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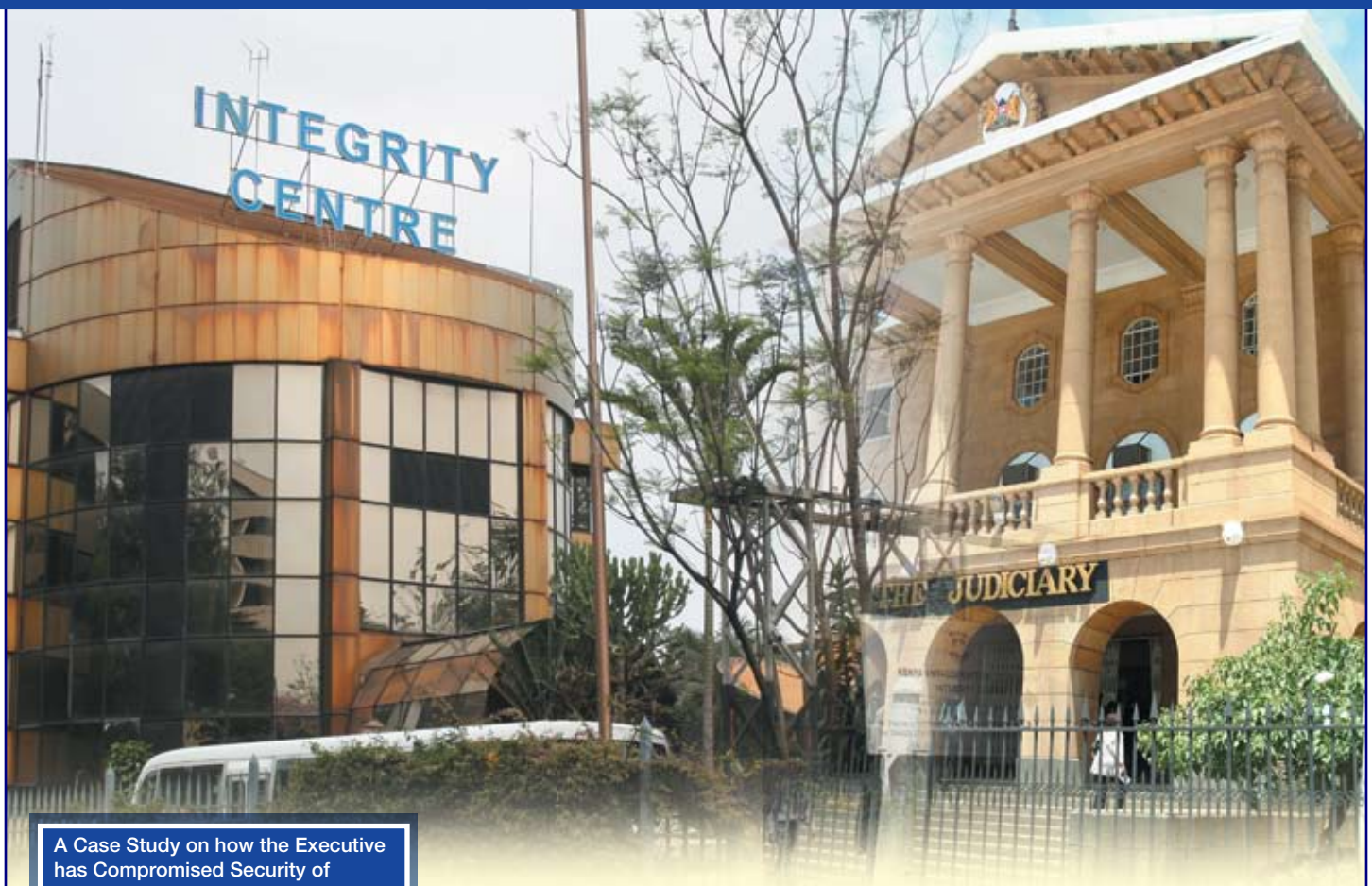
ADILI 110 MAY, 2009



Quote of the Month

"At the heart of the problems facing Kenyans is a leadership crisis that is clear to all except, seemingly, the political leaders,"

The National Council of Churches of Kenya (NCCK).

SECURE FROM PUBLIC SCRUTINY? A CRITICAL ANALYSIS OF SECURITY OF TENURE IN KENYA

By Henry Omusundi Maina

Introduction

Security of tenure for selective public servants has long been espoused as an essential tool in civil service reform; a necessary tool to enhance the effectiveness and efficiency of the civil servant and or the institution. Experts argue that in the principle of separation of powers within branches of any government, security of tenure is required to ensure the rule of law is adhered to, constitutionalism and good governance maintained. The common understanding is that security of tenure for certain public servants shields them from the complications of everyday politics.

It is prudent however to note that, these arguments only hold true in so far as the

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specific public servants are hired on merit and that they will be willing and able to serve according to the highest ethical standards expected by their respective positions. Four questions arise from the above statement;

1. What is security of tenure?
2. Who among the numerous public servants has security of tenure?
3. How effective are the provisions of security of tenure for Judges and the Attorney General in Kenya?
4. Has the Judiciary lived up to its billing in times when security of tenure has not been breached by safeguarding fundamental liberties and rights in Kenya?

In Kenya, the Judges of the High Court and Court of Appeal, the Attorney General, and the Director and Assistant Directors of the Kenya Anti-Corruption Commission (KACC) (amongst others) all enjoy security of tenure. The latter as provided for in the Anti-corruption and Economic Crimes Regulations of 2003, first schedule, section 3 (1) where they enjoy renewable terms of five years and four years respectively. Furthermore their removal from office requires a tribunal appointed by the President on the advice of the Chief Justice and or the Advisory Board.

Commissioners of the now defunct Electoral Commission of Kenya (ECK) also enjoyed security of tenure as was provided for under the repealed section 41 of the Constitution of Kenya. But what does this "security of tenure" really mean?

Security of tenure denotes two things. First, it means that once appointed Judges for example, shall have a guaranteed term of office until they attain the mandatory retirement age set by law. For the Attorney General (AG) and even the Controller and Auditor-General, according to the constitutional provisions of Chapter 8 section 109 and 110 respectively, it means once appointed, they will serve for the full term of that government. The result of such a definition of security of tenure is that no Judge or AG will be removed from office except on (proven) grounds of incapacity or misbehaviour rendering them unfit to continue in office.

Secondly and in a wider sense, security of tenure gives the right to adequate remuneration, pension, and conditions of service secured by law to the extent that they cannot be changed to the individual's detriment. It also refers to independence of the judiciary from political influence, whether exerted by political organs of government or by the public or brought in by the judges themselves through involvement in politics. Other additional components of judicial security of tenure are their physical protection and immunity from suits and harassment for acts and omissions necessitated by virtue of their holding public office.

In Kenya, while the Court of Appeal Judges and High Court Judges do not enjoy life tenure, their removal from office as provided for in Chapter 4 of the Constitution of Kenya section 62 is extremely complex and elongated. It is nearly an impeachment process whose chances of success highly depend on agreement between the Chief Justice and the President when setting up the Constitutional tribunal. One may say that this lengthy process, offers a lifetime security. This is even further buttressed given that their retirement ages were set at 74 years while the ordinary Kenyan is expected to retire at 60 years.

But such provisions are not just found in Kenya as they are a requirement of Article 12 of the United Nations Basic Principle on the Independence of the Judiciary. The article demands that independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or laws of the country.

Is Security of Tenure for Judges and for the Attorney General a Necessary Provision?

The "independence" of public servants with security of tenure in Kenya is taken for granted by both its critics and its defenders. This is because Judges and the Attorney General are often insulated from public scrutiny and comments that result in their dismissal. But is security of tenure necessarily a good thing given the political, economic and social context that is Kenya? Put differently, is security of tenure for senior judicial officers and the Attorney General a facilitator or barrier to the anti-corruption crusade?

Proponents of judicial security of tenure have argued that there is no liberty, freedom and rights if judicial power is not separated from Legislative and Executive power. While most commentators would agree that the Attorney General and Judges are effectively insulated from daily politics given the constitutional provisions that tend to reduce the ability of other public servants to influence their decisions, their verdict on how useful such provisions have been and are to the fight against corruption is varied. Some argue it has been useful and others see it as a barrier to the anti-corruption crusade given that they are not immune from corruption themselves.

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The Bottlenecks of Security of Tenure to Anti-Corruption Efforts

An assessment of how security of tenure is guaranteed by constitutional provisions has been a challenge to the anti-corruption process in Kenya and begs one to look at Chief Justice Bernard Chunga's tenure as the head of the judiciary.

An analysis of Chunga's tenure as the head of the Judiciary reveals no clear effort to rid the branch charged with guaranteeing fundamental freedoms and rights in Kenya of lack of rectitude and rampant corruption. This reinforces the fact that Chunga's appointment as the Chief Justice may have been solely to safeguard the interests of the appointing authority, the President and his supporters in the Executive. Once appointed, it was clear that regardless of what other actors thought or believed in removing him, it could only happen with the permission of the President who would subsequently need to appoint a tribunal to remove the Chief Justice. As a Chief Justice, he was bound to make decisions often in support rather than in contradiction to his appointing authority.

Given the challenges of removing a judge who is deemed to have committed crimes or conducted him or herself in a manner not befitting to discharge the functions of his/her office, the executive commenced a suit against Justice Oguk concurrently with a public campaign to have a radical surgery of the judiciary. The Executive hands were tied as the removal of the judge through a tribunal would have elicited negative reactions from other judges expected to be part of the tribunal. That Justice Oguk resigned before the corruption charges against him were finalised saved face but robbed the country of an opportunity for the judiciary to directly take a role in fighting corruption within its ranks. Therefore existence of security of tenure can be said to be a mechanism to shield judges, AG, Controller and Auditor General and even the Director and Assistant Directors of KACC from horizontal accountability mechanisms. Its suspension too has not been positive for the anti-corruption crusade as it allowed appointment of largely subservient judges.

Apart from the Justice Chunga and Justice Oguk situations, it is important to cast a wide net around the judiciary and gauge what role it may have played to stifle the anti-corruption processes. First it is evident that the judiciary has not been consistent in its decisions on corruption. This is exhibited in two cases: In the *Stephen M. Gachiengo and Albert Kahuria v Republic*, the judiciary disbanded Kenya Anti-corruption Authority claiming that it was established in contravention of the Constitution. This decision may be said to have been in line with the Executive thinking that they needed not to fight corruption were it not for donor conditionality.

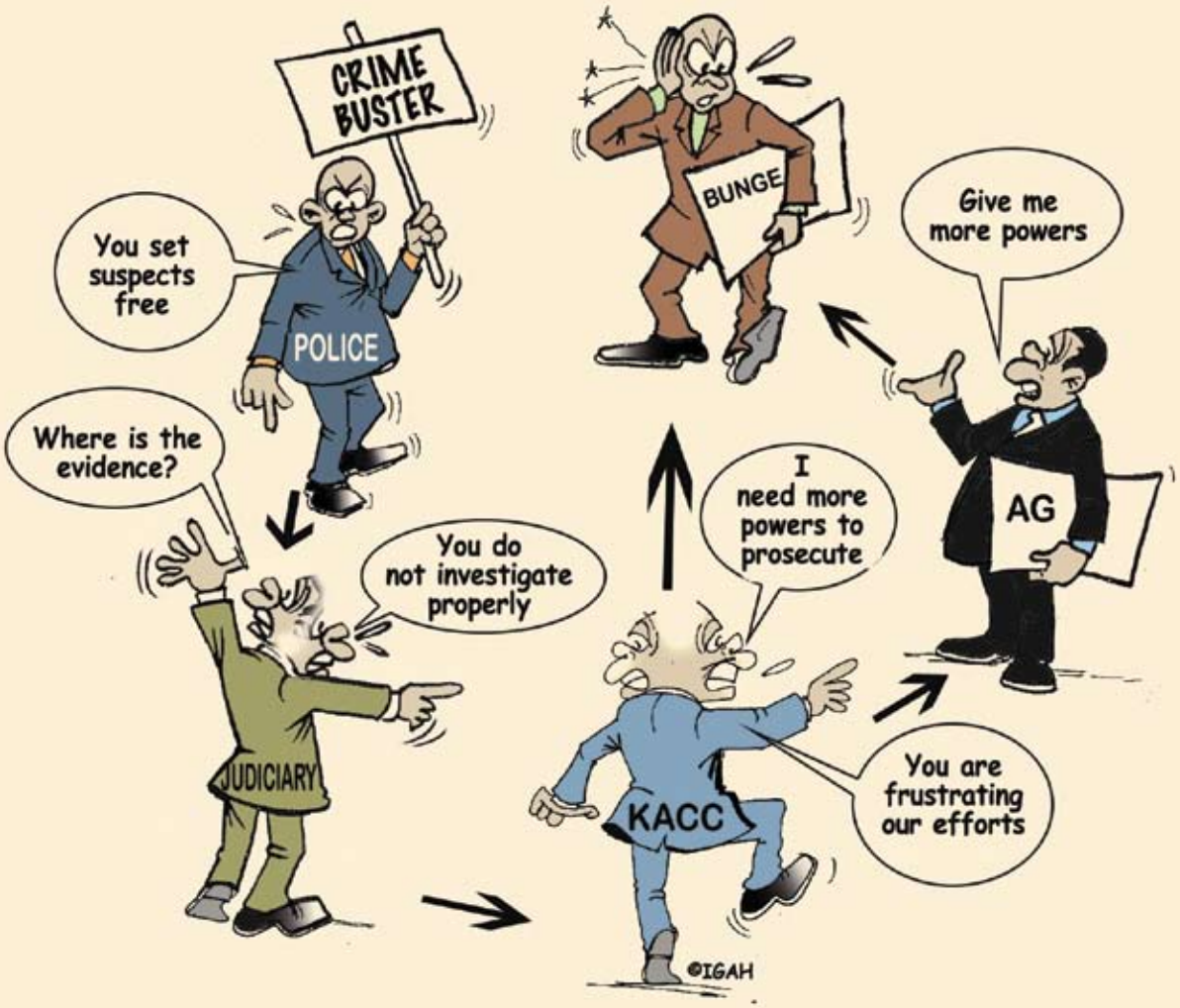
.....Continued on page 5

A CASE STUDY ON HOW THE EXECUTIVE HAS COMPROMISED SECURITY OF TENURE FOR THE JUDGES.

In 1969, Justice G. Farrel and Justice Dalton who was the acting Chief Justice, reduced a twelve month sentence imposed on the Vice-President of the Kenya's Peoples Union, Bildad Kaggia, to six months. On the day of the ruling, President Kenyatta appointed Kitili Mwendwa as the Chief Justice and a few days later Farrel retired from the bench. In this incident, security of tenure was suspended to allow injustices to occur by having Kaggia's sentence not to be reviewed and also appointing a protégé to safeguard the President's interests.

In 1986, Justice William Mbaya and the late Justice S.K Sachdeva were removed from the High Court without a tribunal. A year later, Justice Derek Schofield resigned in protest after the Executive interfered in a proceeding after Mbaraka Karanja was allegedly shot and buried clandestinely. In 1988, two onerous things happened in Kenya with regard to security of tenure of judges, Judge Patrick O'Connor was sacked after he refused to be transferred from Nairobi to Meru , a dismissal that was held as legal by the then Head of Civil Service, Mr Joseph arap Letting.

In August 1988, the security of tenure of Judges was removed after a hastily passed Constitutional Amendment Bill. While this was a dark day for proponents of independence of judiciary, the then AG, Justice Mathew Guy Muli, remarked that judges' security of tenure was inconsistent with powers of the President to hire and fire. The then Vice president Josephat Karanja hastened to add that constitutional security of tenure provisions were 'anachronistic and colonial'. The result was not firing some of the judges but hiring perhaps of more subservient judges and then restoring the security of tenure. In the previous regimes, the tempering with security of tenure was to allow appointment of loyalist judges and do away with independent minded judges. The result was a more subservient judiciary that did not make decisions to expand the rule of law and safeguarding of fundamental rights.



After two years of donor conditionality and agitation by Kenyans, the judges' security of tenure was restored in 1990 through the Constitution of Kenya (Amendment) Act. But the Executive still interfered in judicial matters and an example is in 1994 when Justice Edward Torgor and Justice Couldrey had their contracts terminated perhaps because they had held that an election petition against President Moi by Kenneth Stanley Ngindo Matiba had validly been filed. It is also not long ago that we witnessed the judicial purge of 2003. And this poses a question is judges' security of tenure necessarily a bad thing for the fight against corruption?

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It is also evident that the judiciary has tended to make different rulings with regard to the Goldenberg cases based on who is heading the branch. During the tenure of Justice Majid Cockar most of these cases were ruled in favour of the Central Bank only to be overturned during the tenure of his successors, Justice Zacchaeus Chesoni, Justice Bernard Chunga and the incumbent Justice Evan Gicheru. This trend shows that security of tenure has to a large extent been used to shield perpetrators of elite corruption from facing justice thus entrenching impunity, mal-governance, and unaccountability.

As if that is not enough, the judiciary recently in disregard of overwhelming evidence pointing at Prof George Saitoti, Minister for Internal Security, culpability leading to the Bosire's Commission of Inquiry recommending further investigation and prosecution, the court held that he should not be investigated.

After a discussion of the judiciary and its challenges in the anti-corruption war, it is important to cast the net around the office of the Attorney General and how it has facilitated or hindered the anti-corruption process. First, it is critical to point out that the Attorney General, who is the government's legal adviser and the head of prosecution did not institute any criminal proceedings against the Goldenberg scandal suspects for five years after the scandal was revealed. It was not until the Law Society of Kenya and the current Prime Minister Raila Odinga initiated private prosecutions, that he initiated prosecutions. In fact, it is also openly perceived that the AG instituted nine separate prosecutions as a tactical step to hoodwink the public and donor community that something was being done to fight corruption. This is because none of the nine cases were concluded between 1999-2003. There is also no mechanism for holding the AG accountable for his actions (or lack thereof) even when it is clear that he did not do his work well . It is also evident that the AG was implementing decisions on the approval of the President as any action to the contrary could have had him in bad books with the President. Any attempt to remove him from office would have had to be initiated by the President by setting up a tribunal whose findings he may not be under obligation to agree with. Thus any blame for the inaction with regard to the anti-corruption mechanisms may be apportioned to the public servants and the appointing authority.

A recent report by the Kenya Anti Corruption Commission indicated that the commission had forwarded one hundred and eleven (111) reports of finished investigations to the AGs office. Of these, 70 had been taken to court, but not a single one had been concluded, the commission's report charged. The Attorney General, Amos Wako, argues that given that his office only prosecutes forwarded cases he is not to blame but the Criminal Investigation Department which is part of the Office of the President and Ministry of Internal Security. This is in disregard of the immense power to order investigations and to prosecute that the AG holds as a constitutional officer. A few cases prosecuted are for political expediency to punish those who have fallen from favour by the powerful elites in the executive and their surrogates. However, a discussion that the KACC must be vested with prosecutorial powers may not offer much hope. What needs to be done during the on-going constitutional review process is that the Director of Prosecutions Office must be made a constitutional office with security of tenure and take charge of all prosecutions leaving investigations to police and KACC.

Conclusion

Security of tenure for judges and the Attorney General is like a double edged sword in the fight against corruption. Therefore, given the realities discussed above, it behoves any discussion of security of tenure of judges and the Attorney General and how effective they will discharge the functions to first interrogate the appointment mechanism. The fact that the President is the appointing authority and the one expected to institute a tribunal when a judge or AG falls short of the expectations of the office ensures that once appointed the officers serve subserviently the appointing authority. The constitutional reforms process may have to look at how to involve parliament, professional bodies like Law Society of Kenya and even independent civilians in the Judicial Service Commission.

It is thus important that the ongoing constitutional reforms focus on instituting safeguards to entrench judges' security of tenure. In particular, the magistracy should be brought within the constitutional framework to secure their tenure of office and open up their work for both horizontal and vertical accountability.

International News Roundup

GUARDIAN

Expense culture brings risk of corruption, say activists

By Owen Bowcott , guardian.co.uk, Sunday 10 May 2009 22.35 BST

Anti-corruption campaigners are to meet parliamentary authorities this week amid a growing public outcry over MPs' expenses.

A Church of England bishop told the Guardian today the current expenses system constituted a dangerous temptation capable of undermining ethical standards.

"The expenses culture is dangerous because it can so easily lead to people being tempted to claim more than they ethically can," said the Right Rev. John Packer, Bishop of Ripon and Leeds.

"If someone uses a system for personal gain that's unethical. It's not so much corruption as a culture which may have become dangerous. There's a justification for MPs to have second homes because of the work they do. In my own experience MPs are extremely hardworking. [But] the quicker they come up with an alternative system [for recovering genuine expenditure] the better."

Packer, who sits in the Lords, is chairman of the Church of England's stewardship committee, which monitors financial affairs.
Chandrashekhar Krishnan, the executive director of the anti-corruption agency Transparency International (UK), said: "There's a perception on the part of the UK public that there's something corrupt and that's unhealthy."

Krishnan will meet Sir Christopher Kelly, who is heading the independent inquiry by the committee on standards in public life, on Wednesday to raise his organisation's concerns about the system of paying MPs' expenses. "Without trust in parliament, democracy is tarnished and voter apathy encouraged," Transparency International said.

Mark Wallace, campaign director of the Taxpayers' Alliance, said it would submit a dossier of complaints to John Lyon, the parliamentary commissioner for standards, calling for inquiries into individual MPs. "There are serious questions to be asked," he told the Guardian, "about whether the expenses system is in touch with the tax law of the land."

The use of "house flipping for personal benefit" (changing the designation of a second home) and escaping capital gains tax raised are worrying questions, he added.

Some practices, Wallace said, appeared to be in breach of "regulations and standards of behaviour in public life".

Lord Carey, the former Archbishop of Canterbury, said on Sunday a "culture of abuse" had developed in relation to Westminster expenses, and MPs had only themselves to blame. "The moral authority of parliament is at its lowest ebb in living memory," he wrote in the News of the World. "The latest revelations show it was not just a few MPs with their noses in the trough, but a culture of abuse."

He added: "It is not just the clawing greed of painstaking claims for such minor items as … barbecue sets and bathrobes, but also the egregious way some have transferred allowances from one second property to another – enabling them to refurbish homes at public expense, then sell them for profit.

"Coming at a time of financial crisis and political betrayal of the Gurkhas, this threatens to be the straw that finally breaks the camel's back."
Sir Alistair Graham, former chairman of the committee on standards in public life, added to the calls for reform, telling the Observer: "It has become all too clear that our representatives in parliament have adjusted the use of allowances to maximise their personal benefit. Some have taken advantage of the property market to receive a capital gain, which is clearly not acceptable. The abuse that has disappointed me most has been the freedom to designate what was your main home as your second home and vice versa."

NEW VISION
Convict Global Fund suspects, State tells anti-corruption court
By Edward Anyoli

The State has asked the court to convict the two directors of Valued Health, a local NGO, for mismanaging USh18.7m from the Global Fund. Principal state attorney Alice Komuhangi said during the prosecution's final submission on Friday that Annaliza Mondon and Elizabeth Ngororano diverted Government money to personal use.

"The Global Fund activities were not done by the accused. Instead, they fraudulently diverted. This money does not belong to the accused, it belongs to the Government of Uganda," Komuhangi said.

The State said that the accused made false accountability to the Project Management Unit for a workshop which did not take place. Komuhangi said the court should convict the accused because evidence

Ngorora Elizabeth (L) and Annaliza Mondon (R) appearing before court to answer charges of embezzlement of Global Funds. Photo by Yusuf Muziransa

by several witnesses incriminated them. "The accused received the money for a particular purpose, which they did not do," Komuhangi said. The State argued that Mondon and Ngororano deprived the intended beneficiaries of services. Godfrey Wasswa, a court assessor, also prayed for the conviction of the duo, saying prosecution had proved its case beyond reasonable doubt. He told Justice John Bosco Katusti that he was convinced by prosecution witnesses, especially Philip Ssengendo, the manager of Bativa Hotel in Kampala, where Mondon and Ngororaro claimed to have conducted a ten-day workshop. Ssengendo earlier testified that the workshop lasted for two to three days. Not 10 as the accused claims. Wasswa said he was also convinced by the registrar of motor vehicles, Patrick Mpairwe, who testified that the vehicles the accused claimed to have used in carrying out the Global Fund activities were not registered in Uganda and do not exit.

City lawyers Didas Nkrunziza and Mohammed Mbabazi asked the court to acquit the accused, saying there was no evidence incriminating them.

Aspects of Judicial Independence

Judicial independence, championed by the UN and the International Commission of Jurist, is associated with positive outcome in scholarly work but the term has no precise definition. The focus here is on structural conditions that influenced who is selected for the judiciary and constrains them once in office, they fall into two broad categories some primarily promote independence: others seek to limit corruption inside the judiciary. Conditions related to the independence of the Judiciary from the rest of government

Judge:
- Qualification and methods of selection of individual judges, including the role of political bodies and judicial councils.
- Judicial tenure and career path
- Determination of budges levels and allocations, concluding pay scales.
- Impeachment criteria and criminal statute governing corruption on the judiciary and their enforcement: existence of immunity for judges
- Level of protection from threats and intimidation.

Courts organization and staffing
- Presence or absence of juries or lay judges
- Position of persecution in the structure of government
- Organisation of the judicial system-existence of a separate constitutional court, specialised courts and courts at several government levels.

Condition primarily related to the control of corruption for a given level of political independence

Judge:
- Caseloads(overall and per judge) and associated delays
- Judges sit in panel or decide alone composition of panel(i.e all judges or also include lay assessors)
- Pay and working conditions, especially vis a vis private lawyers
- Conflict of interest and asset disclosure rule
- Rule on ex parte communication with judge in particular cases

Court organisation and staffing:
- Case management systems, including assignments of cases to judges
- Role of clerks and other courts staff, and checks on their behaviours
- Openness of courts proceedings to public and press
- Prevalence of written opinion and dissents.

Legal framework:
- Rules for getting into court, for joining similar cases, dealing with frivolous cases, etc
- Rules of civil and criminal procedure
- Role of precedents, law codes, constitution, statute and agency rules
- Rule for the payment of legal fees

Legal professions:
- Respect for , and competence of , the legal profession
- The nature of legal education and its relevance to modern legal disputes.

Adopted from Global Corruption Report 2007: Corruption in Judicial System

Event: Dubai Summit on Anti-Corruption-Implementing Corporate Governance, Anti-Bribery and FCPA Compliance programs in the Gulf region
Date: 12 May 2009 - 13 May 2009
Organiser: The American Conference Institute
Venue: The Fairmont Dubai Dubai, United Arab Emirates
TI Participants: Miklos Marschall

Event: Building Integrity and Reducing Corruption in Security Sector
Date: 19 May 2009 - 20 May 2009
Organiser: RACVIAC - Centre for Security Cooperation (Regional Arms Control Verification and Implementation Assistance Centre) and the Regional Anti Corruption Initiative (RAI)
Venue: RACVIAC Rakitje, Stari Hrast 53
10437 Bestovje, Croatia

Event: Launch of Global Corruption Barometer
Date: 3 June 2009
Organiser: Transparency International
Venue: Brussels, Belgium
TI Participants: Huguette Labelle, Chair, Transparency International, Robin Hodess, Director, Policy and Research, Transparency International

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