



Africa Centre for Open Governance
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Hon Kenneth Marende,
Speaker of the National Assembly
Parliament Building
P. O. Box 41842-00100
Nairobi
Kenya

20 May 2011

Dear Sir,

Re: NOMINATION OF KERIAKO TOBIKO AS DIRECTOR OF PUBLIC PROSECUTION

The Africa Centre for Open Governance (AfricOG), on behalf of Kenyans for Peace with Truth and Justice¹, would herewith like to appeal for your assistance in addressing the issue of the nomination of Mr. Keriako Tobiko as the country's first Director of Public Prosecution (DPP) under the new constitution.

The constitution offers Kenya a fundamental opportunity to break away from a past characterised by impunity, corruption and abuse of power. The office of DPP is central to this endeavour. However, neither the nominee, nor the manner of his nomination, can provide Kenyans with the confidence that he represents anything other than the continuity of the old order. The sub-standard performance of the prosecutorial services to date is a clear indictment of Mr. Tobiko's suitability for this post. Kenya's dismal record of lack of meaningful action against corruption has continued under his tenure. Nothing indicates that his performance would improve with the greater powers granted by the new constitution.

Given the opacity of the process of appointment, Kenyans do not know or understand the basis of this decision. The nomination panel's methods stand in stark contrast to those of the Judicial Service Commission, which conducted its proceedings transparently and thus allowed the public to form an opinion on the quality of the candidates for these high public offices. There has been no application of key constitutional values such as transparency, participation and probity in leadership to the process of nominating the DPP. The coupling of the nominations of the Chief Justice and Deputy Chief Justice to that of the DPP is unjustified; the former process evinces everything that the latter lacks. They must thus be considered separately.

¹ KENYANS FOR PEACE WITH TRUTH & JUSTICE, (KPTJ) a coalition of over 30 citizens and organizations working in the human rights, governance and legal areas to address the 2007 elections and the violence that followed them. See www.africog.org for further details.

In our view, the nomination of Mr. Tobiko to this office is ill-advised for many reasons, among them the following:

1. As the Deputy Public Prosecutor in the office of the AG, he was responsible for the prosecution of cases and on various occasions he either performed this role incompetently or in a manner that did not protect the public interest. His success rate as a prosecutor has been unimpressive and the prosecutorial services continue to be marked by poor performance, inaction and lack of capacity.

A key example is the failure to energetically prosecute cases of post-election violence, which has directly led to the intervention of the International Criminal Court in Kenya. Of 156 cases on post election violence brought by February 2009, most related to minor charges such as publishing false rumours and breach of the peace. In the *R vs. Edward Kirui* case, the prosecution failed to build a strong case against a police officer shown on video killing two people. The recent acquittal of Hon. William Ruto on fraud charges was also the direct result of prosecutorial incompetence². The chief magistrate's opinion is unambiguous; the prosecution's inexplicable failure to produce a key witness meant that the prosecution had failed to prove its case.

Mr. Tobiko also bears responsibility in the situation that led to the failure of the office of the Attorney General to file an appeal against the discharge of Hon. George Saitoti from culpability in relation to the Goldenberg scandal of 1990-1993 by delaying the appeal until it was time-barred³.

2. Prof. Yash Ghai⁴, submitted a complaint to the nomination panel describing Mr. Tobiko's conduct as a commissioner in the Constitution of Kenya Review Commission. The letter contains serious allegations, which have been supported by the then secretary to the Constitution of Kenya Review Commission Prof. P L O Lumumba in his book, *The Postponed Promise*⁵. We are concerned that the panel that conducted the interviews for the post of DPP chose to ignore these complaints. Such grave charges should not go unanswered. They must be the object of

² In his ruling, chief magistrate Gilbert Mutembei stated that the failure to produce a key witness led to the failure of the case; "Ms Hellen Njue was the missing link in the prosecutions case and the prosecutions failure to produce Hellen Njue, the then Finance manager of Kenya Pipeline Company, to give her evidence, the prosecution had failed to prove its case and thus the accused Mr. Ruto had no case to answer".

³ AG Vs Hon. Prof. George Saitoti civil application 75 of 2007 In his ruling Alnashir Visram, a judge at the court of appeal stated that "It is now almost exactly four years since the judgment was delivered by the superior court and the parties are nowhere near resolving even the issue of the terms of the order emanating from the judgment. And who is to blame for this grossly inordinate delay? In my view, the applicant. Because of the laxity at his office, the draft order was ignored, and by the time the applicant woke up from his long slumber, it was too late. The order had been sealed. Then, instead of including the sealed order in the record, and possibly including his own form of order in the record, the applicant took steps that precipitated further and indefinite delay, resulting in a situation where I am now being asked to grant an extension for an indefinite period of time."

⁴Article published in The Star newspaper on Tuesday, 17 May 2011 by Yash Pal Ghai "Is Tobiko fit to be Director of Public Prosecutions"

thorough inquiry by Parliament, as must the panel's reasons for choosing to ignore Prof. Ghai's letter.

With this letter, we are respectfully requesting that you bring our concerns to the attention of the committee that will deal with the appointment of the DPP. We would also be grateful for an opportunity to address the committee regarding the issues we have raised.

Yours sincerely,



Gladwell Otieno
Executive Director
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for Kenyans for Peace with Truth and Justice

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