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IN THIS ISSUE

7 History will not be whitewashed: Justice Omondi Tunya and the judiciary's authoritarian past

14 A farewell in excellence: celebrating Miracle Okoth Okumu Mudeyi's journey to Yale Yale Law School

16 Is Sifuna the next President of the Republic of Kenya? Inside the making of a candidacy that has turned rallies into referenda on justice, power and the promise of Canaan

27 Is the Ol Kalou By-Election a dress rehearsal for 2027 or a warning Kenya cannot ignore?

29 Recovering its prophetic voice

33 No African should be a stranger in Africa

35 When a nation learns to stay home: The unfinished lesson of Saba Saba

40 The Judicial Service Commission as a Constitutional Hinge: Independence, Accountability and Judicial Governance in Kenya

58 The effectiveness of the African Court on Human and Peoples' Rights: Twenty years on and its contribution to International Criminal Justice

79 Impeachment without legality: Fair trial rights and the collapse of constitutional enforcement

103 The unpredictable rising cost of compliance

105 The governance illusion: When boardroom oversight masks organisational rot

108 Harmful cultural practices and their impacts on women and their children outside marriage: A study of the Gabra community

116 Budgeting for a just transition: Climate justice, fiscal reform, and the politics of preparedness in Kenya's FY 2026/27 budget

142 Breaking the culture of silence

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EDITORIAL

History will not be whitewashed: Justice Omondi Tunya and the judiciary's authoritarian past

There are moments when a nation must pause before accepting the official version of its history. The death of a judicial officer is ordinarily an occasion for mourning, reflection and respect for the family of the deceased. But mourning must not become historical amnesia. Nor should institutional condolences become an occasion for rewriting the past. When the Chief Justice speaks on behalf of the Judiciary, her words carry particular institutional weight. They therefore deserve to be examined not merely as words of condolence, but against the historical record of the institution she leads.

Chief Justice Martha Koome has recently described the late retired Justice Godfrey Omondi Tunya as a distinguished jurist whose decades of service helped strengthen Kenya's administration of justice and uphold the rule of law in her obituary upon his death. She has praised his diligence, integrity and commitment to justice and suggested that his contribution forms part of the Judiciary's enduring legacy. That is a generous institutional tribute. It is also an incomplete account of history.

Justice Omondi Tunya was undeniably part of Kenya's judicial establishment for decades. He rose through the magistracy, became Nairobi Chief Magistrate in 1990 and subsequently served on the High Court. But the relevant question for history is not simply how long a judicial officer served. The more

Justice Omondi Tunya

difficult question is what the institution did with the immense power entrusted to it at the precise moment when the country needed judicial courage most.

Justice Tunya's professional life intersected with one of the darkest periods in Kenya's constitutional history: the authoritarian one-party state under President Daniel arap Moi. During the 1980s and early 1990s, the Judiciary operated in an environment in which political dissent was criminalised, critics were detained, publications were banned and allegations of torture and mistreatment of political detainees were widespread. Justice Tunya was not an observer standing outside that system. He occupied an important judicial position within it.

That distinction matters.

The Judiciary does not become historically neutral merely because its officers act under the language of statutes. Authoritarianism rarely operates exclusively through the police, intelligence services or executive decrees. It also requires institutions capable of converting executive power into apparently lawful outcomes. Courts can become barriers to authoritarianism; but they can also become instruments through which authoritarian power acquires the appearance of legality.That is the uncomfortable lesson that the story of Justice Tunya raises.

Contemporary accounts of his career confirm that he presided over politically sensitive cases involving suspected members of the underground Mwakenya movement during the Moi era. Other historical accounts describe a system in which persons accused of political offences were arrested, subjected to serious mistreatment and subsequently brought before courts, sometimes in circumstances in which their ability to obtain meaningful legal representation or challenge the circumstances of their detention was severely constrained. Amnesty International's reporting from the period specifically identified cases involving political detainees and recorded that allegations of torture were commonly dismissed without investigation. It also identified the then Chief Magistrate, Omondi Tunya, as the judicial officer before whom a number of such cases were heard.

Those facts cannot simply be erased because a judicial officer has died.

Nor can they be rendered irrelevant by the proposition that judges of that period operated under the laws then in force. Law is never merely the text of a statute. It is also the manner in which power is interpreted, constrained and applied. The most important question for a judge confronted with an authoritarian State is not whether the State has produced a legal instrument, but whether the judicial institution will permit law to become an instrument of repression.

Kenya's authoritarian past was sustained by many actors. It was sustained by political leaders, security agencies, prosecutors, administrators, legislators and, at critical moments, elements within the legal system. It is in that broader institutional sense that Justice Tunya belongs to Kenya's authoritarian past. So too, in different ways and in different circumstances, did judicial officers and institutional actors such as William Kipsiro Tuiyot and Norbury Dugdale become associated with difficult chapters in the history of Kenya's relationship between judicial power and executive authority. Their individual histories must of course be assessed on their own records. But the larger point is incontrovertible: authoritarianism does not survive through executive power alone. It requires institutional enablers.

Norbury Dugdale provides perhaps the clearest documented illustration. In 1989, he ruled that the courts had no power to enforce the constitutional Bill of Rights. Contemporary United States State Department reporting described the decision as effectively reinforcing executive influence over the judiciary. Later constitutional scholarship has similarly identified Dugdale's decision as emblematic of the subordination of judicial power during the one-party era.

Gitobu Imanyara

That is precisely why the history of judges matters.

The judiciary is not judged only by the number of cases it disposes of, the years its officers serve, or the elegance of their judgments. It is judged most severely by what it does when the State is powerful and the individual is powerless.

That is why the story of Gitobu Imanyara cannot be forgotten.

In March 1991, Imanyara, then editor and publisher of the Nairobi Law Monthly, was arrested and charged with sedition in connection with the publication of an editorial. Amnesty International documented his arrest and subsequent appearance before Nairobi's Chief Magistrate, Omondi Tunya. The organisation reported that Imanyara was refused bail by Tunya, never mind the fact that Mr. Imanyara was in visible bad shape after having endured torture in the hands of state operatives.

For those who lived through that period, the matter was not an ordinary criminal proceeding divorced from politics. It was part of a broader struggle over whether Kenyans would remain subjects of an authoritarian political order or become citizens entitled to participate freely in determining their country's political destiny.

The account preserved by those who were present and involved in the democratic struggle is even more painful. Imanyara was brought before court after being subjected to severe physical mistreatment. The recollection is that he appeared before the court beaten, bruised, bleeding and visibly broken, yet the judicial response was not compassion or protection but incarceration.

History should ask the obvious question: what does justice mean when a human being arrives before a court in such circumstances?

A court is not merely a room in which charges are read. A judge is not merely an administrator of files. The judicial officer is the constitutional guardian of the individual standing before the coercive machinery of the State. When that individual bears visible signs of mistreatment, the first duty of a conscientious judicial officer should be to ask what happened, whether the person's rights have been violated and whether the machinery of justice itself is being abused.

That is the moral dimension of judging. And it is precisely this dimension that is lost when institutional history is reduced to a list of promotions, appointments and years of service.

The Chief Justice's tribute therefore requires a counterpoint. It is possible to acknowledge that Justice Tunya served for decades and simultaneously acknowledge that parts of his judicial career belong to a deeply troubling period in Kenya's history. It is possible to extend sympathy to his family without sanctifying his professional record. It is possible to respect the dead without requiring the living to forget what happened to victims of authoritarianism.

Indeed, that is what a mature constitutional democracy ought to do.

We should not confuse civility with sanitisation.

Kenya's democratic transformation did not occur because the institutions of the old order suddenly discovered constitutional virtue. It occurred because citizens challenged authoritarianism. Lawyers defended political prisoners. Journalists published what governments did not want published. Students protested. Academics resisted. Religious leaders spoke. Civil society organised. Political detainees endured detention. Victims and survivors kept memories alive. And ordinary Kenyans demanded a different constitutional order.

The people who fought for that transformation deserve at least as much remembrance as those who occupied the institutions of power during the authoritarian years.

This is why the story of Imanyara matters. His ordeal was not simply the personal misfortune of one lawyer and publisher. It represented the broader struggle over whether the State could criminalise dissent and whether the courts would protect those who challenged it.

The Nairobi Law Monthly itself became an important vehicle for democratic debate. Its publisher was prosecuted under laws that had become instruments for controlling political expression. Amnesty International's contemporary documentation shows that Imanyara's prosecution occurred within a wider pattern of repression against political opponents and advocates of multiparty democracy.

That history should trouble every judge who takes the oath of office today.

It should trouble them because authoritarianism is never announced in advance as authoritarianism. It arrives wrapped in the language of national security, public order, stability, legality and institutional discipline. It asks judges to treat exceptional measures as ordinary law. It asks courts to defer. It asks judicial officers to close their eyes to the context surrounding a case and concentrate narrowly on technicalities.

And that is how constitutional democracy begins to die.
The lesson of Kenya's past is therefore not simply that judges must know the law. They must know the historical consequences of how the law is used.

Today's judges operate under a profoundly different constitutional order. The Constitution of Kenya, 2010 places human dignity, equality, freedom, constitutionalism, accountability and the rule of law at the centre of the Republic. Judicial authority is exercised as a trust. The Judiciary is no longer constitutionally conceived as a subordinate administrative arm of government. The Bill of Rights is directly enforceable. Courts possess explicit authority to invalidate unconstitutional State action.

But constitutional text alone cannot guarantee constitutionalism.

Judges must make constitutionalism real.

That requires courage.

It requires a judge to recognise when the State is using ordinary law for extraordinary repression. It requires a judge to see the person behind the file. It requires a judge to question unexplained detention, suspicious evidence, coerced confessions and unexplained injuries. It requires a judge to resist the temptation to regard the government as inherently credible merely because it is the government.

Above all, it requires judges to understand that judicial independence is meaningless unless it produces judicial courage.This is why the Tunya story should not be reduced to a question of whether he was personally a good or bad man. That is not the appropriate historical inquiry. The question is institutional: what did the Judiciary do when Kenya's citizens needed it to stand between them and an increasingly authoritarian State?

There will always be attempts to construct institutional memory as a sequence of achievements. Governments do it. Political parties do it. Corporations do it. Institutions do it. The uncomfortable episodes are softened, inconvenient names disappear, victims become footnotes and official language takes the place of historical memory.

But Kenya's democratic history cannot be written exclusively by institutions about themselves.

The victims have a voice.

The prisoners have a voice.

The journalists have a voice.

The lawyers who defended them have a voice.

The families who waited outside detention centres have a voice.

And those who survived the authoritarian years have a right to tell the country what happened.

History will not be whitewashed simply because those who occupied positions of power are later described in ceremonial language.

Nor should the Judiciary be afraid of its own history. A confident institution does not need to pretend that every chapter of its past was honourable. Indeed, the strongest institutions are those capable of admitting failure, learning from it and ensuring that it is never repeated.

The problem with an uncritical institutional eulogy is not that it honours the dead. The problem is that it teaches the living the wrong lesson.

If the message conveyed to today's judges is that decades of service automatically become a legacy of strengthening the rule of law, regardless of the circumstances in which judicial power was exercised, then we risk teaching precisely the lesson that constitutional democracy cannot afford.

The correct lesson is the opposite.

The lesson of Justice Tunya's era is that a judge can be professionally successful and historically wrong.

A judge can rise through every institutional rank and still leave behind uncomfortable questions. A judge can administer the law faithfully and yet contribute to a system in which the law itself has become an instrument of repression. A judge can be remembered with affection by colleagues and still be remembered painfully by those who appeared before his court.

These contradictions are not disrespectful to history. They are history.

And they are precisely why judges today must strive to be on the right side of history.

Every generation of judges eventually faces its own test. For the judges of the 1980s and early 1990s, the test was whether the Judiciary would stand against the authoritarian machinery of the one-party State. For today's judges, the tests may look different, but the underlying constitutional question is the same: when power collides with liberty, where will the Judiciary stand?

When a protester is arrested, will the court see merely a charge sheet or a citizen exercising constitutional freedoms?

When a journalist is prosecuted, will the court see merely a statutory offence or the broader implications for freedom of expression?

When a person appears before court bearing signs of mistreatment, will the court simply process the file or demand accountability?

When the government invokes national security, will the court simply defer or insist that constitutional rights remain meaningful?

When politically powerful litigants appear before the court, will justice remain blind to status, influence and proximity to power?

Those are the questions that determine whether a judiciary is truly independent.

Chief Justice Koome is therefore right about one thing: institutional memory matters. But institutional memory must include the uncomfortable chapters. The history of the Kenyan Judiciary cannot be a celebration of institutional longevity without a reckoning with institutional failure.

Justice Omondi Tunya's life can be mourned. His family can be comforted. His colleagues can remember his personal qualities. His contributions to particular areas of law can be acknowledged. But none of that requires Kenya to forget the victims of the authoritarian era or to pretend that every exercise of judicial power during that period strengthened the rule of law.

Indeed, the most respectful thing a constitutional democracy can do with such a legacy is to confront it honestly.

The purpose is not vengeance against the dead.

It is accountability to the living.

And it is an instruction for the future.

Kenya has already paid too high a price for judicial deference to executive power. We should not romanticise the era when political dissent could become a criminal offence, when publications could attract prosecution, when citizens could be detained for their political beliefs, when allegations of torture could be ignored and when courts could become the final administrative station in a machinery of repression.
The Judiciary of today must understand that

its greatest legacy will not be measured by how warmly its retired judges are remembered at funerals. It will be measured by whether, when the next constitutional crisis arrives, judges have the courage to say no.

No to unlawful detention.

No to torture.

No to manufactured prosecutions.

No to executive intimidation.

No to the criminalisation of dissent.

No to the use of law as an instrument of political vengeance.

And, above all, no to the idea that judicial office requires obedience rather than independence. The dead cannot rewrite their histories. Institutions, however, can choose whether to learn from them. That is why the story of Justice Omondi Tunya should remain before Kenya's judges—not as an invitation to condemn a dead man, but as a warning to the living.

For the Judiciary, history is not an archive. It is a test.

Every judge who sits today should remember that one day his or her decisions will be read by a generation that knows the political circumstances in which they were made. Titles will disappear. Tributes will fade. Institutional statements will be forgotten. What will remain are the decisions and the lives they affected.

The question every judge should therefore ask before signing an order is deceptively simple: when history judges this moment, where will I have stood?

On the side of power?

Or on the side of the Constitution?

On the side of convenience?

Or on the side of courage?

On the side of silence?

Or on the side of liberty?

That is the enduring lesson of Kenya's authoritarian past.

And that is why we must resist every attempt—however well intentioned—to turn difficult history into comforting mythology.

Justice Omondi Tunya was part of Kenya's judicial history. He was also part of the history of a Judiciary that, at critical moments, failed to provide the protection that citizens required against an authoritarian State. Both propositions can be true at the same time.

Let us mourn the man.

Let us remember the victims.

Let us interrogate the institution.

And let us teach today's judges the lesson that history teaches with unforgiving clarity: judicial office is temporary, but the consequences of judicial choices can last for generations.

History will remember not merely who sat on the bench.

It will remember what they did with the power of the bench.

And history, ultimately, will decide whether they stood on the right side of it.

A farewell in excellence: Celebrating Miracle Okoth Okumu Mudeyi's journey to Yale Law School

At The Platform for Law, Justice and Society, we have long understood that institutions are, at their core, the sum of the people who give themselves to their work with purpose, intellect, and quiet conviction. Today, we pause to celebrate one such individual, Miracle Okoth Okumu Mudeyi, whose admission to Yale Law School for a Master of Laws marks not only a personal milestone but a moment of collective pride.

Miracle's acceptance into Yale, as the first Kenyan in over three decades to secure this distinguished opportunity, is no ordinary achievement. It is a testament to intellectual rigor, sustained discipline, and a fidelity to the ideals of justice that transcend borders. It is also, in a profound sense, a continuation of the very ethos he embodied during his time with us.

As Senior Editorial Assistant, Miracle brought to the Platform a rare blend of analytical clarity and editorial sensitivity. He approached legal texts not merely as documents to be refined, but as living instruments of thought, tools through which ideas could be sharpened, arguments deepened, and public discourse elevated. His editorial hand was both precise and generous.He demanded excellence of the work, while always making space for the voices behind it to emerge stronger and more coherent.

In the often-unseen architecture of legal

publishing, where rigor must meet readability and scholarship must engage the public, Miracle distinguished himself as a steady and discerning presence. He understood that the written word carries weight not only in courtrooms and classrooms, but in shaping the civic imagination. Through his contributions, the Platform has been better able to fulfill its mandate which is to bridge law and society with clarity, integrity, and purpose.

Yet, beyond his technical brilliance, it is Miracle's intellectual curiosity and quiet leadership that have left an enduring imprint. He has been, to colleagues and collaborators alike, a source of thoughtful engagement, someone who listens deeply, questions carefully, and writes with intention.

In an age often defined by haste, he has reminded us of the enduring value of deliberation.

His journey to Yale is, therefore, not a departure but an expansion. It carries with it the aspirations of a generation of Kenyan legal thinkers, and the promise of new conversations between local realities and global scholarship. We have no doubt that he will approach this next chapter with the same humility and excellence that have defined his work thus far.

As an institution committed to the pursuit of justice and the cultivation of legal thought, we take immense pride in having been part of Miracle's journey. His achievement

affirms what we hold to be true. That Kenyan scholarship, when nurtured with care and conviction, stands comfortably among the best in the world.

We extend our deepest gratitude for his service, his intellect, and his unwavering commitment to the craft of legal writing. We wish him every success as he steps onto this global stage, confident that he will not only excel, but also inspire. From all of us at The Platform for Law, Justice and Society, thank you, Miracle, and onward.

COVER STORY

Is Sifuna the next President of the Republic of Kenya? Inside the making of a candidacy that has turned rallies into referenda on justice, power and the promise of Canaan

By Teddy Odira

Introduction

There is a river every Kenyan politician eventually has to cross, at least rhetorically, and its name has never been the Tana or the Athi. It is the Jordan. For nearly three decades, Raila Amolo Odinga stood on its near bank and told a nation weary of bondage that he could see the far side, "Canaan, the land of milk and honey," as he put it at his final Azimio rally at Kasarani in August 2022, the land of redemption song, a country where the pharaoh would finally let the people go.[1] It was never simply a campaign line. It was theology repurposed as constitutional aspiration, the idea that Kenya's independence in 1963, and its second liberation in the 2010 Constitution, were still incomplete exoduses and that somewhere ahead of the tear gas and the ballot-rigging and the ethnic arithmetic lay a country that actually worked for its people.

Raila Amolo Odinga

On 15 October 2025, Raila Odinga died of a heart attack while undergoing treatment in India. He was buried four days later in Bondo, on the shores of Lake Victoria, mourned by a nation that argued about him more than it agreed on him, which is itself the mark of a man who mattered. At his funeral, Kalonzo Musyoka, his old ally and rival, said that they called him Joshua, but

[1] Raila Odinga, "I will bring handshake to Ruto, Raila says in final Azimio rally" (Nation, Nairobi, 5 August 2022) <https://nation.africa/kenya/news/politics/i-will-bring-handshake-to-ruto-raila-says-in-final-azimio-rally-3905908>. Accessed on 28 August 2026.

we never got to Canaan. Another eulogy stated that our Moses is no more. But Joshua's are standing strong to make sure we reach Canaan land.[2]

It turns out the metaphor Raila borrowed from Deuteronomy was more prophetic than he perhaps intended. Moses, remember, was shown the Promised Land from the heights of Mount Nebo and told plainly by God that he would not enter it, that task, and the honour, would fall to his younger deputy, Joshua son of Nun, who would lead the Israelites across the Jordan into Canaan. Raila saw Canaan. He described it in unmistakable, almost cinematic detail, for a generation of Kenyans who grew up believing in it because he did. He did not live to cross over.

The question now hanging over Kenyan politics, asked in matatus and law chambers, in State House and in the Bukusu Council of Elders, is who, if anyone, gets to be Joshua. Which is really another way of asking the question this story exists to answer, is Edwin Watenya Sifuna, the 44-year-old advocate, deposed ODM Secretary-General and sitting Nairobi Senator, the Joshua who takes us to Canaan?

The nut graf: Why now, why him

Nine months ago, that question would have sounded absurd even inside ODM's own headquarters at Bunge Towers. Sifuna was the party's chief administrator, a backroom lawyer known for combative press briefings, not a man with a national following of

Edwin Watenya Sifuna

his own. Today he is, by the most recent TIFA survey, Kenya's second-most-popular declared presidential contender, having overtaken the veteran Kalonzo Musyoka for the first time, 15 percent to 13 percent, in a poll conducted 13–22 June 2026 and released on 24 July.[3] Twelve months earlier, that same tracking poll had him at zero.[4] He was pushed out of the party he helped run for eight years. He answered by building a movement, *Linda Mwananchi*, Protect the Citizen, funded not by billionaires but by a Sh10 M-Pesa paybill that had raised over Sh2.2 million from more than nine thousand small donors within thirty-six hours of launch.[5] He has been endorsed, blessed, and effectively "crowned" as Western Kenya's presidential son at a

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[2]Raila Odinga, "I will bring handshake to Ruto, Raila says in final Azimio rally" (Nation, Nairobi, 5 August 2022) <https://nation.africa/kenya/news/politics/i-will-bring-handshake-to-ruto-raila-says-in-final-azimio-rally-3905908> accessed 28 July 2026.
[3]Poll: Sifuna overtakes Kalonzo for first time, Gachagua supporters want him to be kingmaker (Nation, Nairobi, 24 July 2026) <https://nation.africa/kenya/news/politics/poll-sifuna-overtakes-kalonzo-for-first-time-gachagua-supporters-want-him-to-be-kingmaker-5536430> accessed 28 July 2026.
[4]TIFA survey: Sifuna goes from zero to Luhya kingpin in 12 months (Standard, Nairobi, 13 May 2026) <https://www.standardmedia.co.ke/counties/article/2001547825/tifa-survey-sifuna-goes-from-zero-to-luhya-kingpin-in-12-months> accessed 28 July 2026.
[5]Okinda Benjamin, "Sifuna accuses Safaricom of shutting down Linda Mwananchi paybill on 'Orders from Above'" (Kenya Election Tracker 2027, Nairobi, 23 July 2026) <https://kenyaelectionstracker.com/news-article/1403> accessed 28 July 2026.

homecoming rally in Bungoma so large that The Standard called it the opening of a new chapter in Kenya's political journey.[6] He has been denounced by President William Ruto himself, from a podium in Busia, as the biggest accident ever to befall Kenya.[7] And he has done all of this while insisting, with a lawyer's precision, that he has not yet even declared.

2027 is nineteen months away. Whether Sifuna becomes a footnote in ODM's succession wars or the man who redraws Kenya's opposition map will be decided in that window. This story is an attempt to understand him at the exact moment his candidacy stopped being a joke and started being a headache for the State House and to ask whether the lawyer from Mumias really can be Joshua.

The Canaan question

There is a particular cruelty and a particular opportunity in a movement whose founding prophet has died mid-journey. The cruelty is obvious, no one anointed a successor. The opportunity is that the field is suddenly, violently open. Within ODM itself, the contest over who inherits Raila's biblical mantle has been almost comic in its literalism. Treasury Cabinet Secretary John Mbadi declared himself, in so many words, the Joshua who would lead Luo Nyanza to Canaan.[8] Oburu Odinga, Raila's older brother, who inherited the party chairmanship, offered his own version in Kisumu stating that he will take Kenyans to Canaan, and to get there, we will pass through Singapore thus explicitly folding the promised-land imagery into a pact of cooperation with President Ruto.

Sifuna has never explicitly called himself Joshua. He does not need to. His entire political project since February 2026, when ODM's National Executive Committee removed him as Secretary-General in absentia over his opposition to the party's cooperation pact with Ruto has been an argument that the "Canaan" Oburu is selling, routed through Singapore-style development deals with the very government Raila spent his life opposing, is a counterfeit. His version of Canaan is older and less negotiable. A republic where you can be asked your position on devolution or on the freedoms guaranteed under Article 37 of the Constitution and he would give you the answer straight away, without the confusion of a cooperation deal muddying the party's soul.[9]

That is the tension this profile sits inside. Can a career party functionary, a man whose job for eight years was managing ODM's internal machinery, not commanding a nation, actually become the bridge between the Constitution's grand promises and the lived, granular justice of a matatu tout in Eastleigh or a maize farmer in Kanduyi? Or is he simply the latest actor auditioning for a role that Kenyan politics has cast and recast every five years since 1992, changing the name but never quite arriving?

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[6] Sifuna storm: New chapter in Kenya's political journey begins (Standard, Nairobi, 26 July 2026) <https://www.standardmedia.co.ke/politics/article/2001553754/sifuna-storm-new-chapter-in-kenyas-political-journey-begins> accessed 28 July 2026.
[7] Ruto attacks Sifuna over affordable housing (The Star, Nairobi, 27 July 2026) <https://www.the-star.co.ke/news/2026-07-27-ruto-attacks-sifuna-over-affordable-housing> accessed 28 July 2026.
[8] Mbadi angles to succeed Raila" (Kenya News Agency, Nairobi, date unknown) <https://www.kenyanews.go.ke/mbadi-angles-to-succeed-raila/> (page no longer available, accessed 28 July 2026).
[9] ODM SG Sifuna admits 'confusion' in the party, apologizes to members (Citizen Digital, Nairobi, 15 July 2026) <https://citizen.digital/article/odm-sg-sifuna-admits-confusion-in-the-party-apologizes-to-members-n366774> accessed 28 July 2026.

From courtrooms to rally grounds

Sifuna was born on 22 May 1982 at St. Mary's Hospital in Mumias, then part of Kakamega District in Western Province. His father was a civil servant with the old Municipal Council; his mother taught at Moi Primary School in Bungoma. He is Luhya, the second-largest ethnic bloc in Kenya, and the community whose loyalty every serious presidential coalition since Moi has had to court, buy or borrow. He went to Kakamega Township Primary, then Musingu High School, before studying law at the University of Nairobi, graduating in 2006, then completing his postgraduate diploma at the Kenya School of Law the following year and pupilling at Kairu & McCourt Advocates. He was admitted to the Roll of Advocates of the High Court of Kenya in 2008.

It shows. Listen to Sifuna in a Senate debate and you are listening to a man who thinks in pleadings, issue, rule, application, conclusion, even when the subject is a police shooting rather than a statute. In July 2025, condemning what he called Ruto's "shoot in the leg" order to police handling protesters, he built his case the way a prosecutor builds a charge sheet, naming Rex Masai, the young man shot dead during the 2024 Finance Bill protests, then invoking Albert Ojwang, who died in police custody, with a line that landed like a closing argument. He said, "Albert Ojwang is gone. He won't be able to meet William Ruto in 2027... Is Albert Ojwang supposed to vote from the grave? There's no such polling station".[10] It is rhetoric built by someone trained to make a tribunal choose a side, and it is precisely this instinct, treating every political dispute as a case to be won on the facts, that both his admirers and his enemies point to when explaining him.

Albert Ojwang

His rise inside ODM was gradual, then sudden. He was an advisory-committee presence in the old CORD and NASA coalitions through the 2013–2017 cycle, lost the ODM primary for the Kanduyi parliamentary seat in April 2017, and was parachuted, two months before that year's general election, into the Nairobi Senate race against a young Johnson Sakaja. He lost, taking 42.51 percent to Sakaja's 51.20. Raila did not discard him. In February 2018, Sifuna was appointed ODM Secretary-General, the party's chief administrative officer, succeeding Ababu Namwamba. In 2022, he ran for the Nairobi Senate seat again and won it outright with 716,876 votes, this time as sitting senator and party secretary-general simultaneously, a dual mandate that made him one of the most institutionally embedded figures in the opposition.

For eight years, that was the ceiling. The man who ran ODM's back office,

[10]Sifuna condemns Ruto's protest crackdown (People Daily, Nairobi, 9 July 2025) <https://peopledaily.digital/inside-politics/sifuna-condemns-rutos-protest-crackdown> accessed 28 July 2026.

occasionally combative in public, rarely mentioned as a principal in his own right. Then came the cooperation pact.

A nation watching: The 2027 whisper

In March 2025, ODM and President Ruto's UDA signed a ten-point cooperation agreement folding the opposition party into a broad-based government. Sifuna, as Secretary-General, opposed it publicly and repeatedly and paid for it. Treasury CS John Mbadi, defending the pact, said someone like Sifuna will not remain in ODM because he is conflicted. And urged ODM to let him go.[11] On 11 February 2026, ODM's National Executive Committee removed him as Secretary-General in absentia. He fought it at the Political Parties Disputes Tribunal and won a procedural victory on 18 June, the tribunal found ODM had denied him a fair hearing but on 9 July the Registrar of Political Parties upheld the removal anyway, closing an eight-year chapter.[12] A week later, Speaker Amason Kingi stripped him of his Senate deputy minority whip role too, a move ODM senators, led by Vihiga's Godfrey Osotsi, denounced as State House interference in the Senate's internal affairs.[13]

Cast out, Sifuna did not go quietly into a law practice. He built *Linda Mwananchi*, a rival faction, later a movement, since the Registrar rejected its bid to become a formal party over its resemblance to an existing slogan, that positioned itself against Oburu Odinga's pro-cooperation *Linda Ground* camp. Within a week of its website launching on 13 March 2026, 25,000 Kenyans had signed up. By July, a TIFA poll of ODM's own base found 44 percent would back Sifuna as the party's flagbearer today, against 20 percent for Ruto and 9 percent for Fred Matiang'i.[14] Among Kenyans overall, the same wave had him at 15 percent nationally, second only to Ruto's 24.[15] Among Gen Z voters specifically, an Infotrak poll a fortnight earlier had put him at 20 percent, ahead of every opposition rival in that bracket.[16]

The chant that has followed him *"Sisi Ndio Sifuna,"* we are Sifuna, began appearing in coverage as early as April 2026, an identity marker as much as a slogan.[17] What changed the whisper into a roar was Western Kenya deciding, collectively and with unusual speed, that it wanted him to run, not as a running mate, not as a kingmaker, but as principal.

Voices around Sifuna: Allies, adversaries, and the President

On 7 July 2026, Trans Nzoia Governor George Natembeya hosted Luhya leaders, Vihiga Senator Godfrey Osotsi, Kabuchai MP Majimbo Kalasinga, Bumula MP Jack Wamboka, at his residence to resolve on fronting Sifuna for 2027 through a new

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[11]Mbadi Signals 2032 Presidential Ambitions Amid ODM Rift Over Kenya Kwanza Alliance (AllAfrica, Nairobi, 8 February 2026) <https://allafrica.com/stories/202602090649.html> accessed 28 July 2026.
[12]Pushed out of ODM, Edwin Sifuna plots presidential bid (Africa Confidential, London, 13 July 2026) <https://www.africa-confidential.com/article/id/16094/pushed-out-of-odm--edwin-sifuna-plots-presidential-bid> accessed 28 July 2026.
[13]Senators cry foul over Sifuna ouster, accuse State House of meddling (Radio Generation, Nairobi, 21 July 2026) <https://radiogeneration.co.ke/politics/101100/senators-cry-foul-over-sifuna-ouster-accuse-state-house-of-meddling> accessed 28 July 2026.
[14]TIFA Poll Gives Sifuna Strong Lead in ODM's 2027 Presidential Race (Dawan Africa, Nairobi, 24 July 2026) <https://www.dawan.africa/news/tifa-poll-gives-sifuna-strong-lead-in-odms-2027-presidential-race> accessed 28 July 2026.
[15]Poll: Sifuna overtakes Kalonzo for first time, Gachagua supporters want him to be kingmaker (Nation, Nairobi, 24 July 2026) <https://nation.africa/kenya/news/politics/poll-sifuna-overtakes-kalonzo-for-first-time-gachagua-supporters-want-him-to-be-kingmaker-5536430> accessed 28 July 2026.
[16]Kenya: Sifuna Emerges As Top Choice Among Gen Z Voters in Latest Infotrak Poll (AllAfrica/Capital FM, Nairobi, 13 July 2026) <https://allafrica.com/stories/202607130487.html> accessed 28 July 2026.
[17]Confusion after Sifuna's paybill briefly goes offline following Ruto clash (Standard/The Nairobian, Nairobi, 24 July 2026) <https://tnx.africa/thenairobian/politics/article/2001553602/confusion-after-sifunas-paybill-briefly-goes-offline-following-ruto-clash> accessed 28 July 2026.

political vehicle.[18] Days later, the Bukusu Council of Elders' Kimilili chapter, under chairman Prof. Bonventure Wanjala Kere, issued a formal endorsement, arguing the community should seek the presidency for itself rather than settle again for the deputy's seat. Former Bungoma Governor Wycliffe Wangamati and former Cabinet Secretary Musikari Kombo rallied the wider region behind him.[19] Kakamega Senator Boni Khalwale, never a man to whisper, told the Bungoma crowd outright: "On 10th August 2027, go and vote for Edwin Sifuna to become the President".[20]

Then came the endorsement almost no one predicted a year ago. Former Deputy President Rigathi Gachagua, impeached and estranged from Ruto, stated that he is willing to step aside for the sake of opposition unity.[21] Former Chief Justice David Maraga, himself a declared presidential aspirant, has campaigned alongside him, warning that a second Ruto term would be a tragedy.[22] Faith Odhiambo, the former Law Society of Kenya president, joined *Linda Mwananchi* in June and told Citizen TV that Sifuna carries the aura that would encourage young people to go out and vote. She says he has the ability to listen and is down to earth.[23]

Not everyone is convinced. DCP deputy leader Cleophas Malala has insisted Sifuna must fold into a single united opposition ticket rather than run alone, and reportedly floated a Sh3 billion fundraiser to bankroll the campaign properly,[24] an offer of establishment money that sits awkwardly against Sifuna's Sh10-donor brand. When COTU boss Francis Atwoli offered to raise a billion shillings for him at a Kakamega church fundraiser, Sifuna turned him down stating that he does not need your money and insisted that with his plan to get donations from Kenyans who donate petty cash. He said he would rather be indebted to millions of Kenyans because they gave me Sh10 each than to one person who gave me Sh1 billion.[25]

And then there is President Ruto himself, who has treated Sifuna less as a nuisance and more, increasingly, as a genuine threat. Their clashes have a history. At the April 2025 funeral of a Raila aide in Siaya, Sifuna needled Ruto over the state's banning of Butere Girls' school play "Echoes of War." He said *"mwiba wa kujitakia hauambiwi pole,"* a self-inflicted thorn earns no sympathy, and Ruto shot back that he was one of the ODM's founders and could call a meeting of the founding members if pushed too far.[26] By July 2026, with Sifuna mocking the government's affordable-housing towers as impractical for Western Kenyans who keep chicken that can't go to the 17th floor,

[18]Edwin Sifuna's turning point (Nation, Nairobi, 6 July 2026) <https://nation.africa/kenya/news/politics/edwin-sifuna-s-turning-point--5519666> accessed 28 July 2026.
[19]MP Wamboka, Wangamati rally Western region to back Sifuna's presidential bid (TV47 Digital, Nairobi, 24 July 2026) <https://www.tv47.digital/mp-wamboka-wangamati-rally-western-region-to-back-sifunas-presidential-bid-157065/> accessed 28 July 2026.
[20]A sea of humanity: A mark of honour and belief as Sifuna unveils presidential bid (Western Insight, Bungoma, 27 July 2026) <https://westerninsight.co.ke/a-sea-of-humanity-a-mark-of-honour-and-belief-as-sifuna-unveils-presidential-bid/> accessed 28 July 2026.
[21]I can back Sifuna, Gachagua declares, says he's ready to step down for unity (The Star, Nairobi, 24 July 2026) <https://www.the-star.co.ke/news/2026-07-24-i-can-back-sifuna-gachagua-declares-says-hes-ready-to-step-down-for-unity> accessed 28 July 2026.
[22]Sifuna Speaks After Attack During Kisii Tour (Nairobi Leo, Kisii, 3 July 2026) <https://nairobileo.co.ke/news/article/28591/sifuna-speaks-after-attack-during-kisii-tour> accessed 28 July 2026.
[23]Faith Odhiambo backs Linda Mwananchi, Says Sifuna can Inspire Young Voters (TV47 Digital, Nairobi, 17 June 2026) <https://www.tv47.digital/former-lsk-president-faith-odhiambo-backs-linda-mwananchi-says-sifuna-has-the-aura-to-inspire-young-voters-153260/> accessed 28 July 2026.
[24]Malala Proposes KSh3 Billion Fundraiser to Launch Sifuna's Presidential Bid (Nairobi Wire, Nairobi, 19 July 2026) <https://nairobiwire.com/2026/07/malala-ksh3-billion-fundraiser-sifuna-presidential-bid.html> accessed 28 July 2026.
[25]Okinda Benjamin, "Sifuna accuses Safaricom of shutting down Linda Mwananchi paybill on 'Orders from Above'" (Kenya Election Tracker 2027, Nairobi, 23 July 2026) <https://kenyaelectionstracker.com/news-article/1403> accessed 28 July 2026.
[26]Tensions flare as Ruto and Sifuna clash publicly at Raila aide's funeral in Siaya (Eyewitness Africa, Siaya, 12 April 2025) <https://www.eyewitness.africa/tensions-flare-as-ruto-and-sifuna-clash-publicly-at-raila-aides-funeral-in-siaya/> accessed 28 July 2026.

Ruto's response had lost all patience. He said, "How foolish do you think we are? Some people have no sense".[27] Three days later, in Busia, the President went further, branding the opposition, Sifuna chief among them, the biggest accident to befall the country, an existential threat to the Republic of Kenya and beyond saying '*Wantam,*' '*Kasongo*' and 'Must Go,' they do not have an agenda.[28] Political analyst Wycliffe Odera, in a widely read Africa Report profile, offered the sharpest outside assessment by stating that Sifuna seems to be speaking Raila's language. He is Raila's mouthpiece, a suggestion Sifuna would likely reject, but one that captures how many Kenyans still read him, not yet fully his own man, but no longer merely anyone else's either.[29]

The case for Sifuna as President

The optimist's argument runs like this. Start with the arithmetic. A Kalonzo–Sifuna pairing led opposition-ticket preferences in TIFA's May wave at 28 percent, and Infotrak's July poll found the pairing still competitive at 23 percent against Kalonzo–Matiang'i's 22.[30] Sifuna delivers something no other opposition figure currently offers in equal measure. A genuinely mobilised, non-negotiable Luhya bloc vote, freshly unveiled at Bungoma, layered onto Gen Z enthusiasm his Sh10 paybill has translated into real, if modest, money and, more importantly, real data on supporter registration across the fourteen counties his tour has so far reached.[31]

Then there is temperament repackaged as an asset rather than a liability. His willingness to say, on the floor of the Senate, that a sitting president is an existential threat to be removed as soon as possible[32] plays, to a generation radicalised by the 2024 Finance Bill protests and the deaths of Rex Masai and Albert Ojwang, not as recklessness but as honesty. Add his legal literacy, a trained advocate who can, unlike some of his rivals, actually argue a constitutional point rather than merely assert one, and the case for him becomes a case about fitness for the specific moment, a country exhausted by euphemism, wanting someone who will call an accident an accident and a betrayal a betrayal. Caleb Amisi, the Saboti MP, made the generational version of this case explicitly in May 2026, warning of voter apathy in 2027 if Kenyans do not support a young person like Sifuna. It is, in essence, an argument that Kenya's next Joshua need not come from the old tribe of coalition patriarchs at all, that the crossing this time might be led by someone who learned to argue in a courtroom before he learned to argue on a stage.

The case against Sifuna: Limits, risks, and resistance

The sceptic's case is just as coherent, and just as Kenyan. First, the confrontational register that thrills a rally can curdle a presidency. A man who has spent eight years as a party attack-dog has yet to

[27]President Ruto Hits Out at Sifuna Over Remarks on Affordable Housing Project (Nairobi Leo, Nairobi, 23 July 2026) <https://nairobileo.co.ke/news/article/29013/president-ruto-hits-out-at-sifuna-over-remarks-on-affordable-housing-project> accessed 28 July 2026.
[28]Ruto attacks Sifuna over affordable housing (The Star, Nairobi, 27 July 2026) <https://www.the-star.co.ke/news/2026-07-27-ruto-attacks-sifuna-over-affordable-housing> accessed 28 July 2026.
[29]Kenya: Inside Ruto's silent assault on the opposition – and Sifuna's lone stand (The Africa Report, Nairobi, 24 July 2025) <https://www.theafricareport.com/388704/kenya-inside-rutos-silent-assault-on-the-opposition-and-sifunas-lone-stand/> accessed 28 July 2026.
[30]Kenya: Sifuna Emerges as Top Choice Among Gen Z Voters in Latest Infotrak Poll (AllAfrica/Capital FM, Nairobi, 13 July 2026) <https://allafrica.com/stories/202607130487.html> accessed 28 July 2026.
[31]Sifuna Rules Out Early 2027 Bid, Wants to Gauge Nationwide Popularity First (Dawan Africa, Nairobi, 21 July 2026) <https://www.dawan.africa/news/sifuna-rules-out-early-2027-bid-wants-to-gauge-nationwide-popularity-first> accessed 28 July 2026.
[32]Sifuna condemns Ruto's protest crackdown (People Daily, Nairobi, 9 July 2025) <https://peopledaily.digital/inside-politics/sifuna-condemns-rutos-protest-crackdown> accessed 28 July 2026.

demonstrate he can run anything larger than a secretariat, no ministry, no county, no cabinet portfolio, nothing resembling executive management at scale. Second, the permanent opposition trap. Nandi Senator Samson Cherargei, a Ruto ally, has repeatedly cast Sifuna's combativeness as professional political extortion,[33] arguing his very presence in ODM was a liability and threat to the Broad-based government, the implicit charge being that Sifuna is constitutionally more comfortable resisting power than wielding it.

Third, and perhaps most seriously for a movement built on moral clarity, is the violence that has already trailed his campaign. On 3 July 2026, the Linda Mwananchi convoy, carrying Sifuna, Babu Owino, Governor James Orengo and Maraga, was ambushed by suspected hired goons at Keumbu Market on the Kisii–Keroka road. Maraga's car was seriously damaged. Vincent Osiemo, a supporter riding a campaign vehicle, was struck by a stone, fell and died. Scores were injured, and Governor Orengo accused police of escorting the attackers rather than stopping them.[34] Whatever the truth of who ordered it, the episode is a reminder that Kenyan succession politics has never been a purely rhetorical contest, and a candidate whose crowds keep drawing violence must eventually answer whether his politics can be de-escalated without being defanged.

Then there is money, or the deliberate absence of it. Nominated Senator Karen Nyamu and others have dismissed the

Babu Owino

Sh10 crowdfunding model as symbolically appealing but structurally inadequate for a genuine national campaign against an incumbent with the machinery of the state behind him. And critics, without offering hard evidence, have floated the theory that *Linda Mwananchi* is quietly bankrolled by former President Uhuru Kenyatta, an allegation Sifuna has consistently and firmly denied, but one that, true or not, feeds a broader suspicion that the people's movement branding obscures an old-fashioned elite proxy war.[35] Finally, there is Ruto's own counter-narrative, delivered with characteristic bluntness in Busia: that Sifuna and his allies have no agenda beyond slogans and represent noise rather than governance.[36] Whether that charge is fair or merely the oldest trick in an incumbent's playbook, dismissing the opposition as

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[33]Your tenure as ODM SG is a threat to broad-based govt, UDA senator to Sifuna (Nairobi Leo, Nairobi, 29 April 2026) <https://nairobileo.co.ke/news/article/24787/your-tenure-as-odm-sg-is-a-threat-to-broad-based-govt-uda-senator-to-sifuna> accessed 28 July 2026.
[34]Scores injured in attack on Linda Mwananchi convoy (Standard, Kisii, 3 July 2026) <https://www.standardmedia.co.ke/politics/article/2001551978/scores-injured-in-attack-on-linda-mwananchi-convoy> accessed 28 July 2026.
[35]The price of power: Inside Sifuna's crowdfunded insurgency stirring 2027 race (Nation, Nairobi, 25 July 2026) <https://nation.africa/kenya/weekly-review/the-price-of-power-inside-sifuna-s-crowdfunded-insurgency-stirring-2027-race-5537514> accessed 28 July 2026.
[36]Ruto attacks Sifuna over affordable housing (The Star, Nairobi, 27 July 2026) <https://www.the-star.co.ke/news/2026-07-27-ruto-attacks-sifuna-over-affordable-housing> accessed 28 July 2026.

unserious right up until it isn't, is precisely what the next nineteen months will test.

Moments that made him: Thika, Bungoma, and Beyond

I have had the privilege of following Sifuna's Linda Mwananchi tour on two occasions this year. The first was Thika, on 14 June, Linda Mwananchi's maiden foray into Central Kenya, historically the most hostile terrain imaginable for anything wearing ODM's orange. The day opened with a church service at AIPCA Thika Cathedral, decorous and almost sleepy, before the convoy rolled to Kivulini Grounds in Makongeni, where the crowd was not sleepy at all. What struck me first was who was on the podium, Babu Owino, characteristically loud, Siaya Governor James Orengo, the movement's elder statesman, former Meru Governor Kawira Mwangaza and, making her first appearance with the movement, former LSK president Faith Odhiambo, a visual argument, before anyone said a word, that this was no longer a Luo-Luhya coalition of convenience but something reaching, tentatively, across the whole map.

Then Murang'a Governor Irungu Kang'ata walked onto that stage, having just quit UDA, and the ground itself seemed to shift. A sitting Mt Kenya governor, crossing the floor in public, in Thika of all places, to stand with the man Ruto's people had spent a year dismissing. Sifuna, sensing the moment, reached for Sheng and scripture at once. *"Walisema hatutafika Thika, hapa ni wapi?"* They said we would never reach Thika, well, where are we?, before turning the "*Wantam*," one-term insult that Ruto's camp had tried to weaponise against the opposition, and claiming it instead as a badge. There was a brief, ugly scuffle when a group of rowdy youths tried to force their way toward the podium, the kind of low-grade menace that now seems to shadow every Linda Mwananchi stop, but the leaders did not flinch, and the rally rolled on regardless. Driving back through the Githurai 45 roundabout that evening, past the usual chaos of matatus and *mkokoteni*, I remember thinking that I had just watched something that should not, by the ordinary rules of Kenyan ethnic arithmetic, have been possible.

Bungoma was different in scale and in register, less an argument, more a coronation. I have genuinely never seen anything like it. Weeks of build-up had promised that elders from all seventeen Luhya sub-tribes, plus Teso representatives, would gather at Posta Grounds to symbolically "crown" Sifuna as the region's political spokesman ahead of a 2027 run. What arrived, on 26 July, one day after an equally cavernous rally in Kitale, was, in the words of one outlet's headline, a sea of humanity.[37] Governor Natembeya, who had done as much as anyone to engineer this moment, took the microphone and said that they are there to unveil their son Sifuna for the presidency. He urged the Luhya people to reject Mudavadi, Wetang'ula and Oparanya, a shockingly blunt repudiation, in their own backyard, of the region's three most senior sitting political figures. Boni Khalwale, never a man for subtlety, told the crowd to go and vote for Edwin Sifuna to become the President. Babu Owino framed his own presence as debt repayment for old Luhya solidarity during his political battles. Former Cabinet Secretary Musikari Kombo led the elders' blessing.

[37] A sea of humanity: A mark of honour and belief as Sifuna unveils presidential bid (Western Insight, Bungoma, 27 July 2026) <https://westerninsight.co.ke/a-sea-of-humanity-a-mark-of-honour-and-belief-as-sifuna-unveils-presidential-bid/> accessed 28 July 2026.

What I will remember longest, though, is not the speeches but the money. Supporters did not wait for envelopes to be handed to them, as Kenyan rally-goers so often do; they streamed toward Sifuna themselves, dropping coins and crumpled notes into a collection bucket he held, or dialling the paybill number live from the crowd, reversing, in front of my eyes, the entire transactional logic of Kenyan campaign rallies. Dust rose off the grounds in the afternoon heat, banners reading *"Sisi Ndio Sifuna"* rippled above heads as far back as I could see. NTV's Duncan Hamble, reporting that evening, called it Sifuna's endorsement as the 2027 Luhya community presidential flag bearer, a development that immediately complicates President Ruto's own path to re-election through a region his 2022 coalition had counted as safely, if grudgingly, his. Somewhere in the noise, I kept returning to the same private, half-formed thought. I was watching a homecoming being deliberately, publicly rewritten as a launch.

I will be honest. At some point I was no longer just an observer, and found myself on top of the media truck ahead of his car, helping to wave the Wanta symbol into the crowd, a small, personal reminder of just how easily this candidacy pulls people in.

The man behind the microphone

Strip away the podiums and Sifuna is, by most accounts, an unremarkable family man from Mumias with two brothers, two sisters, a wife and a daughter, the sort of biography that reads as almost deliberately ordinary against the drama of the last eighteen months. What has been consistent, across every interview, is a man who does not perform humility well but does perform candour convincingly. On "The Explainer" in July 2025, at the height of ODM's internal crisis, he did something rare for a Kenyan politician under pressure. He apologised. "I want to apologise to members of ODM for all the confusion we as a leadership have caused," he said, before declining a party peace-committee assignment with the dry line, "I already declared this MoU dead. I am not a mortician".[38] It is the kind of gallows humour that plays well on social media and terribly in a cabinet room, and it is an open question which room he is actually built for.

He does not manage criticism gracefully so much as return it with interest, the Safaricom paybill outage in July 2026, which he blamed, without evidence, on orders from above, is a case study in a man who reaches instinctively for the language of persecution even when a mundane technical glitch will do. And yet the same instinct that makes him occasionally paranoid also makes him legible to a public that has learned, through painful experience, to distrust official explanations.

Conclusion: What Canaan Really Means Now

Kenya's Canaan was never really a place. It was, and remains, a standard. A country where the Bill of Rights is not a chapter in a book but a fact of daily life, where Chapter Six's promise of integrity in leadership survives contact with actual power, where devolution means a governor in Bungoma answers to his own people rather than to State House, and where a young man does not die from a bullet or a police cell for standing at a protest. Raila spent his life describing that country so vividly that

[38] ODM SG Sifuna admits 'confusion' in the party, apologizes to members (Citizen Digital, Nairobi, 15 July 2026) <https://citizen.digital/article/odm-sg-sifuna-admits-confusion-in-the-party-apologizes-to-members-n366774> accessed 28 July 2026.

Edwin Sifuna has emerged as one of Kenya's most recognizable opposition figures. Whether he has a strong case for the presidency depends on how one weighs his strengths against the practical realities of Kenyan politics.

an entire generation could see it without ever having lived in it. He died on the near bank of the river, his Joshua unnamed, his party splintering over whether Canaan should be reached through confrontation or cooperation, through Singapore or through the street.

Sifuna's rise answers a need that predates him and will likely outlast whatever he does next. The need, in a country perpetually promised its Canaan, for someone willing to say the crossing has not happened yet. Whether he is that someone, whether the courtroom instincts, the small-donor idealism, the Luhya crowning, and the sheer bloody-mindedness that has survived a party ouster, a whip removal, and an ambush on a rural road can actually cohere into a presidency, rather than merely a very loud opposition, is not a question this magazine, or anyone, can honestly answer in 2026. Power changes people. Institutions blunt the sharpest edges of every insurgent who has ever won. Kenyan succession politics has swallowed braver men than Sifuna and spat out only their slogans.

But I think of a small scene at the edge of the Bungoma grounds. Sifuna stood for a moment near his vehicle, still holding the collection box people had filled with their coins, saying nothing, looking out at the sea of humanity that had just called him their son and their candidate in the same breath. Somewhere out past the dust and the disappearing banners was the question nobody there had actually spoken aloud, the one this whole magazine's readership, the lawyers, the judges, the people who have spent their careers trying to make the Constitution mean something more than paper, will spend the next nineteen months quietly asking themselves.

Is he our Joshua? Or is he only, like every other name Kenya has tried on this journey, a man still standing on this side of the river, pointing at a Canaan he has not yet proven he can reach.

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Is the Ol Kalou By-Election a dress rehearsal for 2027 or a warning Kenya cannot ignore?

By Mauren Kamuhia

The Ol Kalou by-election may have determined who represents one constituency, but its significance extends far beyond Nyandarua County. It has reignited important questions about the state of Kenya's democracy and what the country should expect as it heads towards the 2027 General Election.

The Constitution of Kenya, 2010 envisions elections that are free, fair, transparent, and peaceful, where every citizen exercises political rights without fear, intimidation, or inducement. Yet, every election cycle seems to revive familiar concerns that constitutional and legislative reforms were intended to consign to history.

The Ol Kalou by-election was no exception. Public discourse surrounding the election included reports and allegations of voter bribery, intimidation, organized disruption of political activities, and the use of development projects as campaign tools. The election day was not an exception. It was marked by heavy security presence and tense political atmosphere. Reports and widely circulated images showed armed police officers deployed across parts of the constituency, alongside allegations of plain-clothed security personnel and groups of individuals accused of intimidating voters and political supporters. Such scenes inevitably raise concerns about whether the electoral environment fostered the confidence and freedom envisioned under Articles 38 and 81 of the Constitution. Yet, despite the tension, the electorate remained resolute. Voters turned out, exercised their constitutional right to vote, and the electoral process proceeded to its conclusion without the reported incidents preventing citizens from expressing their democratic choice. The resilience demonstrated by the people reaffirmed a fundamental constitutional principle: that sovereign power rests with the people, and it is ultimately exercised through the ballot.

Perhaps the most striking outcome, however, was the electorate's verdict. In a constituency where the ruling party sought to retain political dominance, voters instead elected the opposition candidate by a decisive margin. The result serves as a powerful reminder that, ultimately, sovereignty belongs to the people. Article 1 of the Constitution declares that all sovereign power belongs to the people of Kenya, who may exercise it directly or through their democratically elected representatives. The ballot remains the people's most potent instrument of accountability.

Voters during the Ol Kalou by elections.

The outcome also carries an important political message. Regardless of campaign resources, political influence, or incumbency, voters demonstrated that they are prepared to make independent choices. If the reported attempts at voter inducement, intimidation, or political disruption influenced the campaign environment, they did not ultimately determine the will expressed at the ballot box. Democracy, when exercised freely, has the capacity to overcome even the most determined attempts to sway it.

This should not be viewed merely as a victory for one political party over another. Rather, it is a reminder to every political formation, whether the government or opposition, that public support cannot be taken for granted. Development projects, campaign rhetoric, or political mobilization cannot substitute public confidence. Elections are earned through trust, not entitlement.

Equally concerning, however, is the continued presence of political violence and goonism in electoral contests. Every election season, young people are too often drawn into political conflict instead of meaningful democratic participation. Such practices undermine public confidence, discourage voter participation, and erode the democratic values the Constitution seeks to protect.

As Kenya steadily approaches the 2027 General Election, the Ol Kalou by-election should be viewed as more than a local contest. It may have offered an early indication of a change in the political landscape where voters are increasingly willing to challenge established political power through the ballot.

The lesson for all political actors is clear: democracy cannot be purchased, intimidated, or manipulated indefinitely. While institutions must continue to enforce electoral laws impartially, the Ol Kalou electorate demonstrated that the sovereign will of the people remains the ultimate determinant of political power. If that message resonates across the country, then 16th July 2026 may be remembered not simply as a by-election day, but as an early signal of the democratic choices that await Kenya in 2027.

PUBLIC RESPONSIBILITY OF THE CHURCH

Recovering its prophetic voice

By Bishop Francis Omondi, (PhD)

Kenya is in political angst.

Public confidence is at an all time low. Political violence is spreading. Youth frustration is growing. Those entrusted with leadership are detached from the daily struggles of ordinary people. In such moments, society inevitably turns to one institution that has historically spoken when other voices fell silent: the Church.

Yet a debate has emerged.

Some politicians, like Hon Nelson Koech MP, insist that the Church should stay away from politics and focus on prayer. Others, including Hon S.K. Musyoka, opposition leader, urged the church to speak more boldly. The question is not whether the Church should involve itself in partisan politics. It should not. Does the Church have public responsibility beyond worship and prayer?

The answer is yes. It does.

The Church has a prophetic vocation. That vocation obligates it to speak when justice is threatened, when power is abused, and when human dignity is violated.

Rabbi Jonathan Sacks, the former Chief Rabbi of the Common Wealth, observed that the fundamental concern of the prophetic tradition is with equality and a critique of the abuse of power. The biblical prophets consistently defended the poor and challenged rulers who oppressed the vulnerable. Prophecy was never merely about predicting the future. It was about telling the truth in the present. This was exemplified with the likes of archbishops David Gitari, Ndigi Mawana Nzeki, bishops John Okulu and Alexander Muge among many Kenyan clerics.

Ndigi Mawana Nzeki

Kenya's current circumstances demand precisely such a voice.

Walter Brueggemann, in *The Prophetic Imagination* (1978), identifies three central tasks of prophetic ministry. The first is to tell the truth in a society that lives in illusion. The second is to grieve in a society that practices denial. The third is to express hope in a society tempted by despair. These are not political tasks in a partisan sense. They are moral and spiritual responsibilities.

Today, Kenya needs truth.

Citizens are increasingly concerned about corruption, state violence, economic hardship, and the erosion of public trust. The Church cannot honestly witness these realities and remain silent. Silence in moments of injustice is not neutrality. It is surrender.

Yet speaking prophetically is not the same as pursuing political power.

The Church is not called to govern the state. Nor is it called to endorse parties or candidates. Its role is different. It serves as the conscience of society. It reminds leaders that political authority exists to serve the common good and not private interests.

This distinction is important.

Canon Chris Sugden, of the Oxford Center for Religious and Public Life, argues that bishops are fundamentally pastors and overseers. Their primary responsibility is to teach, pray, guard the faith, and strengthen the Church. The detailed translation of Christian convictions into political and social action often belongs to believers working within society itself.

Even so, this does not relieve church leaders of their public responsibility.

Joseph Ratzinger, later Pope Benedict XVI in *Church, Ecumenism, and Politics*, argued that the Church must educate society by forming consciences. Its task is to cultivate openness to truth, justice, and moral responsibility. According to Ratzinger, the Church helps maintain the delicate balance between freedom and tyranny by shaping citizens who act according to conscience.

This means the Church cannot retreat into the private sphere.

Political power always carries the temptation to elevate itself above moral accountability. Every government, regardless of ideology, requires institutions capable of reminding it that it is not absolute. The Church performs this function when it speaks from moral conviction rather than political interest.

Unfortunately, Kenya's churches have not always fulfilled this role consistently.

Many citizens perceive a troubling pattern. Church criticism of the government often appears louder when political opponents are in power and quieter when allies occupy the State House. Different denominations have sometimes adjusted the volume of their prophetic witness according to their proximity to political influence. Such inconsistency weakens public confidence and undermines moral authority.

This problem is not unique to Kenya.

Reflecting on post-apartheid South Africa, Allan Boesak, in the essay '*The Future of Prophetic Christianity*' (1993), warned that churches sometimes allow political struggles to dictate their theology rather than allowing the Gospel to shape their engagement with politics. When this happens, the Church gradually loses clarity about its mission. It becomes reactive rather than prophetic.

Boesak's warning is timely.

The Church's central concerns must remain justice, humanity, truth, and reconciliation. It must not become the chaplain of any political movement. Nor should it become an opposition platform. Its loyalty belongs neither to the government nor to the opposition. Its loyalty belongs to the Kingdom of God.

Leslie Newbigin, in *Truth to Tell: The Gospel as Public Truth* (1991), offers an equally important reminder. He argues that the Church's greatest contribution to society is to be a new social order itself. Before it can transform society, it must demonstrate integrity, unity, justice, and accountability within its own communities. A divided Church cannot convincingly call a divided nation to reconciliation.

Geoffrey Allen, in *A wartime theological or ecclesial reflection* (1943), made a similar point during the turmoil of the twentieth century. A Church that overcomes its own internal conflicts gains the authority to speak credibly into the conflicts of nations.

Kenya's political crisis therefore presents the Church with both a challenge and an opportunity.

The challenge is to rise above partisanship. The opportunity is to recover its prophetic calling.

The Church must condemn violence wherever it appears. It must defend the dignity of every Kenyan regardless of political affiliation. It must advocate for justice, accountability, and peaceful coexistence. It must speak for young people whose frustrations are increasingly ignored. And it must remind political leaders that power is ultimately a trust, not an entitlement.

Most importantly, the Church must continue to point beyond politics itself.

Lasting national renewal cannot be achieved solely through new laws, elections, or institutions. Political problems ultimately reflect deeper moral and spiritual realities. The corruption of public life is often rooted in the corruption of the human heart. The Church's unique contribution is that it addresses this deeper dimension of national life.

The relationship between the church and politics in Kenya has always been influential, complex, and often contentious. Churches have played both a prophetic role—speaking truth to power—and, at times, a partisan role by openly supporting political leaders or parties.

Kenya needs a Church that prays. But it also needs a Church that speaks.

Not as a political actor. Not as a partisan institution. But as a prophetic witness.

In a time of fear, it must tell the truth.

In a time of suffering, it must grieve.

In a time of despair, it must proclaim hope.

That is not political interference. It is the Church fulfilling its God-given vocation.

Bishop Francis Omondi is the Anglican Bishop of Garissa Diocese. His writing interest is in emergent issues from the intersection of Christianity, Islam, and African religion and how these encounters influence society today.

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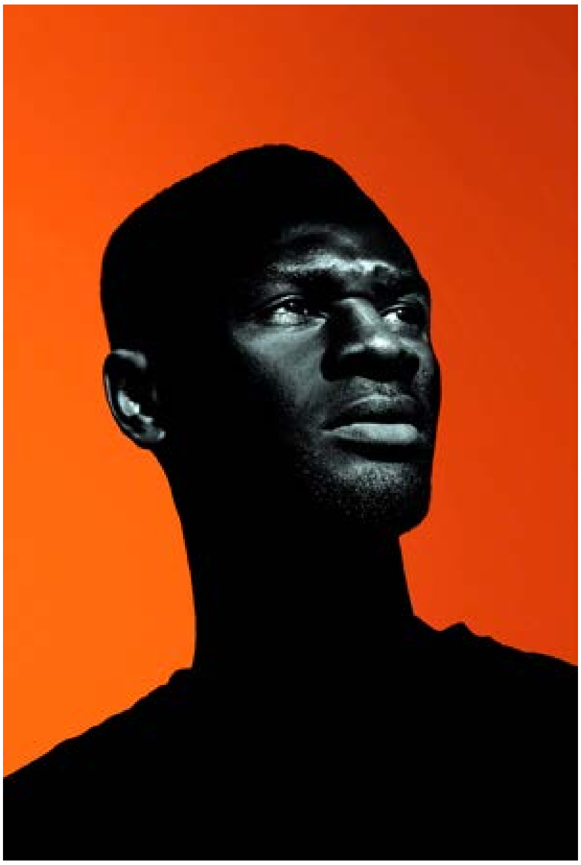
No African should be a stranger in Africa

By Sialo Kimiring

Here is a fact that should embarrass every one of us: it is often easier for a European or American passport holder to travel around Africa than it is for Africans from many of our own countries. The latest Africa Visa Openness Index, published by the African Development Bank and the African Union, finds that only 28 per cent of journeys between African countries are visa free, and that for about half of them an African must still obtain a visa before travelling. Aliko Dangote, the richest man on the continent, has lamented that he needs visas for some thirty-five African countries. On our own soil, we remain more open to our former colonisers than to one another.

We have spoken of African unity for a century. It is time to speak of it differently, and Europe, of all places, shows us why it is possible.

Consider what Europe did. Twenty-seven countries, some two dozen languages, and a century in which they slaughtered one another twice; France and Germany alone fought three wars in seventy years. Out of that graveyard they built a union with free movement, a common passport cover above each nation's name, and a shared currency. No European nation was dissolved. The French remained French, the Poles remained Poles, and yet a Portuguese plumber may live and work in Warsaw as of right. If the continent that gave the world



No African should feel like a stranger in their own continent. The future of Africa lies in greater unity, easier movement, and the recognition that our diversity is our greatest strength. It is time to make Africa a continent where every African is welcomed as family, not as a foreigner.

two World Wars could build that, then the claim that Africa is too diverse or too divided to unite is not analysis. It is defeatism.

But look deeper, because the comparison hides something that makes Africa's case even stronger. Europe's states are, for the most part, natural nations: France is the state of the French, Denmark of the Danes. Europe's union therefore had to persuade real and ancient peoples to lower borders that genuinely expressed who they were. Africa's borders express nobody. They were drawn in Berlin in 1884 by men who never walked the land they divided, and they cut living peoples to pieces: the Somali scattered across five states, the Maasai split by a line through their pastures, the Ewe, the Kongo, and the Hausa divided among neighbours. Europe's union crossed its peoples' borders. Africa's union would heal them. For Europe, union was an innovation. For us, it is a restoration.

So let us separate three things our maps have wrongly fused. Your identity is who your people are, and it is a birthright that travels with you: a Luo is no less Luo in Nairobi, a Zulu no less Zulu in Dar es Salaam. Your residence is where you live, and the city you build with your hands should count you a full member, whatever your ancestry. And your citizenship should be continental: one African citizenship, held by every one of us alike, letting any African move, live, trade, and work anywhere on this continent as freely as within a single town. Identity from your people, membership where you live, rights guaranteed by the whole. No one of these should ever be the gate of another.

None of this requires a super-state, and Europe teaches that lesson too. Its union began in 1951 with something humble: a common market in coal and steel. The currency came half a century later, and even now not every member uses it, while those who adopted it before their economies were ready paid dearly for the haste. The path, then, is not to decree a single African currency tomorrow. It is to do the useful things first: free movement of people, a continental payment system that lets a trader in Accra be paid from Nairobi instantly and cheaply in their own currencies, and a single market made real. Let a common currency arrive when our closeness has made it a desire rather than a decree.

And we are not starting from zero. East Africans already cross several borders on a national identity card. West Africa has a free movement protocol older than most of its citizens. Kenya now admits citizens of more than fifty African countries without visa formalities, among the most open doors on the continent. Rwanda, The Gambia, Benin, and Seychelles have opened theirs to all Africans, and the countries that open up are rewarded with trade and visitors. Our governments have signed a continental free trade area covering more than a billion people. The seeds are planted. What has been missing is the tree they belong to: a shared vision, joined by consent and never by conquest, in which every nation keeps its sovereignty and delegates only what it freely chooses.

Kwame Nkrumah told us in 1963 that Africa must unite. Sixty years on, the question is no longer whether he was right. It is why the continent with the most to gain from unity remains the one whose people find it easier to trade with the world than with the country next door.

I have set out one attempt at that shared vision in a blueprint I call the United Nations of Africa. It is an invitation, not a decree; I hold no office by it and claim authority over no one. It will be imperfect, and it is offered to be argued with and improved. But its first conviction I will defend anywhere: that we are a thousand peoples and one continent, that we can remain everything we are and still belong to the whole, and that no African, of any people or of none, should ever again be made a stranger in Africa.

Sialo Kimiring is an institution builder from Mogotio, Baringo, and convener of the forthcoming "United Nations of Africa: A Blueprint for Dignity, Unity and Diversity."

SABA SABA LESSONS

When a nation learns to stay home: The unfinished lesson of Saba Saba

By Teresia Wavinya Nicholas

There is an African proverb that says until the lion learns to write, every story will glorify the hunter. Saba Saba is one of the few chapters in Kenya's history where the lion found its voice. On 7 July 1990, ordinary Kenyans walked into uncertainty armed with little more than conviction. They walked because they believed that a nation could not indefinitely imprison the aspirations of its own people. They did not know whether they would return home that evening. Some did not. Others returned bearing scars that would long outlive the events of that day. Yet they walked because freedom has always demanded courage before it bestows its rewards.

The Government of the day believed it could outlast the aspirations of its own people. History proved otherwise. Governments panic. History does not. Those four words may well summarise the journey of our Republic.

Three days before the planned Saba Saba rally at Kamukunji Grounds, former Cabinet Ministers Kenneth Matiba and Charles Rubia announced that the meeting would not proceed after the Government declined to permit it. Their decision did not shield them. They were arrested and detained. Their advocate, veteran advocate John Khaminwa, was arrested while seeking to discharge his professional duty on behalf of his clients. The expectation was unmistakable: remove the voices calling for reform and the movement would dissipate. It did not. Ordinary Kenyans gathered anyway.

Kenneth Matiba

The response of the State was swift. Tear gas replaced dialogue. Batons replaced engagement. Live ammunition replaced persuasion. The unrest that followed spread beyond Nairobi and into the national conscience. Official accounts recorded at least twenty deaths and more than one thousand arrests. Yet the State won neither the argument nor history's verdict. Within a year, Section 2A of the Constitution was repealed, restoring multiparty democracy and setting Kenya on the long road that culminated in the Constitution of 2010. Power had spoken. History replied.

The Government demonstrated its power. The people demonstrated something greater: resolve. Two decades later, Kenya gave herself a Constitution founded upon a simple yet revolutionary proposition; that all sovereign power belongs to the people. The lesson seemed obvious. Governments may delay history. They do not defeat it.

This year's Saba Saba left me asking a different question. What becomes of a nation when its people wake up, not wondering whether they should go to work, but whether they should leave their homes at all? That is why Saba Saba should never be reduced to a date on the calendar or an annual political ritual. It is a constitutional reminder that governments derive legitimacy not from the coercive instruments they command but from the confidence the people repose in them.

It is also a reminder that panic has never been an enduring philosophy of governance. This year's Saba Saba brought that lesson back into sharp focus. Before sunrise, the country had already received its message.

Roadblocks sprang up along major entry points into the Central Business District. Parliament Road was barricaded. Checkpoints appeared on Waiyaki Way, Thika Road, Jogoo Road, Lang'ata Road and other arterial routes. Public Service Vehicles were turned back. Commuters alighted and walked long distances to work. Many schools suspended physical learning. Businesses remained shuttered. Offices quietly advised employees to work remotely. The city slowed to an uneasy silence before the day had truly begun.

One did not need to attend a demonstration to understand this year's Saba Saba. The Government panicked. Some may find that conclusion uncomfortable. History often is. Governments panic when they begin to see constitutional freedoms through the prism of fear rather than confidence; when they pre-empt ordinary civic life before public order has even been tested, when schools close not because education has failed, but because uncertainty has prevailed; when businesses remain shut, not because commerce has ceased, but because fear has become the dominant currency of the day; when a citizen's first constitutional calculation is no longer whether to exercise a right, but whether exercising it is worth the risk.

This is not to diminish the constitutional obligation of the State to protect life and property. Far from it. The preservation of public order is one of the primary obligations of every government. No serious constitutional democracy can abdicate that responsibility. Indeed, the National Police Service publicly explained that the enhanced security measures were intended to maintain law and order and prevent disruptions witnessed during previous demonstrations.

But constitutionalism demands something greater than order. It demands confidence. The confidence to secure both the citizen who chooses peacefully to assemble and the citizen who simply wishes to report to work. The confidence to facilitate constitutional freedoms instead of appearing to suspend ordinary life in anticipation of their exercise.

The confidence to demonstrate that public order and constitutional liberty are not

Saba Saba protests refer to demonstrations held on 7 July ("Saba Saba" means "Seven Seven" in Kiswahili). They commemorate the historic 7 July 1990 pro-democracy protests, when Kenyans demanded an end to one-party rule and the introduction of multiparty democracy under President Daniel arap Moi. The protests became a defining moment in Kenya's democratic history.

enemies but partners. That confidence appeared wanting. And that is precisely why the government must learn from history. History is generous to governments that govern with confidence. It is remarkably unforgiving to those that govern through apprehension.

Chinua Achebe, in An Image of Africa, challenged the dangerous habit of reducing human beings into objects existing merely to serve someone else's narrative. Although he wrote in the context of literature and colonialism, the warning transcends both. Whenever those who wield power begin to see people not as human beings but as problems to be managed, statistics to be explained or crowds to be controlled, governance loses its moral centre. The citizen disappears. The security problem remains. That is never where constitutional democracies are meant to arrive. Constitutional democracies are built upon a simple understanding: governments hold power, but the people own it.

Article 1 of the Constitution could not have expressed it more clearly. All sovereign power belongs to the people of Kenya. The government exercises that power only in trust and only in accordance with the Constitution. It is for that reason that Article 37 guarantees every person the right, peacefully and unarmed, to assemble, demonstrate, picket and present petitions to public authorities.

These provisions are not ornamental words decorating our constitutional text. They are the legal descendants of Saba Saba. They are the answer to the sacrifices of 1990. They are the Republic's solemn promise that never again should a Kenyan have to fear exercising freedoms that belong to them by birth and by law.

That promise imposes obligations upon citizens. It imposes even greater obligations upon the government. The burden of constitutional maturity has never rested exclusively upon the governed. It rests most heavily upon those entrusted with governing. That is why governments must be the students of history.

The generation of Saba Saba has already taught us what courage looks like. They stood against detention without trial. They stood against the criminalisation of dissent. They stood against the belief that power could silence principle. Their struggle was never simply about replacing one political order with another. It was about replacing fear with freedom. History rewarded that courage.

The Constitution became our collective covenant. It is therefore deeply ironic that thirty-six years later, one of the most defining images of Saba Saba was not thousands of Kenyans occupying the streets. It was empty streets. A city that appeared to hold its breath. A Republic that, for a moment, seemed uncertain whether constitutional freedoms could coexist with ordinary life.

That image should trouble every one of us. Not because demonstrations occurred. Democracies have demonstrations. Not because the government prepared for them. Responsible governments prepare. It should trouble us because the scale of the precaution projected the image of a State that had become apprehensive of its own people.

Governments panic when they lose confidence in the resilience of their own institutions. There is a profound difference between maintaining public order and governing through fear. Public order enables rights. Fear discourages their exercise. One strengthens democracy. The other quietly weakens it. The casualties of that fear are rarely those who occupy the corridors of power. They are the ordinary Kenyans who have no luxury of postponing life. The trader who opens her kiosk each morning hoping to sell enough to buy supper. The boda boda rider whose income depends on the next passenger.

The advocate whose client cannot reach court because roads have been barricaded. The litigant whose hearing is adjourned. The pupil who loses another day of learning. The patient whose appointment is missed. The parent who must choose between earning a living and keeping a child safe at home. These are not incidental inconveniences. They are constitutional injuries. For every right that cannot be meaningfully exercised because fear has overtaken confidence diminishes the Republic ever so slightly.

As lawyers, we know that constitutions are seldom undone by one dramatic act. They are tested in quieter moments. In the small decisions that determine whether the government chooses persuasion over intimidation.

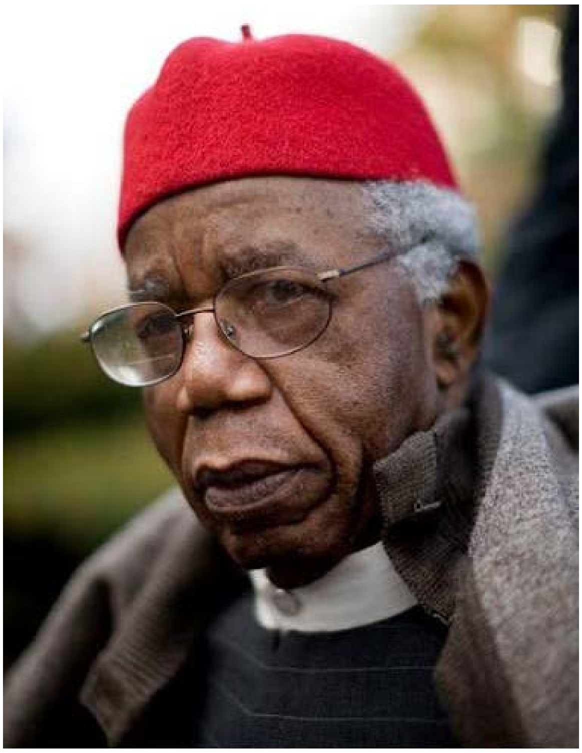
Dialogue over apprehension. Confidence over panic. The legal profession understands this responsibility because we have lived it before. During the struggle for constitutional reform, advocates defended detainees, challenged arbitrary exercises of power, insisted upon due process and reminded the nation that even governments are subject to the law. That responsibility has not changed. The role of the legal profession is neither to echo government nor opposition. It is to echo the Constitution.

The Law Society of Kenya has always found its greatest strength when it has stood where the Constitution stands. Beside the people. Beside the rule of law. Beside justice. Never beside fear. History reminds us that every generation is examined differently. The generation of 1990 was asked whether it possessed the courage to demand democracy. Our generation is being asked a different question. Can we preserve constitutional democracy without surrendering to fear? Can the government maintain order without diminishing liberty? Can citizens exercise their freedoms peacefully while respecting the rights of others? These are not questions for the government alone. But the government bears the heavier responsibility because public power carries public trust.

Chinua Achebe once observed that the trouble with many post-colonial states was not the absence of capable people but a failure of leadership. Leadership, however, is not measured by how effectively it manages agreement. It is measured by how confidently it manages disagreement. A government that trusts the Constitution does not fear peaceful dissent. It protects it. Because it understands that criticism is not the opposite of patriotism. It is often its highest expression.

The generation of Saba Saba did not march so that future governments would become more sophisticated in managing fear. They marched so that future generations would inherit a Republic confident enough to trust its own Constitution. The people have honoured that legacy. Time and again, Kenyans have demonstrated remarkable resilience. They continue to believe in constitutional governance. They continue to seek accountability. They continue to return, despite disappointment, to the promise that this Republic belongs to all of us.

It is the government that must now demonstrate that it has learnt the lesson Saba Saba has patiently taught for thirty-six years. For history has already examined one

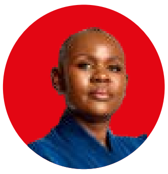


Chinua Achebe

government that governed through panic. It recorded the result. Every government since has had the rare privilege of reading that judgment before writing its own chapter. History has done its part. The people have done theirs. The government must now do its own. Not by fearing the people. But by trusting them. Not by governing through panic. But by governing through constitutional confidence. For in the end, governments come and go. The Constitution endures. The people remain. And history, patient as ever, never stops teaching those willing to learn.

Teresia Wavinya is an Advocate of the High court of Kenya who is passionate, confident, articulate and multi-faceted person who cares deeply about the profession and the society at large. Teresia is currently the Managing Partner of Telow Advocates LLP and the Legal Advisor to H.E Hon Wavinya Ndeti (Governor of Machakos County) where she heads the Legislation and Policy drafting, and Compliance Section at the office of the County Attorney in Machakos County due to her prowess of being keen to details.

The Judicial Service Commission as a Constitutional Hinge: Independence, Accountability and Judicial Governance in Kenya



By Caroline Oduor

Abstract

The Judicial Service Commission is often described by listing its powers. That account is accurate but incomplete. The Commission is the institution through which the Constitution of Kenya attempts to reconcile three demands that do not naturally move together. Judges and judicial institutions must remain independent from executive, legislative, internal, professional, private and popular pressure. Judicial government must remain accountable to the public. The courts must also possess the people, resources and administrative systems required to deliver justice. This article argues that article 172 places those demands in one constitutional office. The JSC is therefore more than a recruitment panel or disciplinary body. It is a constitutional hinge between independence, accountability and effective judicial government. The article first locates the Commission within the post-2010 rejection of executive patronage. It then explains why article 171 requires effective institutional representation rather than factional delegation, and why the advocate representatives must carry the organised Bar's evidence into the Commission while exercising independent constitutional judgment. The article next maps the JSC's functions across recruitment, discipline, conditions of service, performance review, training, finance and advice. It examines the pressure points revealed by Kenyan law and practice, including opaque selection methods, presidential obstruction, incomplete disciplinary procedure, delayed proceedings, the proposed publication of individual performance reports, institutional capacity and conflicts of interest. It proposes bounded independence through published criteria, assessment methods that test judgment and temperament, fair and timely disciplinary rules, performance safeguards, transparent recusal, research capacity and public reporting. Every exercise of JSC power

should be independent in source, lawful in method, reasoned in form and credible in public effect.

Introduction

The Judicial Service Commission sits where constitutional principle becomes institutional practice. Article 172 charges it to promote judicial independence and accountability while facilitating the efficient, effective and transparent administration of justice.[1] Those words do more than announce a mandate. They place the Commission at the point where Kenya decides who may judge, how the judicial workforce is governed, whether misconduct is punished fairly, and whether the Judiciary has the human and material capacity to make constitutional rights real.

The usual account starts with powers. The JSC recommends judges, disciplines judicial officers and staff, reviews conditions of service, organises training and advises the government on the administration of justice.[2]That catalogue is necessary, but it conceals the constitutional problem. Each power can protect the Judiciary from external domination; each can also become a source of internal domination, secrecy or delay. A council created to guard judges may itself require guarding. A commission designed to disperse patronage may reproduce it behind a more respectable institutional form.

This tension offers the central puzzle of the Kenyan JSC. How can an institution be sufficiently insulated to resist the Executive and Parliament, yet sufficiently answerable to justify decisions that shape the third arm of government? How can representative membership broaden legitimacy without turning commissioners into personal delegates? And how can public interviews, written rules and judicial review become genuine safeguards rather than ceremonial signs of transparency?

The basic answer is that independence and accountability are not rival destinations. Properly understood, they are mutually constitutive conditions of lawful judicial government. Independence identifies the actors and pressures from which a decision must be protected. Accountability identifies the law, reasons and procedures through which that decision must be justified. Walter Khobe's work on Kenya's independent institutions makes the point in institutional terms: constitutional entrenchment is important, but design and practice determine whether a commission becomes an effective force for accountability.[3] Comparative scholarship reaches a similar conclusion. Judicial councils may rebalance power, but their existence alone does not guarantee judicial quality or institutional legitimacy.[4]

This article calls the resulting ideal bounded independence. The Commission must enjoy decisional space from political command, partisan bargaining and private influence. But that space is bounded by the Constitution, the Judicial Service Act, fair administrative action, equality, public ethics, reasoned decision-making and judicial review. Independence without those boundaries becomes corporatism. Accountability without independence becomes control.

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[1]Constitution of Kenya 2010, art 172(1).
[2]ibid art 172(1).
[3]Walter Khobe Ochieng, 'The Independence, Accountability, and Effectiveness of Constitutional Commissions and Independent Offices in Kenya' (2019) 4 Kabarak Journal of Law and Ethics 135, 139.
[4]Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 American Journal of Comparative Law 103, 105.

I. The constitutional problem the JSC was designed to solve

A. From executive patronage to plural judicial government

Kenya did not create the post-2010 JSC in an institutional vacuum. It emerged from a constitutional history in which judicial appointments and administration were vulnerable to executive influence, centralised discretion and the political uses of public office. Khobe therefore locates the significance of independent commissions in the effort to dismantle and democratise the inherited state.[5] The point is not that every pre-2010 appointment was improper. It is that a constitutional system should not depend upon the virtue of the appointing authority where structural protection is possible.

Article 171 answers that history by dividing membership among judges, a magistrate, advocates, the Attorney-General, a Public Service Commission nominee and members representing the public.[6] No single constituency can constitute the Commission by itself. The design fragments appointment power and forces different professional and public perspectives into a common deliberative forum. In this sense, plural composition is not demographic decoration. It is an anti-capture device.[7]

The Supreme Court has treated that design as deliberate constitutional architecture. In *Law Society of Kenya v Attorney General*, it held that giving the President a power to appoint even by gazetting elected or nominated commissioners would forget the history and mischief article 171 sought to cure.[8] The Court accordingly invalidated the statutory provision that purported to confer that power over commissioners selected through constitutionally complete routes.[9] The decision matters beyond appointments to the Commission. It affirms that constitutional dispersal of authority cannot be recollected through ordinary legislation or administrative habit.

Plurality, however, does not automatically produce independence. A commission may be formally diverse and still be dominated by blocs, informal alliances or the institutional weight of its chair. Comparative research cautions that judicial councils are designed in many forms and that the relationship between design and judicial quality is weak unless formal arrangements are matched by credible practice.[10] The constitutional question is therefore not merely who occupies the seats. It is how those occupants discharge effective representation.

B. Effective Representation

Article 171 does more than distribute seats among occupational groups. It places several institutional perspectives inside the Commission so that judicial government is not designed only by judges, the Executive or any single professional bloc. Judges and magistrates bring knowledge of adjudication

[5]Khobe Ochieng (n 3) 136; Walter Khobe Ochieng, 'Judicial-Executive Relations in Kenya Post-2010: The Emergence of Judicial Supremacy?' in Charles M Fombad (ed), Separation of Powers in African Constitutionalism (OUP 2016) 289.
[6]Constitution of Kenya 2010, art 171(2).
[7]Walter Khobe Ochieng, 'The Composition, Functions, and Accountability of the Judicial Service Commission from a Comparative Perspective' in Jill Cottrell Ghai (ed), Judicial Accountability in the New Constitutional Order (ICJ Kenya 2016) 47, 47.
[8]*Law Society of Kenya v Attorney General and 4 others* (Petition 45 of 2019) [2023] KESC 19 (KLR) [100].
[9]ibid [101].
[10]Garoupa and Ginsburg (n 4) 133. Their empirical finding was not that councils are irrelevant, but that formal council design showed little necessary relationship with measured judicial quality; this cautions against treating institutional form as a substitute for practice.

and court administration. Advocates bring the experience of court users and the organised profession. The Attorney-General, the Public Service Commission nominee and the public representatives add further constitutional and administrative perspectives. Once appointed or elected, every commissioner exercises delegated sovereign authority and must serve the whole constitutional mandate.[11]

For the two advocate commissioners, effective representation begins with article 171(2)(f), but it does not end there.[12] The Law Society of Kenya Act requires the Society to assist the courts in the administration of justice, uphold constitutionalism and the rule of law, promote access to justice and represent its members.[13] The elected seat therefore secures more than professional visibility. It creates a constitutional route through which the organised Bar's accumulated knowledge may shape judicial governance.

That mandate is neither a licence for instruction nor an invitation to detachment. An advocate commissioner should consult the Society, understand the position developed through its Council, branches and specialist committees, test the evidence supporting that position, and then exercise independent judgment under the Constitution. The Society may inform the commissioner's judgment, but it cannot own her vote in an individual recruitment or disciplinary matter. Conversely, the oath of office does not erase the institutional reason for which advocates elect her.
Effective representation therefore has three parts. The first is consultation. The representative must listen regularly and through predictable channels rather than rely on personal networks or the loudest complaint. The second is translation. She must convert practice experience into questions the Commission can lawfully act upon, including delays, registry failures, integrity concerns, infrastructure gaps, technology problems and barriers to access to justice. The third is accountability. She must report the systemic matters pursued and the institutional progress achieved, subject to confidentiality and collective responsibility.

Advocates hold information that no other constituency holds in the same form. They appear in court daily, observe judicial conduct, encounter registry practice, experience adjournment and technology failure, and see how administrative choices affect litigants. The Law Society is consequently a repository of evidence about judicial administration. Effective representation requires a dependable route by which that evidence reaches the JSC in a form that is verified, prioritised and capable of institutional action.

That route should be structured rather than personality-driven. The advocate representatives should hold scheduled consultations with the LSK Council, branches, practice committees and members on systemic questions. The Society should prepare short evidence-based position papers on appointments, judicial integrity, performance management, infrastructure, court technology and access to justice. The representatives should then communicate what can be disclosed about the Commission's response and explain where law, confidentiality or jurisdiction limits further action.

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[11]Constitution of Kenya 2010, arts 1(1), 1(3)(c), 2(2) and 73(1)(a).
[12]ibid art 171(2)(f).
[13]Law Society of Kenya Act 2014, ss 4(a), 4(b), 4(c), 4(h) and 6; Constitution of Kenya 2010, arts 73(1)(a), 171(2)(f) and 172(1).

A JSC Representation Charter would give that relationship institutional form. It should prescribe a consultation calendar, a secure method for receiving systemic evidence, standards for distinguishing an individual grievance from an institutional problem, periodic non-confidential reporting, disclosure and recusal rules, and a review of performance against published commitments. The Charter should also make clear that consultation cannot dictate an outcome, authorise disclosure of confidential deliberations or convert an elected commissioner into a private agent.[14]

Effective representation thus rejects a false choice between allegiance to the Judiciary and allegiance to the Law Society. The representative serves the Constitution first, but she does so by ensuring that the organised profession's informed voice is consistently, thoughtfully and responsibly integrated into judicial government.

C. Independence, accountability and public reason

Judicial independence has multiple dimensions. It protects judges from interference by the Executive, Parliament, litigants, financiers and public pressure. It must also protect individual judges from improper pressure within the Judiciary itself. John Ferejohn captured the distinction between independent judges and a dependent judiciary: personal adjudicative autonomy can coexist with institutional dependence, just as institutional autonomy can coexist with internal hierarchy.[15] The JSC must attend to both dangers.[16]

Comparative scholarship frames the difficulty in sharply different ways. Garoupa and Ginsburg describe judicial councils as institutions intended to balance independence and accountability, while warning that councils show little necessary relationship with judicial quality.[17] Kosař argues that expanding judicial power makes accountability unavoidable, particularly where conventional controls remain weak.[18] Bobek and Kosař add a different warning: judicial self-government may replace external political capture with internal corporatism, elite reproduction and opaque housekeeping.[19] These accounts are not contradictory. Together they show why a JSC must be independent from command but dependent upon law, reasons and review.

Public reason supplies the connecting principle. A public body does not justify a decision merely by pointing to its constitutional status or the good faith of its members. It must explain the criteria it used, the evidence it accepted, the conflicts it managed and the route by which it reached its conclusion. Article 47 constitutionalises that obligation by requiring lawful, reasonable and procedurally fair administrative action and written reasons

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[14]Khobe Ochieng (n 3) 142.
[15]John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Southern California Law Review 353, 362.
[16]Patricia Kameri-Mbote and Muriuki Muriungi, 'Internal Mechanisms for Ensuring Independence and Accountability in the Judiciary in Kenya' in Jill Cottrell Ghai (ed), Judicial Accountability in the New Constitutional Order (ICJ Kenya 2016) 73, 73.
[17]The literature identifies overlapping but distinct accountability problems. Garoupa and Ginsburg frame councils as an institutional balance between independence and accountability: Garoupa and Ginsburg (n 4) 106. Ferejohn distinguishes the autonomy of individual judges from the institutional dependence of the judiciary: Ferejohn (n 15) 362. David Kosař argues that the expansion of judicial power makes the search for credible accountability mechanisms unavoidable: David Kosař, 'The Least Accountable Branch' (2013) 11 International Journal of Constitutional Law 234, 259. Michal Bobek and David Kosař warn that judicial self-government may generate internal capture and corporatism rather than independence: Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15 German Law Journal 1257, 1268. This article draws from all four accounts but treats public reason as the mechanism that connects institutional autonomy to constitutional justification.
[18]Kosař (n 17) 259.
[19]Bobek and Kosař (n 17) 1268.

where rights are adversely affected.[20] For the JSC, reasons are not an administrative courtesy. They are part of the constitutional price of independence.

II. A functional map of the commission's powers

A. Recruitment and the transmission of judicial authority

Recruitment is the Commission's most visible function because it determines who may exercise judicial authority. The Constitution assigns the JSC power to recommend persons for appointment as judges and requires competitive and transparent processes guided by gender equality.[21] The Judicial Service Act translates that command into advertisements, applications, shortlisting, interviews, evaluation and nomination.[22]

Merit is indispensable, but it is not self-defining. The First Schedule identifies professional competence, communication, integrity, fairness, judgment, legal experience, public service and related qualities.[23] International standards similarly require candidates of integrity and ability with appropriate legal training or qualifications.[24] The difficulty begins after these principles are stated. Commissioners must decide what evidence proves each quality, how competing qualities are weighted, and how individual assessments become an institutional decision.[25]

Public interviews solve only part of that problem. They allow citizens to observe questioning and hear a candidate's responses. They do not disclose the significance assigned to prior judgments, professional references, integrity complaints, writing ability, administrative experience or constitutional philosophy. A process can be visible and still be methodologically opaque. Transparency therefore requires more than opening the interview room. It requires an auditable connection between published criteria and final recommendations.

The courts have already supplied the legal foundation for that conclusion. In *Kinuthia v Judicial Service Commission*, the High Court treated judicial recruitment as administrative action subject to article 47 and the duty to give written reasons.[26] In *National Gender and Equality Commission v JSC*, the Court recognised that merit, non-discrimination and diversity must be read together rather than arranged as mutually exclusive commands.[27] The JSC must therefore show not only that it considered relevant values, but how it reconciled them in the actual decision.[28]

Recommendation also transfers constitutional authority. Article 166 requires the President to appoint judges in accordance with the JSC's recommendation.[29] *Katiba Institute v President* rejected the idea that the President retains a second merits review;

[20]Constitution of Kenya 2010, arts 47(1) and 47(2); Fair Administrative Action Act 2015, ss 4(1), 4(2) and 4(3).
[21]Constitution of Kenya 2010, arts 166(1), 172(1)(a) and 172(2).
[22]Judicial Service Act (Cap 8A), s 30 and First Schedule paras 1(2), 3 and 5.
[23]Judicial Service Act (Cap 8A), First Schedule para 13.
[24]United Nations Basic Principles on the Independence of the Judiciary (1985), para 10.
[25]Judicial Service Act (Cap 8A), First Schedule paras 14(1) and 14(2).
[26]*Kinuthia v Judicial Service Commission; Mumbi and 3 others (Interested Parties)* (Petition 251 of 2019) [2020] KEHC 9224 (KLR) [80].
[27]*National Gender and Equality Commission and another v Judicial Service Commission and another; Lenaola (Interested Party)* (Petitions 446 and 456 of 2016 (Consolidated)) [2017] KEHC 8343 (KLR) [34].
[28]National Gender and Equality Commission (n 27) [29].
[29]Constitution of Kenya 2010, art 166(1).

the presidential act is formal because the substantive selection power belongs to the Commission.[30] *Muchelule* later held that prolonged refusal to appoint recommended candidates violated fair administrative action and the constitutional demand for timely performance.[31] A recommendation that the Executive may indefinitely suspend is not a recommendation in the constitutional sense. It is an invitation to re-create the veto that article 166 removed.

B. Discipline, removal and the boundary of adjudication

Discipline tests the Commission more severely than recruitment. Appointment asks whether a person should enter judicial office. Discipline asks whether an existing officer has breached duties serious enough to justify sanction, while preserving fairness, independence and the presumption that accusation is not proof. The Constitution gives the JSC direct disciplinary authority over registrars, magistrates, other judicial officers and Judiciary staff.[32] For superior court judges, article 168 assigns the Commission a preliminary screening role before a presidential tribunal determines removal.[33]

That division of labour is constitutional, not semantic. In *Mboya v Judicial Service Commission*, the High Court emphasised that the JSC conducts a preliminary inquiry into a complaint against a judge; it does not try or convict the judge.[34] The Commission must decide whether the petition discloses a ground for removal and whether the allegation has sufficient substance to justify the next constitutional stage. It must do enough investigation to avoid forwarding speculation, but not so much adjudication that it prejudges the tribunal.[35]

The danger runs in both directions. A timid Commission may shield misconduct behind the language of judicial independence. An overreaching Commission may use preliminary inquiry as a trial without the safeguards of a trial. The Court of Appeal's older formulation in *Mutava* remains useful: fair administrative action includes legality, reasonableness and procedural fairness, and natural justice must shape the Commission's process.[36] Independence cannot excuse a defective investigation; accountability cannot excuse an unfair one.

Staff discipline presents the same constitutional stakes in a different legal setting. Section 32 and the Third Schedule to the Judicial Service Act govern appointment, discipline and removal of judicial officers and staff.[37] In *Kamande v JSC*, the Supreme Court held that these proceedings are administrative action subject to articles 47 and 50.[38] It distinguished the Chief Justice's preliminary role from the Commission's responsibility for a full hearing and insisted upon an effective opportunity to confront adverse evidence.[39]

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[30]*Katiba Institute v President of the Republic of Kenya and 2 others; Judicial Service Commission and 3 others* (Interested Parties) (Petition 206 of 2020) [2021] KEHC 442 (KLR) [73].

[31]*Muchelule and 5 others v Attorney General; Judicial Service Commission* (Interested Party) (Petition E311 of 2023) [2024] KEHC 12116 (KLR) [67].

[32]Constitution of Kenya 2010, art 172(1)(c).

[33]ibid art 168.

[34]*Mboya and another v Judicial Service Commission and another; Rawal and 5 others (Interested Parties)* (Petitions 204 and 218 of 2016 (Consolidated)) [2020] KEHC 9225 (KLR) [209].

[35]United Nations Basic Principles on the Independence of the Judiciary (1985), paras 17 and 20.

[36]*Judicial Service Commission v Mutava and another* (Civil Appeal 52 of 2014) [2015] KECA 741 (KLR) [23].

[37]Judicial Service Act (Cap 8A), s 32 and Third Schedule.

[38]*Kamande v Judicial Service Commission* (Petition E005 of 2025) [2025] KESC 48 (KLR) [46].

[39]ibid [56].

Kamande is important because it treats procedural design as an institutional substance. A disciplinary body does not become fair merely by allowing written representations or convening a hearing. Fairness depends upon disclosure, the attendance of material witnesses, an opportunity to challenge adverse evidence, impartial decision-makers and a reasoned conclusion. The Commission has statutory powers to summon witnesses and obtain information; failure to use those powers where credibility is central can turn into unfairness.[40]

Delay can decide a disciplinary case before the Commission does. In *Kamande*, the Supreme Court regarded a twenty-three-month process as inordinate and rejected the absence of a statutory deadline as an excuse.[41] Article 259(8) requires constitutional obligations without prescribed time to be performed without unreasonable delay.[42] A suspended officer loses income, reputation and professional direction while memories fade and institutional responsibility diffuses. Speed is therefore not opposed to fairness. Unexplained delay is itself unfair.[43]

Recent litigation over petitions for the removal of judges shows why article 168 requires a settled procedural architecture. The Commission had developed an internal sequence for receiving, screening and hearing complaints, but the process lacked a comprehensive published instrument.

In December 2025, the High Court held in *Lubengu v Judicial Service Commission* that the JSC could not lawfully continue processing removal petitions without regulations under section 47 of the Judicial Service Act. The Court of Appeal stayed that prohibition in March 2026 pending appeal. The stay restored the Commission's ability to act, but it did not answer the institutional criticism that a process affecting security of tenure should not depend on unpublished practice.[44]

The draft Judicial Service (Petition for Removal of a Judge) (Procedure) Regulations, 2026 respond directly to that gap. The JSC opened the draft for validation and later presented it to the National Assembly Committee on Delegated Legislation. The draft seeks to regulate petitions filed by members of the public and proceedings initiated by the Commission on its own motion. It proposes registration, preliminary evaluation, service of allegations and supporting material, investigation, pre-hearing management, oral evidence, cross-examination, written submissions, a report and notification of the outcome.[45]

The detail matters. The draft contemplates a panel of commissioners, defined response periods, powers to summon witnesses and obtain documents, protection for vulnerable witnesses, electronic filing and physical or virtual hearings. It also allows the Commission to record reasons when it closes a matter and to continue

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[40]ibid [73] and [74]. The Court's reasoning is institutionally important: a hearing body with coercive powers cannot remain passive where the absent evidence is central to credibility and fairness.
[41]ibid [78].
[42]Constitution of Kenya 2010, art 259(8); Kamande (n 38) [79].
[43]Kamande (n 38) [81].
[44]Judicial Service Commission, 'JSC Chairperson Chief Justice Martha Koome 2026 New Year Address to the Commission' (7 January 2026) <https://jsc.go.ke/jsc-chairperson-chief-justice-martha-koome-2026-new-year-address-to-the-commission/> accessed 30 July 2026; *Lubengu v Judicial Service Commission* (Constitutional Petition E110 of 2025) [2025] KEHC 18839 (KLR); *Judicial Service Commission v Lubengu and 2 others* (Civil Application E003 of 2026) [2026] KECA 442 (KLR) [21], [26]–[27].
[45]Judicial Service Commission, Draft Judicial Service (Petition for Removal of a Judge) (Procedure) Regulations 2026 (final validation draft, 2026); Judicial Service Commission Kenya, 'The JSC today appeared before the National Assembly's Committee on Delegated Legislation' X (14 May 2026) <https://x.com/jsckenya/status/2054925339063730394> accessed 30 July 2026.

a matter in the public interest even after a petitioner seeks to withdraw it. These provisions would make the process more predictable for complainants, judges and commissioners.

Procedure must nevertheless preserve the division of labour created by article 168. The JSC decides whether the material discloses a constitutional ground serious enough to justify a tribunal. It does not conduct the final trial of the judge. In *Chitembwe v Tribunal Appointed to Investigate the Conduct of Justice Said Juma Chitembwe*, the Supreme Court required the Commission to evaluate the material and satisfy itself that a prima facie ground exists, but warned against definitive findings that pre-empt the tribunal.[46]

The final regulations should therefore distinguish investigation from threshold determination. Where the same panel gathers evidence, questions witnesses and recommends referral, the rules should require disclosure of material gathered, an opportunity to answer it, recorded decisions on disputed evidence and reasons explaining why the article 168 threshold has or has not been met. The Commission should also adopt an articulated recusal test and, where its numbers permit, avoid assigning a commissioner who directed an investigation to dominate the later threshold decision.

The regulations must also separate error from misconduct. A complaint that merely disputes a judge's interpretation of law belongs to appeal or review. The JSC should intervene only where independent material plausibly discloses incapacity, breach of the judicial code, bankruptcy, incompetence, gross misconduct or misbehaviour. Without that screen, discipline may become a collateral appeal and expose decisional independence to pressure from disappointed litigants.

Finally, confidentiality and transparency must be reconciled rather than asserted together. Evidence may require protection to preserve privacy, witness safety and the integrity of a pending process. The Commission should still publish a reasoned summary when a matter ends, stating the legal threshold applied, the broad nature of the material considered and the basis of the disposition without disclosing protected information. A predictable procedure protects judges from arbitrary accusation and protects the public from unreasoned institutional closure.[47]

C. Conditions of service, performance, human capital and institutional culture

The quieter functions of the JSC often determine whether the visible functions succeed. Article 172 requires the Commission to review conditions of service for judges, judicial officers and Judiciary staff, prepare continuing education programmes and advise the national government on improving the administration of justice.[48] These powers concern institutional ecology: recruitment brings capable people into the system, but conditions, training and administrative support determine whether capability survives.

Training performs a related constitutional function. Legal doctrine changes, technology alters procedure, social context complicates adjudication and new forms of

[46] *Chitembwe v Tribunal Appointed to Investigate into the Conduct of the Hon Justice Said Juma Chitembwe* (Petition E001 of 2023) [2023] KESC 114 (KLR) [175]–[178].
[47] Judicial Service Act (Cap 8A), s 47; Judicial Service (Code of Conduct and Ethics) Regulations 2020, regs 78 and 81.
[48] Constitution of Kenya 2010, art 172(1)(b), (d) and (e).

vulnerability reach the courts. Continuing education should therefore extend beyond technical updates. It should include judgment writing, case management, trauma-informed adjudication, equality, disability access, emerging technology, judicial ethics, leadership, wellbeing and the constitutional relationship between decisional independence and public explanation. The Consultative Council of European Judges, commonly referred to as the CCJE, treats selection, promotion, evaluation, ethics, discipline, training, court administration and public confidence as connected tasks of a judicial council.[49]

Performance management belongs within the same institutional ecology, but it serves more than one purpose. The Judiciary's Performance Management and Measurement Understandings system evaluates courts and administrative units against agreed targets. Properly used, institutional data can reveal backlog, staffing gaps, registry weakness, uneven deployment and practices worth replicating. It can also support the JSC's conditions-of-service, training and advisory functions. The data should diagnose the system before it is used to judge the individual.[50]

The case-weighting initiative announced in 2026 adds an important layer. Raw disposal figures treat a short uncontested application and a complex constitutional trial as equivalent units of work. A credible weighted-caseload method can estimate the time and institutional support required by different case types, improve deployment and expose stations carrying structurally heavier burdens. Section 12(3) of the High Court (Organization and Administration) Act already permits the JSC to assess judicial needs and recommend a weighted caseload formula.[51]

Case weighting should not become an invisible algorithm. The Judiciary should publish the categories, time assumptions, sample design, treatment of multi-judge matters and method of periodic review. Judges, judicial officers, registrars, advocates and court staff should participate because each sees a different part of the work. A formula designed only from completed files may ignore the labour of urgent applications, case management, judgment writing, administrative leadership and matters delayed by external actors.

The proposed publication of individual performance reports makes these safeguards urgent. In July 2026, the Judiciary indicated that individual reports would follow reporting, verification, validation and approval. A constitutional challenge was filed soon afterwards, alleging that publication lacked a sufficient legal and policy framework. Whatever the result of that case, the dispute identifies the prior question the JSC must answer: what does an individual score measure, and what will prevent it from influencing the substance of judicial decision-making?[52]

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[49]Consultative Council of European Judges, Opinion No 10 (2007) on the Council for the Judiciary at the Service of Society, para 42.

[50]Office of the Chief Justice, 'Launch of the Performance Management and Measurement Understandings (PMMUs) Evaluation Report 2022/2023' (26 July 2024) <https://ocj.judiciary.go.ke/launch-of-the-performance-management-and-measurement-understandings-pmmus-evaluation-report-2022-2023/> accessed 30 July 2026; Judiciary of Kenya, Performance Management and Measurement Understanding Evaluation Report for the Financial Year 2024/2025 (Judiciary 2026).

[51]High Court (Organization and Administration) Act (Cap 8C), s 12(3); 'JSC rolls out plan to track judges' performance and workload' People Daily (5 February 2026) <https://peopledaily.digital/news/jsc-rolls-out-plan-to-track-judges-performance-and-workload> accessed 30 July 2026.

[52]Felix Kipkemoi, 'Judiciary to publish performance reports of individual judges from July' The Star (3 July 2026) <https://www.the-star.co.ke/news/2026-07-03-judges-performance-reports-to-go-public-this-month> accessed 30 July 2026; Carolyne Kubwa, 'Petition filed to stop JSC from publishing judges' individual performance reports' Eastleigh Voice (15 July 2026) <https://eastleighvoice.co.ke/news/379564/petition-filed-to-stop-jsc-from-publishing-judges-individual-performance-reports> accessed 30 July 2026.

A legitimate framework may consider timeliness, case management, delivery of reserved judgments, treatment of urgent matters, administrative leadership, training and compliance with ethical duties. It must adjust for case complexity, inherited backlog, transfers, illness, vacancies, staff shortages, security conditions and the availability of technology. It must not reward agreement with appellate courts, political acceptability, settlement rates or the popularity of outcomes. Nor should it rely on disposal counts that encourage hurried hearings, avoidance of difficult cases or abbreviated reasons.

The JSC should distinguish developmental review from discipline. Performance review should ordinarily identify support, mentoring, training, workload adjustment and administrative reform. Persistent failure may eventually justify a separate process, but no adverse employment or disciplinary consequence should arise from an unverified score or without notice and a fair opportunity to respond. The CCJE regards evaluation as compatible with judicial independence only where criteria are objective and transparent, evaluators understand judicial work, the judge may comment on the material, and the system does not control the content of decisions.[53]

Before publication, the Commission and Judiciary should disclose the legal basis, indicators, data definitions, weighting method, verification process, qualitative moderation, correction procedure and review mechanism. The affected judge or judicial officer should see and answer the proposed report. Public reports should explain material constraints and avoid league tables that imply false precision. Performance information can deepen accountability only when the method is as transparent as the result.

D. Finance, administration and advice

Judicial independence can fail through the budget without ever being attacked in a speech. Courts require buildings, registries, technology, interpreters, security, research support and sufficient personnel. Article 173 establishes the Judiciary Fund and requires expenditure to be administered by the Chief Registrar, subject to law.[54] The JSC's advisory and conditions-of-service functions place it close to the evidence needed to defend those resources.

Financial independence does not mean financial immunity. The Judiciary must budget transparently, procure lawfully, account for expenditure and demonstrate how resources improve access to justice. The African Principles and Guidelines recognise adequate resources as a condition of judicial independence.[55] But resources acquire constitutional legitimacy only when linked to service: fewer adjournments, accessible courts, reliable records, safer stations, timely judgments and support for judicial officers.

The Commission's advisory function should therefore be evidence-producing rather than episodic. It should identify the administrative causes of delay, quantify personnel gaps, evaluate the effects of new courts, measure training outcomes and publish reasoned recommendations to the government. Garoupa and Ginsburg caution that the mere existence of a council does not

[53] Consultative Council of European Judges, Opinion No 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, paras 6–12, 29–31 and 42–49.
[54] Constitution of Kenya 2010, art 173(1), (3) and (4); Judiciary Fund Act (Cap 8B), ss 4 and 5.
[55] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), s A(4)(h).

produce quality.[56] A Commission that cannot convert administrative data into reform proposals may remain formally independent while operationally dependent.

III. The post-2010 strains

A. Transparency without an auditable method

The first strain is the distance between visible procedure and explainable result. Public interviews are a major constitutional gain because they expose candidates to scrutiny and prevent appointments from occurring wholly through private communication. They are not a complete assessment method. A candidate may recall doctrine fluently while lacking the capacity to organise a difficult record, write a clear judgment, manage a tense courtroom or treat vulnerable litigants with patience and dignity.

The comparative warning is straightforward. Bobek and Kosař show that enthusiasm for judicial councils often focused on composition and formal independence while neglecting transparency, accountability and the ordinary work of administration. Kenya should not repeat that mistake by treating a broadcast interview as the whole of transparency. The Commission should disclose the assessment architecture while protecting the confidentiality of deliberation.[57]

A stronger method should separate eligibility from judicial capability. The first stage should verify constitutional and statutory qualifications, integrity and professional record. The second should use an anonymised written exercise based on an unfamiliar record and require the candidate to identify the issues, evaluate evidence, apply law, reach a disposition and give concise reasons. This would test judgment writing rather than memory.

The third stage should use structured situational questions or a carefully designed role play. Candidates could be asked to manage an unrepresented litigant, respond to apparent bias, control an abusive advocate, prioritise urgent matters, address a conflict of interest or explain a difficult ruling. The assessment should test listening, fairness, decisiveness, courtroom control, empathy, self-awareness and the ability to remain composed under pressure. These are the practical dimensions of judicial temperament and emotional intelligence.

The fourth stage should be a structured behavioural interview. Instead of asking only what the law provides, commissioners should require concrete examples of independence, ethical judgment, leadership, resilience, management of disagreement and willingness to learn. Questions should be standardised around published competencies, with follow-up questions used to test the evidence rather than reward performance or rhetorical confidence.

The United Kingdom's Judicial Appointments Commission uses a skills and abilities framework that includes legal skill, intellectual capacity, reasoned decision-making, communication, resilience, integrity and personal qualities. Its selection exercises may include situational questions, role play and a short judgment. Kenya need not copy that system. It demonstrates,

[56]Garoupa and Ginsburg (n 4) 123.

[57]Bobek and Kosař (n 17) 1275. Their critique is especially relevant to Kenya because a commission may satisfy international design expectations while remaining opaque in selection, discipline, administration and internal governance.

however, that an interview can sit within a broader assessment of the work a judge will actually perform.[58]

Broader assessment also creates new risks. The JSC should not use unvalidated personality tests or impressions about accent, confidence, age, disability or social style as proxies for temperament. Exercises should be job-related, piloted, accessible to candidates with disabilities, moderated for bias and scored against published indicators. Independent quality assurance and a complete audit trail would make the method both fairer and more defensible.[59]

B. Recommendation without timely appointment

The second strain is executive obstruction after the Commission has completed its work. The Supreme Court has already rejected presidential control over constitutionally elected JSC members.[60] The High Court has likewise rejected a presidential merits veto over recommended judges.[61] The remaining problem is practical: delay can exercise the power that the constitutional text denies.

Muchelule demonstrates the cost. Recommended candidates waited for more than three years after the JSC process, despite the absence of presidential discretion to revisit their merit.[62] The Court held that the candidates' legitimate expectation crystallised and that failure to provide written reasons violated article 47.[63] The episode injured more than individual careers. It disrupted staffing, signalled that constitutional recommendations could be selectively honoured and invited the public to read appointments through partisan preference.

C. Accountability without settled procedure

The third strain appears when the Commission acts without sufficiently settled procedures. Recruitment rules are more developed than the public architecture for complaints, preliminary inquiries, recusals and publication of outcomes. The absence of complete procedural rules creates discretion at precisely the point where personal reputation, judicial independence and public confidence are most vulnerable.

Kamande exposes the danger in staff discipline. The Supreme Court found that the Commission failed to meet constitutional and statutory standards, including through delay and an inadequate opportunity to confront material evidence.[64] The Court also set out factors for evaluating unreasonable delay, including the nature of the matter, explanation offered, prejudice and the conduct of the parties.[65]Those principles should now be converted into an operational code rather than rediscovered case by case.

A complete code should specify intake, screening, disclosure, preliminary inquiry,

[58]Judicial Appointments Commission, 'Judicial Skills and Abilities Framework: Legal Roles' (29 July 2025) <https://judicialappointments.gov.uk/corp-publication/judicial-skills-and-abilities-framework/> accessed 30 July 2026; Judicial Appointments Commission, 'Guidance for Selection Days' <https://judicialappointments.gov.uk/corp-publication/guidance-for-selection-days/> accessed 30 July 2026.
[59]United Nations Basic Principles on the Independence of the Judiciary (1985), para 10; Judicial Appointments Commission, 'Judicial Skills and Abilities Framework: Legal Roles' (29 July 2025) <https://judicialappointments.gov.uk/corp-publication/judicial-skills-and-abilities-framework/> accessed 30 July 2026.
[60]Law Society of Kenya (n 8) [100].
[61]Katiba Institute (n 30) [70].
[62]Muchelule (n 31) [67].
[63]ibid [70] and [73].
[64]Kamande (n 38) [84].
[65]ibid [80].

hearing, witness attendance, interim measures, recusal, decision, reasons, publication, review and timelines. It should distinguish complaints against judges, judicial officers and staff because the constitutional pathways differ. It should also identify the circumstances in which information must remain confidential and when public interest requires a reasoned summary.

D. Institutional independence without capacity

The fourth strain is a less dramatic form of dependence: inadequate capacity. A Commission may resist political pressure yet remain unable to investigate complaints promptly, analyse appointment records, model staffing needs or track compliance with its own decisions. Capacity is therefore part of independence. An institution that lacks information, personnel or technology will depend upon the actors it is meant to supervise.

This problem is familiar in comparative accounts of judicial self-government. Councils often acquire prestigious constitutional functions without the research, administrative and evaluative machinery required to perform them.[66] The result is a gap between high constitutional language and low institutional capability. Kenya should treat the JSC secretariat as a constitutional knowledge institution, not merely a meeting-support office.

E. Pluralism without conflict rules

The fifth strain lies inside plural representation itself. Commissioners may have professional relationships with candidates, colleagues, complainants, law firms, judicial officers or institutions appearing before the JSC. A plural commission cannot avoid all connections. It can, however, distinguish ordinary professional familiarity from interests that reasonably threaten impartiality.

The Constitution requires state officers to exercise authority in a manner that promotes public confidence in the integrity of office.[67] That standard should be operationalised through written disclosure and recusal rules. A commissioner should disclose a relevant relationship on the record; the Commission should decide recusal by an articulated test; and the decision should be recorded without unnecessarily publishing private information.

Internal accountability requires more than recusal. Khobe warns that oversight can itself become a route through which Parliament interferes with independent institutions, including the JSC.[68] The answer is not to reject oversight. It is to separate legitimate demands for reports, expenditure accountability and reasons from attempts to direct particular outcomes. The Commission should be transparent enough to withstand scrutiny and independent enough to reject command.

IV. A reform programme for bounded independence

A. Recruitment that can be understood

The first reform is to make selection auditable without making it mechanical.

[66] Bobek and Kosař (n 17) 1285; Garoupa and Ginsburg (n 4) 105.
[67] Constitution of Kenya 2010, arts 10(2)(c) and 73(1)(a).
[68] Khobe Ochieng (n 3) 159. Khobe's concern is not that parliamentary oversight is always illegitimate, but that powers of oversight and removal can be deployed to interfere with institutions whose independence frustrates vested interests.

Before applications open, the JSC should publish the criteria, indicators, weighting ranges, assessment exercises and treatment of equality and diversity. The process should combine record review, an anonymised written judgment exercise, structured situational assessment, behavioural evidence and public interview. After completion, the Commission should publish an institutional report explaining the applicant pool, shortlisting method, integrity verification, assessment design, deliberative framework and basis of the recommendation. Unsuccessful candidates should receive concise individual reasons.

Scoring should inform rather than replace judgment. Numerical evaluation can expose inconsistency and compel commissioners to engage every criterion, but it cannot measure constitutional judgment or temperament with mathematical precision. The Commission should permit a reasoned departure from aggregate scores only where the departure is recorded and justified. It should retain an audit trail showing how written work, scenarios, professional evidence and interview performance contributed to the final decision. Transparency is strongest when it disciplines judgment rather than pretending judgment has disappeared.

B. Complaints and discipline that are fair and timely

The second reform is a comprehensive complaints and discipline code. The Commission should set an initial screening period, a preliminary inquiry period, a hearing period and a time for reasons. Extensions should be exceptional, written and communicated. Article 259(8) already supplies the constitutional principle; procedural rules should give it institutional form.[69]

The code should preserve the different constitutional status of judges, judicial officers and staff. Complaints against superior court judges require the article 168 threshold and a preliminary recommendation, not a final finding of guilt. Staff and subordinate judicial officers require a full disciplinary process under article 172, section 32 and the Third Schedule. Clear differentiation will prevent the Commission from doing too little in one category and too much in another.

C. Capacity, finance and institutional learning

The third reform is to connect constitutional functions to professional capacity. A research and policy directorate should analyse recruitment outcomes, diversity, workload, staffing, disciplinary trends, training needs and access-to-justice indicators. Its work should inform JSC advice to the government and the Judiciary's budget priorities. Constitutional advice should emerge from evidence rather than episodic crisis.

The Commission should adopt a public performance framework for its own constitutional work. Relevant indicators include vacancy-to-recommendation time, complaint disposal, compliance with procedural timelines, implementation of training programmes, stakeholder consultation, resolution of audit issues, publication of reasons and implementation of recommendations made to the national government. The framework should measure institutional delivery without inviting any outside actor to direct the

[69] Constitution of Kenya 2010, art 259(8).

outcome of an individual recruitment or disciplinary matter.[70]

The individual judicial-performance initiative requires a separate framework. It should combine verified quantitative data, weighted caseload, qualitative review and the institutional context in which the judge or judicial officer worked.[71] It should identify whether the purpose is professional development, deployment, promotion, public information or discipline because each purpose demands different safeguards. A single score should not silently perform all five functions.[72]

Before individual reports are released, the Commission and Judiciary should publish the indicators, data definitions, verification process, moderation rules, correction procedure and review mechanism. The affected judge or judicial officer should see and answer the proposed report before publication. Public reporting should avoid ordinal rankings that imply false precision and should explain resource constraints that materially affected performance. Accountability requires usable information, not a league table.

Comparative caution supports modesty here. Bobek and Kosař argue that smaller functional reforms in appointment, staffing and case administration may sometimes achieve more than grand institutional transplantation.[73] Kenya already has the constitutional institution. The next phase should focus less on redesigning its existence and more on improving the quality of its routines.

D. Ethics, recusal and collective responsibility

The fourth reform is a JSC-specific code of ethics. General constitutional standards remain essential, but the Commission's mixed membership creates recurring issues that deserve precise treatment: campaign support, professional relationships, confidentiality, communication with candidates, contact with complainants, collective decisions and public criticism of pending processes.

The code should require annual interest declarations, matter-specific disclosure, recorded recusal decisions and a prohibition on private assurances about outcomes. It should also state that commissioners may explain institutional policy but must not disclose confidential deliberations or undermine collective decisions through selective accounts. Collective responsibility does not forbid dissent. It requires dissent to be expressed through lawful institutional channels.

Public confidence will not be secured by demanding silence from commissioners. It will be secured by consistent rules governing when they speak, what they disclose and how they separate personal political activity from constitutional office. The Venice Commission has emphasised that judicial councils must be structured to protect independence while avoiding corporatism and self-interest.[74] Ethics is the bridge between those aims.

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[70] Judicial Service Commission, Strategic Plan 2022–2027 (JSC 2022) 31–38; Judicial Service Commission, 'Outcome 1: Efficient, Effective, and Accountable Administration of Justice' <https://jsc.go.ke/outcome-1-efficient-effective-and-accountable-administration-of-justice/> accessed 30 July 2026.

[71] Consultative Council of European Judges, Opinion No 10 (2007), para 50.

[72] Consultative Council of European Judges, Opinion No 17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, paras 6–12, 29–31 and 42–49.

[73] Bobek and Kosař (n 17) 1285.

[74] European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, para 32.

E. Public reporting and enforceable institutional boundaries

The fifth reform is a disciplined system of public reporting. The Commission should publish an annual constitutional accountability report distinct from general Judiciary reporting. It should address each article 172 function, identify decisions and unresolved constraints, disclose compliance with timelines, explain the use of public funds and state the reforms proposed to the government.

These boundaries follow from the Constitution's allocation of sovereign power. Article 252 gives commissions powers necessary for investigation, conciliation and the performance of their functions.[75] Article 249 protects their independence while keeping them subject only to the Constitution and law.[76] Bounded independence is therefore not a political compromise. It is the structure the constitutional text already demands.[77]

V. The advocate representative and effective institutional representation

The advocate representative occupies a distinctive position. She understands the institutional life of the courts from outside the Bench but inside the justice system. Advocates observe judicial conduct, confront registry practice, experience technology and infrastructure failure, and see how delay or administrative design affects litigants. The office should convert that dispersed professional experience into reliable institutional knowledge rather than repeat the loudest complaint.
Her first duty is structured consultation. The representative should maintain scheduled channels with the LSK Council, branches and specialist committees, commission short evidence-based position papers and identify recurring problems that deserve the JSC's attention. Consultation should include advocates outside Nairobi and practitioners in specialised and high-volume courts so that the Commission does not mistake the experience of a narrow professional circle for the experience of the Bar.

Her second duty is preparation. In recruitment, she should understand the vacancy, the court's needs, the candidate's record and the published criteria. In discipline, she should test jurisdiction, disclosure, delay, witness sufficiency, conflicts and the correct legal threshold. On administration, she should bring verified evidence about registries, infrastructure, technology, performance management and access to justice. Independence is not performed by a courageous vote at the end. It is built through disciplined inquiry before the vote.

Her third duty is accountable independence. The representative should report the systemic matters pursued, the evidence placed before the Commission and the progress achieved, while respecting confidentiality in individual cases. She should also resist executive obstruction, legislative encroachment, professional lobbying, internal corporatism and popular pressure whenever any of them seeks an unlawful result. The source of pressure does not determine the constitutional response. The test is whether the proposed action is authorised, fair, reasoned and consistent with the JSC's mandate.

The LSK seat is therefore an office of translation and institutional connection. It carries the organised profession's

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[75] Constitution of Kenya 2010, art 252(1)(a) and (b).
[76] ibid art 249(2).
[77] Khobe Ochieng (n 3) 144.

The Chief Justice (CJ) plays a central constitutional role in safeguarding judicial independence, accountability, and effective judicial governance in Kenya. Under the 2010 Constitution, the Chief Justice is not merely the head of the courts but also a key guardian of the rule of law and constitutionalism.

evidence into the Commission, translates constitutional standards into administrative design, and explains institutional policy back to the profession and the public. Article 171 creates an elected route to the Commission.[78] Article 172 supplies the common mandate after election.[79] Effective representation joins the two: constitutionally independent, institutionally informed and professionally accountable.

A Representation Charter would give this conception practical form. It should set a consultation calendar, require a secure mechanism for receiving systemic evidence, provide for periodic non-confidential reports, create a performance review against published commitments and define the limits imposed by recusal, privacy and collective responsibility. Its purpose would not be to subordinate a commissioner to the Society. It would ensure that representation remains continuous, evidence-based and visible rather than depending on personal style or election-season promises.

VI. Conclusion

The JSC's powers are easiest to describe and hardest to integrate. Recruitment, discipline, conditions of service, training, administration and advice appear as separate functions. In practice they form one system of judicial government. Poor recruitment burdens discipline. Weak conditions of service undermine retention. Inadequate training affects quality. Scarce resources produce delay. Opaque procedure weakens confidence in every outcome.

Kenya's answer should not be maximal insulation or maximal exposure. It should be bound to independence: protection from command, submission to law, discipline by reasons, fairness in procedure, timeliness in action and candour in public reporting. That model does not weaken the Commission. It makes its independence defensible.

[78]Constitution of Kenya 2010, art 171(2)(f).
[79]ibid art 172(1).

The effectiveness of the African Court on Human and Peoples' Rights: Twenty years on and its contribution to International Criminal Justice

By Nicholas Cheruiyot

[A keynote address delivered at the Next Generation of International Criminal Law Lawyers Forum, held on Friday, 17 July 2026, at Strathmore University in commemoration of International Day of Justice]

I. Introduction

This year's commemoration of the International Day of Justice comes at a very critical moment in time, where there has been a drastic shift in the geopolitical environment, erosion of criminal justice system ideals, and a threat to regional and international institutions. This calls for a critical analysis of the role that protective institutions have and continue to play in enhancing global justice, playing protective mandates to human rights and fostering positive multilateralism.

At the centre of these institutions is the African Court, whose human rights protective mandate forms a crucial part of the regional and international criminal justice landscape. The African Court on Human and Peoples' Rights (the African Court) is one of the institutions of the African Union (AU), whose seat is in Arusha in the United Republic of Tanzania.

This year (2026), the African Court is celebrating twenty (20) years of protecting human and peoples' rights in Africa since its operationalisation in 2006. This was after the entry into force of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court (the Protocol) in 2004 following a ratification by 15 African States, as prescribed under article 34(3) of the Protocol.[2] Over the course of the 20 years in which it has been in operation, the African Court has made positive strides towards advancing human rights protection and entrenching a culture of justice across the continent.

II. The need for an African Court on Human and Peoples' Rights

The main resolution that was made through *Resolution AHG/Res.230 (XXX)* adopted by the AU Assembly of Heads of State

[2]Article 34 (3) of the African Court Protocol requires that the Protocol shall come into force thirty days after the instruments of ratification or accession have been deposited by fifteen member States.
[3]The Protocol to the African Charter on Human and Peoples' Rights, on the Establishment of the African Court on Human and Peoples' Rights, 1998 (African Court Protocol), Preamble.

and Government in June 1994 in Tunis, Tunisia, was requesting the Secretary-General to convene a Government experts' meeting to ponder, in conjunction with the African Commission on Human and Peoples' Rights (the African Commission), over the means to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court.[3] Following a series of meetings, the Committee of Government Experts recommended to the AU Heads of State that the effective attainment of the objectives of the African Charter on Human and Peoples' Rights (the African Charter) required the establishment of an African Court to complement the efforts and reinforce the functions of the African Commission.[4] This recommendation was adopted by the AU Heads of State, resulting in the establishment of the African Court.[5] The African Court was thus established to complement the protective mandate of the African Commission in the protection of human and peoples' rights under the African Charter,[6] and to handle all cases and disputes submitted to it concerning the interpretation and application of the African Charter.[7]

III. Jurisdiction and notable jurisprudence of the African Court on Human and Peoples' Rights

The African Court has both contentious and advisory jurisdiction.[8] The African Court's jurisdiction extends to all cases and disputes submitted to it concerning the interpretation of the African Charter, the Protocol and other human rights instruments ratified by the state in question.[9] The African Court's contentious jurisdiction relates to allegations of violation of a human right under the African Charter by the concerned State, and can be invoked by the African Commission, a State party that has lodged a complaint before ethe African Commission, the State Party against which a complaint has been lodged at the African Commission, a State Party Whose citizen is a victim of human rights violation, and an African Intergovernmental Organization.[10] The African Court's Advisory jurisdiction can be invoked through a request by an AU member State, the AU, any of the AU organs or any African Organization recognized by the AU, requesting it to provide an opinion on any issue relating to the African Charter or any other human rights instrument.[11] Over the past 20 years, while the African Court's docket of cases has mainly entailed the exercise of its contentious jurisdiction on cases brought before it, it has also handled a few advisory cases, with a few others pending consideration and determination.

The 20th Anniversary of the African Court is not just a milestone to celebrate, but a crucial juncture for candid evaluation of its jurisprudence, legacy and its contribution to the regional and global justice mission.

A deep dive into the African Court's jurisprudence reveals that despite its relatively few years of operation,[12] it has made significant contributions not just to

[4]As above.
[5]African Court Protocol, Article 1.
[6]African Court Protocol, Article 2.
[7]African Court Protocol, Article 3 (1).
[8]African Court Protocol, Articles 3 and 4.
[9]African Court Protocol, Article 3 (1).
[10]African Court Protocol, Article 5 (1).
[11]African Court Protocol, Article 4 (1).
[12]This is since the African Court is by far the youngest regional Court globally. The European Court of Human Rights was operationalized in 1959 while the Inter-American Court of Human Rights was operationalized in 1979.

the regional jurisprudential landscape, but has also established what I refer to as rich, indigenous African jurisprudence[13]. This has gone a long way in not only informing both policy and legal interventions within the region, but also developing regional human rights norms. The African Court has also contributed to international criminal justice, especially within the African context. Some of the decisions which have shaped the regional criminal and justice landscape are highlighted in the following section. While there are many other decisions handed down by the African Court, the focus here is on five key decisions, which I consider to have changed the regional criminal justice system and in effect contributed to the larger international criminal justice mission. These decisions establish among others two key principles; that the right to fair hearing under the African Charter is critical, and ought to be fully observed during all trials, and the African Court's endorsement of the global shift towards the universal abolition of mandatory sentences and the abolition of capital punishment.

i. Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (2014)

This case involved the killing of an investigative journalist and his companions in 1998.[14] Their burnt corpses were found in a car, having been burnt as a result of their investigative journalism and reporting work in which they were investigating the death of the Burkina Faso's President's brother under mysterious circumstances.[15]

Upon the review of evidence tabled before it, the African Court concluded that the legal proceedings were unjustifiably prolonged for years, that the charges were dropped before the perpetrators were apprehended and tried, and in effect, Burkina Faso failed to accord justice to the relatives of the late Zongo, his two colleagues and his brother. In a comprehensive decision on merits, the African Court found the State of Burkina Faso to have violated Article 7 of the African Charter having not shown due diligence to seek out, investigate, prosecute and put to trial the killers of the late Norbert Zongo and his companions.[16] In its reparations judgment, the African Court among others ordered the State to reopen investigations with a view to prosecuting and bringing to trial the perpetrators of the murder of the late Norbert Zongo and his companions.[17]

The African Court through the landmark judgment established that States have a positive obligation to conduct prompt investigations, prosecute perpetrators, ensure accountability for politically motivated killings and in effect combat impunity. The decision by the African Court also established a positive precedent on the protection of the right to freedom of expression under article 9 of the African Charter, especially for journalists who constantly run the risks of this right being violated owing to the nature of their engagements.

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[13]See for example the African Court's jurisprudence on the right to property and land in *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9 (The *Ogiek* Decision).

[14]*Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (2013) 1 AfCLR 197.

[15]*Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (merits) (2014) 1 AfCLR 219, 220.

[16]As above 254.

[17]*Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (reparations) (2015) 1 AfCLR 258, 280.

ii. Umuhoza v Rwanda (merits) (2017)

This case involved the conviction of Victoire Umuhoza, a Rwandan politician, who was convicted of minimising the Rwandan genocide.[18] She was accused of having committed the crimes of propagation of the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism, and establishing an armed branch of a rebel movement.[19] The African Court, upon analysis of the evidence tabled before it, found that there was a violation of Umuhoza's rights to fair trial under Article 7 (1) (c) of the African Charter and the right to freedom of expression under Article 9 (2) of the African Charter.

In this case, the African Court clearly clarified that combating genocide cannot be used as a justification for unfair and politically-motivated criminal proceedings, that politically sensitive prosecutions remain subject to strict legal and human rights standards, and that criminal justice must at all times comply with due process.

iii. Alex Thomas v Tanzania (merits) (2015)

In this case, the Applicant, Alex Thomas, was charged with the offence of robbery together with four others in Rombo district in the United Republic of Tanzania.[20] The Applicant failed to show up during trial since he was admitted in a hospital having suffered from *extra pulmonary tuberculosis* and *ashmatic statae*.[21] On 30th June 1997, a judgment was delivered in the absence of the Applicant, wherein he was convicted of armed robbery and sentenced to thirty years' imprisonment with twelve strokes of a cane.[22] During the appeal processes, the Applicant's appeals were dismissed, the appeals were unreasonably delayed, he was not provided with the record of proceedings in the lower courts, the courts invoked procedural technicalities to strike out his case, and he was denied state counsel and even the ability to review his case.[23]

Having substantively analysed the evidence presented before it, the African Court found that the Applicant's right to defend oneself and be heard was violated.[24] The Court also found that there was an inordinate delay in the Applicant's hearing on appeal, which violated the Applicant's right to be heard by an impartial tribunal and within a reasonable time, which are cardinal principles of the right to fair trial under Article 7 (1) (d) of the African Charter.

The Court also noted that the Applicant was charged with a serious offence, carrying a minimum sentence of thirty (30) years imprisonment. It found that owing to his circumstances, he was entitled to legal aid even without the need to request for it. It noted that even after requesting it, his request was not granted. This, among others, the African Court found to have been in violation of the right to defence and to be defended by Counsel under Article 7 (1) (d) of the African Charter.[25] The Court importantly noted that owing to the violations, the best recourse would have been to order the reopening of his case.

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[18] *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165.
[19] *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165, 166 -167.
[20] Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465.
[21] As above.
[22] As above.
[23] As above.
[24] As above.
[25] As above.

He had however served 20 years out of the 30 years' sentence, prompting the African Court to order the State to take appropriate measures to remedy the violations against the Applicant.[26]

In this case, the African Court established a strong precedent that warrants the provision of legal advice and Legal Counsel to an individual due to the seriousness of the crime they are accused of committing, their indigence, and the interests of justice. Such factors tilt in favour of an accused person in such a condition regardless of whether or not they have requested such legal aid. The standards that the African Court has established in terms of legal aid create a positive addition to the African regional jurisprudence, with such principles being applied within the context of the member States' trial and appellate proceedings.

iv. Ally Rajabu and Others v United Republic of Tanzania (merits and reparations) (2019)

In this case, the Applicants were arrested at Mruma Village, Mwanga District in the United Republic of Tanzania, for killing one Jamal Abdallah. On 24 June 2008, they were charged with murder at the High Court of Tanzania in Arusha. On 25 November 2011, the High Court found the Applicants guilty and sentenced them to death under the Tanzanian Penal Code, which prescribed death as the only punishment upon conviction. Dissatisfied with that decision, they appealed to the Court of Appeal of Tanzania, whose appeal was dismissed.[27]

Upon analysis of the evidence before it, the African Court found the mandatory death sentence to be depriving judges of the discretion to consider the circumstances of each case and its uniqueness, the offender's personal circumstances and the mitigating factors. The Court ordered a rehearing in relation to the sentencing of the Applicants.[28]

The African Court's jurisprudence on the death penalty and mandatory death sentences has made a meaningful contribution to international criminal justice by reinforcing the primacy of fair trial rights, judicial discretion, proportionality in sentencing, and the evolving international movement toward abolition of capital punishment. This position has been replicated across the continent, with countries now moving towards abolishing mandatory sentences and capital punishment. Presently, several African countries have abolished mandatory death sentencing, with twenty-four (24) having abolished death sentences for all crimes.[29] The focus is now on three countries, Kenya, Zimbabwe and the Gambia, and how they will finalise their legislative processes and remove death sentences from their statutes.[30]

IV. Challenges experienced by the African Court

In light of the context within which the African Court operates, it has faced some deep challenges, including political headwinds and implementation gaps. These

[26]As above.
[27]*Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, 540.
[28]As above, 539.
[29]International Commission Against Death Penalty, 'Africa leads the way in abolition of the death penalty' (2024) <https://icomdp.org/wp-content/uploads/2024/10/EN-translation-Africa-leads-the-way-in-abolition-of-the-death-penalty.pdf> (Accessed 15 July 2026).
[30]Amnesty International, 'Africa: Countries on the cusp of abolition must take a stand against the death penalty' (2024) <https://www.amnesty.org/en/latest/news/2024/10/africa-countries-on-the-cusp-of-abolition-must-take-a-stand-against-the-death-penalty/> (Accessed on 16 July 2026).

challenges have not only threatened the operations and sustenance of the African Court, but have also revealed deeply rooted issues within the African continent. These issues include a retrenchment of a culture of human rights protection, political intolerance, electoral malpractices and unconstitutional change of governments. These issues result in various human rights violations, reversal of the gains made in enhancing regional justice and erosion of the African Court's contribution to the international criminal justice ecosystem. The main challenges that the African Court has experienced include the withdrawal of the Article 34(6) declaration by member states, lack of full compliance with the African Court's decisions, and an unhealthy political climate.

A. Withdrawal of Article 34(6) declaration by member states

Article 34 (6) of the African Court Protocol requires that the African Court can only receive a claim against a member state which has made a declaration accepting the competence of the African Court to receive cases under Article 5 (3).[31] In a span of four years (2016-2020), four member states, Rwanda, Tanzania, Benin and Côte d'Ivoire withdrew from the declaration under Article 34 (6)). At the moment, there are only 7 countries which have deposited the Article 34(6) declaration, which are the Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger and Burkina Faso, with Tunisia being the latest country to withdraw its declaration (2025).

The withdrawals of these declarations, especially by the first four countries between 2016-2020, are seen as a direct expression of disagreements with the processes and the decisions of the African Court. For example, following the filing of the Ingabire v. Rwanda case at the African Court, Rwanda, through a series of letters and a *note verbale* to the African Union Commission, commenced its processes of withdrawal of its Article 34 (6) Declaration, with that withdrawal taking effect in 2017.[32] Such withdrawals water down the regional justice standards, contribute to the polarisation of states and restrict access to remedies for human rights violations at the regional level whenever local remedies are unavailable, insufficient or ineffective.[33] This is especially given the fact that access to the African Court through the African Commission route has already proven to be ineffective.

B. Lack of compliance with the African Court's decisions

One of the major challenges which have affected the African Court is lack of compliance with its decisions. Despite the initial belief that the decisions of the African Court, due to its nature, would receive prompt and complete compliance from states, there has been a disturbing pattern of non-reporting and non-compliance by states against which judgments have been issued. As of 2024, only one State, Burkina Faso, had fully implemented the two decisions by the African Court against it, while 82 decisions against 9 AU member states are pending full compliance.[34]

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[31]African Court Protocol, Article 34 (6).
[32]O Windridge, 'Assessing Rwexit: The impact and implications of Rwanda's withdrawal of its article 34(6) declaration before the African Court on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 243-258.
[33]See article 56(5) of the African Charter and the African Court's interpretation in *inter alia Law Society of Tanganyika & Another v Tanzania*, Application 009/2011.
[34]African Court on Human and Peoples' Rights '2024 Status Report on Implementation of Decisions delivered by the African Court,' <https://www.african-court.org/wpafc/wp-content/uploads/2025/04/Status-of-Implementation-of-Decisions-of-African-Court-Popular-Report-2024_11.11.2024.pdf.> (accessed 16 July 2026).

Non-compliance with the African Court's decisions weakens the role and impact of the African Court, and has resulted in legitimacy deficits.[35] This is owing to the fact that, apart from the withdrawals, the big five African Countries have not deposited Article 34 (6) declarations, acceding to the Court's jurisdiction – Algeria, Egypt, Morocco, Nigeria and South Africa.

While the African Court may issue leading jurisprudence in the region and in effect positively contribute to the global justice mission, implementation threatens to water down such progress. Without the political will on the part of the AU member states to not only comply but also rally the States against which decisions have been issued to fully comply, the African Court's operations will be impaired, leading to a culture of impunity, undue regard to the human and peoples' rights under the African Charter, and a lack of an enforcement avenue for African citizens whenever their rights under the African Charter are violated.

C. Unhealthy political climate

While the African Court is an AU institution that performs a supportive role to the African Commission in terms of human rights protection, it cannot fully remove itself from its legal and political environment, which is often characterised by resistance to progressive human rights and democratic ideals, authoritarianism and lack of due regard to human rights and due process during criminal trials. There is a demonstrable lack of commitment from member states to ensure effective functioning of the African Court, a position that not only weakens the Court but also leaves citizens with no alternatives whatsoever whenever there are no available, effective or sufficient recourses locally for human rights violations. This is evident from the lack of sufficient funding to the African Court, failure to timely report on the status of implementation, and the lack of commitment to the jurisdiction of the Court through continued withdrawal and non-ratification of Article 34(6) Declaration by member states. Without sustained political will and commitment to ensure the effective functioning of the African Court, the institution risks serious challenges to its legitimacy, effectiveness and continued existence.

E. Lack of complementarity between the African Court and the African Commission

Under Articles 2, 5 and 6 of the African Court Protocol, the African Court is intended to operate in complementarity with the African Commission. This complementarity is reflected, *inter alia*, in the referral of cases between the two institutions as well as their broader cooperation and efforts aimed at strengthening human rights protection in Africa. This has however been underutilised, raising concerns about the collaborative mandates of the two institutions. For example, the African Commission has referred only three cases to the African Court thus far. This number is very low, considering the massive number of claims the African Commission has received, and the number of cases that the African Court has handled. Among other factors, the complementarity between the Commission and the Court has been hampered by the perception that referral of cases is an indication of the weakness of the Commission relative to the Court,

[35] VO Ayeni 'Enhancing the implementation of decisions of the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights through complementarity and collaborative monitoring' (2025) 25 *African Human Rights Law Journal* 938-956, 943.

African Court of Justice and Human Rights (ACJHR) is intended to be the principal judicial institution of the African Union. It is designed to combine the roles of the former African Court of Justice and the African Court on Human and Peoples' Rights into a single court with broad jurisdiction.

putting the members of the Commission in an uncomfortable position of appearing before the Court as an Applicant on behalf of the victims.

Several attempts have however been taken over time to improve this complementarity. These include the complementarity retreats between the two institutions, held in 2022 and 2025.[36]

D. The future and prospects of the African Court: the Malabo Protocol

In a bid to establish and live up to a pan-African vision for an international legal order that directly responds to the continental concerns and addresses them more directly and equitably, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), seeking to establish an African Court of Justice and Human Rights (ACJHR). This promises to be a direct contribution of the AU to the international criminal justice system, with the ability to develop regional norms and shape international politics. The ACJHR is to include a general affairs section and a criminal law section, with jurisdiction to try international crimes such as genocide, crimes against humanity and war crimes. The Protocol is however yet to enter into force, as it has not attained the minimum threshold of 15 ratifications for it to enter into force.

There are however concerns about Article 46A bis of the Malabo Protocol. The Article shields serving AU heads of state or government and anybody entitled

[36]African Commission on Human and Peoples' Rights 'Communiqué: Second retreat between the African Commission on Human and Peoples' Rights (the African Commission) and the African Court on Human and Peoples' Rights (the Court) <https://achpr.au.int/en/news/press-releases/2025-10-15/communique-second-retreat-between-african-commission-human-and> (Accessed on 20 July 2026).

or acting in such capacity during their office tenure. The provision is deficient, as it offers no clarity on the nature and scope of such immunity, the type of immunity to be conferred, and the nature of actions that such individuals are to be immunised from, whether in their personal or official capacities. While the move to have an African Court to try crimes of international character is promising and in a way promises to embed Africa's positive contribution to international criminal justice, such immunity threatens to take away one of the key benefits that the Protocol seeks to provide.

The Malabo Protocol represents one of the African Union's most ambitious legal reforms, reflecting a vision of a stronger continental justice system capable of addressing both human rights violations and crimes that affect peace, security, and development across Africa.

V. Conclusion

Despite the few years that the African Court has been in operation, its contribution to regional and global jurisprudence on the one hand, and to international criminal justice system on the other hand has been remarkable. The African Court has contributed positively to norm development, which has gone a long way in informing policy and legislative reforms in different countries within the continent.

The African Court has however faced significant challenges, some of which are external to the Court while others are both structural and institutional. These challenges, if not addressed effectively, threaten to water down the progress which has been made thus far. Far beyond holding back the progress of the African Court, these challenges stand in the way of its effectiveness, legitimacy and continuity in the protection of human and peoples' rights.

As we look into the future, it is imperative that the Court continues adapting to emerging regional challenges and the geopolitical environment. New areas of litigation—including climate justice, business and human rights, digital rights, artificial intelligence, migration, environmental protection and transnational crimes—will increasingly require the Court to develop innovative jurisprudence that responds to Africa's evolving realities while remaining faithful to the African Charter.

Importantly, the Malabo Protocol, which may enter into force sooner or later, reflects an ambitious vision of an integrated continental judicial architecture capable of adjudicating interstate disputes, human rights violations and international crimes. There is however a need to review Article 46A bis, and lift the blanket immunity granted to the sitting heads of states and other officials holding such capacities.

Ultimately, the future of the African Court will not be determined solely by its judges or its jurisprudence, but by the collective commitment of African States, regional institutions, civil society and citizens to uphold the rule of law and human dignity.

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POLICE ACCOUNTABILITY

Transformative constitutionalism and police accountability in Kenya: Analyzing the structural interdict and command responsibility in Akhala v Inspector General

By Mokua Mokua

Abstract

The Akhala & 28 Others v Inspector General of the National Police Services [2026] KEHC 3967 (KLR) judgment marks a watershed moment in Kenyan constitutional jurisprudence. This article analyzes four pillars of the decision: the court's application of the Anarita Karimi pleading threshold, its bold adoption of the international law principle of command responsibility to hold the Inspector General accountable, its rejection of IPOA's "ongoing investigations" as a bar to constitutional remedies, and its historic issuance of a structural interdict compelling the state to develop public order regulations within 90 days. The article further examines the state's subsequent defiance of the structural interdict and the contempt proceedings initiated against the Inspector General, the National Police Service, and the Attorney General. It argues that while the monetary compensation is significant, the judgment's true legacy lies in its demonstration that judicial orders are binding commands that even the highest state officers must obey.

Introduction

In July 2023, Brian Oniang'o, a 22- year old awaiting university admission, and William Akhala, a 24 year-old casual labourer, finished their lunch and retreated to the comfort of their home in Nyalenda Estate, Kisumu. Within hours, they lay dead on a roadside, their bodies broken by police batons and kicks. They were not demonstrators. Neither were the other 26 petitioners in *Akhala & 28 Others v Inspector General of the National Police Services*, a 17 year old sent to buy tomatoes, a tuk-tuk driver on his daily route, or a carpenter making coffins in Kondele. Between March and July 2023, during the 'Azimio Maandamano' against the high cost of living, the National Police Service (NPS) unleashed a wave of violence that, as the High Court starkly observed, resembled a 'warfront' rather than public order management exercise. The result was 16 deaths over 90 severe injuries documented by the Kenya National Commission on Human Rights.[1]

While the monetary compensation of Kshs. 36 million awarded to the victims garnered significant public attention, the true jurisprudential weight of the High Court's ruling lies elsewhere. For decades, victims

[2]Ibid

of police brutality in Kenya have faced three seemingly insurmountable barriers to justice: draconian procedural pleading requirements that dismiss petitions for lack of precision, the invincibility of command structures that disclaim liability through the 'rogue officer' defense, and a lethargic oversight body (Independent Policing Oversight Authority) that treats 'ongoing investigations' as a permanent shield against accountability.

This paper contends that the Akhala judgement is a landmark precedent precisely because the High court dismantled all three barriers and went further to issue a transformative structural interdict. The court did not merely compensate for past wrongs; it compelled the state to draft new regulations on public order management within 90 days, effectively restructuring the legal framework for protest policing. By analyzing the court's handling of the pleading threshold, its bold application of command responsibility to the Inspector General, its rejection of IPOA's investigatory inertia as a bar to constitutional remedies, and its issuance of a forward looking structural interdict, this paper demonstrates that Akhala signals a paradigm shift.[2] It moves Kenyan constitutional jurisprudence from reactive reparation to proactive institutional reform, holding the state accountable not just for what it did, but for what it persistently failed to regulate.

The procedural gateway

The pleading threshold in constitutional petitions

Constitutional litigation in Kenya demands a high standard of precision in pleading. A petitioner seeking redress for constitutional violations must 'set out with a reasonable degree of precision that of which he complains , the provisions said to be infringed and the manner in which they are alleged to be infringed' as established in the seminal case of *Anarita Karimi Njeru*.[3] The principle, set out in the case, serves a dual purpose: it enables the respondent to understand the case against them and equips the court to identify the precise constitutional issues requiring determination.[4] The Court of Appeal in ***Mumo Matemu*** subsequently reaffirmed and refined the test emphasizing that while precision is mandatory, it should not be applied in a manner that elevates procedural technicalities above substantive justice.[5]

The respondent's objection

In ***Akhala***, the Inspector General of the National Police Service and the Attorney General (hereinafter referred to as the IG and AG) vigorously contested the petition's compliance with ***Anarita Karimi*** threshold citing it as vague and speculative failing to establish specific acts and commissions allegedly committed by the respondents. The respondents further contended that the petition improperly attributed collective responsibility to the National Police Service and its command structure without proof of individual culpability of the IG. They asserted that the allegations that the allegations were 'generalized speculative and lacked evidential foundation,' and that the reliefs sought were 'incapable of being granted in the absence of specific proof of wrongdoing by the IG.

This objection, if sustained, would have been fatal to the petition. The Supreme

[3]*Anarita Karimi Njeru v Republic* [1979] eKLR (High Court of Kenya)
[4]Ibid
[5]*Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR (Court of Appeal of Kenya) (37)

Court in Communications Commission of Kenya v Royal Media Services, it was observed that courts should be cautious about entertaining matters that lack precise constitutional articulation.[6] However, the court in Akhala took a markedly different approach.

The Court's finding

Justice Mabeya observed that the petitioners had not only pleaded the specific provisions of the Constitution and Statutes allegedly violated but they also specified the facts that they relied on for those allegations. On life and personal security, the petitioners relied on Articles 26–29. On police accountability and state authority, the petition invoked Articles 165(3), 244 and 245. Regarding the right to protest and access to information, the petition invoked Articles 35 and 37. On access to justice and fair process, the petition invoked Articles 47–50 and 53. Finally, the petition relied on Articles 1, 2(1), 3(1) and 10, Articles 19–24, and Articles 258 and 259.[7]

Additionally, the petitioners identified specific statutory violations. Under the National Police Service Act, they relied on sections 8(1) and 10(1)–(2), 24 and 49, 61 and 72, 95, and the Sixth Schedule.[8] -11 Under the Independent Policing and Oversight Authority Act, they relied on sections 5, 6 and 7 and sections 24 and 25.[9] The petitioners also relied on sections 19, 23, 24, 25, 26 and 27 of the Victim Protection Act.[10] Finally, they invoked Chapters 31, 43, 47, 58 and 69 of the National Police Service Standing Orders.[11]

In simpliciter, the *Akhala* judgement therefore reinforces the principle that constitutional litigation should be accessible and that procedural rules should serve, rather than obstruct, substantive justice.

Command responsibility

The IG of Police protested his joinder to the petition, citing that no specific wrong could be associated with him personally. This argument arose against the backdrop of the Respondents' assertion that collective responsibility was improperly attributed to the National Police Service and its command structure without proof of individual culpability, especially that of the IG. Their objection lay in the fact that there was no evidence of policies, directives or specific orders authorizing acts of police violence as such acts were isolated and perpetrated by individual officers acting in their personal frolic and thus cannot attach.[12] This objection was emphatically rejected.

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[6]Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR (Supreme Court of Kenya) (65)

[7]Constitution of Kenya, 2010 Clustered meaning of the provisions cited: Article 1 (sovereignty of the people), 2(1) (supremacy of the Constitution), 3(1) (national values and principles of governance), 10 (national values and principles). General provisions on the Bill of Rights / limitations: Articles 19–24. Life and personal security / dignity: Article 26 (right to life), 27 (equality and freedom from discrimination), 28 (human dignity), 29 (freedom and security of the person). Protest and information: Articles 37 (freedom to assemble, demonstrate, and picket), 35 (access to information held by the State). Access to justice and fair process: Articles 47 (fair administrative action), 48 (access to justice), 49 (rights of arrested persons), 50 (right to a fair hearing), 53 (rights of children, including protection from violence). Police accountability and state authority: Article 165(3) (jurisdiction of the High Court), 244 (objects of the National Police Service, including upholding human-rights standards), 245 (command of the National Police Service by the Inspector-General). Enforcement and interpretation: Articles 258 (enforcement of the Constitution) and 259 (interpretation).

[8]*National Police Service Act* (No 11A of 2011) ss 8(1), 10(1)–(2). These provisions set out the Inspector-General's overall command and functions, and the mandate of the service.

[9]*Independent Policing and Oversight Authority Act* (No 35 of 2011) ss 5, 6, 7, 24, 25. These provisions establish IPOA's mandate and functions, and set out how investigations are conducted and reported.

[10]*Victim Protection Act* (No 16 of 2014) ss 19, 23, 24, 25, 26, 27. These sections provide for protection, assistance and compensation for victims of crime.

[11]*National Police Service Standing Orders* (Government Printer 2013) chs 31, 43, 47, 58, 69. These chapters contain internal operational and conduct rules governing policing activities, public order management, and the use of force during operations.

[12]See generally, Baby Pendo's Pending Trial Could Reshape Police Accountability In Kenya, ICJ Kenya (16 August 2024) <https://icj-kenya.org> accessed 18 July 2026, discussing the "rogue officer" defence in Kenyan police accountability cases.

To accept it would render the command structure virtually immune from constitutional accountability, which would allow the IG, who exercises 'overall and independent command' over the Service, to disclaim all responsibility for systemic failures.

Constitutional and statutory framework of command

The court examined the constitutional and statutory architecture governing the National Police Service. Relying on Article 244 of the Constitution, it observed that the objects of the Service include: 'striving for the highest standards of professionalism and discipline among its members; preventing corruption and promoting transparency and accountability; and complying with human rights standards and fundamental freedoms'.

Additionally, Article 245 (2) (b) establishes that the Inspector General 'shall exercise independent command over the National Police Service and perform any other functions prescribed by national legislation'. The operational control exercised by the IG underscores that the office is not just a titular head but a revelation of 'independent command'.

This constitutional mandate does not exist in isolation. It is operationalized by the National Police Service Act under Section 8(1) which provides '[t]he Service shall be under the overall and independent command of the Inspector-General appointed in accordance with Article 245 of the Constitution and the provisions of this Act'.
In furtherance of such, Section 10 of the Act enumerates a 'plethora of the functions and powers of that office,' which are 'so detailed as to leave no room whatsoever for speculation as to who is in charge and control of the Service.'[13] These functions include the power to issue operational orders, deploy police officers, and ensure discipline within the service.[14] The cumulative effect of these provisions, the court held, is that the IG bears ultimate responsibility for the conduct of the officers under his command.

International Law Principle of Command Responsibility

To impute liability to the IG, the petitioners and interested parties invoked the customary international law doctrine of command responsibility. The core of this principle dictates that military commanders and civilian superiors may be held responsible for the unlawful acts of their subordinates if they knew, or had reason to know, that such actions were about to be or had been committed, and failed to take all necessary and reasonable measures to prevent or punish them.[15]

The court, per Justice Mabeya, drew extensively from the scholarly work of Judge Bakone Justice Moloto, who articulated the three elements of command responsibility as: first, the existence of a superior-subordinate relationship; second, that the superior knew or had reason to know the crime was about to be or had been committed; and third, that the superior failed to take necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.[16]

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[13]Akhala (n 1)
[14]*National Police Service Act* (n 8) s 10
[15]Prosecutor v Delalić (IT-96-21-T) (Judgment) (16 November 1998) (International Criminal Tribunal for the former Yugoslavia) [346]; see also Prosecutor v Bagosora (ICTR-98-41-T) (Judgment) (18 December 2008) (International Criminal Tribunal for Rwanda) 819
[16]Judge Bakone Justice Moloto, 'Command Responsibility in International Criminal Tribunals' (2009) 3 Berkeley Journal of International Law 12, 15, cited in Akhala (n 1) 134

It must be noted, that this principle is not confined to international criminal tribunals alone as it has found its application in domestic jurisprudence particularly in Kenya, by virtue of Article 2(5) of the Constitution. The High Court recognizing its applicability to constitutional adjudication in the case of ***Republic v The University of Nairobi Ex parte Michael Jacobs Odhiambo & 7 Others***.[17]

Regarding the first element, the court found the existence of a superior-subordinate relationship to be incontrovertible. It emphasized that this relationship is not merely formal but one of operational control, reinforced by the Inspector General's power to issue operational orders and directives. Consequently, the Inspector General cannot avoid liability by blaming the misconduct of individual officers; rather, they bear institutional and constitutional responsibility for all actions taken under their command.

Regarding the second element, the court established that the Inspector General possessed actual or constructive knowledge of the ongoing violations through circumstantial evidence. Specifically, the Kenya National Commission on Human Rights documented extensive violence in Kisumu and Migori counties over a five-month period between March and July 2023, resulting in 113 victims, including 16 fatalities and 91 injuries. Given the scale and protracted duration of these events, the court reasoned that the Inspector General could not plausibly claim ignorance of the situation.

In analyzing the third element, namely the failure to prevent or punish criminal acts, the court determined that the security operations to quell the protests did not occur in an operational vacuum. Instead, they must have been guided by a formal 'Operation Order.' Although this document was uniquely within the knowledge, possession, and control of the Inspector General, the respondent failed or neglected to produce it. Consequently, the court drew an adverse inference from this non-disclosure, concluding that the document was deliberately withheld because it potentially contained unlawful directives authorizing excessive force.

By failing to account for these actions, the Inspector General was found to have breached the statutory mandate to maintain the highest standards of professionalism and discipline within the National Police Service. The judgment firmly clarifies that promoting good public relations and adhering to these standards are not merely aspirational values; rather, they constitute binding legal obligations. As the administrative head of the Service, the Inspector General serves as the primary duty-bearer strictly responsible for ensuring absolute constitutional compliance.

IPOA'S institutional failure

The first to third Respondents contended that the petition was premature due to a failure to exhaust available statutory mechanisms for redress, arguing that the matters raised should instead be addressed through the Independent Policing Oversight Authority Act (the IPOA Act), the Access to Information Act, and the Fair Administrative Action Act. Invoking the principles of judicial minimalism and the doctrine of avoidance, they submitted that the Court should decline jurisdiction in light of these existing administrative avenues. In support, they relied on ***Geoffrey Muthinja & Another v Samuel Henry & Others***, where the Court of Appeal held that courts must decline

[17] [2016] KEHC 2093 (KLR) (High Court of Kenya)

jurisdiction when specialized statutory paths exist,[18] as well as the Supreme Court's guidance in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others, which cautioned against framing routine statutory claims as constitutional petitions.[19]

Minimally altering this stance, the fourth Respondent, IPOA, similarly opposed the petition by urging the court to await the conclusion of its ongoing investigations. An Assistant Director of Investigations at IPOA, testifying as R4w1, deposed that the Authority had already commenced inquiries into the alleged excessive use of force by police officers during the Azimio demonstrations in Kisumu and its environs between March and July 2023. At the time of swearing the affidavit, these active investigations covered all of the aggrieved parties with the sole exceptions of the tenth, sixteenth, and eighteenth Petitioners. IPOA's substantive defence rested on three principal pillars: the extreme complexity of investigations conducted during public disorder involving numerous victims, the statutory confidentiality of the sought information under the Access to Information Act, and the absence of a statute of limitation on complex criminal inquiries. In support of the latter, the Authority cited the protracted 2017 post-election violence investigations which ultimately resulted in the ongoing prosecution of ***R v Titus Yoma & 11 Others***.

Court's analysis and rejection of exhaustion objection

Justice Mabeya rejected the Respondents' exhaustion objection on several grounds,

Justice Alfred Mabeya

drawing heavily on the persuasive authority of the Court of Appeal in ***Sharma v Attorney General***.[20] In that decision, the appellate court held that trial courts err in law by equating the function of a criminal trial, which determines individual criminal liability, with that of a constitutional petition designed to determine rights violations and grant appropriate reliefs. Deeming a petition premature under such circumstances effectively forces litigants to wait indefinitely for sluggish investigative bodies, culminating in a denial of justice. The court in Sharma further clarified that an ongoing investigation does not preclude a constitutional court from examining credible rights violations, particularly where the foundational facts are undisputed.

Applying these principles to Akhala, the court found that the alternative statutory

[18] *Geoffrey Muthinja & Another v Samuel Henry & Others & 1756 Others* [2015] eKLR
[19] *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR (Supreme Court of Kenya) (65)
[20] *Sharma v Attorney General & 3 Others* (Civil Appeal E065 of 2023) [2025] KECA 1470 (KLR)

remedies available to the petitioners were entirely inadequate to right the wrongs committed against the victims. Pursuing those avenues would yield no positive resolution for fundamental rights violations. The court emphasized that the mechanisms available under the IPOA Act focus narrowly on investigations aimed at identifying culprits for criminal prosecution; they offer no closure, trauma mitigation, or remedy for personal violence to the victims.[21] Endorsing this approach, the court relied on the Supreme Court's decision in ***Nicholas v Attorney General***, which affirmed that when alternative mechanisms fail to offer adequate or effective relief, courts must select a path that safeguards a litigant's right to access justice while still recognizing the specificity of alternative dispute resolution frameworks.[22]

Furthermore, the court determined that IPOA had directly violated the petitioners' right to information under Article 35 of the Constitution. When the twenty-ninth Petitioner (Pw6) requested specific informational updates, IPOA failed to supply the records or respond to subsequent reminders. The court rejected IPOA's defenses, which argued that Pw6 failed to disclose the identities of the victims she represented and that the Authority had alternatively met with the LSK Nairobi Council. Justice Mabeya observed that because IPOA never sought further particulars or raised data protection concerns at the time of the request, raising them during litigation was merely an afterthought. Additionally, meeting with the LSK Nairobi Council did not address the localized grievances raised by Pw6 on behalf of the victims in Migori and Kisumu. Consequently, the court held that withholding this information violated Article 35 and did not constitute an interference with IPOA's statutory mandate.

This judicial rebuke exposes a deep-seated institutional problem regarding IPOA's functional inertia. Established in November 2011 to provide civilian oversight over the National Police Service, IPOA was envisioned as Kenya's premier police accountability mechanism.[23] However, as Akhala demonstrates, the Authority has developed an insular culture that treats the absence of statutory timelines as a license to investigate indefinitely. This paralysis is well-documented beyond Akhala; academic commentary notes that IPOA consistently struggles against the police's institutional blue code of silence, while civil society leaders like Otsieno Namwaya of Human Rights Watch accuse the Authority of routinely ignoring protest-related killings despite receiving comprehensive data from lobby groups.[24] Similarly, the Independent Medico-Legal Unit (IMLU) highlighted that systemic police non-compliance, such as refusing to document complaints or report fatalities, severely undermines IPOA's efficacy.[25] In response to these systemic failures, the Akhala court firmly underscored that for police investigations to be legally acceptable, they must be prompt, independent, impartial, and transparent. They must occur while evidence is fresh, and victims must be consistently updated

[21] Akhala (n 1)
[22] *Nicholas v Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others* (Interested Parties) [2023] KESC 113 (KLR) (Supreme Court of Kenya)
[23] Independent Policing Oversight Authority Act (No 35 of 2011) (Preamble); see also The Independent Policing Oversight Authority (General) Regulations (Legal Notice 96 of 2024)
[24] Christine Wanjiku, 'The Effectiveness of the Investigative Powers of the Independent Policing and Oversight Authority' (2023) 2 Kabarak Law Review 137, 140; Maryann Anyango, 'IPOA Rarely Investigates Protest Related Killings, HRW Boss Says' The Standard (Nairobi, 20 July 2023) <https://standardmedia.co.ke> accessed 15 July 2026
[25] Sharon Resian, 'Kenya: 128 Cases of Extrajudicial Killings Recorded Between October 2022 - August 2023 - IMLU Report' AllAfrica (14 September 2023) <https://allafrica.com/stories/202309150062.html> accessed 16 July 2026

within parameters that safeguard both the inquiry and their personal safety.

Structural remedies and the jurisprudence of the structural interdict

The court's diagnosis: A complete disconnect

Justice Mabeya began his analysis of the structural remedy by diagnosing the fundamental problem plaguing the National Police Service. The court observed that there appeared to be a complete disconnect between the National Police Service and the mandates and dictates of Article 244 of the Constitution. The extreme level of violence meted out to the unarmed public during the events of March to July 2023 testifies to the fact that the National Police Service remains oblivious to the requirement of upholding the Bill of Rights.

The court specifically highlighted the operational tension between Article 37 of the Constitution, which guarantees the right peaceably and unarmed to assemble, demonstrate, picket, and present petitions to public authorities, and the institutional response to the exercise of that right. Rather than safeguarding this constitutional expression, the police responded to protests with the full force of the state, resort to brutal force as their first point of call.

The court went further by drawing a critical historical connection, noting that most public institutions were a colonial heritage modelled against public interest. In the post-2010 constitutional dispensation, the curriculum, policies, and overarching spirit of institutions created immediately after independence in 1963 run afoul of the supreme law. This judicial observation resonates with scholarly analysis of domestic security reforms. The Constitution of Kenya 2010 was explicitly designed to dismantle the fusion of administration and policing that had been the defining feature of an authoritarian state since independence.[26] Under the Independence Constitution of 1963, the police were granted autonomy through a Police Service Commission and a National Security Council.[27] However, these provisions were never implemented because constitutional amendments in 1964 reduced the police to an extension of the civil service, marking the beginning of a culture of political manipulation and executive control.[28]

The court lamented that it did not have the benefit of knowing what the National Police Service had done to comply with the 2010 Constitution. It noted a total absence of evidence regarding the training curriculum for police officers on public order management, alongside a lack of rules and regulations to govern public order in light of Article 37. The court concluded that the absence of such guiding principles, guidelines, or regulations may have directly led to the immediate resort to violence and brutal force when officers were confronted with the citizens' attempted exercise of their constitutional rights.

The nature and mechanics of a structural interdict

A structural interdict is a judicial remedy where the court retains ongoing

[26]Arnold Nyajayi, 'New police unit and return of a State Kenyans rejected' Daily Nation (10 February 2026) <https://nation.africa/kenya/blogs-opinion/blogs/new-police-unit-and-return-of-a-state-kenyans-rejected-5356294> accessed 17 July 2026
[27]Stellah Kithure, 'Police Reforms in Kenya: Case of National Police Service Commission' (LLM thesis, University of Nairobi 2014) <https://erepository.uonbi.ac.ke/bitstreams/7d133055-9125-4086-a87a-5e9055c6d0a6/download> accessed 17 July 2026
[28]Ibid

jurisdiction to ensure that a public body takes specific positive steps to comply with its constitutional obligations.[29] Unlike backward-looking remedies such as declaratory orders or damages, a structural interdict is forward-looking. It compels institutional reform by requiring the state to address the systemic failures that led to the constitutional violations in the first place.[30] This remedy is particularly appropriate in cases involving systemic failures by public institutions, where the court cannot simply order compensation and walk away. Consequently, structural interdicts serve as the apex of judicial power in a transformative democracy, ensuring that the protections of the Bill of Rights are treated as vested rights rather than mere lofty aspirations.

The court in Akhala recognised that the violations suffered by the petitioners were not isolated incidents but the direct result of systemic institutional failures. The absence of clear regulations on public order management, the lack of training on Article 37 rights, and the institutional culture of resorting to brute force as a first response all pointed to a need for structural rather than merely compensatory relief.

To compel this systemic reform, the court issued a series of specific structural interdicts. First, it directed the first, second, and third Respondents to prepare, develop, and publish regulations on Public Order Management to regulate the handling of public demonstrations, picketing, and the use of force in the event of necessity. The court observed that this would bring certainty on how the citizenry will exercise and realise its rights under Article 37 and give clear guidelines to the National Police Service under Article 244. Second, the court imposed a strict timeline for compliance, ordering the publication to be made within 90 days. Third, the court established an oversight mechanism by tasking the Kenya National Commission on Human Rights and the Independent Policing Oversight Authority with ensuring compliance with the structural interdict. Fourth, the court scheduled a mention date of 7 July 2026 to confirm compliance, thereby retaining active judicial jurisdiction over the execution of the matter.

The court emphasised the urgency of these structural reforms, noting that the National Police Service had operated without adequate guidance on public order management for over a decade since the promulgation of the 2010 Constitution. In the absence of such regulations, police officers had been left to rely on outdated standing orders that were modelled against public interest and fundamentally inconsistent with the transformative vision of the Constitution.

Analysis: The Significance of the Structural Interdict

The structural interdict issued in Akhala represents a significant advance in Kenyan constitutional jurisprudence for several reasons. First, it demonstrates the court's willingness to move beyond reactive remedies like compensation to proactive remedies targeted at systemic reform. Traditionally, Kenyan courts have been reluctant to issue structural interdicts, viewing them as an intrusion into the domain of the executive branch. However, the Akhala judgment makes clear that where there is a complete disconnect between a public institution and its

[29] Minister of Health v Treatment Action Campaign (No 2) [2002] ZACC 15 (Constitutional Court of South Africa)
[30] Pillay v Krishna [2023] ZAKZPHC 14 (High Court of South Africa)

constitutional obligations, the court has both the power and the duty to intervene.

Second, the structural interdict addresses an accountability gap that has persisted since the promulgation of the 2010 Constitution. The constitutional vision for police reform was clear, demanding that the National Police Service be professional, accountable, and compliant with human rights standards. However, as commentators have observed, the constitutional imperatives for police reforms were not automatically implemented.[31] The National Task Force on Police Reforms, chaired by Retired Justice Philip Ransley, had developed over 200 recommendations in 2009, yet more than a decade later, many of those recommendations remained unimplemented.[32] The court's structural interdict compels action on a critical matter that the executive had allowed to languish.

Third, the structural interdict recognises the inadequacy of the existing legal framework for public order management. The Public Order Act (Chapter 56), which regulates public gatherings, processions, and demonstrations, was enacted in 1950, long before the 2010 Constitution and its explicit guarantee of the right to peaceful assembly.[33] Because the Act has never been comprehensively reviewed to align with Article 37, the structural interdict effectively requires the state to fill a legislative vacuum that has persisted since the constitutional moment of 2010.[34] Fourth, the structural interdict establishes a clear template for future cases involving institutional failures. Where a court finds that systemic failures have led to constitutional violations, it can now issue a structural interdict directing specific reforms within a defined timeframe, with oversight by constitutional bodies such as the KNCHR and IPOA. This approach aligns perfectly with the transformative character of the Constitution.

Executive defiance and judicial assertion

On 25 March 2026, Justice Alfred Mabeya issued a structural interdict directing the Inspector General of Police, the National Police Service, and the Attorney General to publish regulations on Public Order Management under Article 37 within a strict 90-day timeline. This compliance window expired on 24 June 2026 with no regulations published or extensions sought.[35] At the compliance mention on 7 July 2026, State Counsel Mr. Kaju admitted total non-compliance. Justice Mabeya rejected oral requests for further time, noting that any application for an extension should have been formally filed prior to the deadline. Consequently, the court issued a formal summons requiring the Inspector General, the National Police Service, and the Attorney General to appear personally on 21 July 2026 to show cause why they should not be cited for contempt. Justice Mabeya forcefully observed that one death is too many given the history of police conduct, emphasizing that citizens and innocent bystanders have historically been killed or maimed while attempting to exercise their constitutional rights.[36]

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[31] Katiba Institute, Ten Years On: Assessing the Achievements of the Constitution of Kenya, 2010 (Katiba Institute 2020)
[32] Government of Kenya, Report of the National Taskforce on Police Reforms (Government Printers 2009)
[33] Public Order Act (Cap 56) (1950)
[34] Katiba Institute, Taking Stock: Challenges and Prospects of Implementing the Constitution of Kenya, 2010 (Katiba Institute 2014)
[35] 'Kisumu High Court Summons IG Kanja, AG over Failure to Enact Protest Regulations' People Daily (7 July 2026) <https://peopledaily.digital/news/kisumu-high-court-summons-ig-kanja-ag-over-failure-to-enact-protest-regulations> accessed 17 July 2026
[36] 'High Court Summons IG Kanja, NPS and Attorney General over Alleged Defiance of Orders' The Star (7 July 2026) <https://www.the-star.co.ke/news/2026-07-07-high-court-summons-ig-kanja-nps-and-attorney-general-over-alleged-defiance-of-orders> accessed 17 July 2026

The Law Society of Kenya (LSK) actively intervened to support the enforcement of the interdict. Kisumu Branch Chairperson Dorcas Oluoch maintained that monetary damages cannot substitute for institutional reform, affirming that state agencies bear an absolute obligation to implement structural changes. Moving beyond litigation, LSK President Charles Kanjama dispatched a formal memorandum to Inspector General Douglas Kanja outlining a five-point operational framework.[37] This framework urged: immediate directions compelling constitutional compliance; a ban on masked or unidentified officers; a strict proportionality mandate for the use of force; transparent investigations into abuses; and clear operational instructions to facilitate, rather than disrupt, peaceful gatherings.[38]

This executive defiance is highly significant for Kenyan public law. First, it exposes a persistent culture of executive impunity, where the state treats judicial directives as optional.[39] Second, the non-compliance maintains a dangerous regulatory vacuum, perpetuating the exact conditions that enabled the original acts of police brutality. Third, the upcoming contempt proceedings represent a critical test of judicial authority; if the court successfully enforces sanctions, Akhala will stand as a watershed victory for transformative democracy. Conversely, unchecked defiance risks exposing structural interdicts as hollow remedies. Ultimately, as noted by the International Commission of Jurists (ICJ), the police service operates within an insular culture of silence.[40] The Akhala interdict is a vital mechanism to dismantle this impunity, making vigilant oversight by the LSK and civil society indispensable to ensuring constitutional compliance.

Conclusion

The Akhala judgment marks a landmark victory in Kenyan constitutional jurisprudence. By applying the command responsibility doctrine, the court pierced the rogue officer defence and held the Inspector General personally accountable for systemic police brutality. Its decisive rejection of IPOA's operational inertia successfully reinforced the absolute primacy of Article 22 constitutional remedies. Furthermore, the structural interdict compelling public order regulations within a strict 90-day window represents transformative constitutionalism in action. However, the subsequent executive defiance and upcoming contempt proceedings critically test whether judicial orders constitute binding commands or mere administrative suggestions. Ultimately, the lasting legacy of the Akhala judgment depends entirely on the court's power to compel absolute compliance, proving that the protections enshrined within the Bill of Rights are not a mere inspiration but a vested right.

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[37]'LSK Recommends New Rules for Policing Protests' The Star (27 June 2026) <https://www.the-star.co.ke/news/2026-06-27-lsk-recommends-new-rules-for-policing-demos> accessed 17 July 2026

[38]Ibid

[39]'Ruto Loyalists Plot New Laws to Stifle Protests' Africa Confidential (28 June 2026) <https://www.africa-confidential.com/article/id/15125/ruto-loyalists-plot-new-laws-to-stifle-protests> accessed 17 July 2026

[40]ICJ Kenya, *Executive Summary of the Report of the Taskforce on Police Reforms* (2023)

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Impeachment without legality: Fair trial rights and the collapse of constitutional enforcement

By Paul P. K. Kamau

In constitutional democracies, impeachment is intended to be a legal and constitutional mechanism for holding public officials accountable. When legality is disregarded, the process may be viewed as an abuse of power, undermining the rule of law, public confidence, and democratic institutions.

Abstract

Purpose: *This paper examines what the High Court's judgment in Petition E565 of 2024 portends for the constitution. The analysis is centred on Article 25(c) and the enforcement of the right to a fair trial, which cannot be derogated from. It tests the apparent conflict between the Court's finding that a non-derogable right has been violated during an impeachment and its decision to let the impeachment stand. The paper also considers how the Court has read the matter of constitutional finality as set out in Article 145(7).*

Design and Methodology: *The paper adopts a doctrinal and analytical approach to assess the judgment. It measures it against fundamental constitutional principles such as judicial review, separation of powers, and the remedies provided for in Article 23 of the Constitution of Kenya 2010. The analysis is buttressed by current constitutional scholarship and a comparative view of constitutional theory.*

Findings: *The paper uncovers a basic contradiction in the Court's judgment. On the one hand, it concedes there was a violation of the right to a fair trial, yet, on the other, it withholds an effective remedy. Such an approach does little for the normative power of non-derogable rights and severs the connection that should exist between a right and its redress; indeed, it is hard to see it as anything but a misreading of constitutional finality. By letting practical concerns dictate its course, the Court has shown too much deference and, in so doing, has eroded the very supremacy of the Constitution.*

Originality and Value: *The paper contributes to the body of constitutional scholarship, highlighting what symbolic constitutionalism risks and why it is so important that fundamental rights be given firm enforcement in any politically charged proceedings.*

Keywords: *Fair trial; non-derogable rights; Impeachment; Constitutional supremacy; Judicial review; Article 25(c)*

Paper type: *Research paper*

1. Introduction

With its ruling on Petition E565 of 2024, the High Court has put to the test some of the basic tenets of Kenya's constitutional order, not least how procedural justice and fundamental rights are to be enforced in the face of constitutional supremacy. The case is defined by an absurd sort of contradiction. On the one hand, the Court was quite clear that the petitioner had been denied a fair trial during his impeachment; on the other, it would not go so far as to set aside the outcome. One is left to wonder about the integrity of such constitutional adjudication when a violation is acknowledged, but no legal consequence follows.

In modern constitutional theory, there is a broad consensus that the right to a fair trial is the very bedrock of constitutional legitimacy. To enshrine it in the Constitution is to give effect to the courts' wider function of upholding the supremacy of the document and protecting people from the caprice of power.[2] Then there is the matter of procedural justice, which recent scholarship has shown to be what makes an institution legitimate in the eyes of the public; when the process is seen as fair, individuals are inclined to accept the law's verdicts. The opposite is true. In this way, one can say that fairness is not some incidental feature but an essential part of any decision-making that is to be considered lawful and legitimate.[3]

This position is underpinned by the Kenyan Constitution, which accords procedural rights prominence. Take Article 50 for instance: it is there to ensure a fair hearing with all the necessary protections, from having enough time to put together a defence to being before an impartial tribunal. Then there is Article 25(c), which makes the right to a fair trial non-derogable.[4] The message is unambiguous; one cannot invoke efficiency or institutional convenience as an excuse for running afoul of these rights. And should any law or behaviour be at odds with the Constitution, Article 2 puts an end to it by virtue of constitutional supremacy, rendering such things void.[5] Taken together, the result is a system in which procedural fairness confers constitutional validity on any process.

Viewed in the light of the normative framework, one could call the High Court's ruling a doctrinal anomaly. In sanctioning an impeachment process that was procedurally unfair, the Court has seemingly put aside the tenet that what is unconstitutional must be voided. There is a sense in contemporary scholarship that for constitutional rights to have any legitimacy, they have to be properly enforced; without a meaningful remedy, one is left with little more than a symbolic guarantee. The point is well taken regarding rights, given that their infringement goes to the very heart of the constitutional order.

The starting point of this paper is that a fair trial is an indispensable requirement

[2]Marta Kłopocka-Jasińska, 'The Role of Constitutional Courts in Shaping Procedural Fairness in Criminal Cases' (2022) 8 *Revista Brasileira de Direito Processual Penal* 13.
[3]Avital Mentovich, JJ Prescott and Orna Rabinovich-Einy, 'Legitimacy and Online Proceedings: Procedural Justice, Access to Justice, and the Role of Income' (2023) 57 *Law & Society Review* 189.
[4]Constitution of Kenya 2010, art 50.
[5]Constitution of Kenya 2010, art 2.

for any state to act lawfully, as a non-derogable guarantee. From this vantage point, it is contended that the High Court has strayed from such a premise in its ruling. The decision severs what should be an essential connection between one's rights and the remedies available for them. When a court acknowledges a violation yet leaves the process intact, it is courting a kind of symbolic constitutionalism in which rights are honoured in theory but not in practice. Such an approach gives rise to broader unease about how Kenya will fare in the years ahead in upholding constitutional supremacy and fundamental rights through judicial review.

2. Methodology

This paper has taken a doctrinal and analytical approach to examine the High Court's judgment in Petition E565 of 2024. The 3-judge bench's judgment is examined here through a close reading of its reasoning and the 2010 Constitution of Kenya, not least Articles 2, 25(c), 23, 50, and 145(7). It offers a critical take on the judgment to see how well it holds up against the tenets of constitutional supremacy, the need for effective remedies, and fair trial rights that cannot be derogated from.

Additionally, the paper takes an analytical approach to the judgment itself and considers whether the Court's conclusions follow coherently from its own findings, paying particular attention to the tension between its recognition of a violation of a non-derogable right and its reluctance to grant a remedy that affects the validity of the impeachment process.

To underpin this evaluation, it draws on the latest constitutional scholarship and a measure of comparative insight, with an eye on judicial review, remedies, and procedural justice. The paper takes a normative and critical approach. It is important to assess whether the Court's line of reasoning aligns with constitutional doctrine and to flag what that means for the enforcement of rights and for constitutional governance at large.

3. Constitutional supremacy and the duty of the courts

The doctrine of constitutional supremacy occupies a foundational position within Kenya's constitutional order. Article 2 establishes that the Constitution is the supreme law, binding all persons and state organs, and that any law or conduct inconsistent with it is void.[6] This provision is not merely declaratory; it imposes a binding obligation on all branches of government to ensure that their actions conform to constitutional standards.

The same view is upheld in modern constitutional theory, which puts supremacy at the heart of how law is able to put a check on power. The duty of constitutional courts is vital in this regard; they ensure that the framework is protected and that public authority observes both its procedural and substantive guarantees. Put simply, it is inconceivable to have constitutional supremacy without the concomitant protection of rights, procedural ones in particular, for it is those that govern the way decisions are taken over people's lives and affairs.[7]

The principle is cast in full force in a process as politically charged as an impeachment. While it is the legislature that wields the power to impeach, it is still a constitutional affair and has to be conducted within

[6] Ibid.
[7] Kłopocka-Jasińska (n 1).

the bounds of constitutional order. The point is plain: a process that runs afoul of constitutional guarantees will not get a legally sound result. The result is as good as the process.

It may be said that judicial review is how the principle of constitutional supremacy is put into practice. It is the means by which courts hold state actors to account and make sure they are bound by the law's limits. Lacking such a mechanism, one might find that constitutional guarantees are more in the nature of an aspiration than something that can actually be enforced.

There is a growing body of legal scholarship to suggest that judicial review and the safeguarding of individual rights go hand in hand. The purpose of the court is not just to be an interpreter of the law but to offer effective remedies when power has been wielded unlawfully. That is no small matter; after all, a court's authority comes as much from its power to enforce rights as it does from simply declaring them.[8]

Take the matter of impeachment, for instance. Here, judicial review is not at odds with legislative authority so much as it is a complement to it. The courts will ensure that Parliament acts in keeping with procedural fairness and other constitutional requirements as it goes about its mandate. The courts do not second-guess the merits of a political decision; they only oversee the legality of the process behind it.

With constitutional supremacy, one of the key takeaways is that what makes something legal is a matter of more than just the end result; the process by which one gets there has to be fair as well. In this way, procedural justice is what gives validity to the constitution. It is a safeguard to see that the state wields its power with the requisite fairness, transparency and accountability.

This view is borne out by the latest empirical work, which shows a marked connection between institutional legitimacy and procedural fairness. When it comes to legal systems, procedural justice largely determines an individual's perception of the system's legitimacy and their readiness to accept the outcome.[9] In a way, it highlights the constitutional role of procedural rights as the means by which the state lends legitimacy to its actions.

There would be a profound effect on the rule of law were society to step away from the Constitution's supremacy. Allowing acts that are unconstitutional to stand unchallenged does nothing but chip away at the state's authority and, in so doing, saps the power that gives the Constitution its binding force.

A legal order cannot have constitutional rights that are truly effective without the backing of meaningful remedies to enforce them. As current scholarship will show, a right unaccompanied by a remedy is little more than a symbol; it loses its practical weight and any power it might have had to hold the state in check. The issue is all the more acute when non-derogable rights are at stake, those that the Constitution puts beyond any form of limitation.[10]

And yet one could argue the High Court in the instant case has strayed from this tenet in its recent ruling. In upholding an impeachment process even while

[8]Musa Ssekaana, 'Remedies in Judicial Review' (Public Lecture, 2023).
[9]Mentovich, Prescott and Rabinovich-Einy (n 2).
[10]Richard H Fallon Jr, 'Constitutional Remedies: In One Era and Out the Other' (2023) 136 *Harvard Law Review* 1300.

conceding a violation of the right to a fair trial, the Court has let an unconstitutional procedure stand. In so doing, it has muddied the waters between what is lawful and what is not, and in the process eroded the very force of constitutional supremacy.

If one is to give effect to constitutional supremacy in any coherent way, the courts have to do more than simply spot a transgression; they must ensure that there are consequences that put the constitutional order back in place. That means an unconstitutional process can be allowed to yield no binding legal effect, all the more so when fundamental rights are at stake.

Judicial review must therefore operate as an effective instrument of constitutional enforcement, reaffirming the principle that no exercise of public power is immune from constitutional scrutiny. In this respect, the duty of the courts extends beyond interpretive clarification to the active vindication of constitutional norms.

4. The nonderogable right to a fair trial

A fair trial is held in especially high regard under Kenya's constitutional order. It is deemed non-derogable under Article 25(c), meaning no limitations may be placed on it under any circumstances. This is the constitution's way of ensuring that where state power is wielded , it is with proper procedural safeguards in place.

International human rights law has a notion of non-derogability that singles out a certain class of rights as binding, regardless of institutional pressure or state of emergency. These are viewed as essential for upholding both constitutional order and human dignity. So when a right is found to have been violated, one cannot make a case for it on the grounds of political necessity or mere expediency and efficiency; the violation stands condemned.[11]

The right to a fair trial is not merely of symbolic constitutional standing; it is absolute, and it places a strict obligation on the courts to treat any infringement as a matter of constitutional importance. Adopting a line of reasoning where the right is subjected to some implicit balancing or limitation would be to undermine its fundamental character.[12]

The right comprises concrete procedural guarantees that operationalise its constitutional promise. These include, *inter alia*, the right to adequate time and facilities to prepare a defence, the right to be heard, and the right to an independent and impartial decision-maker. These elements collectively ensure that individuals are protected against arbitrary or unfair exercise of power.

There is a broad consensus among modern and comparative scholars on this point: these are not peripheral concerns but go to the very core of justice. In the end, it is the right to a fair trial that gives an outcome its procedural legitimacy and lawfulness, for it is the institutional means by which legality is enforced.[13]

There is more to the importance of fair trial rights than simply shielding the individual; they are what give state action its wider legitimacy. After all, procedural fairness is key to determining how people view

[11]Debdatta Dobe, 'Non-Derogable Rights and Civil and Political Freedoms' (2023) (ICCPR analysis module).
[12]Constitution of Kenya 2010, art 50.
[13]Kłopocka-Jasińska (n 1); Siti Anisah and Sahid Hadi, 'The Human Right to a Fair Trial in Competition Law Enforcement Procedures' (2023) 12 *Laws*; M Rizki Yudha Prawira, 'Reconceptualizing Justice' (2025); Mentovich, Prescott and Rabinovich-Einy (n 2).

the authority of legal institutions and the decisions they make.

It is evident from the latest empirical research that there is a clear link between procedural justice and an institution's legitimacy. It bears out that when processes are fair, the public is more inclined to accept legal outcomes, even ones they may not like. In that way, the research puts a fine point on the constitutional role of fair trial rights in lending legitimacy to the authority of the state organ.[14]

Legitimacy is inseparable from procedure, for in constitutional adjudication the two are one and the same. The theory of procedural justice today makes it plain that a legal authority's legitimacy is not a matter of outcomes alone; it comes from the fairness with which decisions are made. In fact, how fair the process is will largely determine if an institution is seen as lawful and deserving of compliance.[15] This same doctrine is seen at work in public law, where lawful decision-making is predicated upon procedural fairness in its various forms: the right to be heard, impartiality, proper notice, among other considerations.[16]

When a decision is the product of an unfair process, it cannot be said to have the normative underpinnings required for constitutional authority. The courts are in agreement on this point: procedural shortcomings affect the legality of the decision, not just its quality. In the realm of judicial review, for instance, one will find that a want of procedural fairness is held to undermine "the very merits of the decision itself," making it open to being quashed.[17] And there is no question but that straying from established norms can put an administrative decision in jeopardy; as the courts have made plain, fairness is a matter of substance in law, not some kind of formality.[18]

There is no confusion or crossroad here: once a procedural infraction is acknowledged, one has to question the soundness of the decision that follows. That is all the more true when it comes to the rights of a fair trial. These are not some minor, ancillary form of protection; they are the structural guarantees on which the whole legitimacy of an adjudicative process rests. And if they are breached, there is no easy remedy, as the integrity of the proceeding has been compromised. The Privy Council put it best in ***MacFoy v United Africa Co Ltd***: "You cannot put something on nothing and expect it to stay there."[19] In other words, where a flaw makes an act void, every proceeding built upon it is bad, incurably so.

What makes fair trial rights distinctive is their power to nullify any outcome that results from their contravention. One could say they are the hallmark of such rights. These are no mere matters of procedure, but rather constitutional prerequisites for legality. When they are breached, it calls into question the decision's authority altogether; an outcome that would have stood up as valid is rendered constitutionally untenable.

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[14]Mentovich, Prescott and Rabinovich-Einy (n 2); Angus Chan, Ben Bradford and Clifford Stott, 'A Systematic Review and Meta-Analysis of Procedural Justice and Legitimacy in Policing' (2023) *Journal of Experimental Criminology*).

[15]Tom R Tyler and Avital Mentovich, Procedural Justice Theory (2023) (explaining legitimacy as grounded in fair decision-making processes).

[16]Cain Sibley, Deborah Mak and Brianna Hammerschmid, 'Public Law Essentials: Procedural Fairness' (2024) (outlining hearing rule and bias rule as core legality requirements).

[17]Marco P Falco, 'Challenging Tribunal Decision for Procedural Unfairness' (2023) (noting that lack of due process compromises the merits of a decision).

[18]*MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) 1172.

[19]*MacFoy (n 17); J.T. v British Columbia (Workers' Compensation Appeal Tribunal)* 2024 BCSC 994.

Comparative jurisprudence and academic analysis support the view that denial of core fair trial rights, such as the right to be heard or the right to adequate preparation, cannot be compartmentalised from the outcome of proceedings.[20] These violations affect the structural integrity of the process and, consequently, the legality of the outcome itself.

The implications of this are considerable. In effect, a proven breach of the right to a fair trial renders any decision that follows invalid by default. One cannot simply put a price on it and call it remedied; to do so would be to misrepresent what these violations are and erode their standing under the Constitution.

What flows from the foregoing analysis is a renewed sense of the right to a fair trial and its absolute nature. In making it non-derogable, the Constitution has prioritised procedural fairness, placing it ahead of other concerns such as efficiency or finality.

There is broad consensus among today's constitutional scholars on the point that a legal system's legitimacy is inextricably linked to how it upholds procedural justice and enforces rights. The scholarship, be it empirical or theoretical, makes a clear case for this: institutional legitimacy rests to a considerable degree on the fairness of one's decision-making and whether people see those processes as just and dependable.

Then there is the matter of remedies. Modern constitutional analysis would have it that, without them, rights risk becoming nothing more than abstractions. Fallon puts it well when he notes that if there is no meaningful enforcement at hand, there is a real risk of "cheapening" the whole notion of constitutional rights by robbing them of any practical force. In the end, not to enforce a right can turn it into a symbolic gesture, which undermines its standing in law and the legitimacy of the constitutional order as a whole.[21]

The High Court has strayed from this principle in its handling of Petition E565 of 2024. While it acknowledged a breach of the right to a fair trial, it did not see fit to set aside the process that followed. In making the violation seem to coexist with the outcome's validity, the Court has in effect, watered down the strictures of Article 25(c) and the constitutional safeguards it is meant to provide.

5. The internal contradiction in the judgment

The discrepancy in the judgment of the High Court on Petition E565 of 2024 is difficult to miss or defend. On one hand, there is a finding of a constitutional violation, on the other, there is no real legal remedy to speak of. The Court was quite plain in holding that the petitioner was not given a fair trial, yet it saw fit to allow the impeachment to proceed anyway. That fundamental contradiction is what the whole ruling comes down to.

There is an argument to be made that the normative force of constitutional rights comes less from their formal recognition than from the fact they can be put into effect. Contemporary scholars put a good deal of weight on the link between remedies and rights in constitutional adjudication, seeing it as something intrinsic. More recent

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[20] Jola Bode and Etlon Peppo, 'Issues of Implementation of the Fair Trial in the Albanian System' (2022) 11 *Academic Journal of Interdisciplinary Studies*; Ryan Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: The Unfortunate Legacy of Ibrahim and Beuze' (2023) 23 *Human Rights Law Review*; 'Due Process and Fair Trial' in *Elgar Encyclopedia of Crime and Criminal Justice* (Edward Elgar 2024).
[21] Fallon (n 9); Mentovich (n 2).

work on the enforcement side also bears this out, with analyses underscoring how judicial intervention is what gives rights value by way of concrete legal outcomes. The point is self-evident. If a constitutional ruling does not yield an effective remedy, then the right has been devalued, little more than a declaratory ideal and no longer an operative constraint of law.[22]

It may be said that the Court has fostered a certain kind of constitutional dissonance with its approach. In upholding the right, it is at the same time allowing an infringement to go unchallenged and without proper remedy. This contradiction may be understood as an instance of *symbolic constitutionalism*, a phenomenon in which constitutional rights are formally acknowledged but not substantively enforced. Symbolic constitutionalism does not deny rights; rather, it affirms them in principle while allowing inconsistent practices to persist in reality.

Recent constitutional scholarship warns about the perils of this kind of approach. If courts are to acknowledge a violation and then leave them undisturbed, the guarantees of the constitution are in danger of being mere words instead of something that works. In effect, the law gives the impression of safeguarding rights but does not actually deliver on that front.[23]

One sees this dynamic at work in the Court's reasoning on Petition E565. The Court held that a non-derogable right had been infringed, yet it would not set aside the process that followed; in doing so, it has made of the right little more than a declaratory principle with no backbone for enforcement. It is an approach that undercuts the Constitution's transformative intent, since that document is founded on the actual protection of rights as much as their being put into words.

The latest in constitutional scholarship frowns at such an approach. There is a risk, after all, that if the courts see fit to declare a violation but do not back it up with any real force, the constitution's guarantees are reduced to empty words rather than anything of substance. What is left is a law that seems to protect rights without really having the means to do so.[24]

If the link between rights and remedies is severed, constitutional adjudication can no longer serve as a check on state power in any meaningful way. Society is left with rights that are little more than abstract pronouncements rather than actual limits on authority. As current scholarship would have it, the enforcement of the Constitution requires more than simply acknowledging rights; for them to have any practical force there must be remedies at hand to back them up.[25]

One sees this difficulty in the Court's handling of the present case. In awarding damages rather than striking down the process in question, the court has put on record a constitutional violation but at the same time left the defect in place. To be sure, compensation can be a way to redress and acknowledge harm, yet it does not address the fact that an unconstitutional process is still legally valid. The upshot is that the impugned outcome is permitted to stand on its flawed footing because the structural problem has not been put right.

[22]Fallon (n 9); Gaurav Mukherjee, 'Political Economy of Effective Judicial Remedies' (2023) 21 *International Journal of Constitutional Law*.
[23]George Duke, 'Constitutional Symbolism in the Shadow of the Common Good' (2024) 25 *German Law Journal*.
[24]Fallon (n 9).
[25]Carlos M Vázquez, 'The Constitution as a Source of Remedial Law' (2023) 132 Yale Law Journal.

The Court has muddled the issue by failing to distinguish between two constitutionally distinct remedies. On the one hand there is redress, on the other the restoration of legality. To be sure, damages can put right an old injury, but they do not in any way cure the illegality of the process. The Court seems to operate under the assumption that one can put a wall between the violation and what follows from it; yet that is difficult to square with the fair trial guarantees which are of a piece with the integrity of the whole proceeding.

This is a stance at odds with the view held by most scholars, who opine that it is remedies that endow constitutional rights with their normative force, turning them into enforceable restraints on public power. The current thinking in constitutional theory is that one needs judicial remedies to put rights into practice and make them work; without them, or if they are not properly calibrated, the very substance of those rights is in danger of being eroded.[26]

There is a certain tension between this position and what one might call the prevailing orthodoxy in modern constitutional scholarship. The latter holds that it is remedies which give constitutional rights their normative force, turning them into something that can be used to constrain public power. In the eyes of most, judicial remedies are the means by which rights are put into effect, converting an abstract guarantee into an operative legal limit.[27]

So, contemporary theory places great emphasis on the fact that rights need effective and properly calibrated remedies to have any practical vitality; without them, or if they are weakened, the substance of the right is at risk of being eroded.[28]

One can trace the effects of this tension far past the case at hand to some broader questions of constitutional doctrine. First, it sows a good deal of uncertainty in the law. If a violation of non-derogable rights is not enough on its own to nullify what comes after, what is born is a set of legal consequences that are difficult to define and the guarantee of the country's constitutional standards is called into question.

Then there is the matter of deterrence. Constitutional adjudication can be blunted by such an approach. As current scholarship shows, there is need for effective remedies for constitutional rights to be a genuine check on the state; if the courts do not make unconstitutional conduct carry some weight, public authorities have less reason to see to it that they are in compliance with constitutional demands.[29]

Institutional legitimacy is at stake as well. There is plenty of empirical evidence to show that trust in the law's institutions is tied up with how fair the procedure is perceived to be, and that legitimacy is what secures voluntary obedience to the law.[30] But when violations are put on the record yet left without redress, confidence in the constitutional order is sure to wane.

In the end, the judgment may be seen as putting in place an unspoken pecking order in the enforcement of rights, making

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[26]Rosalind Dixon and Po Jen Yap, 'Responsive Judicial Remedies' (2025) 14 *Global Constitutionalism* 323; Fowler (n 9).
[27]Dixon and Yap (n 25).
[28]Vázquez (n 24); Fallon (n 9).
[29]Dixon and Yap (n 25).
[30]Chan, Bradford and Stott (n 13).

room for tolerance of some transgressions in politically charged situations. That is at odds with the basic tenet that constitutional rights, the non-derogable ones in particular, are binding and universal constraints on the state and cannot be applied at whim.[31]

What the analysis above makes clear is that one must reaffirm the inextricable link between constitutional rights and what follows from them in law. For a right to be an effective check on public power it has to have some bearing on the validity of an unconstitutional process; its normative force is only as good as its ability to influence legal outcomes. There is a view in current scholarship that constitutional remedies are not some afterthought but are at the heart of how rights work, for they are what turn those rights into practical limits on the state.[32]

With that in mind, a coherent reading of the constitution means that any infringement of non-derogable rights should be seen as determinative of legality. Courts may have some leeway in fashioning a remedy, but they should use that discretion to put things right and make good on the constitutional defect, not just to note that it is there.[33] As remedial theory would have it, adjudication only works if the remedies have enough "bite" to see to it that unlawful behaviour is corrected and not condoned.[34]

In Petition E565, the situation called for a remedy to neutralise the unconstitutional process, be it by way of invalidation, a rehearing or some other order designed to cure the problem. The Court did not go down that road. In doing so it laid bare a structural tension in constitutional adjudication, the divide between rights being recognised and their actual enforcement. It is a familiar shortcoming, one that contemporary writers point to as a risk of our guarantees becoming nothing more than aspirational without the means to enforce them.[35]

6. Misinterpretation of Article 145(7) and the myth of constitutional finality

In its handling on Petition E565 (2024), the High Court made much of its reading of Article 145(7). That article is plain enough: once an impeachment is confirmed, the office holder is no longer in office. But for the Court, this is a central part of its logic. It seems to view the provision as a kind of constitutional finality that would preclude any further judicial interference.

One could make the case for this kind of reading on a surface level, given the political nature of impeachment. After all, in comparative constitutional practice, it is the legislature that is chiefly tasked with holding the line on political accountability through such means. But modern constitutional theory would have none of the idea that these are processes unmoored from the law. Even when an exercise of public power has a political structure to it, it is still answerable to the constraints of the Constitution.[36] Accordingly, the concept of finality in constitutional law cannot be understood as absolute. It must instead operate within the broader framework of constitutional supremacy.

[31]Kathryn McNeilly, '"If Only for a Day": The Universal Declaration of Human Rights, Anniversary Commemoration and International Human Rights Law' (2023) 23 *Human Rights Law Review*.
[32]Fallon (n 9).
[33]Vázquez (n 24).
[34]Dixon and Yap (n 25).
[35]Amina Iqbal, Nouman Akbar and Nazar Hussain (2025).
[36]Kłopocka-Jasińska (n 1).

One has to question the High Court's approach for making finality seem an absolute thing. A sounder way to read the Constitution is to see that such finality is conditional on the process being lawful. Put simply, one can only get constitutional consequences when the procedure behind it all has met with what the Constitution demands.

One need only look at comparative constitutional scholarship to find support for this kind of conditional view. It is the job of the courts to see that politically motivated processes are held to account, upholding the minimum requirements of legality and procedural fairness. In a sense, it is an application of a wider rule: the fact that the constitution has given its imprimatur to state action is no shield against having it put under a constitutional microscope.[37]

A party can no longer appeal to finality as a shield for the process when procedural irregularities have become constitutional violations, of the non-derogable kind especially. Any other view would put the cart before the horse in terms of constitutional norms, letting the outcome of procedure take precedence over what is constitutionally legal.

One has to look at the Court's reasoning and see it poses a more fundamental question of doctrine as to how finality clauses sit with constitutional supremacy. After all, Article 2 of the Constitution is plain on the matter: an act or omission that runs counter to the Constitution is void. That sets up a hierarchy in which legal effect is contingent on constitutional validity.[38]

One would have to interpret finality provisions in a way that is consistent with that. They are not to be construed as establishing some kind of unreviewable authority; their operation is limited to actions that are constitutionally sound.

Recent constitutional analysis reinforces this view by emphasising that the supremacy of the Constitution requires courts to ensure that all state action, regardless of its institutional origin, remains within constitutional bounds.[39] Where a process violates constitutional guarantees, its purported finality is legally unsustainable.

The High Court's failure to adopt this harmonised interpretation resulted in an elevation of finality above legality, thereby weakening the normative force of constitutional supremacy.

One could say the Court has put forward a rather formalistic reading of the separation of powers. In doing so, its reasoning tends to overstate the autonomy of the legislature while shortchanging constitutional accountability. The Court's implicit model of institutional exclusivity, which treats impeachment as an area largely set apart, is at odds with contemporary constitutional practice.

Today's constitutional theory would have none of that rigid compartmentalisation. It favours a system of functional checks and balances where each branch is in turn empowered and held in check by the others. From this vantage point, judicial review is no intrusion on the political sphere; it is the very means by which

[37] Ibid.
[38] Constitution of Kenya 2010, art 2.
[39] Godfrey Mwango and Brooksharon Mwango, 'Blazing the Trail: Kenya's Supreme Court Rejects the Regional Court's Merit Review of its Judgments' (2024) *Oxford Human Rights Hub*.

society ensures public power stays within its constitutional lane.[40] Courts are not shunted away from politically sensitive matters but are there as of right to police their legality, all the more so when rights are at stake.

This more subtle approach is evident in recent case law. In *R (Miller) v Prime Minister*, the UK Supreme Court made clear that even the highest level of prerogative power, such as proroguing Parliament, is justiciable and bound by the rule of law and parliamentary accountability.[41] The message was that if executive action gets in the way of constitutional functions, it is proper for the courts to step in. That is hardly consistent with the notion that such processes are off limits to judicial scrutiny.

Scholars are making similar arguments about the old doctrine of parliamentary privilege. There is a view that using it to shield legislative proceedings from review is becoming an anachronism; modern separation of powers calls for accountability, not exclusivity.[42] To let courts be barred from looking at what is happening in the legislature is to invite constitutional blind spots where unlawful behaviour can go unchallenged.

Applying these tenets to the matter of impeachment will show that judicial review ought to be a check on Parliament's authority, not a replacement for it. The role of the courts is not to opine on the political merits of an impeachment case; rather, they are there to ensure the process is conducted fairly and in keeping with fundamental rights. In proceedings of this nature, where a majoritarian approach can fail to provide adequate procedural safeguards, that is no minor consideration.

Yet the Court seems to have put institutional boundaries ahead of constitutional control. With its deferential posture, born of a certain formalism, it runs the risk of allowing some of the more politically charged exercises of power to escape the scrutiny they ought to have. It is extremely difficult to make sense of that under the logic of constitutional supremacy, which insists on legal accountability for all public power.

It may be said that the decision is a case in point for the broader conflict in constitutional adjudication between holding back and effective constitutional gatekeeping. There is no denying the caution one might feel about overreach, but excessive deference becomes an issue of its own, not least when it has the effect of putting key political processes beyond the law. Looking at what has been done elsewhere, there is a means for the citizen commonly known as *"Wanjiku"* to have their cake and eat it too: to show through the courts due respect for the competence of institutions while insisting on constitutional compliance, which is what a sound constitutional order is all about.

There are serious doctrinal and structural risks in holding an overbroad view of constitutional finality. If one treats finality as something that clings to an outcome irrespective of the legality of the process behind it, then the protection of constitutional rights is undermined fundamentally. Such a stance allows

[40]Rahmad Satria, 'Judicial Review and Its Role in Safeguarding Constitutional Rights in Modern Democracies' (2025) *Riwayat: Educational Journal of History and Humanities*.
[41]*R (Miller) v Prime Minister* [2019] UKSC 41 (reaffirmed in subsequent scholarship as a leading authority on justiciability of high-level political acts); see Maurits Helmich, 'The UK Supreme Court's Miller II' (2023) 20 *International Journal of Constitutional Law* 2008.
[42]Edward Lui, 'Piercing the Parliamentary Veil against Judicial Review' (2022) 42 *Oxford Journal of Legal Studies* 918.

for procedurally wanting or even unconstitutional processes to have binding force, severing what should be an essential connection between rights and their remedies. This is a disjunction that contemporary constitutional scholars have been at pains to warn against; they would have it that the practical force of a right comes from the fact that there are means to enforce it.[43]

This is an issue that strikes at the core of judicial review. One could say it is more than mere supervision; it is a structural way of ensuring the Constitution remains supreme. The role of the courts is to make sure that public power, whether it comes from the legislature or the executive or some quasi-judicial body, does not overstep. If the courts were to dismiss a review on grounds of finality, such an approach would be in danger of rendering the court's function hollow.

The UK Supreme Court left no room for doubt in the *R (Miller) v Prime Minister* case already mentioned: State power can be politically charged, but if it has any legal effect and bears on the rule of law or accountability, it is open to being justiciable. Constitutional finality cannot be put up as a shield against that kind of scrutiny when the Court has been so clear that there is no power which cannot be put to the test of legality.

One finds further argument in recent academic work on parliamentary privilege. Edward Lui has pointed out that doctrines which keep the judiciary at arm's length from legislative processes are hard to square with a modern separation of powers based on accountability, not institutional exclusivity.[44] To put impeachment or the like entirely outside the pale of review is to create what has been referred to earlier in this paper as constitutional blind spots, leaving public power to operate without proper legal constraint. While an impeachment is political in nature, it must be scrutinised to make sure it meets the requirements of fairness and the Constitution. The decision may be a political one, but the process is a question of law.

Perverse incentives need to be considered as well. When finality is defined too loosely, it does not merely erode rights but also the review process itself. Put simply, if those with power think they are beyond oversight, they will be less inclined to do what the constitution requires. As remedies theory would have it, a norm is no better than the credible threat of being enforced; remove that and what remains is leaving compliance to chance.[45]

In the end, it is an affront to the rule of law. One cannot have a situation where certain acts of the state are put beyond the reach of the law and still claim that the Constitution holds sway over every ounce of public power. The whole point of separating powers is to have the arms of government check one another, not to create self-contained fiefdoms.

One has to construe Article 145(7) in a manner that would give due regard to the supremacy of the Constitution. Finality is not some value unto itself, it is derivative of legality. A sensible reading would have it apply to the outcome of a valid process and nothing more. Where a process has been tainted by illegality, a violation of fundamental rights for instance, it ought not

[43] Fallon (n 9).
[44] Lui (n 41).
[45] Dixon and Yap (n 25).

to be permitted to have any binding effect. In this way one can uphold Parliament's role without overstepping. Judicial review does not displace political decision-making so much as underwrite its legitimacy, seeing to it that any constitutional shortcoming is put right.[46]

Yet the High Court's reading of Article 145(7) in the case under review seems to put rubish all the argument advanced above. In insulating the results of an impeachment from any real judicial intervention, it has put procedural finality ahead of substantive legality. That is a misapprehension of the concept. True finality presupposes a lawful process; it is not a validation of one that is constitutionally defective. By not seeing it that way, the Court has not only got Article 145(7) wrong but has done damage to the wider edifice of constitutional supremacy. Where a process is compromised by a violation of the Constitution, it cannot be put under the protection of finality and expect to be binding in law.

7. From deference to abdication: Judicial failure under the separation of powers

The separation of powers is arguably a central pillar of constitutional governance. The idea is to spread authority across the various branches of government so that power does not become too concentrated and accountability is maintained. Yet in modern constitutional theory, one will not find it interpreted as a matter of rigid institutional division. It has become more of a system of checks and balances in which each branch puts a check on the others to see that the Constitution is kept supreme. Courts play a key role here by way of judicial review; it is the means by which they can make sure the executive and legislature do not overstep their constitutional bounds and that rights are given proper protection. [47]

The separation of powers is not an excuse for judicial inaction. Viewed properly, it is the courts' duty to put a stop to constitutional violations, no matter how politically charged the circumstances. A case in point is *R (Miller) v Prime Minister* from the UK Supreme Court. There the Court made it plain that prerogative powers are not above the law or free from scrutiny just because they are political in nature; they are still bound by constitutional limits.[48] What makes the *Miller decision* so telling is its refusal to accept that some public power is off limits to review on account of its politics. It is an affirmation that when accountability and legality are on the line, the courts have to make an intervention.

One has to look at the High Court's handling of Petition E565 in its proper context to see why it is so problematic. In matters of impeachment, the Court seems to be taking a line of marked deference towards Parliament, as if it were some self-contained political affair. There is no question that a certain amount of deference is called for on account of Parliament's institutional competence, but it cannot be let to run to absolutes. Today's constitutional theory does not put up with hard and fast lines between what is "reviewable" and what is not; it accepts that powers can overlap and need to be kept under watch. Impeachment is a case in point. The legislature may be the one to conduct the proceedings, but their authority comes from the Constitution and they have to abide by its terms.

[46] Vázquez (n 24).
[47] Satria (n 39).
[48] *Miller* (n 40).

The problem presents in sharper focus when fundamental rights are on the line. Too much deference can be a danger, with judicial restraint all too easily degenerating into constitutional neglect. It is a worry that recent scholarship has identified: one can hardly square the kind of doctrines that insulate the legislative process from scrutiny with an accountability driven view of separation of powers.[49] A court might have regard for Parliament's function but it cannot shirk its duty to see that the law is followed.

The matter really comes down to the difference between judicial restraint and what amounts to abdication. The former is a matter of principle, a decision not to overstep institutional lines. The latter is when a court will not act despite having spotted a plain constitutional violation. In Petition E565, the High Court determined that the right to a fair trial had been broken yet it would not go so far as to quash the impeachment or offer any real remedy. In letting an unconstitutional process stand, that can hardly be called restraint; it was an abdication. Fallon would say such an approach "cheapens" the right, for what good is it if the court acknowledges it but does nothing to enforce it?[50]

The fallout can be traced from such an abdication well beyond the case at hand. A court's legitimacy is a matter of more than merely putting its own interpretation on the Constitution; it comes from having the will to enforce it. When a violation is left unremedied the effect is to sap judicial review of its force, turning what are supposed to be binding constitutional guarantees into something of an aspiration. Then there is the question of what happens down the line. If those who act under the Constitution feel that processes like impeachment are somehow off limits to review, they are hardly going to be motivated to see to it that their actions are in keeping with constitutional requirements.

A further difficulty with the Court's reasoning is self-evident. It risks contributing to what has been described as the dejudicialisation of constitutional rights. This occurs when courts formally acknowledge rights but withdraw from enforcing them, leaving their protection to political processes. Recent scholarship warns that this trend weakens the structural role of courts and shifts the protection of rights away from law and towards political discretion.[51] In a case like Petition E565, the danger is that rights become less enforceable precisely where they are most vulnerable—within politically sensitive processes.

One could say that the Court has missed the point of the separation of powers in its reasoning. The doctrine, properly understood, is not a way to put institutions beyond the reach of scrutiny but to see that they are held to account. After all, no branch of government is above the Constitution. Take impeachment for instance: it is an important political tool, yet it remains a constitutional one. Its legitimacy is contingent on meeting the standards set by the Constitution, and it falls to the courts to make sure those standards are observed.

Then there is the normative argument for why courts ought to step in. They are in a position like no other to be impartial and to stand between the individual and the excesses of the majority. What they do is

[49] Lui (n 41).
[50] Fallon (n 9).
[51] Mila Versteeg and Emily Zackin, 'De-judicialization Strategies' (2024) *Yale Law Journal*.

more than just settle a dispute; it is about upholding the integrity of the constitutional order. When courts are consistent in enforcing these limits, they do more than right a wrong for the individual at hand; they put off any would-be future transgressions and give the Constitution its due authority.[52]

In a word, the High Court has put institutional stability ahead of any fidelity to the Constitution in its final judgment. One can see where the worries over political disruption are coming from, but they do not excuse letting an infraction of a basic right go unchallenged. What is present here is less legitimate deference and more of an abdication than is permissible. The courts ought to be doing the reverse if they want to be coherent on constitutional matters: holding public power to account, even in cases of impeachment, and making sure that rights come with proper remedies by enforcing the limits set out in the Constitution. Failing to do so only saps the authority of the Constitution and the protections it is meant to offer.

8. Convenience versus the Constitution: The Fallacy of Practical Inconvenience

What stands out in the High Court's approach to Petition E565 is its preoccupation with the institutional upheaval that would follow from an invalidation of the impeachment. One can see the Court has been swayed by the prospect of uncertainty in governance, be it in the form of rival claims to office or a lack of stability in how state institutions operate. But for all that, one might not call these worries illegitimate; to make them the deciding element in a matter of constitutional adjudication is poor doctrine.

One could say constitutional systems are put in place to stand up to disruption of this sort. Judicial review is founded on the idea that the courts have to put a stop to unlawful use of power, no matter how inconvenient it may be. As pointed out earlier, public power does not get a pass from legality review simply because of the political fallout. In the end, it shows that any disruption is hardly an argument for non-intervention; it is what would be expected when constitutional limits are enforced.

One could say the High Court's mistake was not in recognising institutional consequences but in letting them override the hierarchy that constitutional supremacy puts in place. Under Article 2, an act at odds with the constitution must be declared void; this doctrine is laid out in its most classical form in *MacFoy v United Africa Co Ltd*,[54] which made plain that a void act is "incurably bad" and can have no legal effect. Put that principle to work, and one will find it hard to argue for upholding a process that is constitutionally wanting on the grounds of convenience, when the law has never regarded it as valid in the first instance.

Viewed in this way, one has to say the Court is building its case on a false premise: that a choice has to be made between legality and stability. The truth of the matter is that legality is what makes stability legitimate. Authority cannot be bestowed on an outcome by virtue of administrative convenience when it is founded on a breach of the Constitution. To do so would be to put principle at the mercy of expediency and in effect turn the constitutional order on its head.

One has only to look at the Court's unspoken preference for efficiency at the

[52] Thomas Risse, 'Judicial Review and the Role of Courts in Upholding Constitutional Principles' (2025) *International Journal of Law and Legal Studies*.
[53] *Miller* (n 40).
[54] *MacFoy* (n 17).

expense of fairness to make sense of this line of reasoning. And it is worth noting that the latest empirical studies put the matter in perspective: procedural fairness is what underpins an institution's legitimacy. People are likely to accept and comply with legal outcomes when they perceive decision-making processes as fair.[55] This means that sacrificing fairness for the sake of expediency is ultimately self-defeating: it weakens rather than strengthens the authority of legal institutions.

One has to question the Court's appeal to practical inconvenience, given it has not bothered to address the flexibility that is a hallmark of constitutional remedies. In modern adjudication, a court is not put in the position of having to make a binary call between total deference and an outright invalidation. There are other ways to go about it: by making use of remedial tools like supervisory relief, prospective orders or a suspended declaration of invalidity, a court can see to the vindication of rights without ignoring the institutional fallout.[56] These options are there for a reason; they show that both stability and enforcement can coexist. As such, the idea that one must give way to practical difficulty when it comes to upholding the Constitution is hard to sustain.

One would have expected a more constitutionally sound approach to be taken by the court. It should have seen for itself that the impeachment process was flawed by virtue of the fair trial right being violated, and that this in turn called the outcome's validity into question. Some form of remedy, however it had to be put together, was needed to put constitutional legality back in order. In not doing so, the Court has put expediency before principle. It is a decision that does little to uphold the authority of the Constitution or to safeguard fundamental rights.

9. From violation to validity: The remedial collapse under Article 23

To see where the High Court went wrong in Petition E565, one has to look at Article 23 of the Kenyan Constitution. It is the provision that gives courts the power to dispense "appropriate relief" when a constitutional violation is made out. It may be called the foundation of the matter, not some incidental detail, for it is what makes the Bill of Rights an enforceable and living thing as opposed to a collection of abstractions.

Article 23 is as much corrective as it is declaratory in its intent. Its purpose is to put things right and affirm the binding supremacy of the Constitution. The reach of the constitutional remedies should be viewed in systemic terms, not just as individual compensation. They are meant to vindicate the right and deter any repeat offences. Comparative scholars opine that they are instruments of accountability, making sure unconstitutional acts do not pass without notice.[57] Absent those consequences, judicial review would be stripped of its regulatory force and the Constitution would cease to be an effective constraint on public power.

One has to view the High Court's turning to damages in light of this framework. The award of damages is a recognition that a violation has taken place, but it also betrays a basic misunderstanding of what constitutional remedies are intended for in these circumstances. After all, damages are

[55] Chan, Bradford and Stott (n 13).
[56] Dixon and Yap (n 25).
[57] Vázquez (n 24).

by their very nature a form of retrospective redress; they put right harm done yet leave the legal standing of the process in question untouched. Where there is an infringement of the right to a fair trial, the defect runs deeper than consequences, it is structural in the way the process was conducted.

The doctrinal logic of this position is reinforced by the principle articulated in *MacFoy.* There, the Privy Council unequivocal that a void act is a nullity incapable of producing legal consequences.[58] When applied to constitutional adjudication, this principle implies that a process tainted by a violation of a non-derogable right, such as the right to a fair trial, cannot give rise to a valid outcome. It is lamentable, however, that the approach of the High Court, effectively separates the violation from its consequences, allowing an unconstitutional process to stand while offering monetary compensation as a substitute for legality. That approach is difficult to reconcile with the basic structure of constitutional supremacy.

Article 23 does not simply oblige one to offer relief, it demands that the relief be effective. This point is underlined in the jurisprudence, both at home and abroad, with courts insisting that any remedy must be fit for the violation at hand and able to put things right in constitutional terms. Take procedural defects for instance: the tried and tested course of action is to quash the flawed process or the decision it has produced. The UK Supreme Court made as much clear in *R (Miller) v Prime Minister* when it set aside executive action for running counter to constitutional principles.[59] It is a simple matter of logic; if the process is not lawful, the result cannot be allowed to stand.

Yet the High Court has diverged from this well-worn path. In upholding the impeachment even while conceding its unconstitutionality, it has left legality unrepaired and in so doing not fulfilled what Article 23 requires of it. One could call this more than a technical oversight on the part of the Court. In not stepping in to restore order, it has neglected the very essence of judicial review as a means of keeping the exercise of constitutional power in check.

Then there is the deterrent aspect of constitutional remedies, which is inextricably bound up with this. A remedy is not just a means of putting right what has been done wrong; it serves to steer future conduct by making it clear that one will have to answer for any disregard of constitutional norms. This is vital to the integrity of the system. If violations are put to light yet have no bearing on the result, the incentive to do as the constitution requires is eroded. In the words of modern remedial theory, it is the credibility of the mechanisms that enforce rights that matters as much as their recognition.[60]

Empirical research reinforces this point by demonstrating that failure to enforce procedural fairness erodes public confidence in institutions, thereby undermining the legitimacy of the legal system as a whole.[61] If individuals perceive that rights can be violated without meaningful consequence, trust in the constitutional order diminishes. The approach of the court in Petition E565 risks generating precisely this effect by

[58] *MacFoy* (n 17).
[59] *Miller* (n 40).
[60] Dixon and Yap (n 25).
[61] Chan, Bradford and Stott (n 13).

suggesting that violations of even non-derogable rights may not alter the legality of outcomes.

One might say the problem is all the more pressing in light of the flexible remedial tools at hand in modern constitutional practice. As pointed out earlier, courts need not be put to a choice between outright deference and immediate invalidation; there are plenty of inventive ways to vindicate rights while containing any institutional fallout, be it through supervisory orders, prospective rulings, or a suspended declaration of invalidity. Contemporary scholarship has made much of this kind of flexibility. Dixon and Yap, for instance, have put forward the view that courts can give their remedies "bite" without sowing systemic instability.[62]

The High Court's reasoning does not seem to have engaged with such options. In supposing that invalidation would lead to unmanageable disruption, the Court passed over other means of maintaining both stability and fidelity to the constitution. It is an omission that bears out the sense that the Court's analysis was too narrow and did not rise to the occasion of proper constitutional adjudication.

In the end, remedies are what underpin the whole constitutional enterprise. Without them to deal with the illegality in question, a right has no practical force. The High Court has in effect made a fair trial nothing more than a symbolic guarantee by noting the violation but refusing to let it impact on the validity of the process. That is irreconcilable with the logic of constitutional supremacy.

A constitutionally coherent approach requires more. It requires that remedies address the illegality of the process itself; that violations of non-derogable rights carry determinative legal consequences; and that courts exercise their remedial powers in a manner that restores constitutional order. Any approach that falls short of these requirements risks undermining not only the protection of individual rights but also the integrity of the constitutional system as a whole.

10. From rights to rhetoric: The deepening crisis of constitutionalism

The repercussions of the decision of the High Court in Petition E565 go far beyond the dispute at hand. It is indicative of a more profound structural change in how constitutional supremacy is put into practice and in the interplay between rights and remedies. The pivot point for this is the way the Court handled non-derogable rights. Take the right to a fair trial under Article 25(c) for instance: while the Court was clear that it had been breached, it would not have it be the deciding factor on the validity of what followed. In so doing, the High Court has moved away from the modern view that a right is only as good as the remedy one can get for it.[63] The High Court's logic leaves a gap between what is declared and what is enforced, leaving rights standing in principle but without any real consequence when they are contravened.

This is bound to take its toll on the rule of law. The whole point of the rule of law is that public power has to be held in check by legal limits, and when there are infractions they have to be corrected with remedies that are proper and effective, not some token gesture. Procedural fairness is what underpins the constitutional order,

[62] Dixon and Yap (n 25).
[63] Fallon (n 9).

making for decision-making that is both transparent and accountable. Tolerating procedural breach can only blur the distinction between lawful and unlawful action. That runs the risk of turning constitutional adjudication into an exercise in arbitrariness.[64]

There is a direct link between this kind of erosion and the waning confidence people have in constitutional institutions. Studies on procedural justice indicate that institutional legitimacy requires perceptions of fairness; when individuals see a process as just they are far more inclined to accept the outcome, even when it is uncomfortable.[65] But should the courts seem reluctant to stand up for constitutional rights, trust in the judiciary and the legal system at large suffers. Such a loss of faith will eventually compromise the very effectiveness of constitutional governance.

In its approach, the High Court has also put some distance between itself and Kenya's brand of transformative constitutionalism. That project is built on the notion that one has to actively enforce rights to put accountability in place and change the way governance works. Comparative work shows that courts are supposed to be at the forefront of this, using remedies that are both robust and attuned to context so that constitutional norms have practical effect.[66] Instead, by putting institutional convenience ahead of enforcement, the decision curtails what could have been a more transformative exercise in adjudication.

Then there is the judgment's most consequential consequence: the creation of "zones of unaccountability" where the government can act with little chance of being meaningfully scrutinised by the courts. In implying that an impeachment can hold water even in the face of rights violations, the Court has made an exception to the rule of constitutional supremacy. It is a doctrinally shaky position, for a constitutional system cannot coherently have it both ways, with rights being absolute in theory yet optional in practice.

In the final analysis, Kenyan constitutionalism has come to a fork in the road. The judgment is a case study in the pull between two views: the one that favours pragmatic governance and stability, and the other which holds that constitutional supremacy and the enforcement of rights must come first. How society proceeds from here will set the tone for future jurisprudence. For the Constitution to have any normative authority, the courts will need to show they are serious about substantive enforcement and effective remedies, making sure rights are binding constraints and not just words on paper.

11. Conclusion

With its ruling on Petition E565 of 2024, the High Court has put down an important marker in Kenya's constitutional jurisprudence, yet one that is not without its problems. The judgment does concede that the petitioner was denied a fair trial, but it does not attach any real legal weight to that fact. One is left with a kind of tension in the decision: the Court recognises the wrong but refuses to act on it. It is a matter that warrants a re-look.

There is a doctrinal problem at one level. There is Article 25(c), which makes the right to a fair trial something that cannot be

[64] Vázquez (n 24).
[65] Dixon and Yap (n 25).
[66] Mukherjee (n 21).

In Kenya, impeachment is governed primarily by the Constitution of Kenya, 2010, with additional procedures provided in the Standing Orders of Parliament and county assemblies. The rules vary depending on the office involved.

limited, and then there are Articles 2 and 23; put them side by side, and they imply that when conduct is unconstitutional, it ought not to have any binding legal force and should be met with the proper remedy. From this vantage point, one would be hard-pressed to justify an outcome where a process has been deemed procedurally wanting yet permitted to stand.

The concern, however, is not confined to doctrine alone. It also goes to the relationship between rights and remedies in constitutional practice. Rights derive much of their meaning from how they are enforced. Where a violation is formally recognised but does not affect the legal standing of the impugned process, the force of the right is inevitably weakened. What follows is not an outright denial of the right, but a quiet shift in its practical significance.

One cannot overlook the wider institutional implications here. Of course, impeachment is a political affair, and the courts have to be mindful of institutional stability. Yet that does not absolve public power of the obligation to live up to constitutional standards in all its manifestations. Take Article 145(7) and its notion of finality: it would be absurd to argue that it was meant to put a shield around results that are built on procedural illegality.

The courts are not without recourse. Contemporary constitutional practice demonstrates that a remedy need not be blunt or disruptive. There are plenty of flexible instruments at the court's disposal to see rights vindicated and keep institutional consequences in check. In the end, it comes down to whether the course of action taken actually addresses the constitutional breach and has a practical impact, rather than being of no practical use.

This case has put a spotlight on an old and urgent question: how seriously do the courts treat constitutional rights and guarantees? Acknowledging a violation is easy enough, but taking the necessary next step to remedy it effectively is a different matter altogether. If the link between the two is let to fray, so too will the public's faith in the system and the very coherence of the constitutional order. Going forward, it will be up to the courts to bridge the gap between the recognition of rights and their enforcement, ensuring that the protection afforded is genuine rather than an academic exercise. If that does not happen, litigants in Kenyan courts will just be engaging in mouth exercise. Enough said.

Paul P. K. Kamau is a holder of an LLM from the University of Liverpool and an LLB from the UoN.

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COST OF COMPLIANCE

The unpredictable rising cost of compliance

By Agnes Nthenya Waithera

Over the years, I have worked with and interacted with business owners across various industries. While their core business activities differ, they share a common objective: to build a sustainable business. They understand that one among the key requirements for this is remaining compliant to regulations and tax obligations as business compliance is tied to business survival.

However as much as businesses are keen on being compliant it appears this comes at a cost. Tax is a good example, with each financial year comes new regulations one which may warrant one to seek professional advice whether legal or tax related. Unless you are a business leader with expertise in these areas, engaging the services of an advisor becomes inevitable.

Take for instance the recent amendments on the Finance Act, last year, the remittance of withholding tax was reduced to being within 5 working days meaning more payment cycles for companies and more administrative work that was initially scheduled for once a month and an inevitable stretch on cashflows.

This year the Finance Act introduced withholding tax on interchange fees, merchant service fees and payment to card companies after a prior ruling by the supreme court had rendered such fees not subject to withholding tax.

The amendments widen the tax base but at the same time have a severe impact on how financial institutions handle such transactions and the growing cost of carrying out such transactions which may be passed on to customers. Financial institutions process large volumes of transactions everyday and would therefore require technology enhancements and revised operational controls to ensure all fees charged are deducted at the correct withholding tax rate.

Most of these entities that provide such services such as card payments are non-resident and that would render the withholding tax as a final tax. This would mean drastically affecting the provider's margins which would therefore require marking up of the current cost to adjust for the tax withheld. Such a cost which can either be borne by the financial institution or its customers and the chances of these being passed on to customers are higher than the later.

Historically taxes have been made in such a way to encourage financial development and financial inclusion, make access to financial service competitive and affordable. Whether that is still receiving sufficient consideration is a matter open for discussion.

Businesses will also need to monitor the ageing of their losses for tax purposes as losses carried forward limit was set to 5 years, beyond this period any utilized losses would be deemed to have expired. Although the Finance Act 2026 introduced a new provision for companies that invested more than Ksh 10 billion enabling them to carry forward such losses indefinitely, companies that had invested less than 10billion which is still a vast majority of taxpayers, the five-year limitation applies. Although there's a provision for application extension, this has to be through the approval of the cabinet secretary upon recommendation by the commissioner. KRA application of this so far has applied even to losses incurred before 1st July 2025 when the act was introduced. This will put a strain on many entities below the Ksh 10b investment threshold, that had incurred huge losses in prior periods.

Returns filing date for individuals has also been revised with requirements to file returns within the fourth month. This will affect individuals with income other than employment income including partnerships filing considering partnerships income is taxed under the partners. As a result, partnerships will require to structure their administrative process to ensure filing by April.

Virtual assets service providers will also be required to file information returns with the commissioner every financial year to identify reportable persons or entities that are controlled by reportable persons. This means persons or controlling persons who are residents of a reportable jurisdiction as per KRA's list of reportable jurisdictions. Such reporting may warrant such entities to include new provisions in the amount of information they capture about their

Ultimately, good governance is not measured by the number of regulations enacted but by how effectively they achieve their objectives without imposing unnecessary or unpredictable costs. Compliance should promote accountability—not become an obstacle to growth, innovation, and sustainable development.

customers which may involve technical enhancements to their customer platforms, operations process streamlining, policies formulation and training staff on how to capture this information, all which will require resources to comply.

While these are few of the recent changes that are specific to the financial service industry its clear the theme is common in many other sectors. More payment cycles, technology upgrades, additional staff and training costs and overall increased compliance cost.

While there is a legitimate need to grow the tax base, every additional requirement or shortened reporting deadline carries an additional cost. The only variation is who bears the cost as it may be passed to businesses, investors or the final consumer being customers. The predictability around these costs is also uncertain. There should be continuous key interest in simplifying compliance to support businesses and economic growth.

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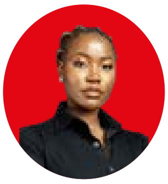
The governance illusion: When boardroom oversight masks organisational rot



By Ondoro Anne

In Kenya's ongoing conversation about institutional accountability, much attention is paid to the boardroom. We ask whether boards are independent, whether audits are clean, whether the Mwongozo Code of Governance for State Corporations, or its private sector equivalents, are being observed on paper. Far less attention is paid to a quieter, more corrosive failure, organisations where board oversight functions perfectly well, yet internally, one individual has become the single point through which all authority, however small, must pass.

This pattern is not hypothetical. Across a number of Kenyan institutions, public and private, staff describe strikingly similar experiences, boards that meet, approve, and sign off diligently, while day to day operations grind to a halt because nothing can move without one person's personal authorisation.

When approval on paper means nothing in practice

Consider a case, drawn from patterns reported across several organisations, where a department head seeks approval for an activity already sanctioned by the board and known to the chief executive. What should take a single email instead drags on for weeks, because nothing proceeds until the chief executive personally releases it. Finance already knows the answer is yes. The board has already said yes. Yet approval on paper counts for nothing, because authority in such organisations lives with one person, and everyone has learned to wait for her, even when the decision was made long before.

In more troubling instances, staff have reported funding essential activities out of pocket, travel, small procurements, welfare costs for junior staff, because no discretionary float exists at operational level. When reimbursement is sought, the answer is rarely a straightforward no. Instead, it is taken up with the chief executive, regardless of how minor the sum involved.

This is the contradiction at the heart of organisations that appear governed from the outside. The board exists. The policies exist. The sign offs exist. But internally, one person has become the single point through which everything must pass.

The governance illusion

Call it the governance illusion, the assumption that healthy oversight at board level automatically translates into healthy structure underneath. Boards exist to hold leadership accountable to shareholders, or in mission driven organisations, to the wider public interest. The Mwongozo Code itself is explicit on this point, calling for effective boards, transparent decision making, and ethical leadership cascading through an institution. But board oversight was never designed to police the everyday texture of how decisions actually move through an organisation. That is meant to be delegated, distributed, and built into functional management.

When it is not, when one leader keeps every thread of authority in her own hands, finance, hiring, training, welfare, even the smallest reimbursements, the organization does not become more accountable. It becomes more fragile. Organizational research on decentralization makes this explicit, when leaders promise distributed authority but quietly withhold it in practice, employees do not merely grow frustrated, they disengage, withdrawing the discretionary effort that keeps institutions functioning. Governance, in other words, is not only a boardroom question. It is a daily, structural one, and Mwongozo's own emphasis on accountability at every level reflects this reality.

Centralisation as a trust problem

At the heart of this kind of leadership is a quiet form of hoarding, not just of decisions, but of information, of credit, of visibility. Staff carry out the actual work, drafting proposals, running programmes, resolving daily problems, but it is often the chief executive who presents outcomes upward, who is seen doing the work, who becomes the face of achievements she did not personally produce.

This is not merely an ethical lapse, though it certainly feels that way to those experiencing it. It is a structural failure. Trust inside any organisation rests on a simple exchange, people give effort and expect recognition, autonomy, or growth in return. When a leader hoards authority, information, and credit simultaneously, that exchange collapses. When leaders quietly withhold delegated authority, even without ever formally reversing a policy, workers respond by withdrawing initiative, the extra care, the willingness to solve problems unprompted. What begins as one individual's need for control slowly hollows out the very engine of institutional life, the willingness of people to feel genuine ownership over outcomes.

Credit versus labour

This dynamic shows up most painfully in small, human moments rather than dramatic institutional failures. It is the junior officer who quietly absorbs a cost the organisation should have covered, and spends weeks chasing reimbursement. It is the programme lead who plans an initiative, approved, sanctioned, budgeted, only to have it stall because one signature is missing. And then, when the initiative finally proceeds, when the report is finally written, it is the chief executive who presents it to the board as her own achievement, her vision, her leadership.

The people who solved the actual problems, who absorbed the actual costs, who made the calls that kept things moving, disappear entirely from the narrative. This is the quiet unfairness that erodes institutional morale faster than any public scandal. People can tolerate difficult work. What they cannot easily tolerate is invisible work, effort that disappears the moment it becomes something worth claiming. Over time, the lesson embeds itself, initiative is punished with invisibility, and the safest course is to wait for permission from the top before acting at all.

The governance illusion reminds us that legitimacy cannot be manufactured through bureaucracy alone. Citizens ultimately judge governments not by the quantity of rules they produce, but by the quality of the outcomes they deliver.

The warning beneath Mwongozo's silence

International case studies, Theranos being the most cited, illustrate where this pattern leads if left unaddressed. A board can appear immaculate on paper, audits conducted, meetings held, resolutions recorded, while internally one individual controls every meaningful channel of information and decision making. What collapsed at Theranos was not board oversight in the technical sense, it was the absence of any internal accountability beneath that oversight, because nobody within the organisation held the authority, or the confidence, to question what was happening.

Few Kenyan institutions will ever reach that scale of catastrophe. Most quiet governance failures never make headlines. They surface instead as burnout, as junior staff who quietly leave, as employees who stop proposing new ideas because nothing moves without a signature that is often unavailable exactly when it matters. Yet the underlying mechanism is identical, and it is precisely what codes like Mwongozo were designed to guard against, not merely at board level, but throughout an institution's operating culture. When board oversight is mistaken for organisational health, the erosion beneath it goes unnoticed until it is too extensive to quietly repair.

What real internal governance requires

Genuine internal governance is not about diminishing a chief executive's authority. It is about distributing sufficient authority that an institution does not stall the moment she is unavailable, or her attention lies elsewhere. In practice, this means modest, achievable measures, a discretionary float that finance officers can release without escalation, department heads empowered to action already sanctioned initiatives without awaiting a personal signature, and a culture in which credit follows the person who performed the work, not merely the person who presents it.

None of this demands elaborate new systems. It demands trust, and a willingness to relinquish small decisions so that leadership's attention is reserved for what genuinely requires it. Boards, in turn, should ask not only whether financial statements are sound and codes of governance exist on paper, as Mwongozo and similar frameworks require, but whether authority actually moves through the institution the way it is meant to. Because the truest measure of governance is not what happens in the boardroom. It is what happens at the operational level, and whether resolving even the smallest matters requires an entire chain of command.

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Harmful cultural practices and their impacts on women and their children outside marriage: A study of the Gabra community

By Britney Abuoga

Abstract

Harmful cultural practices among Kenyan communities have persisted despite the existence of relevant national, regional, and international standard practices on human rights.[1] With greater human rights violations being carried on women.[2] These practices continue to impede the effective realisation of the rights of women and children in Kenya. This article adopts a doctrinal research approach to examine the harmful cultural practices among the Gabra community that violate women's right to equality and undermine the principle of a child's best interest. The article shall give great reliance to the Constitution of Kenya, statutes, regional and international legal frameworks to show how some cultural practices in the Gabra community underscore the rights of women and children born out of wedlock, thereby broadening the gap in the implementation of human rights. It shall equally use case laws to show the developing jurisprudence on matters women's rights and a child's best interest. The study finds the patrilineal descent of the Gabra to be the main contributor towards the human rights violations carried against the women and the children born out of wedlock in the community. The article also shows the effects of these harmful cultural practices on the women and children living in Manyatta Sessi Village in North Horr constituency Marsabit.[3] It concludes that the coherence of cultural practices to the provisions of the constitution, regional and international legal standards is essential for the implementation of human rights in Kenya.

Introduction

Culture as a concept may be understood as the way of life of a particular society or group of people. It encompasses the beliefs, practices, customs and traditions that

[1] Nsama Jonathan Simuziya, 'Harmful Cultural Practices that Violate Women's Rights in African Polities and Why They Have Persisted: A Glance at Namibia, Ethiopia, and Zambia' (31) 2, International Journal on Minority and Group Rights (2023), 265-269.

[2] Zaina Kombo, 'Embark on a Whole of Society Approach in Tackling Harmful Cultural Practices in Kenya,' Amnesty International, 2024, para 1.

[3] No Children Out of Wedlock, Citizen Digital, 31 st January, 2026, 53:10-56:22 <https://www.google.com/search?q=January+31st+2026+Citizen+news&oq=January+31st+2026+Citizen+news&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIHCAEQABjvBTIHCAIQABjvBTIHCAMQABjvBTIHCAQQABjvBTIHCAUQABjvBdIBCTIxNDAxajBqN6gCALACAA&sourceid=chrome&ie=UTF-8#fpstate=ive&vld=cid:20580a7a-e8b2-465d-8eac-02fb662f0f06_9757bf8e,vid:FotJpaMkBug,st:974 >

give a society its identity.[4] These elements are vital in understanding a society,[5] maintaining peace and good relationships among members of the society as well as promoting access to justice through customary laws that are at times applied in courts during adjudication.[6] As not all that glitters is gold, certain cultural practices go contrary to the provisions of national, regional and international legal frameworks, thereby rendering the effective realisation of human rights in the country difficult as well as leaving these women and children with vast negative effects. The Gabra community in Kenya clearly illustrates this tension through their patriarchal social-political structure and discriminatory customs that violates women's rights to equality and undermines the principle of a child's best interest, particularly for children born out of wedlock. This article shall endeavour to discuss when and how cultural practices are not compatible with the rights of women and children as enshrined in the, constitution, statutory provisions such as the children's act, regional and international regulations such as the African Charter on Human and People's Rights, the African Charter on the Rights and Welfare of the Child and the Convention on Children's Rights respectively, consequently impairing the effective implementation of human rights in the country. The article shall begin by highlighting the history and some customary practices of the Gabra community, it shall then show how some cultural practices in the Gabra community are harmful and violate women's right to equality and their effects on the women. The article shall then proceed to discuss how the cultural practice undermines the principle of a child's best interest, show its effect on the children, provide recommendations and give a conclusion.

History of the Gabra community and their cultural practices

The Gabra are a Cushitic ethnic group, who speak a dialect of Boran and inhabit Moyale and Marsabit regions of Northern Kenya and southern parts of Ethiopia.[7] They are believed to be of Somali origin but later came into contact with the Borana and some of the Borana culture including their language Ki-Borana.[8] For the survival and success of any community, there is a need for an effective social, economic and political structure. The Gabra community is not an exception to this. Economically, the Gabra practice pastoralism, as they regard livestock as their farms as their primary source of livelihood.[9] Their livestock is mixed as it consists of camels, cattle, sheep and goats with camels as the most central to the economy and way of life.[10]

Socially and politically, the Gabra are organized along a patrilineal descent, with clans as their basic units[11] headed by men called *Hayus*, who are of sound mind and exhibit leadership qualities. The *Hayus* act as judges and the decision makers in the community.[12] The *Hayus* appoint men called *Jallaba* who serve as mediators by solving disputes that may arise as conflicts

[4]Behavioural Sciences, 'Defining Culture: Its Role and Importance in Society', BNS.Institute, 21 April 2025. < Defining Culture: Its Role and Importance in Society • BNS Institute>
[5]Ibi . See also, Charles A. Ellwood, 'Culture and Human Society,' (1) 23, Oxford University Press (1944), para 1. < Culture and Human Society>
[6]Brigadier (r) Hissam Ullah Baig, 'The Importance of Customary Laws,' Pamir Times, 17 March 2023. < PAMIR TIMES >
[7]Africa 101 Last Tribes, 'Gabra,' para 1. < https://www.101lasttribes.com/tribes/gabra.ppppp>
[8]Ibid para 12.
[9]Ibid para 15.
[10]Ibid para 16.
[11]Ibid para 17.
[12]Ibid para 18.

The Gabra community, like many pastoralist communities in the Horn of Africa, has rich cultural traditions that promote social cohesion and resilience. At the same time, some traditional practices have been criticized by community members, women's rights advocates, and human rights organizations because they can negatively affect the rights, health, and opportunities of women and girls.

are inevitable in any community.[13] Further, the Gabra have families called *Worra* that are mostly monogamous although can be polygamous as it is allowed.[14] The families establish villages called Olla each headed by an elder referred to as "father of the village" who generally meet under a tree to discuss matters affecting the community.[15] The women however, have no assemblies rather,[16] they show the Victorian ideal of a woman by staying in the private sphere of the hearth.[17]

Marriage in the Gabra community is considered as the most important part of life for the Gabra. All people are expected to marry as those that fail to do so are not seen as real people thereby not allowed to fully participate in rituals and are not given traditional shelter.[18] A Gabra woman, ought to be a virgin at the time they are to be married as sexual contact with an unmarried woman is considered a crime given a similar weight as murder. Men and women found guilty of this crime are punished however, each receives a different weight of the punishment. The women are banished from the community while the men perform a cleansing ceremony and pay fines to the family of the banished women.[19] The punishment renders the women as outcasts forcing them to find

[13]Ibid para 19.
[14]Ibid para 38.
[15]Ibid para 39.
[16]Ibid para 40 -41.
[17]Lynn Arahamas, 'Ideals of Womanhood in Victorian Britain,' BC Home, 18th September, 2014. <BBC - History - Ideals of Womanhood in Victorian Britain>
[18]Ibid para 66. <https://www.101lasttribes.com/tribes/gabra.ppppp >
[19]Ibid para 67.

new other tribes and establish their lives a fresh while the men are forgiven, allowed to marry and go on with their lives. These cultural practices, despite giving the Gabra community their identity, encourage discrimination of women through their deeply patriarchal social-political structure and discriminatory customary practices.

How Gabra community's harmful cultural practice violates women's right to equality and its effects on the women

Discrimination is said to be a distinction whether intentional or not, based on the personal characteristics of an individual or a group, that imposes burdens, obligations, disadvantages on the individual or group and limits access to opportunities, benefits or advantages available to members of the society.[20] The struggle against the discrimination of women in Kenya has been a game of push and pull between harmful cultural practices and national, regional and international legal frameworks. Many measures have been put in place to fight against practices such as Female Genital Mutilation (FGM), early marriage and Gender Based Violence (GBV) that discriminate against women.[21]

In fighting against these harmful cultural practices, the government implemented laws such as the Children's Act (2013), Sexual Offenses Act (2006), the Penal Code and the Prohibition of FGM Act (2011) to protect women by criminalizing sexual violence and implicating punishments on the offenders. The government established Child Protection Centres, GBV recovery and referral systems to support GBV and FGM survivors. Further, the government established the National Gender and Equality Commission and the Anti-Female Genital Mutilation Board that have created a comprehensive case tracking tool through the Anti-FGM unit in the Office of the Director of Public Prosecution to ensure accountability in reporting, investigating and prosecuting cases.

The latter established by the National Gender and Equality Act (2011) promotes gender equality by monitoring, facilitating and advising on the integration of the principles of equality in policies, laws and administrative regulations.[22] Further, the domestication of both regional and international treaties or conventions that champion for the non-discrimination of women such as the Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW) and the African Charter on Human and Peoples' Rights has been a great stepping stop in preventing discrimination of women. This is because, upon ratification the government is mandated to implement the obligation of the treaty or convention.[23] Through these measures, the government has seen the rate of harmful cultural practices reduce to almost being unheard of.

Despite the many steps and efforts taken by the government with some highlighted above, these practices continue to thrive in the country through communities. In the Gabra community, cultural practices related to marriage that discriminate against women are still being practiced. Among the Gabra, marriage is regarded to be very important as everyone is expected

[20]EG v Attorney General & 12 Others, Petition 150 & 234 of 2016, Judgement of the High Court (2019), eKLR, para 287.

[21]Harmful Practices, 'Accelerating abandonment of Female Genital Mutilation (FGM) and Child Marriage in Kenya,' UNICEF Kenya,2012. <Harmful Practices | UNICEF Kenya> see also Secretarial Bried, 'Sexual and Gender Based Violence and Harmful Practices in Kenya,' UN WOMEN, 1-3. < sectoral_brief-gender_and_social_norms_gender-based_violence_and_other_harmful_practices_in_kenya_1.pdf>

[22]Government of Kenya, 'Gender Sector Statistics Plan,' Kenya National Bureau of Statistics, 9, 2023, 18-19.

[23]Government of Kenya, 'Gender Sector Statistics Plan,' Kenya National Bureau of Statistics, September 2023, 16.

to marry and get married. For a marriage to be considered valid, the woman has to be virgin as any sexual contact with an unmarried woman is considered a crime. The discriminatory practice is clearly seen through the punishments given to women and men found engaging in sexual contact before marriage. The women who are chased away from their community can be said to be excommunicated while the men undergo cleansing rituals and are accepted back in the community. The different gravity of the punishments is clearly discriminatory as the women pay handsomely for the crime.

The women having to leave the community while the men undergo a cleansing ritual clearly shows the gap in the implementation of the constitution, regional and international legal standards. Instead, this practice conflicts with the constitution, the grundnorm and the supreme law of the land binds all persons[24] and is to be respected, upheld and defended by all people.[25] The practice is in contrast with the constitution which provides for the equal treatment of women and men in political, economic, cultural and social spheres.[26] This is because, politically, the women in the Gabra community are not involved in decision making as all those involved, the elders who are family heads to the Hayus, the heads of clans are all men. Culturally, specifically regarding this practice, unmarried women bear heavier consequences to the crime of engaging in sexual contact as compared to the unmarried men.

Unfortunately, due to lack of participation by the women in decision making and the practice being regarded as law by the community thus binding to all members of the community, the women must observe it and equally accept the consequences despite it having vast negative effects on them. It is then right to say that the women are compelled to observe this practice due to its binding nature on the members of the community. This in turn violates the provision of the constitution that no person shall compel another to perform, observe or undergo any cultural practice.[27]

The African Charter on Human and Peoples' Rights on the Rights of Women also known as the Maputo protocol is a regional protocol that advocates for the equal treatment of women in Africa and is binding among states that have ratified it.[28] The protocol provides that state parties shall combat all forms of discrimination against women[29] as well as prohibit and condemn all forms of harmful practices that negatively affect women's human rights.[30] The protocol equally provides for the participation of women in the formulation of cultural policies.[31] The CEDAW, described as the international bill of rights for women, is an international convention that guarantees the equal treatment of women in political, social and cultural fields.[32] Unfortunately, this practice among the Gabra clearly conflicts with the aforesaid provisions of the legal instruments as the women's right to equality are violated as well as their right to participate in the society's policies.

[24]Constitution of Kenya (2010) Article 2(1).
[25]Constitution of Kenya (2010) Article 3(1).
[26]Constitution of Kenya (2010) Article 27(3).
[27]Constitution of Kenya (2010) Article 44(3).
[28]Constitution of Kenya (2010) Article 2(6).
[29]Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, ***, Article II.
[30]Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article V
[31]Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article XVII
[32]Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, ***, Article 3

As Psalms 127:3 reminds us, "Children are a heritage from the Lord, offspring a reward from Him." However, this feeling cannot be said to be mutual by the ostracised women of the Gabra community of North Horr in Marsabit. This is because, apart from being chased out of the community, the women have to bear the children and take care of them alone. They raise the children alone while solely providing them with basic nutrition, shelter, health care,[33] parental care and protection.[34] This leaves the women with the full responsibility in providing for the children which in turn contravenes with the provisions of the constitution and those of the CEDAW that advocate for equal parental responsibility in providing for the child.[35] With this responsibility resting on their shoulders, these women start groups, *chamas* where they get the finances to cater for their needs and those of their children. The different weight of the punishment born by the men and women undermines the women's dignity as it poses the men to be superior to the women by virtue of the men being the law makers and bearing the least gravity of the punishment. This violates the constitution which guarantees that everyone has inherent dignity that ought to be respected and protected.[36]

How Gabra community's harmful cultural practice undermines the principle of a child's best interest and its effects on the children

The principle of a child's best interests is a globally recognised rule in the protection of children's rights.[37] It is a principle that ensures the well being of a child is given greater priority in all matters concerning a child.[38] It largely applies in matters such as child custody, guardianship, child maintenance, adoption and the rights of child refugees.[39] The CRC its anchor provides that the best interests of a child shall be the primary consideration in all actions concerning children whether taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.[40] Through its binding nature, the constitution of Kenya under article 2(6) as read together with article 53(2) acknowledges his principle.

In abiding to its obligations under the CRC, the government enacted the Children's Act of 2001 and later revised it to the current Children's Act of 2022. The latter specifically acknowledges a child's best interest as paramount in all matters concerning a child.[41] The statute broadly discusses the concepts of child custody, child maintenance, guardianship and adoption providing the requirements to be met for each, the considerations for a child's best interest as well as acts as the guiding statute to courts on matters concerning children. Courts of law in adjudicating matters concerning children, have greatly applied the principle of a child's best interest. ***In re CP(Baby) [2025] KEHC 13828 (KLR)***, the Honourable CJ Kendagor allowed an adoption application as he found it to be in the child's best interest. Further, in the case of ***VNG (Suing as a Mother and***

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[33]Constitution of Kenya (2010) Article 53(1)(d).
[34]Constitution of Kenya (2010) Article 53(1)(e).
[35]Constitution of Kenya (2010) Article 53(1)(e). See also, Convention on the Elimination of All Forms of Discrimination Against Women, Article 16(1)(d)
[36]Constitution of Kenya (2010) Article 28.
[37]Dennis Karecho, 'Principle of Best Interest of a Child: Insights,' MMS ADVOCATES, 19 April 2023. < Principle of Best Interest of a Child : Insights - MMS Advocates >
[38]United Nations High Commissioner for Refugees, 'Best Interests of the Child,' United Nations Refugee Agency, June 2007. < REFUGEE CHILDREN – PROTECTION AND CARE INFORMATION SHEET>
[39]Dennis Karecho, 'Principle of Best Interest of a Child: Insights,' MMS ADVOCATES, 19 April 2023.
[40]Convention on the Rights of Children, 20 November 1989, ***, Article 3. See also, African Charter on the Rights and Welfare of the Child, July 1990, ***, Article 4.
[41]Children Act (No 146 of 2022) Section 8(1)(a).

Today, Gabra culture continues to evolve. Many Gabra women combine traditional cultural practices with formal education, professional careers, entrepreneurship, and leadership roles while continuing to preserve important aspects of their cultural heritage.

Next Friend of the Minor) v FKM [2023] KEHC 20963 (KLR), Honourable Judge A. Mshila overturned the trial court's decision regarding the joint custody of the minor and granted the appellant full custody of the minor as it found it to be in the child's best interest. The strict adherence of the principle by the various arms of government in the country has greatly protected the rights of children.

This customary practice among the Gabra, greatly affects the children born from that 'crime'. It violates their right to equal parental care and protection from both the mother and the father whether they are married or not[42] as enshrined in the constitution. Since, these children never get the parental care and protection from their father's. Due to this cultural practice, these children are denied the experience of a father's love, care and protection which is crucial in their growth. This discrimination stems from the mother's current status as *persona non grata* in that community, thereby violating the ACRWC and CRC that provides for the protection of a child against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members.[43]

Recommendations

To effectively curb harmful cultural practices, this study proposes the following measures to be undertaken:

[42]Constitution of Kenya (2010) Article 53(1)(e).

[43]African Charter on the Rights and Welfare of the Child, Article 3. See also, Convention on the Rights of Children, Article 2


Gabra women play a central role in preserving the community's cultural identity through family life, livestock management, traditional knowledge, and cultural ceremonies.

Economic empowerment. This is for the women already affected by the practice. This can be through establishment of business for the women by the county government of Marsabit. This ensures that the women are financially stable to cater for their needs and those of their children as they are the sole breadwinners of their single parent families.

Inclusion of the women in leadership. This is by allowing women to participate in decision making as well as in formulating the cultural policies. This promotes women's rights to equality and human dignity as well as eradicates such harmful practices against women from being practiced.

Community Sensitisation. This involves one on one conversations with members of the community, educating them on the vast negative effects of the cultural practices and equally educate them on human rights and the need for them to respect and protect them. It may also include in depth conversations with the cultural leaders on the aforesaid. This may be spearheaded by the Kenya National Human Rights Commission (KNHRC).

Further, the women may receive legal aid from organisations such as the Federation of Women Lawyers (FIDA) and equally receive free legal representation on matters affecting them and their children.

The government should establish an annual data collection to monitor the trajectory of the harmful practice as well as assess the effectiveness of the interventions.

Conclusion

The harmful cultural practices among the Gabra community continue to persist due to binding norms, customary laws rooted in the customs and traditions of the community, with grave consequences on women and children born outside marriage. It perpetuates inequality, stigma and marginalisation thereby undermining national, regional and international legal frameworks. The effective protection of women's and children's rights requires community sensitisation, efficient monitoring, adequate support from the government and stricter enforcement of already existing laws to ensure efficient implementation.

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Budgeting for a just transition: Climate justice, fiscal reform, and the politics of preparedness in Kenya's FY 2026/27 budget.

By: Green Congress Party of Kenya

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Abstract

Kenya's KES 4.82 trillion FY 2026/27 budget arrives at a moment when the country's climate exposure, fiscal capacity, and public-service workforce are converging into a single governance test. This briefing, prepared by the Green Congress Party of Kenya (GCK) for circulation among sister green parties, international donors, and policymakers, reads the budget through three lenses rarely combined in a single document: climate justice, fiscal sustainability, and the dignity of the public servants who deliver state services. It argues that Kenya's narrow tax base is not a technical footnote but the structural reason ordinary, formally employed Kenyans are taxed nine times over on fuel while informal wealth escapes the net; that the forecast 2026 El Niño event is not a weather story but a fiscal one requiring the same seriousness as any line item in the budget; and that a living wage and secure conditions for nurses, teachers, and frontline workers are not a cost to be minimised but the human infrastructure on which every other promise in this budget depends.

Executive summary:

Kenya's FY 2026/27 national budget, tabled at KES 4.82 trillion — a 12.4 percent increase from the previous year — arrives at a moment of pronounced convergence between fiscal stress and climate emergency. The government's declared theme, "Sustaining the Bottom-Up Economic Transformation Agenda for Resilient and Inclusive Growth amid Global Uncertainty," signals ambition. This analysis evaluates whether the budget's structure and allocations match that ambition, particularly across climate justice, fiscal equity, workforce reform, and climate preparedness.

The Green Congress Party of Kenya (GCK) finds that the budget is characterised by a substantive gap between stated environmental commitments and actual resource allocation. Kenya allocates KES 567.3 billion to national security and KES 124.8 billion to environmental protection — a ratio that fundamentally inverts the proportionality warranted by the scale of the climate threat Kenya faces. Kenya's renewable electricity generation — at nearly 80 percent of total supply — represents a genuine continental achievement. Yet that infrastructure sits alongside a clean cooking crisis in which over 80 percent of the population relies on biomass, a water development budget that has been cut by 56 percent over three years, and a chemical fertiliser programme that deepens soil dependency rather than building agroecological resilience.

Three structural gaps demand immediate legislative and budgetary attention beyond the twelve thematic sections addressed in this paper. First, Kenya's tax base is critically narrow: approximately 3.7 million formal taxpayers carry a fiscal burden that should be distributed across an economy of 55 million citizens, with an informal sector representing 83 percent of employment contributing a disproportionately small fraction of public revenue. Broadening the tax base — through MSME formalisation, progressive land value taxation, digital economy levies, and closing corporate exemption loopholes — could generate an additional KES 150–250 billion annually without increasing rates on existing formal taxpayers.

Second, Kenya has no credible El Niño preparedness programme. The 2023–24 El Niño event killed over 210 people, displaced 340,000, and caused estimated infrastructure damage of KES 80 billion. El Niño cycles recur every three to seven years; a national El Niño Preparedness and Response Programme (ENPRP), funded through a dedicated contingency reserve of KES 25–50 billion and integrated across agriculture, health, infrastructure, and social protection, would reduce Kenya's structural climate vulnerability far more cost-effectively than post-disaster emergency supplementary budgets.

Third, Kenya's public service workforce — teachers, nurses, police, and frontline social service personnel — is remunerated below living-wage standards, producing brain drain, absenteeism, and diminished service delivery. Embedding a progressive Living Wage Standard in public sector compensation, funded through efficiency gains in procurement and tax base expansion revenues, is both a social justice imperative and a macroeconomic investment: public servants who earn a living wage spend in local economies, reduce reliance on informal supplementary income, and deliver more consistently.

These three imperatives — a broader tax base, a funded El Niño preparedness programme, and a living wage for public servants — are cross-cutting: they interact with and reinforce every sectoral analysis in this document. They are also the three areas where a green fiscal framework departs most sharply from the logic of the FY 2026/27 budget as presented.

Core finding

The FY 2026/27 budget engages with the green agenda at the level of language and incremental programme design. It does not yet treat climate change as a sovereign fiscal and security priority, does not broaden its tax base equitably, does not prepare for predictable El Niño events, and does not pay its frontline public servants a living wage. These are not peripheral critiques — they are systemic failures that compound one another.

Analytical framework and methodology:

This paper applies a climate justice analytical framework to Kenya's FY 2026/27 Budget Statement. Climate justice is not a rhetorical framing; it is a structured evaluative standard with three operational dimensions that this analysis applies consistently across each thematic area:

- Responsibility asymmetry: those least responsible for the climate crisis — Kenya contributes less than 0.1 percent of global cumulative emissions — should not bear its greatest fiscal burden. Budget allocations are evaluated against this principle.
- Resource delivery: public money designated for climate adaptation and resilience should reach frontline communities, not be absorbed by administrative intermediaries. Where evidence suggests structural leakage, this paper notes it explicitly.
- Community agency: resilience is built through land, water, forest, and energy systems controlled by the communities that depend on them. Budget programmes that centralise control of climate assets without community tenure protections are assessed critically regardless of their headline investment size.

The analysis proceeds across twelve sectoral domains drawn from the GCK's twelve-point green policy platform, then addresses three cross-cutting structural imperatives — El Niño preparedness, tax base reform, and workforce remuneration — that cut across all sectors but receive no dedicated treatment in the budget statement. For each domain, the paper distinguishes between what the budget does well, where it falls short, and what GCK's position is. Empirical data are drawn from the FY 2026/27 Budget Statement (11 June 2026), prior-year budget documentation, Kenya National Bureau of Statistics publications, Kenya Revenue Authority data, IGAD and FAO Horn of Africa drought assessments, IPCC Sixth Assessment Report regional findings, and World Meteorological Organization El Niño monitoring records. Thomas Mariwa's policy essay "Innovation with Integrity: Rewriting Kenya's Economic Story" (June 2026) provides the normative framework for workforce reform and industrial policy analysis.

Part I: Sectoral budget analysis.

Climate justice readings across twelve policy domains.

1. Climate resilience, loss and damage, and the El Niño imperative.

Where the budget advances Kenya's climate position:

The Government has committed to establishing the Kenya Green Investment Facility, designed to scale green financing through sustainability-linked bonds with targets in forestry and biodiversity. Kenya's hosting of the African Green Investment Forum in October 2026 and the Green Climate Fund Regional Office reinforces its positioning as a continental climate leader. The integration of environmental risk assessments into the Public Investment Management framework, if operationalised consistently, represents a potentially transformative shift in how infrastructure projects are evaluated.

Where the budget falls short:

Environmental Protection, Water, and Natural Resources receives KES 124.8 billion — less than a quarter of the KES 567.3 billion allocated to national security. Climate change is Kenya's most consequential, most present, and most structurally irreversible security threat. Flooding has displaced more Kenyans in the last five years than any military conflict. The Indian Ocean has risen by approximately four metres in places along Kenya's coastline. Lake Victoria continues to reclaim shoreline land from communities that have lived beside it for generations. The 2023–24 El Niño event caused deaths, displaced hundreds of thousands, and cost the economy tens of billions of shillings. None of this is reflected in the proportionality of this budget's allocations.

Kenya's growth forecast has been revised downward to 5.0 percent for 2026, in part due to higher energy prices linked to Middle East conflict. That dependency — on imported fossil fuels subject to geopolitical shocks — is itself a climate vulnerability this budget does not structurally address.

Climate justice analysis:

The budget treats climate impacts as contingencies to be managed rather than damages already incurred that carry a duty of redress. That is not a semantic distinction. Kenya has already lived through the loss-and-damage reality this budget is largely silent on: school closures announced after flooding begins rather than land-use regulation that prevents the flooding, emergency relief distributed through administrative layers rather than directly to displaced families, and a climate finance architecture that creates accountability obligations to international funders rather than to Kenyan citizens.

As a country that contributes less than 0.1 percent of global cumulative greenhouse gas emissions while absorbing some of its most severe climate consequences, Kenya is a net climate creditor. It should not be financing its own adaptation entirely from domestic revenue. The KES 124.8 billion allocation is not merely too small against the security budget; it is too small against the scale of the climate debt the international community owes Kenya.

El Niño preparedness — cross-cutting alert:

The FY 2026/27 budget contains no dedicated El Niño preparedness programme. El Niño cycles recur every three to seven years with predictable consequences for Kenya's coast, Rift Valley, and arid and semi-arid lands. Section 13 of this paper proposes a comprehensive National El Niño Preparedness and Response Programme (ENPRP) as a central fiscal and governance priority. The case for that programme is rooted in this section's core finding: Kenya cannot treat a predictable, recurring, and increasingly severe climate event as an unforeseeable emergency.

GCK policy position:

The GCK calls for the reclassification of climate change from a development line item to a sovereign security priority, with a minimum 15 percent of the national budget directed toward climate resilience, adaptation, and loss-and-damage programming over a three-year transition period. A dedicated El Niño Preparedness and Response Programme with a funded contingency reserve is a non-negotiable first step.

2. The green economy, job creation, and remuneration reform.

Where the budget advances green employment:

The Affordable Housing Programme has generated over 428,000 jobs and is projected to reach one million by end-2026, spanning masons, carpenters, electricians, plumbers, architects, engineers, and surveyors. Kenya's near-80 percent renewable electricity generation creates an unparalleled foundation for a green economy — no other regional economy is better positioned to lead continental clean energy manufacturing, installation, and export.

Where the Budget Falls Short:

The transforming MSME economy receives KES 1.65 billion — a figure that is structurally indefensible for a sector that employs the majority of Kenyan workers and constitutes the natural home of green economy job creation: solar installation, organic agriculture, eco-construction, conservation management, and circular economy enterprises. The digital superhighway and creative economy receive KES 8.6 billion by comparison. There is no dedicated green jobs programme within manufacturing or energy allocations, and no green skills fund within the education budget.

More critically, the employment generated by the housing programme is not built to green standards, and the wages and working conditions of workers in that programme are not subject to a minimum remuneration framework linked to living costs. "Innovation with Integrity: Rewriting Kenya's Economic Story" (Thomas Mariwa, June 2025) identifies this gap precisely: sustainable economic growth requires that the human capital driving it — workers across all sectors — is compensated at a level that enables productive citizenship, family stability, and continued skills development.

Remuneration, working conditions, and innovation with integrity:

The policy principles articulated in "Innovation with Integrity" are directly applicable to the green economy employment agenda. Three provisions are particularly relevant:

- Living Wage Standard: public servants and workers in government-funded programmes should be remunerated above the poverty threshold, indexed to the actual cost of housing, food, healthcare, transport, and basic education for a family of four in their county of residence.
- Job Security and Contract Standards: green economy job creation should be based on minimum-term contracts with social security enrolment, occupational health and safety compliance, and progression pathways into permanent positions.
- Professional Development and Skills Recognition: workers transitioning from informal to formal green economy roles — including construction workers moving into eco-construction, farmers adopting agroecological practices, and community rangers in conservancy programmes — should have access to subsidised certification and in-service training.

These provisions apply not only to new green economy hires but to the 428,000 workers already in the housing programme who are building the physical infrastructure of Kenya's next generation. The question is not whether to employ people — it is what quality of employment is being created and whether it builds the human capital base that a green economy requires.

> **GCK policy position:**
> *The GCK advocates for a Green Jobs Quality Standard as a procurement condition for all government-funded construction, energy, and conservation programmes. This standard must include minimum wage floors linked to county living costs, mandatory social security enrolment, occupational safety requirements, and access to in-service skills development. It is grounded in the "Innovation with Integrity" principle that investing in human capital repays itself through healthier, more productive, and more economically secure citizens.*

3. Food and water security: Structural resilience and climate adaptation.

Where the budget advances food security:

The Government will sustain the fertiliser subsidy programme, making 2.3 million metric tonnes of assorted fertiliser and 40,000 metric tonnes of agricultural lime available to 4.4 million smallholder farmers. The Kulalu Food Security Project — gazetted as a Special Economic Zone in 2025 — prioritises private investment, the expansion of irrigated acreage to 6,400 acres by June 2026, and the construction of a major dam to enable irrigation of up to 200,000 acres, with a projected output of 14 million bags of maize annually sufficient to eliminate the national maize deficit.

Where the budget falls short:

The fertiliser subsidy as structured represents a significant policy divergence from green agricultural principles. The programme supplies conventional synthetic fertiliser at scale, deepening soil dependency on chemical inputs rather than investing in soil restoration, composting, organic transition programmes, and agroecological resilience. The long-term cost to soil fertility, water quality, biodiversity, and input-price vulnerability is not modelled in this budget.

The water development budget has declined from KES 60.6 billion in 2022/23 to KES 26.6 billion in 2024/25 — a 56 percent decrease — even as Kenya's food security increasingly depends on irrigation. Water is being treated as a budget residual rather than a strategic asset. A single major irrigation scheme is not a drought strategy; it does not address the fundamental question of who controls the climate finance and relief money intended to prevent the next drought from becoming the next famine.

Climate justice and drought response accountability:

Between 2021 and 2024, an estimated 66.4 million people across the Horn of Africa — including 10 million children — experienced food stress, crisis, or famine conditions, with 22 million at risk of starvation at peak. Kenya lost over two million livestock in the 2022–23 drought. The unmanaged decomposition of two million cattle carcasses alone represents a significant greenhouse gas event: preliminary estimates suggest total emissions of seven to sixteen million tonnes of CO_2-equivalent from methane and nitrous oxide release — comparable to Kenya's entire annual transport sector emissions. This is a climate and environmental crisis that demands not only emergency response but structural prevention through animal food bank programmes, pastoralist resilience systems, and early-warning-linked destocking programmes.

A meaningful share of international drought response funding directed to the Horn of Africa is absorbed at the administrative layer before reaching affected communities. This is a governance failure that a green fiscal framework must address through transparent, audited, community-routed climate adaptation financing — not simply through larger capital allocations to centralised irrigation infrastructure.

El Niño intersection:

El Niño events bring simultaneous flood and drought to different regions of Kenya. Section 13 proposes an agricultural preparedness component of the ENPRP that links crop insurance, livestock banking, early-planting programmes, and destocking triggers to real-time meteorological data.

GCK policy position:

The GCK calls for a transition away from synthetic fertiliser subsidies toward a Soil Health and Agroecological Transition Programme over a five-year period, a reversal of the water development budget decline to at least KES 50 billion by FY 2027/28, and a mandatory community-routing and audit requirement for all international drought response funding disbursed through Kenya-based intermediaries.

4. Land rights, forest governance, and community conservation.

Where the budget recognises forestry:

Kenyan forest cover stands at 8.83 percent and tree cover at 12.13 percent, with 316 million seedlings raised and 3,975 hectares of new forest plantation established in recent reporting periods. The forestation infrastructure exists and carries government funding. This is a credible base to build on.

Where the budget falls short:

The budget is essentially silent on community land rights, forest governance reform, and the protection of indigenous and community tenure. There is no visible allocation for operationalisation of the Community Land Act, no ring-fenced funding for community conservancies, and no explicit forestry governance reform agenda. The Sovereign Wealth Fund

Bill, while potentially significant, is framed in terms of national resource management without explicit community revenue-sharing obligations — creating a risk of centralising the proceeds of land-linked resources in national government hands rather than with the communities on whose land those resources sit.

Climate justice analysis:

Forestry is repeatedly identified in regional climate diplomacy as a priority investment area: it sequesters carbon, restores ecosystems, and creates livelihoods. Kenya's seedling and plantation numbers demonstrate that the state recognises this. What is absent is the justice dimension: forest restoration that does not secure the tenure and decision-making rights of communities who have protected these forests for generations simply transfers control of a valuable carbon asset to whoever holds the technical capacity to access green finance. This reproduces the same structural disconnect between funders and frontline communities visible throughout regional climate finance delivery.

> **GCK policy position:**
> *The GCK advocates for immediate operationalisation of the Community Land Act with a dedicated KES 5 billion implementation budget, ring-fenced funding for community conservancies linked to carbon credit revenues, and the inclusion of mandatory community revenue-sharing obligations and environmental governance conditions in the Sovereign Wealth Fund Bill before it is enacted.*

5. Energy transition, energy access, and energy democracy.

Where the budget builds on Kenya's strengths:

Kenya's existing renewable energy infrastructure — nearly 80 percent of electricity generated from geothermal, wind, hydro, and solar sources — is the most compelling green credential on the continent. The National E-Mobility Policy to guide the transition to clean transport, the Green Investment Facility's sustainability-linked bonds, and the development of carbon credit regulations together constitute the architecture of a genuine green energy economy. The removal of excise duty on bottled water is a small but symbolically useful social health measure.

Where the budget contradicts its own green framing:

The most direct contradiction of the budget's green aspirations lies in its approach to fossil fuels. Kenyans pay nine separate taxes and levies on every litre of fuel. The Anti-Adulteration Levy on kerosene — a fuel used disproportionately by low-income households — makes clean energy alternatives less competitive through price suppression of the dirtiest available option. The Road Maintenance Levy Fund Amendment Bill proposes to cut the allocation to the Road Annuity Fund from KES 3 to KES 1.50 per litre of petroleum products — a short-term cost-of-living measure that halves long-term infrastructure investment funding while continuing the logic of fossil fuel dependency.

Most egregiously, the petroleum development levy — collected from consumers to buffer against fuel price volatility — was diverted to service debt to a Chinese firm operating the standard-gauge railway. This represents precisely the governance failure that erodes public trust in fiscal institutions: funds designated for one public purpose redirected to service a debt instrument, while households continue to pay for fossil fuels they cannot escape.

Energy as a justice and sovereignty question:

A grid that is 80 percent renewable but leaves low-income households paying nine layered taxes on the fossil fuel they use for cooking is a grid whose benefits are not democratised. Energy access is not a side benefit of decarbonisation — it is the central justice claim, on the same footing as equitable resource distribution generally. The clean cooking crisis — in which over 80 percent of Kenya's population relies on biomass for cooking and heating, generating indoor air pollution responsible for hundreds of thousands of premature deaths annually — is a public health emergency that demands a structured transition programme, not ad hoc fuel price relief measures.

Regionally, Africa contributes a small fraction of global emissions while functioning as one of the planet's major carbon sinks through its forests and rangelands. Kenya's energy platform is therefore also a sovereignty platform: democratise the grid at home, and demand that Kenya is compensated — not penalised — for the carbon assets it already holds.

> **GCK policy position:**
> *The GCK proposes a National Clean Cooking Transition Programme with a dedicated KES 20 billion allocation over three years, funded through reallocation from fossil fuel subsidy measures, carbon credit revenues, and international climate finance. It further calls for the ring-fencing of all energy levy revenues for their stated purposes, with independent audit trails, and for the immediate fast-tracking of carbon credit regulations that would allow Kenya to begin monetising its renewable and carbon-sink assets.*

6. Urban environment, liveable cities, and flood resilience.

Where the budget invests in urban infrastructure:

Infrastructure development receives KES 220.4 billion, with the Government committing to modernise strategic transport and logistics infrastructure to reduce the cost of doing business. Urban connectivity investment, if directed toward mass transit and non-motorised transport, is aligned with green urbanism principles.

Where the budget misses the opportunity:

The budget contains no dedicated urban air quality programme, no green building standards for the housing construction boom, and no meaningful investment in urban public transport as an environmental or public health intervention. The Affordable Housing Programme is building at scale
— projected at 400,000-plus units — without ecological standards, green space obligations, or heat-island mitigation requirements. This is a generational missed opportunity: the physical infrastructure being built today will define urban climate vulnerability for the next fifty years.

Flood exposure, informality, and climate justice:

Urban flood exposure in Kenya is not randomly distributed. Informal settlements absorb the worst of Nairobi's flash flooding precisely because impermeable surfaces and lost drainage capacity push runoff toward the lowest-lying, least-resourced neighbourhoods. A housing programme built without permeable surfaces, drainage infrastructure, green space, and heat-mitigation standards is not only an environmental failure — it is a climate justice failure, concentrating the physical consequences of poor planning among the residents least able to recover from it.

El Niño intersection:

El Niño events produce Kenya's most severe urban flooding. Without green building standards and flood-resilient urban design embedded in the housing programme now, each new unit built represents an addition to the stock of climate-vulnerable housing that will require emergency response during the next El Niño cycle.

GCK policy position:

The GCK calls for immediate introduction of Green Building Standards as a mandatory procurement condition for all government-funded housing construction, a KES 10 billion Urban Climate Resilience Fund for retrofitting drainage infrastructure and green space in informal settlements, and an Urban Air Quality Monitoring Programme with public-facing real-time data in all urban centres.

7. Environmental justice, anti-corruption, and institutional integrity.

Where the budget commits to governance reform:

KES 109.2 billion has been allocated to improving governance and sustaining the fight against corruption. The Government is advancing public procurement reforms and has rolled out end-to-end e-government procurement to all procuring entities. The Government-Owned Enterprises Act 2025 mandates state corporations to operate as commercial entities, reducing exchequer dependency and creating a framework for sustainable conservation revenue generation.

Where the budget's anti-corruption agenda falls short:

Environmental crime — illegal logging, charcoal trade, wildlife trafficking, and illegal dumping, illegal mining, — receives no dedicated enforcement budget in this statement. The governance allocation is framed almost entirely around financial accountability rather than environmental crime, which remains largely unprosecuted in Kenya. The GCK's position — consistent with the "Innovation with Integrity" framework — is that environmental crime and financial corruption are structurally connected: they depend on the same networks of impunity, the same regulatory capture, and the same failure of institutional integrity.

The same accountability gap visible in domestic enforcement applies at the level of international climate finance: a substantial share of climate and drought relief funding in the Horn of Africa region is consumed by administrative overhead before it reaches affected communities. Transparency requirements must apply equally to domestic procurement and to the climate finance and NGO ecosystem operating in Kenya. The GCK endorses the principle articulated in "Innovation with Integrity" that technology — properly designed and subject to independent audit — can enhance transparency and accountability across both procurement and climate finance delivery.

GCK policy position:

The GCK calls for the establishment of a dedicated Environmental Crime Prosecution Unit within the Office of the Director of Public Prosecutions, a real-time public procurement portal with community-level spending tracking for all climate and conservation finance, and whistleblower protection provisions for public servants who report misappropriation of climate finance or environmental crime.

8. The blue economy: From declaration to funded coastal resilience.

Where the budget names the blue economy:

The Government explicitly identifies the blue economy as a strategic intervention for job creation and economic diversification, and the tourism allocation of KES 45.6 billion encompasses coastal and marine assets. The naming represents political acknowledgement.

Where the budget fails to resource the blue economy:

There is no visible dedicated allocation to marine protected areas, mangrove restoration, fisheries enforcement, or ocean plastic management. Kenya's coastal constituencies — with significant electoral and economic weight — have no concrete blue economy investment plan in this budget. Naming the blue economy as a growth sector without resourcing adaptation for it is naming a loss-and-damage exposure without insuring against it.

Sea-level rise as a fiscal risk:

The same sea-level rise that has pushed the Indian Ocean higher along Kenya's coastline is a direct threat to coastal livelihoods, mangrove ecosystems, fisheries, and tourism infrastructure — the very assets this budget claims as growth anchors. Without funded mangrove restoration, coastal infrastructure resilience investment, and marine protection enforcement, the blue economy will continue to shrink as the physical environment it depends on degrades.

> **GCK policy position:**
> *The GCK calls for a dedicated Blue Economy Resilience Allocation of KES 15 billion over three years, covering marine protected area management, mangrove restoration, fisheries enforcement, and a community-based ocean plastic management programme linked to circular economy incentives.*

9. Biodiversity, wildlife, and the conservation economy.

Where the Budget Engages Conservation:

Kenya's Green Climate Fund portfolio includes the TWENDE project, tackling drought and extreme weather in arid and semi-arid rangelands. The Kenya Wildlife Service is referenced in infrastructure funding proposals, indicating institutional recognition. Carbon credit regulations are in preparation.

Where the budget leaves conservation unresourced:

Wildlife and biodiversity have no ring-fenced national budget line visible in the budget statement. The conservation economy — eco-tourism revenue, carbon sequestration from conservancies, payment for ecosystem services — is not treated as an economic sector in its own right. The delay in finalising carbon credit regulations MAY result in a direct loss of economic sovereignty: Kenya holds the forest cover, geothermal assets, and rangelands to be a continental leader in carbon markets, but without enforceable regulations, that opportunity is leaking to other jurisdictions that move faster.

The carbon-sink valuation gap:

Kenya's rangelands and forests function as carbon sinks of regional and global significance — an ecological asset that Africa holds disproportionately relative to its emissions. Treating that asset as an externality on the national balance sheet, while carbon credit regulation stalls in draft, means Kenya is donating the value of its sink capacity to whichever jurisdiction monetises it first. Climate stakeholders have urged the Government to fast-track carbon credit and methane financing regulations, noting that such frameworks could unlock investments in waste management, food production, and renewable energy simultaneously. The question therefore remains, does Kenya have a fully functional carbon credit system?

Short answer: **partially — the legal architecture exists and is more developed than most African peers, but "functional" in the sense of predictable, fully operational, and dispute-free is not yet true.**

Here's the breakdown as of today:

What is functional / operational:

- **The core legal framework is in force.** The Climate Change (Amendment) Act 2023 and the Climate Change (Carbon Markets) Regulations 2024 are gazetted laws, not proposals — they establish a Designated National Authority, principles for project approval, and requirements every carbon project must meet.
- **The National Carbon Registry is live.** Launched February 17, 2026, the KNCR is an actual operating digital platform for registering, tracking, authorizing, and reporting carbon transactions — this is a real capability, not aspirational infrastructure, and it's already drawn international technical backing (Germany, UK).
- **Enforcement is real, not theoretical.** The KOKO Networks case proves the state can and will block a Letter of Authorization and shut down a non-compliant project — whatever you think of the outcome, that's a functioning enforcement mechanism, not a paper tiger.
- **Fiscal terms exist and are specific.** A 25% state revenue share, a $4 per-credit levy, and 50% fee allocation to a national climate fund are concrete, quantified rules — not vague guidance.
- **A framework for non-market approaches now exists too.** The Climate Change (Non-Market Approaches) Regulations, gazetted February 2026, extend the system to mitigation/adaptation activity that doesn't rely on credit trading, operationalizing Article 6.8.

What is not yet functional:

- **Tax treatment is unresolved.** Tax specialists note that without a clear statutory definition, disputes with the Kenya Revenue Authority remain a real possibility — meaning any project or investor still faces genuine uncertainty on this axis.
- **Approval processes are a live bottleneck, not a settled process.** Industry figures like Regen Organics' MD are on record saying government needs to quickly start recognizing and approving carbon credits from companies like theirs, and are explicitly calling for fast-tracking
  — this is a current complaint, not a resolved historical one.
- **The registry is new and untested at scale.** A platform launched in February 2026 has only a few months of operating history; whether it holds up under transaction volume, avoids double-counting in practice, and integrates cleanly with international registries is still being proven.
- **Methane/agriculture-linked credits remain a regulatory gap.** Parliament's own Livestock and Agriculture Committee chair has said Kenya urgently needs appropriate

regulations, legislation and policies for methane specifically — an entire emissions category (Kenya's largest methane source) is still short of the same clarity applied to forestry/energy credits.

- **Precedent is still being set case-by-case.** The KOKO collapse shows the government exercising discretion in ways that weren't fully predictable in advance — a functional regime should let a serious operator model its regulatory risk in advance, and right now that's still contested terrain.

Bottom line: Kenya has moved from "framework on paper" to "framework with active infrastructure and enforcement" faster than most peer countries in 2026 — that's a genuine achievement worth citing in the GCK document. But calling it "effective and functional" without qualification would overstate it. A more defensible formulation: *Kenya has built the legal and institutional scaffolding for a functional carbon market, but execution — particularly tax certainty, approval turnaround, and methane-sector rules — is still catching up to the architecture.* That's a claim you can defend against scrutiny; "fully functional" is not.

> **GCK policy position:**
> *The GCK calls for the immediate enactment of Kenya's carbon credit regulatory framework, to include the areas of concern outlined above. A ring-fenced Conservation Economy Budget Line of no less than KES 20 billion annually, and the mandatory inclusion of community revenue-sharing provisions in all carbon credit agreements entered into on behalf of or within community-held land.*

10. Health, environment, and the pollution nexus.

Where the budget invests in health:

The health sector receives KES 177.2 billion, including KES 20.9 billion for the Kenya Medical Supplies Agency and KES 3.1 billion for the Kenya Medical Research Institute. The Government proposes to exempt dialyzers from VAT, improving access for patients requiring dialysis. These are meaningful health equity measures.

Where the budget addresses symptoms rather than causes:

The health budget funds treatment without addressing the environmental causes of the conditions it treats. Industrial effluent licensing, urban air quality monitoring, plastic pollution enforcement, and lead contamination in informal settlements receive no explicit budget allocation. The clean cooking crisis — in which over 80 percent of the population uses biomass for cooking, generating indoor air pollution responsible for hundreds of thousands of premature deaths annually — is addressed through temporary fuel price relief rather than a structural clean cooking transition programme.

Environmental health as a justice issue:

Industrial pollution and its public health burden fall hardest on informal settlements, rural communities, and people managing chronic illness or disability — the same populations least able to absorb other climate shocks. Pollution is not a background condition: it is a policy outcome that reflects choices about whose health is worth protecting and at what cost. Regulating and reducing industrial pollution protects both human health and the natural environment simultaneously; this budget separates those goals, funding treatment while leaving the polluting source unregulated.

El Niño intersection:

El Niño events trigger spikes in cholera, malaria, and respiratory illness through flood contamination and vector expansion. County health systems in flood-exposed areas require pre-positioned medical supplies, rapid response teams, and disease surveillance activation before peak season. Section 13 of this paper proposes these as core components of Kenya's El Niño Preparedness Programme.

GCK policy position:

The GCK calls for a National Pollution Control and Environmental Health Programme with a dedicated KES 8 billion allocation covering industrial effluent licensing enforcement, urban air quality monitoring with public dashboards, plastic pollution management, and county-level health system El Niño preparedness packages.

11. Climate finance, carbon markets, and the accountability imperative.

Where the budget creates green finance architecture:

This is the budget's single most forward-looking green element. The preparation of carbon credit regulations, the Kenya Green Investment Facility, sustainability-linked bonds with forestry targets, and the Sovereign Wealth Fund Bill together constitute a nascent green finance architecture. The Government's exploration of debt-for-food and debt-for-development swaps, and its evaluation of Samurai Bonds and Panda Bonds for portfolio diversification, signal sophistication in sovereign finance innovation.

Where the architecture lacks accountability:

The Sovereign Wealth Fund Bill must be scrutinised carefully: without explicit community revenue-sharing obligations and environmental governance conditions, it risks becoming a vehicle for centralised extraction of natural resource proceeds rather than a mechanism for intergenerational environmental investment.

Who actually receives the money:

Climate finance architecture only delivers justice if resources reach the people facing the crisis. Regional experience provides a warning: in Horn of Africa drought response between 2021 and 2024, a majority share of relief and development funds in documented cases was absorbed by the administrative layer — NGOs and intermediary institutions holding the technical capacity to access international climate finance — while farmers, pastoralists, and communities living the emergency remained disconnected from both funders and decisions made on their behalf. This is not a critique unique to Kenya; it is a structural feature of how international climate finance operates, and it will reproduce itself through every instrument this budget proposes — sustainability-linked bonds, carbon credit revenues, and the Sovereign Wealth Fund — unless explicit accountability mechanisms are designed in from the start.

Every shilling of green bond proceeds, carbon credit revenue, or Sovereign Wealth Fund disbursement tied to climate or natural-resource projects should carry public, auditable, community-level reporting on where it landed — not just where it was allocated.

GCK policy position:

The GCK demands that the pending aspects of the carbon credit regulatory framework as partially outlined in this document be enacted within this fiscal year, that every climate finance instrument — including green bonds, the SWF, and carbon credit revenues — carry mandatory community-level disbursement reporting requirements enforceable by the Kenya National Audit

Office, and that an independent Climate Finance Accountability Commissioner be established with powers of audit, investigation, and public reporting.

12. Youth, education, and intergenerational equity.

Where the budget invests in the next generation:

Education receives the largest sector allocation at KES 784.5 billion. The Government proposes KES
4.9 billion to convert 20,000 intern teachers into permanent positions from January 2027, with a further 24,000 newly recruited intern teachers to be absorbed on a permanent basis by July 2027. Investment in teacher permanence is investment in educational quality and student welfare.

The Government commits to advancing youth empowerment through targeted investments in skills development, entrepreneurship, digital opportunities, and access to affordable financing.

Where the budget fails the next generation:

Environmental education, green skills training, and climate literacy receive no dedicated allocation. The TVETs being constructed are not visibly oriented toward green construction, renewable energy installation, agroecology, or environmental conservation. This represents a lost opportunity. The digital superhighway and creative economy receive KES 8.6 billion — but there is no equivalent skills fund for the green economy sectors that will define the employment landscape of 2030–2050.

Intergenerational equity and the climate debt:

The principle of intergenerational equity — that today's fiscal choices should not foreclose the options of future Kenyans — runs through every climate justice analysis in this document. A budget that builds fossil fuel dependency into its fiscal logic, cuts the water development budget by 56 percent, delays carbon market regulations, and builds 400,000 housing units without green standards is creating structural liabilities that the next generation will pay. The education system is the last line of defence: what is taught in schools today determines what economy will exist in twenty years. A green skills agenda embedded in Kenya's education budget is not an ideological preference — it is a preparation for the economy that will actually exist.

The "Innovation with Integrity" principle of professional development applies acutely here: not only should existing teachers be converted to permanent positions, but those teachers need green curriculum training, digital infrastructure, and the professional security to innovate rather than to manage scarcity.

GCK policy position:

The GCK proposes a KES 5 billion Green Skills Fund embedded within the education allocation, targeting TVETs and county training centres for renewable energy, agroecology, eco-construction, and conservation management. Teacher permanence conversion must be completed on schedule. A national Climate Literacy Curriculum must be integrated into primary and secondary education from 2027.

Part II: Cross-cutting policy imperatives.

Three Structural Gaps the FY 2026/27 Budget Fails to Address.

13. El Niño preparedness as a central national policy priority.

The case for a dedicated programme:

Kenya's vulnerability to El Niño is not speculative — it is a documented, recurring, and quantifiable national risk. The 2023–24 El Niño event resulted in more than 210 deaths, the displacement of over 340,000 Kenyans, and infrastructure damage conservatively estimated at KES 80 billion. Earlier events — 1997–98, 2006, 2015–16 — followed similar patterns of coastal flooding, Rift Valley inundation, and simultaneous drought in arid and semi-arid regions. El Niño cycles recur every three to seven years, meaning Kenya can state with near-certainty that another event will occur before the end of this decade. The only variable is Kenya's level of preparation.

Despite this, the FY 2026/27 budget contains no dedicated El Niño preparedness programme, no funded contingency reserve for El Niño response, and no cross-sectoral coordination framework that would enable agriculture, health, infrastructure, and social protection systems to activate pre-positioned responses before — rather than after — an event unfolds. The cost of this absence is not hypothetical: post-disaster supplementary budgets consistently cost more than preparedness investments, while delivering less and reaching affected communities more slowly.

The GCK proposes the establishment of a National El Niño Preparedness and Response Programme (ENPRP) as a standing, cross-sectoral, and funded national programme — not a one-off project, but a permanent feature of Kenya's fiscal and governance architecture.

Programme objectives and components:

Component 1: Early warning and community alert infrastructure.

Kenya's meteorological forecasting capacity requires significant upgrades. The Kenya Meteorological Department should be resourced for real-time radar coverage, automatic weather station networks in all 47 counties, and direct community alert systems delivered through Kenya's 95-percent-plus mobile phone penetration. Early warning that reaches community level five to seven days before a major event can enable crop salvage, livestock destocking, school closure decisions, and emergency supply pre-positioning that dramatically reduce loss of life and economic damage.

Component 2: Infrastructure resilience in exposed counties.

Eighteen counties face the highest El Niño flood exposure — including Tana River, Garissa, Kilifi, Kisumu, Siaya, Homa Bay, Migori, Bungoma, Kakamega, and Mombasa. Critical transport, health facility, water, and sanitation infrastructure in these counties should be climate-proofed through raised culverts, strengthened bridges, permanent flood barriers in vulnerable urban areas, and health facilities relocated from flood plains. This is not emergency construction — it is planned capital investment that reduces the cost of each subsequent El Niño event.

Component 3: Agricultural preparedness and livestock banking.

El Niño brings floods to some regions and drought to others simultaneously. A national crop-switching and early-planting programme — linked to meteorological forecasts and delivered through agricultural extension networks — can protect smallholder livelihoods in flood-risk zones. In pastoralist areas, livestock banking and animal food bank programmes — proven models in neighbouring Ethiopia and in Kenyan pilot programmes — provide the destocking mechanism that prevents the catastrophic livestock mortality of 2022–23, in which Kenya lost over two million animals. The climate and economic costs of that mortality — estimated at seven to sixteen million tonnes of CO_2-equivalent in unmanaged greenhouse gas release — underscore that livestock protection is not only a livelihood issue but an environmental one.

Component 4: Health system El Niño readiness.

El Niño events produce predictable spikes in cholera, malaria — with vector expansion to previously unaffected elevations — and respiratory illness from flood contamination. County health systems in all eighteen at-risk counties should carry pre-positioned medical supply caches, trained rapid response teams, and activated disease surveillance systems before peak El Niño season. Health facility flood-proofing should be completed as part of Component 2 infrastructure investment. Kenya Medical Supplies Agency allocations should include a dedicated El Niño health preparedness reserve.

Component 5: Social protection surge mechanism.

The Inua Jamii social protection system should be upgraded with an automated El Niño trigger mechanism — expanding cash transfer coverage to newly exposed populations when ENPRP alert thresholds are reached, without requiring a separate legislative or administrative authorisation process. This surge mechanism transforms social protection from a reactive poverty programme into a proactive climate resilience instrument.

Funding architecture for the ENPRP:

The GCK proposes a five-source funding model for the ENPRP:

1. National El Niño Contingency Fund: KES 25–50 billion, seeded from budget reallocation, formalised in the Public Finance Management framework, and subject to independent audit. Initial seed capital to be sourced from efficiency savings in the KES 109.2 billion governance allocation and from reallocation of fossil fuel subsidy measures being phased out.
2. Tax Base Expansion Dividend: a defined percentage of additional revenue generated by the tax base broadening measures proposed in Section 14 of this paper, ring-fenced for the ENPRP contingency fund.
3. International Climate Finance: a designated El Niño Preparedness Window within the Kenya Green Investment Facility, structured to attract donor and multilateral funding from the Green Climate Fund, World Bank Climate Investment Funds, and African Development Fund.
4. Carbon Credit Revenues: a defined percentage — the GCK proposes 15 percent — of revenues generated through Kenya's carbon credit market, directed to community-level climate resilience programmes including ENPRP components. A collaborative approach that includes the EAC should be explored and encouraged here.
5. Debt-for-Climate Instruments: building on the Government's existing exploration of debt-for-development swaps, the GCK calls for dedicated El Niño preparedness tranches to be

negotiated with bilateral and multilateral creditors as a condition of debt restructuring discussions.

El Niño as a cross-sectoral governance obligation:

The ENPRP is not a single ministry's programme. It requires a cross-ministerial coordination structure — convened at the level of the National Treasury and the Office of the President — with binding planning obligations on the ministries responsible for Agriculture, Health, Infrastructure, Water, Social Protection, and Environment. Each ministry's annual budget submission should include an El Niño preparedness chapter that demonstrates integration with ENPRP protocols.

> The FY 2026/27 budget allocates zero dedicated resources to El Niño preparedness. Given the predictable recurrence of El Niño events — the next cycle is projected by the World Meteorological Organization to begin between 2027 and 2029 — this is not a planning oversight. It is a structural fiscal risk that Parliament should require the Treasury to address through a supplementary ENPRP allocation within this fiscal year.

14. Tax base reform and the path to fiscal equity.

The structural narrowness of Kenya's current tax base:

Kenya's fiscal architecture rests on an unsustainably narrow foundation. The Kenya Revenue Authority collected approximately KES 2.1 trillion in FY 2024/25 against a GDP of approximately KES
14.5 trillion — a tax-to-GDP ratio of roughly 14.5 percent. The sub-Saharan African average is approximately 20 percent; the OECD average exceeds 33 percent. This structural gap does not reflect the absence of economic activity — it reflects the absence of mechanisms to bring the bulk of that activity into the formal fiscal system.

Approximately 3.7 million formally registered individual taxpayers carry the operational weight of Kenya's public finances in a workforce estimated at 20 million and a population of over 55 million. The informal economy — employing approximately 83 percent of Kenya's workforce — contributes a disproportionately small fraction of tax revenues. This is not merely an equity problem, though it is that: it is also a macroeconomic structural risk. When formal sector growth slows — as it did in FY 2026, with the GDP growth forecast revised down to 5.0 percent — the entire fiscal structure is exposed.

Structural limitations of the existing tax base:

- **PAYE concentration**: income tax is overwhelmingly concentrated in formal employment. Kenya's PAYE system is efficiently administered, but its base is narrow by design — it cannot capture the majority of economic activity occurring outside the formal employment relationship.
- **Property tax under-utilisation**: urban property values have grown at an average of 7–12 percent annually in Nairobi and major secondary cities over the last decade. Yet property tax yields remain negligible relative to assessed values. The gap between what property tax could generate and what it actually generates represents one of the largest untapped fiscal resources in Kenya's economy.
- **VAT compliance shortfall**: the formal VAT net captures an estimated 40 percent of potentially VAT-able transactions. Compliance is constrained by the informal economy's

scale, by trader incentives to remain below VAT registration thresholds, and by administrative capacity.

- **Corporate tax rate and evasion incentives**: Kenya's statutory corporate tax rate of 30 percent is among the highest in the East African Community. High statutory rates combined with complex exemption regimes create incentives for profit-shifting, transfer-pricing abuse, and the structuring of businesses to qualify for sectoral exemptions rather than actual productive investment.
- **Digital economy gap**: e-commerce, app-based services, and platform economy revenues remain partially outside the formal tax net. Kenya's digital services tax exists but is not comprehensively enforced across all digital economy participants.
- **Agricultural income exclusion**: commercial farming — including large-scale horticultural, tea, coffee, and sugar production — generates substantial revenues but largely escapes income tax through sectoral exemptions and preferential treatment.
- **Absence of inheritance and wealth transfer taxation**: Kenya has no inheritance tax, estate duty, or capital transfer tax. This allows inter-generational wealth concentration to proceed without fiscal correction, reinforcing structural inequality while narrowing the tax base.

Pathways to a broader, fairer tax base:

Broadening the tax base is not synonymous with increasing tax burdens on existing formal taxpayers. The GCK's fiscal reform programme is explicitly designed to reduce the proportional burden on the narrow group currently carrying Kenya's fiscal weight, by bringing a much larger share of economic activity into a fair and efficiently administered tax system.

MSME formalisation through mobile money integration:

Kenya's mobile money infrastructure — with M-Pesa penetrating approximately 95 percent of adult Kenyans — creates an unprecedented and underutilised platform for tax compliance among informal businesses. A simplified MSME presumptive tax regime, with rates linked to mobile money transaction volumes rather than self-reported income, can bring millions of micro-enterprises into the tax system at very low compliance cost. The GCK estimates that formalising 20 percent of currently informal businesses through this mechanism could generate KES 100–150 billion annually in additional revenue without any increase in rates on existing formal taxpayers.

1. Progressive land value taxation:

A shift from the existing rates system — based on assessed site value — to a progressive land value tax that captures a larger share of annual market value appreciation would accomplish three objectives simultaneously: generate significant revenue (the GCK estimates KES 30–50 billion annually in Nairobi alone at current market values), discourage land speculation and under-utilisation, and create incentives for densification and productive development. "Innovation with Integrity" (Thomas Mariwa, June 2026) identifies infrastructure investment as a prerequisite for this reform: the case for higher land taxation is strongest where public investment has driven land value appreciation.

2. Closing corporate tax exemptions and preference regimes:

Kenya's effective corporate tax rate — after applying the numerous sectoral exemptions, investment certificates, EPZ incentives, and special economic zone regimes — is significantly lower than the statutory 30 percent for a substantial portion of corporate taxpayers. A systematic review and rationalisation of tax expenditures — costing less than 2 percent of GDP

— would level the playing field between companies with and without access to preferential treatment, while generating additional revenue for priority investments.

3. Digital services tax enforcement and expansion:

Building on Kenya's existing digital services tax framework, the GCK recommends a phased expansion of coverage to all platform economy participants operating in Kenya, combined with a bilateral information-sharing agreement with major digital platforms to verify revenues. The African Tax Administration Forum's model frameworks for digital economy taxation provide an immediately available regional architecture.

4. Selective import tariff reform:

Consistent with the "Innovation with Integrity" policy framework, the GCK endorses a recalibrated tariff structure that imposes higher duties on non-essential imports competing with domestic producers — including luxury consumer goods and commodities Kenya can produce at competitive quality — while reducing duties on productive inputs: agricultural machinery, renewable energy equipment, digital infrastructure hardware, and manufacturing components. This is not protectionism in the conventional sense; it is strategic industrial policy that creates the domestic tax base necessary to sustain the public investments this document calls for. Kenya can and should learn from the Ethiopian model that Thomas Mariwa identifies: infrastructure investment, domestic market protection, and aligned government incentives produced a manufacturing and industrial expansion that generated its own expanding fiscal base.

5. Carbon dividend — pricing domestic emissions:

A modest domestic carbon levy — applied to fossil fuel combustion above industrial thresholds, with revenues returned to low-income households as a per-capita dividend — would accomplish three simultaneous objectives: create a price signal for clean energy transition, generate revenue for climate resilience programming, and redistribute fiscal resources progressively. The net fiscal burden on low-income households would be zero or negative; the behavioural incentive toward cleaner energy would be permanent.

Fiscal dividend and the investment case:

Conservative aggregate estimates suggest that a package of MSME formalisation, progressive land value taxation, corporate exemption rationalisation, digital economy levy enforcement, and selective tariff reform could generate KES 150–250 billion annually in additional tax revenue over a five-year implementation period — without increasing rates on existing formal sector taxpayers. This is not a speculative projection: each component has a documented evidence base in comparable economies.

The investment case is compounding: additional revenue from a broader tax base funds the ENPRP contingency reserve, the Green Skills Fund, the Clean Cooking Transition Programme, the Urban Climate Resilience Fund, and the Living Wage Standard for public servants. These investments in turn generate productive economic activity that further broadens the tax base. Fiscal equity and climate resilience are not competing objectives in this framework — they are mutually reinforcing.

> **Key finding: Tax equity is climate justice.**
>
> A broader, fairer tax base is not only a macroeconomic reform — it is a climate justice reform. It enables the public investment in resilience, skills, and clean energy transition that protects Kenya's most vulnerable communities. It reduces the structural fiscal dependence that forces difficult trade-offs between climate spending and debt service. And it places the financing of Kenya's public goods on a foundation broad enough to sustain them across economic cycles.

15. Workforce reform, remuneration, and innovation with integrity.

The policy framework: "Innovation with integrity".

In June 2025, Thomas Mariwa — National Chairman of the Green Congress Party of Kenya — published "Innovation with Integrity: Rewriting Kenya's Economic Story," a policy essay that articulates four foundational reforms for Kenya's economic transformation: strategic tariff recalibration to protect domestic industries, public infrastructure investment as an economic multiplier, a living wage for all public servants, and technology as a democratic accountability tool. These four pillars are directly actionable within the FY 2026/27 budget framework and are integrated throughout this paper. This section consolidates the workforce and remuneration dimensions.

The GCK's starting premise is stated plainly in "Innovation with Integrity": "Nurses, Doctors, policemen, Teachers and other frontline professionals travel a great distance to their workplaces, a situation brought about by a mismatch between their pay and what could be considered a living wage in most of their areas of deployment. This means that in times of emergency and other times, they cannot show on time. Property in most urban areas is priced out of their reach, another challenge." This is not a peripheral anecdote — it is a structural description of how low public sector remuneration translates into service delivery failure, emergency response failure, and ultimately into preventable deaths, corrupt practices and apathy on the part of most employees. These workers are not only taxpayer, but also consumers and form a critical part of the social fabric. There cannot be a serious discussion about progress without addressing their plight.

1. Living wage standard for public servants:

The GCK endorses a Living Wage Standard as a binding public sector compensation principle, indexed to a poverty basket covering food, housing, transport, healthcare, and basic education for a family of four in the relevant county of residence. The living wage is not the minimum wage — it is the wage at which a worker can meet their family's basic needs without resorting to supplementary employment, informal fee collection, corruption or service abandonment.

Implementation should be phased, prioritising:

- First phase (FY 2027/28): the lowest-earning quartile of public servants in health, education, and frontline social services — the workers whose absence or underperformance carries the highest immediate public cost.
- Second phase (FY 2028/29): extension to police and security services, county-level administrative staff, and public infrastructure workers.
- Third phase (FY 2029/30): universalisation across all public employment categories.

Funding source: KES 50–80 billion available through efficiency savings in the procurement system (targeting 20 percent reduction in the identified leakage within the KES 109.2 billion governance allocation) and from tax base expansion revenues generated by the reforms in Section 14. A living wage is not a budget cost — it is a fiscal investment that reduces brain drain, absenteeism, supplementary income-seeking, and the long-term cost of staff turnover and retraining.

2. Job security, worker rights, and contract standards:

Kenya's employment landscape — including in the government-funded green economy and housing programmes — is characterised by casualisation, short-term contracts, and exclusion from social security systems. The GCK proposes:

- All contracts for workers in government-funded green economy programmes to include minimum 24-month contract periods, mandatory NSSF and NHIF enrolment, occupational health and safety compliance as a procurement condition, and defined progression pathways into permanent positions.
- Teacher internship conversion — 24,000 teachers to be absorbed by July 2027 — to be completed on schedule, with no further extension or casualisation of the teaching profession.
- Platform economy and gig economy workers — including those in digital commerce, ride-hailing, and delivery services — to be enrolled in social protection systems through a contributory mechanism linked to platform transaction records. This can be made mandatory and even attached to licensing etc. and would apply to the *'boda boda"* as well. This offers a unique angle through which we can strengthen our healthcare systems.

3. Professional development and green skills:

"Innovation with Integrity" identifies the development of human capital as a prerequisite for the kind of economic transformation Kenya needs. Applied to the green economy, this means:

- A KES 5 billion Green Skills Fund embedded within the education allocation, targeting county TVETs and training centres for renewable energy installation, agroecological farming, eco-construction, conservation management, and circular economy trades.
- Professional certification pathways for workers transitioning from informal to formal green economy roles — construction workers moving into eco-construction, subsistence farmers adopting agroecological practices, community members entering conservancy ranger programmes.
- Mandatory inclusion of a green skills module in all TVET curricula as a condition of government facility funding.

4. Tariff reform for domestic industry protection:

Consistent with "Innovation with Integrity," the GCK recommends a systematic recalibration of Kenya's tariff structure to protect strategic domestic industries from destructive import competition while reducing costs for productive inputs. The key principle is stated succinctly in Mariwa's essay: "We have entire industries being destroyed in favor of cheap imports which are in turn vestiges of the political patronage system. This too must stop." Specific applications include:

- Higher import duties on non-essential consumer goods competing with Kenyan manufacturers, applied in compliance with WTO commitments and EAC common external tariff obligations.
- Zero or significantly reduced duties on agricultural equipment, irrigation technology, renewable energy components, cold storage infrastructure, and digital technology for productive use.
- Active enforcement of anti-dumping provisions for agricultural imports — particularly maize, sugar, wheat, milk and vegetables — that destroy the domestic food production chains that anchor both food security and the rural tax base.

5. Technology, transparency, and democratic accountability:

"Innovation with Integrity" proposes that digital tools — when deployed wisely and subject to independent oversight — can enhance the transparency, accountability, and citizen engagement that defines a functional democracy. In the context of Kenya's fiscal governance, this means:

- A real-time public procurement portal with community-level spending tracking for all climate finance, conservation programmes, and government-funded employment schemes — accessible to citizens through mobile phone as well as desktop interfaces.
- Blockchain-based or equivalent tamper-resistant record-keeping for all land transactions, carbon credit registration, and natural resource concession agreements.
- Online citizen engagement platforms for public consultations on budget allocations, integrated with the county development planning process.
- An Anti-Corruption Technology Framework — applying data analytics to procurement records, tax filings, and land registrations to identify patterns of fraud, conflict of interest, and illicit financial flows.

> **Innovation with integrity: The central argument**
>
> True economic transformation in Kenya requires that the human beings driving it — teachers, nurses, farmers, construction workers, rangers, and all public servants — are compensated at a level commensurate with their contribution and sufficient for dignified life. When they are not, the state's most critical services underperform, its most capable workers leave, and the economic growth it claims to be building rests on a human capital base that is being steadily eroded. The FY 2026/27 budget does not apply this principle. The GCK insists that it must.

Part III: Assessment and recommendations.

Budget Scorecard, Policy Recommendations, and Conclusion.

Summary budget scorecard: Climate justice assessment.

The following scorecard evaluates the FY 2026/27 Budget against the GCK's climate justice framework across fifteen thematic areas — the twelve sectoral domains of the original analysis and three cross-cutting structural imperatives identified in Part II of this paper. Ratings apply four categories: Positive (budget advances the agenda), Partial (budget partially addresses but leaves significant gaps), Mixed (advances on some dimensions, regresses on others), and Critique (budget fails to address or actively contradicts the relevant principle).

Thematic Area	Assessment	Rating
Climate Resilience & Loss/Damage	No loss-and-damage framework; El Niño preparedness absent; allocations insufficient	**Critique**
Green Economy & Jobs	Housing employment acknowledged; no green jobs programme; remuneration gap	**Partial — Critique**
Food & Water Security	Irrigation progress; fertiliser dependency; water budget cut by 56%; drought finance gap	**Mixed**

Land Rights & Forest Governance	Forestation funded; community land rights absent; tenure insecurity unaddressed	**Critique**
Energy Transition & Access	World-class renewable base; fossil fuel logic maintained; clean cooking absent	**Mixed — Critique**
Urban Environment	Infrastructure investment; no green standards; flood exposure built into design	**Critique**
Environmental Justice & Corruption	Governance allocation; no environmental crime enforcement; no climate-finance audit trail	**Partial**
Blue Economy	Named but unresourced; coastal adaptation absent	**Critique**
Biodiversity & Conservation Economy	No ring-fenced budget; carbon regulation delayed; carbon-sink value unmonetized	**Critique**
Health & Pollution Nexus	Health sector funded; pollution causes and clean cooking transition unaddressed	**Partial**
Climate Finance & Carbon Markets	Green Investment Facility and SWF proposed; accountability mechanisms absent	**Positive — Conditions**
Youth & Intergenerational Equity	Largest education budget; no green skills agenda; no generational equity metric	**Partial**
Tax Base Reform (GCK Priority)	No broadening measures; informal economy untaxed; property tax under-utilised	**Critique**
El Niño Preparedness (GCK Priority)	No dedicated programme; no contingency fund; no cross-sector integration	**Critique**
Workforce & Remuneration (GCK Priority)	Teacher conversion positive; no living wage standard; worker rights gap remains	**Partial — Critique**

Cross-cutting policy recommendations

The following recommendations are addressed to the Government of Kenya, the National Assembly and Senate, county governments, international development partners, and the global Green political community. They are sequenced by institutional addressee:

To the national treasury and planning:

6. Reclassify climate change as a sovereign fiscal and security priority. Increase the Environmental Protection, Water, and Natural Resources allocation to a minimum of 15 percent of the national budget over three years, drawing from a combination of tax base expansion revenues and reallocation from lower-priority expenditure.
7. Establish the National El Niño Preparedness and Response Programme (ENPRP) with a dedicated contingency fund of KES 25–50 billion, formalised in the Public Finance

Management framework and subject to annual independent audit.

8. Initiate a comprehensive tax base broadening programme, covering MSME mobile-money formalisation, progressive land value taxation, corporate exemption rationalisation, digital services tax enforcement, and strategic tariff reform, targeting KES 150–250 billion in additional annual revenue over five years.
9. Embedded a Living Wage Standard in public sector compensation frameworks, beginning with health, education, and frontline social service workers, funded through procurement efficiency savings and tax base expansion revenues.

To the ministry of environment and climate change:

10. Fast-track the conclusion of the enactment of Kenya's carbon credit regulatory framework within the current fiscal year, with mandatory community revenue-sharing provisions in all agreements involving community-held land.
11. Establish a Climate Finance Accountability Commissioner with independent audit, investigation, and public reporting powers over all green bond proceeds, carbon credit revenues, and Sovereign Wealth Fund disbursements tied to climate or natural resource projects. This office can also be accommodated within existing structures such as the auditor general's office among others or as a standalone office.
12. Introduce a National Clean Cooking Transition Programme with a dedicated KES 20 billion allocation over three fiscal years.

To the Ministries of agriculture and water:

13. Reverse the 56 percent decline in the water development budget, restoring allocation to at least KES 50 billion by FY 2027/28 and prioritising community-controlled irrigation systems alongside large-scale infrastructure.
14. Initiate a five-year transition from synthetic fertiliser subsidies to a Soil Health and Agroecological Transition Programme, with crop insurance and livestock banking mechanisms linked to ENPRP meteorological alert systems.

To parliament:

15. Enact the Community Land Act operationalisation budget, the Sovereign Wealth Fund Bill (with mandatory community revenue-sharing provisions and environmental governance conditions), and carbon credit regulations as legislative priorities of the current session.
16. Require the National Treasury to present an El Niño Preparedness Supplementary Allocation within this fiscal year.
17. Establish a Parliamentary Select Committee on Climate Finance Accountability to oversee disbursement of all climate-related funds.

To county governments:

18. Develop county-level El Niño Preparedness Plans integrated with the national ENPRP framework, including local early-warning infrastructure, agricultural preparedness measures, and health facility readiness protocols. Implement progressive land value taxation within county rating systems, using current market values and directing revenues to county-level urban climate resilience programmes.

To international development partners and multilateral institutions:

19. Designate El Niño preparedness as an eligible expenditure category within all climate finance windows operating in Kenya, and fund a dedicated El Niño Preparedness Window within the Kenya Green Investment Facility.
20. Require community-level disbursement reporting as a condition of all climate finance disbursements, and support Kenya in building the administrative infrastructure to comply with these requirements at community level.
21. Support the negotiation of debt-for-climate swap agreements that fund ENPRP components as part of bilateral debt restructuring discussions.

To sister green parties and the global greens network:

22. Recognise Kenya and the East African region as frontline climate justice territories where the principles of the Global Greens Charter — ecological wisdom, social justice, participatory democracy — are tested in the most immediate and material terms.
23. Advocate in your respective legislatures and international forums for the Loss and Damage Mechanism to provide direct, auditable, community-routed funding to Kenya and other climate-creditor nations in the Global South.
24. Share this analysis through your party's policy networks and parliamentary delegations as a contribution to global discourse on how green fiscal policy translates into national budget advocacy.

Conclusion: The gap between the budget Kenya describes and the budget Kenya needs.

Kenya's FY 2026/27 budget is the fiscal statement of a country that knows it is at a crossroads — that knows climate change is real, that knows its renewable energy base is an asset, that knows its informal economy is a missed fiscal opportunity, that knows its frontline workers are underpaid, and that knows a El Niño is coming. It knows all of this and does not yet act on it with the conviction that the moment demands.

The Green Congress Party of Kenya does not oppose this budget in its entirety. Kenya's near-80 percent renewable electricity generation is a genuine achievement. The Green Investment Facility has structural promise. The teacher permanence conversion is the right policy. The housing programme, imperfect as it is, is building infrastructure that Kenya needs. These are the foundations of a convergence between government intent and green principles that the GCK intends to build on, not tear down.

But the foundations are undermined by the same structural failures that have characterised Kenya's fiscal approach to climate and equity for decades: an allocation to environmental protection that is a fraction of the security budget, a tax system that places the burden of a fifty-million-citizen public sector on 3.7 million formal taxpayers, a clean cooking crisis that is treated as a price management problem rather than a transition imperative, and a public service workforce that cannot reach work on time because it cannot afford to live close enough to work. These failures are not rhetorical. They are measurable, they are costing lives, and they are preventable.

The three structural reforms proposed in Part II of this paper — a funded El Niño preparedness programme, a broader and fairer tax base, and a living wage for public servants grounded in the "Innovation with Integrity" framework — are not aspirational additions to the budget. They are the minimum conditions for a fiscal architecture that could actually deliver on Kenya's stated commitments to climate resilience, inclusive growth, and intergenerational equity. They interact with and reinforce every sectoral analysis in this document. And they are fundable — through the very tax base expansion revenues that broadening the fiscal base would generate.

The gap between the Kenya this budget describes and the Kenya this budget is building — and between the climate finance this budget proposes and the communities that finance is supposed to reach — is the analytical and political space that this paper occupies. It is also the policy space that the Green Congress Party of Kenya intends to fill, in Parliament, in civil society, in international climate forums, and in partnership with the global family of Green parties to which this paper is now addressed.

Kenya is a net climate creditor. It contributes less than 0.1 percent of global cumulative emissions while absorbing some of the world's most severe climate consequences. It holds carbon-sink forests and rangelands of continental significance. It generates 80 percent of its electricity from clean sources. It deserves a fiscal framework that matches that status — and a global community of partners that recognises it.

About the green congress party of Kenya:

The Green Congress Party of Kenya (GCK) is Kenya's leading green political party, committed to ecological wisdom, social justice, participatory democracy, nonviolence, sustainability, and respect for diversity as articulated in the Global Greens Charter. The GCK is affiliated with the Global Greens and maintains active partnerships with sister green parties across Africa, Europe, Asia-Pacific, the Americas, and the Middle East.

The GCK's policy programme is organised around twelve thematic pillars — climate resilience, green economy, food and water security, land and forests, energy transition, urban environment, environmental justice, the blue economy, biodiversity, health and pollution, climate finance, and youth and education — and three cross-cutting principles: tax equity, climate preparedness, and innovation with integrity in public service.

This paper was prepared under the joint authorship of Thomas Mariwa, National Chairman, with analytical support from the GCK Policy Secretariat. Correspondence and partnership inquiries may be directed to the GCK Secretariat.

BOOK REVIEW

Breaking the culture of silence

By Shiraz Durrani

The idea of writing this book was born when a group of progressive librarians at the University of Nairobi were searching for relevance in the information field in Kenya by organising a workshop at the Kabete Campus of the University of Nairobi in 1979. I decided to look at the history of mass communication and publishing to see what lessons could be learnt from those experiences. I presented a short version of my paper at the workshop. The fuller version was too big for inclusion in the proceedings of the Workshop which carried another paper I wrote.[1]

But the subject matter of the paper on publishing became an obsession with me the more I read. The fascinating struggles in the information field that unfolded with each new angle explored began to reflect the totality of anti-imperialist struggles in Kenya. I needed to devote more time to the research into publishing. I planned to take sabbatical leave in 1985 to research at the Kenya Archives as well as the Colonial Office files. But the research seemed to take on a life of its own and in a curious turn of events became "political" and led to my exile to Britain in 1984.

In the early 1980s, the underground opposition to the KANU-Moi regime penetrated every field of activity. It was led by the December Twelve Movement which published its own underground newspaper - *Pambana* - and which circulated widely throughout the country. The students at the University of Nairobi joined hands with the underground resistance. They lost no opportunity to attack the regime in every possible way. One of the ways was to publish progressive material on the history of resistance and the progressive anti-imperialist stand of the Kenyan people of all nationalities. A new generation was growing up, they argued, without the awareness of the real history of struggle that created the current society. They approached me in early 1994 for help in some aspects of their publication, *The University Platform*. They also wanted me to write articles on the history of Kenya from a working class point of view. I provided three articles, two from my research on the history of publishing: one on Pio Gama Pinto and the other on Kimaathi.[2] The third was an article I had written as part of the publicity of the progressive play *Kinjikitile – Maji Maji* which was directed by Naila Durrani and staged to full houses at the Education Theatre by the Takhto Arts of Nairobi in conjunction with the University Library's Sehemu ya Utungaji ("creative wing") which I had set up with a group of progressive library workers.

All three articles proved popular and I decided to give them wider circulation. 1984 was in many ways a crucial year:

[1]"Agri-Vet information: production, organisation, storage and retrieval". University of Nairobi Library Magazine (Nairobi). 2 (23-37) 1979.
[2]This is the spelling used throughout the book.

following the 1982 coup, the KANU regime savagely attacked the forces of democracy. The subsequent killing, arrests and exile of thousands of people, whose only "crime" was opposition to the Moi dictatorship, meant that 1984 saw the nation recovering from the ravages of much government-led savagery. The publication of the articles in the national press, I decided, would give a message to those active in the struggle that, in spite of the jailing and exiling of many activists, progressive forces were still active in Kenya. It was necessary for the dispersed groups to come together once again and continue their struggle. The underground opposition forces were regrouping and finding their feet once again and different groups were using different methods to re-establish connections with each other.

It was in this national context that my article on Pio Gama Pinto was published in The Standard of September 17-18th, 1984. The following week, *The Standard* was scheduled to publish a three-part follow-up article by me on Kimaathi, to be followed in future by a series of articles on Makhan Singh. But it was at the publication of the first set of articles on Pinto that the regime struck and unleashed a series of events that forced me to seek political asylum in Britain. However, in the brief space of time between the publication of the articles and the Special Branch starting to take "special interest" in me, a large number of activists, including many from Mau Mau days, started sending messages of support. Their main message was that they wished to continue and consolidate the process of recording the true history of Kenya and to apply the lessons of history to current struggle.

The questions that the Special Branch fired at me during interviews at the Nyayo House give an indication of how hurt the regime was at my research into the history of publishing and the anti-imperialist struggle in Kenya: Why are you writing about Pinto and Kimaathi, and not about Kenyatta? Even historians are not allowed to do research into Mau Mau. Why are you, a mere librarian, doing this research? Do you not know that people at the highest level in the Government are offended by your article on Pinto? Are you a communist? Why do you write about workers and peasants? What do you understand about workers - even Moi is a worker, why are you not writing about him? Do you think that you will escape the wrath of the Government machinery just because you are "an Indian"? And on and on.

It is a matter of utmost satisfaction to me that in the years that I have been in exile in Britain, I have continued work on the struggles in the information field in the context of the national struggle for liberation. This has included a number of articles published in various journals on the politics of information. Among other publications is *Kimaathi, Mau Mau's First Prime Minister of Kenya*.[4]

It also gives me personal satisfaction that the very reason for my exile from Kenya has enabled me to complete the documentation of an important aspect of Kenya's history - something that the KANU-Moi regime found so unpalatable. It is also a matter of pride to me that I completed the project while still remaining a "mere librarian". The work of the underground movement contributed in no small measure to the events that led to the overthrow of KANU-Moi in December 2002. The new social climate in early 2003 has enabled a new debate about the whole colonial and post colonial history of anti-

[3]Durrani, S. (1984 a and b).
[4]Durrani, S (1986).

imperialism not only in Kenya, but in Britain as well. This book, I hope, will throw light on some aspects of the history which had been suppressed by successive KANU regimes.

A note on terminology

Progressive people, policies etc

The Cambridge Dictionaries online define the term "progressive" thus:

- Thinking or behaving in a new or modern way;
- Progressive ideas or systems encourage change in society or in the way things are done: "She worked for women's rights, labor reforms, and other progressive causes".

The term "progressive" is used in this book to indicate those who favour change and development from the "status quo" that represents colonialism and imperialism in Kenya. It refers to those who actively oppose colonialism and imperialism as well as the negative aspects of capitalism e.g. inequality in wealth and property distribution, landlessness for the majority, availability of education, housing, jobs to some classes only, poor wages, unsuitable working conditions, opposition to unionisation, degradation of work/skills in order to achieve more for less (piece work etc), discouragement of collectivism, encouragement of dependence on employer rather than self reliance, etc.

Colonialism sought to "divide and rule" Kenyan people on the basis of their race and colour and discouraged people from looking at class as the real divisive social force.

Those who sought to defeat colonialism and imperialism are referred to in this book as "progressive" and are seen in opposition to those who favoured the continuation of colonialism and neo-colonialism and its culture, practices and values which favour a minority at the expense of the majority.

As used in this book, the concept "progressive" overcomes the artificial social barriers created by imperialism. It sees people on the basis of whether they are for, or against, social change. It is used to indicate those who wanted to unite people of all races and colour on the basis of their commitment to principles of social and economic justice and human rights.

South Asian people / communities

People who originated from South Asia have been variously described in Kenya over the years as Indians, Asian Africans, and Asians etc. The term "South Asian" is used in this book to indicate those who came to Kenya from India, Pakistan, Bangladesh, or Sri Lanka. No judgement is passed on their nationality or what passports they hold.

Spellings

The spellings of proper names used consistently in the text are those preferred by the author. However, these may vary from the usage in some sources quoted. When quoting material which uses this different form, the original spellings are retained. For example, the preferred spelling of "Kimaathi" is used in the text throughout, but "Kimathi" is retained if source material uses this form. The same applies to names like "Ahmed" which have a number of variations.

Shiraz Durrani is a British-Kenyan librarian, publisher and activist known for his pioneering work on the politics of information and progressive librarianship in Kenya and Britain.

[5] http://dictionary.cambridge.org/define.asp?dict=L&key=HW*4515.

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