TJRC Petition to Chief Justice - TJRC Petition for Tribunal

Truth, Justice, and Reconciliation Commission

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TO: The Honorable the Chief Justice of the Republic of Kenya


We, the Commissioners of the Truth Justice & Reconciliation Commission (the “Commission”) hereby request, pursuant to Section 17(2) of the Truth, Justice and Reconciliation Act No. 6 of 2008, as amended (the “Act”), that a Tribunal be appointed to inquire into the question of the removal of our chairperson, Ambassador Bethuel Kiplagat. Specifically we request that, pursuant to Section 17(2)(a) of the Act, a Tribunal be appointed that will, as set out in Section 17(2)(b) of the Act, inquire into the matter, report on the facts, and recommend to the President, whether or not the chairperson of the Commission should be removed from office.

We do not make this request lightly. We make this request in the spirit of, and in furtherance of, the mandate of the Commission, our commitment to the reforms
agreed to as part of the “Agreement on the Principles of Partnership of the Coalition Government” of 28 February 2008 (known as the Agenda Four reforms), and in furtherance of the trust that has been placed with us by the people of Kenya. We have submitted in a separate document a summary of all of our efforts as a Commission to resolve this issue prior to taking this step.

The basis upon which we request the creation of a Tribunal, pursuant to Section 17(1)(a), is the allegation of “misbehavior or misconduct” by the chairperson. The alleged misbehavior or misconduct is the following:

First, it is our information that the chairperson signed a sworn affidavit as a condition for his appointment as a commissioner indicating that, pursuant to Section 10(6)(b) of the Act, he “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 this Act [the Truth, Justice and Reconciliation Act of 2008, as amended].” In addition to the affidavit, the chairperson has continuously, both privately within the Commission and publicly with other individuals and the press, insisted that he has not nor ever has been involved, implicated, linked or associated with any human rights violation that is to be investigated by the Commission under the Act. “Affirmative misconduct” is defined in Black’s Law Dictionary as “An affirmative act of misrepresentation or concealment of a material fact; intentional wrongful behavior.” (Black’s Law Dictionary, 8th Ed., 2004). (We have attached a copy of the definition of “misconduct” found in Black’s Law Dictionary as Appendix A.)

Second, section 21 of the Act states that “each commissioner...shall avoid taking any action, which could create an appearance of partiality or otherwise harm the credibility or integrity of the Commission.” As mentioned in the previous paragraph, the chairperson has signed a sworn affidavit stating that he has not been involved, implicated, linked, or associated with human rights violations of any kind to be investigated under the Act, and has continuously repeated that assertion since being sworn in as a Commissioner.
Third, it is alleged that our chairperson in fact has been involved, implicated, linked or associated with at least three human rights violations that are to be investigated under the Act. It has also been alleged that his connection to those violations, and his repeated denial of any wrongdoing, creates an appearance of partiality and has in fact harmed the credibility and integrity of the Commission, in violation of Section 21(2) of the Act. Those violations, and the allegations related to them, are as follows:

A. Irregular or Illegally Acquired Land

1. Our chairperson allegedly has been the recipient of illegally or irregularly acquired land. The chairperson is mentioned in the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (June 2004) (the “Ndung’u Report”) as the recipient of illegally or irregularly acquired land between 12 December 1963 and 28 February 2008 (the “TJRC Mandate Period”). Specifically he is mentioned on page 798, S/N 104 of Volume I of the Annexes of the Ndung’u Report as the recipient of a 0.354 Ha. plot of property identified as HG544, Lavington, Lr No. 3734/83, which was acquired in 1988. The Ndung’u Report there recommends that this transaction be revoked. It is also alleged that he is the recipient of a house in Kileleshwa. It is alleged that this Kileleshwa House is one of the properties mentioned in pages 709-715 of Annex 50 of the Ndung’u Report. (Attached hereto as Appendix B are relevant pages from the Ndung’u Report.) It is our information that the chairperson was the recipient of 100 acres of settlement scheme land in Uasin Gishu. It is also our information that the chairperson has admitted to three specific land transactions (some or all of which correspond to the aforementioned land transactions), some or all of which may qualify as illegally or irregularly acquired land, and all of which transactions occurred during the TJRC Mandate Period.

2. Under the Act, the Commission’s functions include the following:
a. “inquire into the irregular and illegal acquisition of public land and make recommendations on the repossession of such land or the determination of cases relating thereto” (Section 6(o));

b. “consider the reports of the relevant commissions of inquiry and make recommendations on the implementation of such reports” (Section 6(m));

c. “investigate...expropriation of property suffered by any person” during the Mandate Period (Section 6(a));

d. “investigate economic crimes” (Section 6(g));

e. “investigate economic crimes including...the exploitation of natural or public resources and the action, if any, taken in respect thereof” (Section 6(n));

f. “inquire into the misuse of public institutions for political objectives” (Section 6(q)); and

g. “identify any persons who should be prosecuted for being responsible or involved in human rights and economic rights violations and abuses,” and make recommendations with respect to such prosecution (Sections 6(f) and 6(k)(ii)).

3. As set forth in paragraph 2, the illegal or irregular acquisition of land is both directly (see paragraphs 2(a) and 2(b)) and indirectly (see paragraphs 2(c) – 2(g)) a human rights violation that is to be investigated by the Commission pursuant to the Act. With respect to paragraph 2(b), we have attached as Appendix B copies from the Ndung’u report in which our chairperson is listed as the recipient of illegally or irregularly acquired land. As set forth in the Act we are required to consider and make recommendations with respect to the implementation of that Commission’s report. In light of these allegations concerning the chairpersons involvement, link, or association with illegally or irregularly acquired land, it is alleged that his membership in the Commission which, as set forth in Section 6(o) of the Act (reproduced in subparagraph 2(a) above), is required to
inquire into the illegal and irregular acquisition of land, creates the appearance of partiality or otherwise harms the credibility or integrity of the Commission, thus leading to a violation of Section 21(2) of the Act.


1. It is common cause that our chairperson was the Permanent Secretary in the Ministry of Foreign Affairs at the time when the Minister of Foreign Affairs, the Honorable Robert Ouko, was, *inter alia*, abducted, tortured, and murdered. It is our information that the chairman was a witness in four different inquiries with respect to the assassination: the trials of Jonah Anguka; the Judicial Commission of Inquiry into the Disappearance of the late Dr. the Hon. Robert J. Ouko; the report titled Disappearance and Death of Dr. Robert John Ouko: Report by the Metropolitan Police, Specialist Operations International and Crime New Scotland Yard, written pursuant to an investigation undertaken by the New Scotland Yard team headed by Det. Supt. John Troon (the “Troon Report”); and the Report of the Select Committee Investigating Circumstances Leading to the Death of the Late Dr. The Hon. Robert John Ouko, EGH, MP (March 2005) (the “Parliamentary Select Committee Report.”) The chairman is mentioned by name in the Troon Report and the Parliamentary Select Committee Report.

   a. The Troon Report recommends that “All senior Government Officials and civil servants should be interviewed in relation to the Washington visit and their knowledge of what may have transpired between Dr. Ouko and other colleagues.” (Troon Report, paragraph 296(2).) It is our information that the chairperson was a member of the Washington visit referred to in the Troon Report, and that the chairperson has admitted to being a part of said trip.

   b. The Parliamentary Select Committee Report includes a recommendation that the Government of Kenya investigate
“the withdrawal of Dr. Ouko’s passport, bodyguards, and official transport and the staff of the Ministry of Foreign Affairs, especially Messrs. Bethwel [sic] Kiplagat…….”
(Parliamentary Select Committee Report, paragraph 253.) That same report also states that “The Committee observed with concern that the witness was untruthful despite his senior position in the diplomatic world.” (Parliamentary Select Committee Report, paragraph 216.) (Attached hereto as Appendix C are relevant excerpts from the Parliamentary Select Committee Report.)

c. It is also our information that the widow of the deceased, Mrs. Ouko, has publicly stated in media interviews that the chairperson should be a witness into any inquiry into the assassination of her husband.

2. Under the Act, the Commission is to

   a. “investigate gross violations and abuses of human rights including…..abductions, disappearances…..torture, murder, [and] extrajudicial killings….” during the TJRC Mandate Period (Section 6(a));

   b. “investigate the context in which and causes and circumstances under which the violations and abuses occurred and identifying the individuals, public institutions, bodies, organizations, public office holders, the State, state actors, or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses” (Section 6(b));

   c. “investigate and determine whether or not the violations and abuses were deliberately planned and executed by the State or by any [other] person” responsible for or involved in human rights abuses (Sections 6(d) and 6(k)(ii));
d. “identify any persons who should be prosecuted for being responsible or involved in human rights…..violations and abuses” (Section 6(f)); and

e. “consider the reports of the relevant commissions of inquiry and make recommendations on the implementation of such reports” (Section 6(m)).

3. The Commission has decided that the assassination of the Honorable Robert Ouko will be the subject of an investigation by the Commission. In addition to his importance as a witness with respect to the events surrounding the assassination, the chairman is mentioned in two reports that, pursuant to Section 6(m) of the Act (and referred to in paragraph “e” above), we must consider and make recommendations with respect to their implementation. In at least one of those reports the credibility of the chairperson was directly questioned. The participation as a witness of, and the conclusions with respect to, the chairperson in previous inquiries; the importance of the chairperson as a witness with respect to any inquiry undertaken by the Commission; and public statements by the widow of the deceased with respect to the importance of the chairperson as a witness before any inquiry concerning the assassination of her husband, are alleged to create the appearance of partiality, or otherwise harms the credibility or integrity of the Commission so long as the chairperson is a member of the Commission, thus leading to a violation of Section 21(2) of the Act.

C. Wagalla massacre.

1. Allegations have been raised with respect to the chairman, suggesting that he may be involved, implicated, linked, or associated with the massacre. It is alleged that the chairman participated in a meeting called by the District Security Committee of Wajir District, in Wajir a few days before the security operation that later became known as the Wagalla massacre. These facts are alleged in a book, S. Abdi Sheikh, Blood on the Runway: The Wagalla Massacre of 1984 (2007), page 23. (We have attached hereto as Appendix D, copies of
pages 20-24 of the book.) The book mentions a typed page from the Visitor’s Book of the District Commissioner’s Office of Wajir that lists our chairman, among others, as having visited the District Commissioner’s Office. (We have attached as Appendix E a copy of two pages of a document that purports to be the Visitor’s Book of the District Commissioner’s Office in Wajir.) We have not been presented with any other evidence with respect to this allegation. Our chairperson states that he cannot remember whether he in fact was in Wajir for a meeting at that time or not.

2. Under the Act, the Commission is to

   a. “investigate gross violations and abuses of human rights including…..abductions, disappearances…..torture, murder, [and] extrajudicial killings….” during the TJRC Mandate Period (Section 6(a));

   b. “investigate the context in which and causes and circumstances under which the violations and abuses occurred and identifying the individuals, public institutions, bodies, organizations, public office holders, the State, state actors, or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses” (Section 6(b));

   c. “investigate and determine whether or not the violations and abuses were deliberately planned and executed by the State or by any [other] person” responsible for or involved in human rights abuses (Sections 6(d) and 6(k)(ii)); and

   d. “identify any persons who should be prosecuted for being responsible or involved in human rights…..violations and abuses” (Section 6(f)).

3. The Commission has decided that the event known as the Wagalla massacre, including the circumstances surrounding that massacre, will be investigated by the Commission. The evidence presented to
the Commission to date supports the allegation that the chairperson may be involved, implicated, linked or associated with that massacre. In addition, it is alleged that his membership in the Commission that will be investigating the Wagalla massacre creates the appearance of partiality, or otherwise harms the credibility or integrity of the Commission, thus leading to a violation of Section 21(2) of the Act.

Based upon the foregoing we formally request that you exercise your powers under Section 17 of the Act, and appoint a Tribunal to address and determine the question of whether or not the chairperson should be removed pursuant to Section 17 of the Act for misconduct or misbehavior. We want to reiterate that we make this request conscious of the trust and responsibility that has been given to us by the people of Kenya, in furtherance of our mandate, and committed to the reforms of Agenda Four.

DATED AT NAIROBI, THIS _____DAY OF _____ _____2010

SIGNED:

__________________________________________  ____________________________
Tecla Wanjala, Vice Chairperson                  Kaari Betty Murungi

____________________________________________  ____________________________
Tom Ojienda                                      Gertrude Chawatama

____________________________________________  ____________________________
Margaret Shava                                    Berhanu Dinka
Ronald C. Slye

Ahmed Sheikh Farah