

STRATEGIES OF CONTROLLING THE LINGUISTIC RESPONSE FROM CROSS-EXAMINED WITNESSES: LAY DEFENDANTS AS CROSS- EXAMINERS IN A KENYAN RESIDENT MAGISTRATE’S COURT¹

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This paper analyzes strategies of controlling the linguistic responses of prosecution witnesses that were employed by two accused persons in a grievous-bodily-harm case involving family members at a magistrate’s court in Kenya. The accused persons were ordinary rural women. The first one was a middle aged woman while the second was a young lady in her twenties. Prosecution witnesses, on the other hand, were two young children aged 12 and 14. The study analysed audio-recorded court proceedings lasting about 1¾ hours using a discourse analytic approach and found that the range of controlling strategies used by the defendants included aggressive questioning styles, the use of multiple questions, formulaic questions, epistemological challenges and accusatory remarks against the witnesses. Although the lay defendants demonstrated an unusual level of awareness of cross-examination strategies, the paper questions where they would have learnt such strategies and proposes further research on this area.

1. INTRODUCTION

Kenya’s legal system, like that of most other former British colonies, is founded on the common law system. Accordingly, court proceedings are adversarial and each of the parties involved in a trial “fights for their own case” by “presenting a version of facts that will be challenged by the other party” (Hale 2004: 31). In this situation, linguistic control may be regarded as the means by which a litigant presents his/her version of events in a manner that suggests that that version is the accurate one as opposed to the version of events presented by the defendant.

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Studies on courtroom discourse show that control is exercised through a number of linguistic strategies. For example, Walker (1987), Conley and O'Barr (1998), Cotterill (2003), Hale (2004), and Gibbons (2003 & 2008) have found the manipulation of the question form to be a critical tool of control. For Walker (1987: 64), "the form of the question" is "the most powerful weapon an attorney has in the war of words with the witness". Conley and O'Barr (1998: 24), on the other hand, argue that "the WH question is the least controlling and coercive" ... and that "the tag question ... is the most controlling". Such views have, however, come under criticism. Harris (1984) for example, suggests that "context is important in determining the function of questions", while Bulow-Moller (1991: 39) argues that coercion "is more pronounced in pragmatic conversation rules" than in syntactic choices. In spite of these rather contradictory positions, Hale's (2004: 35) argument that "lawyers deliberately employ certain types of questions to achieve their purposes" and that "as a general rule, they are successful," underscores the importance of manipulation of the question form as a tool of linguistic control. At times, as Cotterill (2003: 144) observes, a lawyer may ask a question and then define the response boundaries. This type of question constrains the witness to give a response within the limits provided by the lawyer. Similarly, the lawyer may ask a question and then constrain the form of the response from the witness by indicating "prescriptively the linguistic form that the response should take". The witness's response will therefore be provided within the type of response suggested by the lawyer and, hence, provide only the type of information required by the lawyer.

In addition, lawyers may also control witnesses' responses through topic management. Conley and O'Barr (1998: 26) argue that "by posing a particular question, one might assume, the lawyer determines the topic of the answer". This, together with the fact that lawyers can execute shifts during cross-examination, places topic control firmly in their hands. In executing this strategy, lawyers may secure what Walker (1987: 62) refers to as "damaging admissions".

Furthermore, through linguistic devices known as “epistemological filters” (Matoesian 1993, p. 184), lawyers have the power to directly challenge the knowledge claimed by a witness, “the specific facts the witness claims to know, ... the sources of the claimed knowledge, and ultimately whether the witness is capable of knowing anything at all” (O’Barr & Conley, 1998, p. 29) An example of an epistemological filter would be a question such as the following: *How do you know what you say that you know?* Conley and O’Barr (1998: 29-30) see these filters “as a strategy that lawyers use to achieve and maintain domination”. They argue that epistemological filters, together with the lawyers’ control over turn-taking and their ability to manipulate the form of questions, “make it very difficult for the witness to contest the epistemological challenge”.

For Drew (1990: 49-55), the subtle strategies that lawyers may employ in order to control witnesses’ responses include “contrast devices” and “three-part descriptions”. In contrast devices, a lawyer juxtaposes two versions of a suspect’s or a witness’s version of events and leaves the matter to the court to decide. For example, as Drew 1992 (506-7) shows, a complainant in rape case claims not have had any relationship with her attacker. But the accused person’s lawyer suggests that they, in fact, had an intimate relationship. He does so by implying that the manner of his greeting suggested the relationship. He asks her how his client had greeted her. Upon stating that the accused asked her how she had been, ‘J-just stuff like that,’ which would suggest that the two had no intimate relationship, the lawyer provides a contrast by juxtaposing that answer with his client’s action of kissing her: “Just asked you how you’d been but kissed you goodnight...”. The contrast here is in the complainant’s suggestion that there was no relationship between the accused person and herself yet she allows him to kiss her goodnight.

Drew (1990) argues that a contrast device offers the lawyer “the opportunity to bring together facts from prior testimony [and] to juxtapose them to make a point”. He adds that by being “available only to the questioner in courtroom examinations,” the device “gives the questioner an important means of control”. Drew notes that “such contrasts generate

inferences that are damaging to the witness's testimony and these are entirely explicit" (p. 51). As for three-part descriptions, they are used to describe some action, scene or other element of the testimony. The oath taken in court best exemplifies a three-part list since the person taking the oath swears to 'tell the truth, the whole truth and nothing but the truth'. So, three-part descriptions may be used as a strategy to lure the witness into agreeing with the lawyer's version of events.²

It should be stressed here that most of the studies mentioned above have focused on the cross-examination strategies employed by lawyers in court. As Tkačuková (2010: 334) remarks, studies on lay persons performing the role of cross-examiners have "been neglected". The absence of such studies may be attributed to the fact that in the United Kingdom and America, where most of the studies have been conducted, it is rare for accused persons to appear in court unrepresented. This is in contrast to the situation in Kenya where self-representation appears to be the norm. Under the Kenyan law, Article 50(1)(h) of the Constitution grants the accused persons the right "to have an advocate assigned to the accused person by the State and at State expense" only "if substantial injustice would otherwise result..." (Republic of Kenya, p. 36). One such instance is when accused persons are charged with capital offences. In all other cases, defendants are left to their own means. Inevitably, this means that accused lay persons find themselves on their own defence which, at times, involves cross-examining their accusers. So, it would be interesting to investigate the extent to which even lay defendants make recourse to the kind of strategies mentioned above and which involve using specific linguistic devices to control the linguistic contribution of their accusers. And this is what this paper set out to do.

² For Gibbons (2003), other strategies for linguistic control in the courtroom are "intonation and tone of voice and various elements of the existing situation..." (p. 101).

2. METHODOLOGY

2.1 The participants

The participants in the case were labelled using the following abbreviations for ease of reference and for the preservation of anonymity: ACCP1 refers to “First Accused Person”, ACCP2 to “Second Accused Person”, CW1 to “First Child Witness”, and CW2 to “Second Child witness”. In all cases, the names of the participants, places and the respective court have been anonymised.³ The defendants in the case were two ordinary women. The first accused person (ACCP1) was a middle-aged woman and the second accused person (ACCP2) was a young lady in her twenties. The prosecution witnesses, on the other hand, were two children: one aged 12, and the other 14. The two defendants had been charged with assaulting and causing grievous bodily harm (GBH) to a family member, Chumba. The facts of the case showed that the complainant had apparently been assaulted by ACCP1 and ACCP2, following a dispute over Chumba’s role in apprehending members of a community from a neighbouring country. This had arisen from allegations that a member of the targeted community had eloped with a school girl from the locality.

2.2 The data

The data used in this study are part of a 1:45-minute audio-recording of court proceedings in a Magistrate’s court in Kenya. They were collected between July and October 2004 at the Kimelil District Court⁴ within the Elgon County located in what was previously the Western Province of Kenya. Both the defendants and the prosecution witnesses spoke the same dialect of Kalenjin as their first language. Their Swahili, which was the language they chose to use during the court proceedings, is non-standard. In

³ This followed an understanding reached between the court’s executive officer and the magistrate on the one hand, and the researcher on the other.

⁴ This is a pseudonym, as are the names of all persons, dates, places and time used in the present paper.

addition, the Swahili used in the excerpts from the two witnesses' accounts contains a fair amount of code switching and mixing.

After the audio-recording, the data were transcribed in conformity with Dörnyei's (2007: 248-9) "tape analysis" and "partial transcription" approach. This entailed listening to the recordings, marking and taking notes on significant parts, and later transcribing the selected parts fully. The level of detail of the transcription were, however, minimised in conformity with Ochs's (2000: 168) observation that a transcript "should not have too much information". The following transcription symbols⁵ were used:

: [i.e.] colon(s): extended or stretched sound, syllable, or word.

(()) [i.e.] double parentheses: scenic details.

° ° [i.e.] degree signs: a passage of talk noticeably softer than the surrounding talk.

OKAY [i.e.] CAPITAL LETTERS: extreme loudness compared with the surrounding talk.

(...) [i.e.] three dots: a significant pause

The verbatim recordings were thereafter freely translated into English.

3. DISCUSSION

As pointed out in the Introduction, a number of strategies of linguistic control have been reported in the literature to be used in the courtroom. The two lay defendants in the case under analysis employed the following strategies of control: questioning strategies, epistemological challenges and accusatory remarks. Each of these strategies is discussed in the following paragraphs with excerpts from the language of the lay defendants in question.

⁵ These symbols were adopted from Gail Jefferson's transcription symbols, except for the last one (...), which has been coined for convenience. In Jefferson's transcription symbols, a pause is usually marked as (.).

3.1 Questioning strategies

Lay defendants in the case used questioning strategies: multiple questions and formulaic questions. The former refer to cases where a lawyer or an accused person asks a series of questions without giving the respondent time to answer the questions, while the latter refer to questions that use legal question-like formulas such as “I put it to you that ...?” and “Is it not the case that...?”.

3.1.1 Multiple questions

The lay defendants in the present case used this strategy in the following excerpt.

Excerpt 1

1. PROSECUTOR:
Eh, unaeleza. Yes, explain.
Ukiulizwa hivyo, When you are asked questions in
that manner,
jibu. Answer them.
2. ACCP1:
Mimi nauliza I am asking
hiyo silaha ilipatikana wapi? where was that weapon recovered?
Kama mimi nilikuwa [na yo] if I had it
Ilipatikana wapi? where was it recovered?
Iko alinisika na silaha? Did anyone find me with a weapon?
Nikaenda polis station (...) Did I go to the police station
na hiyo silaha? with that weapon?
3. PROSECUTOR:
Unajua hiyo? Umeelewa? Do you know that? Have you understood?
4. CW2: ((Silence)) ((Silence))
5. PROSECUTOR:

- | | |
|---|--|
| <i>Anauliza</i> | She's asking where |
| <i>Hiyo silaha ilipatikana wapi?</i> | that weapon was recovered |
| <i>Unajua mahali ilipatikana? (...)</i> | Do you know where it was found? |
| <i>Unajua?</i> | Do you know? |
| 6. CW2: | |
| °Ndiyo° | °Yes°. |
| 7. ACCP1: ((Loudly)) | |
| <i>SASA GANI NI YA UKWELI?</i> | NOW WHAT IS TRUTHFUL? |
| <i>RANDICH AMESEMA</i> | RANDICH HAS SAID |
| <i>ilipatikana kiosk ingine</i> | it was found in some kiosk |
| <i>na we unasema ilipatikana</i> | while you are saying that it was found |
| <i>mstuni. Nani likuwa napata?</i> | in a bush. Who found it? |
| <i>Mkajuaje ni yangu</i> | How did you know it was mine |
| <i>kama ilipatikana kwa mstuni?</i> | if it was found in a bush? |
| <i>Hata hiyo foresti, mapanga wengi</i> | In any case, there are many machetes |
| <i>watu wanatembea huko kukata miti</i> | in that forest as people go there to cut trees |
| <i>miti watoto wanawesa sahu HUKO.</i> | Children may forget them THERE |
| <i>Ni nini inaonyesha ilikuwa ni yangu? (...)</i> | what shows that it was mine? |
| <i>Kwa sababu ilipatikana mstuni?</i> | Is it because it was found in a bush? |
| <i>Uko mstuni ilikuwa ni nyumba yangu</i> | Was that forest my house |
| <i>ama ni ilikuwa wapi? (...)</i> | or where was it / was I |
| 8. PROSECUTOR: | |
| <i>Uliza swali moja moja</i> | Ask one question at a time |
| <i>ndio aweze kujibu.</i> | so that she may answer |

The excerpt illustrates ACCP1's preponderant use of multiple questions. In her first turn of speech (see turn 2 above), she asks four 4 questions in succession without giving the respondent time to respond to any of them. Similarly, in her second turn (see turn 7) she asks six questions in

succession. It is not surprising, therefore, that the witness responds to them with silence. Such a barrage of questions could only confuse the witness, as she would not know which of them she should answer. As a consequence, the witness, who was still a child, remained silent.

An examination of the defendant's questions in turn 7 also shows that a number of propositions are embedded in them. They are, (in their English translations):

- (i) RANDICH has said [that] it was found in a kiosk.
- (ii) You are saying [that] it was found in a bush.
- (iii) There are many matchettes in that forest
- (iv) [Many] people go there to cut trees.
- (v) Children may forget their matchetes.

These five propositions, together with the six questions asked in turn 7 above, raise the number of ideas that the witnesses, both children, need to focus on to eleven. This is too complex for them to understand. As Walker (1999: 13) has observed, "Young children in particular have difficulty attending to more than one or two things at once".

Although the confusion experienced by the witness (CW2) may be attributed to the use of multiple questions and their complex structure, it is likely that he faced other psycholinguistic difficulties as well. First, the witness's silence (in turn 4 and elsewhere in the proceedings) and his constant use of short answers and low voice (in turn 6 and elsewhere in the proceedings) may be indicative of his communication difficulty. Roy (1990: 74), for example, has found that "those who do not fully comprehend a conversation assent weakly when they do not understand".

Second, the witness also appears to be fearful. Whereas the courtroom itself can be a source of intimidation because of the strangeness of the setting (Coulthard, M. & A. Johnson 2007: 95), the boy's fear may be attributed to two things. First, this may be a result of the metapragmatic directives directed at him (see 2.2). But above all, the accused person's insistence to have the witness respond to her multiple questions without giving the witness time to respond to them may be reflective of her desire to depict the witness as unreliable.

3.1.2 Formulaic questions

In the data under analysis, the following type of question will be regarded as formulaic because it repeatedly begins with a conditional clause which creates a predictable pattern. The first one, illustrated in excerpt 2, begins with a conditional clause, followed by one or more propositions, and then ends with a Yes/No question as was the case with all other formulaic questions in the data. Unlike multiple questions, a formulaic question contains only one question.

Excerpt 2

9. ACCP1:

<i>Nikielesa maakama</i>	If I tell the court (that)
<i>sikusika panga kupika Chumba</i>	I did not pick up a machete to hit Chumba (that)
<i>nilitoa kuni yenye ilikuwa iko</i>	I pulled out a piece of burning firewood from the hearth
<i>kwa moto na kupiga Chumba naye</i>	and hit Chumba with it,
<i>nitakuwa nimedanganya maakama? (...)</i>	will I have lied to the court?

10. ACCP2:

<i>Nikielesa hii maakama ha -tuli-</i>	If I tell this court we didn't ...we...
<i>hakuna mtu alitupata mahali pale</i>	no one found us at the scene of crime
<i>nitakuwa nimesema uongo?</i>	will I have lied?

The structure of the formulaic question (used by ACCP1 in [9] and ACCP2 in [10]) is reducible to the following formula : If-clause + propositionⁿ + Yes/No question, where ⁿ refers to the number of times propositions may occur. The propositions in these questions contain the accused person's alternative version of the events. In the Example 9 above, the defendant's version is that she struck the complainant with a piece of firewood, and not with a matchete as suggested by her accuser. Similarly, in Example 10, the

defendant's version is that neither of the accused persons was found at the scene of crime. By suggesting that she had used a piece of firewood to assault Chumba instead of a machete (Example 9), the defendant attempts to minimize the severity of the assault, while in Example 10 the suspect is essentially denying culpability given that she was not at the scene of the crime. The problem with the defendant's question is that it presupposes that the accused persons were at the scene of crime. This negates her denial.

Having examined how lay defendants manipulate the question form to exert control over witnesses, let us now turn our attention to how the defendants use of metapragmatic directives.

3.2 Metapragmatic directives

Cavaleri (2011: 85) defines metadiscourse as “discourse about discourse” and later explains that in metadiscourse, “*I*” tends to co-occur with, among other things, “verbs in the progressive forms” (p. 98). In the data under analysis, interpersonal metadiscourse or metapragmatic directives are used by ACCP1 to control the contributions of her accusers. These are exemplified in the accused person's use of “*I am asking you ...*” in the following excerpts.

Excerpt 3

ACCP1:

<i>Mimi nauliza</i>	<i>I am asking</i> [my emphasis]
<i>hiyo silaha ilipatikana wapi?</i>	where was that weapon found?
<i>Kama mimi nilikuwa (?)</i>	If I was (?)
<i>Ilipatikana wapi?</i>	Where was it found?
<i>Iko alinisika na silaha</i>	Did anybody arrest me with a weapon?
<i>nikaenda polis station na hiyo silaha? (...)</i>	and then I went to the police station with it?

11. ACCP1:

<i>Mi naulisa wewe...</i>	<i>I am asking you...</i> [my emphasis]
<i>hiyo panga ilipatikana mstuni,</i>	the machete that was found in the bush
<i>ilipatikana mstuni</i>	(that) was found in the bush
<i>nani alikuwa anapata kwa mstuni? (...)</i>	who found it in the bush?

12. ACCP1:

<i>Mi naulisa wewe</i>	<i>I am asking you (my emphasis)</i>
<i>hiyo panga ni ya nani?</i>	whose machete is it?

The questions in excerpt 3 are preceded by the metapragmatic directive, “*I am asking you*”, or “*I am telling you*”, which sound intimidating. In fact, Eades (2008: 164), commenting on a similar incident in a case involving three Aboriginal boys in an Australian court, argues that such directives “sound as if they could be used by an authoritarian teacher disciplining a delinquent child”. This apparently makes the witness CW2 fearful. In addition, the combination of the personal pronoun *I* and the progressive verb *am asking* in the directive has the effect of turning a potentially non coercive wh-question into a coercive one. But perhaps the boy’s fear is accentuated most through prosodic resources. The directive is uttered both loudly and fast. This combination of syntactic and prosodic resources appears to accentuate the threat posed by the defendant ACCP1 and ultimately controls the witness’s contribution. The directive tends to suggest that the respondent has not supplied the kind of answer required and is therefore being asked the question again. This has a definite effect on the witness as exemplified in the reactions of the witness. These are exemplified in excerpt 4, turns 13 and 15.

Excerpt 4

ACCP1:

<i>Na tangu mlikata Chumba huyo</i>	And since you cut Chumba
<i>hiyo sila ilipatikana wapi?</i>	where was that weapon found?

13. CW2: ((Inaudible)) ((inaudible))

14. PROSECUTOR:

Unajua mahali ilipatikana? Do you know where it was found?

15. CW2:

◦*Sijui*◦ I don't know.

16. PROSECUTOR:

Eh, unaeleza. Yes, explain.

Ukiulizwa hivyo unajibu. When you're asked such a question, you have to answer.

17. ACCP1:

Mimi nauliza I am asking

hiyo silaha ilipatikana wapi? where was that weapon found?

Kama mimi nilikuwa (?) If I was (?)

Ilipatikana wapi? where was it found?

*Iko alinisika na silaha nikaenda
polis station na hiyo silaha? (...)* Did anybody arrest me and take me
station with that weapon?

18. CW2: ((Silence)) ((silence))

19. PROSECUTOR:

Unajua hiyo? Do you know (the answer) to that (question)?

Umeelewa? Have you understood?

When the child is asked where the machette used in the attack was found, he responds feebly (as suggested by the inaudible response in turn 13) or by *I don't know* (in turn 15), or simply with a silence (in turns 18 and 20). These responses may be interpreted to mean that CW2 is "less convincing as a witness" (Gibbons 2003: 88). But the repeated use of the metapragmatic directive "*I am asking [you]...*" (in turn 17) may be regarded as intensifying the coercive effect of the question.

Inevitably, these metapragmatic directives instill fear and therefore control the contributions of the witnesses. In the following section, I examine how suspects control the contributions of witnesses by challenging the witnesses' capacity to know the facts that they claim to know.

3.3 Epistemological filters

The data also shows that the two lay defendants also challenged the capacity of the witnesses to know what they claimed to know, just as lawyers do to control the contributions of witnesses. Three specific challenges were identified in the language of the lay defendants and are discussed below.

In Excerpt 5 that follows the first accused person (ACCP1) has just started cross-examining the witness, CW1. She questions the latter on their kinship ties.

Excerpt 5

20. ACCP1:

<i>... Umesema mimi ni nyanya yako.</i>	You've said I am your grandmother
<i>Unasema "grandmother",</i>	you say "grandmother",
<i>Mimi sijui Kiingereza</i>	I don't understand English
<i>Mimi ni nyanya <u>koko</u> yako</i>	I am your grandmother, [your] <i>koko</i>
<i>Mimi ni koko yako</i>	I am your <i>koko</i>
<i>nilisaa nani?</i>	[If I am] your <i>koko</i> , whom did I give birth to?

21. CW1:

<i>Baba yangu.</i>	My father.
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22. ACCP1:

<i>Mimi nilisaa baba yako</i>	Did I give birth to your father?
<i>Ama koko mwingine alisaa baba yako?</i>	Or did a different grandmother give birth to your father?

23. CW1:

<i>We ulisaa: mwingine alisaa</i>	You gave birth::: someone else [who] gave birth (to my father) but we are i::n that family.
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24. ACCP1:

<i>Ati nilisaa namna gani?</i>	Whom did you say I give birth to?
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25. CW1:

<i>Mwingine alisaa</i>	Someone else gave birth (to my father)
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but we are i::n that family.

This first challenge revolves around the kinship ties that exist between ACCP1 and CW1: whereas CW1 knows ACCP1 to be her grandmother by virtue of her being married to her grandfather, ACCP1 challenges her knowledge of this relationship by suggesting that she is, in fact, not her grandmother. This challenge contradicts what knowledge CW1 might have acquired as a child growing up in her Kalenjin community where kinship terms are defined in broad terms. For example, kinship terms such as *father* and *mother* carry a greater semantic depth in the Kalenjin community (and in many other African communities) than what the same words would in English. The term *father*, for example, includes the biological male parent, his immediate brothers and clan members of the same age set. Similarly, *mother* covers the biological female parent, her sisters, and female clan members of her age set. In the case of polygamous families, one's *step-mother* is simply either the 'younger' mother or 'older' one, depending on when she got married to her spouse. In the same logic *grandmother* would include one's paternal or maternal grandparent, her sisters and any women of her age. In fact, Schmieid (2012:248) argues that in 'Africa, many English word forms occur in slightly different contexts than in British English, thus usually expanding their referential meaning' adding that 'Kinship terms are expanded as reference and address terms, because they go far beyond core meanings related to the biological features of consanguinity, generation and sex and are related to the social features of seniority (age), solidarity, affection and relations'. So, when CW1 calls ACCP1 her "grandmother", her understanding is defined by her cultural knowledge that she is her grandmother on the basis of ACCP1 being married to her grandfather. That is why CW1 said (in turn 23 above), "Someone else gave birth (to my father) but we are i::n that family" and, later, stated that ACCP1 and her "real" grandmother were "co-wives".

ACCP1's question in turn 22 would therefore be considered to be a challenge to her knowledge about her being the CW1's grandmother.

Interestingly, ACCP1 begins her cross-examination of CW2 with questions about their kinship relationship.

Excerpt 6

26. ACCP 1:

<i>CW2 umesema</i>	CW2, you've said [that] I am,
<i>mimi ni koko yako,</i>	your grandmother,
<i>mimi ni nyanya yako,</i>	your grandmother,
<i>nilisaa baba yako?</i>	Did I give birth to your father?

27. CW2:

((Silence))	((Silence))
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28. ACCP 1:

<i>Mimi nilisaa baba yako?</i>	Did I give birth to your father?
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29. CW2:

((Weakly)) <i>La.</i>	((Weakly)) No.
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30. ACCP 1:

Eh?	[What did you say?]
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31. CW:

((Silence))	((Silence))
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32. PROSECUTOR:

<i>Jibu asikie.</i>	Answer so that she may hear.
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33. CW2:

<i>La.</i>	No.
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34. *Mimi sikusaa baba yako?* I did not give birth to your father?

35. PROSECUTOR:

<i>Amejibu hiyo.</i>	He has answered that question.
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36. ACCP 1:

<i>Na mbona unasema</i>	Why then do you say that I am your
<i>mimi ni nyanya yako?</i>	grandmother?

37. CW2:

((Silence))	((Silence))
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That ACCP 1 begins her cross-examination of CW2 with questions about their kinship relationship strongly suggests that she is using them strategically. Her repeating the question several times suggests that she knows that such a challenge would disorient the witness right from the start and, in the process, give her undue advantage over her accuser. CW2's responses, weakly (turn 29) and in silence (turns 27, 31, and 37) imply that the strategy has worked.

The second epistemological challenge regards the identification of Chumba's voice as a scream. In the following excerpt, ACCP1 questions CW1 on the scream made by Chumba, the victim.

Excerpt 7

38. ACCP1:

<i>Unasema ulisikia Chumba</i>	You say that you heard Chumba
<i>akipiga nduru. Ulisikia sauti yake.</i>	screaming. Did you hear his voice?
<i>Hata mi(mi) nilipiga nduru.</i>	I also screamed.
<i>Ulisikia?</i>	Did you hear my scream?

39. CW1:

<i>Hakuna.</i>	No way.
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40. ACCP1:

<i>Ulijuaje sauti</i>	How did you know the sound
<i>ni ya nduru?</i>	was the sound of a scream?

41. CW1:

<i>Nilijua kwa sababu nilikimbia.</i>	I knew because I came [there] running.
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42. ACCP1:

<i>Chumba alikuwa amepigako nduru</i>	Had Chumba ever screamed before
<i>siku ingine, halafu ukaelewa kumbe hiyo</i>	for you to know that that
<i>sauti ni ya nduru?</i>	sound was that of a scream?

43. CW1:

<i>Si ni uchungu kwake.</i>	It was the pain he suffered.
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44. ACCP1:

<i>Nauliza wewe,</i>	I'm asking you
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<i>ulikuwa umesikia</i>	had you ever heard
<i>Chumba akipiga nduru siku ingine</i>	Chumba screaming before
<i>alafu ukasikia kumbe hiyo ni sauti yake?</i>	for you to know that that was his voice?

45. CW1:

<i>Na sindiyo.</i>	Of course, yes.
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46. ACCP1:

<i>Alikuwa amepiga nduru siku gani?</i>	When did he ever scream?
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In turn 38, ACCP1 strategically sets the stage for her epistemological challenge, by claiming to have also screamed during the assault. When CW1 categorically refutes her claim (by saying *No way*, in turn 39), ACCP1 questions the basis of her knowledge of the voice that she had heard that night as a scream (in turn 39 : *How did you know that the sound was a scream?*) In response, CW1 states that she knew it because she had run to the scene. However, unwilling to let go of the matter, ACCP1 introduces a new twist by raising another epistemological challenge: she questions whether CW1 had ever heard Chumba scream before for her to ascertain that the scream she had heard that night was indeed Chumba's (turns 42 and 44). She seems to imply that one can only identify a voice as belonging to a person X if one has heard the person X make a similar utterance before.

Although the defendant would not be in a position to know what the relevant research on the issue suggests, Watt's (2010: 77) argument that the fact that we can recognize voices of persons we may have met years before "suggests that we store detailed information about the voices of individuals we encounter throughout our lives ... just as we store information about aspects of people's appearance, such as details of faces, hairstyles and clothing". He adds that "the amount of exposure a listener has had to a voice is obviously crucial too". Accordingly, one would imagine that it would have been easy for the witness to identify the scream as being that of Chumba, her father. Indeed, CW1's response that she identified Chumba's voice from the way he speaks ("*Na vile anaongea*" - 'The way he

speaks') tends to support this position. However, other literature on the matter contradict this claim. For example, Jones (1994: 349) argues that "It can be very hard in the absence of other clues to tell a voice, even a well known one, apart from that of an impostor". ACCP1's challenge is therefore also a challenge on the witness's capacity for knowledge.

Witness CW2's knowledge about the facts of the assault was also challenged. From the evidence that the two witnesses gave, it appears that the children, who were within their homestead, rushed to their grandmother's house immediately after hearing the screams from Chumba and may have arrived there within minutes of each other. Therefore, CW2's claim that he witnessed the fight may have been true. However, his inability to express himself clearly, which resulted in his incoherent account of what happened, appears to have invited ACCP2's challenge. She questions CW2's knowledge of matters that happened in his absence. The following excerpt reveals this.

Excerpt 8

47. ACCP1:

<i>Mi naulisa wewe,</i>	I'm asking you
<i>wakati si tulikuwa tunapigana</i>	when we were fighting
<i>kwa hiyo nyumba wewe</i>	in that house
<i>ulikuwa wapi?</i>	where were you?

48. CW2:

<i>Nyumbani.</i>	At home.
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49. ACCP1:

<i>Nyumbani wapi?</i>	Which home?
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50. CW2:

<i>Kwetu.</i>	Our home.
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51. ACCP1:

<i>Kwenu?</i>	Your home?
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52. CW2:

<i>Ndivyo.</i>	Yes.
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53. ACCP1:

Ukajuaje mi nilikata

How did you know that I cut

Chumba na panga? Uliniona?

Chumba with a machete? Did you see me?

54. CW2:

Ndivyo.

Yes.

55. ACP 1:

Unaniona wapi

How did you see me

na ulikuwa nyumbani?

if you were at home?

Unaniona kwa wapi nikikata?

Where did you see me cutting him?

After establishing that CW2 was at his parents' house during the attack on Chumba, ACCP1 questions the child's capacity for knowledge of matters that happened in his "absence". Even if we were to assume that the boy's account was factual and that his inability to express himself clearly was a result of communication difficulties, the epistemological challenge would still remain. How could he have known details about an incident that he did not witness? Accordingly, this challenge puts the credibility of the witness into question.

3.4 Accusatory remarks

It appears to be part of the defendant's strategy to accuse the witnesses of impropriety. This appears to be the case when ACCP2 claims that the two child witnesses were bribed, presumably by their father, so as to give adverse evidence against her and her co-accused. In turns 58 and 60, ACCP2 alleges that they must have been "bought".

Excerpt 9

56. ACCP2:

*Wakati...unaweza kueleza maakama
kwa nini tulipigana na Chumba?*

When...can you tell the
court why we fought Chumba?

57. CW1:

- Siwezi elewa. Sijui.* I don't understand. I don't know.
58. ACCP2:
Nikieleza hii koti If I tell this court (that)
wewe ulinunuliwa you were bought
ndio uweze kuja kutoa ushahidi so that you may give evidence
hujui mbele ya koti that you know nothing about
nitakuwa nimedanganya koti? will I have lied to the court?
59. CW1:
Sijakuelewa. I haven't understood you.
60. ACCP2:
Nikielza maakama If I tell this court
wewe ulinunuliwa that you were bought
uje utoe ushahidi so that you may give evidence
ambao hujui chochote which you know nothing about
mbele wala nyuma at all
nitakuwa nimedanganya maakama? will I have lied to the court?

The essence of the accusation of bribery is encoded in the metaphoric expression “*umenunuliwa*” (‘You have been bought’), which, in the Kenyan context, means ‘being bribed’. However, the witness’s response “*Sijakuelewa*” (‘I have not understood you’) (in turn 59), seems to suggest that she was innocent. This accusation appears to be part of the defendant’s strategy to discredit both the evidence given by the witness as well as her credibility.

4. CONCLUSION

Although this study has shown that lay defendants are aware of cross-examination strategies used by lawyers, their skill in utilizing these strategies is rather limited. This is seen, for example in instances where the defendants cross-examined witnesses but, in the process, asked self-incriminating questions (see Excerpt 8 turn 47). The paper has also shown that while lay defendants were able to control the contribution of the

witnesses through the use of specific types of questions, metapragmatic directives, epistemological challenges and accustatory remarks, it is not clear how they would have acquired these strategies. The question would arise as to where such defendants learnt these strategies from. In the case under study, the two women were first offenders living in a rural set up and would probably never have been to court before. Would it be that they learnt these skills from other inmates during their detention? Or could it be that they had learnt some of these strategies by watching TV programmes such as *Mashatka* or *Vioja Mahakamani*⁶? Or from watching lawyers and other defendants in similar cases? No definite answer can be given to these questions at the moment; they could be the subject of further investigation in the area.

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⁶ *Mashtaka* and *Vioja Mahakamani* are Kenyan TV programmes based on courtroom drama.

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