



**CIVIL SOCIETY STATEMENT
ON THE PROCESS OF VETTING FOR THE CHIEF JUSTICE, DEPUTY CHIEF JUSTICE AND
DIRECTOR OF PUBLIC PROSECUTIONS**

JUNE 8 2011: We have come together as a group of Kenyan civil society organisations to express our views and concerns on the process of vetting the nominees for Chief Justice (CJ), Deputy Chief Justice (DCJ) and Director of Public prosecutions (DPP). While we have no problem with the outcome of the vetting for the CJ and Deputy CJ, the situation of the nominee for DPP, Mr. Keriako Tobiko is radically different. A series of disconcerting objections have been raised, which cannot be brushed aside in the apparent rush to arrive at a political compromise. They require thorough inquiry. Approving this nomination without a thorough inquiry risks subjecting him to unrelenting contestation and opposition and hobbling him as DPP. More importantly, it also risks compromising the transition to greater accountability in Kenya.

Concerns have been raised on many issues: on the process of Tobiko's nomination, which was opaque and did not meet the constitutional requirements of transparency and public participation in governance; on his track record as a prosecutor, which is appalling; on his integrity, which has been seriously impugned by, among others, Prof. Yash Ghai. A former Permanent Secretary has accused him of abusing his office and attempting extortion and bribery. He has been accused of facilitating an illegal land transfer and of sabotaging the prosecution of a case involving a former client in the same matter, while neglecting to declare his interests.

Furthermore, he has in the past published extreme and anti-reformist opinions which, if he still clings to them, would show him to be unfit to occupy an office which is central to the implementation of the new constitution.

These and other disturbing allegations are in the public domain. As such, the Constitution Oversight Implementation Committee (COIC) must make every effort to get to the bottom of them before making any recommendation on Mr. Tobiko's candidacy. Any attempt to engage in unprincipled political horse-trading at the expense of a rigorous search for the truth in these charges and others will be rejected and opposed by all legal and constitutional means. Kenyans have not come so far in order to compromise on the possibility of real change at this critical point in our history. The COIC must be aware; Kenyans are watching each one of you and will judge you according to your actions on this issue.

In our opinion, the multiplicity of deeply troubling allegations from a variety of sources, -that seem to be increasing - would tend to indicate that Mr. Tobiko is very likely highly unsuitable for the office of DPP.

However, the impression is gaining ground that those who have an interest in the confirmation of the candidature of Tobiko have no interest in the faithful implementation of the new constitution. The aim seems to be to ensure that an individual with no apparent interest in, or appetite for, prosecuting serious crimes effectively, occupies the position of DPP, which is a centrepiece in the fight against impunity for crimes against humanity and massive corruption. An examination of his record indicates that perpetrators of serious crimes would have as little to fear from Tobiko Keriako as DPP under the new constitution, as they have had to fear from him to date.

Specifically, the following objections- which urgently need clarification and investigation- have been raised to Mr. Tobiko's candidacy, among others:-

1) The Process:

The process leading to the identification of Tobiko as a candidate was not transparent in keeping with the values and requirements of the new constitution; as a result Kenyans have no idea how it was conducted, on what basis he was chosen as the best candidate, nor what criteria were used to select him. The Minister for Justice Mutula Kilonzo publicly criticized the decision to hold interviews in private. Has the COIC asked the panel for all information on the process, including selection criteria and all scores of all candidates? Have open questions on the integrity of process been answered? Have the reports which we are informed were prepared by the National Security and Intelligence Services on candidates been acquired where available? If there were any adverse findings did the selection panel make any attempt to address them during the interview process? What were the results?

2) How was Prof. Ghai's complaint handled by the selection panel?

Apart from the process, the public needs to understand if or how the selection panel chose to handle a complaint submitted to it by Prof. Yash Ghai, former Chair of the CKRC, in which he made serious allegations against Mr. Tobiko's character, integrity and independence e.g. repeatedly breaching confidentiality to report CKRC proceedings to the Moi government and receiving illegal allowances as a Commissioner. Has COIC been able to satisfy themselves that these allegations were properly dealt with by the selection panel? If not, what does the COIC intend to do about it?

3) Mr. Tobiko's Integrity and impartiality

Mr. Tobiko is accused of facilitating the illegal transfer of 4,000 acres of land in Maasai Mara. This land was confirmed by a ministerial report to have been illegally acquired.

When named Deputy Director of Public Prosecutions he took over the prosecution of the same case in which he had acted for his former client, now the accused. He allegedly failed to declare a conflict of interest and recuse himself. Worse, he was accused of abuse of office and of compromising the cases to the extent that then Chief Magistrate ole Keuwa reportedly appealed to the Attorney General about Tobiko's interference and the danger of accusations of malicious prosecution. Complainants¹ also appealed on Tobiko's alleged perversion of the prosecution.

¹ Letter from Olkiombo Ltd. To Attorney General, August 9, 2007

In its special Report of March 2006², (on page 42) the Public Accounts Committee notes that the appointment of Keriako Tobiko as Director of Public Prosecutions frustrated the progress of one of the Anglo Leasing cases; on the Forensic Science laboratory. The PAC notes that Mr Keriako, again, laboured under an undeclared conflict of interest, having acted as Chief Defence counsel in the matter, for Mr. Zakayo Cheruiyot among others. Surprisingly, Mr. Tobiko yesterday to the COIC professed ignorance of an important report on a process that received wide international attention in major media outlets around the world. At the very least, it indicates a level of disregard of parliament and its proceedings, which should give the COIC pause for thought in terms of Tobiko's likely respect for constitutionalism.

On the same issue, in an opinion piece in the Sunday Nation on March 1st 1998, Tobiko and another basically threaten to incite violent consequences to clerics who strayed away from the narrow religious bounds prescribed by Tobiko and engaged in politics by publicly commenting on the lack of meaningful participation in the then constitutional reform process. Is he committed to defending and upholding the constitution with these past attitudes? Do his actions indicate that he still holds them?

4) Mr Tobiko's Competence

Through incompetence, laxity or worse, Mr. Tobiko has been responsible for the failure of several key cases, among them the fraud case against William Ruto; the failure to appeal in time against the decision to quash sections of the report of the Goldenberg commission's report referring to George Saitoti, and prohibiting the Attorney General from pressing criminal charges against Saitoti in the Goldenberg affair.

Most tellingly, the intervention of the ICC in Kenya is the ultimate indictment of Kenya's judicial and prosecutorial services. What more does the COIC need to consider arriving at the conclusion that very few, if any, individuals, who have been involved in the leadership of these institutions to date is qualified to lead them into the new dispensation? Promises of reform failed to convince the Pre-Trial chamber of the ICC, why should they convince us?

6) Mr. Tobiko's readiness to own his failures

Mr. Tobiko responds to the above criticism by laying blame either at the police's door or the Attorney General's or others. Thus he claims that it was the Attorney General and not he, who presided over the shambolic state of affairs in the prosecutorial services; it is the police, and not he, who failed to produce key witnesses in the Ruto fraud case and others. Mr. Tobiko is shirking his moral and professional responsibility. Passing the buck between institutions has for too long been used to hoodwink Kenyans. It should be a tactic of the past, those who use it belong to the past.

In conclusion, the committee must find that the selection of the shortlist of persons for appointment as DPP was carried out with so much opacity that it cannot be relied on to produce the country's next DPP.

The selected candidate, Keriako Tobiko, suffers too many moral and professional afflictions to be relied on as the next DPP, and cannot therefore be confirmed to this office.