

Odera Oruka in the Twenty-first Century

Kenyan Philosophical Studies, II

Edited by
Reginald M.J. Oduor
Oriare Nyarwath
Francis E.A. Owakah

Odera Oruka on Culture Philosophy and Its Role in the S.M. Otieno Burial Trial

GAIL M. PRESBEY

Introduction

This paper focuses on evaluating Odera Oruka's role as an expert witness in customary law for the Luo community during the Nairobi, Kenya-based trial in 1987, to decide on the place of the burial of S.M. Otieno. During the trial, he described the Luo practices and defended them against misunderstanding and stereotype. The paper seeks to address the following questions:

How does Odera Oruka's role as an expert on Luo customs fit in with his sage philosophy project?

In his testimony at the trial and subsequent public addresses and published work, does he accomplish two important goals, namely, defending African traditions against prejudice and anti-African bias, and championing the reform of traditions when reform is needed?

Can Odera Oruka's participation in the famous trial avoid appearing to be an instance of ethnic chauvinism and marginalization of women?

My conclusion is that Odera Oruka was basically successful in the first stated goal, but some problems remain regarding the achievement of the other goals. While he often asserted the need to evaluate traditions and to jettison those that have become unhelpful, in this context he emphasized traditions so strongly that the need for evaluation and possible change was muted.

What is the Sage Philosophy Project, and How is it Related to Odera Oruka's Testimony at the S.M. Otieno Burial Trial?

The book that Odera Oruka edited, *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy* (1991), contains three distinct parts. As he explains, part one contains his own expositions which, as he says, "give the rationale for treating sage philosophy as

a fully fledged trend in the development of African philosophy" (Oruka, ed. 1991, Preface). The second part contains interviews with sages, while the third contains papers about the sage philosophy project written by other scholars. However, one will note that in part one of the book, there is a section that is unlike all the others. While there are four articles authored by Odera Oruka, there is also a chapter 5, which contains a record of the testimony that Odera Oruka gave at the S.M. Otieno burial trial. Although there is a brief preface to the excerpts, there is little mention by Odera Oruka of how his testimony at the trial is related to sage philosophy. Is it an example of sage philosophy? Is it an application of the fruits of wisdom gleaned from sage philosophy? Is Odera Oruka a sage, being questioned, not by a philosophical interviewer but by a lawyer? The latter seems not to be the case, for it is not included in Part Two of the book containing interviews with sages, and, in any case, none of the sages are interviewed by lawyers. While Odera Oruka does not come out and directly state his purpose for including the trial in the book, let me suggest that the answer is the second ventured answer above, that is, he intends it as an application of the fruits of wisdom gained by sage philosophy.

Nevertheless, a question arises: how is being an expert witness on Luo customs, and telling a judge all about the longstanding, rarely changing values, customs and practices of a particular ethnic group related to the project of finding individual critical thinkers interested in philosophical topics among elders of multiple ethnic groups of Kenya? The latter description is what sage philosophy is most known for, as Odera Oruka championed the abilities of rural elders to be sagacious evaluators and critics of their own groups' beliefs. Focus on named individuals as sages was intended to be an alternative to both ethnophilosophy and anthropological methods that anonymized African philosophical views, attributing them to a group rather than to an individual. Odera Oruka also envisioned the project as one that would help build national culture, as Kenyans of various ethnic backgrounds learned from the wisdom of sages from their own as well as other ethnic groups (Presbey 2013, 5). This aspect of the project is illustrated in part two of the book, since it contains interviews of sages from a variety of ethnic groups.

The answer to the question of how the testimony fits in to the sage philosophy project is found in a series of subtle clues throughout the

early parts of the book. First of all, we learn that sage philosophy as a project was begun by both Odera Oruka and his colleague Joseph Donders in 1974 (Oruka 1975, 54, endnote 6; 1991, 17-18). They received grant money from the Dean's Committee to interview sages who were identified as such by their students (Donders 1977, 11, endnote 16). Thus, the earliest set of interviews were done in the mid-1970s. Based on these beginnings Odera Oruka wrote an article explaining the project and its method, and how it was part of the field of African philosophy. This article, first published in *International Philosophical Quarterly* in 1983, serves as chapter 3 of this 1991 book. The next set of interviews, as Odera Oruka mentions in chapter 4, were financed by being part of a project sponsored by the Institute of African Studies. The goal of the IAS project was to study "socio-cultural factors in change and development" (Oruka 1991, 60). Odera Oruka argued that the best way to understand ethnic cultures was not to survey people in general, as he presumed anthropologists did, but rather to seek out the wisest and most reflective individuals, who could both recount what the widespread beliefs of their communities were, as well as evaluate them. This description of widely held beliefs and longstanding practices he calls "culture philosophy." He then insists that the "culture philosophy" he has learned from these wise individuals is more reliable and insightful than accounts of group views attained by other means (Oruka 1991, 58-60).

Odera Oruka goes on to explain that due to his sage philosophy project, he was able to construct a description of the Luo belief system and philosophies of life. (He does not mention whether the project led to similar constructions of other ethnic groups' beliefs or philosophies of life). The I.A.S. was interested in these findings insofar as they could help them to discern how to better approach topics such as development in a culturally sensitive way. Odera Oruka explains that the I.A.S. was most interested in the communal viewpoint, and so, for their purposes, Odera Oruka highlighted the commonalities and downplayed the differences (Oruka 1991, 60). He also explains, in a related footnote 4 (Oruka 1991, 65), that some sages did not want their names associated with the study, and so only the summary report is given rather than individual interviews. He specifically notes that in this way his study was similar to that of Barry Hallen and J.O. Sodipo's, because, there, the sages consulted were also left anonymous. In the earlier 1983 article, included in the 1991 book on p. 50,

Odera Oruka clarifies that the Hallen-Sodipo project is not philosophy in the second order sense, that is, strict philosophy, but it is only culture philosophy. So, certainly, Odera Oruka's own report of Luo beliefs and philosophies of life given on pp. 60-63 are also an example of culture philosophy. However, this culture philosophy is one of the "fruits," that is, results, of the sage philosophy project.

So, is "culture philosophy" actually philosophy? In *Sage Philosophy* (1991, 48-49), Odera Oruka explains that culture philosophy is philosophy in the broad or loose sense of the term, since "first order" philosophy, which he calls the "mythos" of a culture, is full of prejudices, dominated by communal conformity and anachronism, and is absolutist and ideological. In contrast, second order philosophy, which he calls "philosophy proper," is tentative and ratiocinative. While every individual in a culture is familiar with its mythos, sages are experts in their society's mythos (Oruka 1991, 48). From the way he describes it here, one senses that he might not himself be very interested in the mythos, since his interest seems to be directed toward the second order analysis of first order culture philosophy.

As it turns out, in the Kenyan context there may have been even more interest in this culture philosophy than there was in the rarer "philosophic sagacity." While the international philosophy scene may have been more impressed by the existence of individually named philosophical sages, Odera Oruka was in demand in Kenya because he had completed this study of Luo beliefs, customs, and philosophies of life. As he explains, due to this report, he was asked to be an expert witness at the S.M. Otieno trial. He asserts that his account was more authoritative than the other elder women and men who were witnesses at the trial, because the others were only "folk sages," whereas his testimony was based on the account of "philosophical sages," that is, intellectuals and experts of the Luo community. He thought that the other witnesses became mired in "contradictions," while his testimony contained no contradictions (Oruka 1991, 43, end note 2). This assertion is an interesting one, since Cohen and Atieno-Odhiambo in their in-depth analysis of the S.M. Otieno burial trial noted that Odera Oruka's testimony was met with skepticism due to his young age, while the words of the elders who testified were more easily believed due to their age (Cohen and Atieno-Odhiambo 1992, 49-51).

Odera Oruka also explains in *Sage Philosophy* that due to his role as expert witness at the trial, he was invited by various Provincial Commissioners to give a series of seminars to District Officers and District Commissioners, explaining to them the beliefs and philosophies of life of the Luo people, and he did so extensively in 1987-88. He includes a summary of what he told these government officers in the book (pp.60-65; see his explanation on p.65, end note 1). He mentions that he discussed with them topics such as witchcraft, religion, health, burial and related customs, and the impact of modernization and development (Oruka 1991, 58). It is interesting to note that while he did share with them his insights into group-held beliefs, he also shared with them the other aspect of his study, that is, the study of wise individuals and their uniquely held beliefs and rational arguments in defense of their positions. For example, he explains that traditionally many Luos believed in witchcraft and thought they needed the help of experts to protect themselves from "evils and devils," but he puts that in historical context and explains that it is easier these days to find some Luos who appear to be "indifferent" to witchcraft (Oruka 1991, 61). Still he claims that "a large number" of Luos in Siaya are "extremely superstitious" (Oruka 1991, 62). After this description, he follows up with a reference to Njeru wa Kanyenje from Central Embu, who regarded witchcraft as a "deceit" or "bluff" and said that witchdoctors were "clever manipulators of the weakness of human minds..." (Oruka 1991, 65). While the emphasis in Luo society is upon marriage and robust procreating (Oruka 1991, 62), Odera Oruka references a sage named Mbote Korja from East Ugenya in Siaya who notes that past practices of warring with neighbors to seize their lands are no longer practical, and given this change, parents should attempt to control the size of their families to the ability of their land to support such families (Oruka 1991, 65).¹

Given these examples, does Odera Oruka value the traditions he has learned so much about? Here above are two examples of deeply and widely held beliefs and values among the Luo, that is, a superstitious belief in witchcraft, and loyalty to procreation as a very important goal in life. In both cases Odera Oruka follows up with a sage, perhaps a philosophic sage, who criticizes and/or problematizes

¹ Neither of these sages are included in section two of the book, which is one of several clues that Odera Oruka engaged in many interviews that have not to this day been published.

these views. In other words, he can show that there is already a critique of these practices from within their respective societies. Rural areas are NOT only places of unquestioning, unthinking allegiance to past values; they are also the birthplace of critical thinkers. As Odera Oruka travels among Kenyan institutions, he educates people not only on the traditions, but also on their contemporary critique.

Soon after the trial, and around the same time he was speaking to District Officers, he received funds from USAID to participate in a study organized by the National Council for Population and Development, which involved studying the beliefs and attitudes of rural Kenyans regarding family planning. Odera Oruka oversaw sage interviews in five districts in five provinces (Siaya, Bungoma, Nyeri, Nandi and Machakos). Again, he relied on his method of finding wise sages who could shed light on beliefs and attitudes in their own communities that could be overlooked by usual demographic methods. For example, there is emphasis on having a male heir in a patriarchal society; one must preserve the names of the dead by naming the living after them, so one must have children to name; one must have many children to ward against witchcraft practices such as "footprint picking"; and taboos against counting children make family planning difficult. Dorothy Muniyako wrote that she warned Odera Oruka "that he was likely to be torn apart by demographers" who may not appreciate his unique approach to his study (Muniyako 1990, 21). The study shows that Odera Oruka still has confidence that his sages can do a better job at analyzing their own society than can outside observers. In addition, the fact that this study involves five provinces shows that it has the same inter-ethnic character as does his sage philosophy project for I.A.S. several years earlier.

Odera Oruka's account of Luo practices in *Sage Philosophy* also includes ways in which traditions have been eroded, sometimes due to foreign influence. Not all change is good. He complains that foreign influence on Luo society has led to the promiscuity of wives and young, unmarried people (pp.62-63). He also complains that colonialism, which had been ignorant of African cultures, marginalized the wisdom of the Kenyan elders (p.63). He appreciates that the Kenyan government of his time is trying to rectify some of the past Eurocentrism by handing over land cases to be decided by local elders (p.63). Basically, in Odera Oruka's work over the years, one can find him expressing a tension: many times he is advocating for anachro-

nistic practices of Kenyans to be set aside in favor of progressive change; but as often, he is championing neglected traditions and hoping that Kenyans abandon recent developments. In an article that Odera Oruka wrote in which he reflected on the deeper philosophical meanings of the S.M. Otieno burial trial, he explained that in contemporary times, one must avoid the twin evils of attempting to continue everything traditional on the one hand, and advocating the adoption of everything new and/or foreign on the other (Oruka 1989, 85). Given his stated position on these twin evils, this paper would like to follow up by asking whether, in the context of the trial, he defends African traditions when they suffer due to anti-African bias and prejudice. On the other hand, does he champion reform of traditions when reform is needed? We will answer these questions by looking at his testimony during the S.M. Otieno burial trial, as well as articles that he wrote on related topics within the next few years after the trial.

Traditions and Customary Law: Harmful to Women?

In many places throughout Africa, and certainly in Kenya during Odera Oruka's lifetime, the legal system had what Kenyan feminists consider a double standard: the Constitution said there can be no gender discrimination, but there are limitations to protection against gender discrimination, because the Constitution also recognized local customary law. Customary law could make decisions regarding marriage and divorce, inheritance, burial, and other family matters that could greatly affect women's lives. Feminists argued that much of customary law curtailed women's legal rights, and Kenyan women lawyers had been organizing in attempts to get the customary law clauses out of the constitution. Muna Ndulo explains that in the current Kenyan constitution promulgated in 2010, while customary law is still mentioned there, and while many people in Kenya continue to follow it regarding their life decisions, there is more protection for women because upholding equal human rights trumps any customary law that contradicts that goal. The Kenyan Constitution of 2010, article 159(3) says "[t]raditional dispute resolution mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality..." (cited in Ndulo 2011, 98). Ndulo also argues that insofar as the Kenyan Constitution says it upholds

international law, any international laws that protect women from discrimination would also apply to Kenya (Ndulo 2011, 99).

Similarly, Celestine Nyamu Musembi, a Senior Lecturer at the University of Nairobi's School of Law, states that personal law exemption clauses were used in the past in Kenya and other countries to ensure that customary law could still be followed while being "exempt" from following non-discrimination guidelines. Kenya, along with Ghana, Uganda and Malawi recently adopted constitutions that disallow the application of customary law if it results in discrimination against women. Musembi argues that customary law as it had been practiced in Kenya made it impossible for those who had a grievance of discrimination to get any legal redress. In effect, by leaving issues such as marriage, divorce and inheritance in customary or "personal" law, the former constitutions of those countries exposed women to injustice, since customary laws and norms could be interpreted by powerful persons in a way that discriminated against women, and women could not rely on legal challenges since these personal laws were "supra-constitutional" (Musembi 2013, 199-200).

Odera Oruka lived under the former Kenyan constitution, when customary law was often found to be in contradiction with women's equal rights. He had been requested by the Umira-Kager clan's lawyer, Richard Otieno Kwach, and the clan's spokesman, Omolo Siranga, to be an expert witness in cases dealing with customary law (see Odera Oruka 1991, 68). Since customary law is often unwritten, experts must come and give oral testimony so that the laws which may apply will be known. Insistence that customary law was still binding was, at its best, one way to respect pre-colonial traditions in Kenya, and ensured that the specificity of values and practices among Kenyan communities would not get crushed in a big push for homogeneity.

While Odera Oruka played the role of an expert on customary law in the courtroom (Oruka 1991, 67-84, drawn from Nation newspapers and tape recorded court proceedings), that does not mean he unthinkingly upheld tradition. He wanted to champion the good parts of his tradition, and to more fully understand their implications before daring to have them jettisoned. He did not want to protect the past in a bubble; rather, he wanted to prod it toward better, more humane ideals.

It is interesting to look at Odera Oruka's own statements on the role of women in Luo society in the light of his dedication to the fight

for women's equality to men. In the famous S.M. Otieno burial trial in 1987, the widow of Otieno and members of his clan went to court to decide who had the rights to Otieno's body for burial. Many feminists supported the widow, Virginia Edith Wambui Otieno, believing the customary laws of the Luo to be oppressive to women. Maria Nzomo, a colleague of Odera Oruka's at the University of Nairobi, stated that the S.M. Otieno case "presented a good opportunity that Kenyan women could have seized to insist on the harmonization of Kenyan laws, into one set of laws, to avoid future manipulation of the now contradictory customary and common laws that are conveniently used to victimize women" (Nzomo 1994, 203-217; see also Musembi 2013, 200-201, note 61).

Odera Oruka's description of Luo customs during his testimony to the court included the following remarks:

A woman is knowledgeable on matters involving the house.

A man runs the home...Daughters are not expected as permanent residents of the home...A girl belongs to where she is married" (Oruka 1991, 70). He also explained that although customs do change with time, some Luo customs have been around for a long time, and will not change easily. For example, "in marriage, the husband is the head of the family, and home and also among the Luos, a man needs to have a son to build a home, and before marriage, dowry is paid (Oruka 1991, 78).

Now in the bulk of his testimony, Odera Oruka was not necessarily stating what his own beliefs were, although he himself was also a Luo. Rather, he was recounting the traditional beliefs of his community. So one could argue that although the Luo practices mentioned could be seen as based on the notion of women's inferiority, or having the result of disadvantaging women, it was not necessarily Odera Oruka's own view. If the courtroom was not the proper venue to describe his personal views, then we would expect him to clarify his position outside of the courtroom. The introduction to the excerpts of his testimony which he included in *Sage Philosophy* explains that he did not mean to appear as a supporter of the clan, but since he was ridiculed by the lawyer on the widow's side, he got defensive, and in the end his testimony was used by the clan to help

win their case. It is not made clear in *Sage Philosophy* as to who is the author of this introductory text (Oruka 1991, 68). We can wonder if Odera Oruka himself, being a Luo man, and having been invited by the clan's defense team, meant that in some way he had, perhaps, a pre-disposition to side with the clan rather than to be completely neutral regarding the outcome of the trial. Odera Oruka never wrote anything autobiographical enough to comment on the trial's subject matter in relation to his own identity, and, in fact, he clearly takes offense when the widow's lawyer, Khaminwa, wants to personalize the issues at stake by drawing attention to Odera Oruka's own status as an educated Luo man; but no doubt the first affront was at the very beginning of Khaminwa's cross-examination, when Khaminwa suggested that the issues at hand were regarding religion, while Odera Oruka's field of specialization was philosophy, not religion (Oruka 1991, 72).

However, there is one place, early in his testimony, where Odera Oruka clearly takes sides with the clan and against the widow. He states that he rejects the argument that S.M. Otieno, having moved to Nairobi and having embraced other modern customs, was exempt from the duty to carry out Luo customs. In Odera Oruka's words, "We have no rationale to show that the man had a religion or an explicit philosophy of conscience which justifiably exempts him from being subjected to the Luo customs" (Oruka 1991, 74). This is clearly a response to the earlier *ex parte* order given by Justice Shields to the widow, Wambui Otieno, allowing her to bury her husband's body in Karen (a suburb of Nairobi), on the grounds that S.M. Otieno was a metropolitan lawyer who had opted out of customary law (Twining 2010, 491). The Court of Appeal that heard the trial thought that it was not possible for individuals to opt out of Luo customs, as they explained: "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" (cited in Wanjala 1989, 111; Nation Newspapers, 1986, p.1).

In other words, this would mean that according to Odera Oruka and those who share his view, every Luo individual has the right and the liberty to opt out of following Luo customs if he or she can demonstrate to the community that his or her request for release is due to a carefully thought out and clearly articulated principled position. Here, the stipulation would be that S.M. Otieno's problem

was that he did not clarify the extent of his divergence from their beliefs and practices, or his reasons for his wishes of noncompliance. It may be that he presumed he had the liberty to depart without such formalities or express opinions. Sometimes, people, in an attempt to avoid conflict, are indirect about their disagreements. He may have thought that his actions (or his omissions) spoke louder than words. But, in the ensuing controversy, the widow's legal team argued that his lifestyle and actions spoke clearly about his values and wishes, while the clan's position was basically that actions are ambiguous, open to multiple interpretations, and without the required explicit request for exemption, the issue of S.M. Otieno's exemption would be decided negatively. We must keep in mind that with this added wrinkle of not knowing S. M. Otieno's intentions with certainty, we would need other sources to know whether Odera Oruka's siding with the clan would be due to his agreeing that S.M. Otieno's intentions were not clear, or whether he thought S.M. Otieno would have been wrong to explicitly choose to exempt himself from the burial customs.

Is it possible to divest oneself of traditional ethnic customs? Many Kenyans joined in this debate. In a collection of articles published after the trial, S.C. Wanjala asserted that while it is true that one cannot shed one's ethnic identity, one can and does nevertheless "divest himself of the customary laws of his ethnic group" (Wanjala 1989, 111). For example, a Luo man may marry under the Marriage Act in a civil, Christian, or Muslim marriage. In such circumstances, the man does not have to provide his ethnic group with an explanation as to why he cannot in good conscience follow the marriage traditions of his ethnic group. However, Wanjala thinks that simply because a Luo person marries in a way other than the traditional way does not mean that the other customs are not still in force (Wanjala 1989, 112).

However, as the testimony stands, while Odera Oruka conceded that customs do change, he said there was no ground for being "flexible" in the S.M. Otieno case, for "while they [customs] are in force, it would be absurd to suggest that we should not follow them" (Oruka 1991, 82). With these words, Odera Oruka is seen to embrace the argument of the clan, and the verdict of the court, that "there is no way in which an African citizen of Kenya can divest himself of the association with the tribe of his father" (Nation Newspapers 1986, 1). This position is considered unrealistic by M.D. Okech-Owiti, who says

that the preceding claim of the court is an "unsustainable assertion," since it suggests that a person cannot show by his or her actions, conduct, or lifestyle that he or she rejects certain customs. Okech-Owiti said that S.M. Otieno showed multiple serious signs of abandonment of customs: for example, he did not build a customary ancestral home, he did not socialize himself and his family with the clan, and he shared property titles with a woman - his wife. Nevertheless, beyond these particulars about S.M. Otieno, Okech-Owiti thinks that a rigid understanding of custom goes against the idea and practice of custom, since customs of necessity are always adapting to practical situations. Rather than choose to repeat past customs no matter what, he thinks that people should ask themselves whether the customs in question are still useful in the current context, and, if they are no longer relevant, they should be ignored or discarded (Okech-Owiti, 1989, 20-23) - a position quite close to what Odera Oruka said in other contexts about traditions in general. So why does Odera Oruka not emphasize his own flexible notions of following customs when he is on the witness stand?

In fact, when Odera Oruka is in the witness stand, Khaminwa, Wambui Otieno's lawyer, asks him whether in traditional society there may be people opposed to customs - people who want to depart from those customs and do things their own way. Odera Oruka explains to Khaminwa that "in a traditional communal society there were very few rebels" (Nation, Feb 6, 1987, 4). However, Odera Oruka does not add how, in his sage philosophy project, he especially likes the rebels - those who do not conform to customs. He does not mention that he and other philosophers such as Kwame Gyekye, or earlier anthropologists such as Paul Radin, insisted that there were always individual free thinkers in "traditional," that is, rural and unschooled African contexts. Neither does he say that while there are few rebels in "traditional" societies, those who are rebels are special, and should be lauded and appreciated by their communities and known by all Kenyans, sharing the title of philosophical sage (rather than folk sage). He does tell Khaminwa that during his study of sages, he found there to be two types of sages, those who were flexible and recommended changes, and those who were rigid (Nation, Feb 6, 1987, 4). Nevertheless, he does not say that his study thought that the flexible sages were great role models. In fact, those who heard his testimony were worried that he was repeating (what they thought

were) outdated Luo practices as if they were timeless and unchanging. As Judge Cotran explained, customary law should always be revised often based on new oral evidence of experts (Cotran 1989, 155).

It had been a strategy of Wambui's lawyer, John Khaminwa, to draw Odera Oruka into discussion of himself as a modern Luo man. The lawyer decided to cross-examine Odera Oruka, not only on the topic of Luo customs and tradition, but about himself, as an example of a modern professional Luo who lived in Nairobi (and hence might be a rough parallel to S.M. Otieno). Khaminwa asked Odera Oruka directly whether or not he was a traditional Luo, and Odera Oruka replied: "I am a Luo, although I organize my life according to values some of which are not traditional Luo" (Oruka 1991, 75).

From a philosophical point of view, the conversation between Odera Oruka and Khaminwa becomes interesting, because Odera Oruka was drawn into a discussion where he astounded the lawyer by suggesting that no matter how "modern" of a "professor" he was, he still thought that Luo customs should be followed (Oruka 1991, 74, 78). He admitted to having ingested a *manyasi* (elixir) created by an herbal specialist. In a passage that needs close scrutiny, it sounds as if Odera Oruka said he believed in many of the Luo traditional ideas such as spirits. However, if one looks more closely, he was only expressing a more nuanced position that claimed one could not definitively prove that spirits did not exist. Odera Oruka did not say he believed in spirits, but rather, he turned each question around, answering a question with another question, asking the widow's lawyer John Khaminwa about his own criteria for proving there were no spirits (Oruka 1991, 77-78). It seems that he was attempting to defend indigenous culture from a modernist view which was ready to dismiss it wholesale as backward and primitive.

If the reader will remember, Odera Oruka had, in the chapter in *Sage Philosophy* preceding this testimony, claimed that most Luos were superstitious, and he had, in the context of discussing how to recognize wise assertions, quoted a sage who claimed that witchcraft was bluff and deception (Oruka 1991, 65). However, earlier in his description of Luo beliefs and practices, Odera Oruka had said, when referring to witchdoctors (or "medicinemen" called *ajuoke* in Dholuo), that some of them were "bogus; others are genuine and seem to have power of fulfilling their mission" (Oruka 1991, 62). What would it mean to say some of these *ajuoke* are genuine? Odera Oruka does not

explain exactly what he means. Does that mean that some succeed in driving away evil spirits? This would imply that there actually were such spirits. Odera Oruka had explained that such persons use two methods: some use a combination of herbs and psychological drama; others use only drama. When he says they are able to help people, does that mean that, from a pragmatic perspective, they help their clients by making them feel better? If he actually believes there are such spirits, and that some medicine men successfully drive away evil spirits from their clients, he has been a bit indirect in making this claim. Odera Oruka does not have a chance during the trial to explain under what circumstances in his own life he ingested the *manyasi* (elixir). Did he do it as an experiment? Did he do it because he was being haunted and hoped the elixir would help him? Is his assertion in *Sage Philosophy* that some medicine men are efficacious based on his first-hand experience, or on his research findings? We do not know.

Odera Oruka also explains in chapter 4 of *Sage Philosophy* that Luos are careful and respectful regarding how they bury their dead because they believe the dead are intermediators between themselves and God, and that the dead are in a special position to help them (Oruka 1991, 62). During his testimony at the trial, he explained that many Luos think that if they do not follow the burial customs correctly, they will be haunted by the spirits of the dead (Oruka 1991, 80-81). He does not himself comment on whether he thinks this is true or not.

Wambui Waiyaki Otieno described her own reaction to Odera Oruka's testimony. In her memoirs, she reflects upon how Odera Oruka described a father and his son deciding where to build the son's house on the family compound by observing the behavior of a cock: "Surely the business of being shown where to build a home by a cock cannot be anything else but primitive! I could not envisage that our modern courts and judges could hail such a custom" (Otieno 1998, 188-189). Odera Oruka no doubt considered Wambui a Christian who indulged in wholesale condemnation of African religious traditions without taking time to try to understand them.

A few years after the trial and burial, Odera Oruka published a chapter in a book devoted to discussing the S.M. Otieno trial. His chapter was titled "Traditionalism and Modernisation in Kenya: Customs, Spirits and Christianity," in which he revisited some of the themes above (Oruka 1989). He again reiterated his point that

"modern" should not be equated with "Western," and Kenyan traditions should not be equated with backwardness, since there may be some customs that are more humane and helpful than imported Western traditions. To presume the above erroneous dichotomy is to engage in racism, be it conscious or unconscious (Oruka 1989, 84). He emphasized a popular theme at the time of the S.M. Otieno burial, that is, the claim that African traditional ideas of spirits and Christian ideas of spirits are not that different from each other, and so one should not be put down as "backward" while the other is lauded as "progressive" (Oruka 1989, 82-83; see also Stamp 1991, 834-835).

Odera Oruka insists that his goal is not to fend off all foreign influence, but to evaluate and choose selectively from both foreign influence and African traditions. He says he knows of different people who err too much in one direction or another, either championing all African traditions and attributing all harmful trends to foreign influence, or, on the other hand, worshipping everything foreign. He explains that his own approach is a careful middle road that "utilizes the best of their traditions and harmonises them with the liberating values borrowed from contact with foreigners" (Oruka 1989, 85). He suggests that before borrowing the practices of others, one should subject the practices to careful evaluation. He then quotes himself in his book *Punishment and Terrorism in Africa* (Oruka 1st ed. 1976/ 2nd ed. 1985), where he had written, "When something traditional is negative and stagnating to Africa, it cannot be reasonable for Africa to adopt it simply because it happens to be traditional" (Oruka 1989, 85, quoting 2nd ed. p.54).

While this part of Odera Oruka's 1989 article emphasizes that traditions should not be held rigidly and be regarded as sacrosanct, Odera Oruka ends this article emphasizing the caution from the other end of the continuum, that is, he warns against too eager a rush to "modernization." He says, "We must season our modernization by seriously cleansing its evils and sins with the *manyasi* of traditions" (Oruka 1989, 87). "*Manyasi*" refers to the medicine one must take to ward off the effects of *chira*, that is, (according to Odera Oruka's testimony in court), "a misfortune which befalls someone because of a bad action done in the past...you must be cleansed by experts with *manyasi*" (Daily Nation, Feb. 6, 1987, p.4). While his use of *manyasi* here can only be as a metaphor, his use of the traditional metaphors could be taken as a demonstration that he does not want to distance himself

from the ideas of *chira* and *manyasi* by indulging in prejudices against such thinking and practices (when, for example, Christians may have practices of prayers, asking for the intervention of saints, or going to confession to accomplish a similar cleansing). In other words, Odera Oruka is suggesting that only by deep reflection and by holding onto the valuable aspects of traditions can we safely and confidently open ourselves up to new ways.

Conclusion

If Odera Oruka were able to explain his own view as a more nuanced version of acceptance as well as rejection of various aspects of Luo tradition, his expert witness testimony would not have seemed so clearly to side with the clan against the widow. I consider this one of Odera Oruka's missed opportunities to support women's equality in Kenya. Without his clearly stating his position during the trial that women in Kenya need equal rights with men, the clan could argue that the status quo was justified, and a famous precedent-setting case, supported by feminists, in which a Kenyan woman tried to assert her rights, was lost. The ability to discern what was best for Wambui in her situation, and for Kenyan women more generally, was caught up and then swept aside in the focus on the issue of defending traditions against callous disregard.

The funeral service in the Anglican cathedral in Kisumu and the burial in Siaya attracted large crowds, and gave occasion for many in attendance to express Luo nationalism. Men were warned to think twice before trying to marry a woman from another ethnic group. An irony to Odera Oruka's testimony helping the clan and hurting the widow's case is that a man he greatly admired, Oginga Odinga, was busy speaking at funerals in the Siaya District, speaking out against the parochialism of the Umira-Kager clan, and promoting inter-ethnic marriage and Luo-Kikuyu alliances (Stamp 1991, 839-840).² The irony

² John Murungi argues against Stamp's account, saying that S.M. Otieno and Wambui married for individual, private reasons, and not as a political act to bring Kikuyu and Luo tribes together (Murungi 2013, 177-178). Be that as it may, Oginga Odinga was clearly concerned that a subtext of the trial was Kikuyu-Luo tension, and he wanted to address that tension. Considering he would launch a new political party in 1990 that would attempt to create an alliance of Kikuyu, Luo, and Luhya citizens to be able to win the presidency away from KANU, one can

is that Odera Oruka had envisaged the sage philosophy project as one that interviewed sages from a multiplicity of ethnic groups, and heralded their wisdom as the common heritage of Kenyans at a national level. This goal of national unity was sidelined. Instead, the emphasis on Luo customs and the service of that knowledge of customs for the clan's case can be seen as an instance when the project of building national culture and intercultural harmony is temporarily neglected.

Odera Oruka's own position was that universal, equal human dignity and worth was important for all, including the African context. However, as a caution against its possible misuse and co-optation by Eurocentric notions, a careful analysis of African practices regarding men and women should be undertaken, with care to ensure that there are no presumptions that the African practices are backward. Only after careful and fair scrutiny should African practices that are found to disadvantage women be discarded (Oruka 1990, 107-108).

Thus, we see now how having an accurate "culture philosophy" is an important preliminary step in the project of evaluating traditions, so that we can fairly and with sensitivity decide which aspects of past beliefs and practices should continue as before. Odera Oruka asserted that the philosophical sages were keen evaluators of these traditions, as well as innovators. Being someone who learned from them, he also engages in this process of evaluation. Furthermore, he sought out social roles - such as expert witness in customary law cases - where he could put what he learned from the philosophical sages to good use. In this way, his project parallels that of Kwame Gyekye of Ghana, who argues, in his book *Tradition and Modernity* (1997), that we need to practice a critical Sankofaism, which means looking back to learn from traditions, but always in a critical spirit of discernment (Lamptey 2015). As Gyekye explains, "A realistic normative assessment of the cultural past or cultural traditions of a people must proceed by examining the experiences of the practice of specific aspects or areas of the tradition" (Gyekye 1997, 241). Which values of the past should be embraced by the present and future?

see why, in 1987, Oginga Odinga would have been concerned about the subtext of ethnic animosity during the burial trial. For an overview of the background of Luo-Kikuyu tension, see Dickovick 2012, 214-218.

Women need to enjoy their legal rights on an equal basis with men. Which of the customs will be compatible with such equality? Odera Oruka argues that this needs to be determined case by case. As the years went on, he participated in several debates involving issues of women's rights and traditions, but discussion of the nuances of these debates will have to be saved for future articles or books. Let us hope that, if Odera Oruka is true to his conviction that egalitarianism is an important value, through careful and self-critical thought and reflection, both sexism and Eurocentrism can be rooted out of our processes of moral discernment.

References

- Cohen, David William and E.S. Atieno-Odhiambo. 1992. *Burying S. M. Otiemo: The Politics of Knowledge & the Sociology of Power in Africa*. Nairobi: East African Educational Publishers.
- Cotran, E. 1989. "The Future of Customary Law in Kenya." In Ojwang and Mugambi, eds. *The S.M. Otiemo Case*, pp.149-165.
- Dickovick, James Tyler. 2012. *Africa 2012 (The World Today Series)*. Rowman and Littlefield.
- Donders, J.G. 1977. "Don't Fence Us in: The Liberating Role of Philosophy." 11th Inaugural lecture, University of Nairobi, Taifa Hall, March 10, 1977. Nairobi: Joseph Gerard Publications, University of Nairobi.
- Eze, Emmanuel. 1996. "Toward a Critical Theory of Postcolonial African Identities." In Eze, Emmanuel, ed. 1996, pp.339-344.
- Eze, Emmanuel, ed. 1996. *Postcolonial African Philosophy: A Critical Reader*. London: Blackwell.
- Gyekye, Kwame. 1997. *Tradition and Modernity: Philosophical Reflections on the African Experience*. New York: Oxford University Press.
- Himmelstrand, Ulf, Kabiru Kinyanjui and Edward Mburugu. 1994. *Perspectives on Development: Controversies, Dilemmas, and Openings*. London: James Currey.
- Kathana, Ngungi. 1992. "Philosophic Sagacity in Africa." Unpublished Master's Thesis at the University of Nairobi.
- Lamptey, Yirenkyi. 2015. "Critical 'Sankofaism' is the answer - says Professor Gyekye." *Ghana Today*, March 25, 2015. [Odera Oruka on Culture Philosophy 117](http://www.to</p>
</div>
<div data-bbox=)

- daygh.com/critical-sankofaism-is-the-answer-says-prof-gyekye/ accessed February 28, 2016.
- Mbuya Akoko, Paul. 1999. *Luo Cultural Practices (Luo Kitgi Gi Timbegi)*. Jane Achieng trans. University of Nairobi Library, Afr.DT 435.43, L8M313, unpublished, 1999.
- Munyakho, Dorothy. 1990. "No Easy Road to Family Planning." *Daily Nation* (Nairobi), 3 April 1990, p. 21.
- Murungi, John. 2013. *An introduction to African legal philosophy*. Lanham, Maryland: Lexington Books.
- Musembi, Celestine Nyamu. 2013. "Pulling apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol." In Anne Hellum and Henriette Sinding Aasen eds. *Women's Human Rights: CEDAW in International, Regional and National Law*. Cambridge: Cambridge University Press, pp.183-214.
- Nation Newspapers. 1986. *S.M. Otiemo: Kenya's Unique Burial Saga*. Nairobi: Nation Newspapers.
- Ndulo, Muna. 2011. "African Customary Law, Customs, and Women's Rights." *Cornell Law Faculty Publications*, Paper 187. <http://scholarship.law.cornell.edu/facpub/187>
- Nzomo, Maria. 1994. "Women in Politics and Public Decision Making." In Himmelstrand, Ulf, Kabiru Kinyanjui and Edward Mburugu. eds. 1994, pp. 203-217.
- Ojwang, J.B. and J.N.K. Mugambi eds. 1989. *The S.M. Otiemo Case: Death and Burial in Modern Kenya*. Nairobi: University of Nairobi Press.
- Okech-Owiti, M.D. 1989. "Some Socio-Legal Issues," in Ojwang, J.B. and Mugambi, J.N.K. *The S.M. Otiemo Case*, pp.11-29.
- Oruka, H. Odera. 1976. *Punishment and terrorism in Africa: problems in the philosophy and practice of punishment*. First edition. Nairobi: Kenya Literature Bureau.
- . 1985. *Punishment and terrorism in Africa: problems in the philosophy and practice of punishment*. Second edition. Kampala: East African Literature Bureau.
- . 1989. "Traditionalism and Modernisation in Kenya: Customs, Spirits and Christianity." In Ojwang, J.B. and J.N.K. Mugambi. *The S.M. Otiemo Case: Death and Burial in Modern Kenya*, pp.78-88.
- . 1990. *Ethics*. Nairobi: University of Nairobi Press.
- , ed. 1991. *Sage Philosophy: Indigenous Thinkers and Moral Debate on African Philosophy*. Nairobi: ACTS Press.

- . 1997. *Practical Philosophy: In Search of an Ethical Minimum*. Nairobi: East African Educational Publishers.
- Otieno, Wambui Waiyaki and Cora Ann Presley. 1998. *Mau Mau's Daughter: A Life History*. Boulder, CO: Lynne Rienner Publishers.
- Presbey, Gail. 2012. "Kenyan Sages on Equality of Sexes." *Thought and Practice: A Journal of the Philosophical Association of Kenya (PAK)*, Special Issue: Odera Orika Seventeen Years On. New Series, Vol.4 No.2, December 2012, pp.111-145.
- . 2013. "Attempts to create an Inter-ethnic and Inter-generational 'National Culture' in Kenya." *Diogenes*, July 2013. <http://dio.sagepub.com/content/early/2013/07/11/0392192113493726.citation>
- Stamp, Patricia. 1991. "Burying Otieno: The Politics of Gender and Ethnicity in Kenya." *Signs*, Vol. 16 No. 4: Women, Family, State, and Economy in Africa (Summer, 1991), pp.808-845.
- Twining, William. 2010. "Normative and Legal Pluralism: A Global Perspective." *Duke Journal of Comparative and International Law*, Vol.20, pp. 473-517.
- Wanjala, S.C. 1989. "Conflicts of Law and Burial," in Ojwang, J.B. and Mugambi, J.N.K., pp.101-115.
- Worthington, Nancy. 2003. "Shifting Identities in the Kenyan Press: Representations of Wangari Maathai's Media Complex Protest." *Women's Studies in Communication*, Vol.26 No.2, pp.143-164.

Copyright © 2016 by
The Council for Research in Values and Philosophy

Gibbons Hall B-20
620 Michigan Avenue, NE
Washington, D.C. 20064

All rights reserved

Printed in the United States of America

Library of Congress Cataloging-in-Publication

Names: Oduor, Reginald M. J., editor.
Title: Odera Orika in the twenty-first century / edited by Reginald M.J. Oduor, Oriare Nyarwath, Francis E.A. Owakah.
Description: First [edition]. | Washington DC : Council for Research in Values and Philosophy, 2017. | Series: Cultural heritage and contemporary change. Series II, African philosophical studies ; Volume 20 | Series: Kenyan philosophical studies ; 2 | Includes bibliographical references and index.
Identifiers: LCCN 2017051564 | ISBN 9781565183247 (pbk.)
Subjects: LCSH: Orika, H. Odera. | Philosophy, African. | Philosophers-Kenya.
Classification: LCC B5419.O784 O34 2017 | DDC 199/.6762--dc23
LC record available at <https://lccn.loc.gov/2017051564>