

UNIVERSITY OF THE WITWATERSRAND
AFRICAN STUDIES INSTITUTE

African Studies Seminar Paper
to be presented in RW
4.00pm JULY 1990

Title: Rhetoric and Representation: The Narrative and Discourses
Surrounding the Contest for the Burial of S.M. Otieno, Kenya,
1986-1987.

by: Atieno Odhiambo

No. 274

RHETORIC AND REPRESENTATION:
THE NARRATIVE AND DISCOURSES SURROUNDING THE CONTEST FOR
THE BURIAL OF S.M. OTIENO, KENYA, 1986-1987

Atieno Odhiambo

Prologue

It was a warm, sunny, and brilliant Saturday in Nairobi on the twentieth of December, 1986. The south-Western suburb of Karen-Langata, immortalized by Karen Blixen in print and Meryl Streep on screen, looked dry-brown, dusty and ever ethereal. The African notables who own and live in this neighbourhood - doctors, lawyers, senior military officers - went about their busy pre-Christmas affairs, fixing their cars in readiness for the long drive to the upcountry, to the lands of their birth in the former Native Reserves, to their extensive farms in the Rift Valley, or to their oceanic properties along the Kenya coast. For a few others who were not leaving town, this was the time to fix their peri-urban investments: bars and butcheries in Athi River and Ongata Rongai, the small gardening plot in Limuru or Upper Matasia, or the kiosk in Buru Buru estate, Nairobi. It was also a time to visit, to chat, to be with friends and family.

It was a day to consult uncles and elder brothers about uncompleted dowry, and about the protocol of mourning a mother-in-law in the urban setting of Nairobi, as Khama Nyamogo (named Khama after the 1948 defiant marriage of Seretse to Ruth) was doing that afternoon, consulting with one of the authors, and with his paternal uncle Dr. Zachariah Ogutu Nyamodi at the latter's residence in Karen that afternoon:

Silvano Melea Otieno was one such busy person that Saturday. Born a Luo in Nyamila village, Nyalgunga, Alego, Siaya District. Otieno was the doyen of Kenya's criminal lawyers. Popularly referred to as "S.M.", he spent that last day of his earthly life very typically. That morning Otieno chatted jovially with his wife Edith Virginia Wambui about the need to stock alcohol in the house for an anticipated afternoon visit by a mzee, (an elder) and for Christmas carousals, before heading to his law offices downtown. Wambui joined him there later in the morning, where they bantered more about Christmas. At around mid-day he left his offices in the company of two of his uterine sorority relatives, Odhiambo Modi and Umira Odhiambo and headed for his Karen compound. Otieno played the host to the two, his nephews, showing his clansmen around the compound with his two sons Patrick Oyugi Otieno, and Frederick Otieno in tow.

Sometime that afternoon he left his Langata patrimony in the company of the two uterine sorority relatives, and headed for the six-acre garden he owned at Upper Matasia on the outskirts of Ngong. He carried a parcel containing a dress for a daughter of Wambui who was also staying at the farm. On arrival he chatted with Tiras Waiyaki, a son to his wife Wambui Otieno by a former liaison. A typical weekend yeoman, he then took his relatives round the shamba (farm) to see the cattle - six bulls in all - and the goats. This was his last yeoman's walk, for on returning to the farm cottage he intimated that he was feeling unwell. He laid himself on a lounge chair (sofa). Waiyaki noticed that Otieno was having difficulty with normal breathing, and began massaging him but to no avail. Next, Waiyaki and the two relatives moved him to his Mercedes Benz car and laid him on the rear seat where Waiyaki sat next to him, while one of the relatives drove to Nairobi Hospital. Otieno was pronounced dead on arrival. It was six p.m. under a very azure afternoon sky.

At seven-forty p.m. that evening, Joash Ochieng' Ougo, S.M.'s brother, 51, senior foreman at the Railways Corporation, was visited at his residence, No. 1 Ojijo road, Parklands, by another of Wambui's daughters, Elizabeth, accompanied by Joshua Buliro, a former high-ranking diplomat in the Kenya government. The two informed Ochieng' of the death of his brother. They then gave Ochieng' a lift to the City Mortuary where he viewed the body of S.M., accompanied by one John Obonyo and by a niece, Mrs. Jane Obuong' Abonyo. Ochieng' then proceeded to S.M.'s Langata residence, accompanied by his wife Rispa and his sister Idalia Awino. Ochieng' stayed at Langata for ten minutes, and then went out to inform his other relatives about the death of Otieno. He got back to Langata at about midnight. At this stage, Wambui asked him to sit down to discuss burial arrangements, making clear to Ochieng' that Otieno should be buried in Nairobi "according to his wishes" (Egan: 55)¹.

Ochieng' declined to discuss the matter there and then, pleading that it was too early to do so because "members of my clan who could talk about it had not come". This annoyed Wambui, who asked Ochieng' to leave.

The following day, December 21, was a crowded day. Joash Ochieng' went to Langata again, and apparently annoyed Wambui so much that the police were thrice called to throw him out, by Wambui according to him, or by a Mrs Kimani according to Wambui's lawyer, John Mugalasinga Khaminwa. Ochieng' went back to his house, where he found Omolo Siranga, a member of their clan, Umira Kager. Apparently a decision was then taken that funeral meetings would be held at Ochieng''s house. Siranga and his companions went out to inform people to the effect; and it

appears that they re-convened at No. 1, Ojijo road that evening. Those who attended that meeting numbered about four hundred people. Speeches were made by about twenty people, and it was decided to form a committee to run the affairs of the burial of Otieno then. Omolo Siranga was appointed to chair this committee. This assembly also decided that Otieno would be buried at Nyalgunga. The process of decision-making was apparently implicit:

"The burial place was not an issue. It was already understood where he would be buried".

(Egan:49)

Armed with this understanding, Omolo Siranga was also authorized by the meeting to go to Langata and ask Wambui to allow the funeral throngs to assemble and mourn Otieno at his Langata house. Siranga, accompanied by Fred Ouma of his funeral committee, visited Wambui on December 22 to convey this latter desire. Wambui was not at home, but her son Tiras informed them that he (Tiras) had no authority to talk: rather, Dr. Julius Gikonyo Kiano would be the man to talk to, and Dr Kiano would not be back from Mombasa until the following day. Siranga returned to his base at Ojijo Road. While there the news arrived - via Idalia Awino, and Julia, S.M.'s two sisters, and Ochieng's two daughters - that these people had been refused permission to view the body at the mortuary. Siranga proceeded to the mortuary, only to confirm this allegation, for Wambui had indeed left instructions to the morgue attendants and at the Kilimani police station to that effect.

That evening witnessed the first of a series of reconciliatory meetings. Dr Kiano, accompanied by Dr Josephat Karanja, then a member of Parliament for Mathare, Nairobi, Mrs Muliro (or was it Mrs Buliro?) plus two brothers to Wambui, went to Ochieng's house, where Siranga chaired discussions revolving around the need to coordinate the funeral arrangements. Siranga's group stuck to their Nyalgunga intention, while Dr Kiano's group pleaded that they did not have a mandate from Wambui to discuss that particular specification. Further meetings were held, at Devon Hotel on Tuesday December 23, at Dr Kiano's house the same day, and a subsequent one the same evening at Otieno's house in Langata. The Wambui side held their ground. A visit on December 24 to Otieno's house by Joash, Otieno's step-mother Magdalina, Otieno's sister Julia, Siranga, and Philip Rang'enga did not persuade Wambui otherwise, nor did another meeting on the following Monday, December 29.

Meanwhile, both Wambui and the Umira Kager clan had placed announcements over the Voice of Kenya radio on December 28, she to the effect that Otieno would be buried at their Upper Matasia farm on January 3, 1987, while the clan announced that they would take the body from the mortuary for a viewing and a funeral service at the All Saints' Cathedral on Wednesday, December 31 and a burial at Nyalgunga on Saturday, January 3, 1987.

Meanwhile the clan association, the Umira Kager, part of the Ugenya Kager moiety, had been meeting every evening at the house of Joash Ochieng' Ougo, a roomy brick and stone compound situated at Number One, Ojijo Road, right behind the National Museum. Initially the house served as the rendezvous for all the mourners who could not make it to Karen; as word filtered that Wambui had locked her gates on the Luo anyway, Ojijo road became the alternative funeral gathering for Otieno. Day and night, crowds of Luo milled back and forth, exchanging views on the matter, wailing, arguing, processing a consensus. By week's end, such Luo nationalists like Dr Onyango Abuje had a clear message to broadcast verbally and vigorously: Otieno would be buried at Nyalgunga and nowhere else. The Umira Kager chairman, Omolo Siranga announced on December twenty-ninth that a clan meeting at Ojijo road had resolved that the clan should take over the funeral arrangements.

In light of the open contest, the Voice of Kenya stopped any further announcements on the funeral on the same day.

The Injunctions

It would appear that in the ensuing cacaphony, Joash Ochieng' Ougo had written to the Superintendent of the City Mortuary urging the latter to bar Wambui from taking Otieno's body.

Wambui then sought recourse to the law of the land. On the 29th day of December 1986 Wambui filed a suit in the High Court seeking inter-alia a declaration that she was entitled to claim Otieno's body and perform a burial ceremony in priority of Joash Ochieng' Ougo, or any person claiming to be the latter's representative. (Egan:15).

On December 30, the following day, she filed a twelve-paragraph plaint in High court through her lawyers, John Mugalasinga Khaminwa and Samwel Kinuthia. The plaint, heard before Justice Frank J. Shields:

.Asked the court to declare that she was entitled to claim the body of her husband and bury it.

.Asked that Jairo Ochieng' Ougo and Omolo Siranga be restrained by injunction from removing the body of Otieno from the City Mortuary.

.Prayed that Ochieng' and Siranga be restrained from burying Otieno's body at Nyalgunga, or elsewhere in Kenya.

Shields granted Wambui an ex-parte injunction to collect the body of her husband from the city Mortuary for burial at Ngong.

Immediately after this, Ochieng' and Siranga, through their lawyer, Richard Otieno Kwach filed a counter-injunction on Tuesday, the second of January 1987 asking the court to nullify its earlier order and restrain Wambui from collecting the remains of Otieno from the mortuary. (Egan:5).

By this time, a wider supportive cast had mobilized itself around Ochieng', including Barrack Angoya Onyango who claimed to be the Chairman of some moribund locational Alego Ragar Association (he had not called a meeting in twelve years!), as well as Philip Rang'eng'a, secretary of the Ugenya Association, another moribund body. Both organizations purported to be the representatives of communities from which Otieno sprang.

Pleading before the same Justice F.J . Shields, Kwach pleaded, on behalf of Joash Ochieng' Ougo and Omolo Siranga:

.That Shields put aside his injunction of December 30.

.That Shields should issue an order restraining Wambui or her agents from burying Otieno anywhere other than at Nyalgunga, Otieno's rural birthplace in Alego, Siaya district.

Kwach argued then that Otieno was a Luo, and being a Luo, must therefore be buried in accordance with Luo customs and traditions.

In his ruling on the fifth of January, 1987 Shields made short shrift of Kwach's argumentation, stating:

He [Otieno] was a metropolitan and a cosmopolitan, and though he undoubtedly honoured the traditions of his ancestors, it is hard to envisage such a person as subject to African customary law and in particular to the customs of a rural community.

[Egan:6]

On matters of law, Shields found that Wambui, being Otieno's widow, was the person entitled to be Otieno's personal representative and was therefore entitled to the custody and removal of the body until it was buried. (Egan:6). Turning to the defendants, Shields found that neither Ochieng' as the brother to Otieno, nor Omolo Siranga as the representative of the Umira Kager clan, had any legal right or locus standi in the matter of the burial of Otieno. This would remain the case even if Otieno were to be buried according to Luo custom. The law, in fact the Public Health Act (Cap 242 Section 146, Sub-section 2) recognized that only the legal personal representative or next of kin of a deceased person could be permitted to remove the body from the mortuary for burial. And Wambui was that next of kin.

Kwach thereupon appealed to the highest court of the land, the Kenya Court of Appeal, against the judgement of Justice Shields. But in the meantime Wambui, feeling thus empowered, announced to the press that she would bury Otieno at Upper Matasia on January 10.

This announcement in turn prompted Ochieng' and Siranga to submit, through their lawyer Kwach, to the Kenya Court of Appeal to restrain Wambui from burying Otieno pending the intended hearing of the appeal against the judgement. The Court of Appeal was constituted the next day, January 6, and Kwach appeared before Justices J.O. Nyarangi, H.G. Platt and J. Mugo Gachuhi. It was a brief appearance, and the following day, January 7, the Justices ruled that the body of Otieno should not be buried until after the court has made its ruling on Kwach's original appeal before it:

It is the practice of this court to preserve the status quo until the hearing of the appeal so as to preserve the subject matter (Mr Otieno's body) and avoid the appeal being rendered nugatory (invalid)... It is feasible for the body to be preserved in the City Mortuary and it is unreasonable and unnecessary to risk exhumation... The body shall remain in the City Mortuary until a further order.

(Egan:9)

On January 9, 1987 Kwach filed his memorandum of appeal, in which he argued inter alia that Justice Shields had:

.Erred in law in granting the injunction against Ougo and Siranga without an inter-partes argumentation from Kwach.

.Misdirected himself in law and in fact in holding that because of his education, marriage, association and professional success, Otieno had thereby lost his 'tribal' identity and could not be governed by or be subject to the customary laws, traditions and culture of the Luo.

.Erred in ignoring, the evidence of Ochieng' and the Umira Kager clan regarding Otieno's wishes as to where he ought to be buried.

.Gravely misdirected himself in holding that since Otieno was married under the Marriage Act, he automatically ceased to be governed by or subject to the Luo customary law or any other relevant laws of the land.

(Egan:15)

The following day Kwach began his submissions before the Court of Appeal, urging for a re-trial on the basis that Justice Shields of the High court had totally disregarded Luo customary law in his judgement. Kwach argued that Justice Shields had only heard Wambui's side of the case through her lawyer Khaminwa, and had not given Kwach the chance to interrogate Khaminwa's evidence, nor to make his own case about Luo customary law. In Kwach's view, Justice Shields merely accepted Khaminwa's assertion that Luo customary law was 'primitive' (Egan:12) Kwach argued that in a proper trial Luo assessors should have been summoned by Shields to hear the matter pertaining to Luo customary law. Kwach thus pleaded: "We should have been given a chance to prove our evidence". (Egan:12).

In reply, Khaminwa exclaimed "Customary law is out!", but Kwach reiterated his demand for a retrial.

When it gave its ruling, the court set aside the earlier judgement by Justice Shields empowering Wambui to bury Otieno. More momentously, they ordered a full trial to be held by the High Court to decide where Otieno's body would be buried - not "a retrial, because there was no trial" they stated. (Egan:14).

In giving its ruling, the three Justices distilled the contention succinctly as follows:

The question that lies at the heart of this matter is whether or not the deceased is subject to the Luo customary law. On the pleadings a dispute of primary fact emerged, making it necessary for evidence to be adduced to prove the relevant customary law as a matter of fact. There was no evidence before the judge on the disputed issue and therefore it was a misdirection for the learned judge to find that it is hard to envisage the deceased as subject to the particular customary law.

[Egan:15]

The Justices restrained Wambui or her agents from burying Otieno anywhere else other than Nyalgunga until a full trial of the case before another judge.

On January 14, 1987, Wambui filed an injunction in the High Court through her lawyer Mr Khaminwa, seeking to restrain the Umira Kager clan from collecting her husband's body from the city Mortuary.

The Trial

The full trial opened before Justice S.E.O. Bosire on January 22, 1987. Mr Charles Khaminwa, representing Wambui Otieno, opened his case by submitting as his case that Wambui, as Otieno's widow, was in law entitled to bury her husband; and furthermore that Otieno had expressed his wish to be buried at Langata, or Ngong, or Upper Matasia, both to his wife, his children Jairus Ougo and Patrick Oyugi Otieno. In addition, Khaminwa intended to argue that Luo customary law did not apply in this case. Fourthly, he intended to reiterate the earlier claim that Otieno's style of life had been such that he was not subject to African customs. Khaminwa argued that Otieno had chosen a Christian way of life by marrying Wambui under the African Christian Marriage Act. He put great paid on the fact that Kenyans were living in rapidly changing times and therefore the Luo should not be encouraged to put into practice customs which were not conducive to this 'modernity'. Khaminwa also argued that Wambui should be given her husband's corpse to bury it in "a civilized manner". [Egan:18]

Khaminwa then proceeded to present as witnesses for his case Wambui Otieno and her sons Jairus and Patrick. In addition some neighbours of Otieno at Langata, namely Musa Muna, Harry Mugo and Godwin Wachira, also gave evidence in support. Others included

the lawyer Timan Njugi, a scientist researcher Alfred Adema and his wife, Juta Johanna; plus a host of ordinary people: cultivators Rahab Wambui Muhuni from Kandara and James Ole Tameno from Ngong, kiosk seller Mama Koko and vegetable hawker Jane Njeri Muchina, both of Nairobi, and office workers Edward Muni and Charles Muchina Ngari. They all purported to have heard Otieno express his wish to be buried at Ngong.

In response, Mr Richard Otieno Kwach, for Joash Ochieng' Ougo and Omolo Siranga, summoned an array of witnesses whose cumulative argument was that Otieno should be buried according to Luo customs; which demanded that he should be buried in Nyamila beside his father's grave. The witnesses all sought to script the existence of Luo 'custom' which governed:

.The way to build a home.

.The rituals governing the burial of a male such as Otieno.

.The complete absence of any meaningful role of the Luo widow in the burial ceremonies.

.The metaphysical fate that would befall Otieno's relatives - his brothers, sisters and their families if Otieno were to be buried other than according to Luo customs.

Kwach summoned a mixed bag of witnesses, just like Khaminwa had done. These included businessmen Omolo Siranga and Amos Owuor Tago, skilled artisans Joash Ochieng' Ougo and Albert Ong'ang'o, rural elders Johannes Mayamba and Japheth Yahuma, Otieno's stepmother Magdalena Akumu Ougo and his sister Idalia Awino, and Philosophy Professor Henry Odera Oruka. This trial lasted a total of seventeen days. It also generated, in and out of court, a plethora of discourses.

The Discourses

From the early hours after his death the family of Otieno (uterine and patrimonial) were engaged in conflict, and in running commentaries on the question as to where Otieno should be buried. Their respective announcements on the Voice of Kenya and the subsequent court proceedings prompted public commentary literally everywhere in the republic : about the rights of Wambui, and of women generally; about Luo-Kikuyu and other extra-ethnic marriages; about the rhetorics of modernity and tradition...

A sample of the printed texts is in order. Said Wambui on December 30:

I am married by one man and not by a clan. I was married through Christian traditions and I am from Kiambu.

Again on January 21, 1987:

I am a Muceera in Kikuyu and Kapitei (sic) in Maasai. They should not think I am alone. I can also call my clansmen to come out and demonstrate in support as they have been doing.

[Egan:16]

On marriage she had the following to say:

...it would be difficult for Kenyan women to intermarry if at the death of their husbands they were deprived of the body.

[Egan:5-6]

And:

Every woman in Kenya should look at this case keenly. There is no need of getting married if this is the way women will be treated when their husbands die.

[Egan:16]

To which Barrack Angoya Onyango (for the Alego Ragar Association) retorted:

...burying such a Luo hero in Ngong would be the greatest insult the community would ever suffer.

...She is fighting the whole Luo community and this is very serious. She is our wife....

He pointed out that this incident is greatly hurting the Luo community everywhere in the world.

[Egan:3]

Marriage, inter-marriage, man, clan, Christian, traditions, Kiambu, leveriate on the one hand; ranged against Luo, hero, insult, community, wife, hurt, the world on the other. The list is an anthropologist's delight; in the subsequent weeks they formed the centerpieces around which discussions, coherent and not so coherent, were to be conducted. The pitch of the rhetoric, however, was provided by Frank Shields:

He was a metropolitan and a cosmopolitan..

It is hard to envisage such a person as subject to African customary law and in particular to the customs of a rural community.

[Egan:5]

Mr Kwach: With respect, my Lord, I think he relied on my learned friend's (Mr Khaminwa's) submissions that the Luo customary law was primitive.

[Egan:12 Our
Italics]

Mr Khaminwa quoted Genesis Chapter 2 verse 24 of the Bible which states that a man shall leave his father and mother and shall become one flesh.

[Egan:13]

Modernity was etched out in Otieno's metropolitanism and cosmopolitanism; ranged against him were ancestors, Africanity, customary law, ruralness; these in Frank Shield's opinion, summed up what Karl Marx in The Eighteenth Brumaire of Louis Bonaparte had earlier referred to as "the idiocy of rural life".

Wambui's S.M. Otieno : Wambui's Etching

Kwach: You regard your husband as personal property?

Wambui: That is an insult.

[Egan:34]

In her evidence, Wambui gave a detailed etching of S.M. Otieno as the husband that she knew. She gave a portrait of an educated man who had attended Simenya Primary and Maseno Secondary Schools before proceeding to Bombay University. It was while he was in India that Otieno made some of his life-long friendships: with Dr Joseph Karanja, formerly Kenya's first High Commissioner to London, then vice-Chancellor of the University of Nairobi, subsequently an elected Member of Parliament for Mathere Valley and then Vice-President of Kenya (and hence into disgrace and political oblivion); as well as her own brothers Munyua (who qualified as a doctor, was elected to parliament in 1963, became an Assistant Minister till 1966, and then became Minister for Foreign Affairs from 1974 to 1979), and Mugo (who became a High Court judge).

It was either in Mugo's or Munyua's office that Wambui first met Otieno in 1961. A relationship developed then that was translated into a Christian marriage in 1963. Otieno was then a young man at the beginning of an independent career as a lawyer. In 1964 he was appointed Deputy Town Clerk in Kisumu (by Kenyatta himself according to Wambui) where he served for sixteen months before returning to Nairobi as an Assistant Principal Legal Counsel for the East African Community. Otieno served in this capacity until 1969 when he re-set up his own practice. He prospered over the years, and by his life's end had become a

prominent Kenyan. Wambui's recall is that of a hard-working 'busy' man, but who was also a good husband to her and a good father to her children and foster-children. Indeed he was a philanthropist, having adopted the six children of Richard Arina as his own following the demise of their mother in 1966. (Arina, a Luo and a former District Commissioner, had apparently died poor). Otieno stayed close to his hearth, where he read Bernard Shaw, the Bible, Shakespeare, a bit of Perry Mason and watched football on television (because he disliked the hooliganism at the Nairobi stadium).

He was a Christian, an occasional worshipper and generous donor to churches in Kiambu and Muranga. His children were baptized in church: he demonstrated his modernity by naming one of them as Jairus, after his father Jairo when the patriarch was still alive.

They maintained a modern language code in the family: they spoke English, "a slight Kiswahili", and no Dholuo at home. The family was well provided for in terms of property. The Otieno's jointly owned their Langata residence, a farm in Kiserian and another unnamed place, a Mercedes and a Mazda. The farm in Upper Matasia was registered in Otieno's name. Wambui in addition had personal properties in Mombasa, Naivasha and Kikuyu. Outdoors they danced in their younger age, and he dutifully paid for Wambui's golf later in life.

Wambui: "He was not a poor man for his family not to afford his burial".

This remark elicited a murmur in the audience.

[Egan:24]

He cared for his father in health, enhancing the old man's home by building him a semi-permanent home, and in sickness by accommodating him for medication in Nairobi in 1976/77. The father stayed with the Otieno's for a year. In 1977 Otieno and son Jairus drove the old man back to Nyalgunga. Otieno dutifully went to the burial of his father in 1978, and to the unveiling of a cross over the grave a year later. In addition he attended the funeral of his nephew George Michael Oyugi in 1982, and also the burial of his brother, Simon Odhiambo three years later. Otieno was accessible to both his brothers and sisters - excepting for the fact that some of them were quarrelsome over Otieno's money. He was generous, to the extent of surrendering his patrimony in Nyalgunga, LR Alego Central/Nyalgunga/1983, for the son of his step-sister Felgona Akinyi: the child had been named SM, "because he did not want anyone named after him to be destitute" (Egan:24).

As a member of the Luo community he was a dormant member - Number 18 - of the Ger Union, part of the Ugenya moiety. But his high profile was as a Kenyan, having been the Uasin Gishu Assistant Treasurer of the Kenya African Union (KAU) way back in 1945. He developed a wide network of friends from among his clansmen - Otieno Ombajo, Luke Odembo, Hilary Ochola, Dr William Ouko; from among prominent Luo's - Walter Midamba; and from among other Kenyans - Mr and Mrs Muna, Dr Julius Gikonyo Kiano, former minister, and former Vice President Dr Josephat Karanja wa Njuguna. Otieno was a prominent member of the legal profession, with associations with the Law Society of Kenya and the International Bar Association. Above all, Wambui etched Otieno as a man of integrity:

Mr Otieno had his own ethics.
He was for the truth and that
is what he stood for.

[Egan:33]

Cultivating 'The Other' Luo of Nyalgunga

The evidence that Wambui and her two sons - Jairus Michael Ougo Otieno, and Patrick Louis Wilkinson Oyugi Otieno, - presented before Justice Bosire, sought, among other things to produce an 'anthropology' about the Luo that cast the latter as 'the other': different from urban, civilized people. The sum total of this presentation reads like the very familiar colonial Discourses on the Luo in pre-independent Kenya that such authors like Elspeth Huxley had churned out on the Luo: lazy, half-witted, primitive, obdurate... (Atieno-Odhiambo 1971).

Indeed, Jairus Otieno admitted as much, having, as a 'scholar' (Egan:35), culled it from books. The key input of the Otieno sons however, lay in their attempt to recreate their father's attitude towards the Luo - attitudes which, they inferred, were consonant with colonial discourses, at least at the level of epithets. Jairus' case against burying his father at Nyalgunga lay in what Jairus claimed Otieno had uttered: and it was much. S.M. had spoken against being buried in Nyalgunga "because the traditional customs obtaining in Nyalgunga were "primitive and uncivilized" and therefore these young moderns "wouldn't understand them" (Egan:35). They would not understand the ways of the Nyalgunga folks because they were the ways of "lazy" people who lived in "simple structures" and "would not like us" the city slicks.

Kwach: Are the people like you?

Jairus: No.

Young Patrick not only confirmed his elder brother's evidence, but added to the rhetoric on the idiocy of rural life by claiming as his father's assertion that it was the wife of his grandfather and siblings in Nyalgunga that had "starved" the patriarch Jairo Ougo "to death" (Egan:36). Not content with that, these bumpkins now planned to impose humiliation on his mother Wambui by subjecting her to a burial in which the Otieno family would have no say. Both Wambui and Jairus recited the same text in this regard:

Jairus: The people gather at the widow's home. The brothers and elders make funeral arrangements, the widow and her children are never consulted. When the body is taken home, the widow spends the night with it and a janeko (lunatic) is hired to sleep in the same room.

The next day the widow and her children are shaved. The funeral ceremony is done. Sometimes the nails of the deceased are plucked out and all his body hair shaved off to clear out demons.

[Egan:35]

Mrs Otieno: I would also have to wear my husband's clothes inside out... After his burial, elders in his family would sit down and nominate a man to be my husband.

[Egan:21]

According to this text, then, it was these rituals of "The Other" that Otieno sought to protect his family from. And yet there was this contradictory twist to this portrait:

Kwach: Do you know what your father's tribe was?

Jairus: Yes. He was Luo.

[Egan:35]

"A Stranger in Nyalgunga": Otieno's Wish

Eyeless in Gaza

At the Mill, with slaves.

Milton: Samson Agonistes

A starting point in the discussion on Otieno's wishes as to his last resting place is the intimate proximity between orality and literacy. All the way from 1979 he had been telling all and sundry that came his way about his preferences, orally. Yet when an illiterate friend, Rahab Wambui Muhuni, advised Otieno about the need to put this in writing (indeed a literate world turned upside down) Otieno gave a layman's answer: Wambui would know how to deal with the matter! Otieno did, however, acknowledge the power of the spoken word, for between 1979 he told all who

would care to hear about where he intended to be buried. The venues for his utterances varied. From table talk: to Rahab Wambui Muhuni, 50, to Musa Muna a propertied neighbour in Langata, both at Otieno's house, and to Godwin Wachira, a journalist at the home of the Kiano's. Otieno also spoke to the subject matter when casually chatting with landed neighbours: herdsman James Ligia Ole Tameno, 70, in Upper Matasia; and Harry Mugo, 38, a graduate land economist, at their common boundary in Langata. S.M. Also ranted away, angry in his car, somewhere between Nyamila and Kisumu, in the hearing of Mariamu Murikira, alias Mama Koko, 61, a kiosk owner (and suspected magician), and of Jane Nyeri Muchina, a vegetable hawker at Wakulima market. Sometimes Otieno would let it out at the bar, to his neighbour Harry Mugo at the Bomas of Kenya bar counter, manning 'the SM corner', his preferred seat and reciting from Shakespeare's Julius Caesar, to wit:

Cowards die many times before their deaths;
the valiant never taste of death but once;
of all wonders that I yet have heard
It seems most strange that men should fear;
Seeing that death, a necessary end, will come
when it will come.

The bar venue might shift to the Dambusters' Club, but the message would be the same, as was heard by Juta Johanna Adema and her husband Alfred Adema in 1983. Otieno also carried this orature to his workplaces, declaring his wish to fellow lawyer, Timan Njugi within the hearing of Onyango - Otieno and Lee Muthoga at the Kenya High court offices. The subject came up severally in his own chambers, where he talked about it variously within the hearing of Alfred Adema, Edward Muni...

The message that he gave out was consistent: Otieno was "a stranger at Nyalgunga" (Egan:42) who preferred to be "more at home in Nairobi" where he had friends like Godwin Wachira and Dr Kiano. (Egan:42).

The boundary between orality and literacy was often crossed in Kwach's cross-examination of these witnesses. Kwach often called on Khaminwa's witnesses to indicate why the witnesses did not write down what they heard. Kwach placed a certain premium on the veracity of the written word. Yet the repartees that he got, particularly from the illiterate witnesses, echoed back to values that pre-dated writing:

Ole Tameno: I am telling the truth, the whole truth. I'm an old man, why should I cheat?

[Egan:40]

Kwach: Your story is fabricated.

Jane Njeri Muchina: It is you who is fabricating stories because you were not there.

[Egan:45]

Kwach: I suggest to you that you have been brought here to tell lies.

Mama Koko: You are the one who is lying. You were not there and I was. Were you there?

[Egan:42]

There was, furthermore, a question as to the veracity of Otieno's death wish or death wishes. Wambui claimed in her first affidavit before judge Shields on December 30 and maintained her stance throughout the following months, that Otieno had expressed his wish prior to his death that he be buried in Nairobi either at the Langata property or at the Ngong property. Otieno first spoke to Wambui about this in 1979, when he said he should be buried in Langata, since his parents were now both deceased and since he did not wish to have a house in Siaya. He repeated this in 1980 when Hilary Ochola died, again in 1983 when he bought and built on a plot at Upper Matasia, and most pointedly in 1985 when, lying in an hospital bed at Nairobi Hospital, suffering from High Blood Pressure, he said to Wambui:

You know I would have died yesterday. My blood pressure was 180/110 and I hope you remember to bury me at Langata. If you do not get consent (from the President) then it should be at Upper Matasia.

[Egan:22]

Otieno, at a later discussion with family friend Ms. Wambui Muhuni and her son Peter Kenneth Mwangi, had placed this injunction on his future corpse:

If I die and you pass Westlands (in Nairobi) on the way to Nyamila, I will kick the coffin open, come out and beat up all those in the convoy and go back into my coffin..

[Egan:22]

FACT? FICTION?

Luo 'Custom'

'That is where his placenta was buried'

Mayamba
Egan:69

The evidence of Johannes Mayamba - the Mayamba text - is a succinct distillation of what Luo 'custom' is deemed to be by the people of his generation. Mayamba, 66, was husband of six wives, a rural sub-elite living in Yogo village, a member of the Kager

Kogolla clan, a KANU sub-locational chairman, a Christian of the Church of Christ in Africa (Johera) following (and, it was whispered to one of the authors at Rang'ala market during the period Mayamba was giving his evidence, a portent Jabilo, medicine-man!). Mayamba captured the two sub-titles of the discussions about the Otieno issue: what, or how to build a home; and what the Luo burial customs were. First, goyo ligala, home-building:

Kwach: How does a son build a home?

Mayamba: A son puts up a home when his father takes him where he intends to build it. He is accompanied by his father and his eldest son. The son carries a cock, dry grass and firewood. His father just carries his walking staff and the first born son carries an axe.

Kwach: What happens when they reach there?

Mayamba: When they reach the spot, mzee shows his son where to light the fire. He is then asked to tie the cock near the fire and they start building the house.

Kwach: For how long does he stay in that house before he can be joined by his wife and children?

Mayamba: For three days; he sleeps in that house with his son.

Kwach: What happens after that period?

Mayamba: He must have built another house in those three days. His wife can't stay in the first one.

Bosire: For the three days, is the wife allowed to take them food?

Mayamba: Yes.

Kwach: If a man wants to build a home and his father is dead, who plays his father's role?

Mayamba: He has to look for his father's brothers.

Kwach: What happens to a man who dies before building his own home?

Mayamba: He must be buried next to his mother's house.

Kwach: And what happens if a man sets up a home but dies when his parents are still alive?

Mayamba: He has to be buried in his father's compound.

Kwach: Can he be buried in his own home?

Mayamba: He can't because there is a magenga (funeral fire) which a father cannot warm himself by in his son's home.

Kwach: Is it possible for a man to build a home without the knowledge of his father and uncles?

Mayamba: No, he can't.

Bosire: If both parents are dead can the father's peers gather at his son's home?

Mayamba: No, they still have to go to his father's home.

Next, there was the funeral text:

Kwach: When a man dies, some ceremonies are performed, can you elaborate this to my lord?

Mayamba: If it is a woman, women wash her body and dress it, fit the body in a coffin and call her brothers-in-law to cover the coffin.

Kwach: And in the case of a man?

Mayamba: If he is a man, all women have to leave the room where the body is to be washed. It is customary that women should not see the body of a man and vice-versa.

Kwach: What happens after the burial?

Mayamba: The funeral fire (magenga) is lit.

Kwach: For how long does it burn?

Mayamba: In the case of a man, for days but in the case of women, three days.

Kwach: Is there a rite called terro buru?

Mayamba: After the burial, a cock is slaughtered for in-laws of the deceased at the funeral fire. The next morning, people come with cows for slaughtering.

Bosire: What is it intended to do, guard against evil spirits?

Mayamba: This is a custom started by our great grand-fathers.

Bosire: I'm sure he doesn't know what he is saying!

Mayamba: That is our custom. When magenga burns for four days, the sons of the deceased have to stay around the fire. Their wives sleep in the house of the deceased.

Kwach: Why do they have to stay separately?

Mayamba: If you sneak and sleep with your wife, your son has to die and your wife will never be proper again. That is why elders ensure the custom is adhered to.

Kwach: If a man dies away from home, how is the body admitted in the home?

Mayamba: The body is received through the mbuga, a space cut through the fence to admit the dead. But this has been discarded with the coming of Christianity!

Kwach: You knew the late SM Otieno?

Mayamba: Yes, he is of our clan.

Kwach: His wife told this court that he expressed his wish to be buried in Ngong.

Mayamba: That is not true. He could not have told her alone. He could even have told his brother, Joash.

Kwach: Is it possible for a man to be buried in his son's home?

Mayamba: Never. It appears Otieno had shown his son where to stay. He cannot, therefore, be buried there. It is impossible and against Luo custom.

Kwach: What is the reason behind a man not being buried at his son's home?

Mayamba: Because he will haunt the man's children demanding to know why they allowed him to be buried there. That is why you see madmen around (prolonged laughter).

Kwach: We have evidence that Otieno died without either building his own home in Nyalgunga or his son's hut.

Mayamba: Even if he had built a son's hut there, his late father's compound is there. That is where his placenta was buried.

Kwach: And that is where he should be buried?

Mayamba: Of course, yes. Next to his late father's grave.

Kenya is not out to destroy customs!! Mayamba [Egan:71]

As if burial at home is not enough, Mayamba insinuated that there is even style, a code for such being buried. Witness:

Bosire: (The haunt:) Even those who are not relatives?

Mayamba: Yes, and they have to be cleansed. We buried Ofafa in a tie and he has been haunting us. He screams that the tie is choking him.

Khaminwa: Has he haunted you personally?

Mayamba: No, I don't belong to that clan.

[Egan:70]

The Invention of Traditions

The other witnesses largely echoed aspects this text of Mayamba, many of them a lot less succinctly, because in fact many of them had only vague notions of what "custom" stood for. Ochieng' for example stated:

One of the rituals we will comply with
is praying for four days after we bury him.

[Egan:58]

Of this, all that need be said is that prayer arrived powerfully in Nyamila only around 1924, via the patriarch Jairo Ougo Oyugi, Ochieng's father, who built the Nyamila church in that year. Ochieng', in fairness to him, was involved at the court venue in the instant invention of traditions. Another "customary" practice he cited involved levirate where he argued that Wambui being past child-bearing would not be taken by a new husband. Rather:

Instead of marrying her, a step brother-in-law
can give her a cigarette....

[Egan:63]

Obviously Ochieng' meant to say tobacco, but obviously again, he was merely being true to the post-1954 era, when the British American Tobacco (BAT) introduced cigarettes to the African masses in Kenya. But Ochieng' was equally inept at explaining 'custom', stating in one instance that tero buru, originally the practice of a mock-fight against a neighbouring enemy clan after

the burial of a male adult, was in fact conducted "to chase away demons" (Egan:64). Yet Ochieng' was not alone in these incomplete recalls of custom. Kwach himself, in contrast to Mayamba's presentation about the tandem relating to how to build a home (Elder: son: grandson), gave Justice Bosire a fairly amateurish summary (involving Man: Son: wife/wives and children).

Bosire: What does this "carrying the axe" mean?

Kwach: This is a custom. (our italics). A man cannot build a home unless he has a son who carried the axe... The man follows his son and behind him are his wife or wives and other children.

(In parenthesis, it might be added that it was not Kwach's recall that was faulty. Eight years earlier, he had built his own home - "to get away from being called wod Ugenya (son of Ugenya), and graduate into being referred to as Ja Ugenya (Man from Ugenya)" - as he called it. Neither the Mayamba model, nor the Kwach court model, applied in the latter instance. Instead on the day of Kwach building his home the parishioners of the local Simenya Church gathered at the site, prayed, and then the fundis (builders) went on with the work, while Kwach and his entourage of the Nairobi Club elite: Gard Ojwando, George Odeny Ngure and Ben Okuom drove back to Nairobi the following day, having spent the night at a Kisumu hotel with their families).

Perhaps the most makeshift evidence, in this regard, part of this invention Luo of tradition on the feet, came from Omolo Siranga who argued among other things, in this vein:

Khaminwa: What about if Mr Otieno wished to be buried at Langata cemetery?

Siranga: No, this cannot happen. He was a prominent Luo and it does not comply with customs. (Our italics).

[Egan:50]

This is not to suggest that perhaps his mouth was running ahead of his mind, mixing metaphors (prominent, customs). Rather, it is a reflection of the many new customs that urban Luo have crafted in the post-1940s era. Being prominent merely makes it more compelling that the deceased should be taken home.

Luo Sense of History

The discourse about Otieno was in part a discourse about the Luo Sense of History. Quite apart from the exuberant excesses of the likes of Omolo Siranga, who stated at one stage that Luo customs first became operational "when Luos were still in Libya! (Egan:

52), there was this continuous reiteration to the effect that "a home is where one came from" for example by Mayamba (Egan:70), and repeated more generally by Bishop Japheth Yahuma:

Khaminwa: Why is it so important that the children should have a home in Nyalgunga?

Yahuma: Because a human being must have a place where he came from.

[Egan:73 our italics]

Without reifying the issues, one can read in Mayamba's assertion the attempt to capture, control and regulate the size and sense of community, a process very much at the core of the Luo definition of identity (Siaya Ch.2). And it is this quest for identity that leads to a discussion on the Luo sense of history, which, in the manner it was enacted in the courts in this instance anyway, would suggest that history is the drama of the clan, with the Luo nation as a listening referee and final arbiter.

The Power of the Curse*

All the witnesses for the clan submitted that the consequences for burying Otieno anywhere other than Nyalguga would be dire for his immediate relatives. Siranga submitted that burying Otieno in Ngong "would be like delivering the body of hyenas and a curse would be called the clan". (Egan:54). Joash Ochieng' Ougo expanded on this by arguing that if buried away from Nyalgunga:

...the spirit of the dead will follow the whole family of Jairo.

[Egan:59]

Otieno's spirit (plus other spirits?) would also haunt Ochieng' directly:

I will not be able to sleep properly because wherever I go, there will be ghosts haunting me...

[Egan:59,63]

Joash Ochieng' Ougo added a new twist to what all this curse would mean to him: its most potent legacy would not be metaphysical but largely social in fact:-

...if he is buried at Upper Matasia, the clan will curse me and I will have no voice among my clansmen.

[Egan:55]

Or again:

Wherever I go, my clanspeople will spit on me and say I am Bure (nothing).

[Egan:59]

This social opprobrium would be extended to the family, and to the Umira Kager clan generally. Of the latter Ochieng' argued:

They will be despised by other Luo clans who will say: "Otieno was buried in Nairobi. What were the Ger people doing?"

[Egan:59]

There was also a modernist twist to this discourse about haunting when Ochieng' claimed: "The haunting is in line with Christianity" (Egan:63), and then proceeded on an exegesis connecting Plot No. 1603 at Nyalgunga with the Book of Ruth, Chapter four (where Ruth was taken by Boaz in cousin levirate marriage) and Genesis 49 (where Jacob cured his son Reuben for having committed adultery with one of Jacob's wives). The inference Ochieng' drew from these examples was that there was compatibility between Luo traditions and Christianity (even if it was an inference largely irrelevant to his case).

On the Idea of Change:

Central to the discussion was the whole question of change. Yet it is also surprising how little the court record reveals about the protagonists' concrete ideas about change, how it comes about, by whom it is operationalized. Khaminwa's position would appear to hinge on the inevitability of change, without assigning any specific agencies; or ranking them. To Khaminwa, the school, the State, the Church, any brand of Christianity, indeed the Present itself had been agencies, and were also sufficient evidence of change. In his own words:

Khaminwa: You know that Kenya is an independent country, it is a nation and stands for modernization, right?

Odera: What do you mean by modernization?

Khaminwa: I mean improvement in the quality of life, standards of living and such other things...

[Egan:80]

Implicit also in his submissions was the desirability of change, since the true whiggish tradition (had Khaminwa read English history?) would associate change with progress. To him therefore there was no problematic involved in the conceptualization: indeed he used the word change frequently enough without giving

it a problematique. Yet that was exactly how his opponents saw the issue of change: as an ambiguous venture that needed problematizing:

Kwaminwa: You know that customs change from time to time?

Yahuma: Yes. The world is changing but certain customs which were given to us by God do not change.

Khaminwa: But there will be change?

Yahuma: Yes, those people who will be there in the future will know.

Khaminwa: But change is inevitable?

Yahuma: That is in the future. Those people who will be there then will know what to do.

[Egan:74]

On the Logic of Local Discourses

"They know the customs but cannot explain why they are like that" - Kwach.

[Egan:97]

One of the 'incompletes' of the Otieno phenomenon concerned the realm of explanation, of the logic behind stated actions and stated fears. The functionalist repartee: "it is the custom" must have sounded irritating to those like Justice Bosire who from time to time sought an answer to the question: why? Often the exchanges sounded like a re-run of the colonial discourses of Elspeth Huxley's time, when natives were 'inscrutable' and had 'rendezvous with destiny' [Atieno-Odhiambo: 1971]. Colonial officials, settlers and missionaries often gave up on the native mind.

The exchange between Bosire and Johannes Mayamba in court in 1987 falls well within this genre:

Bosire: When a house is being commissioned, a cock is tied next to the fire, what is this for?

Mayamba: It is the custom.

Bosire: Is it slaughtered?

Mayamba: No, it has to stay there.

Bosire: What is it symbolic of?

Mayamba: That is the custom we inherited from Ramogi.

Bosire: You don't know the meaning of it?

Mayamba: It symbolises that a man has put up a home.

Bosire: What is the reason for burying a man at his father's home, you don't have an explanation or you don't know?

Mayamba: It is a custom we found.

Bosire: You follow it blindly! What would happen if a father warms himself at his son's place?

Mayamba: The family won't be proper.

Bosire: I am not asking for the consequences, but what is the reason why a man cannot warm himself at his son's home?

Mayamba: It is a custom we found

Bosire: What is the logic behind it?

Mayamba: We found the custom.

Bosire: You said women don't wash their husbands?

Mayamba: Yes. It is against the custom.

Bosire: What logic is behind this?

Mayamba: They can become abnormal.

[Egan:71]

An appeal to reason did not elicit much either, as in this discourse between Bosire and Yahuma:

Bosire: In your evidence, you have said that Luos have to be buried by the clan. Is this because of the closeness of the clan or is it because of some other reason?

Yahuma: This is done as it is the custom.

Bosire: Is this done because of the social affinity among the clan members or what?

Yahuma: The reason why they were doing that is that they feared calamities may befall them if they did not bury their people.

Bosire: Is this the only reason?

Yahuma: Yes, because the man might come back and do bad things like killing your children.

[Egan:74]

But it was not only the elders who were seemingly inscrutable. Henry Odera Oruka, Professor of Philosophy at the University of Nairobi, was at one point in this presentation equally obscure:-

Kwach: What is the logic behind the four days of mourning after a man is buried?

Odera: It has been there for a long time. It shows that man takes longer to grow up.

[Egan:79 our italics]

THE FINALE

In the final instalment to the Otieno saga, the Court of Appeal ruled that Otieno was "of the Luo tribe", because of his irrevocable paternity.

At present there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr Otieno having been born and bred a Luo remained a member of the Luo tribe and subject to the customary law of the Luo people.

[Egan:174]

This, in spite of the contention by Mr Khaminwa that Otieno was urbanised and cosmopolitan. Their lordships continued:

It matters not that the deceased was sophisticated, urbanised and had developed a different life-style. It seems to us quite unsustainable on the grounds suggested by Mr Khaminwa that a different formal education, and urban life can affect adherence to one's personal law.

[Egan:174]

On the question of personal law, the Justices found that in general "the British administration had preserved the personal laws of the people of Kenya" [Egan:175] and thus:

...generally speaking the personal law of Kenyans is their customary laws in the first instance. Common law is not the primary source, but it may be resorted to if the primary source fails.

[Egan:176]

In practice, the justices averred, Otieno had maintained real contact with his immediate Ougo family, and with his clan, Ger Union. At the same time, he may have told his nuclear family about the desire to be buried elsewhere, although their lordships stated that he was not being candid in doing so. "We think that he was undecided and as a result his family has been misled" they wrote. [Egan:174]

Regarding the controversy around Otieno's wishes, their Lordships found that Otieno should not merely have wished them, but acted on them along the lines of customary practice. So if he wanted to set up a home elsewhere, he should have done so, for "a Luo who wishes to be buried outside his father's homestead takes steps to have a home elsewhere but acceptable under custom". Having not done so, Otieno died without having a home in the Luo sense of the word.

But did Luo customs amount to customary law? Khaminwa's argument was that they did not; to which the Justices answered, to the contrary, in the affirmative.

It is, we think, clear that the customs and customary procedures concerned with burial and establishment of a home amongst the Luo are rules of action which the Luo have uniformly and voluntarily observed. The Luo have provided the rules for themselves and by reason of their observance, the rules of action constitute customary law within section 3(2) of the Judicature Act.

[Egan:177]

Where did all this leave Wambui? Their Lordships argued that Wambui had become a Luo through marriage:

Otieno was born and bred a Luo and as such under Luo customary law his wife on marriage became part and parcel of her husband's household as well as a member of her husband's clan.

[Egan:177]

This being the case, Wambui became subject to Luo customary law, and should be treated as such, without any privileges:

The appellant as the deceased's wife has to be considered in the context of all wives married to Luo men irrespective of their lifestyles who become subject to customary laws. The fact that her marriage was a mixed one would not confer on her any status under the Luo customary law.

[Egan:177]

In conclusion their Lordships ordered that "the deceased's body shall be handed over to Joash Ochieng' Ougo for burial at Nyamila village, Nyalgunga sub-location, Central Alego, Siaya District".

According to the Nation reporter for that day, "the morning was cool. Rain-clouds floated in the sky".

FOOTNOTE

1. Some of the events surrounding the Otieno burial story, and especially the court drama, have been compiled into a documentary: S.M. Egan,(ed). S.M. Otieno, Kenya's Unique Burial Saga: A Nation Newspaper Publication, Nairobi: Nation Newspapers, n.d. All subsequent references to this document are referred to as Egan:pagination.

* * * * *