

BRIDEWEALTH AND FEMALE CONSENT: MARRIAGE DISPUTES IN AFRICAN COURTS, GUSIILAND, KENYA*

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ABSTRACT: From the early 1940s Gusiiland (Kenya) underwent a series of transformations that pushed bridewealth to unheralded levels. As a result, many young couples could not afford a proper marriage and eloped. Some fathers forced their daughters into marriages with men wealthy enough to give cattle; many of these women ran off instead with more desirable men. In the hundreds of resulting court cases, Gusii debated the relative weight to be given to bridewealth, parental approval and female consent in marriage. Young people did not reject marriage, but fought against senior men who would ignore women's wishes. Gusii court elders usually agreed with fathers and husbands but also believed that female consent did carry some significance.

KEY WORDS: Kenya, women, marriage, law, colonial.

IN 1959 a Gusii woman named Nyabonyi came before the local African court (*ritongo*) to give evidence on behalf of her lover, charged with elopement. Her father accused him of taking Nyabonyi. Nyabonyi retorted that she had gone to the young man 'of my own desire'. 'I had left home', she said, after 'my father took me to [another man] by force, so that he should be given cattle ... My father took me ... there to marry me by force without my consent'. The clash between the father's and daughter's ideas about marriage seemed irresolvable, but Nyabonyi believed their relationship could be mended. 'I agree to return to my parents', she said, 'I will live there, so that I will be married by my wishes, but, if they marry me by force I will return to the accused'.¹ Nyabonyi tried to find some common ground with her father, bowing to his right to claim bridewealth, while reserving the right to choose her own husband.

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¹ *Ritongo* Kuja elopement case 935/59. The research for this article is based on all surviving criminal case records from two of the three courts that served Gusiiland from the 1940s until independence, *Ritongo* Kuja and *Ritongo* Gesima; due to insufficient protection from the elements no criminal records survived from *Ritongo* Manga. Files from *Ritongo* Gesima were (as of 1997) housed at the courthouse in Keroka, and those from *Ritongo* Kuja at the former district headquarters building at Ogembo. *Ritongo* Manga civil files were consulted at the magistrate's court at Nyamira. All civil cases remaining in Gusiiland that involved custody of women and divorce were examined,

Nyabonyi's testimony illustrates the central aspect of post-war courtroom debates over Gusii marriage: the proper balance to be struck between the importance of bridewealth and of female choice in marriage. Beginning in the early 1940s bridewealth rose to ever-higher levels, preventing many young men from marrying. Young lovers, watching their hopes of marriage fade, eloped, hoping to convince the woman's father to accept a reduced bride-wealth or one paid in installments over time. Women pushed into marriage with men whose only redeeming feature was their wealth ran off, taking up with new men or old lovers. Local African courts were deluged by senior men filing criminal charges and civil claims over 'their' women; it was a crime in British Kenya for a man to live with a woman for whom he had not given bridewealth.² Thus, Gusiiland became caught up in bitter debates over whether bridewealth and parental choice alone made marriage, or if female choice was necessary for the creation of a legitimate marriage; all Gusii, however, remained committed to 'Gusii marriage'.

The Gusii case challenges much of the historiography of African marriage and legal systems in the colonial era. In the earliest days of colonial rule, enslaved women and those caught in oppressive marital relationships sought out European officials willing to champion their causes,³ although this was less common in settler areas such as Southern Rhodesia, or where freeing concubines might seem to threaten social stability.⁴ The turning point, according to the scholarship, came when Europeans turned over judicial work to senior African men. Charged with adjudicating according to 'customary law', African elders and chiefs invented customs that expanded

as well as a selection of cases from new archival deposits at Nakuru; a handful of cases from *Ritongo* Manga and the appeals court in Kisii town have survived. Criminal cases used here total approximately 900 (685 adultery, 215 elopement); civil cases are about 380 (160 divorce, 220 custody of women). The earliest cases recovered come from 1944 (transcription had begun only a few years prior to this), although most date from the mid-1950s to the mid-1960s. In the notes the following abbreviations are used: R/K – *Ritongo* Kuja; R/G – *Ritongo* Gesima; R/M – *Ritongo* Manga; ad – adultery; rug – removing an unmarried girl (elopement); c/w – custody of a woman; div – divorce.

² The most desperate young men, those with no cattle and no women willing to elope with them, took women by force, trying to use rape and pregnancy to seal their 'marriages'. I examine abduction elsewhere, since the issues involved in those cases centered on how female consent was determined, rather than its importance. See Shadle, "'Girl cases'", *passim*.

³ Marcia Wright, 'Justice, women and the social order in Abercorn, Northeastern Rhodesia, 1898–1903', in Margaret Jean Hay and Marcia Wright (eds.), *African Women and the Law: Historical Perspectives* (Boston University Papers on Africa VII, 1982), 33–50; Judith Byfield, 'Women, marriage, divorce and the emerging colonial state in Abeokuta (Nigeria) 1892–1904', in Dorothy Hodgson and Sheryl McCurdy (eds.), *'Wicked' Women and the Reconfiguration of Gender in Africa* (Portsmouth NH, 2001), 27–46; Sean Hawkins, "'The woman in question": marriage and identity in the colonial courts of northern Ghana, 1907–1954', in J. Allman, S. Geiger and N. Musisi (eds.), *Women in African Colonial Histories* (Bloomington and Indianapolis, 2002), 116–43, esp. 121–3.

⁴ Elizabeth Schimdt, *Peasants, Traders and Wives: Shona Women in the History of Zimbabwe, 1870–1939* (Portsmouth NH, 1992); Paul Lovejoy, 'Concubinage and the status of women slaves in early colonial Northern Nigeria', *Journal of African History*, 29 (1988), 245–66.

their powers *vis-à-vis* women and junior men.⁵ They could be confident of support from indirect rulers, now dedicated to the preservation of 'tribes' held together by the authority of senior men.

According to many scholars, these legal changes deeply compromised women's status in the courts and in society at large. No longer would women find succor in the legal arena and, moreover, colonial states implemented policies to regulate women's physical mobility. The historiography has tended to portray women as having two main options: resigning themselves to increasingly oppressive male rule, or rejecting marriage and male control entirely. Scholars discuss women who succumbed to the senior men who held them 'hostage in the villages',⁶ while others shrugged off male control, refusing marriage in their rural homelands,⁷ or 'discovering escape routes from rural drudgery and poverty'⁸ in favor of urban or mining areas. Such women chose to support themselves by prostitution or beer brewing rather than being tied to any one man.⁹

⁵ James M. Ault, 'Making "modern" marriage "traditional": state power and the regulation of marriage in colonial Zambia', *Theory and Society*, 12 (1983), 181–210; Penelope A. Roberts, 'The state and the regulation of marriage: Sefwi Wiawso (Ghana) 1900–40', in Haleh Afshar (ed.), *Women, State, Ideology: Studies from Africa and Asia* (Albany, 1987), 48–69; Jane Parpart, 'Sexuality and power on the Zambian Copperbelt: 1926–1964', in Sharon B. Strichter and Jane L. Parpart (eds.), *Patriarchy and Class: African Women in the Home and the Workforce* (Boulder, 1988), 115–38; Marjorie Mbilinyi, 'Runaway wives in colonial Tanganyika: forced labour and forced marriage in Rungwe district 1919–1961', *International Journal of the Sociology of Law*, 16 (1988), 1–29; Margot Lovett, 'Gender relations, class formation, and the colonial state in Africa', in Jane Parpart and Kathleen Staudt (eds.), *Women and the State in Africa* (Boulder, 1989), 23–46; Elizabeth Schmidt, 'Negotiated spaces and contested terrain: men, women and the law in colonial Zimbabwe, 1890–1939', *Journal of Southern African Studies*, 16 (1990), 622–48; Gisela Geisler, 'Moving with tradition: the politics of marriage among the Toka of Zambia', *Canadian Journal of African History*, 26 (1992), 437–61; Schmidt, *Peasants, Traders*, 104–6; Diana Jeater, *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia* (Oxford, 1993), chs. 5 and 6; Jean Allman, 'Adultery and state in Asante: reflections on gender, class and power from 1800–1950', in John Hunwick and Nancy Lawler (eds.), *The Cloth of Many Colored Silks* (Evanston, 1996), 27–65; Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Portsmouth NH, 1998 [1985]), ch. 11; Jean Allman and Victoria Tashjian, *I Will Not Eat Stone: A Women's History of Colonial Asante* (Portsmouth NH, 2000), 145–8.

⁶ Geisler, 'Moving with tradition', 439. See similar phrasing in Cheryl Walker, 'Gender and the development of the migrant labour system c. 1850–1930', in Cheryl Walker (ed.), *Women and Gender in Southern Africa to 1945* (Cape Town, 1990), 168–96, esp. 188; Theresa A. Barnes, 'The fight for control of African women's mobility in colonial Zimbabwe, 1900–1939', *Signs*, 17 (1992), 586–608, esp. 592.

⁷ Jean Allman, 'Rounding up spinsters: gender chaos and unmarried women in colonial Asante', in Hodgson and McCurdy (eds.), *'Wicked' Women*, 130–48; Allman and Tashjian, *I Will Not Eat Stone*, ch. 4, esp. 148.

⁸ Jeater, *Marriage, Perversion*, 251.

⁹ Janet Bujra, 'Production, property, prostitution: "sexual politics" in Atu', *Cahiers d'Etudes Africaines*, 17 (1977), 13–39; Julia Wells, 'Passes and bypasses: freedom of movement for African women under the Urban Areas Act of South Africa', in Hay and Wright (eds.), *African Women and the Law*, 125–50; Mbilinyi, 'Runaway wives'; Parpart, 'Sexuality and power'; Phil Bonner, "'Desirable or undesirable Basotho women?" Liquor, prostitution and the migration of Basotho women to the Rand, 1920–1945', in Walker (ed.), *Women and Gender in Southern Africa*, 221–50; Walker, 'Gender and the

Some scholars, however, have begun to explore other strategies women developed in response to the colonial era's 'shifting terrain' in gender and marital relations, including turning to the courts for divorce.¹⁰ This article expands on these lines of inquiry. Women and young men in Gusiiland, like those elsewhere in Africa, were unwilling to accept marriage on senior men's terms. Yet only a very few rejected marriage outright, which would have been to reject all that they held dear, and to forget all their dreams of children, wealth and success. Thus in establishing illicit unions, young people did not reject bridewealth marriage, but defended bridewealth marriage – as they understood it. Gusii courts, though staffed by senior men and backed by the power of the colonial state, did not impose a customary law that completely silenced women. While court elders generally sided with senior men, they also tried to restrain those of their cohort who argued that women had no rights in marriage whatsoever, and at times carefully considered and responded favorably to the words of women and junior men. Hundreds of disputes wound their way into the local courts. Transcripts of these cases prove invaluable in reconstructing how Gusii – men and women, young and old, powerful and powerless, court elders and litigants – struggled over the nuances, but not the existence, of Gusii marriage.¹¹

THE CRISIS IN GUSII MARRIAGE

The Gusii people reside in the cool, fertile highlands of what is now south-west Kenya. At the turn of the twentieth century they lived in scattered

development of the migrant labour system'; Luise White, *The Comforts of Home: Prostitution in Colonial Nairobi* (Chicago, 1990); Belinda Bozzoli with Mmantho Nkotswe, *Women of Phokeng: Consciousness, Life Strategy, and Migrancy in South Africa, 1900–1983* (Portsmouth NH, 1991); Barnes, 'Control of African women's mobility'; Jane Parpart, "'Where is your mother?": gender, urban marriage, and colonial discourse on the Zambian Copperbelt, 1924–1945', *International Journal of African Historical Studies*, 27 (1994), 241–71. Some Haya women in Tanganyika went to urban areas, but eventually returned home and set up their own, female-headed households. Lesley Stevens, 'Bananas, babies, and women who buy their graves: matrifocal values in a patrilineal Tanzanian society', *Canadian Journal of African Studies*, 29 (1995), 454–80.

¹⁰ Allman and Tashjian, '*I Will Not Eat Stone*'; Richard Roberts, 'Representation, structure and agency: divorce in the French Sudan during the early twentieth century', *Journal of African History*, 40 (1999), 389–410; Rebecca Shereikis, 'Negotiating bride-wealth in the French colonial courts in Kayes (Mali)', and Amy Settergren, 'Ahenyere or Ohemaa: chief's wives, queenmothers and power in Asante (Ghana)', both presented to the African Studies Association annual conference, Nov. 2001.

¹¹ The transcripts were handwritten in Swahili (although the proceedings were conducted in Ekegusii) and range from a page to five or six pages in length and provide valuable sources for recovering social history. In only a handful of cases are failures in transcription glaringly obvious. Internal inconsistencies are few. On occasion the Swahili in the transcripts is awkward but rarely unintelligible. The consistency of phrasing over many years by many different clerks and elders suggests reliable translation. Poor translation would likely have resulted in language and phrasing peculiar to each transcriber, some exceptionally convoluted, some with exceptional stylistic flourishes. For a closer examination of the courts and the uses of their records, see Brett L. Shadle, 'Elders and clerks, literacy and corruption: the making and uses of court records from Gusiiland, Kenya', Stanford University Conference on Interpreters, Letter Writers and Clerks: Mediating Law and Authority in Colonial Africa, May 2002.

homesteads – composed of a patriarch, his wife or wives, unmarried daughters and his sons' families – strung across the hills (although in some areas raiding by Kipsigis and Maasai forced the construction of concentrated settlements). Aside from Getutu (one of seven 'sub-tribes') with its nascent chieftaincy, no powerful leaders arose; authority lay with male elders and local patrons. Tucked away in relative isolation, Gusiiland was spared the ravages of the ivory and slave trades, but not of conquest. The British asserted their rule in two 'punitive expeditions' in 1905 and 1908 which left several hundred Gusii dead.¹²

In the early decades of colonial rule young people did not find marriage practices excessively burdensome. Several stages in the courting process allowed a woman the chance to reject disagreeable suitors. She might turn away her suitor's representative as he made inquiries at her homestead. If the interested man himself came, she might spit in his direction, telling him to step aside and allow her to sweep where he had stepped; the meaning here was quite clear. If she refused to offer him *uji* (porridge) it also signaled rejection.¹³ A woman might dissolve her marriage during the first six weeks or so of married life, prior to the next set of ceremonies that included the bride's acceptance of a calabash and food, tokens of her consent.¹⁴ Although most young men succeeded in collecting enough cattle to marry at a reasonably young age, some were forced to resort to cattle raiding in order to raise bridewealth.¹⁵

This is not to say that Gusii marriage was without tension in the late nineteenth and early twentieth centuries. That some women felt trapped in undesirable marriages is evidenced by reports of dissatisfied wives seeking shelter in clans hostile to their husbands' clans.¹⁶ Similarly, the *okogirokia* ceremony, meant to appease the souls of deceased bachelors, indicates that not all men married before leaving this world.¹⁷ But disputes over marriage reached crisis level only twice within living memory. The first came with the plagues of the 1890s that decimated cattle herds. Many men proved unable to marry and resorted to abducting 'wives', while fathers sought men able to pay even a token bridewealth. As cattle numbers recovered during the next decade, however, abductions fell back to small numbers. After several decades of relative quiet, a different set of circumstances in the 1940s brought forth the second crisis in Gusii marriage.

As late as the 1930s, Gusiiland had not yet experienced anything like the accelerating social differentiation transforming other parts of Kenya. Some Gusii were wealthier than others, but this had been true in pre-colonial

¹² William R. Ochieng', *A Pre-Colonial History of the Gusii of Western Kenya* (Nairobi, 1974); Robert Maxon, *Conflict and Accommodation in Western Kenya: The Gusii and the British, 1907–1963* (Cranbury NJ, 1989); Shadle, "'Girl cases'", ch. 2.

¹³ Shadle, "'Girl cases'", 88.

¹⁴ Philip Mayer, *Gusii Bridewealth Law and Custom*, Rhodes Livingstone Institute, 18 (Oxford, 1950), 15; *idem*, 'Privileged obstruction of marriage rites among the Gusii', *Africa*, 20 (1950), 113–15. ¹⁵ Shadle, "'Girl cases'", 47–8. ¹⁶ *Ibid.* 90, 94.

¹⁷ Iona Mayer, 'The Gusii of western Kenya', in Angela Molnos (ed.), *Cultural Source Materials for Population Planning in East Africa*, 111: *Beliefs and Practices* (Nairobi, 1973), 126.

decades as well. But the 1940s and 1950s saw unprecedented transformations in the Gusii political economy. The empire's warriors needed nourishment, and Gusii quickly responded: maize exports doubled between 1941 and 1942, from 30,000 bags to 60,000, and doubled again by 1946, to 123,000 bags.¹⁸ Those producing maize, sorghum and wheat grew wealthy, and the income derived from these crops, and from tea and coffee (restricted to an emerging elite), remained high well into the post-war years.

The Gusii men becoming wealthy were those with access to land and labor. Husbands looked to their wives' households and found both. Changes in *emonga* (men's fields) were an important part of this new wealth. Previously men had worked *emonga* with crops for trade, or for supplementing subsistence crops. But by the 1940s men with plows 'generally increase[d] the proportion of [their] own *emonga* land as against the land cultivated for subsistence by [their] womenfolk', and planted them with cash crops.¹⁹ To produce cash crops men relied significantly on *risaga*, work parties in which neighborhood men provided their women's labor in exchange for food and beer provided by the host, but prepared by his womenfolk. One representative plow owner in 1948 called 13 *risaga* for assistance at several points during the agricultural cycle: weeding and harvesting maize and digging, clearing and weeding millet. To compensate the *risaga*, his wife prepared at least 24 small pots and 28 larger pots of beer for those working her husband's cash crops.²⁰ By the late 1950s wealth flowed to those men who had appropriated their wives' land and labor. Women were more valuable than before and bridewealth rose accordingly.²¹

While the changing economy of Gusiiland fueled rising bridewealth prices, other factors exacerbated the increases. First, the large amount of new money entering the highlands was unevenly distributed. Cash croppers who had acquired substantial new wealth during the war and veterans returning from the war, their pockets bulging with shillings, exploited their position, marrying for higher than normal bridewealth and demanding excessive bride-wealth for their own daughters. Anthropologist Philip Mayer, resident in Gusiiland in the late 1940s, discussed bridewealth extensively with people in the area and concluded that, although larger amounts of wealth in circulation might be a legitimate cause for higher bridewealth, Gusii also pointed to 'the unfair bargains made by these new rich'.²² This in turn helped push bride-wealth into an inflationary spiral, as other men were forced to demand higher amounts for their daughters. He observed:

Every father fears being left in the lurch by finding that the bridewealth which he has accepted for his daughter will not suffice to get him a daughter-in-law; therefore he is always on the look-out for any signs of a rise in the rate, and tends to raise his demands whenever he hears of other fathers doing so. This means in general

¹⁸ Maxon, *Conflict and Accommodation*, 115.

¹⁹ Philip Mayer, *Two Studies in Applied Anthropology in Kenya* (Colonial Office, 1951), 14.

²⁰ *Ibid.* 12–14.

²¹ Thomas Håkansson, *Bridewealth, Women and Land: Social Change among the Gusii of Kenya*, Uppsala Studies in Cultural Anthropology, 10 (Uppsala, 1988).

²² Mayer, *Two Studies*, 22.

terms, that *individual* cases of over-payment quickly produce a *general* rise in the rate all round.²³

As the costs of bridewealth and cattle soared while wages remained low, more and more young men came to realize that their prospects of early marriage were dwindling, and perhaps even nil. Anthropologist Iona Mayer, observing Gusii life between 1946 and 1949, reported that poor men could be forced to postpone marriage until age forty, while a ‘good number of men actually died as bachelors’.²⁴ By 1950 it appeared that a whole generation of young people would not marry. The cost of marriage now exceeded not only the means of poorer young men, but even the resources of those who were moderately well-off. So dire was the situation that young women were remaining at home past the normal years of marriage, in some cases to the point of breeching the ‘gray hair’ rule: homesteads courted mystical sanctions if daughters grew gray hair at home. To wide acclaim, Chief Kirera (Zacharia) proclaimed a bridewealth limit of six cows and a bull, well within the means of many youth. Large numbers of marriages were contracted, but within two years the wealthy began to ignore the limit, pushing bridewealth back into its upward spiral and edging more men out of the marriage market.²⁵

In response to high bridewealth, many young couples – women and the impoverished men whom they wished to marry – eloped, hoping to exchange bridewealth later. To secure bridewealth many fathers (and brothers who relied on their sisters’ bridewealth to marry) married off their daughters to rich, often older polygamists, who were unappealing to their intended wives. Many of these women responded by running off with former lovers or with new, more desirable men. Married women also faced predicaments in which escape appeared to be the only viable option: from marriages that had been forced upon them, had produced no children or in which the women had suffered merciless domestic violence. The decision to run from a father or husband to a new lover was never an easy one, but it was one that more and more women felt compelled to make.²⁶

I. Mayer and P. Mayer reported on the rising numbers of marriage disputes in the 1940s, including troubling increases in elopement. Elders complained unceasingly about these trends, and dreaded the possibility of their daughters eloping. As many as half the women I. Mayer knew had run off from a husband or father at some point in their lives, while large numbers of men similarly had spent time with runaway women.²⁷

²³ P. Mayer, quoted in Lucy Mair, *African Marriage and Social Change* (London, 1969), 52. See also Arthur Phillips, *Report on Native Tribunals* (Colony and Protectorate of Kenya, 1944), 294.

²⁴ Mayer, ‘Gusii of western Kenya’, 126. ²⁵ Shadle, ‘“Girl cases”’, 167–8.

²⁶ It is difficult to trace how and to what extent colonialism and Christianity influenced local ideas about marriage and consent. Well into the 1950s few Gusii had converted, and few would have had direct contact with white preachers, such that western ideas about marriage would not have easily been transferred into local discussion about marriage. My thanks to Lynn Thomas for pushing me to think more about this question.

²⁷ Mayer, *Two Studies*, 19, 30; Mayer, ‘Gusii of western Kenya’, 133; Iona Mayer, ‘The patriarchal image: routine dissociation in Gusii families’, *African Studies*, 34 (1975), 259–81, esp. 276–8; I. Mayer, ‘Studies in Gusii kinship’ (Ph.D. diss., Rhodes University, 1965), 139. In ‘Nyansongo’, the village in which Robert LeVine and Barbara

Records from Gusii courts substantiate contemporary accounts of the multiplying numbers of marriage disputes. Incomplete court registers present a picture of the number of cases from the mid-1920s. During 24 months between January 1925 and June 1927, 6 per cent of all Gusii criminal cases involved sexual or marital matters.²⁸ Partial records from 1938–9 show that about 7.4 per cent of criminal cases concerned marriage disputes.²⁹ Although the records are incomplete, by the early 1940s the number of complaints over the control of women had shot up dramatically. Extant registers of criminal cases from *Ritongo* Manga show that adultery, elopement and abduction cases ranged from a low of 12 per cent of all criminal cases to a high of 32 per cent.³⁰ Between November 1952 and February 1953, *Ritongo* Kuja heard 142 criminal cases, of which sixty, or 42 per cent, concerned marriage.³¹ All told, between 1943 and 1962, elopement, adultery and abduction cases almost always accounted for at least 15 per cent of all criminal cases, generally more than 20 per cent, and at least once reaching as high as 47 per cent. These figures contrast dramatically with the 7 per cent common in the 1920s and 1930s.³²

In absolute terms too the number of runaway and abducted women in the interwar years paled next to those of post-war years. The total number of criminal cases coming before Gusii courts increased significantly over the decades from the 1930s, with marital disputes thus constituting a larger percentage of a larger number of cases. Based on the numbers available, in 1925 approximately one marital case per month came before the courts; in 1938 this number was three, and in 1939, four. By 1943 in *Ritongo* Manga alone about 17 cases per month were filed, and in 1944, 38 per month; if the numbers from *Ritongo* Kuja were available this number would undoubtedly be much higher. (*Ritongo* Gesima was not established until 1953.) In 1956 *Ritongo* Gesima and *Ritongo* Manga combined for an average of 47 cases per month, and *Ritongo* Kuja probably saw another ten or more.³³ Moreover, these numbers do not include disputes settled outside of court, when one side or the other gave in, or the hundreds or thousands (the numbers are not known at this point) of civil claims filed over women. The numbers presented above simply hint at the tremendous number of marriage disputes erupting in these years.³⁴

LeVine lived in the 1950s, 14 of the 51 married women had previously been married. These earlier marriages had all been completed by the payment of bridewealth, but on one account or another had collapsed. We can guess that many of these unions failed due to the refusal of women to stay in them. Robert LeVine and Barbara LeVine, *Nyansongo* (New York, 1966), 49–50.

²⁸ Kenya National Archive (KNA): PC/NZA 3/33/6.

²⁹ Register of Criminal Cases, *Ritongo* Manga.

³⁰ Shadle, “‘Girl cases’”, Table 5.1. ³¹ *Ibid.* Table 5.2. ³² *Ibid.* 197–200.

³³ While the rise in cases might suggest simply a greater use of the courts by husbands and fathers, the contemporary reports discussed above suggest otherwise.

³⁴ Numbers from Kiambu (in central Kenya) and Nairobi courts make for an interesting comparison. In 1952, Kiambu courts saw about nine, and Nairobi courts between 1951 and 1952 seven cases per month involving runaway women. According to Robertson, this number is quite high, and is ‘a clear indication of the severity of the perceived problem here’. She argues that Loyalists’ (anti-Mau Mau Homeguards)

Marriage disputes also took place elsewhere in Kenya, but did not always take the form they did in Gusiiland. Across the colony administrators put to paper their frustrations over Luo women running off with migrant laborers, Gikuyu and Kamba women absconding to Nairobi and dissatisfied wives 'simply snapp[ing their] fingers at parents and husbands' and creating lives of their own.³⁵ Many complaints were hyperbolic, but not without truth. Nairobi, for example, did shelter a significant number of single women, and according to the legal investigations of official Arthur Phillips the number of adultery cases 'multiplied' during the war years due to the absence of so many men.³⁶ The difference in Gusiiland is that women did not desert the local area.³⁷ At most, they temporarily fled to the nearby Kericho tea estates, always with the intention of returning to Gusiiland and following the normal life course as wives and mothers. Gusii marriage disputes took place in Gusiiland, and in the *ritongo*, rather than in Nairobi or along the rail lines.

COMPLAINTS

African courts in Kenya were hybrid beings: created and backed by the British government, fully African in staff, employing a mixture of 'customary law' and colonial law. Administrators selected court elders, all of whom were local men. While early on qualifications centered on being 'traditional' and hence knowledgeable about 'customary law', from the 1940s education became more important. Literacy was particularly sought after as was a command of Swahili. But in the way elders judged cases, administrative oversight of the courts was relatively limited: in that sense, these were truly *African* courts.³⁸

perceived inability to keep track of women shifted 'the chief loci of efforts to control African women [to] British laws and authorities'. Yet these numbers appear to have been much the same as, if not less than, a decade before. Phillips shows that the Nairobi Native Tribunal in 1942 heard a total of 114 adultery cases, for an average of about ten per month. Claire Robertson, *Trouble Showed the Way: Women, Men, and Trade in the Nairobi Area, 1890-1990* (Bloomington and Indianapolis, 1997), 140-1; Phillips, *Report on Native Tribunals*, 148.

³⁵ District commissioner Fort Hall to provincial commissioner Central Province, 9 Oct. 1936, KNA: PC/CP 19/1. See also Shadle, "'Girl cases'", chs. 3 and 7.

³⁶ White, *Comforts of Home*; Phillips, *Report on Native Tribunals*, 266.

³⁷ The difference is perhaps less historical than historiographical. See opening section of this article.

³⁸ See Brett L. Shadle, "'Changing traditions to meet current altering conditions": customary law, African courts, and the rejection of codification in Kenya, 1930-60', *Journal of African History*, 40 (1999), 411-31; *idem*, "'Girl cases'"; *idem*, 'Clerks, language and literacy'. The structure of Gusii courts should allow us to modify Barbara Cooper's critique: she suggests 'that recent work on the law and gender in Africa ... may overdraw the importance of formal institutions of mediation such as colonial courts in recasting the nature of marriage and gender in Africa. Too great an emphasis on customary law and the courts introduced in the colonial period can lead to an overestimation of the power of the state and "patriarchy" to the neglect of the profound and continuing importance of more local mediational domains'. Gusii courts, however, straddled the two domains of local, unofficial bodies of elders and the colonial legal system. In certain ways they were constrained by administrative procedural rules, but the elders were Gusii and

Among many other types of cases, Gusii courts heard four kinds involving marriage. The first were disputes over runaway wives, which were filed as ‘Adultery contra native law and custom’, and second, elopements, termed ‘Removing an unmarried girl from the custody of her parents without their consent’. The state considered both these charges quasi-criminal. A guilty man (and only men could be prosecuted)³⁹ could be fined and, in default of payment, imprisoned. But unlike purely criminal charges, the individual wronged (the husband or father) personally prosecuted the case and paid a fee to register it. The burden of calling witnesses, cross-examining the defendant and his witnesses and presenting a reasonable case fell to the complainant, although elders at times asked questions of witnesses and litigants. *Ritongo* also heard divorce cases (all of which were filed by women) and civil cases instituted by men to assert rights over women.

In filing adultery cases husbands wished to regain control of their wives, and did so by arguing the primacy of the bridewealth contract. Regulating the sexual life of women was not integral to adultery complaints. Instead, they dealt first and foremost with illicit cohabitation. In only one case did the complaint involve just sex: a man had caught his wife having sex with the accused in the reeds near a river, and he resorted to the courts because the two had enjoyed each other’s company several times before.⁴⁰ Words like *kuzini* (to commit adultery, to fornicate) appear very rarely in case files,⁴¹ in contrast to commonly used verbs such as *kuchukua* (to carry off) or *kutorosha* (to cause to desert).⁴² For husbands what mattered was punishing men who created illicit marriages, and reserving to themselves all that a wife could provide – not only sexual companionship, but agricultural labor, reproduction, the completion of burdensome daily household chores and her presence in the household, which formed the basis of men’s status as adults.

judgments were made with relatively little oversight by, or reference to, British officials. Barbara Cooper, *Marriage in Maradi: Gender and Culture in a Hausa Society in Niger, 1900–1989* (Portsmouth NH, 1997), 21. See also Roberts, ‘Representation, structure and agency’, 410.

³⁹ This was so at the insistence of the Kenya administration, which found it repugnant to fine and imprison women.

⁴⁰ R/G ad 38/65. The court elders thought this quite serious, seeing as how the complainant might easily have killed either of them in his rage. The accused was sentenced to six months’ imprisonment, although this was overturned on revision by a magistrate. It is also significant that elders never demanded guilty men to pay over to complainants the goat necessary for the post-adultery *amasangia* cleansing ceremony.

⁴¹ For example, one man complained that the accused ‘carried off my wife Kemunto and fornicated with her’. R/K ad 892/59. Another charged that the accused had ‘seduced’ his wife. R/K ad 670/63. None of the civil cases consulted included references to sexual matters.

⁴² Although intercourse may have been presumed. As described in the South Nyanza Law Panel (composed of chiefs, court elders and other local notables), complainants did not have to prove sexual infidelity ‘so long as there is an intention to deprive the husband’ of the custody of his wife. Special Law Panel meeting to record customary criminal offences in Kisii District 16/8/61, Cardinal Otunga Historical Society archive (Cardinal Otunga High School, Mosocho, Kenya): MAA/KIS/LAW/1/11. My thanks to Brother Anthony Koenig for use of this archive.

Husbands typically offered few details in setting out their complaints. They began their cases with an enumeration of the bridewealth they had given, and then sought to establish that their wives now lived with the accused. Husbands often said little more. The testimony of Kerege Keroro in an August 1959 adultery case illustrates this:

I charge this accused man Ongechi because around the date of April 26, 1959, he took my wife of the name Nyanchara whom I married with bridewealth of 17 head of cattle, one cow has died leaving 16 head of cattle, and 14 goats, because 3 goats have been slaughtered. My wife has two children, one is there at my home and the other is there together with my wife with the accused.⁴³

By contrast with his detailed exposition on his bridewealth, Kerege had virtually nothing to say about the circumstances of the dispute, including why his wife had left him.

In elopement cases, complainants similarly focused their testimony on two selected topics: bridewealth and parental authority in making marriages. Most provided the bare facts only ('he took my daughter, I found her with him'). When they deigned to explain themselves further, complainants harped on bridewealth and parental consent. As one man told the *ritongo* elders, the accused had taken his daughter 'without giving me bridewealth as is custom'.⁴⁴ The failure to give bridewealth, in turn, presumed that her father had not consented to the union. (Recall that the name of the charge itself was 'Removing an unmarried girl from the custody of her parents *without their consent*'.) Many complainants echoed Meshak, who charged a defendant with living with his daughter 'like his wife without my permission'.⁴⁵

What men left out of their testimony is as important as what they included. Complainants presumed that if they persuaded elders on questions of bride-wealth (and demonstrated that their wives and daughters had been found with the accused men) they had proved their cases. The point complainants felt unnecessary to make was that bridewealth and fatherly consent alone made marriage, and that women's consent did not matter. Since this was the 'proper' interpretation of marriage they saw little reason to expound on it; they assumed elders shared their point of view. Complainants made the dispute one of facts alone: the status of the bridewealth and the location of the woman. Their interpretation of marriage permeated the cases but remained unstated.

DEFENSES

Breaking marriage

With complainants having established the terms of debate, accused men and their lovers tried to divert the cases on to new tracks. Rather than becoming bogged down in questions of cattle (which was, in any event, a point they could not win), they challenged complainants' interpretation of marriage itself. They posed questions about when a wife could legitimately desert her husband, and when a woman could rightfully elope with a young man.

⁴³ R/K ad 610/59.

⁴⁴ R/G rug 658/58.

⁴⁵ R/K rug 1157/59.

Couples pushed the elders to look beyond the cold facts of cattle exchanges to what was (to their minds) the other essential aspect of marriage, a woman's consent.

The 1964 adultery case between John (the complainant) and Obara (the accused) encapsulated these debates. John had given bridewealth for Nyanchera (her father said) but Obara later took her 'and retained her as his wife'. Obara admitted that they had eloped when she was living at home, and therefore before she had been married. He did not know, he said, if she was presently married. Nyanchera herself redefined the lines of debate:

I have never been married to John. I went to the accused when I was very young. Obara was also very young. I finished one year with Obara. My father came for want of bride price. [Obara had none, but promised to collect some cattle and so her father left.] The second time my father came with [Tribal Policeman] Nyabwari and removed me from Obara. When I reached home I was told that he want[ed] to take me to someone else who had cattle. I ran and returned to Obara. I came from Obara's home today. I swear before the court that I [have] never go[ne] to John and I [have] never see[n] him but today.⁴⁶

Nyanchera could not refute the facts: John had given bridewealth, and Obara had been unable to offer any. Nonetheless, she had not consented to marry John, and had successfully avoided ever even meeting him. By comparison she spoke of her longstanding commitment to Obara. She told the court that she continued to reside with him which, on strictly factual grounds, could do nothing but hurt Obara's case. Nyanchera demanded that the court ponder who would be her legitimate mate: the man with whom she had lived for over a year, or a man whom she had never met.

In her 1959 elopement case Nyaabe likewise told the court that she had gone, by her own desire, to her lover:

After one week my brother brought government⁴⁷ and took me away from the home of the accused. That was when my older brother came and told me that I should go to live with him until he is given cattle.

When I was at our home they went to see cattle near Nyaramba in order to marry me off by force. I then ran away and I went to the accused. Those brothers of mine came [to the accused] and were given 11 cows.

Nyaabe's brothers remained unsatisfied, and her lover promised he would deliver more cattle after the harvest. All seemed well, but when Nyaabe returned to help her mother harvest maize, her brothers dragged her off to be married to yet another man. This union too collapsed over a bridewealth dispute and her brothers took Nyaabe back home.

When we arrived home [my brother] tied me up with rope and beat me so much. After two days he told me he wanted to take me to Utende [south of Gusiiland]. We went and when we arrived at Raneni I ran off and hid ... and I went to the accused where I am living up to today.⁴⁸

⁴⁶ R/K ad 732/64. This case was transcribed in English. I have left out John's second name in the text, though without inserting ellipses.

⁴⁷ She most likely refers to a chief's or sub-chief's *askari*, or retainer.

⁴⁸ R/K rug 844/59. While many men used violence to push women into unwanted marriage, women might also use violence to prevent forced marriage: 'From the time

Her lover admitted to the court that he had not paid bridewealth, and this point Nyaabe also conceded. To her, the issue of her consent held more significance. Nyaabe contended that this was the point which demanded attention and debate.⁴⁹

Morangi in 1960 left her husband Bosire (who had married her with a herd of 16 head of cattle, three calves and five goats in 1957, he took pains to point out) since they had had no children. The accused man had taken her in, but upon hearing she was already married ('to a sterile man') he turned her out. Morangi defended her actions:

The complainant is the one who married me. He is sterile, he is not fertile. This reason, to get pregnant, made me desert to the accused and I lived at his home for three days, and then he chased me out of there, and I wandered to the place where my sister lives. But I got pregnant by the accused. I do not wish to return to the complainant because of [his] infertility.⁵⁰

Both men agreed that a husband's infertility was no excuse for desertion, and that bridewealth outweighed all other considerations. Morangi vehemently disagreed. She argued that a true marriage required children, and having proven her husband was infertile she supposed the marriage was over. Given the highly charged atmosphere surrounding infertility, simple accusations of barrenness could sour a woman to her marriage. One woman left her husband after three years of unfruitful marriage and bore a child with a new man: 'Now, I do not wish to return to [my husband's] home because he thinks that I was bad by failing to have children, but no! it is he who was infertile'.⁵¹

In women's estimation a whole host of factors could render a marriage dead. While most Gusii accepted domestic violence as part of married life, women deserted when they felt the beatings had risen to an unacceptable level of brutality. Certainly, brothers and fathers might intervene if a female relative had been subjected to excessive violence. The Gusii Law Panel allowed that, if beatings 'are alleged to be frequent, the parents should go into the matter first'. If they found the charges true and had the support of the local elders (*etureti*), a divorce could be granted.⁵² Yet many women who had been abused felt no need to go through the channels senior men thought

I went to [the accused], it has been a period of five years. But I was sent to the home of the complainant by force, then I hit him in the head with a hoe because I do not want him, [not] even a little'. R/G ad 523/62.

⁴⁹ At least one father, rather than keeping strictly to questions of bridewealth, met his daughter and her lover on their chosen battlefield. His daughter recounted running to her lover to escape Jason, a headman, to whom her father had forced her to marry. The elders inquired of her father if this was true. 'I agreed myself [to the marriage]', he replied, 'but the girl did not like [him] and Jason brought people and they dragged my daughter, they carried her off, because I wished it'. This father articulated the assumption that lay within all complainants' words: daughters married whom fathers wished. R/K ad 641/46.

⁵⁰ R/G ad 742/60.

⁵¹ R/K ad 927/59. Other women pointed to the continual sickness or deaths of children as just cause for repudiating a husband.

⁵² Minutes of the Law Panel Committee (Kisii Section), 29–30 Nov. 1954, KNA: DP 18/13.

essential for the dissolution of a marriage and simply fled. Women who had been chased off by their husbands also refused to return.⁵³ Should a husband fail to build his wife a granary, if he sexually abused her children, if he called her a prostitute or a witch, he might one day find her gone.

Making marriage

After having expressed their aversion to their legal husbands, women wished also to declare their devotion to their chosen mates. Standing before an array of senior men, women disclosed that their lovers had replaced their husbands in fundamental ways. Their words make this patently clear: 'I love [the accused] and want to live with him' 'I know that [the] accused is my husband'; '[the accused] should be my husband'.⁵⁴

Only if women had repudiated bridewealth could they have more decisively challenged senior men's interpretations of marriage, but this was not a step that they were willing to take. Indeed, it likely did not even occur to them as a viable option. Only marriage through bridewealth transformed young people into adults and put them on the road to being respected elders. These couples were not revolutionaries. They shared with senior men an abiding faith in the promise of marriage and the presumption that bride-wealth made marriage. Even if a woman called her lover her husband, she and everyone around her knew this could never be true until he had paid bridewealth.

Young people's belief in bridewealth helps explain why, compared with adultery cases, exceptional numbers of men accused of elopement pleaded guilty. Fully two-thirds of these young men did not contest the charge. On the surface this seems illogical. Charges often collapsed for lack of evidence or because of conflicting testimony. Moreover, men who admitted their guilt did not receive any reduction in punishment. But if elopement is understood as a failed bid at marriage, pleading guilty makes more sense. Eloped couples sincerely wished to marry rather than simply cohabit, and only bride-wealth could transform an illicit union into marriage. Eloping was not a rejection of marriage or of bridewealth, but a pragmatic decision foisted upon young people because of poverty. By pleading guilty men hoped to placate complainants, disputing neither the facts presented nor the importance of gaining a father's consent. Ingratiating themselves with complainants, accused men hoped, would soften them to the idea of consenting to a real marriage.⁵⁵

It was this hope – of transforming illicit into licit marriage – that prompted young women and men to float offers of bridewealth during court proceedings. On occasion this succeeded. Yet such offers often rung hollow,

⁵³ It is not clear in many of these cases why the husband had turned out his wife. Sometimes it seems unceasing arguments or the death of several children had produced intense mutual hostility. In cases where a wife had clearly offended a husband he could send her back to her parents, who would provide her with a goat to appease him. Some cases may have begun like this, only to escalate when the wife refused to return.

⁵⁴ R/G ad 17/64, 858/63, 188/61.

⁵⁵ It made less sense for a man to plead guilty to adultery which would only prove that the complainant had uncontested rights over his wife. In fact, many an accused man denied that he had the complainant's wife: instead, he would said, she is *my* wife.

since inability to pay bridewealth had led to elopement in the first place. Some men could offer a substantial but insufficient herd, others a few head only. Johana claimed in court to have enough cattle to pay bridewealth, but he either lied or deceived himself, since his four head, as the elders stated, 'is not a bridewealth which a person will be paid'.⁵⁶ Other men made only vague promises that complainants were probably wise to ignore. Women too felt out the possibilities of their lovers and fathers coming to some agreement over bridewealth. Perhaps the most poignant instance came in a 1956 case, in which a young man expressed his desire to offer bridewealth. His father, anxious to see his son properly married, seconded the offer. But before the women's parents, the *ritongo* elders, the various assembled onlookers, the father quietly admitted that he did not own a single cow. His son would be found guilty and neither man had any means of making the youth a husband.⁵⁷

No matter how long lovers had spent together, they did not regard themselves as truly married until bridewealth had been paid. Kemunto, for example, coupled her right to choose men with her belief in the importance of bridewealth. 'I refuse the complainant Sambeye', she told the court, 'so I wish to live with Meroka [the accused] and he shall show bridewealth cattle because I have lived with Meroka three years'.⁵⁸ Even a woman who had spent ten years and had borne two children with her lover did not consider herself married since bridewealth had not been paid.⁵⁹ Others squabbled over previous attempts to pay bridewealth. In a 1960 case, Joel claimed that he did not have his accuser's wife. 'I know that Moraa is my wife', he stated. 'I called her father to come to see cattle and he refused'. Moraa concurred: 'My husband is the accused'.⁶⁰ Since bridewealth had been offered they felt some justification for calling each other husband and wife. But Joel remained ready to give his cattle at any time.

From without, this dedication to bridewealth appears irrational. Surely these young couples had the least to gain by the perpetuation of bride-wealth marriage. But it was not bridewealth *per se* that caused them such headaches. Their forced marriages and extended bachelorhood resulted directly from crippling high bridewealth rates and senior men's interpretation of bridewealth, not the *existence* of bridewealth. They desperately wanted all the social amenities that went with a bridewealth marriage, but were unwilling to let the importance of bridewealth overshadow the importance of consent.

Arguing for female agency

Lovers fought for the significance of female consent on another front, for they had to establish the simple fact that women were active agents in the creation of illicit unions. Husbands and fathers sought to isolate cases from questions of female consent, and one strategy was to attribute full responsibility to the accused man. Complainants most commonly used the verb *kuchukua*, to carry off, while others employed the verb *kutorosha*, the

⁵⁶ R/G rug 373/59.

⁵⁷ R/G rug 905/56.

⁵⁸ R/G ad 32/59.

⁵⁹ R/G rug 121/58.

⁶⁰ R/G ad 29/60.

causative form of the verb *kutoroka*, to desert or run away.⁶¹ Thus women did not run away, but accused men carried them off or caused them to desert. In part, this made sense in the context of the colonial legal system. Men, not women, could be charged with adultery and elopement: logically, litigants tried to affix blame on those who could be held criminally accountable. Yet in civil cases plaintiffs used the same verbs, although the salient point insofar as the law was concerned was very different. Civil cases concerned legal claim over a woman, and responsibility for her desertion was legally of little import. As their choice of words demonstrates, husbands and fathers very clearly wanted to keep women's agency entirely out of the discussion.⁶²

In contrast, women said that they had deserted (*kutoroka*) their supposed husbands, or had gone (*kwenda*) from one man or had come (*kuja*) to another. For example, Osugo placed blame for his wife's desertion squarely on the shoulders of the accused: 'I am charging Bichanga because *he has carried off my wife*, who is called Yunuke. Bichanga *took my wife away* in January, 1958'. Bichanga submitted a very different interpretation. 'Truthfully', he told the court, 'Yunuke *wished on her own* [to come] and *she came* to my home in 1956'. Yunuke concurred: '*I went* to the home of the accused'.⁶³

Aside from their choice of verbs, some women assumed full responsibility for their actions. 'I went by my own choice' (*kwa hiari yangu*) many said, or 'by my own desire' (*kwa upendo wangu*). Kerubo, for one, was baffled about why her (now former) lover had been charged for deeds of her own doing: 'I don't know a thing [about] this Ayiera who is being tried here in *Ritongo Kuja*', she said. 'Rather, it is I alone who went to him (*ila ni mimi peke y[angu] niliyemwendea*)'.⁶⁴ Pushing the point, one woman put the logic of the law into question. She maintained that the accused 'is not guilty, because I went to his home by my own choice'.⁶⁵

More than just denying female agency, in a few cases complainants' rhetoric slipped so far as to commodify women. Some litigants portrayed accused men as thieves, while another 'said that he was following his cow of two legs which he had lost'.⁶⁶ In response, women resentfully accused their parents of treating them like cattle or as a commodity. Kemunto, for example, indicted

⁶¹ Litigants spoke in Ekegusii while the cases were recorded in Swahili, thus we must use caution in our analysis of language. The occasional appearance of alternate verbs in criminal cases and the unique details recorded in each case suggests that transcribers respected litigants' language.

⁶² Like husbands, elders often ignored women's agency. As did many other women, Kwamboka told the court that 'I *went* to the accused'. The court heard this very differently: '[T]oday the woman herself has come before the court and she has said that in fact she was *carried off* by the accused'. R/K ad 770/59, emphases added.

⁶³ R/K ad 927/59. Emphases added. While men and women in elopement cases often used *kuja* and *kwenda*, they also employed *kuchukua* (to carry). Yet even *kuchukua* could be balanced by insistence that the woman had been 'carried' consensually. R/G rug 151/61, 742/64.

⁶⁴ R/G ad 164/58.

⁶⁵ R/G ad 329/61.

⁶⁶ R/G ad 319/62. A woman from the Buha highlands of Tanzania recalled that parents, when forcing a girl into marriage, would 'pull her like a goat until she agreed to the marriage'. Margot Lovett, 'Elders, migrants and wives: labor migration and the renegotiation of intergenerational, patronage and gender relations in highland Buha, western Tanzania, 1921-1962' (Ph.D. diss., Columbia University, 1996), 277. Similarly, a Gikuyu man in 1956 referred to his new sister-in-law as a 'two-legged goat'. Robertson, *Trouble Showed the Way*, 208. Also discussing the Gikuyu, however, Kershaw suggests

her father since he had ‘auctioned [her] like a goat’ to the complainant while another charged that ‘my brother auctioned me to the complainant’.⁶⁷

RITONGO ELDERS’ INTERPRETATIONS OF MARRIAGE

Ritongo elders usually interpreted marriage as did the senior men before them. The *raison d’être* of adultery prosecutions was to punish men who did not act like proper men, men who had transgressed the rights of a husband over his wife. Elders thus championed husbands attempting to recover their wives. Yet elders recognized that social stability rested on patriarchal authority, but not on an unrestrained use of that authority. Husbands could fail to live up to the standards elders expected of them: they chased wives away or failed to impregnate them; they waited years before tracing runaway women. While these circumstances did not entitle a woman to create a new union, they were mitigating factors when elders made judgments and passed sentences.

To win his case, a husband had to establish that he had paid bridewealth and that his wife had been found with the accused. The former could be proved through evidence of the father or brother of the woman, the latter point usually by the word of the complainant alone.⁶⁸ Some charges did founder on this point (in particular if the complainant had not gone personally to collect his wife). Other charges failed when it emerged that all or most of the complainant’s bridewealth had been returned to him by the woman’s father, or that the woman had successfully divorced the man in court. If it were proven that the informal union had preceded the complainant’s payment of full bridewealth, or before the legal couple had lived together, elders decided that no marriage had existed to be broken. It was on such questions that complainants most often saw their cases fail: elders dismissed one third of the cases reviewed for these reasons.⁶⁹

Some men escaped conviction when an accuser had allowed his rights over his wife to lapse. By making no effort to seek out his wife for months or years a husband had (in elders’ and the couple’s eyes) essentially condoned the offense. Adultery charges were intended to punish those who repeatedly failed to respect other men’s rights over women. If a husband did not exercise his rights over his wife he had little room to complain when other men transgressed them. Thus elders and women insisted that a man could not be punished for flouting another man’s rights that had long since fallen dormant. Nyangau’s wife had left him and lived with another man for many

that ‘a common term of endearment from a brother to a sister was “my *mburi*”, my goats’. Greet Kershaw, *Mau Mau from Below* (Oxford, 1997), 24.

⁶⁷ R/G ad 696/57; R/K ad 680/60.

⁶⁸ Should the accused deny having cohabitated with the woman (not an uncommon defense) the complainant might call other witnesses: her relatives who had assisted in retrieving the woman, or the *etureti* or sub-headman of the accused’s area.

⁶⁹ That so many cases were dismissed on these grounds does not lessen the importance of the large number of cases filed. If a husband failed to prove his wife was with the accused it still meant she was a runaway wife, though to parts unknown.

years before he filed an adultery case. The elders acquitted the accused because 'a person [who] lives with the wife of [another] person for a period of five years has [committed] no wrong'.⁷⁰ Women tried to expand on this idea, arguing that an extended co-residence could establish a legitimate union. Sigara, the woman under dispute in a 1962 case, told the elders that: 'My husband is [the accused] Nyangwona because I have lived with him for a period of four years, and the complainant, I lived at his place a period of one year'.⁷¹ Elders rejected Sigara's claim of marriage with Nyangwona, but concurred that he could not be punished.⁷² Nevertheless, once a man resurrected his claims over his wife *ritongo* elders expected her to return to him, and the accused no longer to live with her. A long separation did not extinguish rights gained via bridewealth.

Elders also discharged men who had sheltered 'wandering' women. Those who had run off or whose husbands had turned them out might roam or wander (*kutangatanga*) from man to man, searching for stable relationships. For elders dedicated to restraining the unfettered movement of women this was clearly a disturbing situation. When a man took in a wandering woman, protecting her and exerting a measure of male authority over her, elders were inclined to absolve him of the crime of adultery. Again, however, elders believed these relationships had to be terminated once the woman's husband reasserted physical control over his wife.

Elders posited that in a few circumstances wives had rights which outweighed those of husbands. Given the centrality of children to a successful marriage and to women's status, elders trivialized the sheltering of runaway, childless wives. Morangi had left her husband because they had failed to have children. The elders found her lover guilty, but levied a fine less than half the average, 'because the wife of the complainant deserted [due to] the complainant's infertility, that is why the accused will pay a small fine'.⁷³

As in adultery cases, in elopement cases *ritongo* elders tended to share complainants' ideas of marriage. If the couple had lived together without bridewealth having been paid, elders usually entered a guilty verdict, regardless of the woman's desires. In certain circumstances, however, elders adopted more liberal views of elopement. If some bridewealth had been given or negotiations had been opened, elders presumed that the father had consented to a marriage. Elders encouraged such complainants to drop criminal charges and instead to open civil suits for the cattle outstanding. Elders clearly hesitated to break apart these unions, illicit though they were. Rather than separating couples who seemed well on their way to making successful marriages, elders tried to cement such unions. They inquired of complainants if they would accept bridewealth, turning a criminal act into a preliminary to marriage. If a young man willingly produced sufficient cattle, elders saw little sense in punishing him. Similarly, if the couple had lived together for some time or had had a child together, elders usually dismissed the charges and encouraged the complainant to accept the union as a *fait accompli*.

⁷⁰ R/G ad 107/62.

⁷¹ R/G ad 350/57.

⁷² Of the 29 surviving similar cases only one man was fined.

⁷³ R/G ad 742/60. But court elders in two cases ignored this line of defense. R/K ad 832/58; R/G ad 387/58.

Nevertheless, if the father rejected elders' suggestions of marriage the court would convict the young man.

CIVIL CASES

Gusii marriage disputes also produced numerous claims over the custody of women (filed by husbands), and divorce petitions (in every case filed by women).⁷⁴ Custody of women cases replicated adultery cases in form and argument. The plaintiff wished to demonstrate that he, not the defendant, had paid bridewealth and was thus the legitimate husband of the woman in dispute. The arguments advanced by defendants and women also resembled those in adultery cases. Should he succeed, the plaintiff could claim indisputable rights over the woman unless and until his bridewealth was refunded; a union formed between the woman and the defendant, or any man, could never be legitimate in the eyes of the law or the community.

Divorce cases proceeded differently than did custody claims. Here, women spoke first, explaining to the court why their marriages should be ended. They presented litanies of abuse suffered at the hands of their would-be husbands that rendered the marriage illegitimate. She had never desired her husband, a plaintiff might argue, as did Kwamboka: 'I want to divorce this defendant Kinanga because I didn't love him since long ago, he is a good young man, but I don't love him'.⁷⁵ Others complained of physical violence, or of having been accused of witchcraft or barrenness. For these women, their marriages had already effectively ended. They wished only officially to dissolve their marriages, allowing them to marry anew. Women testifying in criminal and custody cases argued in vain that marriage involved more than simply bridewealth; in divorce cases the law required them to make just such an argument.

For men, refuting women's accusations of mistreatment was all the more important given the number of successful divorce applications. Of 164 extant divorce cases 43 were dismissed *ex parte* or on technical grounds. In 86 (or 71 per cent) of the remaining 121 divorce cases heard, elders granted divorces. Why did elders so often comply with the wishes of unsatisfied women? In fact, it was not women's words that counted, but the women's male siblings or parents. The plaintiff who had the support of her family could expect a favorable reception by the court elders. Recognizing the continuing rights of a family over a married-off daughter,⁷⁶ elders nearly always followed families' wishes. Of the 86 divorces granted, parents lent their support in 76 of the cases, in three others only the litigants testified, and of the remaining seven there is little information. In not a single case did the elders grant a woman a divorce against the wishes of her family.

In numerous divorce and custody cases women's families did admit circumstances in which a marriage should be dissolved. Excessive physical violence, the failure to produce children and accusations and counter-accusations

⁷⁴ Men wishing to end a marriage might instead demand or sue for the return of bridewealth.

⁷⁵ R/G div 447/57.

⁷⁶ At least until the *enyangi* ceremony, which fully sealed a marriage and attached mystical sanctions to its dissolution, parents retained some rights over married daughters. Since *enyangi* required transfer of more bridewealth, it was often put off many years into married life, if performed at all.

of witchcraft might lead relatives to support a woman who had left her husband. A man who chased off his wife or failed to give her support could alienate his in-laws. Parents and siblings sometimes also viewed 'irreconcilable differences' as legitimate reasons for divorce.

In a handful of cases, family members acknowledged that force did not a good marriage make. Kerubo defended her daughter Gekondo against Mokoro's claim for custody over her.⁷⁷ Kerubo explained to the court that Gekondo had first been married to another man, but out of greed a brother forced her to marry Mokoro. Gekondo had refused him and thus, her mother stated, she should remain with the defendant to whom she had again run.⁷⁸ At least two fathers admitted that their daughters' marriages had been borne of force, which helped convince them to support divorce applications.⁷⁹ Women who threatened suicide should they be forced to return to their husbands also swayed their kin.⁸⁰

Perhaps more than anything else, the difference between the attitudes of *ritongo* elders and senior men in criminal and civil cases came down to a woman's respect of parental rights. Criminal cases dealt with women who had taken matters into their own hands, taking up with new men without first seeking familial approval. In nearly all divorce cases dissatisfied women had already secured a parent's or brother's support for the dissolution of the marriage. All Gusii might agree that childlessness, accusations of witchcraft and excessive domestic violence might dangerously weaken a marriage. The crucial question centered on who should determine when these issues entirely and irrevocably broke a marriage. Women's arguments remained relatively constant across criminal and civil cases; whether they would be received favorably by the court elders depended in large measure on their kins' testimony.⁸¹

Thus a husband could do wrong, elders believed, so much so that he could effectively resign his rights over his wife. Such instances included a man's sterility, his physical abuse and chasing off of his wife. Elders in Bina's divorce case argued this, if only to demonstrate why they rejected her plea. Evidence had shown that the man was not sterile, as Bina had charged. Moreover, 'her husband didn't hit her, he didn't even chase her off. And so, we don't see a reason for a divorce'.⁸² Chasing off a wife, especially, 'without reason, without any wrongdoing', could end a marriage,⁸³ as could a husband's failure to inquire after his wife who had long ago left him. *Ritongo*

⁷⁷ Mothers of women in dispute rarely gave evidence, although when they did it was generally in support of their daughters.

⁷⁸ R/G c/w 423/57.

⁷⁹ Nyamesa admitted in his daughter's 1960 divorce case that 'I wish that [Sese] should leave Oteyo because I forced [her] to Oteyo, then, Sese utterly refused Oteyo'. R/G div 478/60.

⁸⁰ More than a few women resorted to suicide to escape unwanted marriages, making such threats real. See Shadle, "'Girl cases'", 305-6.

⁸¹ While elders never granted divorces against the wishes of the petitioners' kin, they did dismiss some divorce cases despite familial support for the divorce. In a few custody cases elders felt compelled to over-rule parental wishes, or at least to comment unfavorably on the 'legitimate' bridewealth marriages brought before them.

⁸² R/G div 57/56.

⁸³ R/K div 215/59.

elders also believed that witchcraft, if proved, could lead to the dissolution of a marriage.

Upon a man's death his family continued to exercise rights over his widow, but court elders believed that women's choice might be of greater importance. The elders approved Kerubo's divorce application (allowing her to leave her dead husband's family and be remarried), in part because 'her husband had died'.⁸⁴ Similarly, Siriba claimed the widow of his brother, which her brother supported. The elders dismissed the case, however. 'We see no reason to return this woman to another man who is not her husband, rather it is just the family of the late [husband]'.⁸⁵

The simple right of a woman to reject a man, so vocally argued by women and young men, was on occasion supported by court elders in civil disputes. Magara claimed Miruka for whom he had paid bridewealth in 1959. She reported, however, that she had been but a young girl then, and that she had run off from him and was forced back, only to escape again. The elders denied Magara's claim, noting that Miruka 'has refused to return to Magara. The court has seen no right to order her forcible return to him'.⁸⁶ Even a man who won his claim over his wife might not gain actual custody should she not agree. Obara was awarded his wife and children but, the elders stated, if she refused him he should sue for his bridewealth, dissolving the marriage.⁸⁷

Some elders went so far as to criticize the senior men before them in the court, at times employing the same language used by women who were dissatisfied. Bwari was attacked by the elders for marrying his daughter off first to the defendant, breaking that marriage to marry her to the plaintiff and then during the case claiming that he would break off her marriage to the plaintiff as well. The elders saw clearly that Bwari made and unmade marriage based solely on the amount of bridewealth he might collect and charged that this was 'like commerce'.⁸⁸ In one exceptional case the elders chastised a father along the same lines as had many women their own fathers:

we find that the father of the woman is indeed the guilty one, because first his daughter went to the defendant [then he recovered her through a court case and] seized his daughter to sell her like a goat, and his daughter did not want the second husband. She will live at home [i.e. in her father's homestead] so that she will be married to another husband. Therefore we dismiss the case.⁸⁹

Just as women argued in criminal cases, these elders believed that a marriage borne of coercion was not legitimate.

CONCLUSION

Gusii women involved in marriage disputes remained committed to the ideal of marriage sealed by bridewealth; a single case is the exception that proves the rule. In 1960 Obiri was charged with taking Kemuma, wife of Ntebo.

⁸⁴ R/K div 190/52.

⁸⁵ R/K c/w 474/59.

⁸⁶ R/K div 421/65.

⁸⁷ R/K c/w 1207/47. In one *Ritongo* Manga case the elders pronounced that 'The court has seen that it isn't good to force the plaintiff to go to the [defendant]'. R/M div 20/60. One man successfully claimed custody of his wife and children, but was told by the elders that if she refused to be returned to him, she would be allowed to remain with her chosen man, the defendant. The children, however, would remain the plaintiff's. R/K c/w 709/49.

⁸⁸ R/K c/w 926/57.

⁸⁹ R/G c/w 257/56.

Obiri admitted that the woman had briefly lived with him, but, having learnt she was married, he chased her away the second time she came to him. The court demanded whether Obiri recognized that such dealings were wrong. Yes, he replied:

but the time I took her I found that she had entered the work of prostitution ...

...

Q: Ntebo, is that wife of yours a prostitute?

A: No!

...

Kemuma ... woman who is being fought over: I do not know either of these two ... And this complainant, he found me in the road and abducted me and I slept at his home one day and returned with my child which I got at home [i.e. before she was married]. That is the time I filed a divorce case against this complainant here in *Ritongo* Kuja, and that time ... I was living with Obiri, it was one and a half years without having a child there. When the divorce case was dismissed, [meaning] that I should return to this complainant, I entered the way of prostitution, I even lived in Nubian Village [on the outskirts of Kisii town] to continue my prostitution, and all the three children I have I got there in Nubia. Their fathers – I am unable to know [them], not at all. And now I have no husband between the complainant and the accused, rather I want this complainant to return to me my two children because I was auctioned by my father to go to this complainant.

Kemuma not only rejected her supposed husband, but also any man who might claim her. She sought a life unencumbered by marriage and (direct) male control. (Significantly, her filing a divorce case demonstrates her realization that until her father returned the cattle to Ntebo and the connection was severed, she could never truly be free of the man.) But Kemuma was atypical. In all other cases, women aspired to marriage sanctified by bride-wealth, albeit marriage made on their own terms. Kemuma may seem less exceptional if viewed in relation to existing historiography, but that Kemuma's courtroom story was unique in the *ritongo* demonstrates the imperative of scholars looking beyond more visible examples of women's resistance – running away from newly strengthened senior men. By focusing on (admittedly brave and resourceful) women like Kemuma, scholars ignore the tribulations of the vast majority of women who chose not to concede to senior men the right to define marriage. Women who embraced marriage, but who did so only on their own terms, ultimately did more to shape the course of African marriage than their 'runaway' sisters.

Kemuma was typical in one sense, however, one that also challenges the historiography: she turned to the courts for a divorce, and willingly came forward to give evidence in the case against her former lover, Obiri. *Ritongo* elders generally favored husbands and fathers, but not unquestioningly, and not to the extent that women avoided appearing before the courts. Men could be too violent, elders believed, too adamant in ignoring women's wishes. Thus some women argued successfully for the right to leave one mate and select another without, of course, denying their fathers the right to claim bride-wealth, which elders likewise would never have accepted. Scholars must be more attuned to debates among 'senior men', and to the ability of women to exploit the cracks in the edifice of the 'patriarchal' courts.