
**Mediation as one of the alternatives to resolving
custody and maintenance disputes within the family
in Kisumu, Kenya**

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Introduction

Mediation is one of the forms of alternative dispute resolution that has been used by women to resolve custody and maintenance disputes. Women in Kisumu, Kenya prefer mediation as opposed to litigation in resolving custody and maintenance disputes. Mediation is, at its most basic level, facilitated communication or negotiation using a neutral party to help the disputing parties arrive at a resolution mutually agreeable to them.

Haynes (1993: 1) defines mediation as follows:

‘Mediation is a process in which a third person helps the parties in a dispute to resolve it. The outcome of a successful mediation is an agreement that is satisfactory to all the disputants. The agreement addresses the problem with a mutually acceptable solution and is structured in a way that helps to maintain the relationships of people involved. Mediation is ideally suited to family disputes.’

Mediation is a voluntary, party controlled process that is non-adversarial and confidential, and it has assisted women access justice cheaply and more quickly. The mediator does not give advice to or make decisions for the parties but provides a foundation for communication between the parties.

Women can either access justice through litigation (courts) or through other alternative forms of dispute resolution like mediation. Through mediation women have been able to achieve equality with men before the law, in accordance with the international human rights instruments.

In this paper I seek to explain the process of mediating custody and maintenance disputes, drawing from my experience as a lawyer and mediator. I explore women’s preferences in mediating custody and maintenance disputes as opposed to litigating the same and seek to unmask why men honour maintenance agreements emanating from mediation more than the orders from court.

I investigate the power relations involved during mediation and the broad themes related to custody and maintenance disputes between both married and unmarried couples, as well as the shortcomings of statute law in resolving the same.

The paper analyzes the unequal power relations between men and women whilst mediating custody and maintenance disputes and explores how social norms like culture and custom affect these disputes. It investigates how women seek mediation for purposes of reconciliation and to restore social harmony.

The paper is divided into several parts with the first highlighting the prevalence of custody and maintenance disputes in Kisumu, Kenya and the inadequacy of the Children’s Act in assisting women to pursue maintenance claims from the courts.

The second part explores the various laws and international instruments governing issues relating to the rights of women and children in family disputes.

The third part examines the process of mediation, the power relations during negotiations, settlement, and recording a Parental Responsibility Agreement in accordance with the Children’s Act and analyzes why men honour mediation agreements.

The final part provides an analysis of why mediation is preferred in resolving custody and maintenance disputes as opposed to litigation.

The prevalence of custody and maintenance disputes

The Federation of Women Lawyers in Kenya (FIDA Kenya) is a women's rights organization which provides legal aid, advocacy, counselling and mediation services. From my experience as a legal counsel with FIDA Kenya, I have noted that custody and maintenance disputes are prevalent because many men within Kisumu District fail to maintain their children claiming they cannot afford to do so. Further, due to increased poverty levels because of retrenchment and the after effects of the World Bank's structural adjustment programmes even some of the men who are willing to maintain their children also fail to do so.

Some men also decline to provide maintenance and upkeep for their children, especially in instances where they are separated from their spouses, whether formally or informally, and do not have the actual custody of the children of their union.

There are instances where some men deny paternity of their children born out of wedlock and decline to maintain them, claiming the women have had several partners. They are only compelled to provide maintenance and upkeep once paternity has been proven through DNA testing.

Inadequacy of the Kenyan custody and maintenance laws in assisting women

Kenya enacted the Children's Act No.8 of 2001 that governs issues relating to custody and maintenance, as well as disputes emanating therefrom. Issues pertaining to parental responsibility are outlined first under section 23 of the Children's Act that states as follows:

Section 23 (1): 'In this Act, "parental responsibility" means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.'

This provision emphasizes the responsibility of a parent to provide maintenance and upkeep for a child and gives the parent powers over the said child.

Under part VII of the Act from sections 81-101, it provides for persons who can claim custody of a child and gives the biological parent priority. The parents or legal guardians are also made responsible for providing maintenance and upkeep for their children and this ranges from providing food, clothing, shelter, education, and healthcare to spiritual and parental guidance. Penalties for parents or guardians who neglect their children are also provided for under this section.

Although the Act governs all issues pertaining to parental responsibility, custody and maintenance, including children born out of wedlock, in reality, it has not adequately assisted women to obtain maintenance for their children.

Several factors have hindered women from accessing justice, ranging from apathy amongst the women as some of them are, naturally, afraid of litigating within the courts to inability to afford the expenses involved in instituting and litigating custody and maintenance disputes in a court of law. Some women within Kisumu are also still controlled by strong cultural values that view women who institute court cases against their male partners as errant. Some women also decline to file children's maintenance cases in court claiming their families are opposed to it, viewing it as wrong to sue a male partner in court.

Within Kisumu region there are only four children's courts and the distance to them has also proved to be a hindrance to some women who seek to institute custody and maintenance cases. Some of the court personnel, like the magistrates, are not gender sensitive and fail to appreciate the women's lived realities and have handled their custody and maintenance cases insensitively. The court procedures that include preparation of pleadings,

service of summons, setting the suit down for trial, actual trial and execution of the court order are complex for most women seeking maintenance from their partners.

However, there are also instances where maintenance cases are successful and courts order men to pay maintenance, but they fail to do so, claiming lack of money to pay for maintenance or refusing out rightly because the children in question are not in their custody.

Kenyan laws and the human rights instruments governing custody and maintenance

The Children's Act chapter 586

This is the paramount statute governing all issues pertaining to custody and maintenance disputes for children born within a union or marriage and the ones born out of wedlock.

Section 82 stipulates who is suitable to be granted custody of a child while section 89 provides for custody agreements between parents. These sections state as follows:

Section 82 (1): A court may, on the application of one or more persons qualified under subsection 3 of this section, make an order vesting the custody of a child in the applicant or, as the case may be, in one or more applicants.

Section 82(3): Custody of a child may be granted to the following persons:

- (a) a parent
- (b) a guardian

Section 89: No agreement made between the parents of a child, shall be held to be invalid by reason only of its providing that the father shall give legal custody or actual custody thereof to the mother:

Provided that the court shall not enforce any such agreement if it is of the opinion that it will not be for the benefit of the child to give effect thereto.

The above provisions emphasize the priority given to biological parents regarding issues pertaining to their children. In Kenya the best interest of the child is considered of paramount importance whilst dealing with issues relating to custody and maintenance of the child. The provisions from the Children's Act have been borrowed from the various international instruments regarding the welfare of the children, namely the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child that Kenya has ratified.

Provisions of section 89 clearly provide for making informal custody and maintenance agreements between parents, which are considered valid in accordance with the law. Agreements made during mediation sessions also fall within the ambit of these provisions. It is clear that the provision relating to the making of informal agreements was put in place to safeguard the best interests and welfare of the child and to enhance access to justice on issues pertaining to custody and maintenance.

The Kenyan Constitution (revised 1972)

This is the supreme law of the land. The Bill of Rights in the Constitution safeguards the fundamental rights of each and every individual. Although it has an equality clause at its section 82 (1) that provides for protection of the law for each individual, it however allows discrimination on the basis of personal law matters at its section 82(4). Sections 70 and 82 state as follows:

Section 70: Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the rights, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely, life, liberty, security of the person and the protection of the law:

Section 82(1): Subject to subsections (4), (5), and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

82(4) (b): with respect to adoption, marriage, divorce, burial, devolution of property upon death or other matters of personal law

Section 70 of the Constitution provides for fundamental rights and freedoms of each individual but section 82(4) (b) is a *claw back clause* that takes some of these rights away. Section 82(4) (b) has negative implications because by allowing discrimination on personal law matters, it may deny people their human dignity. For instance issues relating to custody and maintenance fall under the scope of personal law matters, and by the constitution expressly allowing discrimination on such issues, it shows the government's lack of commitment to achieving equality. Personal law matters are the domain that the majority of women's issues fall under and this provision impairs their fundamental dignity as compared to men.

The constitution does not have express provisions governing mediation but since it is a form of dispute resolution assisting parties to access justice; it can be argued that issues concerning mediation fall within the ambit of the fundamental rights and equality before the law clause. For instance, the Children's Act at section 89 validates informal agreements made between parents of a child. Parental Responsibility Agreements reached during mediation sessions and filed in court for enforceability as court orders can be termed informal agreements. Although section 82(4) of the constitution provides for discrimination on personal law issues, it cannot interfere with women's equal rights before the law and their seeking to access justice through mediating custody and maintenance issues is one of the alternative ways of assisting women access justice which is cost effective.

Convention on the Rights of the Child

This convention enshrines the fundamental principle of best interests of a child in dealing with all matters relating to children. Article 3 states as follows:

Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 3(2): States parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The convention lays down the global basis for the protection and promotion of the rights of a child. Article 3 emphasizes the incorporation of the best interests of the child principle whilst dealing with all legal, welfare and administrative issues concerning children. This depicts that while custody and maintenance mediations are between couples, personal differences should be kept aside and issues relating to the best interest of the child concentrated upon. In a broader context, mediation of custody and maintenance disputes is one of the avenues used in enhancing access to justice and safeguarding the best interests of the child.

I concur with Ncube W (1998:41) when he states that:

‘All this suggests that the principle of best interests has become the standard against which decisions affecting children are to be measured. Such decisions go beyond those traditionally made by courts of law to include those made by administrative bodies whether public or private, including families.’

African Charter on the Rights and Welfare of the child

Under this charter, the best interests of a child principle, governs all issues in safeguarding the welfare of all children, regardless of their status. These provisions intended to do away with discrimination and distinction between children born within marriage and those born out of wedlock. Articles 4 and 18 state as follows:

Article 4(1): In all actions concerning the child undertaken by any person or any authority the best interests of the child shall be the primary consideration.

Article 18(2): States parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

Article 18 (3): No child shall be deprived of maintenance by reference to the parents’ marital status.

There is no express provision under this charter governing mediation of custody and maintenance disputes; however, article 4(1) emphasizes that whatever action is undertaken by an authority or person, the best interests of the child is paramount. Mediation of custody and maintenance disputes fall within this ambit as it is an action undertaken to safeguard the welfare of the child.

Article 18 (2) compels the state to ensure equality between the spouses and protect the child in case of dissolution of the marriage. It can be argued that although there are no express provisions for mediation, by parties informally engaging in mediation to resolve custody and maintenance disputes, and thereafter being allowed to file Parental Responsibility Agreements within the courts for enforceability, the state is actually taking steps to ensure equality between the parties.

Protocol to the African Charter on the Human and Peoples’ Rights on the Rights of Women in Africa

The protocol obligates the state to safeguard women’s rights within marriage and provides for equal rights between men and women in marriage and custody issues, and the principle on the best interests of a child is emphasized. Article 7 provides as follows:

Article 7 (c): States parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure:

‘in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;’

The provisions expect disputing parents to have reciprocal rights and responsibilities over their child. These provisions govern the principle behind mediation in the sense that whilst mediating custody and maintenance disputes, equality between the parties and the principle of best interest of the child should be observed.

Convention on All Forms of Discrimination Against Women (CEDAW)

This convention obligates the state to safeguard equality between women and men in issues relating to marriage and family and interests of the child is considered of paramount importance whilst dealing with these issues. Article 16 states as follows:

Article 16 (d): States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

‘The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all the cases interests of the children shall be paramount;

Article 16 recognizes and promotes children’s rights. Parents of a child are expected to have equal rights and responsibilities pertaining to their children and the principle of best interests of the child emphasized as the norm. Whilst mediating custody and maintenance disputes, the equality and best interests of the child principles should be observed..

The mediation process

Parties to the mediation

These are parents of a child whose custody and maintenance is in dispute. The venue for the mediation is normally within the FIDA Kenya offices or any place chosen by the parties. This is advantageous as it does not entail the court set up and is friendlier to resolving disputes relating to family matters. The mediator can either be a lawyer, a religious leader, a family member or even a chief. The mediation process is cheap because most organizations offering it either do it for free or charge a minimum fee, unlike litigation where court filing fees and other incidentals has been prescribed. There is no format of commencing a mediation session or pleadings to be filed prior to a mediation process. One party simply requests a mediation and in FIDA Kenya it is mostly women who request it and the men are invited for a session. The majority of the men invited for mediation attend the sessions, although some decline, preferring litigation. Since there is no law penalizing one for failing to attend mediation, the custody and maintenance dispute is subjected to litigation in accordance with the provisions of the Children’s Act.

Although custody and maintenance issues can also be resolved through the courts, it is possible and advisable to resolve them during mediation whilst considering the best interests of the child for purposes of preserving future relationships. For example, a disagreement may arise with regard to parental contribution for the higher education expenses of a child. While previously parties may have agreed on the amount of maintenance when the child was young, this amount becomes insufficient to provide for the child’s higher education. If the matter had previously been resolved through mediation and the relationship preserved, it would be easier to discuss each party’s contribution to the child’s education.

Negotiations

The mediation is begun by an opening statement where parties are welcomed and introduced. Ground rules (courtesy, mutual respect, non-interruption) are formulated and agreed upon. The respective roles of the various parties are defined and emphasis is laid on the mediator’s role in guiding the process whilst parties control the outcome.

The process of mediation is explained to the parties on issues such as confidentiality, the voluntary nature of the process, the importance of keeping time, caucusing, preparation of agreement and closure.

The parties are thereafter invited to present their cases beginning with the aggrieved party during which notes are taken and questions asked for clarification on matters arising. From the parties' discussions, key issues are narrowed down which form a basis for assisting the parties in assessing the conflict and seeking a workable solution.

As a mediator it is important to be impartial and maintain courtesy between the parties to ensure there is no hostility and keep the lines of communication open.

The parties are guided and left to freely articulate their problems.

There are instances when parties are hostile to each other and the technique of caucusing is used by handling each one separately to assist them to rethink their positions. During caucusing some parties may divulge extra information, which they did not provide during the presentation for fear of losing face.

According to my experience as a mediator I have noted that the men who voluntarily submit to mediation have a positive attitude to it and are cooperative during the negotiations, especially when they realise the process is confidential.

Power relations during negotiations

There are instances when the unequal power relations that exist between the parties within the household are exposed during mediation. Some women are intimidated and fail to present their cases well, whilst some are scared of discussing any issues with the men for fear of future reprisals like being chased out of the matrimonial home and having nowhere to go to.

Crites *et al.* (1987:13) states that:

'For the most part men have dominated the public and women the private sphere, and the legal doctrine has both reflected and reinforced that cultural pattern. Under early common law doctrines of marital unity, husband and wife were one, and, as a practical matter, the one was the husband.'

I agree with the above statement and note that this unequal power relation between men and women affects women whilst seeking legal remedies.

It is hence incumbent upon a mediator to level the playing field during mediation and, as noted by Henry Brown *et al.* (1999: 258):

'Patterns of behaviour that operated during the relationship are likely to be repeated in the mediation process, such as cycles of conflict and mutual recrimination. One of the mediator's functions is to identify such patterns and help the couple to break from them and use the mediation more effectively.'

The mediator has to be firm on the disputing parties and advise them of their equal status. It has been observed that mediation proceeds well if parties formulate ground rules accepting to observe courtesy to avoid interrupting one another.

It is also useful to inform parties of their respective roles and responsibility over their children's lives and advise them to be amiable to each other whilst discussing modalities of future parenting.

Exploring solutions to custody and maintenance disputes

The parties are encouraged to discuss issues and explore solutions relating to future parenting, maintenance, visitation and visitation rights, and each party's contribution to the child's upkeep. During mediation it is important to clarify all issues and identify hidden offers. The parties may be assisted in gathering information that may be crucial in assisting them to arrive at a considered decision. There are instances where suggestions are

made that an aspect of conflict be referred to an expert. Apart from ensuring strict neutrality in the process, no party is allowed to oppress the other or to abuse the process. The parties are also assisted to generate alternatives and create solutions to the maintenance dispute at hand.

Settlements

After negotiations, a summary of the settlement reached by the parties is prepared and all the issues discussed are included. The agreement reached should reflect each parent's interests in the future relationship with the child or children and be clear and unambiguous, and have a legal effect. For example, in Parental Responsibility Agreements, timelines on when maintenance is to be paid are stated and other details like the age of the child and names of each party also stated. The parties are often advised to read, sign and date the agreement, and for the ones who are unable to read, the agreement is read out and explained to them. Once the mediation process is over the parties are thanked for having come for mediation. It is important to end the process on a positive note for purposes of enforcing the agreement reached and preserving the relationship between the parties as they have children whose future growth and development depends on them. Parties are often advised to shake hands or hug each other; however in my experience as a mediator I have noted that very few men agree to hug their partners after mediation. The parties are also educated on the custody and maintenance provisions as stipulated under the Children's Act, to enable them to reach a legal and enduring settlement that will address their real interests.

As a mediator, I have noted that some of the agreements reached during mediation are not adhered to, compelling women to seek orders of execution of Parental Responsibility Agreements from court; however this is not a common occurrence.

Enforcing custody and maintenance agreements

Parental Responsibility Agreement

This can be a formal or informal agreement reached between the disputing parents of a child on how custody and maintenance issues of the said child shall be managed. The agreement has to be filed in the nearest Children's Court for purposes of enforceability and it applies to children born within a marriage or union or those born out of wedlock. Section 24(1) of the Children's Act governs parental responsibility agreements and provides as follows:

Section 24(1): Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.'

Section 24(2): Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.'

Section 24(3): Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other:

(a) the mother shall have parental responsibility at the first instance;

(b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.'

Section 25(b): the father and mother may by agreement ('a parental responsibility agreement') provide for the father to have parental responsibility for the child.

Section 26(1): a parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Chief Justice.'

It is incumbent on the mediator to bring closure to the process on all the issues raised. Should a custody and maintenance agreement be reached, the mediator ensures that it is not only clearly understood by the parties but the terms are clearly expressed.

This will be conducive to the durability of the agreement and the long-term satisfaction of the parties with the settlement and mediation process. The agreement should be crafted and clarified by the parties with the help of the mediator. The Parental Responsibility Agreement is also crafted according to the provisions of section 26(1) of the Children's Act (see appendix I) and thereafter filed in court for enforceability.

Analysis of the effect of court adjudication on custody and maintenance disputes

Most women in Kisumu face a myriad of problems in their quest to seek justice over their custody and maintenance disputes. The statement below reflects the true position of the problems women face:

'Women were excluded from effective use of the formal justice delivery system by the language of the courts, by the complexity of the forms that had to be used, by lack of knowledge of the forms and procedures and the options that law offered in dispute resolution, by the costs involved and by transport and life management logistics' (Stewart J *et al.*, 2000:96).

The Kenyan justice system is adversarial and expensive. In most cases, parties, especially women, cannot afford to access justice either because they are not economically able, or there are instances where socially or religiously, they are not confident enough to pursue their cases. The distance to the courts is often prohibitive denying women access to justice. As for the women who manage to file suits without the help of a counsel; the language of the court is also intimidating.

The procedures for filing cases in court require knowledge of law and court cases also take too long to be heard and determined. By the time a custody and maintenance dispute is set down for hearing in court, there are instances where children are in school, and may be sent away due to lack of school fees or uniforms or they might even lack other basic necessities like food, clothing, shelter or healthcare. In most cases, women who have managed to obtain judgments from the courts pertaining to their custody and maintenance disputes, are unable to execute the said court orders and get money for maintenance because the men are either evasive in paying for maintenance or because it is expensive to execute a decree or order of maintenance.

It is clear that the adversarial system of litigating custody and maintenance issues through the courts often leads to breakdown of the relationship whether the parties were married or not because of the hostile way evidence is tendered in court by the respective parties to prove or disprove their cases, before they are granted favourable judgment.

In most instances married women who seek maintenance for their children through the Children's Act often intend to preserve the relationship between themselves and their partners and only want them to provide upkeep for the said children. Unfortunately, the moment the matter reaches the courts, they often turn into enemies and the partners, including the defending counsel, look for all the ways to avoid being compelled to pay maintenance. There are instances where parties deny paternity to avoid paying maintenance and this makes the cases more acrimonious. It is hence pertinent that the lawyers also have to be trained to appreciate that litigation of custody and maintenance issues is not about winning, but simply about obtaining maintenance for the child. There are lawyers who also have a negative attitude towards FIDA Kenya and oppose any custody and mainte-

nance case instituted by a lawyer from FIDA Kenya leading to cases being protracted and acrimonious at the expense of the children.

The Kenyan law on evidence that provides that the burden of proof of a case lies on whoever has instituted the case also leads to acrimony in litigating custody and maintenance disputes in a court of law. The party instituting the case has to present all evidence to prove their case and the opposing party defends their case and at times presents false evidence for the sake of ensuring that the case is dismissed. That is why men prefer to look for all the excuses for not paying maintenance and go as far as denying paternity of their children and often have to be compelled to undergo a DNA test for purposes of proving paternity, just because they have been sued for maintenance for their children.

I concur with Bosman-Swanepoel *et al.* (1998: 83) in their following observation in litigating custody disputes that reflects the position in Kisumu:

‘With custody disputes parents have a strong need for winning and they tend to suppress certain feelings, thereby presenting a picture that is not necessarily accurate. They also believe the other parent, their opponent, is doing exactly the same. Parents are often non-negotiable regarding their children, but this should not be seen as a pathological characteristic.’

The judgment from the court is either seen as a trophy by the women or as a challenge to hegemonic masculinity by the men and even, at times, their counsel, who have lost the case. Most of the men invoke culture by stating that women are still subordinate and the children shall always belong to them and not the women.

Conclusion: Efficacy of mediation as an alternative to resolving maintenance disputes within the family in Kisumu Kenya.

Mediation has proved appropriate in resolving custody and maintenance disputes in Kisumu Kenya.

I concur with the Bosman-Swanepoel *et al.* (1998:105) summary of the advantages of mediating custody disputes as opposed to litigation in the following terms:

‘The emphasis is on the prevention and intervention on a positive level, isolating and resolving disputes rather than fanning the flames of acrimony. It is vastly preferable to mediate a custody dispute than to have recourse to litigation. The latter is notorious for driving in wedges instead of building bridges.’

The statement clearly demonstrates that mediation of custody disputes is less acrimonious and preserves relationships as opposed to litigation that creates a wedge between the disputing parties. The decision making process during mediation is vested in the hands of the parties who work together collaboratively to find a solution to their conflict.

The process has often eliminated power imbalances, because the parties stand equal before the mediator. The Parental Responsibility Agreement, crafted, clarified and voluntarily signed by the parties with the help of the mediator, has proven durable because it is thereafter filed in court for authenticity and can be enforced as an order of the court if one party fails to comply with the terms therein. Once the parties have signed the agreement, it leads to their long-term satisfaction, because they were empowered during the process. They have often expressed their satisfaction with the mediation process for allowing them to be in control and express themselves freely. The agreement reached through the process is likely to be more enduring and the parties have the satisfaction of having actively crafted or created the solution to their dispute. In a nutshell, the process has a high quotient of procedural, substantive and psychological satisfaction.

Although most men who sign the Parental Responsibility Agreements adhere to the terms of the said agreement by promptly paying maintenance for their children, there are still some who fail to do so claiming lack of money.

Men's participation in formulating the rules at the commencement of the mediation process made them lower their resistance during negotiations. This is often evident when at the beginning of the session most men are aloof and difficult but as the mediation process proceeds, they relax and cooperate.

Most of the women who sought mediation services managed to present their cases in a conciliatory way as opposed to doing it adversarially in court and managed to obtain maintenance for their children and also preserve the relationships with their partners.

Mediating custody and maintenance disputes in Kisumu has proved more effective as most disputes have been resolved amicably, cheaply and more quickly than the custody and maintenance cases instituted in court that pend for a long time as both the women and the children continue to suffer.

This is reflected in Roberts (1977:35) when he states that:

‘Although vexatious litigation and plurality of legal systems have been criticized as inimicable to economic development, it is quite possible that in family law matters such as paternity and child maintenance, the threatened use of less moral agencies provides a basis for long range improvement by increasing the distribution of the fruits of economic development.’

The conciliatory nature of mediation has proven to be in both the best interests of children who are the subject of the dispute and for the women who are interested in preserving relationships despite seeking to safeguard their rights.

As noted by Haynes (1993:134):

‘It is best for your children. All the discussions are tempered by the fact that you are both parents of your children and you will each have a continuing responsibility and relationship as parents after you have ended the spouse relationship.’

I concur with the above statement that succinctly summarizes the advantage of mediation over litigation in resolving custody and maintenance disputes.

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List of statutes

Kenya

The Constitution of Kenya

The Children's Act chapter 586

International

African Charter on the Rights and Welfare of the Child

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

Convention on the Rights of the Child

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

APPENDIX I

REPUBLIC OF KENYA

In the children’s court at Kisumu: Children’s case No ... of ... 2005

In the matter of: Chistine (girl child)

PARENTAL RESPONSIBILITY AGREEMENT

Section 26(1) Children Act 2001

Date Recorded at the Registry

This is a Parental Responsibility Agreement regarding:

Name of Child:	Male/Female	Date of Birth	Date of 18 th Birthday
Christine	Female	27/2/2004	27/2/2022

between

The mother Name: Mother Christine
Address: P.O Box 4AB Kisumu

AND

The father Name: Father Christine
Address: P.O Box 32B Kisumu

We declare that:

1. We are the mother and father of the above named child and we agree that the child’s father shall have parental responsibility for the child. He will buy necessities like milk, clothing, health aspects on a daily basis when need be and thereafter cater for her education.
2. The father of the child shall remit a sum of Kenya one thousand shillings (Kshs.5,000) per month to Post Bank (K) Ltd account number 2334 by the 10th day of June 2005 and thereafter on the 10th day of every succeeding month until the child attains the age of 18 years.

Signed by MOTHER CHRISTINE FATHER CHRISTINE

(Mother) (Father)

Certificate: The following evidence of identity was produced by the person(s) signing above

Mother I.D No 2456.....

Father I.D No 123344.....

Signed in the presence of : **Witness:** _____

ADVOCATE, P.O BOX 1X5KISUMU

BEFORE ME

COMMISSIONER of OATHS/ MAGISTRATE