

**THE JUDICIARY**

**IN**

**REVIEW**

**(2000 – 2002)**

## TABLE OF CONTENT

<b>1.0</b>	<b>ACKNOWLEDGEMENTS .....</b>	<b>3</b>
<b>2.0</b>	<b>FORWARD.....</b>	<b>4</b>
<b>3.0</b>	<b>METHODOLOGY .....</b>	<b>5</b>
<b>4.0</b>	<b>RESEARCH LIMITATIONS.....</b>	<b>5</b>
<b>5.0</b>	<b>JUDICIAL PERFORMANCE.....</b>	<b>6</b>
<b>6.0</b>	<b>JUDICIAL ACCOUNTABILITY.....</b>	<b>10</b>
<b>7.0</b>	<b>JUDICIAL CORRUPTION.....</b>	<b>10</b>
<b>8.0</b>	<b>JUDICIAL REFORM TO FIGHT CORRUPTION.....</b>	<b>12</b>
<b>9.0</b>	<b>ADMINISTRATIVE AND INSTITUTIONAL REFORMS.....</b>	<b>24</b>
<b>10.0</b>	<b>INTEREST GROUPS AWARENESS OF JUDICIAL REFORM.....</b>	<b>25</b>
<b>11.0</b>	<b>ROLE OF THE JUDICIARY IN THE BROADER LEGAL SECTOR REFORMS.....</b>	<b>26</b>
<b>12.0</b>	<b>THE ROLE OF THE JUDICIARY IN CONSTITUTIONAL REFORMS.....</b>	<b>28</b>
<b>13.0</b>	<b>APPENDICES.....</b>	<b>50</b>

## **ACKNOWLEDGEMENTS**

ICJ Kenya is grateful to the different individuals who have contributed to this research report of the Kenyan Section of the International Commission of Jurists. This report has been a collaborative endeavour with direct contribution from Mbuti Gathenji, Advocate of the High Court of Kenya and director of the Dispute Management Centre, Kathurima M'noti, Advocate Of The High Court, Christopher M'maiti, Advocate Of The High Court, and Norah Mutuku, Advocate Of The High Court. We wish to thank all advocates, court clerks, members of the public, institutions and corporations that contributed their views orally and in written submissions.

This report is a publication aimed at supporting effective interest group demand for judicial reform.

This publication is made possible with funding from USAID Kenya Mission to the ICJ Kenya Public Perceptions Index and Links for Action Project. However the views expressed herein are not those of USAID.

## **FORWARD**

The ICJ Kenya Section has been involved in judicial reform initiatives since 1999. It analysed the Kwach Reform Committee Recommendations in a seminar held in Safari Park on 18<sup>th</sup> and 19<sup>th</sup> August 1999. Contributors and discussants were inter alia Hon. Justice Evans Gicheru, the Chairman of the Judicial Reform Implementation Committee. This was followed by series of field surveys, researches and seminars.

This publication seeks to examine the judicial performance in the last two years with reference to the quality of decisions made especially at the High Court and Court of Appeal levels; adherence to the doctrine of *stare decisis* at all levels and the use of information technology in day to day judicial functions. The publication also looks at the fight against chronic case backlog and efficiency in delivery of judgements.

In addition to this, this publication also addresses judicial corruption in the last two years with specific reference to common corrupt practises in the judiciary; measures undertaken within and outside the judiciary to curb corruption in the judiciary; the judiciary's role in the fight (or lack of) against corruption and the establishment of the Corruption Court and its functions.

This publication also examines judicial administrative reforms, judicial accountability over this period, and particularly in relation to judicial responsiveness to external examination. Awareness among interest groups of judicial reform and whether they perceive any reform as satisfactory. The role the judiciary has played in this period in relation to broader legal sector reforms. The role of the judiciary in this period in relation to constitutional reform.

## **METHODOLOGY**

The main method used in collection of the necessary data from the identified sources was through perusal of literature, statutes, case reports, magazines and newspapers on corruption and the judiciary in particular. Interviews with relevant groups and individuals for experiences and perception of corruption, judicial initiatives and judicial reform. Observation of behaviour or reaction to practices of corruption.

## **RESEARCH LIMITATIONS**

The judiciary does not seem to have a single document setting out the action or strategic plan for the reforms recommended by the Kwach Committee. Discussions with the Chief Court Administrator revealed that a number of files existed but they were not open to public scrutiny. The judiciary lacks an archive accessible to the public on its administrative role. Its newly launched websites has not been comprehensively loaded. It has no newsletter or bulletin. The only informative publications would be the Kenya Gazette, Hakimu and Lawyer magazines. As yet there is no officer available to assist in research or development of materials for public dissemination.

The climate for the research on areas like corruption and judicial rectitude in general was not conducive especially because of defensive stand taken by the judiciary in general and the Chief Justice in particular. Some of the information received cannot be published because, it is difficult to verify whilst other relate to matters pending in court and subject to rule of *subjudice*. The cases in which judicial officers have been required to disqualify themselves rarely carry the reasons in details enough to form a basis of a substantive evaluation.

The red tape and the bureaucratic problems in both the public and private sector meant that most questionnaires to interest groups went unanswered or were unduly delayed, with the exception of the Association of Kenya Insurers (AKI).

In the public sector even where useful data exists it cannot be released without authorization. The persons responsible for authorization did not wish disclosure or were unwilling to take responsibility for the disclosure if the information was adverse to other powerful and vested interests.

The individuals interviewed requested non disclosure of their names either for reasons that they are still in service of judiciary or because they availed no proof of

their testimony. The other important impediment was the Official Secrets Act, which restricted them from disclosing matters not in the public domain.

## **JUDICIAL PERFORMANCE**

### i) *Quality of decisions*

The Court of Appeal received a valuation of average for the quality of its decisions with quite a few people happy with its jurisprudence. The High Court also received a valuation of average but with less satisfaction on the part of respondents. The Magistrates' Courts decisions were judged as average tending to bad.

It has been the opinion of many critics that judges and magistrates have performed badly in the enforcement of the bill of rights, been excessively conservative and, especially in the case of the Court of Appeal, lacking in philosophy of law. Even in the incidence of cases that seemed to uphold the supremacy of the Constitution many people believed that there was unprincipled manipulation of the law.

Several cases stand out for their exposition of the Constitutional order and the law:

- **CRISPUS K. NJOGU VS. ATTORNEY GENERAL  
HIGH COURT CRIMINAL APPLICATION NO. 39 OF 2000**

**HELD:** Where the exercise of the Attorney General's discretion to enter a *nolle prosequi* fails the constitutional test under Sections 77 and 123(8) of the Constitution, the High Court will declare the same unconstitutional.

A Constitution is not to be interpreted in the same way as an Act of Parliament but ought to be construed broadly to give the values and aspirations of the people.

- **BENJAMIN L. KITAKA & 4 OTHERS VS. THE ATTORNEY GENERAL  
HIGH COURT CRIMINAL APPLICATION NO. 389 OF 2001**

**HELD:** The Attorney General's prosecutorial powers can be delegated and duly appointed police prosecutors are legitimate.

Other important decisions include: **REPUBLIC VS. CRUCIAL PROPERTIES LTD & ANOTHER (HC MISC CRIM. APPLICATION NO. 174 OF 2001)**

where the Court invoked the due process provisions of the Constitution, and **ROYAL MEDIA SERVICES LTD VS. COMMISSIONER OF CUSTOMS & EXCISE** where the Court invoked the broad powers of Section 84(2) of the Constitution to grant an injunction against a government body.

On the other end of the spectrum are cases such as **ZULEIKHA NAAMAN VS. GHARIB S. GHARIB COA CIVIL APPEAL NO. 123 OF 1997** (Where the court failed to refer to Constitutional provisions on jurisdiction of the Kadhi's Court), **JULIA OJIAMBO VS. H.F.C.K. HCCC NO. 416 OF 1998** (An injunction granted to prevent sale of a premises on the basis of sentimental attachment to the property) and **CENTRAL BANK OF KENYA & ANOTHER VS. UHDL, KAMLESH PATTNI & 3 OTHERS COA CIVIL APPEAL NO. 91 OF 1999** (Injunction granted on principles different from those of a well respected 27 year old precedent- **GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 358**)

The bottom of the heap however might be the occupied by the following cases:

- **GACHIENGO VS. REPUBLIC, REFERENCE NO. 302 OF 2000**

**HELD (WRONGLY):** That the Commissioner of Police is given power to investigate and prosecute crimes by the Constitution;

: That the power to prosecute is limited to the Attorney General;

: That the exercise of prosecutorial powers by the Kenya Anti-Corruption Authority was unconstitutional;

: That the doctrine of separation of powers has force of law in Kenya.

- **ALBERT RUTURI & ANOTHER VS. ATTORNEY GENERAL & ANOTHER HIGH COURT MISC. CIVIL APPLICATION NO. 908 OF 2001**

**HELD (CORRECTLY):** That the retrospective criminal provisions of the Central Bank of Kenya (Amendment) Act 2000 (Act No. 4 of 2001) were unconstitutional.

**HELD (WRONGLY):** That the entire Act was *ultra vires* the Constitution and null and void.

ii) *Stare decisis*

The common law principle of *stare decisis* applicable in Kenya by virtue of the Judicature Act (Cap 8 Laws of Kenya) requires that a court will be bound by the decision of a higher court in similar cases.

A related principle requires that any court follow its previous decisions or that of other courts of similar rank in similar cases.

An overwhelming majority of respondents were of the opinion that the courts have very little regard for the decisions of higher courts or courts of equal rank.

Case law reports are full of examples of court decisions in similar cases that are contradictory on issues such as the effect of an advocate's mistake, the consequences of an unqualified advocate acting, the nature of a chamber summons, adverse possession, the fate of an unpleaded issue, the exercise of the Court of Appeal's discretion especially under Rule 85 of the Court of Appeal Rules, the consequence of failure to sign pleadings and the right of review among others.

There exists a casual disregard for binding authority and precedents that has left judicial officers, advocates and litigants in the dark, a sample of which is in appendix one.

As one writer concluded, " It appears that there are hundreds of such perplexing and evidently incongruous decisions, which cannot be explained away as based on widely disparate circumstances...In truth the whole charade has almost become a game of musical chairs with one never being too sure where the decision will fall when the music stops."<sup>1</sup>

### *iii) Case Backlog*

The judiciary has suffered a chronic problem regarding the speed of case disposal leading to a serious backlog of cases. Virtually 85% of the respondent described the problem as very serious with a shared responsibility between the judicial officers, insufficient manpower and advocates.

The judiciary has tried to deal with the problem by:

- Appointment of additional judicial officers.  
As at March 2002, there were 264 magistrates and as at December 2002 there were 50 judges including judges of appeal.
- Enhancement of pecuniary jurisdiction of magistrates.

---

<sup>1</sup>. "The Advocate's Mistake" Law Africa, Lawtel Africa Limited, published in The Lawyer, January 2003.

- Case management techniques such as refusal of adjournments, charging of adjournment fees, dismissal of cases not prosecuted and use of the call over.

The Law Society of Kenya is known to have advocated for the appointment of more judicial officers and for the use of alternative dispute resolution methods to cure this problem. The end result has so far been ineffective and insignificant.

The workload for the average High Court judge remains 20 cases a day while that of a magistrate approximates 30 cases a day. The situation remains untenable.

The perceptions of the respondents in relation to the time taken for litigation is as indicated in the table below;

	<b>LENGTH OF CASES</b>		<b>TIME TAKEN FOR JUDGMENT</b>	<b>OPINIONS ON TIME TAKEN</b>
	<b>CIVIL</b>	<b>CRIMINAL</b>		
<b>COURT OF APPEAL</b>	3.2 yrs	2.8yrs		Too long
<b>HIGH COURT</b>	4 yrs	2.5 yrs	5 months	Too Long
<b>MAGISTRATES COURT</b>	2.5 yrs	2 yrs	3 months	Long

Civil and criminal cases should not take more than two and one and a half years respectively.

The Court of Appeal and the High Court at Milimani received a vote of confidence in their punctuality with matters starting at about 9.30 a.m. The High Court at the Central registry Nairobi is perceived as fairly punctual. Unfortunately the Magistrates' Courts are deemed to be late and erratic with the Makadara Court being singled out as a court recklessly negligent in observing time.

From these opinions it is clear that the judiciary is inefficient in the handling of cases and delivery of judgments.

- iv) Use of Information technology

The judges of the Court of Appeal were on 13<sup>th</sup> February 2002 presented with 11 new computers and computer. It is also the position that High Court judges each have access to computers. Other judicial officers such as the Registrar of High Court, Chief Court Administrator, librarians, secretaries also use computers. However, whereas other judicial officers use computers on a day-to-day basis, the same cannot be said of the judges. In addition, very few Magistrates have access to computers.

With the exception of judgments and proceedings being typed and printed there is no evidence of any other utilisation of information technology. The secretaries do most of this typing and it is very rarely that a judge will rely on a foreign decision available on the Internet.

The returns from these computers can be maximised by:

- Computerisation of the registry, accounts office, courts and chambers.
- Networking the judges and magistrates' computers
- Providing internet linkages especially to legal web sites
- Encouraging actual usage in court and chambers.

### **JUDICIAL ACCOUNTABILITY OVER THE PERIOD 2000 – 2002 PARTICULARLY IN RELATION TO EXTERNAL EXAMINATION**

The interviews conducted through questionnaires and oral discussion revealed that there is a serious confidence crisis in the judiciary. There is a well-founded feeling that constructive criticism of the judiciary is not tolerated. The hostile public response of the Chief Justice to the Report of the Eminent Commonwealth Judges as well as the suit filed by judges to thwart constitutional reforms demonstrated hostility to criticism and proposals for change.

On the whole the judiciary's response to charges of corruption has been defensive, denial and hostile rebuff instead of open dialogue on the ways and means of detecting and dealing with corrupt judicial officers.

### **JUDICIAL CORRUPTION**

In spite of vigorous protestations on the part of the Chief Justice, the existence of rampant corruption within the judiciary cannot be denied. Kenya has been cited in the reports of Transparency International and of other organisations as suffering from very high levels of corruption. It would be naïve to expect that the judiciary had escaped this cancer.

There have been constant complaints about corruption within the judiciary that were also revealed in the Kwach Report. Indeed, the Chief Justice appointed a committee headed by Justice Evans Gicheru to implement the recommendations of the report. Members of civil society, media and advocates have also echoed these complaints.

It was the opinion of an advocate, Mr. Ahmednasir Abdullahi, that - withdrawal of government from political cases and patronage created a vacuum which was filled by freelance politicians and rich individuals who took corruption in courts to unheard of levels and converted the courts to judicial bazaars. Justice became a commodity for sale to the highest bidder so that “ Corruption was both liberalised and privatised by judges.”<sup>2</sup>

In an interview with the Sunday Nation Mr. Kiraitu Murungi stated, “ The cause celebre of corruption litigation is the Goldenberg case – the eight year odyssey which demonstrates how the courts can grant immunity to corruption through lengthy pre-trial procedures and manipulation of the judicial process.”<sup>3</sup>

A panel of Commonwealth judges presented a report to the Constitution of Kenya Review Commission in May 2002 outlining allegations of nepotism, favouritism, political interference, corruption and inefficiency within the judiciary.

In January 2003, two magistrates were arrested and charged with receiving bribes to influence the outcome of cases. Kenyans cannot have been surprised when on 23<sup>rd</sup> January 2003 a warrant of arrest was issued for a High Court judge who was being questioned in relation to allegations of corruption touching on a civil case he had handled.

Common corrupt practises within the judiciary include:

- i) Hiding and destruction of court files and documents.
- ii) Bribing judicial officers with money and in kind to secure advantages such as favourable decisions, access to court files, convenient hearing dates, preparation of orders and unnecessary adjournments.
- iii) Theft of government fees and fines using fake receipts.
- iv) Deliberately failing to collect government fees and fines.
- v) Judges and magistrates deliberately failing to record proceedings.
- vi) Alteration of court records.
- vii) Cronyism
- viii) Removal of cases from the hearing list to delay cases.
- ix) Non-disclosure of vested interests in cases by judicial officers handling the same.

This list is not exhaustive and there have been cases where magistrates have moved court files from one station to another unlawfully and of magistrates, advocates and auctioneers colluding to enter and execute judgments unlawfully especially in the area of running down cases.

---

<sup>2</sup>. Sunday Nation, 19.1.2003 “ Why Judiciary Must be Reformed Urgently”

<sup>3</sup>. Sunday Nation, 19.8.2001 “ Kiraitu’s Agenda for reforming Judiciary”

The judiciary has utilised regular transfer of officers, restriction of duties for officers, restricted access to court registries, provision of identification badges for officers and interdiction and prosecution of corrupt low-level clerks in its fight against corruption.

After a long period of resistance, the Chief Justice finally agreed to establish the anti corruption courts which he limited to three situated at the High Court at Nairobi. The success of the court could not be established as at the time of this report.

There have been a number of cases prosecuted against middle level and senior government officers and businessmen which were handled by the judiciary whose fate was an indictment on the capability, competence and willingness of the Attorney General and the courts as follows:

**i) GACHIENGO VS. REPUBLIC, REFERENCE NO. 302 OF 2000**

- KACA was declared unconstitutional. Charges of abuse of office against the government computer service staff were then withdrawn by the Attorney General and new charges preferred. (Present position unknown)

**ii) REPUBLIC V AG & CHIEF MAGISTRATE'S COURT *ex parte* KIPNG'ENO ARAP NGENY , HIGH COURT MISC. CIVIL APPLICATION NO. 406 OF 2001**

- Charges against the Minister were declared unconstitutional in view of the delay in presenting them and the failure to explain that delay.

Other measures undertaken outside the judiciary to fight corruption include advocacy against corruption on the part of Non-Governmental Organisations and the Law Society of Kenya.

The fight is largely seen as cosmetic and ineffective and most respondents could not identify any anti-corruption measures undertaken by the judiciary.

Indeed damning reports alleged that nepotism and corruption were the order of the day within the judiciary with examples such as 12 cases where close relatives of past and present judicial officers were appointed to serve the judiciary in the same or nearby station in Nairobi and without undergoing interviews.

Other claims of officers found stealing and interdicted yet returned to office within a year and of an accounts officer who formed private companies to tender for and sell

goods to the judiciary (whose payments he approved) leave little doubt as to the judiciary's impotence and reluctance to fight corruption.

## **JUDICIAL REFORM INITIATIVES TO FIGHT CORRUPTION**

### **Report of the Committee on the Administration of Justice**

The Committee on the Administration of Justice (otherwise known as the Kwach Committee) was appointed by the late Chief Justice, Hon. Justice Z. R. Chesoni on 7<sup>th</sup> January 1998. The Committee's first term of reference was in regard to the judicial rectitude, i.e. moral uprightness, righteousness or correctness of judicial officers in the discharge of their judicial functions.

The Committee underlined the need for an independent and honourable judiciary in the dispensation of justice. It directed its attention to the character of the judicial employee and concluded that such officer must be of high standard of conduct, a person of integrity and devotion in service of the public.

Two forms of corruption were identified: -

1. "Petty" or "survival" corruptions; mainly confined to the grossly underpaid staff
2. "Grand" corruption, which is the exclusive specialty of the high public officials who exercise discretionary power.

The committee made the following recommendations:

- a. The introduction of the Judiciary of a Code of Ethics to apply to all judicial staff. It was to outline the expected and prohibited forms of conduct as well as attendant penalties for transgressions against these minimum standards.
- b. The adoption of a transfer policy by the judiciary intended to reduce undue familiarity requiring all the paralegals, magistrates and judges to serve for a term not exceeding four years in a station.
- c. In order to limit access to chambers, all cases must be heard in open court, except in specific circumstances.
- d. The declaration of assets by all judicial officers and the paralegal staff on first appointment and thereafter every three years.
- e. The salary levels and other allowances of judicial officers be given serious and urgent consideration with a view to making them more realistic and attractive.

- f. That there should be in place a system of vetting those proposed for judicial appointments.<sup>4</sup>

### **Initiative (a)**

### **Judicial Code of Ethics**

The Implementation Committee drafted the Code of Ethics in 1999. It covered, inter alia, the following areas: -

- a re-commitment to the oath of allegiance and the judicial oath both taken on appointment, that is *“a judicial officer shall be true and faithful to his oath of allegiance and judicial oath. He shall faithfully apply the laws of the land in his daily judicial function”*.
- Independence-*“that the judicial officer shall be free and seen to be free from external influence from any quarter”*.
- Recognition that ‘everyone is equal before the law’ - That the judicial officer shall not be improperly influenced by :-
  - Sex, ethnic or national origin, religious belief, political association of the victim, witness accused person, plaintiff or defendant.
  - Personal feelings concerning the plaintiff, defendant, victim or accused person.
  - Pressure from any person, individual or group of people claiming to have interest in particular case.<sup>5</sup>

What were the standards set in this code?

We compared the provisions in the code with among others the Latimer Rules, UN Rules and the contribution by a senior member of the bar Mr. Lee Muthoga in his paper Judicial Discipline; A Code of Conduct (presented in the ICJ symposium at Safari Park)

We also asked what was the level of consultation within the bench?

There is evidence that the draft was circulated to all judicial officers including the magistracy on or about September 1999.

---

<sup>4</sup> Extracts of The Committee on the Administration of Justice. Appendix 2

<sup>5</sup> Extracts of 1999 Judicial Code of Ethics. Appendix 3

A senior Court of Appeal judge described the final draft, which was given to the Chief Justice, 'as drastic' and 'exhaustive'. From inquiries made in the court it is not clear what became of the draft code. The Code has never been discussed outside the judiciary.

It is important to examine the standards of the draft codes for combating corruption. In setting standards one must seek the abstract measures and harmonize with reality on the ground. Which are the standard norms, the 'do' and 'don'ts'?

Various commissions and individuals have made the call for such a code as a remedy for judicial corruption. The draft code refers to the Kotut Committee (1991 –1993) set up to enquire into the terms and conditions of service of the judiciary and the seminar held for Judges and Magistrates on Judicial Education and Accountability held in Mombasa between 6<sup>th</sup> and 9<sup>th</sup> December 1994.

The Public Officer Ethics Bill 2002 provided for a code of conduct and ethics to be established by the commission responsible for judiciary and set the guiding provisions for conduct and ethics. This will expose the draft code framework to public debate.<sup>6</sup>

The initiative on judicial code of ethics, good and meritorious as it may be is in a limbo awaiting the decision of the Chief Justice.

### **Cases, which could have been avoided or dealt with under the draft code**

#### **a. The Tala Case**

In a bizarre case of judicial misconduct, a magistrate was reported in the East African Standard to have ordered the arrest of a waiter who had declined to serve her on priority over other customers. The magistrate had, in fit of impatience refused to queue like other customers and demanded to be served on priority.

#### **b. Grand Regency Hotel Case.**

This case attracted newspaper headlines, debate in Parliament guarded comment from the Chief Justice and a vague and elusive response from the Attorney General. At the heart of the case was the charge that a High Court Judge, at the time when he was seized of a legal dispute between a five star hotel in Nairobi and a Receiver appointed to manage the hotel had enjoyed free food, drinks, provision and other facilities from the hotel. He was also said to have called the hotel several times and left messages there touching on the case before him. The judge had refused to disqualify himself from the case and only purported to so after deciding the case.

---

<sup>6</sup> Extracts of The Public Officer Ethics Bill 2002. Appendix 3

The press reported severally that the matter had been taken over by the Anti Corruption Police Unit, which had compiled a report and handed the same to the Attorney General. The judge was mentioned by name in Parliament and when the press asked the Chief Justice what was being done about the case, he passed the buck to the Attorney General who in turn stated that he was waiting for the court cases touching on the matter to be determined first!

### **c. The Cases Against the CKRC**

- a) Miscellaneous Application No. 994 of 2002 Tom O. K'Opere, John M. Njongoro –vs- Professor Yash Pal Ghai and the Constitution of Kenya Review Commission.

This was the first suit against the CKRC . It was filed by two advocates of the High Court. They sought to quash proposals for the reform of the Judiciary by the CKRC, on the basis that as practicing advocates, their clients and themselves would be adversely affected by the proposals touching on judges. Many people perceived the actual applicant to be the judiciary.

The High Court granted leave for judicial review and directed that the leave operate as a stay of discussion and implementation of the proposals.

- b) High Court Miscellaneous Application Case No. 1110 of 2002 Mr. Justice Moijo Ole Keiwua and Mr. Justice J. V. Odero Juma –vs.- In the Matter of Professor Yash Pal Ghai the Chairman of the Constitution of Kenya Review Commission and two others.

This was the second suit filed by a High Court and Court of Appeal judge also seeking to stop discussion and implementation of proposals for judicial reform contained in the draft constitution on the basis that as judges, they would be adversely affected by the proposals. The proposals, *inter alia* recommended creation of a supreme court, more stringent qualifications for appointment of judges, reduction of the retirement age of judges from 74 years to 65 and voluntary early retirement for sitting judges with benefits or close scrutiny of those wishing to continue in service. They obtained leave from another High Court judge to apply for judicial review and it was ordered the grant of leave would operate as stay of discussion of the proposals touching on the judiciary. Although the judges purported not to be opposed to the people of Kenya reviewing their Constitution and were only concerned with the proposals touching on the judiciary, they subsequently amended their application to challenge the entire process of reviewing the Constitution. It is noteworthy that the judiciary had actually presented proposals to the CKRC.

The above three cases appear to have violated among others Rule 3, 4 and 6 of the draft code of conduct for judicial officers.

#### **d. Public Quarrel by Court of Appeal Judges**

Three judges of the Court of Appeal, Justice R. O. Kwach, Justice P. Tunoi and Justice A B Shah heard an appeal in Express (K) Ltd –vs- Manu Patel Civil Appeal No. 158 of 2000. When they came to deliver the judgement Kwach JA delivered a scathing criticism of his colleagues charging that they had all agreed to allow the appeal but subsequently his two colleagues had changed their minds. He dwelt at length on the purpose of the judicial oath and judicial integrity leaving no doubt that he was accusing his brethren of lacking judicial integrity. Tunoi JA in a scathing reply accused Kwach JA of pride, arrogance, impropriety, publicity seeking and generally holding other judges in contempt and challenged him to resign if the judiciary was as rotten as he had charged.

These accusations were prominently highlighted in the press. Instead of getting to the bottom of the matter, the Chief Justice declared that the issue was an internal judiciary matter and held a meeting with the judges from which the protagonists emerged to pose for the press shaking hands in gestures of reconciliation!. To many Kenyans, this incident was a fundamental manifestation of judicial malady but the critical issues were effectively swept under the carpet.

The conduct of the judges was clearly in breach of Rule 2 of the draft code.

#### **Other justification for code of conduct**

Judges and advocates are both branches of the common professional stem. They have common ethical and doctrinal origin. Advocates are subject to the Advocates Practice Rules and rules of etiquette under the Advocates Act. Attempts to bring judicial officers under the Advocates disciplinary regime have, justifiably been met with stiff resistance for example in the case of William Kipsiro Tuiyot v Law Society of Kenya.

The Advocates Complaints Commission deals with complaints against Advocates. The Attorney General has the powers to table in Parliament bills amending the penalties against advocates to reflect the level and seriousness of the misconduct. The Complaints Commission has been publishing its report on the cases it has handled, the outcome and cases pending before it.

The British bar on the other hand has published a comprehensive code of conduct, which covers all areas of legal practice such as the role of advocates as defence counsels, prosecutors and officers of the court.

Although the conduct of judges with respect to making decision is under continuous scrutiny in both High Court and Court of Appeal there are other areas, which cannot possibly be the subject of comments without empirical evidence.

Issues concerning bias, misdirection, incompetence, familiarity and inebriation can be discerned and exposed without difficulty in Court.

## **2. Initiative (b)**

### **The adoption of a transfer policy by judiciary intended to reduce undue familiarity**

The Kwach Committee noted “there are pointers in the behaviour and other activities of certain judicial officers which leave no doubt about their involvement in corruption. These include, *inter alia*, interaction with litigants or their relatives, entertainment of visitors in chambers, engaging in business activities, undue familiarity with bar and local populace due to overstaying in one station; registering, hearing and determining cases that do not emanate from their jurisdiction, delayed judgments and rulings”.

The committee recommended the adoption of a transfer policy intended to reduce familiarity, requiring all paralegals, magistrates and judges to serve for a term not exceeding four years in a station.

We have not been able to obtain statistics of transfers due to familiarity or suspicion of involvement in corruption or misconduct. However, the following facts were ascertained by interviewing persons affected or officers responsible for transfers.

1. Since 1999 there have been several transfers from various courts. Some of the transfers were done immediately before and after the commencement of the implementation of the Kwach Committee Report.
2. There has been reorganization of the courts including the High Court by:-
  - (i) Creation of Chief Magistrates Courts in areas outside Nairobi.
  - (ii) Changes in jurisdiction by enhancement of pecuniary jurisdiction.
  - (iii) Creation of different divisions of the High Court such as the Commercial Court, Family Court etc.
3. This reorganization has of necessity resulted in transfer of staff, some on promotion.

There have been transfers of judicial officers therefore which cannot be explained entirely as a result of implementation of the Kwach Committee Report. Despite what has been described as 'acute shortage of magistrates' there has been reservation about some of the transfers. The figure of judicial officers has been put at 42 judges and 271 magistrates. The proportion is very inadequate for 30 million people.

It is individual magistrates whose jurisdiction has been enhanced. This has rekindled the old fears that parties especially in running down cases will shift their matters to individual magistrates instead of the geographical and in-situ jurisdiction. The insurance companies are particularly worried that the enhancement of jurisdiction for the magistrate will hike the level of awards of damages. Although one apparent advantage of the enhancement of jurisdiction for the magistrate is clearance of backlog of cases in the High Court through transfer of some of the cases to the subordinate courts, there is no corresponding institutional changes in the subordinate courts to handle the influx of cases e.g. expansion of registries and capacity in terms of trained manpower.

There are no reliable statistics to show whether the transfer of judicial staff has changed trends in corruption. However the removal of backlog of cases by creation of new court divisions and enhanced jurisdiction on the positive side will address one of the 'indicators' of corruption i.e. bottlenecks in resolution of disputes.

### **3. Initiative (c)**

#### **Hearing of matters in open court**

The Kwach Committee recommended that in order to limit access to chambers all cases should be heard in open court except in special circumstance.

The research revealed that most matters in the High Courts are heard in open courts. However the Civil Procedure Rules, the Criminal Procedure Code and the Court of Appeal Rules provide for hearing of some matters in chambers and others in open court.

The rules have not been amended to address this proposal. The physical facilities as a fact may hinder the implementation of the proposal because of limited number of 'open court buildings'.

There is no evidence that the initiative has reduced corruption. The corrupt deals are not normally announced or urged as part of pleadings. The open hearing may only prevent familiarity and make part of the proceedings transparent and open to the public.

#### **4. Initiative (d)**

##### **The declaration of assets by all judicial officers and the paralegal staff or first appointment and thereafter every three years.**

The research was not able to establish whether this proposal has been implemented. It is noted however that it is part of the draft code of conduct of the judicial officer. It is also contained in part IV of (The Public Officer Ethics Bill 2002). As noted above both these initiatives have not been implemented.

#### **5. Initiative (e)**

##### **Remuneration and Terms of Service**

The Kwach Committee recommended that the salaries and other allowances of judicial officers be given serious and urgent consideration with a view to making them more realistic and attractive.

This was based on the arguments that the inadequate remuneration and poor terms of service have contributed to corruption in the judiciary. This was backgrounded by numerous commissions, which had all the time-prioritised remuneration of judicial officers as a panacea for corruption such as Waruhiu Commission, Kotut Commission, and Masime Commission etc.

Whether this argument has a strong foundation is a matter of conjecture. However, the remuneration for judicial officers was reviewed. The current remuneration package is as follows:-

		<b>Salary</b>	<b>Allowances</b>
i)	Chief Justice	531,650	452,990
ii)	Judges of Court of Appeal	214,635 277,950	287,590
iii)	High Court judges	130,314 333,320	227,290
iv)	Magistrates salaries between	18,960 and 84,055	
v)	Paralegal	4,425 and 71,365	

In addition, judges of the High Court and Court of Appeal have been provided with top of the range Mercedes Benz cars as recommended by the Committee. Whether these cars are assigned to judges as of right or as a favour, it is not clear. Recently the press reported that one of the judges who had expressed to the Chief Justice disapproval of the case filed by judges against the CKRC had the Mercedes Benz car assigned to her taken away.

It is too early to tell whether this initiative has had any effect on the reduction of corruption.

## **5. Initiative (f)**

### **Vetting of judicial appointment**

The Kwach Committee recommended that there should be in place a system of vetting those proposed for judicial appointment.

- (i) In case of practicing advocates being appointed to the judiciary the views of Law Society of Kenya and the Advocates Complaints Commission among others should be sought.
- (ii) Appointment as magistrates should be restricted to Resident Magistrate level five years experience in private practice or related fields. The recruitment of district magistrate was to phase out.
- (iii) It was recommended that S.61 (3)(b) of the constitution to require not less than ten years in legal practice or related field to qualify for appointment as a judge. The research was not able to establish concretely whether a vetting system has been established. However, the Law Society of Kenya's criticism of the appointment of Mr Justice William Tuiyot suggests that they were never consulted. In the year 2001 a number of judges were appointed i.e. Hon. Omondi Tunya, Hon. Mr. P. J. S. Hewett (now deceased), Hon. Mr. Alnashir Visram, Hon. Mr. Robert Mugo Mutitu, Hon. Lady Jean Wanjiku Gacheche, Hon. Mr. David Onyancha, Mr. Lawrence Peter Ouna, and Mr. Nicholas R. O. Ombija.

Other appointed made after the recommendation were those of, Hon. J. W. Onyango Otieno, Hon. J. K. Mitey, Hon. H. P. Waweru, Hon. Kasanga Mulwa, Hon. William Tuiyot, Hon. K. H. Rawal

S.61 (3) (b) of the constitution has not been amended to conform to the said recommendation. The qualification for the appointment as a judge remains "an advocate of High Court of Kenya not less than seven years standing".

### **What is the present rating of the judiciary's initiatives on corruption?**

- i) The Transparency International Urban Bribery Report published on 5<sup>th</sup> February 2002 rated the judiciary, in terms of corruption perception at No. 6 after the Nairobi City Council.
- ii) The Report of the Advisory panel of Eminent Commonwealth Judicial Experts dated May 2002 stated that corruption exist in the judiciary and noted that "*complaints exceed levels that can be expected or tolerated*". It also noted that many of the fundamental recommendation of the Kwach Committee have not been implemented.
- iii) The Association of Kenya Insurers was of the firm view that corruption persisted in the judiciary despite the implementation of some of the Kwach Committee recommendations.
- iv) The Commercial Justice User Survey carried out by the British Department for International Development in East Africa in January 2000 stated that 81% out of a sample of 336 interviewees responded that the judiciary was corrupt.
- vii) The observation and conclusion of The Risk Advisory Group Ltd (TRAG) were that "the level of corruption within Kenya is becoming so endemic that it is beginning to threaten the basic structures of the state". TRAG's information was obtained from the Government, political parties, domestic interest groups, Local and International Business and Financial Institution.

The organization was mandated to examine the appropriateness of existing and planned approaches, programmes and activities for enforcement, public awareness/sensitisation and corruption prevention, designed to promote good governance. It was also required to study, comment and make recommendations on, *inter alia*, Public Service (Code of Ethics and Conduct) Bill 2001. In discharging its mandate it examined, *inter alia*, the Kombo Committee Report, the draft report prepared by Anti Corruption Police Unit in 2001 entitled "A Situational Analysis of the Knowledge, Attitude and Perception of the Fight Against corruption in Kenya.

Despite the initiatives we have outlined above, in February 2002 the TRAG Report stated in its executive summary that "there were great concern about the independence of the judiciary and the application of the rule of law".

On the judiciary it observed that “there was unanimity amongst all interviewees that the judiciary lacks integrity and is corrupt. This sentiment was expressed across the political divide, the business community, the religious community and other interest groups. The Chief Justice did not share this view”.

The TRAG report also noted the stakeholder’s concern that “*the multinationals expressed extreme concern about their inability to rely on normal civil legal process to protect their contractual rights. They also complained that employees were using the Court system corruptly. Domestic bankers echoed concern in particular they said it was almost impossible to enforce security when debts were not paid*”.

(viii) The CKRC after conducting countrywide hearings noted the views of Kenyans that corruption was rampant in the judiciary. It specifically made the following findings:-

- (a) The Judiciary is the most criticized section of the Kenyan public society.
- (b) Issues of delay, expense and corruption are most worrying.
- (c) Because of the sensitivity of the issue of corruption, the commission invited a panel of distinguished judges from other commonwealth countries to make a fact-finding visit and make necessary recommendations. The panel stated in its report that “*while many of Kenyan judges continue to fulfil their duties faithfully and according to oath, public confidence in the independence and impartiality of the judiciary has virtually collapsed*”. A group invited by the Government to advise on the issue of corruption which reported early in 2002 was even more damning, it stated that “*there was unanimity among parties involved that the judiciary lacks integrity and is corrupt*”. Judges are not the only culprits, other persons employed in the system such as magistrates, clerks, registrars have made their own contribution to the poor repute of the system.
- (d) Lawyers and clients give bribes or accept improper deals and are also to blame.
- (e) There was government interference – some senior government official asked judges to decide particular cases in a particular way; and judges who give in to pressure, which is a form of corruption.

The report of the Eminent Commonwealth judges was grounded on the Kwach Committee Report and updated through interviews with stakeholders. It was therefore an independent and authoritative report *inter alia* on corruption in the

judiciary and it concluded that no significant changes had been made to wipe out corruption.

## **ADMINISTRATIVE AND INSTITUTIONAL REFORMS**

Within the period under review, the Chief Justice made administrative reforms that saw the establishment of the Family Division of the High Court in December 2000 charged with the responsibility of handling cases relating to succession, divorce and separation, maintenance, adoption, Married Women's Property Act and burial disputes.

The Rules Committee that had been inactive was also re-ignited to review the practice and procedure of the courts. Some of its recommendations were positive and helpful including among others, the cancellation of summons for directions, the requirements for service of pleadings and replying affidavits in good time, the limit on ex-parte injunctions and the 42 day limit for delivery of judgments.

Other changes proved to be added impediments to the quick dispensation of justice. The rule requiring successful plaintiffs wishing to change advocates to apply to court to do so was misconceived in view of the facts that choice of an advocate is a contractual decision that the court cannot interfere with, an advocate's fees are supposed to be taxed in the ordinary course of litigation and that an advocate is free to sue for his fees.

The National Council for Law Reporting was also awakened leading to the re-launch of the Kenya Law Reports on 11<sup>th</sup> January 2002.

The Chief Justice then inaugurated the Anti Corruption Courts, established frequent staff reshuffles and emphasised restriction on access to court registries. The Judiciary also increased the salaries and allowances of judges.

With the coming into force of the Children's Act 2001, the Chief Justice established Children's Courts across the country to deal exclusively with matters arising under the Act. He went on to appoint 115 magistrates to exercise the jurisdiction under the Act.

The pecuniary jurisdiction of various individual magistrates was also upgraded as indicated below: -

<b>OFFICER</b>	<b>JURISDICTION</b>
<b>CHIEF MAGISTRATE</b>	Kshs. 3,000,000/-
<b>SENIOR PRINCIPAL MAGISTRATE</b>	Kshs. 2,000,000/-
<b>PRINCIPAL MAGISTRATE</b>	Kshs. 1,000,000/-
<b>SENIOR RESIDENT MAGISTRATE</b>	Kshs. 800,000/-
<b>RESIDENT MAGISTRATE</b>	Kshs. 500,000/-

The effect of the changes made is positive and long term.

However the judicial reforms initiated are limited and only a first step in the effort to improve judicial efficiency.

Increasing the salaries of judges by fantastic proportions without addressing the remuneration needs of other judicial officers can only have a negative impact on staff morale.

The most common opinion of judicial reforms is that exemplified by the fate of the Gicheru Committee that had ear marked 50 magistrates for dismissal for inefficiency, incompetence and corruption. According to Kwamchetsi Makokha<sup>7</sup> it soon found its work hampered and withered away.

## **INTEREST GROUPS' AWARENESS OF JUDICIAL REFORM AND THEIR EVALUATION OF THE IMPLEMENTED REFORMS**

The Kwach Committee listed the following as interest groups in the judiciary.

- Persons interested in trade and investments – investors
- Individuals and companies
- The general population of Kenya

All these groups are prejudiced by corruption in the judiciary.

The research carried out among interest groups to determine their awareness of judicial reform reveal significant ignorance of reforms being implemented by the judiciary. Members of the insurance industry were not aware of any reforms save the enhancement of jurisdiction, which was published in the Kenya Gazette. The general

---

<sup>7</sup>. Daily Nation, 17.1.2003

complaint was that there was no communication between the judiciary and the business associations.

On inquiry from the judiciary on the mode of communicating with the public it was found that the offices of the Chief Court Administrator, the Deputy Registrar and head of Protocol were created as a result of the Kwach Committee recommendations.

Save for the intermittent speeches made by the Chief Justice in various forums detailing the reforms that were contemplated or undertaken, there was no plan of action available to the public for implementation of recommendations of the Kwach Committee. The committee appointed to implement the recommendations of the Kwach Committee had divide the recommendations into two broad groups, namely the those that could be implemented immediately and not require great outlay of funds such as identification of court buildings and registries and the long term recommendations.

## **THE ROLE OF THE JUDICIARY IN THE BROADER LEGAL SECTOR REFORMS, 2000-2002**

### **1. The Legal Sector Reform Programme**

In April 2000 a proposed Legal Sector Reform Programme was presented to the donor community, developed by the Legal Sector Reform Co-ordinating and legal training institutions. It key proposals were:

- Creation of a Justice Ministry.
- Strengthening the independence of the judiciary, by strengthening the Judicial Service Commission.
- Undertaking training needs assessments for lawyers and paralegals
- Undertaking major building/refurbishment programme
- Reforming, simplifying and streamlining the civil and criminal procedure rules
- Developing a National Legal Aid Policy
- Establishing small claims courts
- Enhancing alternative dispute resolution (ADR) mechanisms and strengthening commercial arbitration.
- Establishing a court recording system
- Strengthening legislative drafting
- Rationalising legal training

- Computerizing the Judiciary, office of Attorney General and training institutions.
- Refurbishing and re-stock law libraries

The Secretary of the Legal Sector Reform Committee was Mrs. Jaoko a Deputy Registrar of the High Court. The expanded, legal sector programme included in addition to the judiciary and the office of the Attorney General some other institutions, which have a vital role to play in the delivery of justice such as the Police and Prison Department.

The mandate of the expanded legal reform sector was to recast, amplify, consolidate and where necessary expand the Legal Sector Reform Programme. The technical Committee charged with the task of implementation included the Federation of Women Lawyers (FIDA), the Police and Prisons department among others.

The expanded Legal Sector Reform Programme operates within the Government's broader reform and development agenda as conceptualised in the poverty reduction and strategy paper of June 2001.

The expanded Programme set out a long-term strategic framework for reform of the delivery justice in Kenya and a medium (3 years) costed work plan and budget in order to achieve this goal.

Some of the important reforms in the Legal Sector in Kenya spearheaded by the judiciary and the office of the Attorney General include:-

- Reorganization of the High Court into four divisions, namely the Civil, Commercial, Family and Criminal divisions and the improvement of the court registries.
- Rehabilitation of court buildings.
- Reforms to the civil and criminal procedure rules.
- Reintroduction of law reporting after a 20 years lapse. The 1981, 1982 and 1983 law reports have already been published.
- Formation of court inspection units reporting to the Chief Justice.
- Finalisation of a code of conduct for judicial officers.
- Establishment of a partnership between Government and Non Governmental Organisations. Thus the creation of the High Court Family Division was spearheaded by FIDA among other organisations, whilst the ICJ has donated computers to the judiciary.

### **Other Reform Programmes**

The Commercial Court Division was established under the Commercial Justice Reform Programme of the Legal Sector Reform Programme in conjunction with the private sector. The initiative is perceived as largely successful and has attracted praise and positive comment. The Commercial Courts have reduced the backlog of cases and are fairly efficient.

The private business sector had intended to improve the administration of commercial justice by addressing, inter alia, the problems of:-

- A overloaded and under resourced court system.
- Abuse of court procedures by litigants and their lawyers to delay judgment and
- Inappropriate use of injunctions and adjournments.

The basic idea was to introduce business-like management of the court. They recommended wider use of information technology and the strengthening of the leadership of the court.

Reservations have however been expressed that the Commercial Courts are also attracting the same vices as the other civil courts. The courts lack commercially trained judges and occasionally suffer as the judges who are about to settle down in the Commercial Court are abruptly transferred to other divisions of the High Court.

We found that there is need to develop a commercial cadre of judges and magistrates. The same should go with the supporting paralegal staff.

### **THE ROLE OF THE JUDICIARY IN CONSTITUTIONAL REFORM, 2000-2002**

The objects and purposes of the review of the constitution is stated in S.3 of the Constitution of Kenya Review Act Cap 3A as to secure provisions therein:-

- (a) Guaranteeing peace, national unity and integrity of the Republic of Kenya in order to safeguard the well being of the people of Kenya.
- (b) Establishing a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity.
- (c) Recognizing and demarcating divisions of responsibility among the various state organs including the executive, the legislature and the judiciary so as to create checks and balances between them and to ensure accountability with an opportunity to actively, freely and meaningfully participate in generating and debating proposals to alter the constitution:
  - (ii) Is subject to this Act, conducted in an open manner; and
  - (iii) Is guided by respect for the universal principles of human rights, gender equity and democracy;

- (b) Ensure that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.

S.17 sets out the functions, powers and principles of the commission and commissioners. The functions of the Commission are:-

- (a) To collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a Bill to alter the Constitution for presentation to the National Assembly;
- (b) To carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems as, in the Commission's opinion, may inform the Commission and the people of Kenya on the state of the Constitution of Kenya; and
- (c) Without prejudice to paragraphs (b) and (c), to ensure that in reviewing the Constitution, the people of Kenya:-
- (i) Examine and recommend the composition and functions of the organs of state including the executive, the legislature and the judiciary and their operations aiming to maximize their mutual checks and balances and secure their independence;
- (ii) Without prejudice to subparagraph (i), examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary.

Pursuant to the above mandate the Commission invited all Kenyans including the judiciary to submit their views.<sup>8</sup>

### **Recommendations of Hon. Mr. Justice Ringera**

It is important to record the suggestions for reform made by Hon. Justice Ringera, which appeared on Daily Nation of 27<sup>th</sup> March 2002.

His position not only as a judge of the High Court but as a former Solicitor General and Director and Chief Executive of the Kenya Anti Corruption Authority which was declared illegal by the judiciary is relevant to issues of judicial reform in general and corruption in particular. He recommended the following:-

- Establishment of a Constitutional Court to hear matters relating to enforcement of the bill of rights and interpretation to the Constitution.

---

<sup>8</sup> Submissions of the Judiciary to CKRC. Appendix 4

- Vetting and disciplining of judges through parliament or re-constituted Judicial Service Commission.
- Establishment of Justice ministry and an enforceable code of conduct to deal with corruption.
- The establishment of a Judicial Service Committee in parliament to consider nominees for position of judges.
- The advertisement of vacant positions for judges in the print media.

**Extracts of Recommendations of the Judges of Appeal, High Court Judges and Commonwealth Judges incorporated in the draft of the Constitution of Kenya by the CKRC**

1. Judicial powers are derived from the people and shall be exercised by the courts:-
  - (a) in the name of the people
  - (b) in the conformity with the constitution and laws
2. Vest exclusively in the courts and tribunals
3. Courts shall be guided by the following principles:-
  - (a) No delay
  - (b) Reconciliation, mediation, arbitration shall be promoted
  - (c) Administration of justice without undue regard to technicalities
  - (d) Protection and promotion of principles and purposes of the constitution
4. In the performance of their duties, judicial officers;
  - (a) Shall deliver the highest standard of service to the public
  - (b) Are bound by the leadership and integrity code of conduct

**Hierarchy of Courts**

Courts of judicature shall consist of;

- (a) Supreme Court
- (b) Court of Appeal
- (c) High Court
- (d) Magistrates and Kadhi's courts established by an Act of Parliament
- (e) Traditional or local tribunals with limited jurisdiction

**Independence of the judiciary**

- The administrative expenses of the judiciary including all remunerations, gratuities and pensions shall be charged on the consolidated fund.
- No variation of the remuneration, and terms of services to the disadvantage of the judicial officers.
- Court fees payable shall be reasonable.

- Judicial officers to be provided with immunity from action of suit while in the course of his official duties.

### **The Supreme Court**

It shall consist of:-

- (a) The Chief Justice who is head of judiciary
- (b) Not more than six judges

### **General jurisdiction of Supreme Court**

- Shall have:
  - Original jurisdiction
  - Appellate jurisdiction conferred by the Act of Parliament.
- Any question relating to original jurisdiction of the Supreme Court arising in a lower court, that court shall stay its proceedings and refer the question to the Supreme Court for determination, its decision shall be final.
- Departure from previous decisions in the interest of public.
- All courts are bound by the Supreme Court decisions.  
Supervisory jurisdiction of the Supreme Court shall vest over all courts

### **The Court of Appeal**

It shall consist of:-

- (a) President
- (b) Not less than ten judges

- The Court of Appeal is constituted by 3 judges
- Its decisions are bound by the Supreme Court decisions
- Its decisions are binding on the High Court and the lower courts.

### **Jurisdiction of Court of Appeal**

It shall be an appellate court with jurisdictions in:

- Appeals from a decree, judgement or an order of the High Court, and
- Any other appellate jurisdiction conferred to it by law.

### **The High Court**

Shall consist of:-

- A principal judge
- Not less than 50 judges as may be prescribed by an Act of Parliament
- The principal judge in consultation with the Chief Justice creates divisions of the High Court and specifies their jurisdiction.

- The High Court shall sit in places as the Principal judge may appoint.

### **Jurisdiction of the High Court**

It shall have:

- Unlimited original jurisdiction in civil and criminal matters
- Any other original appellate jurisdiction conferred by an Act of Parliament.

### **Appointment of Judges**

- When the Chief Justice's office falls vacant, the most senior judge, in reference to date of appointment becomes the Chief Justice.
- When the office of the president of the Court of Appeal, the most senior judge in reference to the date of appointment, becomes the president of the Court of Appeal.
- When the office of the principal judge falls vacant, the most senior judge in reference to the date of appointment becomes the principal judge of the High Court.
- Other judges of the superior courts of record and the Chief Kadhi shall be appointed by the president acting on the advice of the Judicial Service Commission and with the approval of the National Council.

### **Qualifications for Appointment of Judges**

The Chief Justice and Judges of the Supreme Court shall be appointed from persons with the following qualification; fifteen years of experience as a;

- Judge of the Court of Appeal on the High Court or
- In practice as an Advocate or
- Full time law teacher at a recognised university,
  - Qualified and competent
  - High moral character and integrity
- Judges of the Court of Appeal shall be appointed with the following qualifications:-
  - Ten years of experience as a;
    - (a) Judge of the Court of Appeal or High Court or
    - (b) In practice as an advocate or
    - (c) Full time law lecturer at a recognized university.

### **Judges of the High Court**

Shall possess the following:-

Ten years experience as a:-

- a) Magistrate or
- b) In practice as an Advocate or
- c) Full-time law teacher at a recognised university
  - Qualified and competent

- High moral character and integrity.

### **Tenure of office of judges**

Retirement age of judges will be sixty-five years of age, they may also retire at the age of sixty.

### **Removal of judges**

A judge may be removed from office on grounds of;

- Inability to perform his duties due to infirmity of body or mind
- A breach of the code of conduct; or
- Incompetence and misconduct
- Presentation of a petition to the Judicial Service Commission by any party desiring removal of a judge

In the case of the Chief Justice, a tribunal shall be set up by the President to conduct hearing of the allegation. It shall consist of;-

- Speaker of the National Council
- Judges from the member states of East African Community
- Three persons with vast experience on public affairs.

The president is bound by the recommendations of the Tribunal and shall act accordingly. In the case of a judge, a tribunal to conduct the hearing shall consist of:-

- The Chairperson
- Persons who are judges of the superior courts
- 3 persons with vast experience on public affairs, one of whom shall be a woman.

### **Subordinate Courts**

They may be established by an Act of Parliament with functions and jurisdiction conferred to them by law. All judicial officers shall be entitled to security of tenure.

### **Kadhi's Courts**

There shall be establishment of a;-

- Chief Kadhi
- Senior Kadhi
- Office of Kadhi.

There shall be not less than 30 judges or as prescribed by Act of Parliament. The Kadhis' shall be empowered by law to hold office.

### **Jurisdiction of Kadhi's Court**

Extends to:

- Determination of questions of Muslim Law
- Determination of civil and commercial disputes
- Settlement of disputes between parties

The Chief Kadhi in consultation with the Chief Justice and LSK make rules of court for the practise and procedure to be followed by the Kadhi Court.

### **Appointment of Kadhis**

- Kadhis shall be appointed by the Judicial Service Commission
- All Kadhis shall be full-time judicial officers.

### **Qualifications for the Appointment of Kadhis**

A person is qualified to be appointed Chief Kadhi if he/she is;

- A Muslim aged 35 years and above,
- An advocate of 10 years standing with recognised qualifications in Muslim Law.
- Has obtained a degree in Islamic Law and is a practitioner of Islamic Law of 10 years or has held position of Kadhi for 10 years.
- A senior Kadhi shall have 5 yeas experience

### **Rules Committee**

This shall consist of:-

- Chief Justice
- President of Court of Appeal
- Principal judge of the High Court
- Chief Kadhi
- Registrars of the Supreme Court, the Court of Appeal and the High Court
- Two representatives of the LSK

The function of the committee is to determine the court fees payable to court.

### **The Judicial Service Commission**

The Judicial Service Commission shall consist of:-

- Full time Chairperson, qualified to be a Judge of the Supreme Court appointed by President of the Republic.
- Muslim woman to represent the Muslim community
- The Attorney General
- The Supreme Court Judge

- The Court of Appeal Judge
- The High Court Judge
- The Chief Kadhi
- Two magistrates, one of whom shall be a woman
- Two advocates of 15 years standing, one of whom shall be a woman
- Two law teachers
- A nominated member of the Council of Legal Education
- Chairperson of the PSC or his/her nominee
- Three lay members nominated by NGOs established under the NGO co-ordinated Act

Members shall hold office for a maximum of two terms

The functions of the JSC are adopted from the Commonwealth Judges recommendations.

### **Appointment and removal of judges**

The JSC shall appoint judicial officers.

## **THE CONSTITUTION OF KENYA REVIEW COMMISSION RECOMMENDATION ON JUDICIARY**

After considering the submission presented to it by the people of Kenya including the judicial officers the CKRC presented its draft proposals. These included *inter alia* the following:-

- An article setting out the basic principles of a fair and acceptable judicial system. The article spells out, *inter alia*, impartiality and accessibility independence of judges, accountability and save in exceptional cases, public hearings.
- A statement that the judiciary exercises the judicial power.
- A new court system with a supreme court staffed entirely by new judges.
- A provision that the most senior judge of the Supreme Court is to be appointed Chief Justice of the entire judicial system (with special provisions for initial appointments).
- The most senior judge of the Court of Appeal is President of the High Court.
- Requirements of accessibility.
- Strengthened and independent Judicial Service Commission.
- Provisions on remuneration and terms of service.

- Judicial immunity (except in case of corruption).
- Character and integrity of judges.
- The Kadhi's Court made up of District, Provincial, and Court of Appeal.
- Jurisdiction and appointments to the Kadhi Court.
- Accountability and control.
- Security of tenure.
- Retirement at 65 years of age.
- Transitional measures.

On Transitional matters the Commission observed:-

“The most difficult issue on the judiciary the CKRC has had to deal with has been what should be done with the existing judges. The recommendation of the expert panel was that no wholesale dismissal of judges should take place. The Law Society of Kenya proposed that this drastic step should be taken. The Commission is convinced that unless very serious steps are taken the whole future of constitutionality in Kenya will be placed in jeopardy. The judiciary is one of the keys to the effective functioning of a constitution. Yet there is overwhelming evidence that judges have been appointed for the wrong reasons, and many have demonstrated neither competence nor integrity. However, we have decided not to go so far as recommending the dismissal of the existing judiciary. It would be viewed internationally as a grave interference with the independence of the judiciary. Within the country it might be thought to weaken the taboo against dismissing judges. And the honest judges might feel that they are being targeted equally with the guilty. We are therefore recommending:-

- (i) That judges shall retire at the age of 65 years.
- (ii) Judges who choose to retire when the new constitution comes into effect will be offered a retirement package.
- (iii) Judges who decide not to take this offer up may be the subject of an inquiry into their fitness for office by the Judicial Service commission, based on material held by bodies such as the Attorney General's Department, the Law Society, the Chief Justice, the Anti-Corruption Unit of the Police and the former KACA.
- (iv) All judges who remain will be subjected to the standards of the new Constitution and Leadership Code and those who do not qualify will be dismissed”.

<b>ANALYSIS OF SUBMISSIONS TO CONSTITUTION REVIEW</b>			
	<b>COURT OF APPEAL AND HIGH COURT JUDGES</b>	<b>COMMONWEALTH JUDGES</b>	<b>DRAFT CRKC</b>
<b>Judicial Authority &amp; Independence</b>		<p>Added more provisions on judicial power.</p> <ul style="list-style-type: none"> <li>• The right to freedom of assembly, association, expression and belief.</li> <li>• Financial independence be entrenched in the constitution</li> <li>• The judicial officials shall be full-time officials</li> </ul>	<p>Adopted new provisions:-</p> <ul style="list-style-type: none"> <li>• Make up of courts to represent gender equity and national diversity</li> <li>• Encourage reconciliation</li> <li>• Development of the law by judges</li> </ul>
<b>Courts of Judicature</b>	<ul style="list-style-type: none"> <li>• Against the creation of a four tier system</li> <li>• Proposed that the Court of Appeal be renamed the Supreme Court.</li> <li>• The High Court should retain</li> </ul>	<p>Recommended the creation of a four-tier system. Courts of judicature to consist of:</p> <ul style="list-style-type: none"> <li>• Supreme Court</li> <li>• Court of Appeal</li> <li>• High Court</li> <li>• Subordinate Court</li> </ul>	<p>Introduced tribunals to be part of the courts of judicature</p>

	<p>original jurisdiction in all constitutional matters.</p> <p>Courts of judicature shall consist of:-</p> <ul style="list-style-type: none"> <li>• Supreme Court</li> <li>• High Court</li> <li>• Subordinate Court</li> </ul>		
<b>Constitutional Court</b>	There is no need for a specialized constitutional court. The High Court is to retain jurisdiction on constitutional matters	Did not recommend a constitutional court. With time, the Supreme Court becomes a specialized constitutional court.	Adoption of the CWJ recommendation.
<b>Appointment of Judicial Officers Qualifications</b>	Proposed a new provision that only Kenyan citizens are to be appointed as judicial officers	<p>Introduces lecturers as persons who can apply for the position of the CJ or judges of the Supreme Court, Court of Appeal and High Court. Applicants must possess the following qualifications:-</p> <p>Fifteen years of experience as a:-</p> <ul style="list-style-type: none"> <li>• Judge in the Court of Appeal or High Court</li> <li>• Practising Advocate</li> <li>• Full-time law lecturer in a recognised university</li> </ul>	

	Proposed the creation of the office of a deputy chief justice, and a principal judge who shall head the High Court.		Proposes the creation of the office of president who shall head the Court of Appeal
<b>Appointment of Judges</b>	<p>Proposal specifies the number of judges to constitute the bench, namely;</p> <ul style="list-style-type: none"> <li>• Six judges to constitute the Supreme Court bench</li> <li>• Nine judges to constitute the Court of Appeal bench</li> <li>• Thirty judges to constitute the High Court bench</li> </ul>	Proposals that a Magistrate, who has ten years experience is eligible to apply for the position of a judge in the High Court	
<b>Tenure of Judges</b>	<p>Proposed that judges shall have security of tenure and this should extend to any appointment made and the duration. Retirement age should be seventy-four years. The president on advice of the</p>	<p>Proposed that tenure of judges be guaranteed and adequately provided for in the constitution. Retirement age should be sixty-eight years</p>	Retirement age should be sixty-five years.

	judicial service commission can revoke a judge's appointment. An Act of Parliament should prescribe retirement age.		
<b>Removal of judges</b>		Made recommendations that a petition can be filed to the Judicial Service Commission regarding a complaint against a judge.	
<b>Disclosure</b>		Judges on date of appointment shall make a disclosure of their financial statements, assets and other property.  Judges shall also make a disclosure to the JSC of instances of bribe in the cause of their duties. Failure to disclose the above will be deemed as judicial misconduct, which if proven will lead to dismissal from office.	
<b>Office of the Kadhi</b>		Recommended that there should be no change to the current constitutional provisions regarding Kadhi's courts. Judges who are experts on Muslim law should be appointed to handle matters of Islamic Law.	There is the creation of the office of a Senior Kadhi. <ul style="list-style-type: none"> <li>• It was recommended that the jurisdiction be extended to civil and commercial matters.</li> <li>• Recommended the creation of hierarchy of Kadhi courts to be as follows:-</li> </ul>

			District Kadhi Court Provincial Kadhi Court Kadhi Court of Appeal
--	--	--	---

<p><b>Judicial Service Commission</b></p>		<p>A restructure JSC shall be entrenched in the constitution. It shall consist of:-</p> <ul style="list-style-type: none"> <li>• Full time chairperson, with similar qualification of a Supreme Court Judge</li> <li>• A nominee of the CJ</li> <li>• 2 lay members of the public appointed by president</li> <li>• 2 nominated members of the LSK</li> <li>• 2 members elected by the faculties of law of recognised universities</li> <li>• 3 judges elected by the Supreme Court, court of Appeal and High Court</li> <li>• 2 members from the Subordinate Courts</li> <li>• A representative of the PSC</li> </ul>	
<p><b>Functions of JSC</b></p>		<p>Prepare and implement programmes for education and training of judicial officers.</p> <p>Encourage gender equity in the administration of justice</p>	

		Advice government on efficient administration of justice  Any other function as may be prescribed by parliament or by the constitution.	
--	--	---	--

## **THE JUDGES CASE AGAINST THE CKRC**

Despite the contribution made to the CKRC by the judiciary through the Court of Appeal and High Court judges' memorandum, certain members of the bench were alarmed by the draft proposals of the CKRC. They filed a case, High Court Miscellaneous Civil Application No No.1110 of 2002 in the matter of Professor Yash Pal Ghai, Chairman Constitution of Kenya Review Commission, the Constitution of Kenya Review Commission, and the National Constitutional Conference, Ex-parte Mr. Justice Ole Keiwua, Mr. Justice Joseph Vitalis Odero Juma even before the draft was published.

On 26<sup>th</sup> September 2002, a fellow judge in the High Court granted them leave to institute judicial review proceedings seeking the following relieves:-

- (a) An order of certiorari to quash the decision and/or proposals actual or intended and/or recommendations of the 2<sup>nd</sup> Respondent, the Constitution of Kenya Review Commission and the 1<sup>st</sup> Respondent Yash Pal Ghai, the Chairman of the 2<sup>nd</sup> Respondent concerning and touching on the Kenyan judiciary contained and embodied in Chap. 8 of Draft 1 – 8/12/02 or draft 1 – 8/26/02 both of which titled Constitution of the Republic of Kenya 2002-8-12 or “The People’s Choice”. The report of the Constitution of Kenya Review Commission short version (The People’s Choice) any other subsequent document whose contents are similar thereto or are an adoption of continuation of the contents and views contained therein.
- (b) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from propagating the views contained in parts of the said draft 1 – 8/21/02 and 1 – 8/26/02 entitled “The judiciary and the court system” and more particularly paragraphs 7, 8 and 15 thereof or in the people’s choice part (d) Transitional measures.
- (c) An order of mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in dealing with the Kenyan judiciary to observe the provisions of S.14 of the Constitution of Kenya Review Act (the Act) and the provisions of the code of conduct (the code) prescribed in the 2<sup>nd</sup> schedule to the Act in particular paragraphs 2(2) thereof.
- (d) An order of prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in the review exercise concerning the Kenyan judiciary from associating themselves with views expressed by panel of judges, of the Law Society of Kenya who did not present any evidence credible or otherwise to a tribunal appointed under S.65(5) of the Constitution of Kenya.

- (e) An order of mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in the constitutional review process to observe section 14 of the Act and the Code.
- (f) An order of prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from making statements or conduct which jeopardize their credibility, impartiality, independence or integrity in relation to the Kenyan judiciary
- (g) An order of prohibition prohibiting the 1<sup>st</sup> Respondent from making statements or conducting himself in a manner, which jeopardize his perceived independence in relation to the Kenyan judiciary.
- (h) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from propagating the view that in appointment of judges to man the proposed Supreme Court, sitting judges both of the Court of Appeal and the High Court ought not to be considered leave alone appointed.
- (i) An order of prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proposing that the country “bite the bullet” and be prepared to remove all judges and reappoint those who merit.
- (j) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from committing an imminent breach of S.5 (a) of the Act.
- (k) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from reviewing Chap. IV of the Constitution of Kenya unless such review is undertaken strictly in accordance with the Act.
- (l) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents form selective and discriminatory treatment of the Kenyan judiciary.
- (m) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in view of their partiality towards the Kenyan judiciary from making the report, recommendation sand draft bill to alter the constitution envisaged by S.26 of the Act in relation to Chapter IV of the Constitution of Kenya unless they are made in strict compliance with the Act.
- (n) An order of certiorari to bring the High Court and quash any report, recommendation and draft bill to alter the constitution which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have made of are about to make in terms of the said S.26 of the Act in relation to Chapter IV of the Constitution of Kenya.
- (o) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from publishing any report and/or draft bill in terms of S.27 of the Act or at all in relation to Chapter IV of the Constitution of Kenya.

- (p) An order of prohibition to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from availing any report and or draft bill to persons conducting civic education or facilitating public discussion and debate on the content of any report or concerning a National Constitutional Conference to discuss or debate or amend or adopt any report or draft bill containing any recommendation touching and concerning Chapter IV of the Constitution of Kenya unless such report and/or bill has been evolved in compliance with the Act and in observance of the existing Constitution of Kenya.
- (q) That leave granted do operate as a stay of the proceedings of the respondents in respect of all matters touching on the Applicant as judges of the Kenyan judiciary.
- (q) Costs

The matter came before Hon. Mr. Justice Hayanga and he ordered that:-

1. Leave be and is hereby granted as prayed to institute judicial review proceeding.
2. Proposals or suggestion challenged and or impugned by the applicants under the chapter dealing with “judiciary” be and are hereby stayed.
3. That concerning the order of stay there be leave to apply in case of any emergent factor.
4. Service be effected on the Respondents immediately and the same be fixed for hearing eight days instead of 21 days as set out in the rules of procedure.

The discussion of the merits of the case would be *subjudice* but the examination of the ruling reveals the following:-

- (i) The application was heard ex-parte
- (ii) The Honourable judge did not address the issue of his own competence to hear the matter despite the fact that as a judge, he was also an interested party.
- (iii) The statute constituting the CKRC prohibits suits against the Commission.
- (iv) The implication of the orders granted for the high constitutional principle that the people of Kenya have a right to reform and review their constitution as they may wish.

The affidavits of Justice Moijo Ole Keiwua and Justice Joseph Vitalis Juma sworn in support of the application confirmed that the application was all about the terms and conditions of service of all judges thus making the judiciary effective as a judge in its own cause. One of the rules of natural justice provides that “a judge is disqualified

from hearing any case in which he has a pecuniary interest or any other interest likely to be a real cause of bias”<sup>9</sup>.

His lordship failed to heed the words of Lord Campbell in the said case who said that *“No one can suppose that Lord Collenham could be in the remotest degree influenced by the interest that he had in this concern; but my lords it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred”*.

## **THE ADVOCATES’ CASE**

The judges’ case against the CKRC was preceded by another case, High Court Misc. Civil Application No. 994 of 2002. In the matter of Constitution of Kenya Review Act Cap 3A Laws of Kenya. TOM O. K’OPERE, JOHN M. NJONGORO –VS- PROFESSOR YASH PAL GHAI CONSTITUTION OF KENYA REVIEW COMMISSION brought by two advocates and members of Law Society of Kenya seeking similar orders to stop reforms in the judiciary. The case also sought leave to commence judicial review proceedings and the leave to operate as a stay of the Commission’s work. Another High Court judge granted the orders sought.

The commission ignored both the orders, which sought to put the judiciary beyond reform and discussion by the people of Kenya, and proceeded to publish its draft proposals including those dealing with the judiciary. The advocates instituted contempt of Court proceedings against the Chairperson of the Commission, which are still pending.

The two suits have overshadowed any positive contribution of the judiciary to the constitution review. The significance of these suits and the stand taken by judiciary has been condemn in the strongest terms by members of public, Parliament, professional bodies, international communities through their diplomats, religious organization etc.

## **SWEARING OF CKRC COMMISSIONER ANDRONICO ADEDE**

Another illustration of the attempt by the judiciary to obstruct the work of the CKRC was the initial refusal by the Chief Justice to swear one of the Commissioners of the CKRC. Upon the death of the Commission’s Vice Chairman, Dr Ooki Ooko Ombaka, Dr Andronicus Adede was appointed as a replacement. He was to be sworn in by the Chief Justice in Nairobi, but he was not sworn in on the appointed day. The commission was then directed to appear before the Chief Justice in Mombasa on 29<sup>th</sup> August 2002 for the swearing in. The candidate duly appeared but was again sent away and directed to appear in Nairobi. It took public complaints by the Chairperson

---

<sup>9</sup> Dimes vs. Grand Junction Canal (1852) 3 H.L.C 759

of the CKRC about the refusal to swear in the commissioner and the intervention of the Parliamentary Committee through the Attorney General for the Chief Justice to swear the Commissioner on 3<sup>rd</sup> October 2002.

## **RECOMMENDATIONS**

Engagement with judiciary should be at all levels starting with the Magistrate Courts, Registries and Libraries.

- Sensitisation of the Judiciary especially the office of Chief Justice on the need to involve stakeholders at all stages of evolution, discussion, implementation and policy formulation of the code and related legislation e.g. the Civil Procedure Rules, Circulars, Court of Appeal Rules touching on matters relevant to the code e.g. disqualification of a judicial officers. Involvement of civil society in the Rules Committee on an advisory capacity would be a starting point.
- **Pilot Project on Corruption**

Civil society should conceptualise and initiate a forum of opinion leaders, the judiciary and the Community to create “a corruption free judicial zone”. The project would build on the findings and initiatives of ACPU, KWACH COMMITTEE, EXPANDED LEGAL SECTOR, CRKC, MEDIA RELIGIOUS and other CIVIL ORGANIZATIONS. It would utilize archives already built through ICJ, LSK, KHRC, NCKK and other research organizations including specialized agencies e.g. Transparency International (Kenya Chapter). If successful it will be replicated in other zones.

- **Multi Sectoral Standing Committee on Corruption**

On linkages with judiciary with respect to initiative to combat corruption we recommend the establishment of a committee composed of civil society, the judiciary and Anti-Corruption Police Unit (ACPU).

The committee would, inter alia, undertake the following tasks:-

- A complete review of Kwach Committee report.
- Engage in education of the public on the evils of corruption through literature, drama, and other community based communication mechanism.
- Monitor the corruption trends and recommend measures.
- Open channels of communication to expose corruption e.g. suggestions (confidential) box in accessible areas for public to vent their views on corruption and disclose instances of corruption.

- Engage the public and the judiciary in continuous well-programmed debate on the appropriateness of the current measures for combating corruption both in the media and communal forums.
- Popularise the code of ethics. Establishment of a judiciary code of conduct to require *inter alia*: -
  - Declaration of wealth by judicial officers
  - Ban on direct involvement by judges in business activities and a limitation of any involvement to trustees upon appointment.
  - Dismissal for serious crimes and misconduct
- Take active role in lobbying for effective legislation e.g. pending Public Officer Ethics Bill 2002.

- **Legal Sector Reform**

A necessary linkage is in building a tripartite Forum to strengthen the legal sector reform process. Interest groups are apprehensive and lack the necessary approach to engage with judiciary. The private sector is prepared to assist the judiciary if a consortium is in place. A good example of such initiative is the Nairobi Central District Association Project and Commercial Justice Reform Programme.

- **Transitional measures recommended in the Draft Constitution of Kenya**

A Programme of Action to deal with the transitional measures recommended by CKRC should be developed. We recommend that bearing in mind that the contentious issues might be lost in the current judicial intervention, a concerted and well organized mass action should be in place to re-agitate for the restoration of the transitional measures as recommended by the people of Kenya. The programme should focus on the vacuum that might be created by lack of knowledge on the part of population. The significance and implications of the cases in court against the CKRC has not been explained to the people sufficiently.

- **Judicial Education**

One of the causes of delayed judgments and rulings is the lack of proper and continuing legal education for judicial officers. It also causes the uncertainty in the judicial system. Identified stakeholders should devise a practical system of sponsoring seminars/work on specific 'troubled' areas of practice and invite scholars and speakers, e.g. Commonwealth Judicial Officers. This should be done in conjunction with existing judicial committee on education and training.

- **Website Development**

The judiciary should develop a comprehensive website. Such a medium would bridge the information gap between judiciary and public at large. Information should include all necessary data on development, progress reports, projects, judicial education etc. The current website has limited information but it is a move in the right direction.

- Amendments to the Constitution to provide new and better requirements for eligibility and appointment to judicial office such as;
  - Integrity
  - Financial stability
  - Academic qualifications
  - Involvement of the Law Society and other interested groups in the selection of candidates in an expanded and independent Judicial Service Commission
  - Proper vetting of nominees by a parliamentary judicial committee
- Establishment of tribunals to relieve corrupt and inept judges of office.
- Improvement of the efficiency of judges and other judicial officers by: -
  - Proper training and hiring of new staff committed to excellence and integrity
  - Employment of sufficient judicial officers to reduce the work load
  - Introducing checks and balances to audit performance
  - Evaluation of quality of judicial decisions
  - Computerisation of the judiciary especially the registries
  - Preparation of law reports and their publication on the Internet.
  - Provision of clerks with legal education to assist in research and preparation of judgments.
  - Use of stenographers and tape recorders in court.
  - Limit on time taken to deliver judgments .
  - Limit on adjournments.
  - Introduction of other case management techniques.
- Provision of attractive remuneration for staff and incentives for exemplary staff.
- Promotion on merit alone
- Less acrimonious engagement between the bar and the bench.
- Establishment of Community Courts
- Provision of legal aid
- Development of sound philosophical basis for judicial decisions through workshops, seminars, online conferences etc.
- Maintenance of dignity and respect befitting of judicial officers.
- The introduction of Alternative Dispute Resolution mechanisms.

## APPENDICES

### Appendix 1

#### **Contradictory Cases**

**A. i) ANNA A. OWINO V. REPUBLIC  
COA CRIMINAL APPEAL NO. 172 OF 2000**

The COA decided that: “ It is trite law that the question relating to severity of sentence is a matter of fact [and] under section 361(1)(b) of the Criminal Procedure Code a second appeal against sentence does not lie.”

**ii) CHANGAWA K. KATENGA V. REPUBLIC  
COA CRIMINAL APPEAL NUMBER 64 OF  
2000(MOMBASA)**

In a three paragraph judgment dated 18<sup>th</sup> January 2001 and in circumstances similar to the Owino case the court arrived at a different conclusions and interfered with the sentence.

The Owino position was reinstated in RUWA NZAI V. REPUBLIC – COA CRIMINAL APPEAL NO. 74 OF 2000 and also in MWALIMU KADZAGAMBA & ANOTHER V. REPUBLIC COA CRIMINAL APPEAL NUMBER 77 OF 2000.

**B. i) CHANGAWA K. KATENGA V. REPUBLIC  
COA CRIMINAL APPEAL NUMBER 64 OF  
2000(MOMBASA)**

**HELD:** The Court could under Section 3(2) of the Appellate Jurisdiction Act exercise the power, authority and jurisdiction vested in the High Court and interfere with the decision of the High Court.

*Note: The Court acted in contravention of Section 361(1) (b) of the Criminal Procedure Code, which did not allow a second appeal against sentence.*

**ii) RAFIKI ENTERPRISES V. KINGSWAY TYRES &  
AUTOMART LTD.  
COA CIVIL APPLICATION NO. NAI 375 OF 1996**

**HELD:** The court could not under section 3(2) of the Appellate Jurisdiction Act exercise the power authority and jurisdiction vested in the High Court unless there was a proper appeal to the court allowed by law.

**C. i) THE BOARD OF GOVERNORS, NAIROBI SCHOOL  
VS. JACKSON IRERI GETAH-COA CIVIL  
APPEAL NUMBER 61 OF 1999**

**HELD:** That a chamber summons is not a pleading within the meaning of Section 2 of the Civil Procedure Act and Rules made there under.

**ii) COMMISSIONER OF VAT VS. NAKUMATT  
HOLDINGS LTD. & 2 OTHERS COA CIVIL APPEAL  
(APPLICATION) NO. 191 OF 2000**

**HELD:** That a chamber summons is a pleading within the meaning of Section 2 of the Civil Procedure Act.

**D. i) REPUBLIC & THE COMMUNICATIONS  
COMMISSION OF KENYA & OTHERS EX PARTE  
EAST AFRICAN TELEVISION NETWORK COA  
CIVIL APPEAL NO. 175 OF 2000**

**HELD:** the Notice of Motion filed pursuant to leave granted originates proceedings under Order 53 of the Civil Procedure Rules.

**ii) COMMISSIONER OF VAT VS. NAKUMATT  
HOLDINGS LTD. & 2 OTHERS COA CIVIL APPEAL  
(APPLICATION) NO. 191 OF 2000**

**HELD:** Proceedings under Order 53 of the Civil Procedure Rules are initiated by the Chamber Summons application for leave.

**E. i) VIPIN MAGANLAL SHAH VS. I&M BANK LIMITED  
& 2 OTHERS COA CIVIL APPLICATION NO.NAI 327  
OF 2000 CORAM: OMOLO, SHAH, BOSIRE, JJA**

**HELD:** Failure to sign a Plaint is not such an omission as would affect the merits of a case or jurisdiction of a court and any application to strike out the claim on this ground is an abuse of the process of the court (Shah JA dissenting)

**ii) VIPIN MAGANLAL SHAH VS. I&M BANK LIMITED  
& 2 OTHERS COA CIVIL APPEAL NO.13 OF 2001  
CORAM: OMOLO, OKUBASU, BOSIRE, JJA**

**HELD:** Any pleading that is not signed is incurably defective and liable to be struck out.

**F. i) NAIROBI CITY COUNCIL VS THABITI  
ENTERPRISES LIMITED COA CIVIL APPEAL NO.  
264 OF 1996**

**HELD:** (Disapproving ODD JOBS VS MUBIA 1970 EA 476)

A court cannot base its decisions on an unpleaded issue even if the parties acquiesce to it.

**ii) ABDI SHIRE VS THABITI FINANCE CO. LTD.  
COA CIVIL APPEAL NO. 76 OF 2000**

**HELD:** Notwithstanding the fact that a defence based on the provisions of a statute was not expressly pleaded, a court may base its decision on it where it appears from the course followed at the trial that the issue has been left to the court for decision.

**G. i) ABUBAKAR BWANA VS. TWAHIR SAID & ANOR 1991  
2 KAR 262**

**ii) BILHA KANYI VS. K. GATUNGU COA CIVIL APPEAL  
NO. 38 OF 2000**

**HELD:** A suit for adverse possession can only strictly be brought by way of originating summons.

**iii) GITHURAI TING'ANG'A CO. LTD. VS. MOKI SACCO LTD.  
COA CIVIL APPEAL NO. 8 OF 2000**

**HELD:** It is proper to bring proceedings based on adverse possession by way of plaint if it involves disputed facts and other issues.

## **Appendix 2**

### **REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE**

The Committee on the Administration of Justice (otherwise known as the Kwach Committee) was appointed by the late Chief Justice, Hon. Justice Z. R. Chesoni on 7<sup>th</sup> January 1998. The Committee's first term of reference was in regard to the judicial rectitude, i.e. moral uprightness, righteousness or correctness of judicial officers in the discharge of their judicial functions.

The Committee underlined the need for an independent and honourable judiciary in the dispensation of justice. It directed its attention to the character of the judicial employee and concluded that such officer must be of high standard of conduct, a person of integrity and devotion in service of the public.

Two forms of corruption were identified: -

1. "Petty" or "survival" corruptions; mainly confined to the grossly underpaid staff.
2. "Grand" corruption, which is the exclusive specialty of the high public officials who exercise discretionary power.

The committee identified two serious areas of the mischief:

- (a) Inducing court officials to lose or misplace case files.
- (b) Delay of trials and delivery of judgment and rulings.

The grand corruption involved payment of money to judges and magistrates to influence their decisions. Indicators of corruption were given as: -

- i) Loss of files
- ii) Misplacing files
- iii) Delayed trials
- iv) Delayed judgments
- v) Delayed rulings

Other matters noted by the Committee as evidence/pointers and causes of corrupt behaviour were: -

- (a) Interaction with litigants relatives
- (b) Entertainment of visitors in chambers
- (c) Engagement in business activities
- (d) Undue familiarity with bar and local populace
- (e) Overstaying in once station
- (f) Inadequate remuneration
- (g) Poor terms of service
- (h) Lack of proper vetting

- (i) Lack of transparency in discharge of judicial function.
- (j) Lack of transparent and merit-based judicial appointment system

The committee made the following recommendations:

- (a) The introduction to the Judiciary of a Code of Ethics to apply to all judicial staff. It was to outline the expected and prohibited forms of conduct as well as attendant penalties for transgressions against these minimum standards.
- (b) The adoption of a transfer policy by the Judiciary intended to reduce undue familiarity requiring all the paralegals, magistrates and judges to serve for a term not exceeding four years in a station.
- (c) In order to limit access to chambers, all cases must be heard in open court, except in specific circumstances.
- (d) The declaration of assets by all judicial officers and the paralegal staff on first appointment and thereafter every three years.
- (e) The salary levels and other allowances of judicial officers be given serious and urgent consideration with a view to making them more realistic and attractive.
- (f) That there should be in place a system of vetting those proposed for judicial appointments;
  - (1) In the case of practising advocates being considered for judicial appointment the views of the Law Society of Kenya and the Advocates' Complaints Commission among others, should be sought.  
Appointment as a magistrate should be restricted to Resident Magistrate level with five years experience in private practice or related fields. This should mean phasing out of recruitment to the cadre of District Magistrates.
  - (2) Section 61(3)(b) of the Constitution should be amended so that one does not qualify to be appointed a judge unless he has been engaged in private practice or related field for not less than ten years.

## Appendix 3

### **JUDICIAL CODE OF ETHICS**

The Implementation Committee drafted the Code of Ethics in 1999. It covered, inter alia, the following areas: -

- a re-commitment to the oath of allegiance and the judicial oath both taken on appointment, that is *“a judicial officer shall be true and faithful to his oath of allegiance and judicial oath. He shall faithfully apply the laws of the land in his daily judicial function”*.
- Independence-*“that the judicial officer shall be free and seen to be free from external influence from any quarter”*.
- Recognition that ‘everyone is equal before the law’ - That the judicial officer shall not be improperly influenced by :-
  - Sex, ethnic or national origin, religious belief, political association of the victim, witness accused person, plaintiff or defendant.
  - Personal feelings concerning the plaintiff, defendant, victim or accused person.
  - Pressure from any person, individual or group of people claiming to have interest in particular case.

The judicial officer shall refrain from consulting, discussing or seeking views outside judicial circles, on matters, which are before him or indeed any other court in the Republic.

One pertinent and relevant issue today is the disqualification of a judicial officer in view of current litigation in which the judges are parties before one of their own.

Rule 3 stated:-

“A judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances which:

- He has personal bias, prejudice or knowledge about a party or facts.
- He has his family or any other interest that could substantially affect the outcome of the proceedings.
- He or his spouse or a person or a friend is a party to the proceedings or is acting as a lawyer in the proceedings.
- The proceedings involving one or more parties to a suit that had previously been heard and determined by him.

The code also addressed conflict of interest under business activities, sports, and social and recreation activities. Involvements in the above activities were sanctioned

so long as it did not adversely affect the dignity of office or interfere with the performance of judicial duties. However, engaging in activities that may generate additional income was prohibited as it was likely to cause the judicial officer to subordinate judicial duties and result in conflict of interest with divided loyalty between duty and private interests. Upon first appointment to the bench an officer is required to disclose full particulars of any private interest held. If such interests are 'real or apparent' or might influence the officer in the discharge of judicial duties the officer shall to such extent as the judicial service commission may direct be divested of such private interests.

Under fiduciary activities the code prohibited the judicial officer from serving as administrator, executor or trustee of any estate except for the estate or trust of a member of family and only if such service will not interfere with proper performance of judicial duties.

Under civil and charitable activities the judicial officer was obliged to regulate extra-judicial activities to minimize the risk of conflict with judicial duties. With specific reference to harambee participation was conditional on it not reflect adversely upon the officer's impartiality and so long as it did not interfere with the performance of judicial duties. A judicial officer may contribute towards or attend harambees but should not play a central part in its organization or preside over the same. No judicial officer is permitted to solicit for funds harambees or any other purposes.

With respect to gifts, the code provided that:-

- As a general rule, judicial officers are prohibited from receiving valuable presents (other than the ordinary gifts from personal friends) whether in the form of money, goods, free passages or other personal benefits and from giving such gifts. This restriction applies to Christmas, birthday or any other anniversary gifts (except those from close friends and relatives).
- No judicial officer shall accept any property, gift or benefit of any kind offered to him by any person as an inducement for the granting of a favour or performance of a function by the officer.

Rule 6 specifically addressed the issue of abuse of office. A judicial officer shall not do or direct to be done, an act, which is prejudicial to the rights of any other person by reason of judicial office. The judicial officer is not above the law, rules or bylaws and must comply with all legal requirements and obey all the laws of the land.

Rule 8 addressed the disposal of the business of the court, the delivery of judgments and the handling of adjournments. The emphasis was on professionalism, competence and clearance of backlog of cases.

Rule 12 addressed political association and prohibited the judicial officers from engaging in partisan politics.

Rule 13 specifically addressed pecuniary embarrassment. It demanded that a “judicial officer must live within means and avoid any form of financial commitments which is likely to bring embarrassment”. The rule further underlined the fact that financial over-commitment might result in corruption and interfere with the officer’s performance. It directed :-

- (i) That judicial officer must borrow only from recognised financial institutions and only if capable of servicing the loan without any form of financial hardship to the officer or family.
- (ii) That immediate disciplinary action should be taken against a judicial officer who has become a judgment debtor or against whom bankruptcy proceedings have been taken.

Rule 15 restricted the judicial officers from social associations to ‘respectable places and selected functions’. The justification was to ensure safety and security to avoid suspicion by association.

The judicial officers were defined to mean and include ‘any judge, magistrate or Kadhi of all grades employed and/or appointed in the Kenyan judiciary’.

The sanctions imposed by the code were: -

- (i) Removal from office
- (ii) Reduction in rank or seniority
- (iii) Stoppage of increment
- (iv) Withholding of increment
- (v) Deferment of increment
- (vi) Reprimand (including severe reprimand)
- (vii) Recovery of the costs of or any loss or damage caused default or negligence
- (viii) Salary deduction

It is not clear from the draft who was to administer the code but there was a provision that “the Judicial Service Commission will where appropriate effect the punishments”.

## **Appendix 4**

### **THE PUBLIC OFFICER ETHICS BILL 2002**

The Public Officers Ethics Bill 2002 dated 28<sup>th</sup> March 2002 provides for the establishment and enforcement of codes of conduct and ethics for persons holding public office and for periodical declaration of income, assets and liabilities by specified officers.

In **Part I**, Public Officer is defined to include members of the judiciary. 'A commission for judiciary would bear the responsibility of establishing a code of conduct and ethics for the group.'

**Part II** – establishes Commissions which shall enforce a code of conduct and ethics for the officers for which it is responsible. The code shall be established within 90 days after the proposed Act comes into operation.

**Part III** – provides principles of ethics and conduct called “guiding principles”. The principles have force of law and deals with such matters as efficiency, professionalism, respect for law and property. It requires avoidance of enrichment by abuse of office, conflicts, nepotism and sexual harassment.

**Part IV** – requires public officers to declare their income, assets and liabilities. Such declarations are required to be submitted by all public officers listed in the first schedule to the bill within 60 days after the responsible commission determines and publishes administrative arrangements for their lodgement and thereafter by December of each year.

The information contained in the declarations is to be retained by the responsible commission and kept confidential.

**Part V** – provides for the enforcement of the codes. The responsible commission must investigate any suspected breaches of the code established by it. On finding that the code has been breached the commission must either take disciplinary action itself or refer the matter to another body having power to deal with the matter appropriately. In appropriate cases the commission will recommend prosecution.

**Part VI** - provides for the punishment of persons hindering or obstructing officers performing functions under the Act. It prohibits divulgence of confidential information and provides for making of regulations.

## **Appendix 5**

### **SUBMISSIONS OF THE JUDICIARY TO THE CONSTITUTION OF KENYA REVIEW COMMISSION**

The judges of the Court of Appeal presented to the Commission a memorandum dated 30th July 2002. Judges of the High Court also submitted their proposals to the Commission in a memorandum on 30<sup>th</sup> July 2002.

The Court of Appeal memorandum was signed by all the judges of the Court of appeal namely Mr Justice J. E. Gicheru, Hon Mr Justice R O Kwach, Hon Mr Justice R S C Omolo, Hon Mr Justice P K Tunoi, Hon Mr Justice A B Shah, Hon Mr Justice AA Lakha, Hon Mr Justice S E O Bosire, Hon Lady Justice E Owour, Hon Mr Justice E Okubasu and Hon Mr Justice M Keiwua.

The following were their submissions:

#### **(1) Judicial authority and independence**

The judicial power of the Republic of Kenya should be expressly vested in the Judicature with the courts being independent and not subject to the control of any person or authority in the exercise of their respective judicial power save only to the constitution and law which they must apply impartially and without fear, favour or prejudice.

No person, organ of state or any other authority should interfere with the courts, or judicial officers in the exercise of their judicial functions.

The administrative expenses of the judicature including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the Judicature should be charged on the Consolidated Fund with the Judicature being self-accounting and dealing directly with the Ministry responsible for finance in relation to its finances.

The salaries, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power should not be varied to his or her disadvantage.

#### **(2) The Courts of Judicature**

“We think that there is no justification for a fourth tier in the present court structure by adding a supreme court as this would result in further delay and undue expense. We also think that there is no need for a special Constitutional Court. Consequently, we propose that the present Court of Appeal be renamed the Supreme Court and

recommend that the High Court should retain original jurisdiction in all constitutional matters with a right of appeal to the Supreme Court. The judicial power of the Republic of Kenya should therefore be exercised by the Courts of Judicature, which shall consist of: -

- (a) The Supreme Court of Kenya;
- (b) The High Court of Kenya; and
- (c) Such subordinate courts as Parliament may establish, including Kadhis' courts which subject to the constitution would have such jurisdiction and powers as may be conferred on them by any law".

### **(3) Constitutional Court**

When the High Court is hearing a constitutional matter, the court should consist of not less than 5 judges and an appeal to the Supreme Court should be heard by all the judges of the Supreme Court.

There should be a right of appeal to the Supreme Court on constitutional references made to the High Court irrespective of whether the case involves questions of interpretation of the Constitution of alleged violation of fundamental or human rights of the individual.

### **(4) Office of the Chief Justice**

- (a) The Chief Justice shall be the head of the judiciary and shall be responsible for the administration and supervision of all the courts in Kenya. He may issue orders and directions for the proper and efficient administration of justice.
- (b) There shall be a deputy Chief Justice who shall be appointed by the president on the advice of the judicial service commission from the judges of the Supreme Court.
- (c) Where the office of the Chief Justice is vacant or where the Chief Justice is for any reason unable to perform the functions of his or her office, then until a person has been appointed to and has assumed the functions of that office or until the Chief Justice has resumed the performance of those functions, those functional shall be performed by the Deputy Chief Justice.
- (d) Subject to paragraph (a) and in order to ease the workload of the Chief Justice and to ensure a smooth and efficient administration of justice, the Deputy Chief Justice shall be in charge of the day to day running of the Supreme Court and a judge to be designated Principal Judge shall be in charge of the High Court.

- (e) The Chief Justice shall be a judge of the Supreme Court and shall not be eligible to sit as a judge of the High Court.

**(5) Qualification for appointment as Chief Justice**

A person shall be qualified for appointment as Chief Justice, if he or she has served as a judge of the Supreme Court of Kenya for a period of not less than 5 years or as a judge of the High Court of Kenya for a period of not less than 10 years or as an Advocate of the High Court of Kenya for a period of not less than 20 years.

**(6) Qualification for appointment of judges of the Supreme Court.**

A person shall be qualified to be appointed a judge of the Supreme Court of Kenya if he or she has served as a judge of the High Court of Kenya for a period of not less than 10 years or having been an Advocate of the High Court of Kenya for a period of not less than 15 years. Kenya citizens who have served as judges or practiced as advocates in other but similar jurisdictions for those periods shall be eligible for appointment of the Supreme Court.

**(7) Qualifications of judges of the High Court**

A person shall be qualified to be appointed as a judge of the High Court of Kenya if he or she is or has been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practiced as an Advocate for a period of not less than 10 years before a court having unlimited jurisdiction in civil and criminal matters.

**(8)** A person shall not be eligible to be appointed to the office of the Chief Justice, deputy Chief Justice, a judge of the Supreme Court or a judge of the High Court of Kenya unless he or she is a citizen of Kenya.

**(9) Tenure of judges**

(a) The Chief Justice, Deputy Chief Justice and all judges of the Supreme Court and the High Court shall have security of tenure, which should also extend to acting appointments during the duration of such appointments.

(b) A judge may retire at any time after attaining the age of sixty-eight years, and shall vacate his or her office: -

(i) In the case of the Chief Justice, the Deputy Chief Justice, a Judge of the Supreme Court and a Judge of the High Court, on attaining the age of seventy four years; but a judge may continue in office after attaining the age at which he or she is

required to vacate office for a period not exceeding three months necessary to enable him or her to complete any work pending before him or her.

- (c) A judge may be removed from office only for: -
  - (i) Inability to perform the functions of his or her office arising from infirmity of body or mind; or
  - (ii) Misbehaviour or misconduct; or
  - (iii) Incompetence
  - (iv) The President shall remove a judge if the question of his or her removal has been referred to a tribunal and the tribunal has recommended to the President that the judge involved ought to be removed from office on any of the grounds set out above.
  - (v) The question whether the Chief Justice, Deputy Chief Justice or a judge should be removed shall be referred to the President by the Judicial Service Commission with the advice that the President should appoint a tribunal; and the President shall then appoint a tribunal consisting of: -
    - a. In the case of the Chief Justice, the Deputy Chief Justice or a judge of the Supreme Court, the Speaker of the National Assembly who shall be the Chairman and five persons who are or have been judges of a court having similar jurisdiction or who are advocates of at least twenty years standing; or
    - b. In the case of a judge of the High Court, three persons who are or have held office as judges of the Supreme Court one of whom shall be appointed Chairman.
      - (i) If the President has referred the question of removal of a judge to a tribunal, the President shall suspend the judge involved from performing the functions of his or her office.
      - (ii) The decision of the tribunal whether or not the judge should be removed shall be binding on the President.

#### **(10) Appointment of judges**

The President acting on the advice of the Judicial Service Commission shall appoint the Chief Justice, the Deputy Chief Justice, a judge of the Supreme Court and Judge of the High Court. In the promotion of judges to higher judicial offices in the Judicature, the principle of seniority should as far as possible be respected and adhered to.

The office of the Chief Justice, Deputy Chief Justice, Judge of the Supreme Court and a Judge of the High Court shall not be abolished when there is a substantive holder of that office.

#### **(11) Judicial Service Commission**

The Judicial Service Commission should be enlarged to provide for wider representation. The members shall be the Chief Justice who shall be the Chairman, the Attorney General, the Deputy Chief Justice, and the Principal Judge of the High Court and the Chairman of the Public Service Commission. But the Judicial Service Commission may in its discretion co-opt any person to participate in its deliberations.

## **(12) Office of Kadhi**

A person should only be appointed to the office of Kadhi if he is a Muslim and has at least a diploma in Islamic law and is legally qualified to be an advocate of the High Court of Kenya. This is with a view to improving the decisions of the Kadhis' courts and to create an opening for advancement in the Judicature for holders of the office of Kadhi.

## **(13) Administrative Structure**

There should be a Chief Registrar of the Judicature who shall also be the Accounting Officer and below him there should be a Registrar of the Supreme Court and a Registrar of the High Court to be assisted by any number of Deputy Registrars as may be necessary. Only persons with professional legal qualifications and who have been admitted as Advocates of the High Court should be appointed as Registrars.

The High Court proposals were signed by the Hon Mr Justice Aganyanya, the Hon Mr Justice, T. Mbaluto, the Hon Mr Justice S Oguk, the Hon Lady Justice K H Rawal, the Acting Registrar, Mr William Ouko and Senior Principle Magistrate, Kiambu, Mrs Jane Ondieki.

Their proposals were: -

### **(1) Judicial Power**

The judicial power of the Republic of Kenya shall be exercised by the Courts of Judicature, which shall consist of: -

- (a) The Supreme Court of Kenya
- (b) The Court of Appeal of Kenya
- (c) The High Court of Kenya
- (d) Such courts subordinate to High Court and Court-martial as Parliament may by law establish, which shall have such jurisdiction and powers as may be conferred on them by any law.

### **(2) Supreme Court of Kenya**

- (a) The Supreme Court of Kenya shall be the final court of appeal from the decisions of the Court of Appeal and shall have such appellate power and jurisdiction as may be conferred on it by law.
- (b) The judges of the Supreme Court shall include the Chief Justice and such number of judges not being less than six, as may be prescribed by Parliament.
- (c) When either a judge of the High Court or Court of Appeal has been appointed as a judge of Supreme Court he may continue to exercise his functions to enable him to complete the proceedings undertaken in the High Court or Court of Appeal as may be the case and commenced by him prior to his being so appointed.

**(3) Court of Appeal of Kenya**

- (a) The Court of Appeal of Kenya shall consist of the Chief Justice and such number of judges, not being less than nine, as may be prescribed by Parliament.
- (b) The Court of Appeal shall be a superior court of record and shall have such jurisdiction and powers in relation to appeals from the High Court as maybe conferred on it by law.
- (c) When a judge of the High Court has been appointed as a judge of the Court of Appeal he may continue to exercise the functions of a judge to enable him to complete proceedings in the High Court that were commenced before him prior to his being so appointed.

**(4) High Court of Kenya**

- a) The High Court shall consist of the Chief Justice and such number of judges not less than thirty, as may be prescribed by Parliament.
- b) The High Court shall be a superior court of record which shall have unlimited jurisdiction in civil and criminal matters and such appellate and other jurisdictions and powers as may be conferred on it by this Constitution or any other law.
- c) Apart from specific provisions made in this constitution the High Court shall be the Court of first instance in respect of the interpretation and application of the provisions of Constitution.
- d) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court martial and may make such orders, issue such writs (inclusive of writs of *habeas corpus*, *mandamus*, *prohibition* and *certiorari*) and give directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.

- e) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by sub-sections (b), (c) and (d) hereof.

**(5) The Administrative functions of the Chief Justice**

- a) The Chief Justice shall be the head of the judiciary and shall be responsible for the administration and supervision of all courts in Kenya.
- b) The Chief Justice may issue orders and directions to all the courts necessary for the proper and efficient administration of justice.
- c) The Chief Justice shall direct the places at which the Supreme Court, the Court of Appeal and the High Court shall have their respective sittings.
- d) Where the office of the Chief Justice is vacant, or if the Chief Justice for any reason is unable to discharge the function of his office, the President may appoint from one of the Judges of the Supreme Court, Court of Appeal or High Court to act as Chief Justice and a judge so appointed shall exercise the functions of that office until a person is appointed to and assumes the functions of that office, or until the Chief Justice resumes those functions as the case may be, or until his appointment is revoked by the President.

**(6) Appointment of judicial officers**

- (a) The President shall appoint the Chief Justice.
- (b) The President acting in accordance with the advice of the Judicial Service Commission shall appoint Judges of all the above-mentioned courts.
- (c) A person shall not be qualified to be appointed to the post of judge unless: -
  - (i) He or she is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the commonwealth or a court having jurisdiction in appeals from such a court; or
  - (ii) He or she is an advocate of the High Court of Kenya or not less than twenty years standing; or
  - (iii) He or she has been a magistrate in Kenya for a period of not less than fifteen years and holds the rank of either a Chief Magistrate or a Senior Principal Magistrate; or
  - (iv) He or she holds, and has held for a period or for periods amounting in the aggregate to not less than twenty years, one or other of the qualifications specified in Sections 12 and 13 of the Advocate's Act.

- (d) If the office of a judge is vacant or a judge is for any reason unable to discharge the functions of his office, or if the Chief Justice advises the President that the state of business in the High Court so requires, the President, acting in accordance with the advice of the Judicial Service Commission, may appoint a person who is qualified to be appointed as a judge of the High Court to act as a judge; and a person may act as a judge notwithstanding that he has attained the age for the purposes of Section 7 hereinafter
  - (e) A person appointed under subsection (d) to act as a judge shall continue to act for the period of his appointment or, if no period is specified, until his appointment is revoked by the President acting in accordance with the advice of the Judicial Service Commission, and may continue to act thereafter for so long as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that have already been commenced before him.
7. (i) Subject to this section, a judge shall vacate his office when he attains such age as may be prescribed by parliament
- (ii) Notwithstanding that he has attained the age prescribed for the purposes of sub-section (i), a judge may continue in office for so long after attaining that age as may be necessary to enable him deliver judgement or to do any other thing in relation to proceedings that were commenced before him before he attained that age.
  - (iii) A judge may be removed from office only for inability to perform the function of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be removed except in accordance with this section.
  - (iv) A judge shall be removed from office by the President if the question of his removal has been referred to a tribunal appointed under sub-section (v) hereinafter and the tribunal has recommended to the president that the judge ought to be removed from office for inability as aforesaid or for misbehaviour.
  - (v) If the Chief Justice represents to the president that the question of removing a judge under this section ought to be investigated, then the President shall appoint a tribunal which shall consist o

a Chairman and four other members selected from among persons: -

1. who hold or have held the offices of Judge of the High Court; Judge of the Appeal or Judge of the Supreme Court; or
2. who are qualified to be appointed as judges.
3. upon whom the president has conferred the rank of Senior Counsel under Section 17 of the Advocates Act; and

- (vi) Where the question of removing a Judge from office has been referred to a tribunal under this section, the President, acting in accordance with the advice of the Chief Justice may suspend the judge from exercising the functions of his office and any such suspension may at any time be revoked by the President, acting in accordance with the advice of Chief Justice, and shall in any case cease to have effect if the tribunal recommends to the president that the judge ought not to be removed from office.
- (vii) Where the question arises as to whether the Chief Justice has become unable by reason of physical or mental infirmity to exercise the functions of his office or that his conduct ought to be investigated, then the President shall appoint a tribunal consisting of five members appointed by him in the manner provided under subsection (viii) hereinafter.
- (viii) The tribunal appointed under sub-section (vi) shall consist of the following members: -
- (i) A person who holds or has held the office of Speaker of National Assembly who shall be the Chairman;
  - (ii) Two persons who hold or have held office as Judges of Supreme Court;
  - (iii) One person upon whom the rank of Senior Counsel has been conferred by the President under Section 17 of the Advocates Act;
  - (iv) The Chairman of the Public Service Commission.
- (ix) When the question of removing the Chief Justice has been referred to a tribunal under this section he shall not exercise any of the functions of his office pending the decision of the tribunal; but he will resume those functions if the tribunal recommends to the president that the Chief Justice ought not to be removed from office.

**(8) Independence of the judiciary**

- a) In the exercise of judicial functions the courts shall be independent and shall not be subject to the control or direction of any person or authority.
- b) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.
- c) All organs and agencies of the State shall accord the courts such assistance as may be required to ensure the effectiveness of the courts.
- d) A person exercising judicial functions shall not be liable to any action or suit for any act or omission by that person in the exercise of such function.
- e) The administrative expenses of the judiciary including all salaries, allowances, gratuities and pensions payable to persons serving in the judiciary shall be charged at the Consolidated Fund.
- f) The judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.
- g) The salaries, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial functions, shall not be varied to his or her disadvantage.
- h) The offices of the Chief Justice, a judge of the Supreme Court, a judge of Court of Appeal or a judge of the High Court shall not be abolished when there is a substantive holder of that office.

**(9) Judicial oath**

A judicial officer shall not enter upon the duties of his office until he has taken and subscribed the Oath of allegiance and such Oath for the due execution of his office as may be prescribed by Parliament.

For the purposes of this section “Judicial Officer “ mean the Chief Justice, Judges of Supreme Court, Judges of Court of Appeal, Judges of High Court of Kenya and Magistrates.

**(10) Judicial Service Commission**

- a) There shall be a Judicial Service Commission, which shall be independent and shall not be subject to the direction or control of any person or authority in the performance of its functions.

The Judicial Service Commission shall consist of: -

- (a) The Chief Justice as its Chairman
- (b) The Attorney General as its ex-officio member
- (c) The senior most judge of the Supreme Court of Kenya
- (d) The senior most judge of the Court of Appeal
- (e) The senior most judge of the High Court
- (f) A magistrate nominee holding a post not lower than Senior Principal Magistrate
- (g) The Chairman of the Public Service Commission
- (h) The members mentioned in clauses (c), (d), (e) and (f) shall hold their posts for a period of four years renewable once. At the expiry of their respective tenure the second judge in seniority and next nominee from the Magistrate's Court shall take their respective places.  
Provided that the current members of the Commission mentioned in clauses (d) and (e) shall continue to serve their respective tenure.
- (i) Except the Chief Justice, Attorney General and the Chairman of Public Service Commission any of the members of the Commission shall vacate his or her post or resignation or upon ceasing to hold their respective posts.

**(11) Functions of the Judicial Service Commission**

- (i) The functions of the Judicial Service Commission are: -
  - (a) To advise the President in the exercise of the power to appoint persons to hold or act in any office specified in subsection (ii) of this section, which includes power to confirm appointments, to exercise disciplinary control over such persons and to remove them from office; subject to the provision of this Constitution, to review and make recommendations on the terms and conditions of service of judges and other judicial officers;
  - (b) To prepare and implement programmes for the education of, and for the dissemination of information to judicial officers and the public about law and the administration of justice;
  - (c) To receive and process people's recommendations and complains concerning the judiciary and the administration of justice and generally to act as a link between the public and the Judiciary;
  - (d) To advise the Government on improving the administration of justice; and
  - (e) Any other function prescribed by this Constitution or by Parliament.

- (ii) The offices referred to in sub-section (i) (a) of this section are those of the Chief Justice, Judges of the Supreme Court, Judges of Court of Appeal and Judges of the High Court.

**(12) Appointment of other judicial officers**

Subject to the provisions of the Constitution the Judicial Service Commission may appoint persons to hold or act in any judicial office other than the offices specified hereinbefore and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices or remove such persons from office.

## **Appendix 6**

### **REPORT OF THE ADVISORY PANEL OF EMINENT COMMONWEALTH JUDICIAL EXPERTS**

#### **The Panellists comprised of:**

The Hon. Justice Dr. George W. Kanyeihamba  
Supreme Court of Uganda

The Hon. Mr. Justice Damian Z. Lubuva  
Court of Appeal, Tanzania

The Hon. Justice Yvonne Mokgoro  
Constitutional Court of South Africa

The Hon. Justice Robert J. Sharpe  
Court of Appeal for Ontario, Canada

Professor Ed Ratushny, Q.C.  
University of Ottawa, Canada  
President of the International Commission of Jurists (Canadian Section)

As earlier noted, the Advisory Panel was set up by the Constitution of Kenya Review Commission to advise on constitutional reforms regarding the Kenya judiciary. The members of the Panel were invited with the support of the Chief Justice and the CKRC. ICJ (K) was contracted to coordinate the project.

Letter of invitation to the panel members requested them to, inter alia:

- i. Advise the CKRC on what reforms proposals to make regarding the Kenya judiciary in a new constitutional framework.
- ii. Advise the CKRC on what corollary proposals and recommendations of a legislative policy or administrative nature to make for further efficacious working of the judiciary.
- iii. Advise the CKRC on what to do to transit from the current to a post constitution dispensation.

Specific terms of reference for the Advisory Panel were to:

- Examine and make recommendations on the financial and administrative autonomy of the judiciary.

- Examine and make recommendations on the constitutional jurisdiction of the courts and whether a separate constitutional court should be established.
- Examine and make recommendations on the structure of the courts and whether a separate supreme court should be established.
- Examine and make recommendations on the electoral appellate jurisdiction of the courts.
- Examine and make recommendations on the jurisdiction of the Kadhis courts and appeal there from.
- Examine the procedure for the appointment, discipline and dismissal of judges as well as magistrates and make recommendations for strengthening of the independence and competence of the judiciary.
- Examine the backlog of cases and recommend methods to speed up the management of cases.
- Examine other improvements to the procedures and facilities of courts, including case management, fast tracks, alternative dispute resolution, and computerization among others.
- Examine and recommend any other aspect of the judiciary, which will strengthen the general independence, efficiency and accountability of the judiciary.
- Examine and make recommendations on appointment, tenure and functions of Attorney General.
- Examine and recommend on the powers of prosecution.

The Panel consulted among other authoritative documents the Constitution of Tanzania 1997, Constitution of Uganda 1995 and the Constitution of South Africa 1994. It considered the Report of the Kwach Committee on the Administration of justice among other relevant background researches done in the judiciary.

In its report, the Panel observed, “many of the fundamental recommendations of the Kwach Committee have not been implemented.”

On the assistance accorded by the judiciary they remarked, “We regret to report that the group of judges delegated by the Chief Justice to meet with us did not come prepared to discuss issues identified in our terms of references”.

They however confirmed that there was:

- “Crisis of confidence “in the judiciary.
- “Widespread allegations of corruption in the Kenyan judiciary”
- “Lack of public confidence in the independence and impartiality of the judiciary”

They recommended, “an effective interim mechanism be adopted to inquire into allegations of judicial misconduct pending completion of the constitution review process.

On accountability they stated “crucial aspects of the Kenya judicial structures are hidden to public view and advised that that several reforms are required to make institutions of the judiciary more accountable to the public.

They recommended more transparent processes in:

- Appeals
- The appointment of judges
- The conduct and removal of judges
- The Judicial Service Commission.

The panel strongly found that corruption in the Kenya judiciary was such a serious problem and that a strong and immediate response was required.

They recommended setting up of a committee to receive complaints about the conduct of any judge in Kenya. The membership was to be drawn from the Attorney General, the Law Society of Kenya, the International Commission of Jurists, FIDA, and the University of Nairobi Law Faculty.