

Assessing Amos Wako's Performance: POISONED LEGACY

August 2011



Africa Centre
for Open Governance

Overview

Amos Sitswila Wako has served as the Attorney General of Kenya (AG) from May 1991 to August 2011. At first he was seen as offering a welcome change from his bumbling predecessor, Matthew Muli, who had led the Kenyan government in the enactment of an amendment that removed the security of tenure of all constitutional offices, including his own¹. The optimism was based on Wako's brilliant credentials; before becoming AG, he had held several influential posts, including that of Secretary General of the African Bar Association (1978-1980) and the first Secretary General of the Inter-African Union of Lawyers. He also served as the chair of the Law Society of Kenya (LSK) and of the Kenyan Section of the International Commission of Jurists (ICJ), of whose global Board he was an active member. He was therefore viewed as having a solid human rights background, which was much needed to counter the country's disastrous international image. However, there were misgivings in some quarters, and a closer look at his record shows that Wako's human rights work focused largely on the prestigious international stage, while he kept "an extremely low profile in matters affecting the fundamental rights

of Kenyans"². In retrospect, Wako's abstention from a 1991 Law Society of Kenya AGM vote calling on the government to abolish detention without trial boded ill for the future.

List of Acronyms

AfriCOG	Africa Centre for Open Governance
AG	Attorney General
CID	Criminal Investigation Department
CIPEV	Commission of Inquiry into the Post Election Violence
DPP	Director of Public Prosecutions
ICC	International Criminal Court
IEACC	Independent Ethics & Anti-Corruption Commission
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
KANU	Kenya African National Union
KTN	Kenya Television Network
KWS	Kenya Wildlife Service
LSK	Law Society of Kenya
NARC	National Rainbow Coalition
PAC	Public Accounts Committee

¹ In moving the debate to remove these constitutional protections, Muli described them as "anachronistic and obnoxious". See Maina Kiai, *The Fallen Angel: A Report on the Performance of Amos Wako in Promoting Human Rights and Democracy as Kenya's Attorney General*, May 28, 1993. Kenya Human Rights Commission, Nairobi, Kenya, p.6.

² Ibid, p. 8.

Former functions and mandate

Under the old constitution, Kenya's Attorney General had security of tenure; he could only be removed from office through a finding of misconduct by a judicial tribunal. He was shielded from the then reigning practice of firing public officials on radio news broadcasts. Furthermore, the constitution insulated him from political pressure from Parliament, the Cabinet and the President. He was thus well placed to protect and advance the rule of law, prosecute serious crimes and protect human rights.

He was also responsible for public prosecution, providing legal advice and legal services to the government on any subject, and representing the government in courts or in any other legal proceedings. He drew up, or advised on contracts, agreements and international legal undertakings by government and scrutinised them for legal and policy soundness.

Under section 26 of the old constitution the AG had plenary powers to start and terminate prosecutions; he could also, under subsection 4, instruct the Commissioner of Police to "investigate any matter" relating "to any offence" or "alleged offence". His powers were mandatory, meaning that the Commissioner

had to obey him.³ The AG therefore had the dual role of being a custodian of the public interest as DPP and a member of the government. The KHRC report, *The Fallen Angel*, asks "How well can someone who is part of the political establishment perform his duties as custodian of the public interest if that interests conflicts with the government's?"⁴ This report will investigate how effectively he managed the tension between the two roles and audit how he used his constitutional powers to promote the rule of law, human rights, democracy and accountable governance in Kenya, which we contend was his highest responsibility. It reviews the 20 year tenure of Amos Wako from his appointment as Attorney General in 1991 to his constitutionally mandated departure from office, on August 27 2011.

An assessment of Amos Wako's performance as Attorney General is necessary if we are to document, learn and implement the necessary lessons at this point in Kenya's history. The struggle to achieve the full promise of Kenya's new constitution hangs in the balance and could fall prey to the poisoned legacy of protection of incompetence, impunity, corruption and massive human rights abuses, if we do not learn from the past.

³ Cf. Maina, Wachira, the *East African Standard*, 28 February 2005.

⁴ Cf. *The Fallen Angel* report p.3 ff.

1. The new powers and functions of the Attorney General

The Constitution of Kenya, 2010, resolves the earlier problem of the Attorney General's dual role by removing the public prosecutorial docket from the office. Instead, this responsibility has been made the preserve of the Director of Public Prosecutions, whose powers and independence have been greatly enhanced.

The Attorney General is, however, still responsible for representing the national government in court or in any other legal proceedings, other than criminal proceedings; and performing any other functions conferred

on the office by an Act of Parliament or by the President.⁵ The Attorney General also has the authority to apply to appear as a friend of the court in any civil proceedings to which the Government is not a party.⁶

Kenya's Attorneys General

Attorney General	Tenure
Charles Njonjo	1963 – 1980
James Karugu	1980 – 1981
Joseph Kamere	1981 – 1983
Matthew Guy Muli	1983 – 1991
Amos S. Wako	1991 – 2011
Prof. Githu Muigai*	2011 –

*Not yet confirmed.

2. Wako's record as the Attorney General

It would be impossible for a person to serve for so long and do nothing good. In 1992, on being appointed AG Amos Wako was instrumental in setting up several task forces on reform. He has been supportive of the Mau Mau case against the British government. He also promoted the passage of the Sexual Offences Bill. He retains influence and respect in certain important arenas such as among the African Members of the Assembly of State Parties to the Rome Statute.

In government, he has been important in empowering his colleagues to engage with critical interlocutors around sensitive issues. There are undoubtedly many other examples. Most recently, his stand against the president's attempt to unilaterally and unconstitutionally

appoint senior judicial officers must also be commended. Sadly, it gave a poignant insight into what might have been had he consistently played such a role throughout his career.

Below, Amos Wako's 20 year performance in office is reviewed and assessed against the expectations and legal requirements entrusted to him as office bearer. Several key cases serve to demonstrate his performance in important areas, in which it had a systemic impact .

2.1 Overseeing the abuse of human rights

Amos Wako was appointed Attorney General at a time when Kenya's reputation for observance of basic human rights was abysmal, with former President Moi's regime using increasingly

⁵ Article 156 (4) of the Constitution of Kenya.

⁶ Article 156 (5).

heavy-handed methods to thwart the emerging opposition to his one-party dictatorship.

One case that came to symbolise this situation was the 1987 killing of Joseph Mbaraka Karanja by police officers. Karanja was a well known rally driver and businessman who was physically abused at the Nyayo House torture cells and eventually died from heavy internal bleeding and open wounds. The police then secretly buried his remains at a public cemetery in Eldoret. The furore arising from the discovery that Karanja had been killed and then secretly buried put the government under sufficient pressure to concede to the demand for an inquest into his death. The inquest dragged on until 1991, and only ended when Wako had become the Attorney General. The magistrate conducting the inquest concluded that "Karanja died like a caged animal as police stood guard over him throughout his dying moments." He concluded that an offence had been committed leading to Karanja's death and ordered that the Attorney General carry out further investigations and prosecute the offender. However, there is no record that any investigation ever took place and there certainly was no prosecution as a result of Karanja's death.

The high profile case of Joseph Mbaraka Karanja was an early test of the new Attorney General's commitment to defending human rights in keeping with his impressive background. He failed completely to rise to the occasion. His failure in the prosecution of egregious human rights abuses, as represented by the Karanja case, set a tone of overall failure by Wako to mount prosecutions in all types of cases, including those related to anti-corruption.

2.1.1 Frustrating the right to fair trial

Soon after the Karanja case, Kenya went through a period of political turmoil, as Moi and his followers mounted a last-ditch resistance to demands for the end of KANU's one party rule. Wako's appointment as Attorney General occurred just as well-publicised rallies by senior KANU politicians were held in the Rift Valley and at the Coast, during which doom was predicted if multiparty politics were ever to be allowed in the country. These rallies set the signal for the extensive so-called ethnic clashes which occurred in 1992.

Following this, the A.G made frequent attempts to frustrate fair trial of various persons that challenged the government. Specifically, he used the colonial strategy of charging accused persons in their original home districts and, in so doing, distancing those that he charged from their legal counsel. Some instances:

- a) **November 1991:** Wako charged pluralist campaigners in their home districts, frustrating their defence efforts and isolating them from their lawyers.
- b) **April 1992:** Wako charged editors and staff of the *Society* magazine with sedition in Mombasa, despite their being arrested in Nairobi. The financial burden of flying to Mombasa every two weeks was mentioned in the case. In the first week of May 1993, publication of the magazine was suspended. On 19th May 1993, Wako dropped the sedition charges.
- c) **May 1993:** Then MP for Molo - Njenga Mungai was charged with incitement to violence. The crime was allegedly committed in Nakuru but he was charged in Kericho, 100 miles away.⁷

⁷ Cf. *The Fallen Angel* report p.9 ff.

Curtailing freedom of expression

Magazines impounded under Wako's tenure

Magazine	Year	Date Impounded
Finance Magazine	1992 1993	May, November, December January, April
The People	1993	14 th , 21 st , 28 th February
Society Magazine	1992 1993	January, June February
Economic Review	1993	February

The Fallen Angel, pp. 12 – 13

2.1.2 Allowing Police Brutality

Police brutality also became a prominent feature of Wako's tenure. In January 1993, police officers launched a coordinated assault in Nairobi that involved the beating of civilians, property destruction and looting. In the same year, the police beat-up civilians participating in a legal religious march led by Muslim and Christian clergy and destroyed 600 kiosks in Nakuru. These actions went unpunished. It was also common for opposition members of parliament to be beaten and later charged in court for various offences. Although Wako had the power to direct the Commissioner of Police to launch an investigation into these human rights violations, he did not do so.

2.2 Compromising the independence of his office

Wako's role as a handmaiden of the ruling party has perhaps been exemplified by the fact that, throughout the one-party era, he was a permanent fixture in the public rallies of the ruling party KANU. Through his presence in KANU meetings, a large number of which were the forum for the most vitriolic hate

Colluding with dictatorship

Following the re-introduction of pluralism, Wako selectively applied the law to help the government eliminate its opposition. Police investigations and prosecutions of opposition leaders were initiated for all manner of "offences" (such as incitement, sedition or breaching the peace). Cases were launched against: Raila Odinga, Njenga Muigai, Njehu Gatabaki, Kenneth Matiba and Haroun Lempaka to name a few. No member of KANU or the government was similarly targeted in spite of some highly inflammatory public statements.

messages against the opponents of the ruling party, Wako displayed the obvious fact that his independent office had been captured by the ruling party and it was no longer possible to protect the public interest where this was in conflict with the wishes of the ruling party.

Upon the advent of multi-party politics, Wako maintained the practice of open companionship with the ruling party. The *Fallen Angel* report recounts how Wako unsuccessfully attempted to "covertly change election laws" which would have given the country less than a month to prepare and conduct the first multiparty elections since 1963.⁸

The conclusion appears justified that a powerful driving force for Wako has been the preservation of his career as Attorney General. This has arguably been achieved by the avoidance of any action that would bring him into collision with the ruling elite to the extent of openly showing his loyalty to them, even when this compromised the image of his office - an independent constitutional office. It should come as no surprise then, that no prosecution followed the well-publicised public rallies that

⁸ Ibid, p. 14

KANU bigwigs held in 1991, during which they predicted that violence would come to Kenya if multi-party politics was ever allowed to take root.

2.3 The Chief Legal Advisor

Giving the government legal advice in local, international, administrative and commercial contractual issues was and is a key responsibility of the AG. In such instances, he was required to provide legal opinions while taking into consideration the financial and technical evaluations provided by the relevant Government departments.

What was to become known as the the Anglo Leasing scandal provides an opportunity to assess Amos Wako's performance of his duties in this important area.

2.3.1 The Anglo Leasing scandal

Anglo Leasing is a series of scandals connected to security related procurement in which the government entered into agreements with fictitious entities, or committed itself to highly disadvantageous contracts for projects ostensibly funded through foreign supplier/credit arrangements. Investigations commencing in 2004 uncovered at least 18 such dubious contracts worth a total of roughly KES 62.6 billion. They were spread across various Government agencies and represented "the equivalent of 20% of the Kenya government's annual gross expenditure", according to the special audit by the Controller and Auditor General presented to the Ministry of Finance and later tabled in Parliament.⁹

This commitment of funds entirely bypassed the government budgetary process, because it was done using debt instruments.

The Public Accounts Committee (PAC) of the National Assembly investigated the contracts and concluded that the 18 companies that signed the contracts appeared related, thus suggesting that the companies were acting in concert. The inter-related nature of the companies with the shared directorships and/or addresses as well as the identical structure of all the contracts in question was evidence of collusion.

All the contracts shared strong secrecy clauses which demanded the observance of confidentiality on the part of the parties, and stipulated that other departments of the government were not authorized to see the contents of the contracts as this may breach the confidentiality. For example, the 2002 contract with Nedermar Technology By Ltd for the supply of the classified, advanced military command (dubbed Project Nexus), provided that the technical specifications would be contained in a separate secret document prohibited to any third parties, including other Government departments. This clause would subsequently be used at the High Court to block investigations into the contract by the Kenya Anti-Corruption Commission (KACC).

The facts show that Wako had, in his role as chief legal advisor of government, offered legal advice to bureaucrats, whom he then turned around and indicted for accepting his advice. Asked for his opinion on the Forensic Laboratories

⁹ Special Audit Report of the Controller and Auditor-General on Finance, Procurement and Implementation of Security Related Projects, April 2006. This report also stated that the DPP, Keriako Tobiko, had acted as legal counsel for one of the accused in the scandal and would therefore not be able to prosecute Anglo Leasing.

contract in August 2001, he concluded that the agreement constituted “legal, valid and binding obligations” that were “enforceable”. In December 2003, he gave similar advice to the Ministry of Home Affairs on the contract for an enhanced immigration and passport control system, declaring 29 promissory notes valued at more than KShs 56.33 billion as “valid, binding and enforceable”. With this, Wako gave Anglo Leasing ghost companies the comfort of a legal opinion that contractually bound Kenyans to pay an illegitimate debt. Despite civil society’s vociferous campaigns, no credible steps were ever taken to protect Kenya against this massive liability¹⁰.

The committee’s findings were damning: Amos Wako was variously described as guilty of “serious negligence”, “negligent in representing his client but keen on paper work to shield himself”. They concluded that “the Attorney General was unable to show that he took adequate steps to ensure that the Agreement signed was favourable to the Government”. As a legal advisor, their opinion of him was that “he was incapable of advising his client adequately”.¹¹

It is astounding that despite government accepting the report, its findings did not result in the instalment of a tribunal to remove Wako from office.

2.4 Failure to prosecute

2.4.1 The Goldenberg scandal

When the Goldenberg scandal was unearthed in 1993, calls for action against the perpetrators

went unheeded. At the commencement of the proceedings of the 2003 Judicial Commission of Inquiry into the Goldenberg Affair, chaired by Justice Samuel Bosire, Wako remarked:

“One can think of no other matter which has engaged the time of all organs of Government - the Executive, the Legislature and the Judiciary, as much as the ‘Goldenberg Affair’ has. Nothing in the public perception has come to epitomise corruption as the ‘Goldenberg Affair’...The ‘Goldenberg Affair’ became, in the words of that British dramatist and novelist, Dodd Smith, ‘the dear octopus, whose tentacles we never quite escape’.”¹²

Apart from the overblown rhetoric, this remark is interesting because Wako conveyed a clear recognition of the sheer magnitude and gravity of the Goldenberg scam.. However this understanding is not reflected in any meaningful action by Wako to prosecute those behind it.

On the contrary, despite the identification of perpetrators and subsequent exposure of the scam, he did nothing to bring cases against those involved in the scam.¹³ The Commission noted that:

“The records were always available in the various government offices for all to see. But, interestingly, we did not receive any evidence to show that the Attorney General moved to order police investigations into the affair.”¹⁴

¹⁰ See for instance “27 CSOs demand immediate action on promissory notes” at <http://marsgroupkenya.org>, May 5th 2007.

¹¹ Report of the Public Accounts Committee on the Government of Kenya Accounts for the Year 2006/2007.

¹² Appendix D of the Commission’s Report.

¹³ Report of the Judicial Commission of Inquiry into the Goldenberg Affair, AfriCOG, All that Glitters? An Appraisal of the Goldenberg Report, available on www.africog.org

¹⁴ Para. 761

In fact, the investigations conducted by the police were not upon direction of the Attorney General - who had a constitutional mandate to do so - but upon the direction of Mr. Cheserem, the Governor of the Commercial Bank of Kenya. Even then, the Commission found that “the investigations and consequent prosecutions were selective”¹⁵

2.4.1.1 Deliberate incompetence?

Besides Wako’s lack of commitment to pursue prosecution of the implicated Goldenberg perpetrators, there seems to have been intentional mishandling of those cases that did eventually go to court resulting in numerous halting and recommencements of proceedings.¹⁶ The Bosire Commission found that the Attorney General’s office had ‘proceeded with the cases in the most haphazard and lethargic fashion’¹⁷. For reasons known only to himself, Amos Wako elected to bring a multiplicity of cases¹⁸ against the same accused persons and determine which cases were withdrawn, consolidated and otherwise terminated. Wako also determined which cases would be instituted afresh consequently ‘creating needless delays through the chaotic situation caused by these many cases’¹⁹, which resulted in a ‘pointless merry-go-round’.²⁰

The muddle created by the Attorney General’s office is highly suggestive of deliberate mischief aimed at sabotaging or scuttling any serious

prosecution. The immediate consequence of the delays and multiplicity of suits was the increase in judicial review proceedings at the High Court, in which Mr. Pattni and his co-accused persons complained that the prosecutions were prejudicial to them and infringed on their constitutional rights.²¹

“All these left the Commission grappling with the question of whether the mess at the State Law Office was the product of design or coincidence; whether it was the manifestation of sheer negligence and inattention or part of an orchestrated cover-up intended to aid and abet the culprits of the ‘Goldenberg Affair’ or to subvert the cause of justice.”²²

2.4.2 Unwillingness to prosecute Anglo Leasing

Wako’s inability or unwillingness to prosecute has also been manifest in respect to the Anglo leasing Scandal, which continues to cost Kenya billions.

His inaction in the face of evidence of the scam and the perpetrators of the scam forced the Law Society of Kenya to go to court in 2005 and file criminal proceedings against him.

In 2006, KACC forwarded 12 case files on Musalia Mudavadi and former Cabinet ministers Chris Murungaru (Transport and Internal Security), David Mwiraria (Finance) and Chris Obure and a number of other former government officials, implicated in the Anglo leasing scandal with

¹⁵ Para. 765

¹⁶ AfriCOG, *All that Glitters? An Appraisal of the Goldenberg Report*, available on www.africog.org

¹⁷ Para. 773

¹⁸ The AG promised action on Goldenberg in 1992, but when several years later he finally indicted the Goldenberg principals, he ignored the then DPP’s advice and filed excessive charges, starting with 48 counts, then ratcheting them up to 98, which inevitably led to their rejection in July 1997 as prejudicial to the accused.

¹⁹ Para. 777

²⁰ Para. 778

²¹ Para. 779

²² AfriCOG “*All that Glitters? An Appraisal of the Goldenberg Report*” http://www.africog.org/reports/Goldenberg_Report.pdf

the recommendation to prosecute. Wako sent all 12 files back to KACC asking for further investigations to be done before the cases were resubmitted to the Attorney General's office for prosecution. This sparked a furious exchange between Wako and the KACC chief Ringera. Rather than pursuing the political principals, Wako indicted civil servants for crimes arising from presumptively illegal Anglo Leasing contracts. Curiously, the bureaucrats had signed these contracts on the advice of the Attorney General.

2.5 Defeating public interest litigation

Frustrated by Wako's failure to prosecute major cases other parties sought to institute public interest cases to enforce accountability on those adversely implicated in Goldenberg. In 1993, the LSK drafted criminal charges against the Goldenberg masterminds and sought court permission to file the indictment. Wako later applied to be enjoined as *amicus curiae* (friend of the Court). In 1995, however, he then opposed it on the grounds that the LSK had no legal standing to file charges, that it was acting outside the Law Society of Kenya Act and that the charges were incurably faulty. The chief magistrate agreed with the AG arguments and the prosecution was terminated.

In 1995, Raila Odinga filed another private suit against the former finance minister - George Saitoti and others. In the suit, it was alleged that Saitoti had facilitated fraud when he authorised the fraudulent payment of up to KES 18 billion in export compensation for goods never exported and at 15 per cent higher than the legal rate. Before Saitoti could appear before

the court, Wako quashed the case by entering a *nolle prosequi*²³.

Again, in 2005, the LSK filed 12 charges against Wako. The LSK accused him of wrongly advising the government to pay the Anglo Leasing and Finance Company when he knew, or ought to have known, that the company did not exist. Predictably, Wako terminated the LSK's bid to prosecute him – by having the Director of Public Prosecutions (DPP) Keriako Tobiko enter a *nolle prosequi* in the case - arguing bluntly that it was within his power to terminate the suit.

2.6 Passing the buck

The relationship between the Attorney General and the Kenya Anti Corruption Commission (KACC) has been characterised by frequent public recrimination and buck-passing over inadequate investigations and prosecutorial inaction. The result has been an unproductive relationship between the two, marked by repetitive public spats and the stalling of the fight against corruption.

The liaison with the police has also been characterised by mutual blame games. For example, the AG was put to task before Justice Waki's Commission of Inquiry into the Post Election Violence (CIPEV), on the poor law enforcement record against perpetrators of electoral violence over the years. Wako was accused of protecting political impunity through his consistent failure to implement the recommendations of several inquiries into electoral violence to prosecute probable culprits identified.

²³ The authority to discontinue a criminal case in court at any stage before judgment, without having to give any reasons or to seek the permission of the court in order to do so.

2.6.1 Institutional “pata potea”²⁴

The Attorney General took the commission through a routine that had been perfected between his office and that of the Director of the Criminal Investigations Department (CID). As part of this sham, Wako would write to the CID directing them, under the Constitution, to commence investigations in relation to a given incident. The CID would either ignore the directives or would report back to the Attorney General, after considerable delay, lamenting about the difficulties that had frustrated them in their attempts to investigate the case as directed.

Wako apparently considered his responsibility to be discharged each time he wrote a letter requiring an investigation to be conducted, and claimed that he had no power to enforce compliance against the police.

Responding to the AG’s claim that he had no power to enforce directives to the police, the Commission stated:

“In passing, we express our doubts about the impotence expressed by the Attorney General in enforcing the directives given to the Commissioner of Police. As stated earlier, the Constitution makes it mandatory for the Commissioner to comply, and the consequences of breach should be obvious.”

In other words the AG’s inaction constituted a grave dereliction of his duties.

2.7. Manipulating the *nolle prosequi*

Under the old constitution, The Attorney General was vested with authority to take over

any criminal case which had been started by another authority. In taking over such a case, the Attorney General could decide to discontinue the prosecution of the case at any time before judgement. The Attorney General also had the power to discontinue the prosecution of any case that he may have instituted in court, provided that it was done before judgement.

The authority to discontinue a criminal case in court at any stage before judgment, without having to give any reasons or to seek the permission of the court in order to do so was exclusive to the Attorney General. This power is known as *nolle prosequi* and became a defining feature of Wako’s 20 year tenure. Wako used the *nolle prosequi* to executively acquit several prominent persons in the country and in so doing shield them from justice. They include:

- a) **First Lady Lucy Kibaki:** In 2005, Wako entered a *nolle prosequi* terminating an assault suit brought by former KTN cameraman Clifford Derrick against the First Lady after he was slapped on nationwide TV and his camera broken.
- b) **Tom Cholmondeley:** In 2005, Wako again wielded the *nolle prosequi* to terminate the case against Cholmondeley, who was accused of murdering Kenya Wildlife Service (KWS) Warden Simon ole Sisina, before the case was taken to court.
- c) **Amos Wako:** In 2005, Wako entered a *nolle prosequi* in a private prosecution instituted against him by the Law Society of Kenya in relation to the Anglo Leasing scandal.

²⁴ Pata potea (literally “to get and to lose”) is a card game of deception commonly played on the street, with the aim of fleecing passersby of their money. It is similar to the “shell game”.

- d) **Wanjuki Muchemi:** In 2008, Wako entered a *nolle prosequi* and terminated any further proceedings against the then Solicitor General who had been charged with abuse of office.
- e) **Maina Njenga:** The leader of the outlawed Mungiki Sect was facing charges relating to the Mathira massacre in which 29 people were hacked to death by suspected *Mungiki* members on May 2009. Wako entered a *nolle prosequi* shortly after Njenga threatened to expose senior government officials' dealings with *Mungiki*.

2.8 Wako: "The embodiment of impunity"

Electoral violence in Kenya is not a new phenomenon. This form of violence has been a mainstay of competitive Kenyan politics since independence in 1963. When multipartyism was reintroduced into the country in 1992, after a 23 year period of single partyism, incidents of electoral violence increased dramatically. To varying degrees, violence in the form of confinement, battery, torture, arson, looting, rape, sexual harassment, hate speech, political thuggery, destruction and damage of property, eviction/displacement, closure of campaign offices or premises and the violent or physical disruption of public meetings and campaign rallies accompanied the 1992, 1997, 2002, and 2007 general elections.

The manipulation of ethnicity has been the main feature of Kenyan politics. Ethnic balkanization has been employed by politicians during election periods to enhance their chances of political victory or survival. This has been a significant driver of conflict in the country around election

time, culminating in the violence that followed the 2007 general elections.

The Kiliku Committee, the Law Society of Kenya and the Judicial Commission of Inquiry into the tribal clashes popularly referred to as "the Akiwumi Commission" released reports that castigated Wako's handling of perpetrators of ethnic violence that was orchestrated between 1991 and 1993. The reports recommended the prosecution of suspects named and looked to the A.G for these prosecutions to be instituted and successfully completed.

To this day, no person has ever been prosecuted for organising the "ethnic clashes" of 1992 and those of 1997 despite the Criminal Investigation Department forwarding cases to the AG for prosecution. The immunity enjoyed by these individuals meant that those peddling ethnic hatred and violence were emboldened.

The Waki Commission report was particularly critical of Wako and the role he played in the post election violence of 2008. It noted that in his tenure as AG, his failure to prosecute those who had previously incited others to violence had led to a series of events that culminated in the post election violence of 2008 and the intervention of the ICC.

Waki states the following in respect of the AG's ineffective handling of these cases;

"The same process of investigation in respect of the Kiliku Report and the report prepared by the Standing Committee was no different... The Attorney-General would make the request under S.26 of the Constitution and the Police investigators would dutifully report on the lack of evidence and difficulties associated with

collection of it....In the end, the Attorney-General testified that he had done all he could within his powers to fight impunity.”²⁵

“In view of the lack of any visible prosecution against perpetrators of politically related violence, the perception has pervaded for some time now that the Attorney-General cannot act effectively or at all to deal with such perpetrators and this, in our view, has promoted the sense of impunity and emboldened those who peddled their trade of violence during the election periods, to continue doing so.”²⁶

Wako’s role in the post election violence of 2008 was further highlighted and criticized by the UN Special Rapporteur on extrajudicial killings or summary executions Mission to Kenya, Prof. Philip Alston, in 2009. In a press release, Alston noted that:

“[Wako] has presided for a great many years over a system that is clearly bankrupt in relation to dealing with police killings and has done nothing to ensure that the system is reformed. Public statements lamenting the system’s shortcomings have been utterly unsupported by any real action. In brief, Mr. Wako is the embodiment in Kenya of the phenomenon of impunity.”

In closing, Prof Alston stated categorically that Wako’s resignation was an essential first step to restoring the integrity of the AG’s Office

2.8.1 Frustrating accountability for post-election violence

Under section 26 (4) of the old constitution, the Attorney General had the power to instruct

the Commissioner of Police to investigate any matter relating to any offence or alleged offence. Wako’s inaction in prosecuting persons mainly responsible for the 2008 post election violence ultimately led to the International Criminal Court (ICC) intervention in Kenya. The few prosecutions that did take place largely targeted the “small fry”.

In March 2011, Kenya challenged the admissibility of the cases in the ICC, claiming that judicial and constitutional reforms had been enacted and that the country was capable of investigating and prosecuting the perpetrators of the 2007 post-election violence locally. The submission against the ICC’s admissibility could only have succeeded if the same persons accused were facing similar charges in local courts at the time of the challenge.

The state sought to show that efforts had been made to have the cases of those suspects identified tried in Kenya. One of the efforts cited was that the AG had written a letter to the Commissioner of Police instructing him to investigate and determine the identities of those who masterminded the post-election violence of 2007/2008. The letter in question, however, was only written a day before the government filed the case in the ICC Trial Chamber challenging the admissibility of the cases before the Chamber. The challenge failed. The ICC found that at the time of the Attorney General Amos Wako’s letter of April 14 2011 to the Commissioner of Police, no investigation into the six suspects²⁷ was underway.

²⁵ Page 452

²⁶ Page 453

²⁷ The 2008 violence left some 1,300 dead and displaced over half a million people. The suspects are Deputy Prime Minister and Finance Minister Uhuru Kenyatta, Head of Public Service and Secretary to the Cabinet Francis Muthaura, former Police Commissioner and current CEO of the Postal Corporation of Kenya, Mohamed Hussein Ali, former Higher Education Minister William Ruto, former Industrialisation Minister Henry Kosgey and radio presenter Joshua arap Sang.

2.9 Ineptitude and laxity

In 2006, George Saitoti successfully applied for and obtained the following orders:

1. An order of *certiorari* to remove into the High Court the Report of the Judicial Commission of Inquiry into the Goldenberg Affair and to quash the findings, remarks, decisions therein relating to Prof. George Saitoti;
2. An order of Prohibition directed to the Attorney-General and/or any other person prohibiting the filing and prosecution of criminal charges against Prof. George Saitoti in respect of the Goldenberg Affair pursuant to the Judicial Commission of Inquiry into the Goldenberg Affair

Following the orders, Wako promised that an appeal would be made against the decision. However, no appeal was ever filed. The clearance of Saitoti has since opened floodgates for similar appeals. For instance, former Governor of the Central Bank of Kenya, Eric Kotut's similar application was successful. Wilfred Koinange, the Permanent Secretary to the Treasury with whom the Goldenberg Commission blamed for the fraudulent payment of KES 5.8 billion to the Goldenberg owners, is apparently also set to be cleared by the Judiciary.

Inaction on the part of Wako and the DPP, Keriako Tobiko²⁸, in appealing the clearance

of Saitoti has emboldened these spurious challenges, which have effectively put an end to efforts to establish accountability in relation to the Goldenberg scandal.

2.9.1 Administrative incompetence

In a further show of ineptitude, Wako has somehow managed to undermine the State's case against MP Henry Kosgey, charged with abuse of office in 2011 for allegedly allowing three individuals and three companies to import 113 vehicles that were more than eight-years-old contrary to Kenya Standards Code of Practice for Inspection of Road Vehicles.

Kosgey's defense team is challenging the legal authority of Special Prosecutor Patrick Kiage to prosecute him. In their application, Kosgey's lawyers argue that Kiage's contract had expired at the time of prosecuting their client and that the AG, on whose behalf he prosecuted the case, neither renewed his contract nor substituted him with an officer with a valid contract.

Kosgey contends that Wako appointed Kiage for a period of one year, and that, since no further term was gazetted, the proceedings against him should be declared a nullity. Most worrying is that this show of ineptitude puts all cases handled by Special Prosecutor Kiage after February 14th 2008 in danger of being challenged.

²⁸ DPP, Tobiko failed to lodge the appeal in time resulting in the ruling in favour of Saitoti. AG v Hon. Prof. George Saitoti civil application 75 of 2007. Justice Alnashir Visram, noted the following with respect to the delay: "And who is to blame for this grossly inordinate delay? In my view, the applicant. Because of the laxity the draft order was ignored, and by the time the applicant woke up from his deep slumber, it was too late."

3. Conclusion: Poisoned legacy

Amos Wako has been the Attorney General of Kenya for 20 years. Under his watch, the credibility of the office of the Attorney General has been destroyed, as a result of his complete failure to exercise authority in a way that imposes on the Kenyan political system the values for which the office was first established. In design, the office of the Attorney General was conceived as a high-level independent and prestigious office which the executive and other organs of the state should have a healthy regard for. Unfortunately, Wako turned the office into an extension of the presidency and, at times, of the ruling clique or party.

Wako has persisted in interpreting his important constitutional role in perfunctory and minimalist terms. Given the rather clerical manner in which Wako carried out his functions, it is not surprising that he has been ignored by those over whom the Constitution gave him policy oversight.

Wako has, by his sins of omission and commission, inflicted untold damage on the rule of law and on the entire justice sector. Through his failure to pursue accountability for repeated cycles of electoral violence, he contributed significantly to the occurrence of Kenya's worst human rights crisis, the 2008 post-election violence. This failure, which he no doubt shares with the political leadership, resulted in Kenya being put in the international dock for crimes against humanity.

He has presided over a barren anti-corruption regime. As shown above, the Goldenberg scandal was already in full bloom when Wako became the country's Attorney General in 1991. It is now known that Goldenberg was a high-level conspiracy in the government to loot public funds, ostensibly to support KANU in retaining power in the context of multi-party politics. Here, Wako proactively intervened to prevent independent action against those culprits.

In the Anglo Leasing scandal Wako was an integral player, providing legal advice on the design of the contracts, which turned out to be fraudulent. In the Nedermar case, involving one of the Anglo Leasing companies, the High Court pointed out the conflictual position in which the prosecution of the Anglo Leasing scandal places Wako. He consistently placed the interests of shadowy foreign operatives and the political elite above those of the majority of the citizens of Kenya.

The haggling over whether prosecutorial powers should be granted to KACC, and now the Independent Ethics and Anti-Corruption Commission, is a direct result of Wako's failure to do his job in prosecuting corruption. Kenyans wanted these powers granted to the Commission because they are disgusted with the institutionalised impunity that has prevailed during Wako's tenure, a matter for which he was justly condemned in both the Waki commission and the UN Special Rapporteur on Extra-Judicial Killings.

As Amos Wako exits the national stage he leaves behind him a pernicious legacy:

- a) The incoming AG, even with a narrower ambit of responsibilities under the new Constitution, will have an uphill battle to restore the shattered credibility of this office. He will have to work hard with his counterparts and colleagues in the judicial sector to restore the rule of law and improve coordination. He will also have to play his part in pushing faithful implementation of the constitution. He must resolve the crunch caused by the delay in passing constitutional bills through the Cabinet and help to sharpen the quality of these hurriedly drafted and debated laws.
- b) The creation of a strong independent office of the DPP under the new constitution provides an opportunity to move away from the negative past. Unfortunately, the waters were muddied by the opaque process of nomination of the DPP²⁹, in which Wako played an important role.

As seen above, his name has already come up with regard to prosecutorial incompetence in the exculpation of George Saitoti and a conflict of interest on Anglo Leasing. However, Kenyans must continue pressing for the now autonomous and constitutionally empowered office of the DPP to do its job. This will include pursuing accountability for the abuses and scandals listed in this report.

It has taken 18 years to implement the recommendations made in the *Fallen Angel* report to separate the prosecutorial and advisory responsibilities of the office of the Attorney General. In this time, rather than confronting the failures of this office head on, resources have been wasted in the search for institutional and legal shortcuts. As this report documents, Amos Wako bears a great share of responsibility for this state of affairs. However, as citizens, we must accept our responsibility for ensuring that the promise of the new constitution is fulfilled.

... a closer look at his record shows that Wako's human rights work focused largely on the prestigious international stage, while he kept "an extremely low profile in matters affecting the fundamental rights of Kenyans".

"Amos Wako: The Fallen Angel" (KHRC, 1993)

²⁹ During the vetting process serious allegations were made by the public with regards to Mr. Tobiko's integrity and performance. These issues were never clarified prior to his appointment, and there is no indication that they are being investigated.

About AfriCOG

Africa Centre for Open Governance (AfriCOG) is a civil society organisation dedicated to addressing the structural and institutional causes of corruption and bad governance in Kenya.

AfriCOG is grateful to the UNDP Amkeni Wakenya programme for its support which made the production of this report possible. AfriCOG also thanks the Open Society Initiative for East Africa for its continued support to our work. However, the opinions expressed in the report are those of AfriCOG alone.

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