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# UPHOLDING JUDICIAL INDEPENDENCE IN KENYA

Challenges, context and solutions

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# Executive Summary

The Kenyan Judiciary is grappling with a renewed onslaught on all the pillars of its independence. The unprecedented gun attack on a magistrate within a courtroom, the barrage of public attacks from the Executive and the Legislature, widespread perceptions of systemic corruption within the corridors of justice, crippling budget cuts, and unexplained internal redeployment of judges are some of the violations of the constitutional protections of judicial independence.

On the one hand, the judges in Kenya have made bold decisions and declarations to promote prudent public policy, protect socio-economic well-being, and curtail the avarice of the people in power. Nearly all judicial decisions that those in power interpret as detrimental to their interests are met with threats of budget cuts and reminders to judges about the social contract that elected representatives have with the people. Members of the Executive, including the President and his deputy, and the Members of Parliament, often publicly issue threats against individual judges and the Judiciary, reminding the judicial officers about the power of the purse and the powerful tools of the State at their disposal. So far in 2024, the Judiciary has been attacked for declaring the discriminatory housing levy unconstitutional, voiding the government's health insurance plans on similar grounds, deeming as illegal the rushed deployment of the Kenyan military to the streets to quell widespread youth protests, and nullifying the tax laws for violating the constitution.

On the other hand, the Judiciary has had to contend with a pervasive perception that the powerful pay judicial officers to avoid being brought to book, or that the Judiciary is politically manipulated for favourable verdicts. The perception arose after key players within the criminal justice system – the police, the Director of Public Prosecutions, the Director of Criminal Investigations, and even government agen-

cies— dropped cases against the Deputy President, some Cabinet ministers, and some public officers. The Kenyan Supreme Court banned a senior counsel for publicly “scandalizing, ridiculing and outrightly denigrating” the court, and for accusing the judges and the court of “acts of corruption, incompetence and outright bribery”. These controversies have created a perception that perhaps the Judiciary is not independent and is susceptible to political manipulation and judicial collusion for self-preservation.

In liberal democracies such as Kenya, the Judiciary is the bastion of justice. Its decisions preserve order, deliver justice, hold the powerful to account, deal with impunity, and grease the wheels of democracy by promoting social, political, and economic well-being in a country. Therefore, this policy paper addresses concerns about judicial independence, interrogating the pervasive corruption and lack of transparency within the Kenyan judiciary and their significant impacts on judicial independence. It takes a closer look at the systemic corruption and perception of corruption that undermines the rule of law, examining how political interference and bribery erode public trust in judicial institutions. It illustrates how corruption, political interference, threats of budget cuts (and actual cuts), and blocked appointments compromise the impartiality and integrity of judicial proceedings, judicial officers, and the Judiciary.

The paper highlights how political pressures can undermine judicial independence while also recognising the efforts of honest judges striving to maintain their autonomy in such a challenging environment. The paper concludes with recommendations for enhancing judicial transparency and combating corruption, political meddling, and financial threats, to restore faith in Kenya's legal system and uphold the principles of justice and fairness.

# 1. Introduction

## The quest for an independent Judiciary in Kenya is a never-ending struggle.

This policy paper is urgent now, to address the growing overt and covert erosion of judicial independence, more so with the rising perception of political interference and attacks<sup>1</sup>, budget cuts, blocked appointment of judges perceived as anti-government<sup>2</sup>, rampant disregard of court orders, police raids on judges and judicial officers, gun attacks within court premises, and mounting claims of widespread corruption, including within the Judicial Service Commission<sup>3</sup>, the administrative arm of the Judiciary.

However, even with all these physical, reputational, and financial attacks, together with the constitutional violations, the Kenyan Judiciary has valiantly pursued justice on behalf of the people of Kenya, in the service of the Constitution. This paper promotes the position that the Judiciary, as one of the branches of government, relies on its independence to fulfil its role in upholding the rule of law and interpreting the Constitution. In the 14 years of the Constitution of Kenya (2010) the country has made important strides to entrench the independence of the Judiciary. The Constitution has robust provisions guaranteeing that the Judiciary “shall not be subject to the control or direction of any person or authority”<sup>4</sup>. It also protects the pay-packets of judges, shields them from arbitrary removal, and sets up a dedicated Judiciary Fund to give the Judiciary financial and operational autonomy<sup>5</sup>.

The security of tenure for judges, their financial security, the Judiciary’s budgetary control, operational autonomy in hiring and dismissal of judges through the Judicial Service Commission, and the constitutional independence for judicial officers to interpret the law without interference from other branches of government or external entities are key ingredients of judicial independence<sup>6,7</sup>. The court system management, the safeguards against threats to independence, and public perception of the impartiality of the Judiciary, together with the judicial officers’ views about their autonomy, all play a role in evaluating the Judiciary’s independence<sup>8</sup>. Therefore, this policy brief reasserts the altruism that Judicial independence is crucial for maintaining the rule of law and is vital for the effective functioning of society.<sup>9</sup>

Without impartial and independent mechanisms for resolving disputes, there can be no genuine protection of human rights, no real economic security or free market, and no effective governance or civil order.<sup>10</sup> The rule of law fundamentally depends on the independence of the judiciary.<sup>11</sup> Judicial independence allows the judiciary to act as a check on the powers of the other branches of government, thereby preserving the balance of power within a democratic system.

<sup>1</sup> Oudia, R. & Langat, P. (2023, August 9). LSK condemns Duale attack on Justice George Odunga. *Nation Africa*.

Available from <https://nation.africa/kenya/news/lsk-condemns-duale-attack-on-justice-george-odunga-340820>

<sup>2</sup> Benjamin v Chief Justice of the Republic of Kenya (C.J.) & another; Judicial Service Commission (JSC) & 13 others (Interested Parties) (Constitutional Petition E196 of 2021) [2022] KEHC 10072 (KLR) (Constitutional and Human Rights) (25 July 2022) (Judgment). Available from <https://kenyalaw.org/caselaw/cases/view/235448/>

<sup>3</sup> Shollei v Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment). <https://kenyalaw.org/caselaw/cases/view/228631>

<sup>4</sup> Article 160(1), Constitution of Kenya, 2010

<sup>5</sup> Articles 161-173 of the Constitution of Kenya, 2010

<sup>6</sup> Shimon Shetreet, ‘Judicial Independence and Accountability: Core Values in Liberal Democracies’, in Hoong Phun Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 9.

<sup>7</sup> See Sègnonna Horace Adjolohoun, ‘Judges Guarding Judges: Investigating Regional Harbours for Judicial Independence in Africa’ (2023) 67 *Journal of African Law* 172

<sup>8</sup> European Network of Councils for the Judiciary (ENCJ), ‘Independence and Accountability of the Judiciary’ (ENCJ Report 2013-2014) available from [https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj\\_report\\_independence\\_accountability\\_adopted\\_version\\_sept\\_2014.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf)

<sup>9</sup> Shimon Shetreet and Wayne McCormack (eds), *The Culture of Judicial Independence in a Globalised World* (Brill Nijhoff 2016).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

## 2. The erosion of judicial independence in Kenya

While constitutionally designed to be independent, Kenya's judiciary faces many practical challenges that make it difficult to realise its full autonomy in executing its mandate. The Judiciary is ever inundated with public calls for transparency, efficiency, and accountability, yet it still has to fight off the erosion of its independence.

Apart from corruption which compromises impartiality, with financial incentives swaying decisions, judicial independence faces several other threats, including political interference, where politicians exert pressure on judges to influence rulings. Intimidation and threats against judges and their families also undermine the ability of judicial officers to rule fairly.

Inadequate legal frameworks and a lack of enforcement mechanisms also weaken judicial independence. Additionally, insufficient funding and resources hinder the judiciary's effectiveness, making it vulnerable to external influences. These threats collectively undermine the integrity and effectiveness of the judicial system.

### 2.1 Widespread claims and perception of corruption within the Judiciary

Corruption directly threatens the judiciary's independence by compromising its integrity and impartiality.

The Bar, the Bench, and the Executive have made high-level allegations of bribery and/or the extortion of litigants against judges and even the Supreme Court. These allegations erode public trust and weaken the judiciary's ability to check government power, thus undermining the rule of law and democratic governance.

Former Chief Justice Willy Mutunga also acknowledged in a media interview at the tail-end of his career, that the Judiciary was not immune in the "bandit economy"<sup>12</sup> that Kenya had become, with pervasive bribery, extortion and corruption in the criminal justice system. Mutunga said:

*"Yes, I am now at the top. I'm riding a tiger, hoping that the monster will not devour me... But as long as I fight the cartels and they are protected, you cannot achieve anything. You are taking these people into a corrupt investigating system, through a corrupt anti-corruption system, and a corrupt judiciary."*

The two presidents who have led Kenya in the past decade – William Ruto (2022-present) and Uhuru Kenyatta (2013-2022) – have at different times accused the Judiciary, and some judges and judicial officers, of corruption. Kenyatta cited confidential reports of government agencies that questioned the moral probity of the judges<sup>13</sup> as the basis of his refusal to follow the law and appoint the judges whom the Judicial Service Commission had already interviewed, vetted and found suitable to arbitrate disputes in the Kenyan courts. Ruto too said judges had taken bribes during the Kenyatta administration, to the extent that the Executive "had a budget to bribe courts"<sup>14</sup>.

#### Screenshot 1 | Ruto said in January 2024, in a statement amplified by his official spokesperson Hussein Mohammed.



Similarly, in responding to Ruto's allegation, Ms. Faith Odhiambo, the President of the Law Society of Kenya (LSK) asked Ruto to present evidence and take legal action against the corrupt judges, instead of politically smearing the courts, with the hope of intimidating the Judiciary to rule in his favour. "... the sustained campaign to undermine the judiciary," the LSK President said "and use the pressure to bulldoze the judges to make decisions in one way or another will be robustly resisted"<sup>15</sup>.

<sup>12</sup> Lindiker, K. (2016). Kenya has become a "bandit economy", says Chief Justice Willy Mutunga. *African Arguments*. 11.01.16.

Available from <https://africanarguments.org/2016/01/kenya-has-become-a-bandit-economy-says-chief-justice-willy-mutunga/>

<sup>13</sup> Gachuri, F. (2021) President Uhuru Kenyatta defends his decision to reject 6 judges. *Citizen Digital*.

Available at <https://www.citizen.digital/news/president-uhuru-kenyatta-defends-his-decision-to-reject-6-judges-11783123>

<sup>14</sup> Available at <https://x.com/husseinmohamedg/status/1744715260836085887?s=46&t=C5oO7-kguEu307vNCcVMmw> accessed on 4 July 2024.

<sup>15</sup> Available at <https://x.com/faihodhiambo8/status/1744725974003192258?s=46&t=C5oO7-kguEu307vNCcVMmw>, accessed on 4 July 2024.

However, even as she condemned Ruto and defended the Judiciary, the LSK President admitted that corruption was rife in the Judiciary.

*“We still have irresponsible and corrupt judges. That war on corruption is coming. They should not think that we are not coming for them. Let’s first deal with issues that we are having right now. CJ Martha Koome should either shape up or ship out because if people lose trust in the Judiciary, they will go back to the streets.”<sup>16</sup>*

The Supreme Court also indefinitely banned Senior Counsel Ahmednasir Abdullahi from appearing before its judges because of his repeated claims that unnamed judges took bribes to defeat justice. Ahmednasir, a former president of the Law Society of Kenya, and former member of the Judicial Service Commission, hasn’t provided evidence to back his claims – yet.

Even though the allegations of corruption against judicial officers are widespread, they often remain unproven due to several factors. Evidence is hard to obtain since corrupt activities are well-hidden. Whistleblowers fear retaliation, discouraging them from coming forward. Additionally, the judiciary’s own investigative bodies can be compromised, hindering impartial investigations. Political interference further complicates matters, protecting influential figures involved in corruption.

In many regions, the legal framework to address judicial corruption is inadequate, with laws either lacking necessary provisions or containing loopholes. Slow judicial processes also impede timely action. Public trust in the judiciary suffers as a result, with inaction on corruption allegations perpetuating a culture of impunity. Addressing this issue requires stronger investigative and legal mechanisms, protection for whistleblowers, and a commitment to integrity within the judiciary.

It is challenging to fully understand corruption within the Judiciary from the JSC’s annual reports, which primarily focus on statistics rather than qualitative evaluation. For instance, in the financial year 2022/23, the JSC reported 118 petitions against judges, with only seven involving corruption allegations<sup>17</sup>. However, these low numbers do not necessarily indicate a corruption-free Judiciary. The difficulty in presenting convincing evidence, as noted by the Judges and Magistrates

Vetting Board<sup>18</sup>, could explain the low figures. Additionally, the elitist composition of the JSC, where judicial officers are the majority, might intimidate potential complainants<sup>19</sup>.

Corruption allegations typically surface in advanced stages of proceedings, as seen in the cases of judges Joseph Mutava<sup>20</sup> and Said Chitembwe. Initial complaints were withdrawn<sup>21</sup> in both instances. These cases underscore the deeper issues of corruption within the Judiciary, indicating that relying solely on public complaints is insufficient for ensuring judicial accountability. Corruption and the perception of its prevalence remain a persistent concern.

## 2.2 Political threats and attacks

The Kenyan Judiciary has had to contend with rising political attacks from politicians, both in government and in the opposition, whenever it makes decisions that these public figures consider unfavourable. The public finger-pointing against the Judiciary under the Constitution of Kenya (2010), first came in 2013, when then opposition leader Raila Odinga, aggrieved by the unanimous dismissal of his presidential petition, labelled the Supreme Court “*mahakama bandia*” Kiswahili for “fake court”<sup>22</sup>. His then running-mate, Kalonzo Musyoka, a former vice president, claimed the court had been bribed<sup>23</sup>. Both claims, made in public in a highly polarized context, coloured the public perception of the Judiciary as compromised.

In 2016, when the Judiciary ruled on the controversial electoral laws, then Leader of the Majority Party in the National Assembly, Aden Duale, accused Justice George Odunga of the High Court, of “tribal politics”<sup>24</sup>, essentially sowing the seed for the perception of tribal bias, with the claim that the judge, from the western part of the country, had decided in favour of Odinga, who also come from that part of the country. In Kenya, ethnic affiliation and tribalism are key tools of political mobilisation<sup>25</sup>. Then Chief Justice David Maraga and the Law Society of Kenya condemned the utterances<sup>26</sup> as an attack on the independence of the Judiciary.

In 2017, when the Supreme Court nullified the presidential election, then President, Uhuru Kenyatta and his deputy William Ruto – who had been declared winners in that election – attacked the Judiciary’s legitimacy for “overturning the will of the people”<sup>27</sup> with the label “*wakora*”, Kiswahili for crooks,

<sup>16</sup> Available at <https://x.com/lookuptv/status/1806647995514917311> accessed on 4 July 2024.

<sup>17</sup> Judicial Service Commission ‘Annual Report for the Financial Year 2022-2023’ 18 available at <https://www.jsc.go.ke/wp-content/uploads/2024/02/JSC-ANNUAL-REPORT-FY-2022-23.pdf> accessed on 14 June 2024.

<sup>18</sup> The Vetting of Judges and Magistrates Act, 2011, Section 18 (1) (b).

<sup>19</sup> Article 171 of the Constitution of Kenya 2010.

<sup>20</sup> Hon. Mr. Justice Joseph Mbalu Mutava v. The Tribunal appointed to investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya, SC Petition No. 15 “B” of 2016; [2019] 149-150 eKLR (Mutava Petition) 13.

<sup>21</sup> Hon. Justice Juma Said Chitembwe v. The Tribunal appointed to investigate the conduct of Hon.

Justice Juma Said Chitembwe, SC Petition No. E001 of 2023; [2023] 41 eKLR (Chitembwe Petition) 9-10.

<sup>22</sup> Mutunga, Willy (2017). Will the Kenyan elite ever grow up? *The Star* (Nairobi). 16-09-17. Available at: <https://justiceleaders.org/news/will-the-kenyan-elite-ever-grow-up/> [Republished]

<sup>23</sup> Meny, W. (2021). Willy Mutunga: How ruling against Raila Odinga almost cost me my family, friends. *Nation Africa*. 24.10.21.

Available from <https://nation.africa/kenya/news/willy-mutunga-how-ruling-against-raila-odinga-almost-cost-me-my-family-friends-3593668>

<sup>24</sup> *Nation Africa*. (2016). Duale accuses high court judge of playing tribal politics. 23.06.16. *Hiiraan Online*.

Available from [https://www.hiiraan.com/news/4/2016/Dec/139466/duale\\_accuses\\_high\\_court\\_judge\\_of\\_playing\\_tribal\\_politics.aspx](https://www.hiiraan.com/news/4/2016/Dec/139466/duale_accuses_high_court_judge_of_playing_tribal_politics.aspx)

<sup>25</sup> Kwatamba, S. W. (2008). Ethnicity and political pluralism in Kenya. *Journal of African elections*, 7(2), 77-112.

Available from <https://www.eisa.org/wp-content/uploads/2023/05/2008-journal-of-african-elections-v7n2-ethnicity-political-pluralism-kenya-eisa.pdf>

<sup>26</sup> Muinde, J. (2016). Maraga unleashes stinging attack on Duale. *Citizen Digital*. 23.12.16.

Available at <https://www.citizen.digital/news/maraga-unleashes-stinging-attack-on-duale-152780>

<sup>27</sup> *Ibid*

attached to the judges behind the majority decision. In his second term, Kenyatta promised to “deal with” the Judiciary and to “fix” it<sup>28</sup>, and come 2021, he declined to appoint duly nominated judges, kept on tarnishing their reputation with inuendo-filled claims about their integrity<sup>29</sup>.

When Ruto ascended to power in 2022, he appointed these judges to office<sup>30</sup>. However, the post-election political attacks on the Supreme Court continued, with the opposition accusing it of bias due to the choice of words used in its decision on the presidential petition<sup>31</sup>.

**Photo 1 | Opposition leader Raila Odinga and Governor James Orengo of Siaya County, a Senior Counsel and one of Odinga's lawyers in the 2022 presidential election, publicly criticised the Judiciary using words that painted the institution as biased, incompetent, and evil.**



Photo credits: Digital cards from Kenyans.co.ke

In 2024, President Ruto too, despite styling himself as a champion of rule of law, also turned around and attacked the Judiciary, when the courts rejected the housing levy and the government’s decision to send police officers to Haiti<sup>32</sup>. The opposition leader, too, painted a meeting between the President and the Chief Justice – two leaders of two arms of Government – as a threat to judicial independence<sup>33</sup>. Government-allied politicians also continued with attacks on the Judiciary in 2023 whenever it faulted the Ruto administration for illegalities and irregularities in implementing government projects<sup>34</sup>. Recently, the Judiciary has also been in the spotlight after it questioned why Parliament ignores public submissions.

## 2.3 Political interference and judicial manipulation

The Kenyan judiciary also suffers an erosion in its credibility due to inconsistent decisions that perpetuate impunity and violate the rights of litigants, thereby creating a credible perception of judicial manipulation or political interference in the criminal justice system<sup>35</sup>. Judges and magistrates are obligated to make their decisions in accordance with the law and the Constitution and in a manner consistent with precedents set in other jurisdictions on similar legal contests. Put another way, their decisions must be explainable, clear, and jurisprudentially sound.

<sup>28</sup> Aljazeera (2017). Kenyan judges criticise Kenyatta over ‘veiled threats’. *Aljazeera*. 03.09.21.

Available from <https://www.aljazeera.com/news/2017/9/3/kenyan-judges-criticise-kenyatta-over-veiled-threats>

<sup>29</sup> Gachuri, F. (2021) President Uhuru Kenyatta defends his decision to reject 6 judges. *Citizen Digital*.

Available from <https://www.citizen.digital/news/president-uhuru-kenyatta-defends-his-decision-to-reject-6-judges-11783123>

<sup>30</sup> Kiplagat, S. (2022). President William Ruto appoints six judges rejected by Uhuru Kenyatta. *Business Daily*. 13.09.22.

Available from <https://www.businessdailyafrica.com/bd/economy/president-ruto-appoints-six-judges-rejected-by-uhuru-kenyatta-3947510>

<sup>31</sup> Mito, W. (2022). Raila Attacks CJ Koome, Lenaola and Lists Next Course of Action. *Kenyans*.

Available from <https://www.kenyans.co.ke/news/79677-raila-singles-out-lenaola-list-3-next-courses-action>

<sup>32</sup> Rukanga, B. (2024). How Kenya’s judges stood up to President William Ruto. *BBC*. 27.01.24. Available from <https://www.bbc.com/news/world-africa-68108822>

<sup>33</sup> Chweya, D. (2021). Raila faults CJ Koome for meeting Ruto at State House. *Citizen Digital*. 22.01.24.

Available from <https://www.citizen.digital/news/raila-faults-cj-koome-for-meeting-ruto-at-state-house-n335255>

<sup>34</sup> Citizen Team (2023). Kenya Kwanza Gov’t officials attack Judiciary over Finance Act ruling. *Citizen Digital*. 01.07.23

<https://www.citizen.digital/news/kenya-kwanza-govt-officials-attack-judiciary-over-finance-act-ruling-n322758>

<sup>35</sup> Otieno, O. (2022). Score of prominent Kenyans being acquitted by courts growing. *The East African*. 24.12.22.

Available from <https://www.theeastafrican.co.ke/tea/news/east-africa/list-of-acquitted-prominent-kenyans-grows-4065514>



However, this is not always the case.

It is common in Kenya for powerful politicians and business-people to join politics and publicly associate with the ruling administration to avoid prosecution and conviction. Often, once they obtain political cover, it follows that their cases will inevitably be delayed or dropped due to insufficient evidence<sup>36</sup>. If the courts rule on these cases, then the connected respondents are often let off the hook or given light sentences not proportional to the crimes. Such decisions usually lead to credible speculation of a rigged criminal justice system. (Court cases dropped by DCI/DPP)

For instance, the extradition cases involving former Cabinet Minister Chris Okemo and his co-accused Samuel Gichuru, a former managing director of Kenya's State-owned power supplier, caused considerable embarrassment for Kenya. This was due to the country's failure to prosecute both suspects locally for alleged corruption and its inability to comply with the Island of Jersey's extradition request for them to face theft and money laundering charges.<sup>37</sup> After a roller-coaster of events leading to a decision by the Supreme Court of Kenya to the effect that the Director of Public Prosecutions (DPP) had the overall mandate on extradition, the matter suffered a natural death at the magistracy, whereupon request by the DPP, the magistrate's court let off the hook Mr. Gichuru on the grounds that he was 'old and of ill health'.<sup>38</sup> The court also said the case against Mr. Okemo had to fall because it was contingent to that of Mr. Gichuru, the prime suspect, and the DPP had not called the necessary witnesses to provide evidence.<sup>39</sup> The irony is that a Jersey-registered company, Windward Trading Limited, owned by Mr. Gichuru, was convicted in Jersey Islands for money laundering after pleading guilty.<sup>40</sup>

Extradition is the formal process by which one country requests the surrender of an individual from another country to face criminal charges or serve a sentence<sup>41</sup>. The principles governing extradition are shaped by international treaties, national laws, and established legal practices.<sup>42</sup>

Before extradition, countries have an obligation to prosecute their nationals who have committed a crime while guaranteeing fair trial, respect for human rights, avoiding double jeopardy and political persecution<sup>43</sup>. The question then arises: Which principles underpinned the decision in the Okemo/Gichuru case? It is unclear.

On the other hand, litigants whom the people in power view as troublesome also suffer from unexplainable decisions, delay-

ed adjudication, and the violation of their rights. For instance, Martha Karua, a prominent Kenyan politician and former Minister of Justice, challenged the handling of her election petition in the Kenyan courts<sup>44</sup> in the East African Court of Justice (EACJ). The court examined whether the handling of Karua's election petition by the Kenyan Judiciary met the standards of a fair trial and judicial independence as outlined in the East Africa Community (EAC) Treaty, and whether the delays in resolving Karua's petition constituted a denial of justice, ultimately finding that they did. The EACJ ruled that Karua's right to a fair trial had indeed been violated due to undue delays in the judicial process. The court underscored the importance of timely justice and the necessity of judicial independence in maintaining democratic principles.

The ruling set a significant precedent for addressing electoral justice issues at the regional level, highlighting the role of the EACJ in safeguarding democratic processes. It also emphasised the court's role in protecting human rights and ensuring member states adhere to their obligations under the EAC Treaty. Moreover, the decision underscored the need for judicial systems within the EAC region to operate independently and efficiently, free from undue influence and delays, thereby enhancing judicial accountability and the overall integrity of electoral justice.

## 2.4 Rampant disregard of court orders

The Executive has historically demonstrated a pattern of disregarding court orders, reflecting a problematic relationship with the judiciary. This persistent issue undermines the rule of law and the judiciary's authority, highlighting a significant challenge in the balance of power between the branches of government. If court judgments are ignored, it does not matter if the judiciary is independent. In this case it is not the word of the judge that counts, but the word of the politician. And because the very idea of rule of law is to limit the power of the politicians, the entire edifice of the rule of law collapses.

Politicians often struggle to accept that their powers must be exercised within legal boundaries. The court has a duty to intervene when legal norms protecting individual rights and social cohesion are violated. Instead, courts and individual judges are perceived as nuisances and stumbling blocks to government initiatives, whose salutary impact is assumed to be unquestionable and beyond scrutiny. Even the current President, William Ruto, is on record saying he would not respect court orders that "frustrate government projects".<sup>45</sup>

<sup>36</sup> Musau, D. (2023). DPP Haji defends high-profile case withdrawals, says allowed under the law. Citizen Digital. 22.05.23. Available from <https://www.citizen.digital/news/dpp-haji-defends-high-profile-case-withdrawals-says-allowed-under-the-law-n320147>

<sup>37</sup> <https://www.capitalfm.co.ke/news/2022/03/kenya-to-get-sh450mn-stolen-by-gichuru-and-okemo-who-stashed-it-in-jersey/> accessed on 1/7/2024 at 1410 hours

<sup>38</sup> <https://nation.africa/kenya/news/politics/okemo-gichuru-case-dpp-haji-under-scrutiny-3987174> accessed on 1/7/2024 at 1353 hours, quoting the Director of Public Prosecutions

<sup>39</sup> Ibid; See, Director of Public Prosecutions v Samuel Kimuchu Gichuru & Chrysantus Barnabas Okemo Miscellaneous Application No.9 of 2011

<sup>40</sup> <https://www.capitalfm.co.ke/news/2022/03/kenya-to-get-sh450mn-stolen-by-gichuru-and-okemo-who-stashed-it-in-jersey/> accessed on 1/7/2024 at 1410 hours

<sup>41</sup> Extradition Lawyers | Mutual Legal Assistance (MLA) | NGM Lawyers. <https://ngm.com.au/es/extradition-lawyers-sydney>

<sup>42</sup> See generally, Ananya Chakraborty, *Extradition Laws in the International and Indian Regime: Focusing on Global Terrorism* (Palgrave Macmillan 2019)

<sup>43</sup> M Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, Oxford University Press 2014) 63-178; See also, United Nations Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* [https://www.unodc.org/pdf/model\\_treaty\\_extradition\\_revised\\_manual.pdf](https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf) accessed 3 July 2024

<sup>44</sup> See, Martha Wangari Karua and Another v Attorney General of the Republic of Kenya (Reference No 56 of 2022, East African Court of Justice)

<sup>45</sup> Anthony Mwangi, 'Ruto: I'll disobey court orders on my key projects', People's Daily available at <https://www.pd.co.ke/news/ruto-ill-disobey-court-orders-on-my-key-projects-216004/> accessed on 24 April 2024.

In 2018, the Cabinet Secretary for Interior expressed his frustration about Kenyan courts using the following words:

*“There is a certain clique of judicial officers who have gotten into ,unholy relationship’ with a clique of opposition activists to derail the government. It is like there is a race on which judicial officer will injunct the government, and the higher the officer may be the better. One civil society member gets 30 ex parte orders in a month. Even if he goes to Court asking for all CSs to commit suicide, the orders will be granted. It is the case of collusion between activist lawyers, judicial officers and elements in civil society to drag us.”<sup>46</sup>*

President Ruto’s predecessor, Uhuru Kenyatta, also ignored multiple court orders to appoint – as judges – individuals who had already been vetted and approved by the Judicial Service Commission<sup>47</sup>. Kenyatta cited confidential reports adversely mentioning the said judges. However, the Kenyan courts conclusively said the president is constitutionally required to act on the recommendations of the Judicial Service Commission under Article 166(1) and Article 172(1)(a) of the Constitution. Furthermore, the courts also declared that the president’s failure to appoint the recommended individuals violates the Constitution and the Judicial Service Act. These judges were only appointed after Kenyatta left office.

In 2024, the Kenyan High Court issued orders stopping the deployment of Kenyan police officers to any part of the world until the terms stipulated in the orders were fulfilled, namely; the lack of reciprocal provisions in Kenyan and Haitian laws, the absence of a bilateral treaty and the failure to observe the requirements of the National Police Service Act<sup>48</sup>. The Executive disregarded these orders with utter contempt and proceeded to deploy police officers to Haiti without fulfilling the terms of the order.

The most shocking example in the recent history of Kenya for ignoring court order is, however, the long saga of Kenyan lawyer Miguna Miguna, a former top adviser to Kenyan prime minister Raila Odinga (2008-2013). After the 2017 election in which Dr. Miguna swore Mr. Odinga in as ‘the people’s president’ he was arrested and swiftly deported to Canada in February 2018. The State claimed the actions were justified because Dr. Miguna had lost his Kenyan citizenship when he applied for Canadian citizenship during his exile at a time when Kenyan laws did not allow for dual citizenship. Under the old citizenship laws, acquiring of another State’s citizenship resulted in the loss of Kenyan citizenship. This changed with the entry into force of the 2010 Constitution,

but Dr. Miguna – according to the position held by the Government of Kenya – did not benefit from this change, as he allegedly failed to complete some formalities. Dr. Miguna tried to return to Kenya and even managed to disembark from the Nairobi-bound aircraft at the Jomo Kenyatta International Airport in March 2018. However, after being physically abused by security officers, he was blocked from leaving the airport terminal and ultimately forcefully taken to an aircraft which left the country.

Up to this point the events have been documented by the Kenya National Commission on Human Rights (KNCHR) which a statutory body mandated with promotion and protection of Human Rights by virtue of Article 59 of the Constitution. The KNCHR report documents a number of court orders related to Dr. Miguna’s citizenship,<sup>49</sup> removal from the country in February. Suspending the declaration regarding the loss of citizenship, ordering that the relevant authorities reinstate Dr. Miguna’s passport and facilitate his entry into Kenya. After his return, the Cabinet Secretary of Interior, the Director of Immigration and Inspector General of Police were ordered “not to remove Miguna from the jurisdiction of the court and release him unconditionally forthwith to appear in court”.<sup>50</sup> In vain.

Summarizing the saga, the KNCHR report comes to a damning conclusion:

*“Since the initial arrest of Miguna Miguna on 2nd February 2018, the courts have issued at least ten (10) court orders requiring Miguna to be produced in court to be dealt with in accordance with the law. All the orders were flagrantly disregarded and disobeyed by the respondents who ironically are senior state officers in charge of enforcement and maintenance of law and order in the country.”<sup>51</sup>*

Quite notably, the court fined the senior officers concerned KSh200,000 each for “failing to adhere to the rule of law by brazenly disobeying orders of the Court”.<sup>52</sup>

The story did not end there. Two further court orders were issued: one declaring Dr. Miguna’s deportation to Canada illegal and a gross violation of his rights, and another banning state agencies from interfering with his return. Despite these rulings, Dr. Miguna’s subsequent two attempts to return to Kenya (early 2020) were thwarted. In both cases, he was even refused boarding on Nairobi-bound flights, allegedly due to ‘red alerts’ issued by the Kenyan government. These alerts effectively made it legally impossible for airlines to bring Dr. Miguna into Kenya.

<sup>46</sup> Martin Siele, ‘CJ David Maraga Dismisses CS Fred Matiangi’s Allegations of Captured Judiciary’ available at <https://www.kenyans.co.ke/news/28396-cj-david-maraga-dismisses-cs-fred-matiangis-allegations-captured-judiciary?page=119> accessed on 4 July 2024.

<sup>47</sup> Njenga v Attorney General [2020] KEHC 9228 (KLR) (Constitutional and Human Rights) Petition 369 of 2019 (Judgment of 6 February 2020).

<sup>48</sup> Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR) (Constitutional and Human Rights) (26 January 2024) (Judgment). Available from <https://kenyalaw.org/caselaw/cases/view/278777/>

<sup>49</sup> KNCHR, ‘Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna’, April 2018, available at [https://www.knchr.org/Portals/0/CivilAndPoliticalReports/KNCHR%20Report%20on%20Miguna%20Miguna%20Final\\_2.pdf](https://www.knchr.org/Portals/0/CivilAndPoliticalReports/KNCHR%20Report%20on%20Miguna%20Miguna%20Final_2.pdf) accessed on 3 July 2024.

<sup>50</sup> *Ibid*

<sup>51</sup> *Ibid*

<sup>52</sup> *Ibid*

By issuing the red alerts the Government managed not only to ignore the previous court orders but also to outmanoeuvre the courts which declined the application to lift the red alerts citing lack of evidence that such alerts even existed.<sup>53</sup> It is very unfortunate that the lack of transparency in issuing the red alerts was used to deny remedies for an individual who was negatively affected by that very same lack of transparency, especially given that transparency is a national value in accordance with Article 10 (2) (c) of the Constitution. Dr. Miguna returned to Kenya following the change of government in 2022.

## 2.5 Underfunding, fiscal intimidation and budget cuts

Stripping the Judiciary of resources is another potent tool the Executive can use to penalize the Judiciary for making decisions it dislikes. Even though the national budget is passed by Parliament, the Executive has a *de facto* controlling power over budgetary allocations.

Kenyan chief justices have been complaining about the underfunding of the Judiciary<sup>54</sup> amid a rising workload. The budget cuts cripple the delivery of justice in the courts. In November 2019, Chief Justice David Maraga had to publicly complain that the Judiciary had had its entire recurrent and development votes slashed by half, to the extent that it did not even have money to pay for the Judiciary's Wi-Fi<sup>55</sup>.

*"The key message here to Kenyans is that the strangling of the Judiciary results in a failure to deliver services expeditiously. Budget cuts have been a consistent phenomenon and not an accident or isolated incident. Some of the incidents that we encounter are deliberate attempts to undermine the Judiciary. ...nobody is doing me a favour; the Judiciary should not be given its budget on the basis of how well the CJ speaks to those who control public funds. The Budget is from public funds for service delivery to the public."<sup>56</sup>*

In March 2022, Chief Justice Martha Koome continued to call for adequate funding and the fight against fiscal intimidation through budget cuts.

In 2022/23, for example, the Judiciary needed KSh43.2 billion but only received 21.1 billion, or 51% of the funding requirement.<sup>57</sup> The underfunding hindered the hiring of new judges and staff, left some judges without necessary equipment and vehicles, and compromised staff welfare, including mortgage, medical, and insurance benefits. It also stalled plans for jurisprudence development, expanding the Alternative Dispute Resolution System, and other interventions for quick service delivery.

**Figure 1 | The Judiciary has perennially received less than or just about half of its annual budget requirements. This underfunding affects service delivery.**

| Financial Year     | 2020/21      |              |             | 2021/22      |              |             | 2022/23      |              |             |
|--------------------|--------------|--------------|-------------|--------------|--------------|-------------|--------------|--------------|-------------|
|                    | Requirements | Allocation   | Funding Gap | Requirements | Allocation   | Funding Gap | Requirements | Allocation   | Funding Gap |
| <b>Recurrent</b>   | 30.68        | 14.58        | 16.11       | 28.29        | 15.97        | 12.33       | 35.81        | 19.23        | 16.58       |
| <b>Development</b> | 6.73         | 2.56         | 4.17        | 7.09         | 2.15         | 4.93        | 7.36         | 1.90         | 5.46        |
| <b>Overall</b>     | <b>37.42</b> | <b>17.13</b> | 20.28       | <b>35.38</b> | <b>18.12</b> | 17.26       | <b>43.17</b> | <b>21.13</b> | 22.04       |

<sup>53</sup> For an overview see Joseph Wangui, 'Miguna return: Court says there is no proof red alerts exist' Daily Nation, available at <https://nation.africa/kenya/news/miguna-return-court-says-there-is-no-proof-red-alerts-exist-3616830> accessed on 3 July 2024.

<sup>54</sup> Kembol, L.K. (2020). Judiciary funding problems correlate with its efficiency questions. The Institute of Economic Affairs -Kenya. 23.01.20. Available from <https://ieakenya.or.ke/blog/judiciary-funding-problems-correlate-with-its-efficiency-questions/>

<sup>55</sup> Maraga, D. (2019). Statement by Chief Justice David Maraga on Judiciary Budget Cuts. The Judiciary. Available from <https://judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/>

<sup>56</sup> Maraga, D. (2019). Statement by Chief Justice David Maraga on Judiciary Budget Cuts. The Judiciary. Available from <https://judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/>

<sup>57</sup> The Judiciary. (2023). The State of the Judiciary and Administration of Justice. Annual Report 2022/23, p299. Available from <https://judiciary.go.ke/wp-content/uploads/2023/11/SOJAR-2022-2023-1.pdf>

According to the Report of the Task Force on Judicial Reforms, the Kenyan Judiciary needs a minimum of 2.5% to boost its operational independence. The Executive and Parliament are yet to implement these provisions<sup>58</sup>.

*“To enhance the independence, operational autonomy, efficiency and effectiveness in the governance and management of the Judiciary, it is recommended the annual budgetary allocation to the Judiciary be augmented to a minimum of 2.5% of the national budget, provided that this percentage may be increased in future to cater for the Judiciary’s needs.”*

Analysing the dynamics of the decision-making process on budgetary allocation, the Institute of Economic Affairs -Kenya, a policy think tank, said the National Treasury “has an advantage over other institutions when it comes to creating budgets.”<sup>59</sup> The Executive actually used this power to penalize the Judiciary. This happened following the Supreme Court’s decision that nullified President Kenyatta’s electoral win in 2017. In more technical terms, the IEA-Kenya researchers said, the National Treasury set spending priorities to the detriment of the judiciary using its powerful position in policy.<sup>60</sup>

While there is no hard evidence of a causal link between the nullification of the election results and the subsequent underfunding of the Judiciary. But the facts do point in this direction. A day after the Supreme Court judgment, President Kenyatta made following remarks:

*“I have always said, we have a problem with our judiciary. Irregardless (sic) we respect, but we shall revisit. We shall respect but we shall revisit this agenda... Maraga thinks he can overturn the will of the people, we shall show you in 60 days that the will of the people cannot be overturned by one or two individuals... Tutarudi, natukishamaliza we tutarevisit hii mambo yenu...”<sup>61</sup>  
(We will go to the elections, but when we are done, we will come back to this. We will revisit this)*

Two years later, Chief Justice Maraga recalled that the communication with the President had been cordial before the Supreme Court judgment and broke down completely after that. According to the Chief Justice, the budget was deliberately slashed to the extent of “almost grounding court operations.”<sup>62</sup>

In August 2018, the Kenya Branch of the International Commission of Jurists (ICJ) issued a press statement against “denying the Judiciary financial stability”, warning that such actions “will lead to an increase of graft in the Judiciary, erosion of transparency and accountability, disrespect and non-adherence to the Rule of Law and ultimately the violation of human rights and democracy.”<sup>63</sup> The ICJ noted that threats to defund the Judiciary had already been made on another occasion. This was the case in 2015, following the ruling that the Constituency Development Fund was unconstitutional. Another petty move flagged by the ICJ was a suspension of the medical insurance cover for all judges and its employees in June 2018.

## 2.6 Violence against judicial officers

The June 2024 unprecedented shooting of a magistrate inside a courtroom for what a disgruntled police officer saw as an unfair decision against his loved one exposed the vulnerability of the judicial officers who have to depend on other arms of the government to guarantee their security<sup>64</sup>. The magistrate Monica Kivuti died in hospital from gunshot wounds, forcing the Judiciary and the National Police Service to step up the security of courtroom premises<sup>65</sup>. That an armed police officer pulled the trigger on a judicial officer doing his duty sent a chilling message across the country about their safety, its limits and associated risks.

However, even with police protection, violence against judges continues unabated. In October 2017, the official car of the Deputy Chief Justice Philomena Mwilu was shot at, and the assigned police driver injured, just days before the delivery of a crucial decision that could have affected the fresh presidential election<sup>66</sup>. As a result, Justice Mwilu did not show up to court, fearing for her life. Only two judges showed up; thus, the Supreme Court did not sit to adjudicate an appeal about the rules of the fresh election, which was scheduled within two days. The shooting of the Deputy Chief Justice’s aide intensified existing tensions in the country and was aimed to intimidate judicial officers.

<sup>58</sup> Government of Kenya (2010). Final report of the taskforce on judicial reforms.

Available from [https://kenyalaw.org/ki/fileadmin/pdfdownloads/Final\\_Report\\_of\\_the\\_Task\\_Force\\_on\\_Judicial\\_Reforms.pdf](https://kenyalaw.org/ki/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf)

<sup>59</sup> Jackline Kagume & Leo Kipkogei Kemboi, ‘Problem-Driven Political Economy Analysis of Judiciary’s Resource Allocations’ 2023 Institute of Economic Affairs Working Paper, 24 available at <https://ieakenya.or.ke/download/problem-driven-political-economy-analysis-of-judiciarys-resource-allocations/> accessed on 4 July 2024.

<sup>60</sup> *Ibid.*

<sup>61</sup> Benjamin Muriuki, ‘Former CJ Maraga Recounts How Uhuru’s ‘We Shall Revisit’ Statement Was Effected’, available at <https://www.citizen.digital/news/former-cj-maraga-recounts-how-uhurus-we-shall-revisit-statement-was-effected-4371460> accessed on 4 July 2024.

<sup>62</sup> *Ibid.*

<sup>63</sup> ICJ Kenya, ‘Statement on the state of the judiciary in light of drastic cuts in budgetary allocations’ August 2, 2018, available at <https://ieakenya.or.ke/download/problem-driven-political-economy-analysis-of-judiciarys-resource-allocations/> accessed on 4 July 2024.

<sup>64</sup> Citizen Digital, ‘Makadara Magistrate Monica Kivuti Dies After Shooting by Senior Police Officer in Court’ (12 June 2024)

available at <https://www.citizen.digital/news/makadara-magistrate-monica-kivuti-dies-after-shooting-by-senior-police-officer-in-court-n344036> accessed 1 July 2024.

<sup>65</sup> *Ibid.*

## 2.7 Arbitrary transfer of judges

The need for formal regulations governing transfer of judicial officers is essential to maintain the integrity and independence of the judiciary. Without clear guidelines, the transfer process can become arbitrary and susceptible to manipulation, undermining the judicial officers' impartiality and independence. Formal regulations ensure that transfers are based on objective criteria, such as performance, expertise, and judicial needs, rather than on external pressures or political influences. This transparency and fairness help in preserving public confidence in the judicial system, ensuring that justice is administered without bias or undue interference. Additionally, well-defined transfer protocols protect the rights and career progression of judicial officers, fostering a professional and motivated judiciary committed to upholding the rule of law.<sup>67</sup>

The transfer of Justice Mugure Thande from the Constitutional and Human Rights Division to the High Court at Malindi raised concerns, particularly as it followed her ruling that temporarily halted the collection of certain taxes under the Finance Act 2023.<sup>68</sup> These concerns expose an underbelly. Kenya lacks a formal policy document governing the transfer of judicial officers, which poses a significant threat to judicial independence. Without clear guidelines and transparency in the transfer process, the judiciary is vulnerable to external influences and arbitrary decisions. This absence of regulation undermines the stability and impartiality of the judiciary, eroding public confidence in the judicial system's ability to function independently and fairly.

# 3. The Kenyan Judiciary holding power to account

Even with the systemic, political, and financial shackles that threaten its independence, the Kenyan Judiciary has delivered robust decisions to defend the country's Constitution from the excesses of Parliament, the Executive, and the people in power. Some of these decisions riled the other State organs to the extent that they publicly threatened the courts.

*"National Security Council has no constitutional or legal mandate to deploy National Police Service outside Kenya under article 240(8) or any other law... In that regard, any purported decision by National Security Council to deploy police officers outside Kenya and any other action taken by any other state organ or state officer in furtherance of that decision, is invalid null and void."*

## 3.1 Protecting Kenya's laws and interests when implementing international agreements

In July 2023, Kenya offered to lead a multinational police force to stabilise Haiti, a decision approved by the United Nations Security Council in October 2023. The controversial decision saw the government earmark 1,000 police officers for the deployment.

However, even with that decisive judgement, the government ignored the court decision<sup>70</sup> and went ahead with the deployment<sup>71</sup>.

However, a constitutional challenge was filed against the deployment, citing the lack of a legal basis for deploying police officers outside the country and the lack of public participation before the promise to send the police officers outside the country. The court ruled that because Kenya and Haiti did not have reciprocal arrangements for the deployment of police officers, it was "unconstitutional, illegal and invalid" to send the police officers to Haiti.<sup>69</sup>

## 3.2 Defending the Constitution from political manipulation

The Kenyan Judiciary, from the High Court through the Court of Appeal to the Supreme Court, all dismissed a government-led attempt to amend the Constitution to entrench a political deal that then President Uhuru Kenyatta had struck with his opposition rival Raila Odinga in 2018 to secure their respective political futures<sup>72</sup>. Popularly known as the Building Bridges Initiative (BBI), the duo had wanted to amend the Constitution, but the courts ruled that the president was

<sup>66</sup> VOA News, 'Kenyan Deputy Chief Justice's Driver Shot Ahead of Election Rerun' (27 October 2017) available at <https://www.voanews.com/a/kenya-election-violence/4084386.html> accessed 1 July 2024.

<sup>67</sup> See, Rule 2.19 of the Mt. Scopus International Standards of Judicial Independence which states that 'the power to transfer a judge from one court to another shall be vested in a judicial authority according to grounds provided by law and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld'

<sup>68</sup> Business Daily, 'Transfer of Mugure Thande, Who Suspended Ruto Taxes' (Business Daily, 2 July 2023) <https://www.businessdailyafrica.com/bd/lifestyle/profiles/transfer-of-mugure-thande-who-suspended-ruto-taxes--4335030> accessed 2 July 2024.

<sup>69</sup> Aukot & 2 others v National Security Council & 5 others; Law Society of Kenya (Interested Party) (Petition E389 of 2023) [2024] KEHC 336 (KLR) (Constitutional and Human Rights) (26 January 2024) (Judgment). Available from <https://kenyalaw.org/caselaw/cases/view/278777/>

<sup>70</sup> Dahir, AL. (2024) Kenya Plans to Bypass Court Order in Haiti Deployment. *The New York Times*. 24.02.24. Available from <https://www.nytimes.com/2024/02/04/world/africa/kenya-deployment-haiti.html>

<sup>71</sup> Daras, M. Aradi, G., & Fletcher, P. (2024). Haiti vows to restore order with Kenya-led force's help. *The BBC*. 26.06.24. Available from <https://www.bbc.com/news/articles/cy772v3j89o>

<sup>72</sup> Gathara, P. (2019). Kenya's BBI is the political elite's attempt to rewrite history. *Al Jazeera*. 30.11.2019. Available from <https://www.aljazeera.com/opinions/2019/11/30/kenyas-bbi-is-the-political-elites-attempt-to-rewrite-history>

“is ineligible to directly or indirectly initiate a constitutional amendment”.<sup>73</sup>

The courts said the BBI process did not adhere to a number of constitutional requirements and violated the basic structure doctrine. Despite concerted political pressure and intimidation, the High Court, Court of Appeal and the Supreme Court maintained that the proposed constitutional amendments shepherded by the Executive under the auspices of the so-called Building Bridges Initiative (BBI) fell short of the requirements of the Constitution.<sup>74</sup>

### 3.3 Entrenching Electoral Justice

After the August 2017 general elections, one presidential candidate Raila Odinga contested the declaration of then-incumbent president Uhuru Kenyatta as the winner of the elections. Odinga filed his case in the Supreme Court. Until then, there had been no case, in Africa where the incumbent's election had been overturned<sup>75</sup>.

However, then Chief Justice David Maraga, having looked at the evidence and the constitutional threshold of verifiable election results, led a majority of judges in annulling the presidential election results, citing widespread irregularities and illegalities that compromised the integrity of the elections<sup>76</sup>.

The decision was not well received by some politicians, leading to threats and intimidation.<sup>77</sup>

### 3.4 Preserving order in the public service

The Kenyan Judiciary rejected the President's attempt to use the Public Service Commission to create the office of Chief Administrative Secretary as a backdoor attempt to reintroduce the office of assistant minister, which was abolished when the Constitution of Kenya (2010) was promulgated. A three-judge bench of the High Court said the President had acted unconstitutionally in establishing the offices and nominating individuals to the office.<sup>78</sup>

### 3.5 Protecting the public from arbitrary and discriminatory taxation

Under pressure to fulfil election promises on affordable housing, the government introduced the affordable housing levy as a form of tax, imposing a tax on income payable by both the employer and the employee. However, this was challenged and the High Court found that imposing the housing levy only on people with formal jobs, while excluding those with informal incomes, was unjustified, unfair, discriminatory, and unreasonable, and therefore in violation of the Constitution<sup>79</sup>.

<sup>73</sup> Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent). Available from <https://kenyalaw.org/caselaw/cases/view/231325/>

<sup>74</sup> Joseph Wangui & Richard Munguti, 'Magistrates, judges condemn attacks on colleagues over BBI Bill judgment' *Daily Nation* Available at: <https://nation.africa/kenya/news/magistrates-judges-condemn-attacks-on-colleagues-over-bbi-bill-judgment-3406024> accessed on 30 May 2024.

<sup>75</sup> Mwititi, L. (2017). Is Kenya the first African country to overturn a presidential election? *Africa Check*. 04.09.17 Available from <https://africacheck.org/fact-checks/spotchecks/kenya-first-african-country-overturn-presidential-election>

<sup>76</sup> Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ). Available from <https://kenyalaw.org/caselaw/cases/view/140716/>

<sup>77</sup> 'David Maraga hits back at 'threats' over Kenya election re-run' *BBC News*. Available at <https://www.bbc.com/news/world-africa-41322927> accessed on 30 May 2024.

<sup>78</sup> Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties) (Petition E080, E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment) (with dissent - HI Ong'udi, J) Available from <https://kenyalaw.org/caselaw/cases/view/262389/>

<sup>79</sup> Okoiti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties) (Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated)) [2023] KEHC 25872 (KLR) (Constitutional and Human Rights) (28 November 2023) (Judgment). Available from <http://kenyalaw.org/caselaw/cases/view/274862/>

## 4. Socio-economic threats from a subservient and captured Judiciary

A judiciary subdued by either the political elite in power or subservient to the „highest bidder“ is not just an individual problem for an individual who loses a case in court. It is a concern for the entire society, as everyone ultimately pays the price for a compromised judicial system.

**Subdued judiciary means manipulated elections.** If it were not for CJ Maraga’s Supreme Court bench, the electoral machinations would not be sanctioned, and the people would be deprived of their right to elect their representatives. Failure to sanction the shortcomings of the electoral process would have very likely emboldened and encouraged such practices.

**Subdued judiciary means loss of health and environment.** In 2020, the Centre for Justice Governance and Environmental Action, established by environmental activist Phyllis Omido, won compensation for the inhabitants of the low-income, densely populated Uhuru Owino slums in Mombasa. The people were suffering from lead pollution from a battery recycling factory in the area. Ms. Omido realised the extent of the disaster after her son sustained lead poisoning ingested from breastmilk. After being ignored by the factory operators and state agencies and brutalized by the police, it was the court that awarded KSh1.3 billion to the pollution victims to be paid by the factory owners and the state authorities that approved the establishment of the factory.<sup>80</sup> Of course, no amount of money can restore the health devastated among the Uhuru Owino people by greedy investors and the state officers colluding with them. However, the award may mitigate the harm and help prevent similar practices from occurring in the future.

**Subdued judiciary means violence.** This is something the LSK President warned against by saying that people may come back to the streets. A partisan, corrupt, and captured judiciary has its share of responsibility for the most tragic experience in the recent history of Kenya, the post-election violence of 2007/08. The violence was also the main trigger for the radical reform of the judiciary. The first strategic blueprint for Kenya’s Judiciary after the adoption of 2010 Constitution – the Judiciary Transformation Framework (JTF) 2012-2016 – makes the following observation:

*“Ultimately, the Kenyan public lost confidence in the Judiciary. So much so that in the aftermath of the disputed presidential elections in 2007, which resulted in violence leading to the loss of many lives, destruction of property and displacement*

*of people, those who felt aggrieved by the poll results were adamant that they would not take the matter to court as they did not trust the Judiciary to dispense justice impartially.”<sup>81</sup>*

**Subdued judiciary means mismanagement of public resources and consequently poor services for the people.**

Here we pick the example from South Africa. In 2014, the Public Protector, an office provided for in the constitution of South Africa to protect and promote the interest of the public, suggested in her report a “remedial action” with regard to the public funds spent on the renovation of President’s Jacob Zuma private residence in Nkandla. The cost for the taxpayer amounted to 249 million Rand (at that time a sum equivalent to some 22 million USD). The Public Protector recommended that the President should pay from his private funds “a reasonable percentage of the costs” to be determined in cooperation with the Treasury. However, the recommendation was not adopted by the National Assembly. With the ruling party holding the overwhelming majority, the National Assembly exonerated the President from any wrongdoing. It was the Constitutional Court of South Africa that set aside this resolution clarifying that the remedial actions recommended by the office of the Public Protector are binding.<sup>82</sup>

**Subdued judiciary means thriving corruption and economic decline.** One of the judges declared by the Vetting Board unsuitable for the office in 2012 – Mr. Joseph Nyamu – failed the test of fairness, of impartiality, by frustrating investigations in two biggest corruption scandals that occurred in Kenya around the turn of the century: the Goldenberg scandal under President’s Moi administration and the Anglo-Leasing scandal under the administration of President Kibaki. As already mentioned, the judge ordered a permanent stay of prosecution with regard to the main suspects of the Goldenberg scandal, which included a former Vice-President (Prof. George Saitoti) and the Governor of the Central Bank of Kenya (Mr. Eric Kotut). Justice Nyamu also ordered the release of passports to some other suspects, making it possible for them to leave Kenya. By making those rulings, the judge relied on “strange and tortuous reading of the law” and “use of relentless repetition rather than calmly-stated logic”.<sup>83</sup> As noted by the Vetting Board, the judge caused enormous damage to the public by closing any avenue of accountability for corruption. With the verdicts of Justice Nyamu and the ruling of Justice Mutava discussed above – both removed from office –, the major suspects of the Goldenberg scandal managed to escape justice. Yet, the damage

<sup>80</sup> Kelvin Musyoka & Others v. The Honorable Attorney General & Others [2020] eKLR.

<sup>81</sup> ‘Judiciary Transformation Framework 2012-2016. Laying the foundations for the transformation of the Kenyan Judiciary’ (2012) 9. Available at [https://judiciary.go.ke/judiciary-transformation-frameworkjtf-2012-2016/#:~:text=The%20Judiciary%20Transformation%20Framework%20\(JTF,operating%20on%20world%20class%20standards](https://judiciary.go.ke/judiciary-transformation-frameworkjtf-2012-2016/#:~:text=The%20Judiciary%20Transformation%20Framework%20(JTF,operating%20on%20world%20class%20standards) accessed on 13 June 2024.

<sup>82</sup> Michael Fagbadeo & Nirmala Dorasamy, ‘Judicial Review as an Accountability Mechanism in South Africa: A Discourse on the Nkandla Case’ (2022), 4 *African Journal of Inter/Multidisciplinary Studies* 135-136.

<sup>83</sup> Judges & Magistrates Vetting Board (n. 24) 61.

caused by the scandal was immense. It is estimated that the scandal amounted to 10% of Kenya's GDP,<sup>84</sup> while 7% of the money in circulation in the Kenyan economy at that time was transferred to the accounts of fraudulent companies.<sup>85</sup> As a consequence of the corrupt dealings, Kenyan currency lost half of its value, while inflation shot up to over 40%.<sup>86</sup> If the perpetrators of a scandal of this magnitude are allowed to go scot-free, what stops others from engaging in corruption and plunder of public resources?

**Subdued judiciary means destruction of prospects for an economic development that works for all.** The positive correlation between judicial independence and economic growth is a quite common theoretical assumption. The conventional wisdom holds that independent courts are crucial for protecting property and enforcing contracts, making investment more predictable and thus attractive. Empirical studies confirm such correlation.<sup>87</sup> Interestingly, even authoritarian regimes seem to recognize it. According to the study by Mark Fathi Massoud focusing on Sudan under the rule of Omar al-Bashir, a dictator wanted by the International Criminal Court for crimes against humanity, authoritarian regimes are keen to attract foreign investors, particularly in the extractive sector, for example by entering with them into agreements to construct, manage, and maintain oil pipelines. But rather than empowering domestic court which could weaken their grip on power, authoritarian regimes outsource protection of investors to international arbitration.<sup>88</sup> Such arbitration works, however, only for investments in large scale natural resource projects which usually have little links with domestic economy, fail to create jobs and consequently benefit only a tiny elite.<sup>89</sup> Smaller and domestic businesses are left with dysfunctional and compromised judiciaries with hardly any protection by the rule of law.

**Subdued Judiciary means a collapse the rule of law.** Put simply, the concept of the rule of law presupposed that in a society that strives for justice and equality, laws must govern rather than the whims of powerful individuals and cartels. To achieve this, institutions must be in place to ensure the primacy and enforcement of the law. Through such institutions, even the weakest individuals can uphold their claims against the wealthy and powerful, provided those claims are supported by the law.<sup>90</sup> It is also from such institutions, that protection against abuse of power through unlawful acts by the government can be sought. If the judiciary is not impartial, or its impartiality is not secured by adequate independence guarantees, there will be no place to seek protection by the law. According to the Advisory Panel of Eminent Commonwealth Judicial Experts (APECJE) set up by the Cons-

titution of Kenya Review Commission observed in its 2002 report that corruption in the Kenyan judiciary and distrust towards Judiciary undermined

*"[...] the principle of the Rule of Law, the very foundation of all modern democracies. The Judiciary must be the one bastion where the citizen may go to challenge the arbitrary or oppressive actions of the state. It must be the safe haven where the most impoverished or abused citizen may find support for his or her legal rights when they conflict with those of the rich and powerful in society. A court of law is the forum where corrupt police officers and government officials may be brought in order to condemn their misconduct and impose punishment for their abuse of public trust. Where justice is not dispensed with impartiality, there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions."<sup>91</sup>*

**Subdued judiciary means reign of cartels, barons and recycled politicians.** According to John Hart Ely, the judge's role is to intervene, when powerless minorities are singled out for victimization,<sup>92</sup> where channels of political change are clogged, and those in power are keen to ensure that they stay in and others stay out, or "when an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying the minority the protection afforded other groups by a representative system".<sup>93</sup> And how can judiciary protect the marginalized against powerful majorities, the indigenous communities against powerful investors encroaching on their land and destroying their livelihoods, the dwellers of informal settlements against forceful evictions, against exclusion, prejudice and violence without being impartial and independent?

Giving voice to those marginalized by the system of political representation thus lies at the core of judicial impartiality and independence. This idea resonates well with the idea of transformative constitutionalism associated with post-apartheid South Africa, but adopted also in Kenya. As explained by Yash Pal Ghai, "transformative constitutionalism" stands for a set of idea about the government that takes positive actions, promotes equality seeks to transform the political and social institutions making them more democratic, participatory and egalitarian.<sup>94</sup> Transforming the Judiciary to transform the Kenyan society as whole – this has been the guiding thought of the post-2010 reforms.

<sup>84</sup> Franceschi (n. 51).

<sup>85</sup> Branch (n. 51), 219.

<sup>86</sup> Ibid. 220.

<sup>87</sup> Stefan Voigt, Jerg Gutmann & Lars P Feld, 'Economic Growth and Judicial Independence, a Dozen Years On: Cross-Country Evidence Using an Updated Set of Indicators' (2014) CESifo Working Paper No. 5010 17 Available at: [https://www.econstor.eu/bitstream/10419/103098/1/cesifo\\_wp5010.pdf](https://www.econstor.eu/bitstream/10419/103098/1/cesifo_wp5010.pdf) accessed on 5 June 2024.

<sup>88</sup> Mark Fathi Massoud, 'International Arbitration and Judicial Politics in Authoritarian States' (2014) 39 Law and Social Inquiry 2, 24-25

<sup>89</sup> Tomasz Milej, 'Reclaiming African Agency: The Right to Regulate, Investor-State Dispute Settlement, and the 'Africanisation' of International Investment Law' in Julian Scheu and others, *Investment Protection, Human Rights, and International Arbitration in Extraordinary Times* (Nomos, 2022) 364.

<sup>90</sup> Klaus Stern, *Staatsrecht der Bundesrepublik Deutschland. Band I* (C.H. Beck 1977) 661.

<sup>91</sup> APECJE Report 2002 (n. 31).

<sup>92</sup> John Hart Ely, *Democracy and Distrust: A theory of Judicial Review* (Harvard University Press 1980) 181.

<sup>93</sup> Ibid, 103.

<sup>94</sup> Yash Ghai, 'Constitutionalism: African Perspectives' in Patricia Kameri-Mbote and Collins Odote (eds),

*The Gallant Academic. Essays in Honour of HWO Okoth-Ogendo* (School of Law, University of Nairobi, 2017) 169.



# 5. Strategies to improve judicial independence

## 5.1 Strengthen the social ownership of the Judiciary

The sense of ownership, the idea that society owns the judiciary, is important for two reasons. First, it is a question of access to justice. Even if the objective obstacles to access to justice, like corruption or – quite importantly – high costs of the same, are removed, there is still one aspect that would remain unaddressed. It is the issue of public perception, or as the famous dictum of Lord Chief Justice Hewart goes that it is “(...) of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done”.<sup>95</sup> More recent case law, too, stresses the importance of public perceptions. The test of independence and impartiality can accordingly only be passed by a Judiciary which is also perceived as impartial and independent.<sup>96</sup>

However, there is more to the public perception than a broadly held conviction that justice is being delivered. It is about the extent to which the Judiciary provides an open and welcoming atmosphere to express oneself in a culturally and socially permissible way. In this context, Busingye Kabumba refers to the socio-cultural and psychological aspects of access to justice.<sup>97</sup> The 2003 Ringera Report speaks even of a “phobia” of courts among common people citing examples of members of the public being imprisoned for not bowing to the judges upon entering the courtroom.<sup>98</sup> In contrast, Kabumba gives the example of the South African Constitutional Court, in which not only the architecture of the Court’s premises but also the design and materials are meant to infuse the Court with an African feel. In other words, it is about a court that extends an embrace rather than demanding a bow, a court integrated within society rather than a foreign implant performing unfamiliar rituals.

As professional as it may be, alienated, aloof, and underused, the Judiciary will have a hard time defending its independence. Simply put, it will be on its own in its struggle.

The Judiciary Transformation Framework underscores the importance of Judiciary reform as a cornerstone for societal transformation per the 2010 Constitution, ensuring it ser-

ves everyone’s interests in the new democratic order.<sup>99</sup> At the same time, the Framework recognises that in the past, the Judiciary was “insular and remote both in its poise and processes, giving rise to grave misunderstandings of how it runs its affairs”.<sup>100</sup>

As a result, “public confidence in the justice system has been greatly undermined”.<sup>101</sup> Quite crucial is the realisation that “philosophical and cultural orientation of the Judiciary has reflected its founding history of dominance, power, prestige and remoteness, as opposed to service and equality”.<sup>102</sup> Consequently, the JTF postulated that the Judiciary must not only remain open and available to all who seek assistance,<sup>103</sup> but must also rebrand itself and engage with those it seeks to serve.<sup>104</sup> The subsequent strategic blueprints for the Judiciary focused on a “people-centred justice delivery”.<sup>105</sup> An important element is the creation of specialised courts for vulnerable groups, with the Sexual and Gender-Based Violence Courts as the most recent initiative.<sup>106</sup>

But is it only for the Judiciary to promote the people-centredness of justice delivery? In this context, the legal profession has a special role to play. This is why not only the Judiciary, but also lawyers in general should reflect on their “philosophical and cultural orientation”.

Is the legal profession looking to get close to ordinary person or celebrating its remoteness? The proliferation of public interest litigation and the number of lawyers actively engaged in civil society litigation, sometimes risking or even losing their lives for the cause of justice, like the late Willi Kimani, are certainly its great source of pride. Not to forget, are the lawyers who represented the protestors in the 2024 youth-led anti-tax protests who had to withstand beatings, arbitrary detention, and teargas as they defended their clients in police custody<sup>107</sup>.

Unfortunately, there have also been cases of lawyers making statements that alienate the legal profession – and, by extension, also the Judiciary – from society. This is a post of social media coming from a lawyer as it appeared originally:

<sup>95</sup> King’s Bench Division of the High Court, Lord Hewart C.J., *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256.

<sup>96</sup> See for example Ontario Supreme Court in *R v Valente* [1983] 2 CCC (3d) 417, 423; also Supreme Court of Canada, *Valente v R* (1985) 2 SCR 673 at 689.

<sup>97</sup> Busingye Kabumba, ‘Not Yet Uhuru. Legal Decolonisation and Access to Justice in the East African Community’ (2022)

*Keynote Address at the 2nd Annual East African Court of Justice Judicial Conference 8-9*

Available at <https://www.studocu.com/row/document/makerere-university/jurisprudence/1-kabumba-keynote-october-2022/45256699> accessed on 13 June 2024.

<sup>98</sup> Ringera Report (n. 29) 27-28.

<sup>99</sup> Judiciary Transformation Framework (n. 87) 10.

<sup>100</sup> *Ibid* 14.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid* 15.

<sup>103</sup> *Ibid* 13.

<sup>104</sup> *Ibid* 15.

<sup>105</sup> This is especially true for the current strategy ‘A Blueprint for Social Transformation through Access to Justice 2023-2033. A people-centred approach’

Available at <https://judiciary.go.ke/wp-content/uploads/2023/11/STAJ-Blueprint-1.pdf> accessed on 14 June 2024.

<sup>106</sup> SOJAR 2022/23 (n. 43) 107.

<sup>107</sup> Nyakundi, E. (2024). Police teargas lawyers at central police station. 18.06.2024.

Available from <https://www.nairobileo.co.ke/news/article/16227/police-teargas-lawyers-at-central-police-station>

*“To those maids, petty scambags and lowlifes who send me inboxes and when I decline you insult me. Desist. I am not at your level. I am an advocate. I listen to Vivaldi. Read Shakespeare and have subscribed to New York Times.... If your list of hobbies including eating chips at Sabina joints. Bargain with makanga to reduce fare. Your only qualification is a D+ in KSCE – then stick to your lane.”<sup>108</sup>*

## 5.2 Ensure accountability

There is a compelling need to hold judges accountable. This is because judges’ roles extend beyond being merely the “lips of the statute.” It is recognized that judges do not solely interpret laws but sometimes engage in judicial law-making as well.<sup>109</sup> Moreover, judges, although bound by the law, make decisions that often carry political implications and as the Judiciary becomes more involved in key policy issues, the demand for accountability intensifies. This is especially relevant in countries like Kenya, which adhere to the model of transformative constitutionalism and are still undergoing a transition from an authoritarian regime to a democratic system. This phase involves significant political, social, and legal changes aimed at establishing democratic institutions, processes, and norms. These include free and fair elections, the rule of law, and the protection of fundamental rights and freedoms. Such changes are essential to realize the societal transformation mandated by the 2010 Constitution.

The concept of judicial accountability poses a complex challenge. While judges are expected to impartially resolve disputes that parties cannot settle themselves, they are also individuals with their own interests, backgrounds, and biases.<sup>110</sup> This means that not all judges can be assumed to always act in the best interests, to always make correct decisions, or to be morally superior to others.<sup>111</sup>

The core argument suggests that the Judiciary, as a key state institution, is always involved in governance. In transitional states such as Kenya, where governance accountability is emphasized, this accountability should inherently include the judiciary.<sup>112</sup> Kenyan society has demonstrated a strong inclination for clear constitutional assurances of rights, justice, and accountability, prioritizing the principle of constitutional supremacy.<sup>113</sup> Judicial independence and accountability are closely connected.

As much as the need for accountability may then occasionally clash with the principle of judicial independence,<sup>114</sup> accountability is essential for independence to be sustainable.

Internally, systems that lack accountability often have weaker incentives for self-improvement than those that engage with external feedback and criticism. If Judiciaries focus solely on their independence, they risk becoming detached from society and failing to respond to legitimate societal demands.<sup>115</sup> The public can trust that judges are independent and impartial only if the Judiciary operates transparently and demonstrates its commitment to being accountable to society.<sup>116</sup> The objective accountability of the Judiciary should be evaluated at both the structural level and the level of individual judges.<sup>117</sup> The judiciary needs to be held more accountable; individual judges must also be held accountable. Their decision-making processes must be transparent and conducted in public.

The indicators for the judiciary’s objective accountability include: (1) case allocation, (2) handling complaints against judges, (3) regular reporting by the judiciary, (4) interactions between the judiciary and the press, and (5) external reviews of the judiciary. For individual judges, the indicators of objective accountability are: (1) adherence to judicial ethics codes, (2) procedures for withdrawal and recusal, (3) regulations on external activities and the disclosure of such activities and interests, and (4) the accessibility and comprehensibility of legal proceedings for the general public.

## 5.3 Reform and strengthen the Judicial Service Commission

Reforming the composition and the procedures of the JSC is essential to ensure the social ownership and the accountability of the Judiciary. Effective constitutional design of institutions such as the Judicial Service Commission is crucial to prevent institutional capture by vested interests, ensuring that governance structures and processes remain resilient and accountable.

A social sense of ownership can be mediated by the Judicial Service Commission, though it must be noted that the composition of Kenyan JSC as it stands now is quite elitist, consisting of the Chief Justice, a Supreme Court Judge, a Court of Appeal Judge, a High Court Judge, a Magistrate, the Attorney General, two advocates (one man and one woman) with fifteen years’ experience, a Public Service Commission nominee and two non-lawyers (one man and one woman) representing the public, but appointed by the President with approval of the National Assembly, its composition is skewed towards senior public officers. In the outgoing JSC, even the two members of the public were very senior and accomplished civil servants, one of whom is currently

<sup>108</sup> An apparently already deleted post by an advocate of the High Court of Kenya on the social platform X (formerly Twitter) from 5 September 2018. Screenshot of file with the authors.

<sup>109</sup> Ibid.

<sup>110</sup> Kosaf, David, *Perils of Judicial Self-Government in Transitional Societies: Holding the Least Accountable Branch to Account* (Cambridge University Press, 2016) 25.

<sup>111</sup> Ibid.

<sup>112</sup> Hakeem O Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge Publishing 2010) 71.

<sup>113</sup> See, Constitution of Kenya 2010, arts 1(3), 2(1), and 165(3)(b).

<sup>114</sup> Russel (n. 126) 427.

<sup>115</sup> Frans van Dijk and Geoffrey Vos, ‘A Method for Assessment of the Independence and Accountability of the Judiciary’ (2018) 9(3) *International Journal for Court Administration*, available at <https://doi.org/10.18352/ijca.276> accessed 2 June 2024.

<sup>116</sup> Ibid.

<sup>117</sup> European Network of Councils for the Judiciary (ENCJ), ‘Independence and Accountability of the Judiciary’ (ENCJ Report 2013-2014) available at [https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj\\_report\\_independence\\_accountability\\_adopted\\_version\\_sept\\_2014.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf) accessed on 3 June 2024.

the Head of Public Service, Mr. Felix Koskei, while the other person, Prof. Olive Mugenda is the CEO of a large hospital.

The Kenyan JSC lacks the “range and depth of membership”<sup>118</sup> comparable to the South African Judicial Service Commission which is composed not only of lawyers, but also of eleven politicians who must obligatorily include opposition parties and four persons chosen by the President in consultation with the leaders of all parties in the National Assembly. According to Francois du Bois, the diverse composition of the JSC contributes to greater diversity of the bench and protects against false conceptions of “merit” in the judicial appointments which sometimes tend to mask prejudice and vested interest.<sup>119</sup> And while balancing professional and political membership, it also balances independence and accountability.<sup>120</sup> The JSC so composed seems to be more likely to promote social ownership of the Judiciary, than a JSC dominated by judges, legal profession and civil servants. However, allowing politicians to have a say on judicial appointments and judicial accountability makes it necessary to include safeguards shielding the Judiciary from capture by the government. The requirement of the South African constitution to include representatives of the opposition parties serves this purpose.

It is unfortunate that individuals raising corruption allegations often do not submit them to the JSC for investigation. Additionally, the JSC needs more authority to investigate these allegations on its initiative. While the Commission can initiate proceedings independently, these must be aimed at the removal of a judge,<sup>121</sup> Or involve investigating magistrates.<sup>122</sup> Therefore, the Commission can only prosecute individuals, which might have serious consequences for their reputations. The JSC cannot choose to first initiate proceedings *in rem* to investigate all circumstances surrounding the corruption allegation without immediately targeting a specific judge or magistrate. This is a significant shortcoming, allowing such allegations to remain in the public domain uninvestigated, thereby undermining public confidence in the Judiciary.

#### 5.4 Delink the Office of Judiciary Ombuds-person from the Office of Chief Justice

Another issue of concern concerns the organisation of the Office of the Judiciary Ombudsperson (OJO), which operates un-

der the Office of the Chief Justice.<sup>123</sup> The office is responsible for receiving and handling complaints from the public against the Judiciary, judicial officers, and staff, as well as complaints from employees and its goal is said to be to enhance public confidence, improve transparency and accountability within the Judiciary, and encourage public participation<sup>124</sup>. Placing the Office of the Judiciary Ombudsman within the Office of the Chief Justice as an administrative unit raises significant structural and independence concerns.

In contemporary liberal democracies, the ombuds institution plays a crucial role within public law frameworks, primarily due to the many complaints they handle and their distinctive jurisdiction and authority.<sup>125</sup> Across the globe, the term „ombudsman concept“ signifies this unique approach to receiving, addressing, and resolving citizen complaints, as well as its ability to address broader issues of maladministration.<sup>126</sup> Ombudspersons are distinct from government departments and other branches they investigate, although they are considered public sector entities.<sup>127</sup>

Embedding the ombudsman within the Office of the Chief Justice contradicts the fundamental principle of ombudsman independence from the entities they oversee. Ombuds are designed to be external and impartial bodies, ensuring accountability and fairness in the administration of public services. Furthermore, such an arrangement could create conflicts of interest, as the ombudsman may be influenced by the Chief Justice or the Judiciary, compromising their ability to investigate complaints against judicial entities effectively.<sup>128</sup>

Embedding the ombudsman within the Office of the Chief Justice is not only contrary to the core principles of ombudsman independence but also raises significant legal and practical concerns regarding their effectiveness and legitimacy.

#### 5.5 Take separation of powers seriously

Given the legacy of the imperial presidency, Parliament must reassert its position in relation to the Presidency and take a more active role in defending human rights and the interests of the underprivileged. This task cannot be left solely to the Judiciary, as it could easily become overwhelming. Moreover, Parliament should be an advocate for judicial independence.

<sup>118</sup> Peter Russel, ‘Conclusion’ in Kate Malleson & Peter Russell (eds.)

*Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 424.

<sup>119</sup> François Du Bois, ‘Judicial Selection in Post-Apartheid South Africa’ in Kate Malleson & Peter Russell (eds.)

*Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 282.

<sup>120</sup> *Ibid* 285.

<sup>121</sup> Article 168(2) of the Constitution of Kenya 2010.

<sup>122</sup> Article 172(1)(c) of the Constitution of Kenya 2010.

<sup>123</sup> Office of the Judiciary Ombudsman, ‘Office of Ombudsman’ (Judiciary of Kenya), available at <https://judiciary.go.ke/office-of-ombudsman/> accessed on 2 June 2024.

<sup>124</sup> *Ibid*.

<sup>125</sup> Matthew Groves and Anita Stuhmcke, ‘The Evolution and Future of the Ombuds’ in Matthew Groves and Anita Stuhmcke (eds), *The Ombudsman in the Modern State* (Hart Publishing, 2022) 2.

<sup>126</sup> *Ibid*.

<sup>127</sup> *Ibid*.

<sup>128</sup> The South African SDG Hub. <https://sasdghub.up.ac.za/article/hdl-handle-net-10394-2274>

The Constitution of Kenya is based on the fundamental principles of liberal democracy, including the separation of powers and judicial independence. Article 159(1) states that the judicial authority of the Republic derives from the people and is vested in the courts. Article 160(1) further elaborates that the courts are independent and are bound only by the Constitution and the law, which they must apply impartially and without bias. A global read of the Constitution accordingly requires all state organs to support and protect the courts to ensure their independence, impartiality, dignity, accessibility, and effectiveness.

In Africa – and Kenya is not an exception – the separation of powers is difficult to implement because of the legacy of imperial presidency.<sup>129</sup> The risk presented by an imperial presidency is that constitutionalism could deteriorate into a continuous accumulation of power by an individual or group with the ability to manipulate the institutions outlined in the constitution, ultimately weakening or eroding their capacity to uphold the constitution's principles.<sup>130</sup>

For the Judiciary and in practical terms, threats to judicial independence within a separation of powers framework often emerge when the courts issue constitutional decisions, prompting backlash from the political branches.<sup>131</sup> These reactions can include non-compliance, proposing constitutional amendments, altering the Court's jurisdiction or budget, changing the size of the Court, or impeaching individual justices.<sup>132</sup>

In the African context, the legacy of the imperial presidency has exacerbated a general problem which is sometimes flagged in democracies across the globe – collusion between the executive power and the legislative power.<sup>133</sup> African presidents are often leaders of the ruling party, and perhaps more importantly, access to public office is a primary means of accumulating wealth. Consequently, political and financial elites are often the same ones, and it is they who are in control of the government and financial resources.<sup>134</sup> This leads to a power imbalance between the executive and legislative branch, with the executive branch controlling the state resources, and the parliamentarians relying on government's good will. For example, in Kenya, parliamentarians do not always perceive themselves as legislators and government overseers, even though the principle of separation of powers assigns them this role. Even voters evaluate parliamentari-

ans' performance by the value of government-funded “development projects” they attract for their constituency, thus creating another layer of dependency on the Executive. This kind of dependency makes it for the president easier to push his or her projects through parliament, while the parliament would be reluctant to hold the president to account. In Kenya, there are worrying cases of parliamentarians calling themselves president's “foot soldiers”.<sup>135</sup> Also while passing the Finance Bill 2024 despite huge social protests and subsequently endorsing the withdrawal of the same bill by the President, the legislators of the governing party showed very little independent initiative. Michael Fagbadebo and Nirmala Dorasamy speak of “entrenched culture of party loyalty and incapacity of legislature to enforce accountability”.<sup>136</sup>

The more the Legislature kowtows to the Executive, the more important the role of the judiciary becomes. This is because the courts become the principal institutions where minorities and civil society groups can seek protection. Joshua Malidzo Nyawa<sup>137</sup> makes a similar point, discussing how the Judiciary's halting of certain government projects, such as affordable housing or appointment of “Cabinet Administrative Secretaries”, a position not provided for in the Constitution, triggered government's anger. According to Nyawa:

*“Kenyans turned to the judiciary for rights protection in a country where the parliament is merely an Executive extension. They adopted ‘lawfare’, using courts to enforce what were traditionally considered political disputes.”*

It is in this context that the President alluded to disobeying of the court orders and even accused the Judiciary of corrupt dealings.<sup>138</sup> And it was only after a mediatic meeting between the leaders of three branches of the government: the President, the Chief Justice and the Speaker of the National Assembly that this rhetoric was toned down.<sup>139</sup> The clash could have been avoided altogether, had the parliament played its role as a check on the government. With the (almost) entire burden of limiting government's power on Judiciary's shoulder, such clashes are, however, likely to occur. But under heavy pressure from President and his executives, and little support from the parliament, maintaining judicial independence becomes even more difficult. Accordingly, with the parliament not playing its oversight role, the entire edifice of separation of powers is at risk of collapsing.

<sup>129</sup> See generally, H. Kwasi Prempeh, ‘Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa’ (2008) 35 *Hastings Constitutional Law Quarterly* 761 available at: [https://repository.uclawsf.edu/hastings\\_constitutional\\_law\\_quarterly/vol35/iss4/6](https://repository.uclawsf.edu/hastings_constitutional_law_quarterly/vol35/iss4/6) accessed on 13 June 2024.

<sup>130</sup> Francois Venter, ‘Parliamentary Sovereignty or Presidential Imperialism? The Difficulties in Identifying the Source of Constitutional Power from the Interaction Between Legislatures and Executives in Anglophone Africa’ in Charles M. Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 99.

<sup>131</sup> Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton University Press 2011) 98.

<sup>132</sup> *Ibid.*

<sup>133</sup> From a practical perspective see Mickey Edwards, ‘We No Longer Have Three Branches of Government’ *Politico Magazine* available at <https://www.politico.com/magazine/story/2017/02/three-branches-government-separation-powers-executive-legislative-judicial-214812/> accessed on 13 June 2024, see also Shikyl Sylvester, ‘Legislative–Executive Relations in Presidential Democracies: The Case of Nigeria’ in Charles Fombad (ed) *Separation of Powers in African Constitutionalism* (Oxford University Press, 2016) 147.

<sup>134</sup> Keith Somerville, *Africa's Long Road Since Independence: The Many Histories of a Continent* (Penguin Books, 2017) 141-142.

<sup>135</sup> Maureen Kinyanjui, ‘I'm now Ruto's foot soldier in Jubilee - Senator Dullo’ *The Star*, available at <https://www.the-star.co.ke/news/2023-05-21-im-now-rutos-foot-soldier-in-jubilee-senator-dullo/> accessed on 5 June 2024.

<sup>136</sup> Fagbadebo, O. M., & Dorasamy, N. (2022). Judicial review as an accountability mechanism in South Africa: a discourse on the Nkandla case. *African Journal of Inter/Multidisciplinary Studies*, 4(1), 126-140. Available from <https://journals.co.za/doi/pdf/10.51415/ajims.v4i1.993>

<sup>137</sup> Joshua Malidzo Nyawa. ‘How Populist Politicians Are Weakening the Kenyan Judiciary’ *VerfBlog* 2024/3/12, <https://verfassungsblog.de/how-populist-politicians-are-weakening-the-kenyan-judiciary/>, accessed 5 June 2024.

<sup>138</sup> *Ibid.*

<sup>139</sup> Sam Kiplagat, ‘President Ruto, CJ Koome and Speaker Wetangula declare war on graft’ *Daily Nation* available at <https://nation.africa/kenya/news/president-ruto-cj-koome-and-speaker-wetangula-declare-war-on-graft-4499526>, accessed 5 June 2024.

## 6. Summary of Recommendations

Addressing judicial independence in Kenya is a complex and urgent challenge that requires comprehensive reforms across multiple areas, including legal and constitutional amendments and a change of mindset, both of which are difficult to achieve.

However, these specific recommendations will help sow the seeds for judicial independence.

1. Dutifully implement the recommendations of the task force on judicial reforms with regard financial independence and operational autonomy, including the allocation of 2.5% of the national budget to the Judiciary
2. Reinforcing the Judiciary's independence from political and other external pressures to build public confidence in its impartiality and fairness through legal penalties for contempt of court, deterring any attempts to undermine judicial authority.
3. Sustained public pressure on the Legislature and the Executive to change the mindsets of the political leaders, ensuring that Parliament shifts its self-perception from being an extension of the Executive to becoming an ally of the Judiciary. And most importantly, the Executive should see court decisions not as nuisance or stumbling blocks but rather as an opportunity to improve its policies and standards of operation. Ultimately, all three branches serve one sovereign: The People of Kenya
4. Amend Article 171 of the Constitution of Kenya to effect changes in the composition of the Judicial Service Commission (JSC) to ensure a more balanced, diverse and representative commission that better reflects the interests and needs of the public, the legal profession, and judicial officers.
5. The judicial Ombudsperson should be delinked from the Judicial Service Commission and created as a neutral, standalone office responsible for addressing complaints and concerns related to judicial conduct and the functioning of the judicial system.
6. Promoting public awareness of the importance of judicial independence, engaging civil society organisations and media in advocating for judicial reforms and monitoring judiciary performance for transparency and accountability.
7. Making court proceedings more accessible to the public, including allowing media coverage and public attendance in courtrooms, except where privacy is necessary. This should include improving physical access to courthouses, especially in rural areas, and developing digital platforms for filing cases, accessing information, and attending virtual hearings.
8. Expanding legal aid services and encourage pro-bono work by lawyers to ensure all citizens, regardless of their financial status, have access to justice.
9. Simplifying legal language, using plain language in legal documents and court communications to make them more understandable to the general public.
10. Organising community outreach programmes, including free legal clinics and workshops, where judges and court officials can engage with the public to explain the judicial process, answer questions, provide legal advice and demystify legal procedures.
11. Develop a comprehensive communication strategy to keep the public informed about significant judicial reforms, landmark cases, and the Judiciary's role in upholding justice.
12. Developing robust anti-corruption measures within the Judiciary, establishing internal oversight mechanisms, whistleblower protections, and transparent disciplinary processes.
13. Transparent disciplinary processes in holding judicial officers accountable for unethical behaviour, reinforcing standards of conduct, and having formal transfer guidelines for judicial officers to guarantee that transfers are conducted transparently and fairly, based on clear and objective criteria

