reversed, and elsewhere in Kakamega District, plaintiffs sought and recovered compensation for *all* the school fees they had paid for daughters who had been removed from school and impregnated by defendants.¹⁹²

¹⁹⁰ Letter of Kakamega Appeals Magistrate to African Courts Officer, Nov. 10, 1966.

¹⁹¹ On re-hearing the Magistrate found that Adagala had paid 300/- for his daughter's last year of schooling, and that she had been expelled after completing half of it because of pregnancy. He therefore allowed 150/- damages. He did not allow compensation for pregnancy of two head of cattle because the boy and girl were related, and under such circumstances no compensation is paid.

¹⁹² See, e.g., Hamisi AC CC 1/66 (Jan. 15, 1966) (claim for one head of cattle pregnancy compensation and 1500/- school fees; defendant agreed to pay 500/- school fees, 177/- court costs and 23/- transport, which the court approved); Lurambi AC CC 388/66 (Sept. 22, 1966) (judgment for one head of cattle, customary pregnancy compensation; one sheep for cleansing since the parties were related, and 800/- school fees); Lurambi AC CC 441/66 (Oct. 10, 1966) (judgment for 450/- school fees); Lurambi AC CC 515/66 (Dec. 21, 1966) (judgment for two head of cattle customary pregnancy compensation and 700/- school fees; this case was decided after the letter from the ACO); Khwisero AC CC 153/66 (Aug. 31, 1966) (judgment of 1350/- school fees; this court is also subordinate to the Kakamega Appeals Magistrate); Emuhaya AC CC 78/66 (May 4, 1966) (judgment for 900/- school fees; this court also falls within the same appellate system). The Kakamega Magistrate who had received the reproof clearly learned his lesson, and in subsequent appeals he reduced all awards to the two head of cattle which traditionally constituted customary compensation. See, e.g., Kakamega Mag. CA 128/66 (Apr. 10, 1967), dismissing appeal from, but varying award of, Butali AC CC 535/66 (July 25, 1966) (original claim 1200/-; lower court awarded 800/-; on appeal reduced to 300/- representing two head of cattle); Kakamega Mag. CA 178/66 (Jan. 3, 1967), dismissing appeal from, but varying award of, Ikolomani AC CC 312/66 (Aug. 29, 1966) (original claim 2000/-; 1000/- allowed below, reduced to 300/- on

Yet ignorance is not the only reason for nonconformity with appellate decisions; even were copies of opinions available to the primary courts it is doubtful whether they would have commanded much respect. The elders of the African Courts felt with some justice that they knew better how to resolve disputes according to customary law than did the appellate judges—certainly they were more skilled than the European and Asian bench, and probably more adept than African magistrates, who were strangers to the local community and might even be from another tribe.¹⁹³ Moreover, were adherence to precedent not voluntary, it would be very difficult to compel. Direct review by an administrative official could be frustrated by recording a distorted version of the evidence to make it appear that an unpopular rule was being faithfully applied, when in fact it was being ignored. Even absent such distortion, effective administrative review of the vast mass of litigation was impossible within a system which aimed to provide inexpensive legal redress on a balanced budget.¹⁹⁴ Nor was the informal supervision provided by the professional bar in developed countries available, since the Kenya bar was not interested in and in any case had little access to unpublished primary decisions.

Perhaps this somewhat abstract discussion of the merits and drawbacks of various sources can be given substance by analysis of the progress of an actual case through a series of appeals. For, notwithstanding all the criticisms just offered, I did make extensive use of Magistrate's Appeals, for two quite unrelated reasons.¹⁹⁵ On balance, greater literacy and legal sophistication outweighed any unfamiliarity with or bias against customary law. Moreover, such bias might possess considerable significance for legal development since the Magistrates decided enough cases to have a substantial impact within the legal process. Finally, appellate case files contained a full record of primary court proceedings, as well as the evidence heard and judgment rendered on appeal.¹⁹⁶ Apart from these considerations, however, there

appeal). However, another magistrate who subsequently sat in the same court was apparently unaware of the ruling. See Kakamega Mag. CA 50/67 (Feb. 23, 1968), allowing appeal from Ikolomani AC CC 388/66 (Oct. 15, 1966) (reversed lower court's award of compensation for pregnancy for lack of evidence, but no mention made of the size of award, which was 756/- for school fees).

¹⁹³ This attitude is undoubtedly changing as primary court judges receive more legal education, concurrently adopting Western attitudes, and as the appellate structure is Africanized.

¹⁹⁴ District Officers, and subsequently Appeals Magistrates, did have the power to revise any decision of an African Court. African Courts Ord., Laws of Kenya, cap. 11, §44 (rev. ed. 1963) as amended by African Courts (Amendment) Ord., No. 50 of 1962, §33. My impression is that, at least in civil cases, this power has not been widely used in the recent past. It was eliminated by the Magistrate's Courts Act, No. 17 of 1967.

¹⁹⁵ There were only about a dozen decisions by the Court of Review relevant to my subject during the decade or more that it functioned.

¹⁹⁶ As stated earlier, all papers filed in a case are kept in the court which passes the

was an overwhelming advantage in terms of convenience and efficiency. In the early 1960's the African Courts Officer instructed the Appeals Magistrates to send him a typed carbon copy of every judgment.¹⁹⁷ He has thus collected more than 5,000 judgments, handed down since about 1963, which are filed in the Law Courts in Nairobi. I used these materials intensively during the first two months of my field work in order to obtain a synoptic view of the role of customary law in the judicial process. From this source I have deliberately chosen an atypical case to illustrate in extreme form the differences in ability and attitude among the several levels of the judicial hierarchy. The parties are all Kamba.¹⁹⁸

Plaintiff: Paul

Defendant: John

Claim: Damage to reputation, 300/- (filed Oct. 16, 1963).

Facts: Paul alleged that on 17 September 1963 he was walking along a road with two old women, Esther and Lidia on the way to address a political meeting when he was overtaken by John. John asked the women if they were going to vote for him. They replied that they did not consider that he would compete with Paul at the elections. John rebuked them, saying that they should vote for Paul because he gave them *mamwana* (bread toasts) and slept with them. Paul asked John to repeat that, but John refused and rode off on his bicycle. John denied meeting Paul on that date. He said that he was speaking at a different place.

Judgment of the Nziu African Court: for Paul, 300/- damages. Paul and John held political meetings at different places on that date, but they had met and John had used insulting words to Paul in the presence of the two women.

John's grounds of appeal: John again denied meeting Paul on that date and wanted to call an additional witness to support his denial. John also wished to swear a *kithitu* oath¹⁹⁹ to prove his allegations.

Evidence on appeal: John was allowed to call a witness, Kisuko, who confirmed John's alibi.²⁰⁰

final judgment. In 1966 there were twenty-five Appeals Magistrates Courts in Kenya: Kiambu, Murang'a, Thika, Kerugoya, Nyeri, Embu, Meru, Machakos, Kitui, Wundanyi, Kilifi, Kwale, Mombasa, Nakuru, Naivasha, Eldoret, Kitale, Kericho, Kisii, Homa Bay, Kisumu, Kakamega, Bungoma, Kapsabet, and Nairobi.

¹⁹⁷ These judgments contain a summary of the evidence and decision below, the grounds of appeal, any additional evidence heard, and a reasoned opinion. However, the record is not complete, and testimony and cross-examination are omitted.

¹⁹⁸ Nziu AC CC P278/63 (n.d.), appeal allowed, Machakos Mag. CA 98/64 (R. Mulla, May 5, 1965), appl. to COR allowed, Machakos District Registry Appl. P30/65 (ACO, May 19, 1965), appeal dism'd, COR Appl. 7/66 (Ainley, C. J., Feb. 9, 1967). The Kamba are a Bantu people numbering about a million, who live in Eastern Province, just east of Nairobi. All the names used are pseudonyms.

¹⁹⁹ A *kithitu* is an object on which an oath is sworn; it is alleged to kill a perjurer or his near kin within six months. Traditionally it was greatly feared and highly effective at insuring truthful testimony. See Penwill, *Kamba Customary Law* 56-66 (1951). That it has much less power today is shown by the instant case. John's story was probably false yet he, an educated man, was anxious to swear to it on the *kithitu* in order to impress the more credible primary court.

²⁰⁰ That the court allowed John to call an additional witness who could easily have been produced below shows the readiness of appellate courts to hear further testimony. Compare note 178 supra.

Judgment of the Machakos Appeals Magistrate: for John. "Both parties in this case are politicians. During the month when this dispute arose both were contesting for one seat at the Machakos County Council²⁰¹ elections. They both belonged to one political party then." The court was convinced that the parties held political meetings at different places on the day involved, but that they did meet on the road. "... one thing is that the defendant did not talk to the plaintiff but to the women. The alleged insulting words were said to the women. The question is whether the alleged words were said by John as claimed by Paul and his witness. And further did the words alleged spoken amount to defamation of Paul's good name. It must be remembered here that the parties were great rivals over an election to a seat at the Machakos County Council. . . . In my humble opinion I consider that these words spoken by John were not defamatory to Paul but perhaps would have been so to the two women. This is because John was directly talking to these women, and as the Nziu African Court found the women were disappointed [sic] with the defendant's insults to them. I have also considered the circumstances under which the words were spoken. John was trying to convince the women to vote for him at the election. There were no other people around who heard the alleged defamatory words. The two women were the right wing [sic] supporters of Paul. . . . the parties have had *fitina*²⁰² long before this dispute. This *fitina* is still existing." The court refused to allow the oath.

[Paul then applied to the African Courts Officer for permission to submit the case to the Court of Review, which was granted]

Judgment of the Court of Review: "This was a disgraceful thing to say, but it is quite clear that John was merely being rude and abusive. It scarcely needs saying that the two old ladies would realize that, and there is not the slightest evidence on the record that anyone besides Paul, Esther and Lidia heard these words. The fact is then that Paul's good name was not injured. . . . We wish to say, however, that Kamba custom may possibly permit a man to recover compensation for mere vulgar or scurrilous insults and abuse which have not spoiled his name or lowered his reputation in the community, but which have caused him distress and affront. . . . If there is such a custom, and a man wishes to base his claim on it, he must do so clearly and at the outset of the case so that the trial court knows precisely the issues which it has to try. . . . It is not only a matter of law, it is a matter of common sense that there is a vast difference between saying 'that man was rude and insulting' and 'that man has lowered my reputation and damaged the character which I hold among my friends.' To say one thing is to make, on any showing, a trivial allegation. To say the other is to allege what may be a very serious wrong indeed."

The substantive law in this area is unclear, and probably in a state of flux. Kamba historically had a system of age-grades; although membership had to be achieved by making certain payments, these grades served roughly to divide the male population into groups of coevals.²⁰³ A young man who had been disrespectful towards an elder would be

²⁰¹ Machakos District contains well over half of the Kamba, and thus more than half a million people. The position of county councillor is one of considerable status.

²⁰² Jealousy, contention (swahili).

²⁰³ See Middleton and Kershaw, *The Central Tribes of the North-Eastern Bantu* 74-75 (1965).

required by his father to make the elder a gift of beer, at least equal in value to a goat.²⁰⁴ When courts were instituted insulted persons began to seek redress in novel situations, and to ask for money compensation in increasing amounts. Some courts have continued to emphasize the age relationship, restricting recovery to elders insulted by youths,²⁰⁵ and denying it when the parties are of the same age.²⁰⁶ Others have extended the cause of action to allow a woman to sue a younger man.²⁰⁷ A few courts have held older men liable for insulting younger women²⁰⁸ or men,²⁰⁹ expressly rejecting the traditional basis of the tort:

I am satisfied that the old custom of the Kamba whereby the aged were probably privileged to insult the young ones has died out in these modern civilized periods and days where no one is privileged to insult the other.²¹⁰

But most cases simply grant recovery without any reference to the relative ages of the parties,²¹¹ recognizing that age-grades have lost their traditional significance.²¹² Similarly, there is no correspondence

²⁰⁴ See Penwill, *Kamba Customary Law* 110 (1951). The official value of a goat today for judicial purposes is 20/-.

²⁰⁵ See, e.g., Machakos Mag. CA 156/65 (Dec. 22, 1965), dismissing appeal from Iveti AC CC 450/65 (Nov. 30, 1965) (defendant said to plaintiff, an old man, in front of eight people, that he had been spoiled by harlots and was a rascal; plaintiff awarded 200/- damages); Machakos Mag. CA 23/66 (Mar. 4, 1966), dismissing appeal from Miu AC CC 2/66 (Jan. 24, 1966) (defendants, members of an age grade inferior to that of plaintiff, said they wanted to have intercourse with him, and that he was a dog and should die; plaintiff claimed 1000/- compensation and was awarded 600/-).

²⁰⁶ See, e.g., P1, P2, and P3 v. D, Machakos Mag. CA 66/65 (Sept. 21, 1965), dismissing appeal from Miu AC CC ?/65 (Apr. 30, 1965) (P1 and P3 are of the same age group as the defendant and therefore cannot recover).

²⁰⁷ Ibid. (P2, a woman is older than the defendant and therefore can recover).

²⁰⁸ See, e.g., Machakos Mag. CA 14/65 (Mar. 20, 1965), allowing appeal from Iveti AC CC? (Jan. 8, 1965); Machakos Mag. CA 34/65 (Aug. 20, 1965), dismissing appeal from Kangundo AC CC ?(n.d.): "The person abused is a woman and the person who abused her is an old man of about the age of the woman's father. . . . I consider that the abusive words used by the defendant are bad [stupid dog, devil, *kino*] and especially when used by a man to a woman of a younger age than the man."

²⁰⁹ Machakos Mag. CA 43/67 (June 19, 1967), dismissing appeal from Miu AC CC 5/67 (n.d.) (plaintiff suing elder half-brother for saying "that he usually peeps dresses of his daughter so as to find out whether she has committed adultery"; plaintiff claimed 600/- compensation and received 200/-).

²¹⁰ Ibid.

²¹¹ See, e.g., Machakos Mag. CA 31/65 (Aug. 19, 1965), allowing appeal from Kangundo AC CC ? (Feb. 15, 1965) (upper and lower courts differing only on whether there was sufficient evidence of the abuse; plaintiff claimed 150/- for being called a stupid dog, and was allowed 100/-); Machakos Mag. CA 157/66 (Jan. 24, 1967), dismissing appeal from Miu AC CC 160/66 (n.d.) (plaintiff claimed 500/- for being called a dog, and was allowed 300/-).

²¹² My Kamba research assistant, a second-year student at University College, Dar es Salaam, did not know his age-grade, though he had lived at home until going to the university.

today between the traditional compensation of a goat and the money claims made or allowed.²¹³

The Nziu African Court in the instant case apparently followed contemporary notions of abuse, since there was no evidence that Paul and John were of different ages, and since the compensation awarded was worth fifteen goats, not one. Its application of those rules, however, showed little insight into the issues raised by the case, nor even an accurate perception of the basic facts.²¹⁴ The Machakos Appeals Magistrate wrote a judgment displaying considerably greater juristic ability in identifying and resolving the issues, although his presentation of them is somewhat disorganized. He found three basic questions: had the parties met; had John used the words alleged; did they create a cause of action? The answers to the first two were clearly positive, thus disposing of John's alibi. As for the third, there were two possible claims—customary insult and common law defamation²¹⁵—and the magistrate appears to have understood this distinction, although he tends to use the two terms interchangeably. As a Kamba himself, he recognized the existence of an action for insult without difficulty. However, the facts in this case did not satisfy an essential element of the action, that the insulting words be addressed to the plaintiff.²¹⁶ Treating Paul's complaint as one for defamation, the court again rejected it, on alternative grounds. First, it did not satisfy the common law requirements of publication and damage because the only persons who heard the defamatory words were Paul's own supporters. Second, the "circumstances under which the words were spoken" were such as to preclude an action for damages: the litigants were both politicians, members of the same party, between whom there had long been ill-feeling; John uttered the words shortly prior to a hotly contested local election in order to persuade the women, supporters of his opponent,

²¹³ See cases cited in notes 205-211 supra.

²¹⁴ As the Magistrate correctly noted, John had not used insulting words to Paul, but to the two women.

²¹⁵ One of the most fascinating aspects of the evolution of customary law in Kenya is the gradual introduction of common law actions, for which there is no legal basis whatsoever. The African Courts Ordinance which grants the courts jurisdiction quite clearly states that the law to be applied is the "African customary law prevailing in the area" (with other rules and statutes not relevant here). Laws of Kenya, cap. 11, §18(a) (rev. ed. 1963). Nowhere were such courts authorized to administer the common law. Nevertheless, actions for "defamation" are widespread throughout Kenya, as are other claims clearly based on the English common law, e.g., breach of promise of marriage, negligence, assault. I have never seen any discussion of this point, even in those cases which reached the Court of Review. Indeed in the instant case the Court of Review rejected a customary claim because it did not accord with the common law, although the governing statute required it to do just the opposite.

²¹⁶ The magistrate's recognition of this point shows that he was talking about a distinct customary action for insult, since personal confrontation is not a requirement of defamation. However, he may have been wrong that it is necessary in insult. See Machakos Mag. CA 23/66 (Mar. 4, 1966), dismissing appeal from Miu AC CC 2/66 (Jan. 24, 1966) (plaintiff was not present when defendants uttered the words).

to vote for him instead. The magistrate is here clearly seeking for a policy which might support a justification for defamation, although he never succeeds in making it explicit.²¹⁷

The Court of Review reached the same conclusion but by a divergent route which revealed its premises to be fundamentally different from those of the two lower courts. There could of course be no liability in defamation because the words were only published to the two old ladies who would recognize them as abusive and not defamatory.²¹⁸ Where this court differed from the others was in its attitude towards abuse. It had little sympathy with an action for "*mere vulgar or scurrilous insults and abuse [my italics]*" for it was a matter of "common sense" that such conduct was "trivial" when compared with words injurious to reputation which "may be a very serious wrong indeed." Although customary actions could not be abolished²¹⁹ the court was determined to hedge them about with procedural impediments: plaintiffs would be required to state clearly and precisely at the outset of the case the customary rule on which they wished to rely. This is in sharp conflict with the generally informal practice of the primary courts, whose official rules have never demanded strict pleading,²²⁰ and is indeed in violation of the express language of the governing Act.²²¹

These three judgments thus characterize, and perhaps even caricature, the approaches of the several levels of the judicial hierarchy. Primary court judgments, while most significant from the point of view of numbers, may be empty of reasoning, and even misleading in the

²¹⁷ Cf. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

²¹⁸ It is unclear where in the common law the court finds such a rule. It is clearly defamatory of a man to say that he sleeps with other women. Perhaps the court is arguing that the women would not believe such accusations, and hence would not lower their estimate of Paul as a result.

²¹⁹ Courts may refuse to apply a customary law which is "repugnant to justice or morality," but the granting of compensation for abuse is hardly such a rule. African Courts Ord., *Laws of Kenya*, cap. 11, §18(a) (rev. ed. 1963).

²²⁰ See African Courts Civil Procedure Rules:

§4, Filing of case: When a plaintiff wishes to file a civil action, *the clerk shall open a 'Case File' and shall record briefly in the space provided thereon the substance of the claim. . . .*

§34, The Plaintiff: The plaintiff shall give his evidence. . . . At the close of his evidence he may be questioned by the court and cross-examined by the defendant. *From this evidence the court shall reduce to writing and enter the Particulars of the Claim in the place provided in the 'Case File.'* [Italics added]

Aside from the fact that these rules appear to be mutually inconsistent, it is ironic that they were promulgated by the Chief Justice of Kenya, who also wrote the opinion for the Court of Review in the instant case, under his authority derived from the African Courts Ord., *Laws of Kenya*, cap. 11, §62(1)(a) (rev. ed. 1963).

²²¹ African Courts Ord., *Laws of Kenya*, cap. 11, §54 (rev. ed. 1963):

No proceedings under this Ordinance in the Supreme Court, the Court of Review, a magistrate's court or any African court . . . shall be varied or declared void upon appeal, revision or review solely by reason of any defect in procedure *or want of form*, but all matters shall be decided according to substantial justice without undue regard to technicalities. [Italics added]

statement and interpretation of rules. The Appeals Magistrate here made a highly sophisticated application of customary rules to the facts of the particular dispute. Indeed, he went beyond this and sought to adapt customary law to changed conditions, balancing the traditional concern to protect personal dignity by penalizing disrespectful behavior against the modern desire to foster democratic government by allowing the freedom to compete for political allegiance through the use of loose language if necessary. However, innovative decisions like this are rare and have a doubtful impact on the daily operation of the law. Finally, the opinion of the Court of Review, while expressed with more elegance and better organization, showed an unfortunate insensitivity to customary legal principles and indigenous cultural attitudes. In a small-scale society the man who is subjected to abuse may well suffer a greater loss of self-respect and of standing in the community than the man who is defamed.²²² It is strange that the Chief Justice should have been so ignorant of this fact when, little more than a century ago in England and throughout Europe, equivalent words would have been cause for a duel, possibly leading to the death of one of the participants.²²³ But regrettably such incomprehension is not unusual: lack of respect for differing values is always a danger when a person of one culture is required to pass judgment on the behavior of someone from another. A display of even more serious ethnocentrism may be found in a similar case of customary abuse. Although the European magistrate allowed the "trifling" damages he considered appropriate to what he viewed as a "childish" case, he wrote:

This is a typical storm in a tea cup so typical of the Somali people. . . . In my opinion it was a vulgar slanging match and not calculated slander.²²⁴

Not only did the magistrate fail to see that abuse, and not common law slander, was the gravamen of the complaint, but he mistakenly assessed the "trifling" damages by his own economic standard and not by that of people living at a subsistence level. Although this statement, and the opinion of the Court of Review in the principal case, are unusually egregious examples of cultural blindness, they should stand as a warning against over-ready acceptance of the pronouncements of European judges on customary law. For it is hardly surprising that primary courts do not, in practice, share this concern with reputation rather than public dignity or self-respect, but continue to award

²²² The vast number of complaints about abuse should be sufficient evidence of this.

²²³ This is still true in many parts of Europe today. See generally, *Honour and Shame* (Peristiany ed. 1965).

²²⁴ Kakamega Mag. CA 24/64 (Oct. 28, 1964), dismissing appeal from Lurambi AC CC 207/64 (n.d.).

compensation, substantial in the eyes of the parties, for "mere" abuse or insult.²²⁵

III. CONCLUSION

This paper has described the methods employed in investigating the customary laws of wrongs in Kenya, and has tried to show that some of the tentative conclusions drawn from this research may offer valuable insights into the nature and functioning of African legal systems. I have argued that analysis of the entire content of individual case files, including both evidence and judgment, leads to a much more sophisticated statement of substantive rules than can be elicited from an informant. Moreover, only such analysis can reveal the application of rules to characterize, imply, and contradict facts—in the strategies of litigants and in the reasoning of judges—which I believe to be the central concern of the judicial process. However, detailed consideration of individual decisions must be placed in proper perspective in two possible dimensions, horizontal and vertical.²²⁶ First, how does the behavior of these litigants, the nature of this claim, and the reaction of this court compare with the norms for this type of litigation; this can be learned from statistical analysis of the business of the primary courts. Second, what is the role of these courts in the broader framework of dispute settlement—both pre-judicial arbitration and appellate review. When case studies are supported by this kind of information they combine the essential criteria of depth and representativeness. I hope by continued analysis of these materials to confirm the value of such an approach.

²²⁵ See cases cited notes 205, 208, 209, and 211 *supra*, and Machakos Mag. CA 33/66 (Mar. 23, 1966), dismissing appeal from Kilungu AC CC 465/65 (Feb. 11, 1966) (plaintiff claimed 100/- because defendant had called him a fool, *shenzi* (savage—swahili), etc., and got full amount); Machakos Mag. CA 112/64 (Nov. 17, 1964), allowing appeal from Nziu AC CC ?/64 (n.d.). In the latter case plaintiff alleged that defendant bus conductors had insulted her when she had refused to ride in their bus. They had told her to "go be fucked" and one of them had said: "Come near and I will hold your legs apart for everyone to see your vagina and anus." The lower court found neither insult nor defamation, but the Appeals Magistrate granted the sum claimed, 150/-, although on the confusing grounds that "the insult used by both defendants amounts to defamation. . . ."

²²⁶ For reasons of space, two sections of the original paper, referred to below, have been omitted. The first was a statistical analysis of litigation in the primary courts which examined the characteristics of litigants, the kinds of claims they brought, and the disposition by the court. The second was a detailed exposition of an instance of extra-judicial dispute settlement by a group of Luyia *maguru*, which sought to explore the relationship between informal arbitration and judicial institutions. Both of these will appear in a version of this paper to be published by the *East African Law Journal*.