



KEYNOTE ADDRESS BY THE HON MR. JUSTICE KIHARA
KARUKI, PRESIDENT, COURT OF APPEAL OF KENYA
DURING THE ANNUAL UGANDA JUDGES CONFERENCE
HELD AT SPEKE RESORT, MUNYONYO
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“JUDICIAL ACCOUNTABILITY AS A TOOL FOR PROMOTING
EFFICIENCY IN THE COURTS”

Your Lordship .the Chief Justice of the Republic of Uganda,
Honourable Justice Bart MagundaKatureebe,Your Lordship
the Deputy Chief Justice of the Republic of Uganda,
Honourable Justices of the Supreme Court, Honourable
Judges of the Court of Appeal, The Principal Judge and
Honourable Judges of the High Court,Distinguished Guests,
Ladies and Gentlemen,

It is indeed a great pleasureand singular privilege to
have been nominated by the Honourable the Chief Justice of
the Republic of Kenya to address this distinguished
conference on his Honour's behalf.Let me at the outset thank
Your Lordship the Chief Justice on his Honour's and on my
own behalf for the kind invitation andthe opportunity
to speak at this important forum.Since my arrival here
yesterday afternoon, it has indeed been a pleasure to meet
many of you, and now to be with you in this official opening.

Judicial convenings such as the Annual Judicial
Conference are important venues in which to focus our
attention on fundamental judicial questions; they help us to
reflect upon the very practice of adjudication,
judgecraft,ethics,and generally how to build a system of

justice whose hallmark is excellence. In doing so, they cause us to reflect on our role, in these times when the thirst for judicial solutions to our intractable problems is at its peak; when the test of judicial credentials lie in our ability to accomplish the judicial function with tact and craft, stretched as it is to its outer limits in an ever changing social, economic and political environment.

Distinguished colleagues,

It is in this context that the theme of this Annual Conference acquires its particular significance. Being exactly two decades since the promulgation of the Constitution of Uganda, an achievement which set in process the revitalization of institutions of governance, it is indeed a good time to take stock of the progress achieved, and the remaining challenges in fostering judicial accountability during this Conference. If it may be lost to us that much of the content of the judicial architecture in our own Constitution of Kenya was largely borrowed from your own Constitution, then there is much to be learnt from your own experience as much as there are to be taken from our own

experience in Kenya. In this context, therefore, allow me in the next few minutes to highlight some of the Kenyan experiences in regard to judicial accountability as a tool for promoting efficiency in the courts.

It is somewhat paradoxical that although the concept of 'judicial accountability' comes easily in ordinary parlance, it is not a self-contained idea. Indeed, there is a school of thought that regards the term itself an oxymoron; Lord Cooke of Thomdon, a senior New Zealand judge, questioned the idea of accountability beyond the accountability inherent in the judicial system through the appellate process. He stated that judicial accountability has to be mainly a matter of self-policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardised. He raised the old and yet unanswerable Socratic question, "quis custodiet ipsos custodies", meaning "Who will guard the guards themselves?" Indeed some have questioned whether certain notions of judicial accountability threaten the concept of separation of powers, a fundamental requirement

found in constitutional arrangements of all liberal democracies committed to the rule of law.

Yet others also argue that the nature of the judicial process is inherently accountable. With open courts accessible to the public, reasoned and published judgements subject to both appellate scrutiny and the scrutiny of the media, legal fraternity and community at large, judges are by the very character of the judicial process, accountable. The only task in regard to securing or enhancing judicial accountability, according to this school of thought, is thus focusing on these traditional processes of judicial craft. Finally, the third and more radical school of thought problematises the notions of judicial independence and separation of powers as unqualified constitutional principles that must be balanced against other considerations such as the public good, accountability and transparency.

Distinguished colleagues,

In considering judicial accountability, it is perhaps important that our attention be drawn to the types and levels of accountability. Distinction may be drawn between the accountability of individual judges and that of courts collectively as judicial institutions. Examples of individual accountability include discipline for personal misconduct, drafting individual reasoned judgments in a multi-judge court among others. Examples of institutional accountability are the publication of annual reports; consultation over proposed changes to court rules and practice; financial audit requirements; the requirement for a court to sit in public; the existence of rights of appeal to higher courts and so forth. There is also the distinction between formal accountability and accountability via interaction with the legal profession, the media, and academia.

In other words, we could consider accountability in terms of levels that relate to the wide range of tasks undertaken by the Judiciary and judicial officers. There is

content accountability, which refers to written, reasoned judgments and the contributions of individual judges to law reviews and public speeches. There is process accountability, which refers to, for example, methods of selecting cases for hearing and assigning cases to judges and benches. Performance accountability refers to targets, delivery and outcomes; the most obvious example is the time in which it takes for matters to be determined in court. And finally, probity accountability, in regard to the institution, encompasses the basic financial audit requirements; and in regard to individual judges refers to mechanisms intended to guard against corruption or making judgments in one's own cause.

Without delving too deeply into the finer points of this important and thought-provoking debate, it would suffice to say that in considering the question of judicial accountability, context is vitally important.

Distinguished colleagues,

As many of you may know, Kenya's judicial history has been a checkered one in regard to independence, transparency and accountability. Prior to current constitutional dispensation, the judicial institution was perceived as having failed in its core primary role of justice delivery and subject to the control and interference of the other arms of government, particularly the Executive. For many decades, the Judiciary was treated as a department within the Office of the Attorney General.

It is fair to say, then, that while many in the Judiciary worked diligently under extraordinarily difficult circumstances, capture by narrow economic and political interests had created an institution plagued by corruption and inefficiency. There was crippling case backlog, one pointer being the existence of a case filed 45 years earlier without a judicial determination! So pernicious was the problem that between 1990 and 2010, to take a representative period, more than ten committees, commissions or Task Forces were set up to diagnose and recommend solutions to the

challenges that beset the Judiciary. The outcomes of these initiatives would find themselves in a raft of judicial reforms entrenched in the Constitution of Kenya, 2010.

The Constitution of Kenya 2010 promises to reconstruct the Judiciary as it does the other two arms of government. It declares, as does your own Constitution, that judicial authority is derived from the people, and is to be exercised in accordance with the Constitution and the law and not subject to the control or direction of any person or authority. Such vesting of sovereign power (judicial power included) in the people of Kenya under the Constitution essentially reminds us that as public servants, we owe a duty and are accountable to the people, who delegate their power to us. For judicial authority is expressly vested in the people to be exercised on their behalf by the courts and tribunals. For lack of a better metaphor, we are thus accountable to the people, who constitute the principal.

Most importantly, judicial power exercised by judges and judicial officers becomes a public trust to be exercised only for public good. No longer are judges to act as demi-gods, but as faithful servants conscientiously

discharging their delegated power in the public interest.

The one feature of modern constitutions is that they entail value systems. They spell out national values and principles of governance which every state organ (the judiciary included) must abide by. Under the Constitution of Kenya, these values and principles of governance include, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability. The Constitution incorporates a whole chapter on leadership and integrity that promises to institute a shifting governance.

As with the Constitution of Uganda, so for the Constitution of Kenya, there are spelt out principles on how judicial authority was to be exercised thus under Article 159(2):

“(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional

dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted”.

Needless to state, with the Constitution also comes an expanded Bill of Rights that protects various civil and political liberties, including the right to fair hearing, which encompasses the right, “to have the trial begin and conclude without unreasonable delay” and the right to a public trial before a court.

Distinguished colleagues,

It is perhaps the constitutionaltransitional clausesproviding for the vetting of judges and magistrates who were in office at the date of promulgation of the new Constitution that deviates from constitutional orthodoxy.If the vetting of judges and magistrates was deemed to be a compromise to the more drastic proposal of removing all

judicial officers from office and recruiting the bench anew, there was established a Vetting Board that is currently in the final stages of its commission.

Distinguished colleagues,

In light of its historical context therefore, judicial accountability in Kenya post-2010 has taken a multipronged approach. Beyond constitutional requirements, there was established the Judiciary Transformation Framework (JTF) (2012-2016), founded on four pillars: (i) People focused delivery of justice; (ii) Transformative leadership, organizational culture, and professional and motivated staff (iii) Adequate financial resources and physical infrastructure; and (iv) Harnessing technology.

In mid-April last year(2015), to take one aspect of the Judiciary Transformation Framework, the Judiciary formally institutionalised performance-based management and measurement in regard to the judicial function. The main objective of the system is to enhance accountability for results and focus the judiciary's efforts towards improving

access to and expeditious delivery of justice. The system is expected to enable the Judiciary to continually evaluate its performance on selected key indicators and to implement informed strategies to improve overall judicial performance. By evaluating performance, it will now be possible to assess how judges are working and timeously identify those stations that may require intervention.

All these, of course, is premised on the understanding that performance management systems will streamline internal processes and systems, improve efficiency and effectiveness, and ultimately increase accountability and productivity of judges and judicial officers and staff. Because, as they say, 'What gets measured gets done.'

Certainly, we do not purport to have resolved the difficult questions of performance management for all time. Therefore, in addition to the tool which incorporates a set of metrics, there are other tools designed to measure performance including annual work plans, strategic plans, Citizens Service Delivery Charters, quality management standards, performance appraisals, performance reporting, court user and employee satisfaction surveys and, most

importantly, the Performance Management and Measurement Understandings(PMMUs).

Structurally, there has been created a Directorate of Performance Management ("PMD"), which is responsible for among others data management, planning, monitoring and policy advisory. Through a comprehensive national case audit and institutional capacity survey conducted in 2015, we have been able to get a more accurate assessment of the status of case load in the system, by case type and location. The Directorate has also developed a Daily Court Returns Template ("DCRT"), a standardized data collection and performance reporting tool that enables us to gauge the output of judges and magistrates and the case clearance rate for the various court stations. This initiative has been helpful in standardisation of court data collection in the Judiciary.

Distinguished colleagues

One related aspect needs highlighting at this point. One of the key changes brought in by the new Constitution is a

new system of devolved governance. Among the objects of devolution is "to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya". Previously in the Judiciary, matters were concentrated within Nairobi, where all the administrative issues emanating directly from the various court stations were dealt with, leading to inefficiency. Currently, court stations now have heads of stations, some of whom are endowed with authority to incur expenditure so as to handle basic administrative issues at the local level. This has greatly boosted efficiency at court stations, fostering innovative management committees thereat.

In many ways, this process of decentralization of court functions promotes the accountable exercise of judicial authority. It has directly impacted on efficiency as it has increased capacity at the local level by disbursing resources as well as allowing prompt decision-making in regard to the administration of justice at court stations across the country.

Distinguished colleagues,

Stakeholder engagement is one of the key result areas under the Judiciary Transformation Framework (JTF). It stems from a recognition that the Judiciary is but one of a number of institutional actors in the justice. Continuous collaborative efforts with institutions such as the Kenya Police Service, Kenya Prisons, Children's Department, Kenya Law Reform Commission, Attorney General's Office, Office of the Director of Public Prosecutions, Probation and Aftercare Service among others have yielded the dividends in regard to the systemic operation of the justice system particularly the criminal justice system. Such engagement is crucial for judicial accountability by providing an avenue through which the institution can engage and interact with key actors in the justice system and their diverse constituencies.

Formally, this collaboration is institutionalized within the National Council on the Administration of Justice (NCAJ), which is established under the Judicial Service Act, 2011 under the chairmanship of the Honourable the Chief Justice. It provides a useful platform for cooperation amongst the various justice sectors at the national level. The NCAJ is statutorily mandated to ensure, "a co-ordinated,

efficient, effective and consultative approach in the administration of justice and reform of the justice system". The NCAJ is to achieve this objective by formulating policies relating to the administration of justice and implementing, monitoring, evaluating and reviewing strategies for the administration of justice.

Although the NCAJ may be viewed as a policy-oriented body, it provides synergy with which to effectively respond to national problems on a wholesale, as opposed to disjointed, uncoordinated and piecemeal responses. It has also boosted accountability of the concerned institutions including the Judiciary, as it provides a peer review mechanism. Important to this function are Court Users Committees (CUCs), grassroot structures at the court station level comprising various justice sector actors. Similar to the NCAJ at the national level, CUCs have been vital in identifying localized solutions to local problems in the justice sector. Headed by the respective heads of court stations and Resident Judges, these CUCs provide forums where complaints relating to the operations of courts are aired.

Beyond the CUCs, the Judiciary has devised other means of engaging with court users. One example is the bar/bench committee meetings, convened by the various High Court Divisions, at which specific challenges and issues relating the administration of justice in the respective divisions are raised and discussed. Another example is the Judiciary open day. These stakeholder engagement fora enhance judicial accountability and promote efficiency in the court room.

Distinguished colleagues,

The Judiciary has taken lead in the development of various rules on case management. Judges and judicial officers are moving from the traditional role of passive arbiters, to more active managers of the course of justice. In both civil and criminal matters, judges have case management powers in pretrial, as the case may be, and throughout the trial processes. This has in turn not only boosted transparency but also saved judicial time. In the Family Division of the High Court, for instance, what is known as the '*P & A File Tracker*' solution is already assisting in management of file movements. Through this system, petitioners are able to

receive updates on the status of their petition via short text message (SMS).

Court Registry Manual

A related development is the streamlining of registry operations and protocols. As we all know, the Registry offers the first point of contact with the court system. In the past, numerous complaints against the Judiciary related to lost and misplaced files. There was also ignorance amongst the public in regard to the operations of our registries and courts. To improve court processes, it was therefore imperative that registry processes be streamlined. It is against this backdrop that the Registry Operations Manual was developed. The manual provides a quick users guide on the processes at the various registries. The manual has served to harmonise the processes in various registries and to inject accountability and predictability. This system for tracking file movement has further reduced cases of lost or misplaced files, an area of particular concern to court users and with a direct impact on the efficiency of courts.

Further, to improve service delivery, we developed two years ago the Citizen's Service Delivery Charter. At its most basic, it contains a set of pledges that judicial officers and staff undertake to abide by and actively promote towards enhancing accountability and promoting efficiency. The Service Charter has been cascaded down to the directorates and departments all of which are required to design custom-made service charters to suit the respective services offered to court users and clients at each service point. These Charters provide service standards that are to guide both management and staff in providing quality and efficient service. Certainly, the public is encouraged to demand and hold officers to these standards.

Distinguished colleagues,

Finally, as an aspect of leveraging information communications technology to make its court services more efficient and, importantly, to enhance accountability particularly in regard to fraud and corruption, we have among others embraced a mobile money transfer service through which court users can pay their fines, court deposits as well as cash bail through mobile-money. At the

moment, over 80% of the 116 court stations across the country now utilize this electronic wallet system. This payment system has gone a long way in injecting transparency and efficiency especially in traffic cases. Under the mobile payment system, court users are able to make direct payments using their mobile phones at the convenience of open courts and corridors. With the realization that traffic cases are a source of acute case backlog, traffic courts are now required to process the payment of traffic fines in open court and ease of payment has also meant dismantling corruption conduits in our court corridors.

Distinguished colleagues,

It is with a lot of humility that I have outlined some of what we consider important changes made in our courts in the past few years. Certainly, by the adoption of a new Constitution in 2010 alone, much has been achieved in laying the infrastructure for judicial accountability. As mentioned briefly above, these measures are a product of a response to history, one mired in judicial decline, corruption and

inefficiency. It is fair to say, even if the jury must be out there, that confidence in the Judiciary has increased and, with this, record numbers of court cases are being filed every day by Kenyans seeking to access justice from our courts. As these measure complement and improve the judicial function, they ineluctably enhance efficiency in our courts. Though challenges remain, we are still learning, and it is herein that collegial transboundary engagements such as these are important in interrogating, reorienting, re-strategising and recalibrating our initiatives.

In conclusion, it is perhaps appropriate to recall the "mythic Greek god Zeus, supreme ruler of Mount Olympus and of the Pantheon of gods who resided there. He upheld law, justice and morals. Zeus held a banquet in celebration of the marriage of Peleus and Thetis."

"Left off the guest list was Eris (goddess of discord), and upon turning up uninvited she threw a golden apple into the ceremony, with the inscription which said: "for the fairest one". Three goddesses claimed the apple: Hera, Athena and Aphrodite."

"Zeus decided that Paris of Troy would judge their cases. Each of the goddesses offered Paris a gift. Hera would give him power, Athena would make him wise, and Aphrodite offered him the love of the world's most beautiful woman, Helen. Paris chose Aphrodite (afro.dye.tee), and Helen's leaving of her previous husband precipitated the Trojan War."

The whole point of invoking this, of course, is to remind us of the place of law and the judicial decision in society since immemorial time. Such is the call, no less exacting as it has been for ages. That is the more reason why judicial accountability is a foundation of change. In my view, what we must remember always is that change is the currency of our time, complacency and stagnancy its counterfeit. We do not have the luxury of letting the opportunity we have go to waste. That is the opportunity, as it is the challenge.

I want to thank you once again for your kind attention and accommodation, and I look forward to learning a great

deal from the upcoming sessions and to engaging with you. I wish you a wonderful conference and fruitful deliberation.

I thank you and may God Bless You.

THE HON. MR. JUSTICE P. KIHARA-KARIUKI,
PRESIDENT, COURT OF APPEAL OF KENYA