Civil Society Petition to Chief Justice on Kiplagat

Truth, Justice, and Reconciliation Commission

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Thursday, September 9 2010

To
Justice Evans Gicheru,
The Chief Justice of the Republic of Kenya,
High Court,
Nairobi.

Dear Sir,

Re: Public Petition to the Chief Justice to Institute a Tribunal against
Mr. Bethuel Kiplagat, the Chair of Kenya’s Truth Justice and Reconciliation Commission (TJRC)

PREAMBLE:
The Constitution of Kenya (2010), in Article 37, provides: “Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.”

PETITION:
Greetings from the Kenya Transitional Justice Network (KTJN). The KTJN is a coalition of civil society organizations, victim groups, individuals and actors committed to spearheading reforms and transitional justice in Kenya. KTJN envisions a society where national unity, equity and accountability are the basis of behaviour of both the citizen and the State alike. In this regard, we make reference to the following:

1. The Communiqué developed by partners during the National Dialogue Forum on Truth, Justice and Reconciliation organized by stakeholders
under the auspices of the Kenya Transitional Justice Network: 1 The main objective of the forum was to create a platform for supporters to reflect and develop strategies and mechanisms for engagement with the truth Justice and reconciliation processes.

The above forum and communiqué analyzed and attributed most of the legitimacy, credibility and operational challenges facing the TJRC to the questions related to its Chairperson’s, Mr. Bethuel Kiplagat, past record. Critical to this are: the allegations about lack of clarity and truthfulness with regard to the murder of Hon. Robert Ouko; alleged complicity in the Wagalla Massacre; and alleged grabbing of public property through illegal and irregular allocation as reported in different Ndung’u Report. These allegations expose the TJRC to the further operational, legal and administrative bottlenecks as captured below.

2. Selection Panel failure to comply with Section 10 (6-8) of the TJRC Act 2008 during the recruitment of the Chairperson to the TJRC: Indeed, Section 10(5) provides that no person shall be qualified for appointment as a commissioner unless such a person:

   a) is of good character and integrity;
   b) has not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under thus Act; and,
   c) shall be impartial in the performance of the functions of the Commission under this Act and who will generally enjoy the confidence of the people of Kenya.

Rather than getting detailed insights into the profiles of the candidates during the recruitment process, the Selection Panel chose to make them swear affidavits indicating their compliance with the above provision. Given the allegations above and the fact that the chair may have lied under the oath makes him morally and legally incompetent to lead a truth-telling process.

This also violates the principles of natural justice where one cannot be a judge in his own cause. Sub-Section 8 of the Act provides inter alia that the Commission shall, as much as possible be perceived as impartial in its collectivity.

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1 Forum was held at the Kenyatta International Conference Centre between 2nd and 3rd September 2010. Members to the Kenya Transitional Justice Network: Victims Networks; Community Based Human Rights Networks, Kenya Human Rights Commission (KHRC) International Centre for Policy and Conflict(ICPC); Kenya Land Alliance(KLA); International Commission for Jurists(ICJ Kenya); Kenyas for Justice and Development(KEJUDE), Muslims for Human Rights(MUHURI); Youth Congress; Constitution Reform Education Consortium(CRECO); Catholic Justice and Peace Commission(CJPC); Centre for Multiparty Democracy(CMD); Kenya Muslim Youth Alliance(KMYA); Association of Sisterhoods of Kenya-Justice and Peace(AOSK-JP), Release Political Prisoners(RPP); Bunge La Mwananchi; Haki Focus; National Convention Executive Council(NCEC); Kenyans for Peace, Truth and Justice(KPTJ) among others.
3. **Allegations on Kiplagat’s Malpractices** in relation to Sections 16 and 17 of the TJRC Act 2008: The sections above provide the grounds on which the office of the Chairperson or a Commissioner shall become vacant. Section 17(1) captures four professional and ethical bases, two of which applies substantively to the questions being raised against Mr. Bethuel Kiplagat. That is: a) for misbehaviour or misconduct; b) if the chairperson or a commissioner is convicted of an offence involving moral turpitude among others.

4. **Mandate of Chief Justice** to establish a tribunal against the Chair or Commissioners: Pursuant to the above standards, Section 17(2) (a-b) of the Act confers the Office of the Chief Justice the powers to by a notice in the gazette, appoint a Tribunal which shall inquire into the matter and report on the facts (with recommendations) to the President. The president may suspend or remove the chair or commissioner in question depending on the findings and recommendations of the Tribunal. Meanwhile, the vice chair will take over leadership pending the resolutions of these issues pursuant to Section 19 of the Act. That means while the chairperson’s issues are being processed, the work of the Commission shall continue without any disruptions.

5. **Petition to the Chief Justice** by the 8 Commissioners from the TJRC. We wish to reiterate that based on the issues and processes above, fellow Commissioners of the Chairperson petitioned Office of the Chief Justice in April 16 2010 and to date no action has been taken. This administrative action by the Commissioner’s is a clear indicator that they are equally concerned and convinced about these allegations which have caused a great deal of divisions and paralysis in the operations of the Commission.

Moreover, since the Vice Chair resigned from the Commission on April 19 2010 no gazette notice was issued by the president within 7 days of resignation (by April 26, 2010) as required in the TJRC Act. This act of impunity has created further legal and professional mandate implications to the vacancy simply because the Act requires commissioners to possess certain skills.

Take note that any further inaction over this matter is a violation of Article 47(1) of the Constitution of Kenya (2010) which provides: “every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

6. **Violation of the Constitution of Kenya (2010):** We wish to observe further that the questions being raised against the TJRC Chairperson violates both the spirit and letter of the Constitution of Kenya (2010). First, the TJRC’s mandate of establishing the truth, promoting peace, justice, national unity, social justice, human rights, accountability, among
Kenyans is critical in the realization of national values and principles of governance, as set out in the Constitution of Kenya (2010).

Second, the credibility issues being raised against the Chairperson and lack of action on the part of the Office of the Chief Justice against them are inimical to provisions under Chapters 6 and 13 on Leadership and Integrity and The Public Service respectively of the Constitution of Kenya (2010). Article 73(1) under Leadership and Integrity provides among others that authority assigned to a State Officer “is a public trust to be exercised in a manner that is consistent with the purposes and objects of this Constitution; demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office.”

Finally, Article 232 (1) under The Public Service provides the values and principles of public service as including among others “high standards of professional ethics” and “accountability for administrative acts”.

Based on the above references, we hereby urge you to act expeditiously and establish a tribunal to investigate these allegations against the Chairperson. We hope this will give the TJRC the much required credibility and stakeholders’ support. We are convinced this will also help in unraveling all the other governance challenges which have stalled the work of the TJRC.

Finally, we wish to inform you that failure to respond to these demands may elucidate further public outrage, victim apathy and possible political mass action against both the TJRC and Office of the Chief Justice.

For further information do not hesitate to contact the undersigned and/ or Ndung’u Wainaina and George Kegoro, the executive directors of International Centre for Policy and Conflict (ICPC) and the International Commission for Jurists (ICJ Kenya) respectively.

Sincerely,

L. Muthoni Wanyeki,
Executive Director, Kenya Human Rights Commission

Ndung’u Wainaina,
Executive Director, International Centre for Policy and Conflict

George Kegoro
Executive Director, International Commission for Jurists

For and on Behalf of the Kenya Transitional Justice Network
Enclosed:

1) A Communiqué from the 3rd National Dialogue Forum on the Truth, Justice and Reconciliation;
3) A Petition From The Commissioners Of The Truth Justice And Reconciliation Commission Of Kenya Pursuant To Section 17 And Section 10 Of The Truth, Justice And Reconciliation Act No. 6 Of 2008, As Amended.

CC.

1) **Hon. Mwai Kibaki**, President of the Republic of Kenya. C/O Francis Muthaura, Head of Civil Service and Secretary to the Cabinet;
2) **Hon. Raila Odinga**, Prime Minister of the Republic of Kenya;
3) **Hon. Amos Wako**, Attorney General of the Republic of Kenya;
4) **Hon. Mutula Kilonzo**, Minister for Justice, National Cohesion and Constitutional Affairs;
5) **Hon. Abdikadir Mohammed**, Chair, Constitutional Implementation Oversight Committee;
6) **Florence Jaoko**, Chair, Kenya National Commission on Human Rights on Behalf of the Selection Panel.
7) **Patricia Nyaundi**, Secretary, Truth, Justice and Reconciliation Commission.