



STATEMENT ON STATE OF JUDICIAL INDEPENDENCE IN KENYA:

THREATS, INTIMIDATION, AND HARASSMENT OF JUDGES AND MAGISTRATES

OCTOBER 25, 2021

Members of the fifth estate, good morning. I wish to thank you for honouring our invitation:

On 21 October 2021, the High Court of Kenya rendered yet another historic judgement in ***Katiba v President of the Republic of Kenya and 6 Others Pet 206 of 2020***. The court directed that His Excellency, the President of the Republic of Kenya, appoint the remaining six nominees as Judges to their respective courts within the next fourteen days from the date of judgement. The decision further stated that upon the lapse of the fourteen days, and in the event of inaction from H.E the President, then it would be presumed that his power to appoint them has expired and his office become *functus*, so far as the appointments are concerned, and the six nominees shall be deemed duly appointed.

The decision further directs that the Chief Justice of the Republic of Kenya and the Judicial Service Commission (JSC) shall be at liberty to take all necessary steps to swear the six Judges. As a body of Jurists, we welcome this judgement and particularly its direction regarding the consequences of dereliction of duty by the President.

Members of the fifth estate, it is our considered view and regrettable that the Executive would require a court order to compel and direct that it undertakes its constitutionally mandated role. Further, we observe with concern that the various Judges and Magistrates whom the President refused to swear in have continued to discharge their duties with dignity and professionalism with no action from the Chief Justice or Judicial Service Commission on due process safeguards.

Secondly, we remind the Executive that Kenya's 2010 Constitution guarantees the independence of the Judiciary and specifically insulates the institution from the control or direction of any person or authority. Specifically, Article 160 of the Constitution of Kenya guarantees the independence of the Judiciary. We wish to further state that the independence of the Judiciary underpins the rule of law and is essential to the functioning of democracy and the observance of human rights.

Towards this end and relatedly in the recent past, ICJ Kenya has received anonymous complaints, concerns, and allegations that staff and personnel closely associated with the National Intelligence Service (NIS) are being deployed to threaten, intimidate and harass Judges and Judicial Officers, either during adjudication or after delivery of their decision. This is more so when the decisions are perceived to be unfavorable to the government's executive arm.

Judicial independence is critical to maintaining the integrity of the Judiciary. Judges must feel free to fairly evaluate the matters before them based on the evidence presented and the relevant law, secure from external pressures. The independence of the Judiciary, in particular, its decisional independence, is provided for in most jurisdictions and is entrenched in constitutional and normative frameworks.

Principle 2 of the UN Basic Principles states that: "The judiciary shall decide matters before them impartially, based on facts and per the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." The African Charter obligates State parties to guarantee the independence of the courts. Moreover, the Grand Bay (Mauritius) Declaration and Plan of Action recognizes that an independent, open, accessible, and impartial judiciary guarantees adherence to the rule of law, democracy, and human rights. The Bangalore Principles of Judicial Conduct and Latimer House guidelines, among others. These instruments underline judicial authority and independence as essential to the principle of separation of powers and a pre-requisite of the right to a fair trial. In sum, judges and judicial officers have a right and a duty to decide cases before them, free from fear of reprisals or intimidation.

Despite these global and regional standards, Judges suffer from overt and covert intimidation, ranging from killings, psychological torture to extortion, transfer, proceedings for carrying out their professional duties, and unlawful removal from office.

Thirdly and from the preceding, we maintain that these allegations against the security agents, trends, and actions cannot be ignored and therefore sound out the alarm to relevant authorities. These allegations of interference contravene the normative frameworks and principles espoused in the international, regional, and constitutional safeguards that guarantee judicial independence and, in particular, decisional independence.

Further, we wish to remind all stakeholders that the Independence of the Judiciary must be jealously guarded, upheld by refraining from interfering in its work and by compliance with its decisions or rulings. As the third arm of government and as a matter of public policy, individual judges and judicial officers must enjoy personal independence without fear of reprisals.

In conclusion, ICJ Kenya wishes to invite the National Intelligence Service to monitor these allegations, recommend to the Director of Criminal Investigations for investigations and lastly for the Office of the Director of Public Prosecution to prosecute these persons abusing their privileged positions in public office through covert means to intimidate Judges and Judicial Officers.

To the Judges and Judicial Officers, we commit our unyielding support to continue ringfencing the gains made by the Constitution of Kenya that guarantee the Independence of the Judiciary.

Thank you,



Kelvin Mogeni,
Chairperson, ICJ Kenya.