Speech Act Functions in Cross Examination Discourse in the Kenyan Courtroom

Gatitu Kiguru
Kenyatta University

Emily A. Ogutu
Kenyatta University

Martin C. Njoroge
Pan Africa Christian University

Abstract

This paper focuses on the utterances by examiners in the cross examination phase in trials in selected Kenyan courtrooms and seeks to show their use of speech act functions (other than questioning) to achieve various goals. The cross examination phase is presented in a bid to show its impact on the discourse of the participants thus preparing a presentation of the various speech act functions in this phase of trial. The data are audio recordings of proceedings from sampled courts in Kenya specifically targeting a dichotomy of trials in which accused persons are represented by counsel and those in which the defendants appear pro se. The discussion of the data is done within the framework of Critical Discourse Analysis (CDA) to show how the various speech act functions in the two phases of trial are a reflection of the power asymmetry that hold among different participants in a trial.

Keywords: courtroom discourse, Kenya, cross examination, speech act functions

1.0 Background

The Kenyan legal system falls within the adversarial legal tradition in which parties to a dispute present a competing set of fact before a neutral fact finder. In this system, a trial follows a generic pattern and is divided into different phases each marked by unique use of language and pragmatic resources. This paper focuses on the cross examination phase of trial and will show how the use of speech act functions varies as a factor of the asymmetries in power among discourse participants.

A trial in the adversarial tradition involves the presentation of a competing set of facts and the challenging of these facts through question-answer exchanges in direct and cross examination phases. As such the dominant speech act functions in a trial are questioning or interrogating, achieved through questions by the examiner, and asserting, stating and claiming as achieved through utterances by witnesses. But while these could be the dominant speech acts, they are by no means the only ones. Focusing on utterances by examiners, this paper seeks to show that a variety of other speech act function are achieved, and that these functions vary in their pragmatic significance depending on the fact of their occurrence in the cross examination phase of trial. Further, under the framework of Critical Discourse Analysis (CDA), our discussion will seek to link the use of various speech act functions to power imbalance among the discourse participants in the courtroom setting.

In the adversarial system, the task of gathering evidence lies with the parties to the dispute: the prosecution and the defence. In Kenya, the gathering of evidence against the accused person and the presentation of the same before the fact finders is done by police prosecutors in criminal proceedings. The defence is also expected to gather evidence to prove the innocence of the accused person. The evidence marshaled by either party can take many forms, but it presentation before the presiding judge or magistrate mainly involves calling witnesses to give oral evidence in the course of which material evidence (pictures, weapons, forensic reports etc) can be produced. It is this presentation of evidence by the parties to a dispute, through calling witnesses, that patterns into direct examination (examination-in-chief) and cross examination.

Ideally, in the adversarial tradition, during trial, the role of the accused is reduced to one of a spectator who may or may not be called to give testimony, and the task of proving his or her innocence lies with the counsel of the accused. Significant in the Kenyan courtroom is the big number of persons appearing before courts accused of crimes cannot afford to retain regal representation. Therefore, such persons appear before court pro se and the task of defending themselves fall squarely on them. An unrepresented litigant has to be part and parcel of the proceedings. He or she has to cross examining the prosecution's witnesses and also mount a defence.

The direct examination phase provides opportunity witnesses to present testimony favourable to the party that calls the witness. Thus, in examination-in-chief, a police prosecutor, representing the victim, will call witnesses whose testimony will lay blame on the accused person, while the counsel for the defence or the accused person appearing in person will call witnesses whose testimony will remove blame from the accused person. The implication on the discourse is that the examiner and the witness, by and large, work together to develop a particular case theory through their question-answer interaction. It is for this reason that direct examination has been characterized as the phase of trial that is friendly to the witness (Danet, 1980; Lane, 1990; Luchjenbroers, 1993; Eades, 2000).

In cross examination, the discourse goals of the participants are at a cross purpose. The divergent goals of the examiner and the witness in cross examination are a factor of the very purpose set for this phase of trial. The *Laws of Kenya: Evidence Act,* Part IV Section 154 (a)-(c) provides that in cross examination a witness may be asked questions 'to test his accuracy, veracity or

credibility' and 'to shake his credit, by injuring his character' (p. E17-49 – E17-50). Further, Sections 128 and 155 of the same Act provide that a witness be compelled to answer the questions posed to him or her. Cross examination has been labeled as unfriendly to the witness (Danet, 1980; Farinde 2009; Luchjenbroers, 1993; Eades, 2000), and it could be argued that the provisions in the law are the foundation of the combative nature of cross examination.

The purpose of this paper, however, is to show that this combativeness of cross examination is evident in the other speech act functions of the utterances of the examiners aside from questioning. Further, our discussion will show that pro se litigants face challenges utilizing various speech act functions to antagonistic ends when we compare their use of the same to that of defence counsel.

The discussion above has dwelt on direct and cross examination in criminal trials. The same pattern applies for civil trials with only a change in terms used to refer to the discourse participants. The person who files a civil suit is the plaintiff while the one against whom the suit is filed is the defendant. The plaintiff can have regal representation and thus the direct examination phase would be done by the counsel for the plaintiff while cross examination is by the counsel for the defendant if he or she is unrepresented.

1.1 The Data

This paper reports on findings of a study conducted in three Chief Magistrate's courts in Kenya. As stated, the Kenyan regal system fall in the adversarial tradition and the courts are hierarchically ordered. The Supreme Court is the highest followed by the Court of Appeal.

Below these are the subordinate courts among which the Chief Magistrate's Courts are the highest. In practice, a Chief Magistrate is the head of several courts within a particular judicial domain. Therefore, a Chief Magistrates court consists of a cluster of courts each of which is presided over by a magistrate (Kiguru, 2014). Thus, in sampling three Chief Magistrates Courts, the researcher had access to all the courtrooms under the jurisdiction of a given Chief Magistrate.

The data are transcriptions of 30 hours of audio recordings of proceedings in the cross examination of sampled trials in the three Chief Magistrate's Courts. The sample was arrived at through quota sampling so that there were 10 hours recorded in each court to reflect the ratio of five hour of trials (criminal and civil) featuring accused persons represented by a defence counsel and five hours of trials featuring accused persons appearing pro se. Thus, our analysis will show the use of speech act functions by counsel and unrepresented accused persons in cross examination. The sample consisted of trials both criminal and civil trials, and whereas in some criminal cases the accused person was unrepresented by counsel, all the plaintiff and defendants in the sampled civil cases had legal representation.

1.2 Speech Act Functions

A major contribution of the Speech Act Theory was the identification and classification of speech acts, with certain speech acts being said to realize different discourse or speech act functions. To Austin's (1962) five classes of illocutionary acts namely expositives, exercitives, commissives, verdictives and behabitives, other scholars have added other classes (Searle 1976, 1975; Searle & Vanderveken, 1985, Thomas, 1985), and this has become a very dynamic area of the theory.

Despite this dynamism, the identification of speech acts is not a straight forward matter. With the exception of explicit performatives, other speech acts can only be identified by taking into account the felicity conditions that allow for their use as well as a consideration of prosodic aspects of tone, stress, word order and even voice quality. In addition, there is not always a direct relationship between formal grammatical structures and speech act function. For this reason, a distinction is made between direct speech acts and indirect speech acts. Direct speech acts are those in which there is a fit between grammatical form and discourse function. For instance the utterance 'Please lend me that novel' is imperative in form and it can used to achieve the discourse function of requesting. Therefore, it is a direct speech act because imperative sentences are used to issue commands or make requests. But the discourse function of requesting can be achieved through the utterance 'That novel looks interesting' which is declarative in form. This, therefore, is an indirect speech act because declarative sentences are usually used for stating and asserting rather than requesting.

Given that the major aim in a trial is to establish what happened at an earlier time in order to arrive at a decision on who is to bear responsibility for an occurrence or omission, it is to be expected that questioning and declaring/asserting are the dominant speech act functions in courtroom discourse. The speech act function of questioning during cross examination can mainly be attributed to lawyers, while the speech act function of declaring or asserting can mainly be attributed to witnesses who make declarations or assertions in their response to questions. However, the present study also sought to identify other speech act functions realized by utterances that are not interrogative or declarative in nature. It also identified speech act

functions achieved through structures that could formally be categorised as questions and as declarative sentences, but can be analysed as achieving more than just the discourse functions of questioning and declaring/asserting respectively. Thus, our discussion of speech acts to the exclusion of questioning and asserting is not meant to deny these are speech acts. Rather, it is meant for analytic convenience where questions and statements are acknowledged as the structures achieving the dominant speech acts in cross examination discourse. Then, other types of acts achieved through other structures or through questions, statements and are identified and are the focus of this paper.

2.0 Overview of Speech Act Functions in the Cross Examination Phase of the Sampled Trials

According to Fletcher (2003) the law is the arena of speech acts par excellence because it is in law, probably more than anywhere else, that language can be seen so clearly as performing actions. Indeed, the centrality of the Speech Act Theory in courtroom discourse has always been acknowledged. Danet (1980) reviews the typology of speech acts by Searle (1976) with a view to show how they apply legal settings. She notes that the class of representatives would include act like testifying, stating and asserting all of which are what witnesses do in court. The class of directives includes commands and questions are a special type of a command as they require one to tell something rather than do something. There are commissives in which the speaker commits to do something in future and in the legal setting, they are realized through contractual agreements and guarantees. Expressive have to do with the speaker's psychological state and blaming is one such act that is common in courtroom discourse. Finally, the class of declarations includes utterances that bring about some change in reality. In dispute resolution, utterances

during plea taking and sentencing as well as the raising of objections by different parties count as declarations.

There is need to take into account the fact that a trial and its various phases are speech events where the verbal interaction is directed toward achieving some desired outcome. Overall, the speech act functions in the courtroom setting are expected to be oriented to the overriding discourse functions of blame implicating and blame avoidance that dictate language use in this setting. With this in mind, the identification of other speech act functions in this paper has been tied to analysis of the intended function of specific utterances. This classification is based on the goal-orientation and the observation of the maxims of interpersonal pragmatics specifically those by Thomas (1985, 1986). She identifies speech acts, which she terms as pragmatic acts, which are characteristic of discourse of unequal encounters. These include metapgramatic comments, Illocutionary Force Indicating Devices (IFIDs), reformulations, appeal to felicity conditions and discoursal indicators. The other speech act function categories adopted are from Allan (1986) and include summon, encouragement, command, clarification and information.

The frequencies of use of these speech act functions in cross examination are presented in Figures 1 that follows. The figure contrasts the percentage frequencies of the speech act functions by counsel and lay litigants in the cross examination phases of the trials in the study sample.

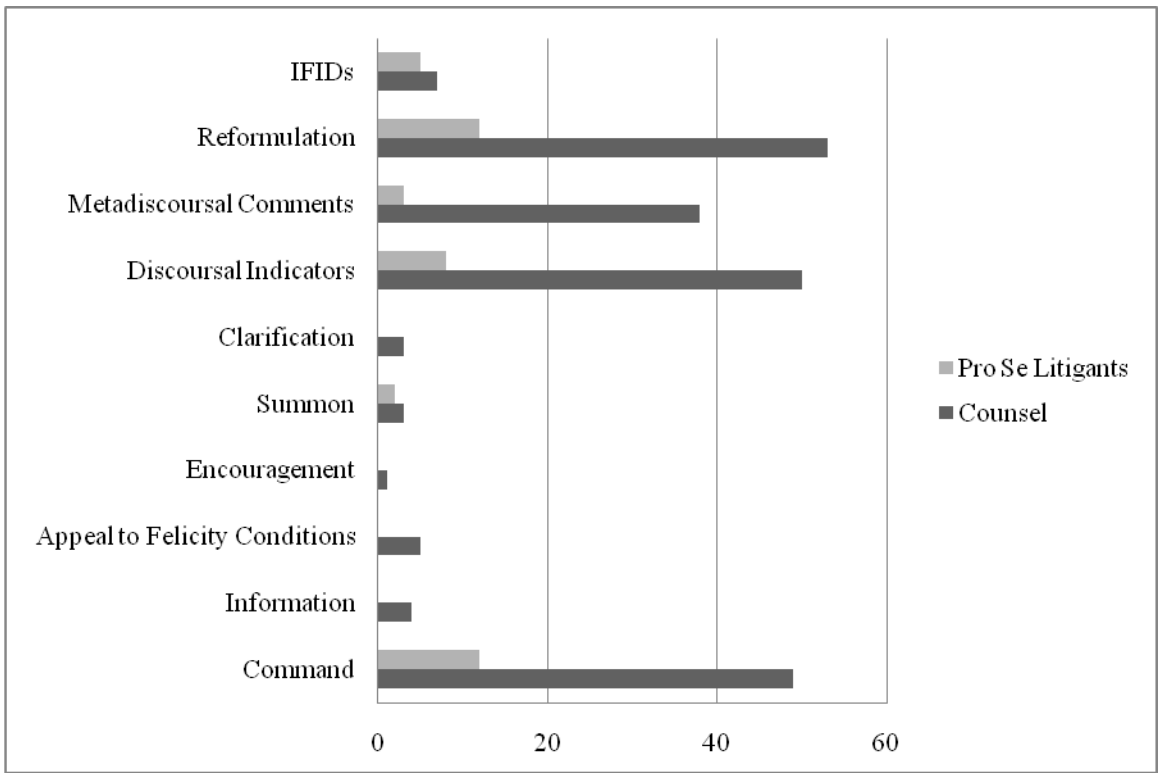

Figure 1: Comparison of Speech Act Functions by Counsel and Pro Se Litigants in Cross Examination

As Figure 1 shows, a variety of ten speech act functions were observed in use by counsel in cross examination. The least frequently used of these was encouragement with a frequency of 0.47% followed by summon and clarification which tie at 1.41% each. The most frequently occurring speech act function was reformulation 24.88% followed by discoursal indicators at 23.47% and commands are third with a percentage frequency of 23.00%.

In contrast, Figure 1 also shows that unrepresented defendants only achieved six speech act functions in their cross examination. The most frequent were command and reformulation at 28.57% each followed by discoursal indicators with a frequency of 19.05%. IFIDs had a frequency of 11.90% while metadiscoursal comments and summon had frequencies of 7.14% and 4.77% respectively.

We now present examples of the actual use of various speech act functions by examiners in the study sample. The presentation includes examples showing the utterances achieving the various speech act functions in context and an account of the possible impacts these functions were meant to serve by the participants who used them.

3.0 Speech Act Functions in Cross Examination

In challenging the testimony of the prosecution's witnesses, defence counsel and pro se litigants used a variety of speech actions. These are presented in this section with explanations of their possible impact on the discourse.

3.1 Summon

Summon is a speech act used to demand the presence of somebody (Farinde, 2009) but in this study it was only found to be used by counsel and lay litigants calling out the name of the witness at the start of cross examination as in examples 14 and 15 that follow.

Example 1
Ac: **N_____**
W2: Ndio.
Yes.
Ac: Kwa nini unatoa ushahidi wa uongo?
Why are you giving false testimony?

Example 2
Ac1: **Bwana B___**
Mr. B___
W: Ndio.
Yes.
Ac1: Wakati ulikuwa pale kwa bank, uli communicate na mwenzako una muita:::
When you were there at the bank, did you communicate with your colleague you are calling him:::

In both examples 1 and 2 the examiner calls out the name of the witness and when the witness responds then the examiner begins his questioning. This was done much as the witness was physically present and it would seem that the calling out acts as a summons to the witness to acknowledge that the phase of cross examination has started. This calling out is thus a marker that the accused person is the one now addressing the witness. Such utterances, involving saying the name of the witness with a rising intonation, were thus classified as summons because the party addressed responded to them as such. Indeed, this is in line with the assertion by Allan (1994) that the hearer's evaluation is also criteria for classifying speech acts.

3.2 Encouragement

The discourse function of encouragement is used to urge witnesses to continue with what they are saying, and in the data of the present study, it was found in use only once in cross examination. And as example 3 that follows shows even then it was used in a way that ended placing the witness at a disadvantage.

Example 3

C: Chaotic. How do you know they are chaotic?
W: Through their behaviours. They fight with people always.
C: Can you tell the court one such as incident apart from when you fought with them?
W: Not one. Many.
C: Yes, but can you tell us of one?
W: Yes, they fought with another lady at ( )
C: What's her name?
W: Er::: she is G___ no J____
C: **Yes.** Another incident?
W: They also beat another lady at M____.
C: Her name?
W: I don't know her name.
C: Interesting. So know all their chaotic behaviour because you have been following P___ and W___ around, right?
W: I have not been following them. I said I have seen them fighting.
C: But you have somehow managed to be at their every fight.

The witness in example 3 has given her opinion that the accused persons are chaotic. The defence counsel asks her to substantiate and she responds that they are always in fights. Probed further she starts to enumerate the incidents she has witnessed the accused person in fights, and it is her the counsel utters the word 'yes' with a raising intonation to encourage her to give yet another incident. In a subsequent contribution in the exchange the counsel makes the metadiscoursal comment 'interesting' followed by the 'so' prefaced tag question that concludes that the witness must have been in the habit of following the accused persons around if she is able to chronicle all their fights. The encouragement to go on ends up eliciting information that is used against the witness by the defence counsel.

3.3 Command

In cross examination, commands were mainly used to coerce the witness especially in instances where it is obvious the witness would rather do or say something else as captured in example 4 (a)-(b).

Example 4

(a) Ac1: Na kwa statement yako uliandika hivyo, kwamba ulitoka nje bank ukampigia simu?
And in your statement did you write that, that you got outside the bank and called him?

W: Eer, nilikuwa nime communicate nayeye before niingie hapo kwa bank. Ikawa yeye kuna kitu anaenda kulipa harafu aje tupatane [hapo C___-]
Eer, I had communicated with him before I got into the bank. It was that there was something he was going to pay then he comes there at C__-

Ac1: [Aaha aaha.] **Jibu swali langu**. Nauliza mlicommunicate nayeye ukiwa ndani ya bank au nje?
*Aaha aaha. **Answer my question**. I am asking you communicated with him when you were inside the bank or outside?*

(b) W: Wajua baada ya kushtuka ndio niliona kwamba [umati-]
You know after being startled is when I saw members of the public-

Ac1: [Aaha aaha.] **Jibu swali langu**. Mtu akishtuka ako katika hali gani?
*Aaha aaha. **Answer my question**. When one is startled one is in which state?*

The accused person in the role of cross examiner interrupts the witness on the two occasions in examples 4 (a)-(b), explicitly rejects the response of the witness (Aaha aaha) and then commands the witness to respond to his question. The interruption, the meta-comment showing negative evaluation and the command to answer the question are all markers of combativeness and they are discourse resources only available to the examiner. This is evidence of the hostile nature of cross examination.

3.4 Clarification and Information

One would expect clarification and information to be witness supportive speech act functions. But the data revealed instances of clarification by the examining counsel that were actually used to the detriment of the witness. Example 5 below captures such use.

Example 5
C2: [Zilikuwa] zimeanguka chini?
Had they fallen on the ground?
W: Sio kuanguka lakini **zilikuwa zimebend chini kuliko vile zinatakikana**. [Ndio-]
*Not falling on the ground but **they were bending down more that they should**. That's why-*
C2: [Wire] za stima huwa zinabend kwasababu ni wire na zinaexpand na kucontract. Na hiyo allowance huwa inapeanwa zikiwekwa. Nakuuliza, zilikuwa zimeanguka chini?
***Electricity wires usually bend because they are wires and they expand and contract. And that is an allowance that is given when they are put up.** I am asking you, had they fallen on the ground?*

The question by the cross examining counsel is on whether the wires in question had fallen on the ground. The witness affirms they had not but adds that they were bending more than they should. The lawyer gives what could be a scientifically sound explanation about contraction and expansion of electricity transmission lines and asserts that this is put into consideration when

they are erected. This clarification seeks to explain the bending which the witness has repeatedly talked about as his explanation of how the electrocution of his son happened. If the bending is explained away by the counsel, then a strong point for the plaintiff's demand for compensation is weakened. As such, the clarification by the counsel is neither supportive to the witness nor to the version of facts he wants to advance.

3.5 Discoursal Indicators

In cross examination, discoursal indicators were observed being used to indicate termination of a conversation in a way that the other party cannot continue with the discourse even if he or she wanted to. Because such indicators, as shown in examples 6 and 7 below, are a language resource only available to the examiner, they are evidence of the power asymmetry in courtroom discourse.

Example 6
P: **Nothing further your Honour**.

Example 7
W: =Ee na hiyo siku si mara ya kwanza. [ali-]
And that is not the first time. He-
P: **[Your Honour] I am through with examination**.

In both 6 and 7, examiners signal the end of direct or cross examination through a discoursal indicator statement directed at the presiding magistrate. Example 7 further illustrates the fact that the end of the phase of trial is determined by the examiner and the witness has no say about it. In this particular instance, the witness has to cut short an utterance because the prosecutor has signaled the end of direct examination. Such phase ending utterances are accompanied by the physical act of the examiner taking his or her seat and the witness has no choice but to await for the next party to ask him questions or to be released by the court. This is unlike in ordinary

conversations where a conversation is brought to an end by the parties through some mutual leave taking exchange.

3.6 Metadiscoursal Comments

Metadiscoursal comments are comments on the discourse that are always used by the dominant party. These are also called meta-talk which allow the dominant party 'to produce overt and covert blame-inferential comments' about the testimony given by a witness (Matoesian, 1993 p. 173). In this role, they serve the function of positively or negatively evaluating the contributions by witnesses and also keeping the witnesses from wandering off a particular discourse path which the dominant party wishes for them to follow as example 8 (a)-(b).

Example 8

(a) C: Anywhere in your statement did you write that the accused person was selling these works?
W1: He was [selling-]
C: [**No, no, no.**] I am asking where in particular did you record that was he offering these for sale? Did you record that?

(b) W1: It was not necessary to write that.
C: **According to you it was not necessary**. So did any of these people you found in the shop record a statement?
W1: They did not.
C: **Again you did not find it necessary**. How much did you find the accused person selling the items at?

In example 8 (a), counsel rejects the preceding response by the witness even before it is complete. The triplet 'no' is a comment on the contribution by the witness, and it marks a rather forceful rejection of the witness's response. Conversely, it would not be possible for a witness to express rejection or acceptance of a particular question in such a forceful manner in the courtroom setting. In example 8 (b), the witness says it was not necessary to record that the accused was selling particular items in his statement. The cross examining counsel's comment

'according to you it was not necessary' has the effect of making the response the witness has just given make the witness's actions seem negligent. When the witness says the people found buying CDs in the accused person's shop were never required to record statements, the counsel adds the comment 'Again you did not find it necessary.' Cumulatively, the two comments could have the effect of reflecting badly on the way the witness, who was the arresting officer in this case, conducted his duties and show he was negligent. Moreover, these statements are background statements and so the witness has no chance to react to them or the way they portray him.

3.7 Reformulation

Reformulations involve the dominant party repeating the statements of the weaker party. Whereas such reformulations can be supportive, they can also be coercive tools if the dominant party uses them to challenge witness's testimony, point out discrepancies or restate witness testimony in order to point out inconsistencies in the testimony of a witness as happens in example 9.

Example 9

C: **You said the 2nd accused had a gun, you saw him throw a gun in the bush?**
W: Yes.
C: **In your testimony you have told us that two men are running in front of you in the forest so you cannot see clearly and it is past six thirty**. How did you confirm that it was a gun and **you have said you never recovered it immediately?**
W: I saw it.
C: How far would you say he was from you as he threw what you call a gun?
W: About ten meters
C: Ten meters. Ten meters and you saw that he is holding a gun and throwing it away?
W: Yes.
C: After he threw away the gun, how long did it take to reach the wall they couldn't jump?
W: Not long.
C: Be specific. Another ten minutes or 4 minutes?
W: About two minutes.

C: Good. **You said why did you not recover the gun immediately? Because it was dark, right?**
W: The gun- he threw it away and it fell in a long [grass-]
C: [There you] go again changing your testimony.
W: No, I said the gun fell in the bushes.
C: Let's not debate that. I wish the court to refresh your memory as to the reason you have given as to why you could not recover the gun immediately. Your Honour this witness is having problems recollecting the testimony he has just given.
M: You did say that you couldn't recover the gun because it was dark.
W: Yes.
C: Thank you your Honour.
Now are you listening to yourself? **You say you clearly saw a gun that the accused threw away but two minutes later, you can't see the gun as it is dark**. Can you be truthful. Did you see that what he threw was a gun?

In example 9, the lawyer reformulates the evidence that the witness gave during direct examination with the aim of showing logical gaps in the testimony. The witness had said the chase for the two accused persons happened in a forest and it was dark. But, he confidently identifies the second accused as the one who threw a gun into the bushes. The lawyer's reformulations could have the effect of showing this portrayal of events as being farfetched because the officer has also said they could not recover the gun that was thrown into the bush at that time as it was too dark to see. The question then is how, in the first place, the witness can unequivocally identify what he saw being thrown into the bush as a gun if two minutes later he cannot recover it as it is too dark to see.

Reformulation can also be done in a way that is possibly meant to show irony and thus create a sense of incredulity with regard to the way certain actions and events are portrayed. This is shown in example 10 (a)-(c) that follows.

Example 10

(a) C: Now, here is a person banging the OCS table, telling the OCS 'you police officer you are useless' uttering the other words you told us here and you Mr. O__, **you as an officer in the station did not arrest him**. Did you arrest him?

W1: **We did not arrest him**.
C: **Nobody arrested him** when he uttered those words to the OCS, when he banged the table?
W1: No.
C: And you have told us here that inside that office were three police officers. The OCS, Mr. M__ and you Mr. O___, correct?
W1: Yes.
C: This is happening at a police station. There are very many policemen at T__ Police Station, isn't it?

(b) C: Who were those police officers who were in that office at that particular day?
W1: They were __ and ___
C: These police officers who were in the report office, **did any of them attempt to arrest the accused person for insulting the OCS directly**?
W1: **We did not arrest him**.
C: Why not? Can you tell us **why he was not arrested for abusing the OCS** 'you police officer are very useless'?
W1: We were not given orders to arrest [him-]
C: [You don't] receive orders from above to arrest a person who is assaulting the other, insulting the other, in fact insulting-abusing your senior. Or do you usually wait to receive an order from above to arrest a person who is committing crime?
W1: No.
C: But in this case you just left the accused to go on and commit a crime?

(c) C: [You are] addressing yourself to the court. **Did you arrest the accused person then because you have just testified that he abused the OCS again**?
W1: No.
C: **He was not arrested.** You have said here that when you left K___, K___ and M___ at the gate of the municipal council, you went to the office of the OCS to inform him what you had been told, correct?

The reformulation in 10 (c) is a result of a build-up from 10 (a)-(c) on the issue of the arrest of the accused person. The witness answers with a simple 'no' to the counsels question in 10 (c) whether the accused person was arrested for sending the witness with an abusive message to a senior police officer. This one word response is reformulated to the sentence 'He was not arrested' by the counsel most likely for dramatic effect because it is the third time that the witness is admitting the accused person was not arrested despite allegedly having verbally abused a senior police officer in a police station and in the presence of other officers. The

reformulation is likely meant to create a feeling of disbelief and show that the charges before the court are more likely to be fabrications or an afterthought given that the crime was committed against a senior police officer, in a police station and was witnessed by several police officers, the witness included.

3.8 Illocutionary Force Indicating Devices (IFIDs)

IFIDs are expressions with an explicit marker of the illocutionary force of the utterance. Farinde (2009 p. 274) asserts that the use of IFIDs with declarative statements or question is the most explicit marker of the power wielded by the examiner because such structures 'are very challenging, combating, controlling, powerful and coercive'. The explicit marker of the illocutionary force of the utterance could be a performative verb, word order or the tone of voice of the speaker. In the data for the present study, IFIDs were identified on the basis of the presence of an explicit performative verb as shown below.

Example 11

(a) C1: [So **I am**] **putting it to you** Mr. K__ that you are concocting lies simply because the matter has progressed this far.

(b) C1: **I am putting it to you** that all these cases and the present one prove that you are engaged- that S___ Limited is engaged in unfair and unlawful trade practices, isn't that correct?

Example 11

C: [**Nakwambia**,] haukuwa umemshika mkono, si ndio?
I am telling you, *you were not holding his or her hand, isn't it?*

The expressions 'I am putting it to you…' and 'I am telling you…' are examples of IFIDs where the dominant discourse participant identifies himself/herself using the first person singular pronoun 'I' and follows this with a performative verb to make clear what he or she is doing through the utterance.

3.9 Appeal to Felicity Conditions

Appeal to felicity conditions refers to the fact that dominant discourse participants derive their power from institutional conventions. For instance, witnesses cannot ask questions and cannot refuse to answer them, and if they do, counsel appeal to the institutional conventions to make them respond. This is shown in example 12 that follows.

Example 12

C: Yet you saw, what did you say, that you saw P___ sneering at you. Meaning you were staring at her, right? ((Laughter))
W: I was not looking- a sneer is an expression that you see [not-]
C: [But you] were talking to Mr. ____ and E____, right?
W: My eyes were not closed. The eyes were open, you see things, not that you are [looking-]
C: [You had] taken two glasses of wine you said and you were not drunk. How many do you take to get drunk? ((Laughter))
W: Your Honour do I have to answer that?
C: **Yes you have to**. **I have the right to question you on anything because you have accused my clients**. How many, do you take to get drunk?

The witness seems of the opinion that the question the counsel is posing is rather personal and she addresses herself to the presiding magistrate to ask whether she should answer it. But it is the counsel who answers her 'Yes you have to. You have accused my clients and I have a right to ask you anything'. The response by the lawyer makes appeal to the institutional conventions operating in this setting that give counsel dominance over witnesses in cross examination. The response serves as a reminder to witnesses that in the courtroom her verbal behaviour is subject to rules to which she must show deference despite the discomfiture she may feel due to the personal nature of some questions.

4.0 Discussion of the Statistical Results of Speech Act Functions in the Sampled Trials

In the following sections, a comparison is made among various participants on their use of different speech act functions in the cross examination phase of the sampled trials. Under the tenets of CDA, these comparisons then inform the discussion on how the use of the speech act functions reveals the unequal distribution of power among the discourse participants in the courtroom setting.

4.1 Significance of Speech Act Functions in Cross examination

The lawyers in the study sample had more variety of the speech act functions compared to the unrepresented accused persons. The latter did not make use of information, appeal to felicity conditions, encouragement and clarification, which were functions found in cross examination by the lawyers as Table 1 that follows shows.

Table 1: Comparison of Speech Act Functions by Counsel and Pro Se Litigants in Cross Examination

Speech Act Functions	**Counsel**		**Lay Litigants**		**Totals**	
	Frequency	**%**	**Frequency**	**%**	**Frequency**	**%**
Command	49	23.00	12	28.57	61	23.92
Information	4	1.88	-	-	4	1.57
Appeal to felicity conditions	5	2.35	-	-	5	1.96
Encouragement	1	0.47	-	-	1	0.39
Summon	3	1.41	2	4.76	5	1.96
Clarification	3	1.41	-	-	3	1.18
Discoursal Indicators	50	23.47	8	19.05	58	22.75
Metadiscoursal Comments	38	17.84	3	7.14	41	16.08
Reformulation	53	24.88	12	28.57	65	25.49
IFIDs	7	3.29	5	11.90	12	4.71
Total	**213**	**100**	**42**	**100**	**255**	**100**

Most noticeable, in this trial phase was the variety of the speech act functions achieved by examiner utterances. As Table 1 shows, the cross examination phase of the sample data had a

total of 255 speech act functions. It is significant that out of these 255 speech act functions 213 were to be found to be used by the counsel while pro se litigants only had 42. For counsel, as cross examiners, reformulation of witness testimony had a frequency of 53 (24.88%) almost tying with discourse indicators whose frequency was 50 (23.47%). Closely following were commands 49 (23.00%) while metadiscoursal comments were 38 (17.84%). These were the only speech act functions with a frequency above ten.

Comparatively, pro se litigants registered the lower use of speech act functions with only 42 speech acts identified for this group. According to distribution, commands and reformulation, with occurrence of 12 (28.57%) each, were the most used. Discoursal indicator 8 (19.05%) was third followed by IFIDs with an occurrence of 5 (11.90%).

The variation in variety and numbers with regard to the speech act function achieved between counsel and lay litigants can be taken to be more evidence of the power asymmetry in courtroom discourse. To account for this symmetry we adopt the distinction by Wilson (2006) between influential power and instrumental power. Influential power deals with abilities to influence actions and behaviour by specific use of language mainly in the media and politics. Instrumental power has to do with 'the control over access to certain forms of knowledge' such that 'the control over turns or specific speech actions' is deemed as an exercise of instrumental power (Wilson, 2006, p. 8443). Thus, though the lay litigants procedurally do assume the role of examiner, they may be lacking in instrumental power: that is the capacity to exploit the language resources this role avails them due to lack of formal training and or practice in the use of language in formal disputing. Adopting CDAs approach of interpretive and deconstructive reading of discourse allows for the conclusion that a lack of knowledge and training in the

principles of language use in the adversarial legal system is a major obstacle for unrepresented accused persons. Without such knowledge their attempts to gain power over witness replies when they assume the role of cross examiners are likely to remain unsuccessful (Tkačuková, 2010).

5.0 Conclusion

The significance of the speech act functions in courtroom discourse cannot be overemphasized. Our discussion has show that such functions can serve different purposes ranging from marking the examiners intent in a way that curtails the contribution of witnesses as well as allowing the dominant party to impact on the propositional content of a witness' responses. It could be argued that the power behind these functions is their subtlety. Stubbs (1983) aptly notes that in conversations it is common to have performative utterances that 'step out of the conversation, comment on its progress, and propose a re-orientation' and that such utterances usually pass unnoticed. He further asserts that 'such utterances are simultaneously conversational acts in the linear sequence of discourse and also acts at a higher metalevel, which comment on the lower level' (p. 16).

We argue that it is this in this higher level role of speech acts functions that power and inequality is manifest among the participants in courtroom discourse. In the first place, these speech act functions, as disputing strategies, are disproportionately available to examiners. Secondly, their use seems to be tied to training, in language and law, as well as to practice through frequent appearance in court. This could be the reason the statistics in Table 1 show pro se litigants poorly in the frequency of use and variety of the speech act functions as compared to counsel. We can

thus conclude that courtroom discourse disadvantages witness, by denying them certain language resources, and pro se litigants, by encouraging the use of strategies whose acquisition and command are dependent on training and exposure that such litigant may be lacking.

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