

REPUBLIC OF KENYA



THE JUDICIARY

**PROGRESS REPORT ON THE
TRANSFORMATION OF THE JUDICIARY**

THE FIRST HUNDRED AND TWENTY DAYS

19TH OCTOBER, 2011

By: *Dr. Willy Mutunga*
Chief Justice/President
Supreme Court of Kenya

Fellow country women, men and friends:

It is with great pleasure that I submit the Progress Report on the Transformation of the Judiciary in Kenya.

The struggle to reform the Judiciary predates my rise to the Office of the Chief Justice. However, my assumption of office on June 20, 2011, following a rigorous vetting process where the institutions of the Executive, Legislature and the Judiciary, as well as the general public played significant roles, marked an important turning point. I want to thank all of them, and, in particular, the Judicial Service Commission (JSC) which, in many respects, has set the golden standard in the vetting of public officials.

In making this Report, I have elected to issue it on the eve of Mashujaa Day, a day so emblematic of our struggle for justice and freedom that it should remind us how an oppressive system of government can easily use courts to perpetuate a miscarriage of justice. The existence of courts alone provides no guarantee of justice. Rather, it is the values and quality of the people who lead it; the aspirations and design of the Constitution that creates it; and the vigilance and civic consciousness of the people who continuously demand better. In sad moments in our history, courts have failed to uphold the rule of law and to defend the rights of man and woman.

This is why Kenyans fought for a new Constitution. It is the reason we are reforming the Judiciary. It is the reason we must succeed in creating an institution of justice that can secure our democracy and fulfil its rich promise.

Today marks the 120th day since assuming the office of Chief Justice. I think it is opportune to give a review of our accomplishments so far, and, similarly, provide strategic direction for the future. My vision, as we move forward, is to transform the Judiciary to ensure equitable access to, and efficient and effective delivery of, justice. In leading this transformation agenda, I am guided by the constitutional principle that the people are the source of judicial authority. Those of us to whom this authority is delegated must exercise it only in their interest and for their benefit. This is the article of faith that I uphold as I execute my duties as the Chief Justice of the Republic of Kenya.

For the past 20 years, no less than four internal reports on the Judiciary have been published. These fairly robust and honest self assessments identified long standing problems that plague our system of justice, and in their pages are some very progressive recommendations. Most of these have remained unimplemented. There was lack of will and support to implement the recommendations. What is new is that we have the collective will of the Kenyan people, and the leadership in the judiciary to implement these reforms. In designing my reform agenda, We have borrowed

heavily from these reports, while reviewing and updating them to reflect the context and demands of the Constitution.

Before I outline to the country the measures that we have taken and the strategic direction for the future, I think that it is important to briefly describe the Judiciary we found.

We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.

We found a Judiciary that was designed to fail. The institutional structure was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralised. Accountability mechanisms were weak and reporting requirements absent. When we put people on a pedestal it is based on negative power and authority. That is the old order. The new order for the 21st Century demands we move to equality and work from the basis it is not about the individual's achievement but what a group of people, indeed, a collective has the potential to accomplish.

We are glad that the new Constitution has radically altered this ugly structure. We now have a decentralised Judiciary with the Supreme Court and the Court of Appeal having their own Presidents and the High Court having a Principal Judge at their respective helms. We must not take this dispersal of power for granted for the intoxicating nature of power can be true of the Judiciary as it is of the Executive.

In order to strengthen this collective and accountable use of the power envisaged in our constitutional architecture, I have taken additional administrative decisions to give effect to the intentions of the Constitution. I have set up a Leadership Committee which will act as a management team for the entire Judiciary. Its composition – from the Chief Justice as Chair, DCJ, President of Court of Appeal, Principal Judge of the High Court, as well as representatives from the magistracy and the paralegal fraternity – permits all the voices of the Judiciary to be heard in the management of this important institution. The operationalisation of this committee will take effect once the vetting process is completed, new judges are on board, and elections held for each level of representation.

The new team at the helm of the Judiciary brings with it the necessary political will to implement reforms that many had long identified. Some of these include excessive bureaucracy and silo mentality among organisational units and the court system; backlog of cases; endemic corruption; inefficient and ineffective case flow management; poor terms and conditions of service for judicial and administrative staff; poor infrastructure; absence of a clear transfer policy; understaffing; artificial workloads occasioned by unfilled approved vacant positions; remuneration

imbalances due to haphazard salary grading and compensation structures where, for example, magistrates are poorly remunerated relative to other court officers; weak institutional and staff performance management systems; blatant disregard for performance and financial audits; fragmented reform interventions; and inadequate implementation capacity of recommended institutional reforms by the various task forces.

Our transformation agenda seeks to address all these composite defects.

Since coming into office four months ago, I have listened keenly to the voice of the Kenyan people: unceasing and unequivocal in its invocation to the Judiciary: Clean Up, Now! This call is driven by the recognition that the transformation of the Judiciary constitutes the next most important stage in our democratic transition -- a recognition that a Judiciary that upholds the rule of law, dispenses justice fairly and efficiently, validates and protects rights is not just good for our stability but also our economy. These are basic settled facts that are not just evidenced in literature but also in the experience of societies that have matured in their governance. As leaders and as a people, we must embrace them.

The ends of justice cannot be met when the Judiciary not only suffers an integrity deficit but is also perceived as the playground of the corrupt and the refuge of the inept. Corruption corrodes our humanity, undermines our institutions and sabotages our economy.

In my inaugural address as Chief Justice, I pledged that never again should it be possible to speak about corruption and the Judiciary in the same breath. I meant it. One of the first actions I undertook was to appoint an Ombudsperson to receive and respond to complaints by staff and the public. In just three months, the office has received over 700 complaints of various categories! Of these, 229 have been finalized while another 275 are presently actively being processed. I invite the public to make use of this office which we shall strengthen so that it can effectively serve the public.

Whereas I hasten to reassure my colleagues in the Judiciary that the Ombudsperson will not be used to conduct witch hunts, I appeal to the public not to hesitate to file any complaint against any judicial officer to this office.

Even where no complaints are raised, I give you my pledge that we shall hold ourselves up to the highest ethical standards in the conduct of our affairs. So far, the JSC has released a Code of Ethics and Conduct for judicial officers, and established a standing committee to handle enforcement and discipline.

Corruption in the Judiciary will, however, not be eliminated if we do not change the environment that incentivises it. Four months ago, when we took office, we found a Judiciary in which junior officers entrusted with paperwork in matters concerning billions of shillings lived lives that exposed them to influence-peddling and bribery. Many of the clerical staff, who ensure that the courts system works – or does not

work – , and who are very critical in the administration of justice, earned an average of Ksh. 20,000 only. Staff morale was slow and career stagnation rampant. Many officers had been in one position for over 10 years. The disparities in pay between judges and magistrates, on one hand, and judicial officers and administrative staff, on the other, were acute.

The JSC has reviewed the terms and conditions of judicial officers and its proposals are awaiting the approval of the Salaries and Remuneration Commission. The JSC approved the creation of additional posts in the magistracy and Kadhis establishment and now has before it a recommendation from my office to immediately promote 278 magistrates and 12 Kadhis. We have assented to the formation of an association to represent the interests of paralegal staff, and hope to have structured engagement with them.

The Judiciary must be a place where the dignity of workers is respected and upheld. It is a place that must care for the welfare of its staff to take away any excuse to convert public goods and services into private gain.

The Kenyan public has expressed its frustrations with the inefficiencies in the Judiciary's case management system, which has contributed to huge backlogs. When judicial officers report to work late, sit for very short periods and casually adjourn cases, it is not surprising that the Judiciary would be swamped by close to one million case backlog.

An initial analysis of the case backlog lays bare the anatomy of the problem: close to two thirds of the cases are traffic-related. As an immediate response, I have appointed a Chief Magistrate to specifically deal with this issue in a comprehensive and speedy manner. Further, I will be writing to the Commissioner of Police asking him to indicate to us those cases he thinks his officers can no longer sustain so that we clear them out of our system.

At the High Court alone, we found 2,015 pending criminal appeal cases. Some have been not been heard for as long as 20 years because their files are missing or the records are incomplete. It is a mockery of the oft-quoted legal adage that justice delayed is justice denied, and we have taken decisive steps to right the situation. Civil cases in the courts hold up a great amount of resources needed for economic growth. Clearing the backlog will not only serve the ends of justice but also free resources into the economy and deepen investor confidence.

First, I am happy to report that the Judiciary has now completed digitising 60 million pages of cases for the High Court across Kenya. The Court of Appeal has digitised 10,000 records covering the years 1999 to 2010. Some 1,042 cases that should be progressing in the High Court are waiting arguments at the Court of Appeal while some 942 main appeals are yet to be heard. We have asked parties in the oldest cases, filed as far back as 2004, to take dates within the month so that

their matters can be disposed of. Within six months, I expect the Court of Appeal to be handling only fresh applications. I intend to reduce the waiting period for appeal cases from the current average of six years to less than a year.

Further, my office and the ICT department are in the process of creating an electronic-based system for monitoring and tracking overdue judgments and rulings with a view to taking remedial action. It is the policy of the Judiciary that once proceedings begin, cases will be heard back-to-back on a first filed, first heard basis. Queuing of cases will take away the incentive for corruption.

In the days to come, the public will be able to access case information by short text messages (SMS). We are also embarking on a major computerisation of the Judiciary that will ensure that proceedings are recorded electronically. As part of this programme, the Supreme Court will be established as a paperless Court. It is our intention to establish a modern e-library that can serve the interest of justice.

Judges of the High Court and the Court of Appeal shall, from now henceforth, be empanelled automatically using computer software that removes the human hand from the choice of those who hear cases. In future, cause lists will not contain the name of the judge, to shield judges from undue influence or being hunted down by litigants.

Kenyans have suggested extending the sitting time, having night courts. It is a proposal we are keen to consider operationalising as staff numbers in the Judiciary rise.

I have also redeployed three other experienced Chief Magistrates to clear the backlog of cases in civil, criminal and commercial appeals courts. These magistrates will report to the judges who head their respective divisions on their specific mandate.

Case backlogs also result from understaffing. In order to address this shortcoming, we have embarked on a major recruitment drive for the Judiciary. In the past 120 days, the Judiciary has hired 28 new High Court Judges, bringing the total number of to 80. We have advertised for 7 additional Court of Appeal Judges and another 160 magistrates. An amendment to the Judicature Act makes the High Court judges not to be less than 120 and the Court of Appeal not to have less than 30 judges.

In order to free judges to do what they are primarily mandated to do – hearing and deciding cases -- we have completely separated the judicial function from the administrative. Judges will not be sitting on administrative committees for procurement and tendering; just as magistrates will no longer act as registrars in addition to hearing cases. We will have a policy that ensures judges and magistrates are in stations for specific periods. As work on a comprehensive transfer policy

continues, we have ensured that judges and magistrates do not criss-cross stations to eliminate the problem of part-heard cases.

Once we lay down the burden of the case backlog, the Judiciary is determined to prevent a recurrence of this phenomenon.

I am instituting performance contracting in the Judiciary. Performance based management will be applied to both judicial and administrative staff. A fully fledged directorate of performance management is to be established and an advertisement has already gone out for the recruitment of its head.

I intend to strictly enforce deadlines on writing of judgments and the hearing of cases. In the days to come, I intend to review the rules on deadlines with a view to further shortening this period as more staff more joins the Judiciary.

The hiring of 129 researchers, whose positions have only recently been advertised, will ensure that each and every judge has a research assistant. We shall spare no effort or resource to ensure that judicial officers deliver quality justice in an efficient and timely manner.

In order to promote sound management practices, we have also established the Judiciary Transformation Steering Committee chaired by the Deputy Chief Justice and where all stakeholders in the judicial system are represented. The Steering Committee, under the strong and able leadership of the Deputy Chief Justice Hon. Nancy Baraza, has developed an Integrated Comprehensive and Institutional Transformation Framework. The Judicial Transformation Comprehensive Strategic Plan whose 10 clusters will be given to all of you today is a product of this Steering Committee.

Further, I have moved to strengthen the office of the Chief Justice. Under the new Constitution, the canvass of responsibility for the Office of the Chief Justice has expanded considerably – judicially, administratively and in terms of policy making. The CJ is a judge of the Supreme Court, and is expected to sit in court, hear cases and write judgements. He is also the president of that Court, which bestows managerial responsibilities. He is the head of the entire Judiciary, which has enormous administrative implications. He is the Chair of the Judicial Service Commission and the National Council for Administration of Justice. He also plays ceremonial duties and functions such as swearing in of Constitutional office holders and advocates. To deliver on this broad mandate the office needs executive competence. The office of the Chief Justice cannot operate as it does now with two secretaries and six bodyguards and still discharge its functions effectively as well as hold the other arms of government to account. This state of affairs imperil our democracy as the imperative of checks and balances effectively becomes inoperative when the balance of power is heavily tilted in disfavour of the judicial arm, as it is now. To remedy this problem, I have appointed a Chief of Staff to oversee the establishment of the

Executive Office of the Chief Justice. Both the President of the Court of Appeal and the Principal Judge will also have to establish nimble but efficient executive offices to be able to perform their functions. We must modernise our Judiciary informed by known models and practices of 21st century management science.

The reform of the administrative limb of the Judiciary is one that rarely receives sufficient public attention. The work that judicial officers do is determined to a large extent by the quality and efficiency of the support system that they have. However, this part of our human resource needs immediate attention. We have launched an accelerated professionalization programme of the administrative staff of the Judiciary. We have advertised for six positions of Directors for Finance, ICT, Procurement, Administration and Chief Accounts Controller and five Registrars, each to serve the Supreme Court, the Court of Appeal, the High Court, the subordinate courts and the Judicial Service Commission. I appeal to Kenyan professionals to make applications for these jobs as the cause of justice would only be better served if our country's best and brightest offer to serve in its bastions. We have also launched the Sexual Harassment Policy to protect our own staff from predatory social behaviour that not only undermines our professionalism, violates staff rights but also creates artificial barriers to career growth and development.

As part of efforts to reorganise the Judiciary and to optimise efficiency, the Supreme Court is now operational following the establishment of its registry and publication of its interim rules of procedure. Its courtroom is being restructured to make it modern with a view to launching it before the end of January. The Court of Appeal is to be decentralised to Garissa, Nyeri, Eldoret, Kisumu and Mombasa. The construction of some of these Courts are at an advanced stage.

I have reorganised and reconstituted the divisions of the High Court in an attempt to honour and respect the spirit of the Constitution and the popular aspirations of our people as expressed through their sovereign will in the referendum. There are now divisions for Land and Environment, Judicial Review, Commercial and Admiralty, and Constitution and Human Rights. The Commercial and Admiralty division will accelerate the adjudication of commercial disputes and reduce the transaction costs of justice for the private sector.

The Constitution and Human Rights division will be the court of first instance in constitutional cases; and will play a leading role in addressing the many issues around the interpretation and enforcement of our expanded Bill of Rights. The Land and Environment division will deal with the critical issues of sustainable development and equitable distribution of resources. We intend to reinforce these divisions as the Judiciary recruits more staff.

In the meantime, we are considering the modalities for fast-tracking certain matters relating to children, victims of sexual offences and older persons. We also recognise

the need to fast track and conclude cases that have been in court for over three decades.

In pursuing the important objective of bringing justice closer to the people, we are establishing 14 new courts in places where the Judiciary has never before had a footprint. Additionally, 8 mobile courts have been set up and 38 new vehicles released to serve court stations in historically marginalised areas. For the first time in Kenya's history, a judge of the High Court of Kenya has been posted to Garissa. More court stations will be subsequently established in Lodwar, Isiolo and other marginal districts including Archer's Post, Wamba, Kakuma, Lokitaung, Lokichoggio and Loitoktok, as a way to reduce the cost of justice for litigants.

We wholeheartedly embrace the culture of continuous learning, vigorous debate and peer review. Until now, there has been no organised training for judicial officers. A curriculum is under development for the Judicial Training Institute and a full time Director has been appointed. Justice Paul Kariuki we have a well respected and innovative Director. The JTI will provide the intellectual anchor in making our Courts the home and hearth of a robust jurisprudence. It is pivotal to a successful Judiciary. It was never facilitated to meet the training needs of the courts. Going forward, the Institute will have its own conference and residential facilities and staff as it moves towards awarding degrees. The JTI must become our judicial think tank, an institute of excellence, the nerve centre of robust and rich intellectual exchange, where the interface between the judiciary and contemporary developments in society occurs. I see the institute hosting conferences on critical issues, attended by judges, magistrates, and paralegals where our collective intelligence can be harnessed for the benefit the country.

An important component of the reform of the Judiciary is the vetting of judges and magistrates as called for in the Constitution, and further provided for in the Vetting of Judges and Magistrates Act. Given the enormity of public interest in this matter and its direct bearing on the confidence of my judicial officers, I directed that the constitutional case filed on this matter be fast-tracked and a quick and fair determination made on it. A ruling on this matter is expected in November. When it does take place, the position of the Chief Justice and the JSC is that it should not be on the basis of witch hunt but must be fair and transparent and concluded in the most reasonable time possible. Should this process not be concluded within a reasonable time, the case backlog will become a Sisyphean boulder we keep pushing uphill only for it to roll back. I also urge the Executive to expedite the process of appointment of foreign members to the Vetting Board and do so in a consultative manner.

Throughout what appear like tumultuous changes, I pay special tribute to the Judicial Service Commission that enjoys an expanded role under the new Constitution. It has stuck to the law and ensured that the hiring of officers of the

Judiciary benefits from public participation. I look forward to its support as we execute our transformation programme.

In conclusion, I would like to point out that the Judiciary will not change until those who serve in it and the public change their attitude and behaviour. When we say that judicial authority is derived from the people the implication is that the people should be law abiding – make use of other fora of justice such as family, churches and mosques and other alternative dispute resolution mechanisms because court actions are, in their very nature, adversarial. Kenyans must see themselves as the change they wish to see in the Judiciary.

Dear Kenyans, this is the judicial transformation journey I have embarked on. It is my hope that through this I have brought a future to the present. Please walk with me.

Thank you.

Hon. Dr. Willy Mutunga, SC

Chief Justice/President of Supreme Court

Republic of Kenya