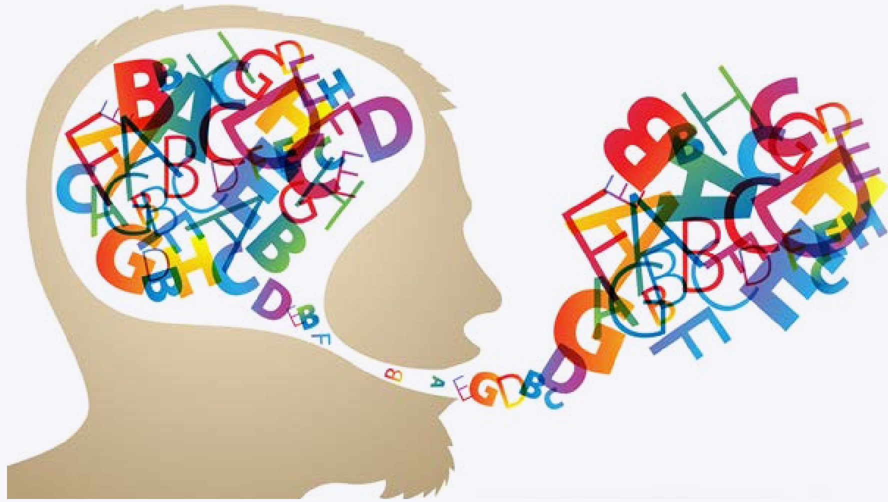
# Language Use in Mainland Tanzanian Courts: *The Legal Framework and Language Barrier Puzzle*



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**Abstract**

Tanzania is a heterogeneous society characterised by various languages which include Kiswahili, a widely spoken national language. The law provides mainly for English and Kiswahili as the languages of the court with former as the predominant language of the court record.[2]The context within which the two languages are used has potentials for language barrier in the course of court proceedings and difficulties to presiding judicial officers in recording proceedings and discrimination of those who do not understand the languages of the court.[3]This article examines the legal framework for language use in Mainland Tanzanian courts in relation to the inherent language barrier. It concludes that in apart from the presence of an inadequate regime that regulates interpretation of evidence in proceedings, there are other significant measures that need to be taken to address language barrier.

***Key words:*** Court Language, Interpretation and Language fair trial rights.

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2 Wanitzek, U. and Twaib, F., *The Presentation of Claims in Matrimonial Proceedings in Tanzania: A Problem of Language and Legal Culture*, AAP, 1996, Vol. 47, 115- 137.

3 Odhiambo, K., et al., *Court Interpreters View of Language Use in Subordinate Courts in Nyanza Province, Kenya,* Theory and Practice in Language Studies, 2013, Vol. 3, No. 6, pp. 910-918.



## 1. Introduction

Language is broadly defined as any organised means of conveying or communicating ideas especially by human speech, written characters or sign language.[4] In the legal context, language is a pervasive and dynamic element that has powerful influences on the legal process. Tanzania is a multilingual country consisting of multi-ethnic population. There are more than 25 tribes and approximately 120 different ethnic groups living in Tanzania, and over 120 vernaculars languages, which are the first languages to the people, particularly those residing in rural areas. However, the Bantu-speaking ones are the majority of all.[5] Language use in Tanzanian courts of law is a subject which is provided for and regulated by the law. The law provides for specific languages, namely, Kiswahili and English which are official languages of courts. There are provisions for interpreters for those who do not understand language used by the court. Courts are therefore multilingual in nature. It is against the above background of the use of various languages that this article examines the legal framework for the use of language in courts in Mainland Tanzania and the potential language barrier.

4 Namakula, C. S. Language and the Right to Fair Hearing in International Criminal Trials, Springer, London, 2014; Karton, J., *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony,* Vanderbilt Journal of Transnational Law, 2008, Vol. 41, No. 1, 1-54.

5 Legal and Human Rights Centre, Tanzania Human Rights Report, Dar es Salaam, 2012, p.9, www.humanrights.or.tz (Accessed 6/10/2013). Legal and Human Rights Centre, Tanzania Human Rights Reports 2009, Dar es Salaam, 2010, p. 20https://www.researchgate.net/publication/267840648_The_linguistic_situation_in_Tanzania/citation/download.Petzell, M. *The Linguistic Situation in Tanzania,* University of Gothenburg. 2012. Vol.106(Accessed 20/4/2020).

## 2. Plurality of Languages in Tanzania and the Concern for Fair Trial

The major tribes in Mainland Tanzania includes the Sukuma, Nyamwezi, Haya, Nyakyusa, Chagga, Gogo, Makonde, Hehe, Luguru, Ngoni, Fipa, Bena, Makua, Kaguru, Sambaa, Kurya and Yao.[6] In addition, there are many other small tribes with their own vernaculars languages spoken as first languages by members of such tribes, mostly in rural areas. Although each tribe has its own native language, they are generally united by Kiswahili, which is the national language in Tanzania.[7]

Despite the general understanding that most of such tribes are united by Kiswahili, the country is not free from people who lack, or have limited, knowledge or understanding of Kiswahili and English.[8] Such situation is not uncommon with elderly illiterate population living in the interior parts of rural Tanzania.[9] Not only that, but also there are other foreign languages that are increasingly being spoken by residents from foreign nations who have limited knowledge of Kiswahili, English or any of the local tribal languages. The latter is true with globalisation and movement of people from different nations across the globe. The influx of people of Chinese origin is a case in point that serves to illustrate the point. It means therefore that language barrier problems may potentially result in court proceedings which may compromise fair trial, and negatively affect disposition of cases.

6 *Ibid.*

7 Boshe, P., and Mbezi P, *The Value of Pro bono Services in Accessing Justice in Tanzania,* Open University Law Journal, 2013, Vol.4, No.2, pp. 146-157.

8 Kiswahili is the national language of Tanzania, which is widely spoken across the country.

9 Wanitzek and Twaib (n 1) 121.

Language barrier in court proceedings would call for the need to interpret proceedings from one language to Kiswahili and hence instant translation by the court from Kiswahili to English. This scenario stimulates a debate on the impact of language diversity in fair hearing in the trial process because the conduct of a trial in more than one language affects the proceedings especially the rights of litigants and accused persons. A multilingual trial raises multiple complexities relating to cross-lingual and cross-cultural communication. Complexities such as misunderstandings, failures in translation, cultural distance among trial participants affect courtroom communication, and the presentation and perception of the evidence, hence challenging the credibility of a trial. The impact of interpretation on proceedings also makes language diversity in the proceedings a fair trial concern.

With the existence of plurality of languages within one and the same country as shown above, one cannot therefore speak of knowledge of 'the law' because a certain law, mostly the African customary law, may be well known to a person or a group of the population, while the official state law remains largely unknown.[10] In effect, the general populace remains mostly ignorant of the law. Consequently, the claim that everybody is presumed to know the law would in the circumstances amount to nothing but a fallacy.[11]

10 *Ibid.*

11 *Ibid* 117- 121.

## 3. Language of the Law and the Court

Language of the law is the language in which the legal system functions which is composed mainly of the legislature and the judiciary.[12]Section 84 of the Interpretation of Laws Act[13]provides at the scope of the language of the law in Tanzania. It states as follow:

*84. Language of the Laws of Tanzania*

> *(1) The language of the laws of Tanzania shall be English or Kiswahili or both.*
>
> *(2) Where any written law is translated from one language into another and published in both languages, then in the case of conflict or doubt as to the meaning of any word or expression, the version of the language in which the law was enacted shall take precedence.*
>
> *(3) Where any written law is enacted in both languages and there occurs a conflict or doubt as to the meaning of any word or expression, the English version shall take precedence.*

Going by the above statutory provision, 'the language of the law' can in practical terms best be explained as follows. Firstly, it refers to the language in which bills and subsidiary legislation are drafted, and then debated and passed in parliament. And secondly, it refers to the language in which courts conduct and record proceedings, and write judgments.[14] In view of the above meaning, the language of the law and therefore the court is English or Kiswahili or both. However, the scope as to the use of the languages is stipulated under section 13 of the Magistrates' Courts Act[15]with reference to Primary Courts, District Courts and Resident Magistrates' Courts. The same is to the effect that the language of the Resident Magistrate Courts and District Courts shall be English or Kiswahili.[16] The relevant provision reads thus:

> *13(1) The language of Primary Courts shall be Kiswahili*
>
> *(2) The language of courts of a resident magistrate and of District Courts shall be either English or Kiswahili or such other language as the magistrate holding such court may direct save that is the exercise of appellate, revisional or confirmatory jurisdiction by a district court (in which case the record and judgment maybe in English or Kiswahili), the record and judgment of the court shall be in English.*

It is pertinent that the above sectional so provides room for the use of "other languages" in such courts as a presiding magistrate may deem it fit. This room departs from the language of the law provided for under section 84 of the Interpretation of Law Act which does not envisage the use of "such other language." Although there is no guideline in place or rules as to the use of "other language" as the court may deem fit, it would appear that the use of the phrase "other language' was meant to cover other languages that are equally spoken in Tanzanian communities and to address the fact that Tanzania is a multilingual society. This, however, would be possible in actual practice only where the magistrate, the parties and the witnesses share a common language other than Kiswahili and English, which may rarely be the case.[17] The provision is also clear that while the said Resident Magistrate Courts and District Courts may use either Kiswahili or English, the record and judgment of the said courts must be in English.[18]The exception is the District Court which in the exercise of its appellate, revisional or confirmatory jurisdiction, its record and judgment maybe in either English or Kiswahili.

Similarly, the language of the High Court is either English or Kiswahili as directed by the trial judge presiding in such court. However, records of judgments or decisions of courts must be in English, save for the High Court (Labour Division) which may use either English or Kiswahili or both as the case may be.[19] Consistent with the position of the law in respect of the Resident Magistrate Courts and District Courts, the language used in the Court of Appeal is also English or Kiswahili but the judgment, order or decision of the court must be in English.[20]As for Primary Court the official language is Kiswahili.[21]

12 Wanitzek and Twaib (n.1) 116. Rwezaura, B., *Constraining Factors to the Adoption of Kiswahili as a Language of the Law in Tanzania*, African Law Journal, 1994, Vol. 37, pp. 30-45.

13 Cap. 1 R.E 2002. The provision underlines the predominance of English over Kiswahili and other languages in Tanzania legal system.

14 *Ibid.* See also United Republic of Tanzania, The Law Reform Commission, Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, 2013.

15 [Cap. 20 R.E 2002].

16 Magistrates Courts Act [Cap. 20 R.E 2002], s. 13.

17 Wanitzek and Twaib (n 1) 121. Presently, there is no policy guideline to direct presiding district magistrate or resident magistrate to the use of 'other language' as the language of the court in court proceedings. Since language of the court record is English, the court will have to record the proceedings and write judgments in English regardless of the use of 'other language'.

18 Ibid.

19 Language of Court Rules, GN 115 of 1981. See also, Language of the Court Rules, GN. No. 307 of 1964 as amended in 1996. It is important to note that the Language of the Court Rules refers to the High Court only and not to subordinate Courts. The exception is the High Court (Labour Division). See rule 4(1) & (2) of the Labour Court Rules, 2007 (GN No. 106 of 2007).

20 Tanzania Court of Appeal Rules 2009, rule 5.

21 Magistrates Courts Act Cap. 20 R.E 2002, s. 13(1).

It follows also that the record and judgment of the Primary Courts must equally be in Kiswahili.

The law provides for the use of Kiswahili or English, but as a matter of practice in the higher courts, the inclination remains towards the use of English language.[22] As a result, presiding judicial officers ordinarily record proceedings in English even if the same are conducted in Kiswahili or in other language.[23] This seems to be the case because English remains the language of court records save for Primary Courts. The Law Reform Commission of Tanzania has had opportunity to address this practice of the courts conducting proceedings in Kiswahili and maintaining their records in English. In so doing, the commission appeared to defend the use of English as the language of record as opposed to Kiswahili. The commission said:

> *As a matter of policy, all courts permit parties to address the Court in Swahili or English or both interchangeably. The law simply requires records to be kept in English for obvious reasons. It is noted that the decisions of the High Court and Court of Appeal are being used as precedents in the courts in other commonwealth jurisdictions. English is the most widely used language globally and no one wants to be left behind. To insist that Swahili should be the only language in all aspects of judicial proceedings is hard to justify. Above all, it will aggravate the lack of command and proficiency of English language by our lawyers.*[24]*(Emphasis supplied).*

This practice however lacks clear guideline as to what the record should adhere to. To make things worse, the law is silent on how a presiding judicial officer should take and record court proceedings. The relevant law does not state that the record should indicate that the proceedings were conducted in Kiswahili and instantly and manually translated by the trial presiding judicial officer in English. The law does not also require the court to take and keep the original Kiswahili account that transpired in the court proceedings for reference in the event of a dispute or want of clarity. Since proceedings in the Primary Courts are conducted in Kiswahili and recorded in Kiswahili, the upper courts' practice of recording in English proceedings conducted in Kiswahili is non-existent in the Primary Courts. Reasons underlying the predominance of such practice have elsewhere been given. They include the fact that the medium of instruction for legal education in Tanzania is English and the law is drafted in English.[25]Among the Law Reform Commission recommendations'is that the language of the Court in the Court of Appeal and High Court should continue to be English language.[26]

The Commission underscored the observation made by the former Chief Justice of Tanzania, Mohamed Chande Othman who in one of his keynote address identified the use of English in Civil Procedure Code as opposed to Kiswahili as one of the pressing problems.[27] The Commission observed that:

> *The catalogue of weaknesses was recapitulated by Chief Justice Mohamed Othman Chande in his keynote address on the occasion of the Annual Conference of the Tanganyika Law Society, 17th February 2012 at Arusha as including, the adversarial process of justice, uneasy co-existence of procedures derived from Common Law, Customary Law and Islamic Law, and use of foreign language (English) which makes it the language of the law instead of Kiswahili the language of the people.*[28]

Nevertheless, the Commission in its final report, in the end, recommended that the Language of the Court Rules[29] should be amended. The proposed amendment was couched by the commission in the following manner.

> *Language of the Courts Rules, G.N. No. 307 of 1964*
>
> *(i) That the Language of the Court in the Court of Appeal must be English;*
>
> *(ii) That the Languages of the Courts in the High Court, Court of Resident Magistrate and District Court must be English or Kiswahili as the Judge or Magistrate holding such court shall direct, but the records of proceedings, orders, rulings or judgment must be in English; provided that when hearing appeals from Primary Courts, the Language of the Court must be Kiswahili but the record of proceedings, orders, rulings or judgments must be in English.*[30]

While the Commission glorified the continuing use of English as the language of courts record, it is unfortunate that it failed to see the risk and complexity involved in instant translation and recording of proceedings conducted in Kiswahili into English.[31]The practice allows only translated version of the proceedings to be on the record while the original Kiswahili version of the proceedings is not kept anywhere. In addition, there is no requirement on the part of a presiding judicial officer to make a clear record of the fact that the proceedings were conducted in Kiswahili and were instantly and manually translated and recorded by him in English in the course of the proceedings.

Much as the commission recommended the amendment of the Language of the Courts Rules, it did not find it important to recommend the regulation of the practice of instant translation and manual recording of proceedings from Kiswahili to English.

22 Wanitzek and Twaib (n 1) 118.
23 Order XVIII, Rule 9 of the Civil Procedure Code Cap. 33 R.E 2002 requires a judicial officer to direct a court stenographer to record the proceedings in short hand. Nonetheless, because of lack of qualified stenographers to record the proceedings in short hand, in practice the recording of the proceedings is often done by the judicial officers themselves.
24 United Republic of Tanzania, The Law Reform Commission, Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, 2013.
25 Wanitzek and Twaib (n.1) 117.
26 The Law Reform Commission is in favour of the practice of continuing using English as the language of courts.
27 *Ibid.* SeeOthman, M.C., A Keynote Address by Honourable Chief Justice of the United Republic of Tanzania on the occasion of the Annual Conference of the Tanganyika Law Society, Arusha, 17/02/2012,<https://www.scribd.com/document/112948089/CJ-Speech-AGM>(Accessed 01/012013).
28 *Ibid* 10.
29 G.N. No. 307 of 1964.
30 The Law Reform Commission, Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, 2013, p.128.
31 It is worthwhile to note that the report sought to provide for the gaps that exist in civil justice legislation and make recommendations on the ways to fill these gaps. The opinions of the stakeholders, consultants and the Commission were analysed before making recommendations on the best way to improve the civil justice system in Tanzania.

More importantly, the commission did not also see the significance of proposing for any improvement in the manner in which proceedings are taken and recorded in courts. There is no doubt that Mwakajinga had the above weaknesses in mind when he maintained thus:

> *While the Magistrates' Courts Act specifies that the record shall be in English in the District and Magistrates' Courts, but in Kiswahili in Primary Courts (section 12(1) (sic)), the law does not specify how court records can be obtained. The present practice is that the magistrate records the protocols in a case file in handwriting. Later these are typed when there is an appeal. At the trial the magistrate has to listen and write simultaneously. The magistrate has to be succinct, reasonably fast and accurate in writing, and be quick in sorting out relevant facts from the evidence. Finally, the magistrate reads the recorded evidence to a witness for corrections.*
>
> *This present method of protocolling is conducive to errors, omissions, or irregularities, which may amount to injustice. The proceedings should be taped-better yet even video-taped- so that in case of an error or omission, the tape will clarify the matter. Video taping has the advantage of showing the demeanor of the witnesses……. using such equipment would raise the costs of court proceedings.*[32]

According to the preceding quoatation it seems that it is difficult to reconcile the two laguages in the court proceedings simply because they impose an extra burden to the magistrate when they are writing the court records. The option which is suggested to address the anomaly is that the proceedings should be taped so that in case of an error or ommission the tape will calrify the matter. However, this method is expensive as it is likely to impose an extra burden.

## 4. Language of Law as a Special Variety of Language Use

The law refers to English language as among the language of the court, but the English used in law and in court is not the plain English language.[33] Rather, it is unique and peculiar legal English which is characterised by legal jargons, Latin and Greek words as well as legal terms peculiar only to law. Indeed, legal English, commonly known as legalese is the language that lawyers and judicial officers have been trained in and exposed to throughout their training process.

Since law aims at precision, legalese is seemingly used to avoid generalisation. It is used in courts by advocates for the purposes of argument and advancement of the interest of their clients. It is also used and reflected not only in court proceedings but also in judgments and other court records. There is no doubt that this language in itself poses a significant barrier to laypersons in their pursuit of accessing justice.

Apparently, even when Kiswahili is used, it also ends up being heavily mixed with such jargons and terms such that a layperson can hardly understand. It is instructive to inquire into the manner in which Kiswahili is used in court proceedings. This would have established the variety of Kiswahili that has emerged over the years as the language of the courts. To be sure, the variety of Kiswahili and in particular vocabularies and a conceptual apparatus used in court would not necessarily be the same as the ordinary Kiswahili spoken by ordinary people.[34] To the above extent, the language used in courts is the "lawyers' or rather "Lawyers Language".

The nature and character of the language of the law is clearly notable in legal writing which is characterised by unusually long sentences with numerous carefully phrased clauses and features that are intended to make it resistant to misinterpretation. It is a distinctive style of writing aimed at a highly specialised group that uses specialised vocabulary imbued with technical meaning.[35] The language of the law used in court rooms as well as during the drafting of legal documents is therefore difficult for the lay person to comprehend unless he gets legal assistance from a person knowledgeable in law.[36] Certainly, this is inimical to the interest of justice since representation by legal counsel is not free and so many people cannot afford it. This problem is captured by Evans and others when they observed as follow in relation to language of the law:

> *From the clients' point of view, resolving a legal problem without professional help would be extremely difficult. The first problem is the terminology used by lawyers and in the text books, which is both unfamiliar and intimidating to laypersons. **The way in which the lawyer communicates with his or her client may create a barrier between them**. It is therefore important for the lawyer to be aware that problem exists and also to be prepared to take steps to overcome it……It therefore makes sense to avoid the use of legal jargon and to discuss the problem in language the client understands.*[37]

It is not surprising that much concern have been raised against the language of law and language used in the court processes.[38] It is also for this reason, legal writing has often been criticised as an obtuse exercise that encourages the perception that lawyers speak in rhetoric that is without substance.[39] Explaining problem of legal language and the barrier it poses, Ashipu and Umukoro write:

> *The language of law is obscured because of its jargons, ambiguity and inaccuracy. The resultant problem is that those who are not in the legal profession, find it difficult to comprehend such a language variety. Hence, even in a situation*

32 Mwakajinga, A. N., *Court Administration and Doing Justice in Tanzania,* in Jones-Pauly, C., and Elbern, S.(eds), Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts, Kluwer Law International, London, 2002, pp.231and 233.

33 Both English and Kiswahili as languages of the court consist of legalese. Legalese refers to a jargon characteristically used by lawyers for legal writing which may not be easy for laypersons to understand. It is a special variety of language used by lawyers.

34 United Republic of Tanzania, Report of the Presidential Commission of Inquiry into Land Matters, Dar es Salaam, Ministry of Lands, Housing, and Urban Development, Government of United Republic of Tanzania1994, p. 199. See also n 146 whereby a list of some Kiswahili vocabularies commonly used in Primary Court proceedings is given.

35 Ashipu, K.B.C and Umukoro, G.M., *A Critique of the Language of Law in Selected Court Cases in Nigeria*, Mediterranean Journal of Social Sciences, 2014, Vol 5 No 8, pp. 622-626.

36 Ibid

37 Evans, J., and Perk, L. (ed) Legal Skills and System, Old Bailey Press, London, 1997, pp.305-306

38 Different calls and concerns have been made by several human rights activists for the need for courts to use plain English language and the language of the majority of the population.

39 Ashipu and Umukoro (n 38).

> *where the information that concerns them is vital, it is neglected due to their inability to understand the language. To speak of legal English as communicating meaning is in itself misleading. Of all the varieties of language, it is perhaps the least communicative in that it is designed not to enlighten the users of language at large.*[40]

One can imagine the hardship the accused and litigants go through simply because they do not understand English language. The hardship is worsened by the fact that the legal English as shown above differs from the ordinary language in terms of vocabulary, syntax, semantic and morphology.[41] It comprises of legal jargons derived from colonial legacy constituting other foreign languages. Example the following Latin words used in law: *ab initio* (from the beginning); *ab extra* (from outside); *animus possidendi* (intention to posess); *actus reus* (guilty act); and *obiter dicta* (by the way).

No wonder this situation translates to hardship to unrepresented layperson and to an increased workload to judicial officers entrusted with dispensation of justice and hence delays in disposal of cases. It is in this context that Kwikima, Ag. J. (as he then was) in the case of *Simon Chatanda v. Abdul Kisoma*[42] advised as thus:

> *Where the parties to a suit are laymen conducting their own cases, the trial court should scrutinise the pleadings before admitting them and in general furnish any necessary guidance. In that way people would feel secure to go to court. But not where they will be bombarded with Latin and other jargons they have never heard of and at the end of the day pay for it.* [43]

Consistent with the above authority as per Kwikima Ag J (as he then was), it is according to *Manase Singano and two others v Director of Vicfish Ltd*,[44] the duty of the court to ensure that parties in both civil and criminal proceedings understand the language used in those proceedings. In that case, the appellants contended among other things that the advocate for the respondent always spoke English despite their protesting against it. Mrosso J observed that

> *I wish to sound a caution that a court has to ensure that all parties in a case are given all available facilities to follow and participate fully in the proceedings. I need hardly remind the trial magistrate that although the district court record must be in English, the proceedings may be in English or Kiswahili as convenient, considering the parties in court. Therefore, the trial court should have directed.....the learned advocate to address it in Kiswahili (if he in fact did not do so) so that the appellants could understand what he was telling the court in his submissions.*

Likewise, in compliance with the procedural rule, the general rule appears to be that where parties to a case are represented, courts demand greater diligence in compliance with

40 *Ibid* 623.
41 *Ibid*.
42 *Chatanda v. Abdul Kisoma* [1973] LRT 11.

43 The case was also discussed in Peter, C. M., 'The Contribution of the Court of Appeal of Tanzania in the Maintenance and Safeguard of Rule of Law and Human Rights' A Paper Presented in the 25th Anniversary of Tanzania Court of Appeal, Dar es Salaam, 2004, p. 13.
44 Civil Appeal No. 28 of 1999, High Court, Mwanza (2000) (Unreported).



the rules of procedure than those parties who are not represented. The court may in those cases, overlook the procedural errors, as was pointed out by Mkwawa J in *Ramadhani Nyoni v M/S Haule & Co.Advocates.*[45]

At this juncture, it is pertinent to note that the provisions of law that stipulate for language of law and use in courts do not go as far as imposing a duty to the court to translate pleadings to the litigants. It does not also describe the specificity of the language of law. The omission is perhaps notwithstanding the language fair trial rights that are inherent in article 13 (6) (a) of the said Constitution of United Republic of Tanzania discussed herein below. The only explicit and relevant provision in this context is perhaps section 135(a) (i) and (ii) of the Criminal Procedure Act which forestalls the use of legalese in a charge sheet. However, this provision is only relevant in criminal proceedings. As far as the provision relates to statement of offence, it insists on describing "the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence."[46] In relation to particulars of the offence, the provision states that the same must be "set out in ordinary language, in which the use of technical terms shall not be necessary."

The dominance in the use of English language in law and courts is not an accident. Rather, it is a retrospective reflection of the British colonial rule which replaced the German colonial rule immediately after the WWI.[47]The British colonial rule lasted for many years from 1922 to 1961.[48] It is responsible for introducing the English common law system in Mainland Tanzania. To facilitate the communication with people, Kiswahili was then used at the level of Native administration and courts. During the process of communication, the chiefs and clerks took the role to interpret.[49] It is from such background that English use in courts traced its origin in Mainland Tanzania.

## 5. Legal Aspects of Language Use and Language Fair Trial Rights in Court Proceedings

Aspects of language use and language fair trial rights in court trace their basis in article 13 of the Constitution of the United Republic of Tanzania and in particular sub-article 13 (6) (a) of the said Constitution. The significance of this article is that it guarantees right to a fair hearing/trial to any person whose rights and duties are being determined by the court. This right necessarily envisages language fair trial rights since the determination of the rights and duties of such a person involves a hearing; and hence language use and as communication in the administration of justice.[50]Arguably, language fair trial rights are priority rights situated within the minimum guarantees of trial fairness hence clarifying the position of language rights in court proceedings. It is arguable therefore that in so far as the language fair trial rights are concerned, the court has an obligation to fully respect these rights in the process of ensuring justice.[51] This duty is both

45 [1996] TLR 71 at p. 73.
46 Criminal Procedure Act [Cap. 20 R.E 2002], s. 135(a) (ii).
47 It was vide article 22 of the Covenant of the League of Nations that the British took over Tanganyika.

48 Rashid, N., *British Colonialism in East-Africa During Nineteenth Century*, IOSR Journal Of Humanities And Social Science, 2014, Vol. 19, No. 3, pp. 08-11. See also the Tanganyika Order in Council in 1920.
49 *Ibid*.
50 Namakula (n 3) 4.
51 *Ibid*.

negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights.[52]Language is therefore a pertinent subject for consideration in the reform discourse of civil and criminal justice system of any jurisdiction such as Mainland Tanzania. A commitment to guarantee trial fairness in court proceedings should entail commitment to address the language question.

For any fair trial, among other features, the language used needs to be well understood by all litigants appearing before the court. If the language used is understood only by one party and not understood by another party in the court trial, this leads to inequality before the court due to miscomprehension of language and thus the trial held will be unfair trial and unconstitutional. As stipulated under the cardinal principle of justice embodied in the Latin maxim: *"Audi Altera Parte*, *Audiatur Et Altera"* meaning that "no man should be condemned unheard or without having an opportunity of being heard.

Similarly, "*Qui Aliquid Statuerit Parte Inaudita Altera, Aequum Licet Dixerit, Haud Aequum Fecerit",* means that "He who shall decide anything without the other side having been heard," although he may have said what is right, will not have done what is right." [53]As stated in the case of *Alex John v R.*,[54] the state has enacted many laws containing provisions giving effect to this clear dictate of the Constitution. One such law is the Criminal Procedure Act [Cap. 20 R.E. 2002]. The Act contains many provisions which guarantee a full hearing or a fair trial to an accused person.

There is absolutely no doubt that language plays an important role for any court trial. A fair trial is a central pillar and a cardinal requirement of the rule of law in any justice system. It requires absence of abuse of process, inefficacious proceedings and in absence of bringing administration of justice into disrepute. As a fundamental legal principle in any civil or criminal trial, there is a need to have clear and unambiguous language use before the court.[55]

In *Mpemba Mponeja v Republic,*[56] the appellant was charged and convicted of murder contrary to section 196 of the Penal Code. He was sentenced to the mandatory sentence of death by hanging. He was aggrieved by the conviction and sentence. He therefore appealed against the conviction and sentence raising a number of grounds of appeal. One of such grounds of appeal which was also not opposed by the Republic was that the appellant was not given a fair hearing for lack of being provided with a court interpreter as provided for under section 211 (1) of the Criminal Procedure Act [Cap 20 R.E 2002]. The Court of Appeal examined the record of proceedings of the trial High Court. It was satisfied that the appellant was not conversant with Kiswahili but Kisukuma. Yet, the appellant was not provided with an interpreter during the trial.

52 *Ibid*. See also *Abdallah Mponzi v Daudi Mlwilo* Civil Revision No. 1 of 1999, Court of Appeal of Tanzania at Mbeya where the court said "…the fact that a litigant is a layman and therefore likely not to be conversant with technical legal issues before the court has never been regarded by the court as constituting a warrant for depriving the litigant his right to be heard. The right is so fundamental that deprivation of it makes the proceedings concerned incurably defective."

53 The above principle was adopted in the case of *The Attorney General v. Lesinoi Ndeinai and Joseph Saleyo Laizer and Two Others* Court of Appeal of Tanzania at Arusha (Nyalali, C.J., Mwakasendo and Kisanga, JJ.A) Criminal Appeal 52 and 53 of 1979.

54 Criminal Appeal No. 129 of 2006.

55 Wanitzek and Twaib (n 1), Namakula (n 3), Mwakajinga (n 31) 230, 232, and 233.

56 Criminal Appeal No. 256 of 2009, Court of Appeal of Tanzania, Mwanza (10/09/2012) (*Unreported*).



The Court of Appeal was settled that the omission constituted a fundamental breach of the appellant's rights to understand and follow up proceedings of the case against him. At page 5 of its typed judgment, the Court of Appeal observed and held that:

> *We start by considering the issue of denial of a fair hearing. This claim originates from claims that the appellant, who did not understand Kiswahili or could not speak it well, was at times during the trial, not provided with an interpreter from Kisukuma to Kiswahili and vice versa. We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellant's rights to understand and follow up proceedings of the case against him. It was a fatal omission.*

Consequently, the Court of Appeal quashed the conviction and set aside the sentence imposed by the High Court. The appellant was therefore set free. It is clear that the Court of Appeal did not in this case seriously consider whether the issue of failure to provide an interpreter was raised in the trial court. However, it is evident from the above quotation that the court only considered that the failure to provide the interpreter had prejudiced the appellant.

Similar omission occurred in the case of *Moses Mayanja @ Msoke v Republic,*[57] in which the appellant was charged with and convicted of the offence of armed robbery and sentenced to thirty years imprisonment by the District Court of Mwanza. The appellant's first appeal to the High Court against the conviction and sentence was dismissed. The appellant was aggrieved by the decision of the High Court and decided to lodge a second appeal to the Court of Appeal. The appellant's memorandum of appeal listed five grounds of complaint against the judgment of the High Court. The Court of Appeal found the second ground of appeal compelling. The ground had it that the appellant was not given a fair trial as two purported eyewitnesses testified in a language he did not understand and without an interpreter worth compelling. As such, he could not effectively cross-examine the eyewitnesses in his bid to establish his innocence.

Upon perusal of the trial court's record, the Court of Appeal discerned the fact that the appellant, who was a Ugandan by nationality, did not understand the Kiswahili language which was used by witnesses against him. The court observed from the record that such fact was known to the prosecutors as well as the trial magistrate, even before the trial started. The Court of Appeal was also clear that court interpreter had always been provided at the trial in the District Court at the instance of the public prosecutors. However, when the two witnesses were testifying, the service of the interpreter was withdrawn for undisclosed reasons. The Court of Appeal found that the omission was highly irregular and fundamentally flawed the trial of the appellant. The Court of Appeal went further to hold that the appellant was not given a fair trial or fair hearing. It therefore expunged the relevant evidence that was given without interpretation. In so doing, it further held that there was no cogent evidence left to ground

57 Criminal Appeal No. 56 of 2009, Court of Appeal Tanzania, Mwanza (*Unreported*).

the conviction. Consequently, the failure to provide interpretation led to the quashing of the trial proceedings and hence acquittal of the appellant.

In the case of *Musa Mwaikunde v Republic,*[58] the conviction against the appellant was quashed and sentence imposed against him was set aside. The court was satisfied that the charge sheet was defective as the particulars of the offence were not sufficient. In other words, the manner in which the charge sheet was drafted, it was clear that the prosecutor who drafted it suffered from language barrier. Apparently, the prosecutor could not properly craft statement of particulars of the offence that is consistent with the facts and the ingredients of the offence. The consequence was that the accused person was taken not to have known the nature of the case facing him and hence there was no fair trial. In relation to such failure, the court in this case stated that:

> *It is interesting to note here that in the above charge sheet the particular of statement of offence did not allege anything on threatening which is the catchword in the paragraph.*
>
> *The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing this in mind, the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element.....In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him.*

In addition, in the case of *Mawazo Makiwa v. Republic*[59] which was before Twaib, J,[60] the appellant was appealing against the decision and orders of Kilosa District Court at Kilosa, which convicted him of rape and sentenced him to 30 years imprisonment. After the perusal of the court proceedings and hearing both the appellant and the prosecution side, the appellant was discharged by the court and was ordered to be released from prison because the prosecution failed to state in the particulars of the offence, that; firstly, the accused's carnal knowledge of the girl was unlawful; and secondly, that the girl was below the age of 18 years. Therefore, due to the above two crucial omissions by the prosecution, the court stated that the crucial omissions had been committed by the prosecution and rendered the appellant's plea equivocal and, therefore, his conviction unsustainable. Subsequently, the court discharged the appellant.[61]

The case of *Atilio Kitine v Republic* provides instances where hearing impairment of the accused person was accidently detected by the court as the accused person/appellant who was thought to have jumped bail was in fact within the court premises waiting for his case to be called for preliminary hearing.[62] It became clear that he did not hear when his case was called because he had serious hearing impairment. Therefore, the warrant of arrest that was issued against him had to be cancelled although no arrangement was made by the court to overcome the inherent language barrier on the accused/appellant who had serious hearing impairment. When this case came for hearing before the trial District Court, and PW.1 started to give his evidence, the trial magistrate suddenly observed that the accused/appellant had hearing impairment. Apparently, there was nothing that was put on the record suggesting that the accused/appellant had hearing impairment as earlier detected. It was then that the trial court abruptly called the accused/appellant's brother who was sworn in to serve as an interpreter of the accused/ appellant.[63] It was in the appeal to the High Court by the accused/

Consequently, the learned judge had this to say:

> *It is not clear how the appellant managed to understand and follow up the court proceedings from the date when the charge was read over and explained to him on 27/7/2006 and during preliminary hearing. Secondly it is not clear how the trial Magistrate discovered that Abas Kitine, the brother of the appellant was an expert in deaf-mute communication language. In addition the record of proceedings is not clear on how the interpretation was conducted especially on the defence level.*[64]

In this case, the trial judge allowed the appeal, quashed the conviction against the appellant and set aside the sentence of thirty (30) years imprisonment imposed against him.

Defects signifying language barrier are also notable in other court documents filed in court by or on behalf of litigants or accused person/persons. It occasionally happens that a quick look at a document makes one to conclude that whoever prepared it has limited understanding and knowledge of English language. It is always obvious in such documents that the drafter was struggling with language barrier and hence difficulties in proper and clear presentation of whatever he wanted to put across. With the recent technological advancement in communication, such instances are always exposed through social media. One of such instances can be drawn from a letter prepared and filed in Kilwa District Court by one advocate. The letter was a subject of debate in many social media. The letter in part reads as thus:

58 *Musa Mwaikunde v R* [2006] TLR 387. See also *Buhimila Mapembe v Republic* [1988] TLR174; *Munisi Marko Nkya v R* [1989] TLR 59.

59 *Mawazo Makiwa v. Republic,* Criminal Appeal No. 45 of 2013, High Court, Dar es Salaam District Registry.

60 Twaib. J.

61 Judgment was delivered at Dar es Salaam on 27th October 2014.

62 *Atilio Kitine v Republic* DC Criminal Appeal No. 9 of 2012, High Court, Iringa (unreported).

63 It would appear from the record that the prosecution side was not asked whether they object the accused's brother to serve as the interpreter. This is not notwithstanding that the accused's brother had obvious interest to serve in the case in which the accused was facing a charge of rape. See the case of *Cuscani v United Kingdom* (2003) 36 E.H.R.R 2 in which the accused's brother was present in court proceedings and the court was assured by the accused's counsel that in the event of any language barrier to the accused whose English knowledge was limited, the accused's brother would be able to deal with the situation. On appeal however the appellate court found that there was violation of the appellant/accused's rights to fair hearing. This case is discussed under subtitle 3.4.3 of chapter three of this study.

64 *Ibid* p. 4.

HON. DISTRICT COURT MAGISTRATE 1/C

KILWA DISTRICT COURT

P.O.BOX……..

KILWA

**REF: THE NEED TO JOIN IN CRIMINAL CASE No. 4 of 2012**

Reference is made to the above subject.

I am an advocate of the High Court Surbordinate. I am here by pray to join tthe case above to represent accuser an the suit is in the Kilwa District Court, the parties to the case are:

Republic

Verses

AHMADI ALLY RUWAMBO……….Accused

Due to the instructions of my client who is accuser to the suit, therefore trough this letter let the court accept and be aware that the accuser will be presented by Mnahi MNAHI MUHEKA NILUNBA & CO. ADVOCATES in the application against the Respondent.

Yours faithfully

(Sgn and stamped)

The foregoing is a testimony of the fact that the language barrier is also a challenge to some lawyers.

05/02/2013

## 6. Language Aspects of Taking and Recording of Evidence

In any court trial, evidence is substantial for one to prove his case. One cannot give solid ground without evidence. A strong argument is considered with sufficient evidence to prove the case. Therefore, evidence is paramount in all cases before the court of law. Again, in this matter it is paramount for language to be considered in the production of evidence as language is a communication means through which the evidence is given.

Whatever evidence produced, it needs to be understood by not only the parties in court but also the court so that they can present well their case in court and the court can at the end of the day determine the case based on the evidence on the record.

It goes without saying that the giving of evidence involves giving an accused person or a litigant a chance to call his witness to testify and if need be produce documents. The giving of such evidence is only possible if a witness understands the language of the court or is facilitated with a court interpreter who would interpret his evidence from the language he is using to give his evidence to Kiswahili or English.[65] It is settled law that refusal to give a party chance to call his witness to testify amounts to a refusal to a right to be heard.[66] There is no doubt that failure of a party or his witness to give evidence simply because of language barrier is tantamount to denying him his right to be heard and in particular denying him his language fair trial rights.[67] The same position would apply if a party is denied opportunity to cross-examine a witness of his opponent because of language barrier as afore stated.

In so far as criminal proceedings are concerned, the law clearly provides guidance as to how the evidence given must be taken and recorded by the Resident Magistrates' Courts and District Courts. The law goes as far as providing guidance as to the language to be used and the style of taking and recording the evidence. As far as Resident Magistrates' Courts and District Courts are concerned, the relevant provision reads thus:

> *210.-(1) In trials, other than trials under section 213, by or before, a magistrate, the evidence of the witnesses shall be recorded in the recording in the following manner*
>
> *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by him and shall form part of the record;*
>
> *(b) the evidence shall not ordinarily be taken down in the form of question and answer, but subject to subsection (2), in the form of a narrative.*
>
> *(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.*
>
> *(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.*[68]

On the contrary, the relevant provision for the Primary Court with regard to the requirement of reading over the evidence to accused, complainant and witness reads as follow:

> *Rule 35 (6) the magistrate shall record the substance of the evidence of the complainant, the accused person and the witness and after each of them has given evidence shall read his evidence over to him and record any amendment or corrections. The magistrate shall certify at the foot of such evidence, that he has complied with this requirement.*[69]

65 As regards to witnesses with speech and/or hearing impairment, section 128(1) of the Evidence Act Cap.6 R.E 2002 provides the manner in which the evidence of such dumb witnesses can be adduced. The provision reads: "A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written, and the signs made, in open court."

66 *Andrea Salimo v Ernest Msanjila*, Civil Appeal No. 1 of 2007, High Court, Dodoma (*Unreported*).

67 This is also the case if such a party or his witness does not speak any of the languages (English or Kiswahili) of the court and interpretation facilities are not provided. This is so if it was clear at the trial that the party or his witness was ignorant of the said languages.

68 Criminal Procedure Act Cap. 20 R.E 2002, s. 210.

69 Primary Courts Criminal Procedure Code Cap. 11 R.E 2002, rule 35(6).

Going by the provision of section 210 of the Criminal Procedure Act, it is clear that the evidence given in Resident Magistrates' Courts and District Courts must be taken and recorded in writing in narrative form in the language of the court. It must also be signed by the presiding judicial officer so that it forms part of the record of the court. As the evidence taken forms part of the record of the court, it is pertinent that the language in which the evidence is taken and recorded must be the language of court record which is presently English. A witness is entitled to have his evidence read over to him if upon being informed of this right by the court he asks the court to read his evidence.[70]

When his evidence is read over to him, he may comment on his recorded evidence. The comments given by the witness must be recorded by the presiding judicial officer.[71] One can deduce from the above provisions that the Primary Court magistrate is obliged to read over the evidence recorded to the witness whereas the resident or district magistrate is only obliged to inform the witness of his right to have the evidence read over to him. In any case, the provisions are excellent safeguard seeking to ensure that the translation and recording of the evidence in English or Kiswahili in the Primary Court did not lead to loss of evidence and distortion of witness testimonies.

In practice, however, witnesses are rarely informed of this right. Of significance is the insistence on the taking of the evidence in the language of the court, and the presence and hearing of the presiding judicial officer even when he directs the evidence to be taken under his direction or superintendent.[72]

70 See Criminal Procedure Act [Cap. 20 R.E 2002], s. 210 (3).
71 *Ibid.*
72 Criminal Procedure Act Cap. 11 R.E 2002, s. 210.

Despite the niceties of the provision, it does not provide guidance as to instant translation and recording of evidence given in court proceedings in Kiswahili.[73] The provision also caters only for criminal proceedings.[74] It is interesting to note that there is no similar provision applicable to the High Court as to recording of evidence adduced by a witness and reading the evidence over to the witness.

In order for a witness to give a proper testimony, he has to do so through the language known to him or her. It means that if he does not understand the language of the court, there must be a facility such as an interpreter to cater for the need. One of the basic tenets of due process or a fair trial is that evidence in a criminal trial ought to be tendered in the presence and hearing of an accused person unless the latter for any reason, decides to absent himself.[75] However, this requirement is not fulfilled by the mere physical presence of the accused in the court room. This presence must be accompanied by his actual full participation in the proceedings. Thus, this right would be illusive if the proceedings are conducted in a language not fully understood by the accused.

## 7. Language Use and Interpretation in Court Proceedings

The law envisages language barrier in court proceedings. It is in such regard that provisions were enacted that seek to address the problem. The problem might arise from a party's or his witness's ignorance or limited understanding of language used in court proceedings or language in which the evidence is given. This could arise when

73 Ibid.
74 The study did not find any similar provision in any other legislation that is applicable in civil proceedings.
75 Criminal Procedure Act Cap. 20 R.E 2002, s. 196.



a party or his witness does not understand the language of the court or the language in which the evidence is given in court proceedings. It may also occur when a party or his witness cannot give evidence in the language of the court but in the language that he understands. Such a party cannot cross-examine his opponent or his opponent's witnesses by using the language of the court but the language he understands. In the context of Mainland Tanzania, such a party or his witness might be ignorant of or having limited understanding of the language used in the court proceedings, which is Kiswahili or English or both. The obvious implication is that the failure to cross-examine a witness on an important piece of evidence as a general rule renders such evidence to be taken as the truth.

In a bid to resolve the problem of language barrier once it arises in the proceedings, the law has in place provisions that cater for interpretation of the evidence given in the language not understood by the accused. One of such provisions is found in section 30 of the Magistrates' Courts' Act which stipulates that:[76]

> *30 (1) Where any evidence is given in a language not understood by the accused, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) Before entering upon the duties of his office, an interpreter shall take oath or be affirmed, as the case may be in the prescribed form:*
>
> *Provided that a regular court interpreter who has taken oath or has been affirmed generally shall not require to take oath or be affirmed in each proceeding.*

76 Cap. 11 R.E. 2002. See also section 4(b) of the Oaths (Judicial Proceedings), and Statutory Declarations Act [Cap.34 R.E 2002] which provides for the requirement for an interpreter to take an oath.

The other relevant provision is found under section 211 of the Criminal Procedure Act[77] states that:

> *(1) Whenever, any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) If he is represented by an advocate and the evidence is given in a language other than the language of the court, and not understood by the advocate, it shall be interpreted to such advocate in the language of the court.*
>
> *(3) When documents are produced for the purpose of formal proof it shall be in the discretion of the court to interpret as much of them as appears necessary.*

In Primary Courts, the provision of rule 30 of the Criminal Procedure Code is applicable for interpretation of evidence. The provision reads as follow.

> *30.-(1) where any evidence is given in a language not understood by the accused, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) Before entering upon the duties of his office, an interpreter shall take oath or be affirmed, as the case may be:*

77 *Ibid.*

*Provided that a regular court interpreter who has taken oath or has been affirmed generally shall not require to take oath or be affirmed in each proceeding.*

The above provisions set a regime for interpretation of evidence in criminal proceedings. Accordingly, when evidence is given in a language not understood by the accused person, the evidence must be interpreted for him in open court in a language understood by him.[78] The evidence must, however, be given in the presence of the accused or his advocate where applicable. The evidence will also be interpreted to the accused's advocate if it is given in a language other than the language of the court. The interpreter must take oath or be affirmed before he discharges his responsibilities. However, if he is a regular court interpreter, there is no requirement for him to take an oath or being affirmed. The requirement as to the court interpreter taking oath or being affirmed is complemented by section 4(b) of the Oaths (Judicial Proceedings) and Statutory Declarations Act [Cap. 34 R.E 2002]. The provision reads:

*Subject to any provision to the contrary contained in any law, an oath shall be made by-*

*(a)……………………..*

*(b) any person acting as interpreter of questions put and evidences given by a person being examined by or giving evidence before a court*

Notably, Part I of the First Schedule and Part I of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967, have provided a format of an oath to be made by an interpreter in the courts other than the Primary Courts in the following words:

*I swear that I shall well and truly interpret and make explanation to the court and witnesses and others in the languages of …..... and …..... of all such matters and things as shall be required of me, [as interpreter appointed to the court of .........................] to the best of my skill and undertaking.*[79]

As shown earlier, there are similar provisions for interpretation in Primary Court proceedings.[80]According to Part II of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967 an interpreter in the Primary Court must repeat the following:

*"Mimi nathibitisha kwa kiapo kwamba nitatafsiri katika lugha ya .............. na ........... kwa ukweli na usahihi kwa kadri niwezavyo na nitatoa maelezo yanayohitajiwa kwa mahakama hii, kwa watu wadaawa na kwa mashahidi.".*

One can clearly see the emphasis placed by the law for an interpreter to take an oath or affirmation before discharging his responsibilities in court. It is pertinent that the purpose of such an oath is to give assurance to the witness whose evidence is being interpreted to the court that the interpretation is faithful and not misleading. The obvious question is on the legal effect of the omission by the court to require an interpreter to take the interpreter's oath or affirmation.[81]

Apart from the fact that Kiswahili is used in the Primary Courts and the affirmations/oaths for interpreters are made in Kiswahili, the other difference is that the regime for primary court interpreters covers both civil and criminal proceedings. This is particularly so because the provisions of section 211 of the Criminal Procedure Act and section 30 of the Magistrates Courts Act are only applicable in criminal proceedings in Resident Magistrates' Courts and District Courts. The study did not find a corresponding provision that applies in civil proceedings in such courts. The exception could be in probate and administration matters, in which there is the Probate and Administration Rules [Cap.352 R.E 2002] that governs translation of a document which ought to be filed with an application. The relevant rule reads as follow:

*Where any document required under these Rules to be filed with an application or otherwise produced to the court is in any language other than English there shall be attached to such document a translation thereof in English made by a person competent to translate the same and verified by such person by affidavit in the form prescribed in Form 2 the First Schedule.*[82]

However, the above provision governs translation of document, which is in any language other than English which is the language of court record. It is strange that Kiswahili is omitted while it is as earlier shown language of the court and widely understood by people in Tanzania. Unlike the other provisions on interpretation and interpreters, rule 8 of the Probate and Administration Rules provides an indication as to the qualification of the translator which includes his experience in translating documents from the original language into English. According to such rule such translator must have competence to translate the document into English from another language. Having translated the document, the translator must verify by an affidavit that the translation is true and faithful. The format of the affidavit to be sworn or affirmed is prescribed in Form 2 in the First Schedule to the Probate and Administration Act [Cap. 352 R.E 2002]. The form is to the following effect.

78 It would appear that this is also applicable where a witness with speech and/or hearing impairment gives evidence in accordance with section 128(1) of the Evidence Act [Cap. 6 R.E 2002]. As the evidence may in this respect be given by sign language, an interpreter would necessarily be needed.

79 However, pursuant to paragraph 2 of Part I of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967 'any other interpreter shall make oath or affirmation in accordance with paragraph 1, except that he shall omit the words "as interpreter appointed to the court of......"'. It appears that the omission of the said phrase is applicable to interpreter appointed to discharge interpretation duties although he is not a regular court interpreter appointed as such. This implies that the courts must have regular and duly appointed interpreters that can be called upon to discharge such duties as may be necessary. Nevertheless, in practice the courts do not maintain a register of regular and duly appointed court interpreters.

80 Rule 6 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules Cap. 11 R.E. 2002 provides for interpretation where a party to a civil matter is not conversant with the language in which proceedings are being conducted. The proceedings have to be interpreted to him in open court in a language understood by him. What such party says must also be interpreted. The same is the case where the evidence is given in a language other than the language in which the proceedings are being conducted. The rules require an interpreter to be affirmed save where he is a regular interpreter who in such situation will need not to be affirmed in each proceeding. As for criminal proceedings see rule 30 of the Primary Court Criminal Procedure Code [Cap.11 R.E. 2002] which enacts similar provisions as the foregoing. Rule 19 of the Labour Court Rules, 2007 (GN No. 106 of 2007) provides for the requirements of taking oath or affirmation before an interpretor or translator interpretes or tranlsates in court or elsewhere in relation to court work and the exemption provided if such person is admitted and enrolled as a sworn interpreter or translator of any division of the High Court in which case he shall be deemed as such for interpreting or translating for the High Court (Labour Division).

81 See for instance *Interbest Investment Company Limited v Qingdao Foreign Economic Relations and Trade Company* Civil Appeal No. 95 of 2001, Court of Appeal, Dar es Salaam (unreported).

82 The first exception is reflected in rule 8 of the Probate and Administration Rules [Cap 352. R.E. 2002]. The case of *Re Aloysius Benedicto Rutaihwa* Probate and Administration Cause No. 1 of 2013, High Court, Bukoba (*Unreported*) is worth noting. In this case, a will written in English and *Kihaya* was used in evidence although it was admittedly translated by undisclosed person without following the requirement of rule 8 of Probate and Administration Rules [Cap. 352 R.E 2002]. The court did not seem to have addressed itself to the said rule. Had it done so, perhaps it would have rejected the translation. No doubt that the admission of the said will along with its translation occasioned failure of justice to those who were objecting the will. The other exception could be section 4 (b) of the Oaths (Judicial Proceedings) and Statutory Declarations Act which in practice seems to be applied in all courts in both civil and criminal proceedings.

***"FORM 2***

***AFFIDAVIT VERIFYING TRANSLATION OF A DOCUMENT***

***(Rule 8)***

***(Title)***

*I, C.D. of ............................................................................................ make oath and say as follows–*

*1. That I am well acquainted with (Kiswahili) and English languages and have had experience in translation of documents from (Kiswahili) into English (state qualifications, if any)…………………..........*

*2. That the paper writing marked "A" is a true and faithful translation of ........ (descriptions of the document translated) marked B which is in (Kiswahili) language.*

*Sworn, etc."*

It is pertinent to note that the translator is required to state his qualification relevant to translation involving English and the other language in which the document was written. This is glaringly wanting in the other provisions that cater for interpretation of evidence given in language not understood by the accused. This is particularly so as there is no stand-alone legislation that regulates the conducts of interpreters and translators.[83]

As to translation of a document, section 173(3) of the Evidence Act is relevant.[84] It enables the court to cause a document to be translated by a translator. In so doing, the court may direct the translator to keep the contents secret until such time when the document is given in evidence. If the translator disobeys such direction he will be held to have committed an offence under section 96 of the Penal Code [Cap. 16 R.E 2002] in relation to abuse of office whether or not he holds office in the public service. As a whole the law relating to translation and interpretation is not elaborate. Among other things, and in addition to the weaknesses pointed out above, it does not provide the types of interpretation required for the interpretation service in court. The law does not indicate whether the interpretation ought to be consecutive or simultaneous or perhaps both. The law does not explain how many interpreters are required in particular sessions and their tenure of service whether they are employed by the courts or are freelance interpreters. In this regard, the law does not state if there is specific guideline and any lists of the registered interpreters to provide interpretation service in court.

Nevertheless, the law also does not provide any kind of mechanism for monitoring and evaluation for the quality of interpretation service provided in courts. Most importantly, the law on court interpretation is completely silent as to the requirement of impartiality on the part of court interpreter and the right of a litigant or an accused to refuse the interpreter. There is yet another anomaly. The provisions as to interpretation of evidence given in the language which is not understood by an accused person only relate to the evidence given in the trial which is just a part of the entire court proceedings. Clearly, the relevant provisions do not provide for interpretation of the other part of the proceedings. Therefore, the existing law is not comprehensive. The following figure summarises the process of interpretation and translation of evidence from source language to the target language during court proceedings and the roles played by a court interpreter and a presiding judicial officer in the interpretation process.

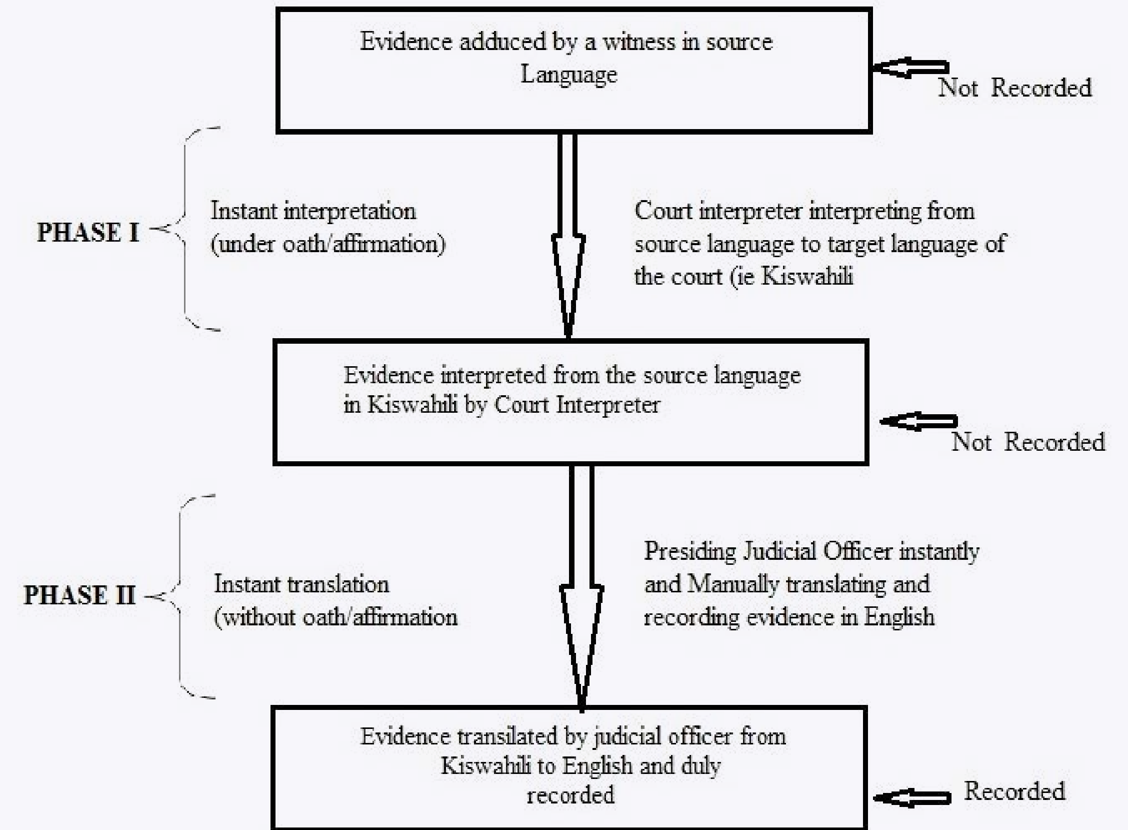


**Figure 3: Court Interpretation and Translation Paradox in Court Proceedings**

**Source:** Researcher of this study, 2017

83 See for example the US Federal Court Interpreter's Act 1978. This Act reflects the parallel efforts on the part of State governments in the US to ensure the due process rights of the non-English speaking and the hearing impaired. With this Act, when such persons are brought into the judicial system, increasingly one finds in the courtroom a person who makes communication between the legal actors possible: the court interpreter.

84 Cap. 6 R.E 2002.

## 8. Conclusion

The language of the law is characterised by legalese which creates barrier to laypersons in accessing courts. The fact that Tanzania is multilingual and the legal framework allows for complicated co-existence of Kiswahili and English as the languages of law and court in different contexts, the courts are potentially likely to experience instances of language barrier. It is unfortunate though that nothing very significant has been done to address language barrier other than the presence of an inadequate regime that regulates interpretation of evidence mainly in criminal proceedings. The instant translation and recording of evidence given in Kiswahili into English is a characteristic feature of the day to day court proceedings. Nothing has thus far been devised to address the challenge which has potential for loss and distortion of evidence and witnesses' testimonies. Whilst the regime appears to envisage language fair trial rights as priority rights, the concept is seemingly still yet to be realised and prioritised in court proceedings which creates flaws in due process of adjudicating justice. The lack of court interpreters to the parties that would also take into consideration persons with disabilities such as those with hearing impairment as explained *inter alia*, leads to expunction of relevant evidence that was given without interpretation.