

A black and white photograph of the Supreme Court of Kenya building. The building is a large, multi-story structure with a prominent entrance. A banner across the front of the building reads 'THE SUPREME COURT OF KENYA'. A large red diagonal graphic, consisting of two overlapping triangles, is superimposed over the top half of the image, pointing downwards towards the building's entrance.

THE SUPREME COURT OF KENYA

# DEMOCRATIC GAINS AND PITFALLS

THE ROLE OF COURTS IN SAFEGUARDING  
CIVIC SPACE IN KENYA

A CASE DIGEST



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**DEMOCRATIC GAINS AND PITFALLS**  
*The Role of Courts in Safeguarding Civic Space in Kenya*  
**A CASE DIGEST**  
**BY**  
**KENYA HUMAN RIGHTS COMMISSION**

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## **ACRONYMS AND ABBREVIATIONS**

AfriCOG	Africa Centre for Open Governance
AG	Attorney General (State Law Office)
APD	Agency for Peace and Development
ATPU	Anti-Terrorism Police Unit
CAK	Communications Authority of Kenya
CBK	Central Bank of Kenya
CS	Cabinet Secretary
CSOs	Civil Society Organisations
DCI	Directorate of Criminal Investigations
DMS	Device Management System
EKF	Evans Kidero Foundation
FBOs	Faith-Based Organizations
HRDs	Human Rights Defenders
IFES	International Foundation for Electoral Systems
IG	Inspector General (of Police)
IGP	Inspector-General of the Police
IIEC	Interim Independent Electoral Commission
IJM	International Justice Mission
INGO	International Non-Governmental Organization
IPOA	Independent Policing Oversight Authority
IRA	Insurance Regulatory Authority
KEAP	Kenya Electoral Assistance Programme
KFEK	Key Empowerment Foundation Kenya
KHRC	Kenya Human Rights Commission
KI	Katiba Institute
KICA	Kenya Information and Communications Act
KMF	Kalonzo Musyoka Foundation
KTN	Kenya Television Network
LGBTIQ	Lesbian, Gay, Bisexual, Trans-gendered, Intersex and Queer (LGBTIQ) Community

LSK	Law Society of Kenya
MUHURI	Muslims for Human Rights
NGLHRC	National Gay and Lesbian Human Rights Commission
NGO	Non-Governmental Organizations
NP	National Police Service
NTV	Nation Television
PBOs	Public Benefits Organizations
PIL	Public Interest Litigation
RBA	Rights-Based Approaches
RMS	Royal Media Services
RPP	Rights Protection and Promotion Centre
USA	United States of America
USAID	United States Agency for International Development



## **EXECUTIVE SUMMARY**

This Case Digest documents the select cases where the civil society in its broad sense applied Public Interest Litigation (PIL) as the strategy and tool of reversing massive backlash from the Kenyan State mainly between 2014 and 2018.

### **Main Findings**

First, court actions were instituted in protection of the Civil Society Organizations (CSOs) registered as Non-Governmental Organizations (NGOs) where the National NGOs Coordination Board felt like has unfettered powers to make arbitrary and capricious decisions.

While the two and four incidents of respective attacks on the Evans Kidero Foundation(EKF) and Kenya Human Rights Commission(KHRC) represents very systematic targeting, the cases of Muslim for Human Rights(MUHURI) and HAKI Africa presents the most punitive and callous attacks, ending with the deregistration of the organizations, freezing of their bank accounts and suspension of their insurances.

Moreover, the cases of the EKF, Key Empowerment Foundation Kenya and Kalonzo Musyoka Foundation (KMF) presents a politically motivated attacks targeting the initiatives of families associated with the opposition between 2003 and 2007.

Further, court actions were instituted in the protection of the civil society organizations registered as companies limited by guarantees to which the NGOs, Coordination Board zealously wanted to extent its irregular jurisdiction under the wrong assumptions that it has a sweeping mandates over every civic organization irrespective of the diverse regimes governing them. The cases of the African Centre for Open Governance (AfriCOG), International Federation of Electoral Systems (IFES) and Katiba Institute (KI) presents this situation.

In addition, KHRC also went to court to protect various Human Rights Defenders (HRDs) who are arbitrarily arrested for allegedly being involved in illegal assemblies or violently targeted or killed for being steadfast in their struggles for justice and accountability in the country. The arrest of Happy Olal and colleagues (in 2016) and the killing of Willie Kimani and two others (in 2016) are the unfortunate cases in point.

Further still, we petitioned courts in furtherance of creating an enabling environment for CSOs, media houses, bloggers and journalists. It is on that basis that the cases advancing the commencement of the Public Organizations (PBO Act) and challenging such repressive policies like the Kenya information and Communication Act (KICA) and surveillance gadgets proposed by the Communication Authority of Kenya(CCK) against the telecommunication companies in Kenya was instituted. This also entails the protection of the freedoms of association by the sexual minorities in Kenya. Thus the case seeking the registration of the National Gay and Lesbian Human Rights Commission (NGLHRC- between 2013 to date) is historical.

In most of these above cases, the NGOs Coordination Board was the key duty bearer targeted for its unfair administrative actions. Other agencies targeted for directed by the Board or directly culpability includes the Kenya Revenue Authority (KRA), Central Bank of Kenya (CBK), The National Police Service (NPS), Inspector General of Police (IG), Attorney General (AG), and CAK among others.

Courtesy of our progressive Constitution and judicial activism enshrined within both the Constitution and the Judiciary, the court have made very progressive decisions which shaped the existence of the affected organization or reversed repugnant legal and administrative actions.

## 1 FINDINGS FROM NOTABLE CASES

Beyond the above cases, five (5) of others could be enumerated as follows:

### 1.1 In the case of MUHURI and HAKI Africa:

The High Court ruled on 12<sup>th</sup> June 2015 that the organizations had no links to terrorism, but fell short of giving an explicit order to unfreeze their bank accounts. The two organizations appealed the ruling and on 12<sup>th</sup> November 2015, the High Court found that the Inspector-General's action to freeze their accounts was unconstitutional and therefore null and void. The court ordered the immediate unfreezing of the accounts.<sup>1</sup> In the words of Justice Anyara Emukule:

*“In these orders, I am merely emphasizing that the citizens of Kenya, such as the Petitioners, the ruled, those governed, and the rulers or governors, such as the Respondents are subject to the Constitution and the rule of law, that the fight against terrorism must be conducted in strict adherence to the letter and spirit of the Constitution, and the law, that is the rule of law, for the law was made for man, and not man for law.”*

### 1.2 In the first case of the KHRC:

The court found that the failure by the NGOs Coordination Board to give notice to the NGO prior to the hearing and before arriving at a decision to cancel its registration was a violation of the constitutional right. The court further found that this failure was compounded when the NGO board failed to furnish written reasons to the KHRC despite the fact that the organization had written, asking for such reasons. In his words, Justice Louis Onguto, stated:

*“that the decision by the Respondent to commence and or effect the process of deregistering the Petitioner as a non-governmental organization under the NGOs Coordination Act, 1990 was riddled with impropriety and procedural deficiencies contrary to Articles 47 and 50(1) of the Constitution. The same position applies to the decision to order or direct the freezing of the Petitioner's bank accounts.”*<sup>2</sup>

### 1.3 In the second case of KHRC:

The court further stipulated that the NGOs Board acted against the Constitution and fair administrative action by failing to accord the organisation a hearing before making the decision. In his words, Justice Chacha Mwita, observed as follows:

*“In that regard therefore, the Respondent's Executive Director acted outside his mandate in advising the Central Bank of Kenya to freeze KHRC's bank accounts. It would appear the Respondent was only interested in paralysing the operations of the organisation, not enforcing the law. Neither were the actions in public interest nor in pursuit of justice.”*

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<sup>1</sup>See full judgment, visit: <http://kenyalaw.org/caselaw/cases/view/116382/>, accessed October 07, 2018.

<sup>2</sup> See full judgment in the Petition 495 of 2015 Visit, <http://kenyalaw.org/caselaw/cases/view/121717/> accessed October 07, 2018.

#### **1.4 In the case of AfriCOG:**

The High Court quashed the decision by NGOs Coordination Board, and specifically, the Executive Director Fazul Mohammed, to deregister AfriCOG for allegedly operating illegally. The court prohibited the Directorate of Criminal Investigations (DCI) from investigating and prosecuting seven directors of the lobby group over illegal operations. In addition, the court barred the Central Bank of Kenya from freezing the NGO's accounts. In the words of Justice George Odunga, it was stated:

*“...if it is proved that in purporting to exercise the powers donated to him by law a public officer has gone out of control or has exceeded the legal parameters and criteria set out for the exercise of his jurisdiction, the leash of the supervisory jurisdiction of the High Court must be activated and invoked.”*

#### **1.5 In the case of International Foundation for Electoral Systems (IFES):**

The court upheld that provisions of the said NGOs Coordination Act were only applicable to the registration and coordination of Non-Governmental Organizations in Kenya and for connected purposes. It clearly did not apply to other entity, which does not fall within the definition of a NGO. As IFES was registered as a company, then the Respondent and the 1st Interested Party had no jurisdiction over IFES and the directives purportedly given were illegal and unconstitutional.

#### **1.6 Affirmation of Constitutional Rights**

From the above decisions and many more as seen in this Report, Courts were able to powerfully and consistently affirm the following rights and freedoms, such as Freedom of Association, Assembly, Information, Expression, Fair Administrative Action, Rights, Fair Hearing among others. Further, in the Constitution, the following are guaranteed and were affirmed:

- Article 26: Right to Life
- Article 27: Equality and Freedom from Discrimination
- Article 29: Freedom and Security of the Person
- Article 33: Freedom of Expression
- Article 34: Freedom of the Media
- Article 35: Access to Information
- Article 36: Freedom of Association
- Article 37: Assembly, Demonstration, Picketing and Petition
- Article 47: Fair Administrative Action
- Article 48: Access to Justice
- Article 50: Fair Hearing

#### **Challenges of the Cases**

##### **i) Contempt of Court**

As documented in the PBO Case, on October 31<sup>st</sup> 2016, the High Court also gave a ruling compelling the government to gazette the Commencement Date by 11<sup>th</sup> November 2016. Despite this court order, the Act was not operationalized, to date. Subsequently, the CSOs resorted to going back to court, and on 23<sup>rd</sup> May 2017, and the High Court found the Cabinet Secretary in charge of the Ministry of Interior and Coordination

of National Government in contempt of court for failing to adhere or abide the previous court order of October 2016.

In the latter case, the court ordered, again, commencement within 30 days from the date of that judgment. The 30 days lapsed, and the Act is yet to be commenced, to date of this publication. The executive arm of government, and specifically the current Cabinet Secretary in the Ministry of Interior, remains in contempt of court.

## **ii) Some Repugnant Decisions<sup>3</sup>**

A Member of Parliament from Nyeri Town, Ngunjiri Wambugu, filed a petition on June 28, 2016 before Justice J.A Makau calling for the IG, Interior and Coordination of National Government Cabinet Secretary (CS) and the Attorney General (AG) to declare that the right to demonstrate should be allowed only on condition that protesters conduct themselves peaceably and unarmed. Hon. Wambugu in his petition claimed that previous demonstrations have led to loss of life and property hence the need to ensure those not demonstrating are not affected during such protests. He argued that it is possible to assemble and demonstrate peacefully without infringing on other people's rights and fundamental freedoms<sup>4</sup>.

The High Court ordered the IG and Interior CS to formulate a code of conduct for conveners of demonstrations. The code should include detailed explanations of how they intend to ensure non-demonstrators are not adversely affected by such assemblies. The same should provide a clear line of responsibility of who is liable in case of loss of life or property.

The judge said formulating of regulations that will limit the right to picket is of utmost importance as it will enable in resolving the dilemma that has failed the country in managing, controlling and containing the violent demonstrations that have threatened the peace of the country. Justice J.A Makau stated:

"In this country it's no longer a secret that demonstrations have escalated from peaceful and unarmed gathering to a violent unruly and unlawful gathering which end clouding the real agenda," he said.

## **1.7 Main Recommendations**

From KHRC's perspectives, we make the following recommendations:

- i) CSOs should continue holding state institutions and officers individually responsible for violating the Constitution and other laws, and their non-compliance with court orders. Indeed Article 232(Part 1) of the Constitution on the "Values and Principles of Public Service" provides for among others: "accountability for administrative acts" for all the State organs and state corporations at the national and devolved levels of government.
- ii) There is need to continuously challenge, both in Court and Parliament, the public decisions which affronts the constitutional threshold in Article 24(1) which expects limitations which are only "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."
- iii) The government advance the immediate and unconditional payment of remedies awarded to the different organizations and individuals who suffered diverse harms and inconveniences

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<sup>3</sup> <http://kenyalaw.org/caselaw/cases/view/178860/>

<sup>4</sup> <https://www.the-star.co.ke/news/2019-08-19-protesters-to-have-rough-time-as-court-spells-out-conditions-for-demos/>

- following the bad decisions of the government. The cases of KHRC and Olal and others are instructive.
- iv) There is need to audit, review and/or repeal all the retrogressive and unconstitutional laws and policies which have been appropriated by the above-mentioned government agencies to cause repression, violate human rights and limit space for the many civic and other independent organizations voices in the society. The colonial era “Penal Code” remains one of the most oppressive legislation.
  - v) The government should implement the Public Benefits Organizations (PBOs) Act, according to the court orders issued on October 31<sup>st</sup> 2016, compelling the executive to gazette the commencement date by November 11, 2016. This will go a long way in creating an enabling and conducive environment for the civil society organizations.
  - vi) There is need for continuously creating awareness among the different State, non-State (CSOs, corporations and masses) about our very progressive Constitution and Court decisions relating to these issues and the broader questions of good governance advanced in Article 10. This will foster more consciousness, commitment and compliance with the just rule of laws and practices.
  - vii) Finally, as Kenyans, we need to strive to zealously guard, and protect judicial independence, as it is the only pillar against executive tyranny. Judicial activism has been critical in protecting the targeted organizations and individual.

In conclusion, we should all try and nurture a State which is envisaged in Article 4(2) of the Constitution that: “the Republic of Kenya shall be a multi-party democratic State founded on the principles and values of governance referred to in Article 10”. Finally, as Philip Randolph<sup>5</sup> declares, we need to remember thus:

*"A community is democratic only when the humblest and weakest person can enjoy the highest civil, economic, and social rights that the biggest and most powerful possess."*<sup>6</sup>

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<sup>5</sup> Philip Randolph (April 15, 1889 – May 16, 1979) was a leader in the Civil Rights Movement, the American labour movement, and socialist political parties. In 1925, he organized and led the Brotherhood of Sleeping Car Porters, the first predominantly African-American labour union.

<sup>6</sup> <https://www.azquotes.com/quote/240211?ref=democracy-and-human-rights>

## 2 BACKGROUND: THE POLITICAL CONTEXT

Despite Kenya having a vibrant sector of NGOs and CSOs, they still face several obstacles in recent years. From 2013, when the current government of the Jubilee Coalition assumed office, there have been several attempts by the government to constrain the civic and democratic space.

This has been done through punitive and prohibitive governance frameworks targeting the Public Benefits Organizations (PBOs), Faith-Based Organizations (FBOs), media organizations, trade unions, and Constitutional Commissions and Independent Offices, among other independent State and non-State actors.

As documented in one KHRC Report, *Towards a Protected and Expanded Civic Space in Kenya and Beyond*, these measures have either been covert or overt and include: burdensome registration requirements for civic actors and other registration restrictions; restricting financing from foreign sources; harassment of staff and partners, arrests and intimidation during outreach activities; censorship, clampdowns and de-registration; specific targeting of individuals for extortion, arrests and brutalization; and also challenges in obtaining work permits and visas, challenges of in country registration of international agencies, among others.<sup>7</sup>

Further, the government has also attempted and sometime succeeded in proportionate penalties for non-compliance with regulatory laws; difficulties in getting approvals from governments especially for the Rights-Based Programmes (RBA) as compared to humanitarian programmes; undue surveillance by security forces; limited government consultation with respect to policy development; and finally, banning or criminalization of protests and other forms of picketing, limiting the ability of citizens to organize and demonstrate among many more covert or overt measures.<sup>8</sup>

The PBOs Act, which regulates the sector, and which was assented to in January 2013 and has to date of this publication, never been commenced. Instead, the law has faced several bureaucratic attempts to introduce draconian amendments to restrict the operations of the sector. Also reported, have been many attempts to frustrate the operations of other independent actors, voices and institutions in Kenya through retrogressive legal and administrative frameworks.

In December 2014, and again in December 2015, a total of 540 NGOs and 959 NGOs respectively were targeted for deregistration by the NGOs Coordination Board, an attempted exercise that failed to demonstrate substantive grounds for such a cause.

In the run up to the 2017 General Election, the work of Human Rights Defenders (HRDs) and CSOs around electoral processes such as voter registration and election observation, were particularly targeted by the State. The State actively championed the view that these electoral programs had been ‘infiltrated by foreign interests’. This was aimed at delegitimizing the crucial work CSOs’ play in elections’ processes and cycles.

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<sup>7</sup> For details see, *Towards a Protected and Expanded Civic Space in Kenya and Beyond: A Status Report and Strategy Paper Developed for the Civil Society Sector in Kenya*, October 2016. Visit: <https://www.khrc.or.ke/civic-space-publications/173-towards-a-protected-and-expanded-civic-space-in-kenya-and-beyond/file.html>, accessed October 06, 2018.

<sup>8</sup> Ibid

## **3 MAJOR COURT ACTIONS BY THE DIFFERENT ACTORS TARGETED**

### **3.1 Court Action by CSOs Registered under the NGOs Act**

This represents the civil society organizations registered under the National Non-Governmental Organizations (NGO) Coordination Act of 1990. The Act establishes the NGOs Coordination Board (The NGO Board) and Bureau as the agencies responsible for policy and operations, respectively.

#### **3.1.1 The Case of MUHURI and HAKI Africa**

This case covers one of the most punitive and devastating attacks on NGOs by the State through joint actions by the NGO Board, Bureau, Inspector General of Police (IGP), Central Bank of Kenya (CBK), Kenya Revenue Authority (KRA), the Insurance Regulatory Authority (IRA) among others.

Based in Mombasa, Muslims for Human Rights (MUHURI) has been involved in promoting good governance and respect for the human rights of marginalized groups since 1997. It seeks to enhance the capacity of the coastal communities to hold State and non-State actors accountable for human rights violations; increase public participation in the political, social, and economic development of the coastal communities; and finally, progressively mainstream gender perspectives into the policies, institutions, and practices of the communities.<sup>9</sup>

Regardless of mainly working in the coastal areas of Kenya, MUHURI also addresses national issues that have a bearing on country as a whole, such as counter- and anti-terrorism, extrajudicial executions and enforced disappearances.<sup>10</sup>

Initiated in 2012, the second organization affected was HAKI Africa is also human rights organisation based in Mombasa working to improve livelihoods and enhance the progressive realisation of human rights in Kenya. . In particular, the organization seeks to agitate for the recognition and empowerment of local communities in Kenya to fully participate in rights and development initiatives with a view to improving the standards of living amongst all including the poor and marginalized.<sup>11</sup>

While the word “Haki” is Swahili for “justice” or “human right”, the organization has given meaning to the four letters which stand for Humanity; Activism; Knowledge; and finally, Integrity. From the foregoing, the first value of humanity represents the desire to see human rights and dignity guaranteed to all. Activism is meant to get individuals and communities to be proactive in addressing issues that affect them. Knowledge is the organization’s ambition to ignite a thirst for knowledge and to get rid of ignorance. Integrity is the aspiration to promote transparency and accountability across all levels of governance.<sup>12</sup>

#### **The Attacks**

A week after the attack on Garissa University in April 02, 2015, 85 companies and NGOs, including MUHURI and HAKI Africa, were designated as “specified entities” by the Inspector General of the Police

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<sup>9</sup> <http://www.muhuri.org/muhuri/pgs/visionmission.php>, accessed October 06, 2018.

<sup>10</sup> <http://www.muhuri.org/muhuri/pgs/visionmission.php>, accessed October 06, 2018.

<sup>11</sup> <http://haki africa.or.ke/about-us/>, accessed October 07, 2018.

<sup>12</sup> <http://haki africa.or.ke/about-us/>, accessed October 07, 2018.



(IG) in a Gazette Notice (No. 2326 of 2015), a step before being classified as a terrorist organization under the Prevention of Terrorism Act.<sup>13</sup>

Five days later, the NGOs Board cancelled the licenses of MUHURI, HAKI Africa, and the Agency for Peace and Development (APD). The cancellation was ‘informed’ by alleged links to terrorism.<sup>14</sup> On 20 and 21 April, KRA raided the offices of MUHURI and Haki Africa, disabling their servers, confiscating computer hard drives and other documents to determine whether the two organizations were tax compliant.

Moreover, as CBK moved in to freeze their accounts, the Insurance Regulatory Agency (IRA) instructed and effected the cancellation of the medical and car insurances accorded to the staff and vehicles of the two organizations. All these ruthless actions literally halted the operations of the two organizations.

### **The Court Action**

In the Petition that was filed before the High Court, MUHURI and Haki Africa sought declarations that the respondents, especially the IG, had acted contrary to the law in exercising their powers under the Constitution and the applicable law. The parties sought a declaration that freezing of their accounts was also illegal and unconstitutional and in violation of the petitioners fundamental freedoms which was contrary to Art.47 of the constitution and the Fair Administrative Act.<sup>15</sup>

Further, the petitioners also sought a conservatory order lifting the suspension of organizational bank accounts until the hearing and determination of the case. The basis of this claim was that they had not been informed of the reasons they were declared a terrorist organization which was contrary to Article 238 of the Constitution and Section 3 of the Prevention of Terrorism Act. Finally, they contended that their right to the presumption of innocence and fair trial guaranteed under Article 50 of the Constitution was violated.

### **The Decisions**

The High Court ruled on 12<sup>th</sup> June 2015 that the organizations had no links to terrorism, but fell short of giving an explicit order to unfreeze their bank accounts. The two organizations appealed the ruling and on 12<sup>th</sup> November 2015, the High Court found that the Inspector-General’s action of ordering the freeze of their accounts was unconstitutional and therefore null and void. The court ordered the immediate unfreezing of the accounts.<sup>16</sup> In the words of Justice Anyara Emukule:

*“In these orders, I am merely emphasizing that the citizens of Kenya, such as the Petitioners, the ruled, those governed, and the rulers or governors, such as the Respondents are subject to the Constitution and the rule of law, that the fight against terrorism must be conducted in strict adherence to the letter and spirit of the Constitution, and the law, that is the rule of law, for the law was made for man, and not man for law.”<sup>17</sup>*

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<sup>13</sup> On 2 April 2015, gunmen stormed the Garissa University College in Garissa, Kenya, killing 148 people, and injuring 79 or more. The militant group and Qaeda offshoot, Al-Shabaab, which the gunmen claimed to be from, took responsibility for the attack. The gunmen took over 700 students hostage, freeing Muslims and killing those who identified as Christians. The siege ended the same day, when all four of the attackers were killed. Five men were later arrested in connection with the attack, and a bounty was placed for the arrest of a suspected organizer. Visit: [https://en.wikipedia.org/wiki/Garissa\\_University\\_College\\_attack](https://en.wikipedia.org/wiki/Garissa_University_College_attack), accessed October 07, 2018.

<sup>14</sup> US Department Country Rights Report on Human Rights Practices 2015, Page 37. Visit: <https://www.state.gov/j/drl/rls/hrrpt/2015/>, accessed October 07, 2018.

<sup>15</sup> Petition No. 19 of 2015, Muslims for Human Rights & another vs. the Inspector General of police & 7 others. Visit: <http://kenyalaw.org/caselaw/cases/view/110659/>, accessed October 06, 2018.

<sup>16</sup> See full judgment, visit: <http://kenyalaw.org/caselaw/cases/view/116382/>, accessed October 07, 2018.

<sup>17</sup> See full judgment, <http://kenyalaw.org/caselaw/cases/view/130268/>, accessed October 06, 2018

### **3.1.2 The Cases of the Kenya Human Rights Commission**

This case covers a situation of what could easily be described as the most targeted and maligned organization in Kenya. KHRC was attacked record 4 times, first in October 2015 and thrice in January, August and October 2017 with the last 2 episodes coinciding with the General Elections and the repeat presidential elections, respectively. The ‘political accusations’ have remained the same, from government’s vague claims on non-payment of taxes, running irregular bank accounts, illegal hiring of migrants. The first instance included allegations of funding terrorism.

The Kenya Human Rights Commission (KHRC) is a premier and flagship national NGO in Kenya, and Africa at large, which was established and incorporated in 1992 by Kenyans exiled in the United States of America (USA). Later, KHRC was registered in Kenya in 1994. KHRC driven by a Vision of “securing human rights States and societies” and the Mission “to foster human rights, democratic values, human dignity and social justice”.<sup>18</sup> Its mandate is to enhance human rights centred governance at all levels.

The KHRC espouses a very holistic concept of human rights that straddles interventions that are executed under four independent strategic objective and thematic programmes that include: transformative justice; economic and social justice; political pluralism and diversity; and finally, institutional support and development.<sup>19</sup> All these programmes are aimed at creating synergy and delivering at the county, national, regional and global levels.

#### **The Attacks**

On 28<sup>th</sup> October 2015, the NGOs Board notified 957 NGOs, through its Executive Director, Fazul Mohammed of their requirement to submit their audited bank accounts within two weeks or be deregistered. The Board accused the NGOs of misappropriation of funds, funding of terrorism, money laundering, and diversion of donor money and failing to file their audited books of accounts as required by law.

Without due regard to legal and constitutional requirements for fair administrative action, including issuing sufficient notice and fair hearing to the affected organisations, the NGOs Board issued a press statement to the effect that it had allegedly carried out a forensic audit on 10,015 NGOs, among them the KHRC, established that some NGOs had failed to account for funds they had received despite numerous reminders.

The Board announced that it had, with immediate effect, initiated deregistration of 957 of these organizations among them the KHRC, and had forwarded the list to several public authorities to effect the de-registration process. The Board claimed that the KHRC had failed to account for about Ksh. 1.3 Billion. However the agency failed to substantiate when asked to do so by the KHRC or in court when KHRC filed proceedings against the NGO Board.

Further, and in August 2017, the Board attempted to deregister the KHRC for alleged tax evasion, illegal bank accounts and illegal hiring of expatriates. In a letter dated 14<sup>th</sup> August 2017 that was shared directly to the media, without due notice or knowledge by the KHRC, Fazul Mohammed, stated that the KHRC was

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<sup>18</sup> Visit: <https://www.khrc.or.ke/about-us.html>, accessed October 06, 2018.

<sup>19</sup> Visit: <https://www.khrc.or.ke/programmes.html>, accessed October 06, 2018.

operating four illegal bank accounts – two at NIC bank<sup>20</sup> and two others at the Commercial Bank of Africa(CBA) – contravening the terms and conditions attached to the certificate of registration. <sup>21</sup>

Further, it was averred that the KHRC was employing expatriates without valid work permits, “contrary to the provisions of The Kenya Citizenship and Immigration Act, 2011, the NGOs Coordination Act 1990, the attendant regulations of 1992 and the terms and conditions attached to [the] certificate of registration”. <sup>22</sup>

### **The Court Actions**

The High Court allowed the petition by the KHRC challenging the first decision of the NGOs Board which threatened to cancel the registration certificate for the organization.<sup>23</sup> The KHRC also filed legal proceedings against the Board regarding the August 2017 attacks. KHRC argued that the move was unreasonable and against its expectations as it was not given a chance to defend its self. <sup>24</sup>

### **The Court Decisions**

Regarding the first attacks in October 2015, the court found that the failure by the NGOs Coordination Board to give notice and a hearing to the NGO before arriving at a decision to cancel its registration was a violation of the constitutional right. The court further found that this failure was compounded when the NGOs Coordination Board failed to furnish written reasons to the KHRC despite the fact that the organization had written, asking for such reasons. In his words, Justice Louis Onguto, stated:

*“that the decision by the Respondent to commence and or effect the process of deregistering the Petitioner as a non-governmental organization under the Non-Governmental Organizations Co-ordination Act, 1990 was riddled with impropriety and procedural deficiencies contrary to Articles 47 and 50(1) of the Constitution. The same position applies to the decision to order or direct the freezing of the Petitioner’s bank accounts.”* <sup>25</sup>

In making a ruling on the August 2017 matter, the court declared that the Executive Director of the NGOs Coordination Board (Fazul Mohammed), acted beyond his mandate when he further directed KRA to recover accrued taxes. The court further stipulated that the Board acted against the Constitution and fair administrative action by failing to accord the organisation a hearing before making the decision. In his words, Justice Chacha Mwita, observed as follows:

*“In that regard therefore, the Respondent’s Executive Director acted outside his mandate in advising the Central Bank of Kenya to freeze KHRC’s bank accounts. It would appear the*

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<sup>20</sup> National Industrial Credit Bank Ltd

<sup>21</sup> See media coverage, [https://www.kenyans.co.ke/news/21751-ngo-coordination-board-deregisters-kenya-human-rights-commission-khrc?page=2&fb\\_comment\\_id=1349048268547582\\_1349128415206234](https://www.kenyans.co.ke/news/21751-ngo-coordination-board-deregisters-kenya-human-rights-commission-khrc?page=2&fb_comment_id=1349048268547582_1349128415206234), accessed October 06, 2018.

<sup>22</sup> Ibid

<sup>23</sup> Petition 495 of 2015, Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016], eKLR. Visit: <http://kenyalaw.org/caselaw/cases/view/121717/>, accessed October 07, 2018

<sup>24</sup> Petition 404 Of 2017, KHRC and the Community Advocacy and Awareness Trust VS NGOs Coordination Board. Visit: <http://kenyalaw.org/caselaw/cases/view/147166/>, Accessed October 07, 2018.

<sup>25</sup>See full judgment in the Petition 495 of 2015 Visit, <http://kenyalaw.org/caselaw/cases/view/121717/> accessed October 07, 2018.

*Respondent was only interested in paralysing the operations of the organisation, not enforcing the law. Neither were the actions in public interest nor in pursuit of justice.”<sup>26</sup>*

Pursuant to the above, the court ordered the Board to pay KHRC compensation amounting to two million Kenya shillings, reiterating that the directive to CBK to freeze the KHRC’s bank accounts was illegal. The NGOs Coordination Board has recently written to the KHRC proposing to settle the said payments in two tranches.

### **3.2 Court Actions by CSOs Registered as Companies**

The Company’s Act in Kenya allows for registration of certain categories of companies limited by guarantee that can undertake certain social interventions in the society. This has accorded room for the incorporation of many CSOs. However, the NGO Board has taken a retrogressive posture that all organizations undertaking civic actions in Kenya, irrespective of the legal regimes should be regulated by his office.

It is against this background that Fazul Mohammed expanded his expeditions to some select CSOs, which usually report under the Registrar of Companies. Thus, The Africa Centre for Open Governance (AfriCOG), International Foundation for Electoral Systems (IFES) and Katiba Institute (KI) found themselves on the receiving end of the Board. While AfriCOG and IFES matters ended up in court that of KI was were prosecuted through political advocacy by sector members.

#### **3.2.1 The Case of Africa Centre for Open Governance**

The Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organization that provides cutting-edge research and monitoring on governance and public ethics issues in both the public and private sectors so as to address the structural causes of the crisis of governance in Kenya.

The overall objectives of the AfriCOG programmes are: i) to promote the implementation of the Constitution of Kenya 2010; ii) strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy; and ii), to build Kenya’s capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors in Kenya.<sup>27</sup>

#### **The Attacks**

Following the above attempt to deregister the KHRC, on August 15<sup>th</sup> 2017, the NGOs Board made a similar attempt at the AfriCOG. The board, in a letter to then head of the Directorate of Criminal Investigations (DCI), Ndegwa Muhoro, alleged that AfriCOG had been operating illegally because it “is not registered under the NGOs Coordination Act 1990 as required by law and continues to operate as a charitable organization in direct contravention of Section 22 (of NGOs Co-ordination Act 1990) which according to the Act is an offence punishable by law.”<sup>28</sup> The Director also quoted Regulation 75 of the Act and the attendant regulation, which requires all organizations engaging in charitable activities to rescind their various registrations and obtain new registration.

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<sup>26</sup>See full judgment, <http://kenyalaw.org/caselaw/cases/view/147166/>, accessed October 07, 2018.

<sup>27</sup> <https://africog.org/about-us/>, accessed October 06, 2018

<sup>28</sup> See, *Daily Nation*, *Fazul Mohamed's sword now targets AfriCOG*. August 15, 2017. Visit: <https://www.nation.co.ke/news/africa/NGOs-board-shuts-Africa-Centre-for-Open-Governance-AfriCOG/1066-4057960-soyu16/index.html>, accessed October 06, 2018

In this letter, the Board purported to issue instructions to the DCI to close down the operations of this organization; arrest the directors and members of AfriCOG, for contravening the foregoing provision; and also, arraigning and prosecuting them in a court of law. The NGOs Coordination Board further purported to further instruct all the directors of AfriCOG to cease all operations with immediate effect until the organization acquires a certificate of registration. Finally, the Board in the letter purported to instruct CBK to freeze all bank accounts belonging to AfriCOG.

These arbitrary actions by the NGO Coordination Board seemed to be a deliberate attempt at frustrating NGOs purported to have reproached the government before, during and after the 2017 General Election. Just before the August 08, 2017 polls, AfriCOG Executive Director, Gladwell Otieno, had asked the courts to compel the Independent Electoral and Boundaries Commission (IEBC) to open up the voters register for public scrutiny. She had partly won the battle after the IEBC told the court that the register was already open online.

### **The Court Actions**

In a petition to the High Court, AfriCOG sought an order to quash the decision of the NGOs Board contained in its letter dated 15<sup>th</sup> August 2017, the applicants submitted that the' actions were arbitrary; that the 4th Respondent does not possess any powers whatsoever to make demands, issue directives and/or recommendations whatsoever relating to the 1st applicant's activities and/or operations.<sup>29</sup>

The petitioners noted that letter cited a legal regime that did not apply to the applicant. They insisted that since its incorporation the 1st applicant operated publicly, religiously and diligently complying with all statutory and regulatory regulations under the Companies Act. The petitioners also noted that the conduct and actions of the respondents were intended to distract the 1st applicant's activities relating to the 2017 General Election in particular observation, research and possible litigation arising from that election.

### **The Court Decisions**

Quoting previous similar matters before, the court noted that in the past, it raised its concern on the manner in which the said 3<sup>rd</sup> and 4<sup>th</sup> Respondents (Mohammed Fazul and the NGOs Coordination Board, respectively) purport to carry out their mandates.

The High Court quashed the decision by NGOs Board, and specifically, the Executive Director Fazul Mohammed, to deregister the AfriCOG for allegedly operating illegally. The court prohibited the DCI from investigating and prosecuting seven directors of the lobby group over illegal operations. In addition, the court barred the Central Bank of Kenya from freezing the NGO's accounts. In the words of Justice George Odunga, it was stated:

*"...if it is proved that in purporting to exercise the powers donated to him by law a public officer has gone out of control or has exceeded the legal parameters and criteria set out for the exercise of his jurisdiction, the leash of the supervisory jurisdiction of the High Court must be activated and invoked."*<sup>30</sup>

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<sup>29</sup> See full judgment, Miscellaneous Application 598 of 2017 Republic Vs. Cabinet secretary Ministry of interior and National Coordination & 6 others, Ex-parte, accessed October 07, 2018.

<sup>30</sup> See full judgment, <http://kenyalaw.org/caselaw/cases/view/145604/>, accessed October 07, 2018.

### **3.2.2 The Case of the IFES**

The International Foundation for Electoral Systems (IFES) has a long working history in Kenya. Between 1992 and 2002, IFES conducted four electoral assessment missions for three national electoral cycles. In 2010, IFES provided technical support to the Interim Independent Election Commission (IIEC) on the implementation of an electronic results transmission system, which resulted in a timely, transparent release of constitutional referendum results as well as the subsequent by-election results.

In August 2010, Kenya promulgated a new Constitution, which included the establishment of a new independent election management body, the Independent Electoral and Boundaries Commission (IEBC). Since 2011, IFES has provided technical assistance to the IEBC in the areas of voter registration, results transmission, and oversight of political parties, civic education, and dispute resolution to facilitate the IEBC's role in conducting transparent, credible and violence-free elections.<sup>31</sup>

#### **The Attacks**

In December 2016, the NGOs Board cancelled the Kenya Electoral Assistance Programme (KEAP) that was being undertaken through the United States Agency for International Development (USAID) through IFES. In a letter dated 19<sup>th</sup> December 2016, Fazul Mohammed, directed the IFES Kenya office to immediately cease all operations in the country including the implementation of the KEAP.

In the letter, Mohammed accused USAID of engaging the American International NGO (INGO) that is not registered in Kenya as required by law. All its staff were also said to be working in the country illegally because none of them had work permits. In the letter, he also purported to advise the Central Bank of Kenya to immediately preserve all bank accounts and any other funds held under the name of IFES until further communication from this office.

This action by the Board came a week after President Kenyatta claimed foreigners were pumping in billions of money “in the guise of civic education”, but funds he said were meant to influence regime change.<sup>32</sup>

#### **The Court Action and Decision**

In a petition to the High Court, the applicants averred that IFES was not an NGO but registered in Kenya under the Companies Act.<sup>33</sup> The applicant contended that the 1<sup>st</sup> Interested Party acted illegally in exercising his mandate, since legally and operationally, the Respondent was only responsible for organizations under the NGO Coordination Act.

The court upheld that provisions of the said Act were only applicable to the registration and coordination of Non-Governmental Organizations in Kenya and for connected purposes. It clearly did not apply to other entity, which does not fall within the definition of a NGO. As IFES was registered as a company, then the Respondent and the 1st Interested Party had no jurisdiction over IFES and the directives purportedly given were illegal and unconstitutional.

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<sup>31</sup> <http://www.ifes.org/kenya>, accessed October 06, 2018

<sup>32</sup> Op Cit

<sup>33</sup> See, The Star, December 23, 2016, *High Court stops NGOs board from deregistering IFES*, [https://www.the-star.co.ke/news/2016/12/23/high-court-stops-ngos-board-from-derigestering-ifes\\_c1478002](https://www.the-star.co.ke/news/2016/12/23/high-court-stops-ngos-board-from-derigestering-ifes_c1478002), accessed October 07, 2018.

### **3.2.3 The Case of Katiba Institute**

Katiba Institute is incorporated, as from 2011, as a (non-profit) company limited by guarantee and without a share capital under the Companies Act of Kenya. The Institute is dedicated to improving implementation and understanding of the constitution through research, publications and Public Interest Litigation (PIL) in partnership with donor agencies, government agencies, and NGOs. The Institute works with partners to promote changes in individual behaviour and community environments using communications and social marketing strategies.<sup>34</sup>

#### **The Attacks**

On 4 November, 2017, some sections of the Kenyan media reported that the NGO Board had summoned the leadership of three organisations, one of which was Katiba Institute.<sup>35</sup> The reason for the summons was for questioning regarding the organisation's finances. Based on media reports, the Board alleged that the organisation had failed to provide a true reflection on the state of its finances. In addition, the Board reportedly warned of unnamed legal consequences should these organisations fail to honour the summons.

#### **The Political Actions**

In a solidarity press statement issued by the KHRC in collaboration with partner organisations, it was noted that it was not a coincidence that the NGO Board had decided to come after these organisations at this time. All three, including KI had been instrumental in documenting and calling for free, fair, and credible elections in the 2017 election cycle. In addition, all organisations, including Katiba institute had in one way or another been involved in litigation and other advocacy around elections issues.<sup>36</sup>

The Institute was in the process of instituting legal proceedings on the constitutionality of the Election Laws (Amendment) Act 2017 that had been then passed. In the statement, CSOs partners noted that they were aware of plans to target, intimidate, and subvert the work of civil society organisations in the then near future. This was part of a larger scheme to intimidate institutions and organisations who had dared to dissent with or contradict with the official government line.<sup>37</sup>

### **3.3 Court Action by Affected Foundations**

Foundations are registered under the NGO Coordination Act. Most of those targeted were either owned or led by political leaders in the opposition towards and during the 2017 General Elections. We here by analyze the cases of the Kalonzo Musyoka Foundation<sup>38</sup>, Key Empowerment Foundation Kenya<sup>39</sup> and Evans Kidero Foundation (EKF)<sup>40</sup>, that were attacked in 2017. For EKF, this was the second incident, following the first one in December 2016.

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<sup>34</sup> <http://www.katibainstitute.org/about-us/> accessed October 06, 2018

<sup>35</sup> See Press Statement on Intimidation of Civil Society Organizations: <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/635-statement-on-intimidation-of-civil-society-organisations.html>, accessed October 05, 2018.

<sup>36</sup> Ibid

<sup>37</sup> Press Statement on Intimidation of Civil Society Organizations, Loc Cit.

<sup>38</sup> By the former Vice President, now Party Leader of the Wiper Democratic Party and Deputy Party leader of the National Super Alliance (NASA), part of the top opposition political parties. The Foundation's board of directors are his wife Pauline Musyoka and Mrs Martha Mulwa

<sup>39</sup> Led by Rosemary Odinga, daughter to Raila Odinga, the former Prime Minister, Party leader to the Orange Democratic Movement (ODM) and NASA. NASA was the main coalition for the oppositionist parties.

<sup>40</sup> Evans Kidero was then the Governor of the Nairobi Party and a key member of ODM and NASA.

### **3.3.1 The Kalonzo Musyoka Foundation (KMF)**

The Kalonzo Musyoka Foundation is a nonprofit making organization dedicated to the improvement of quality of life for all, alleviation of poverty, provision of healthcare and promotion of justice, peace, cultural values, human rights, democracy and conservation of environment. The Foundation aims at developing strategic alliances and partnership while fostering community engagements to not only identify needy areas of assistance but also pool adequate resources for the implementation of various programs.<sup>41</sup>

#### **The Attacks**

In May 2017, The NGOs Board attempted to freeze the accounts of the Kalonzo Musyoka Foundation. Through a letter dated 2<sup>nd</sup> May, it also tried to dissolve the foundation's board for failure to account for Sh196 million. The Board alleged that the Foundation could not account for Ksh 50 million from China Youth Development Foundation for construction of classrooms in the area. It also claimed that the funds are not traceable in the Foundation's bank accounts, annual returns, audited accounts or the foundation's bank statements given to the board for review.

#### **The Court Actions**

By a notice of motion dated 5<sup>th</sup> May, 2017, the applicants, KMF sought from the court judicial review orders prohibiting the respondent, which was the NGOs Board from: i) freezing the Foundation's bank accounts or otherwise interfering with the Foundation's day to day operations; ii) from de-registering or in any way or interfering with its operations; and finally, ii) from breaching, abrogating and or in any way or infringing on the rights of the organization's officials and officers under the pretext of investigating the Applicant.<sup>42</sup>

#### **Court Decisions**

In allowing all the orders sought above, the court reiterated that the respondent never accorded the applicant any hearing on the allegations levelled against it which violates the applicants' right to fair administrative action Act as espoused in Article 47 of the Constitution.

### **3.3.2 Key Empowerment Foundation Kenya**

Key Empowerment Foundation Kenya (KEFK) is a registered NGO purposed to provide enabling environment for the local communities.<sup>43</sup>

#### **The Attacks**

On 4<sup>th</sup> August 2017, the NGO associated with Rosemary Odinga, daughter of the then NASA opposition party flag bearer Rt Hon Raila Odinga, former Prime Minister of Kenya in the coalition government (2008-

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<sup>41</sup> <http://www.kalonzomusyokafoundation.or.ke/about-kmf>, accessed October 06, 2018.

<sup>42</sup> See full judgment. Visit: Republic vs. Non-Governmental Organizations and Co-ordination Board ex parte Kalonzo Musyoka Foundation [2018] eKLR; Milimani Judicial Review No. 218 OF 2017, accessed October 07, 2018.

<sup>43</sup> [https://www.facebook.com/pg/keyempowerment/about/?ref=page\\_internal](https://www.facebook.com/pg/keyempowerment/about/?ref=page_internal), accessed October 06, 2018.



2013) was also targeted for deregistration and freezing of accounts. The NGOs Board's Fazul Mohamed, wrote to the chairperson of KEFK, to communicate the decision to deregister the organization<sup>44</sup>

The Board also instructed the Central Bank to freeze the Foundation's account "with immediate effect."<sup>45</sup> The Board alleged that the foundation's account was involved in political activities contrary to the provisions NGOs Coordination Act, regulations and further, that the KFEK was operating an illegal bank account contrary to provisions of the Act and attendant regulations.

### **The Actions**

This matter did not proceed to court because the NGO Board could not prove their allegations, as they could not produce the alleged certificate of registration. From the foregoing, it could only be concluded that this act was yet another glaring example showing the depth to which the NGO Board would sink to blatantly harass, undermine and intimidate key civic and political players especially during elections.

Challenging these allegations, Rt. Hon Raila Odinga's Communications Director, Dennis Onyango, issued a statement indicating that while the organization had applied for registration, submitted all the requirements and paid the registration fee, it was yet to be issued with a certificate, and therefore, could in no way have been able to open a bank account.

### **3.3.3 The Evans Kidero Foundation (EKF)**

#### **The Attacks**

First on the 13<sup>th</sup> of December 2016, it was reported that the NGOs Coordination Board had suspended the entire board of the Evans Kidero Foundation after allegations that it had received funds from suspicious sources and also deviated from its registered objectives.

The NGOs Coordination Board through its Executive Director Fazul Mohammed wrote to the management of the Foundation requesting them to provide it with audited bank accounts, certified bank accounts, details of donors or financiers of the foundation since 2013 and annual returns for the past four years within fourteen days.<sup>46</sup>

This was premised on an allegation by the NGO's Board that the foundation had failed to file its annual returns since board further accused the foundation of failing to file its annual returns since 2013. The Board wrote to CBK, the Director of DCI and Family Bank to freeze the accounts of the foundation until their case is resolved.

Second, in the 21<sup>st</sup> of February 2017, the NGOs Coordination Board deregistered the EKF due to non-compliance of the NGOs coordination Act. It was further alleged that the foundation had conducted transactions involving millions of shillings despite no known donor or record, failed to file annual returns,

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<sup>44</sup> See *NGO Associated with Raila's Family Deregistered*. Visit: <https://nairobineews.nation.co.ke/news/ngo-associated-with-rosemary-odinga-deregistered/> accessed October 06, 2018

<sup>45</sup> See *Daily Nation, Board de-lists NGO linked to Rosemary Odinga*, <https://www.nation.co.ke/news/NGO-Board-Rosemary-Odinga-Key-Empowerment-Foundation-Kenya/1056-4045026-puhq4y/index.html>, accessed October 07, 2018.

<sup>46</sup> <https://www.capitalfm.co.ke/news/2016/12/kidero-foundation-board-suspended-accounts-demanded/>

had a membership that raised numerous fundamental questions of conflict of interest between the County Government and the Foundation and operated unauthorized bank accounts.

The NGOs Coordination Board also noted that Ndeiya farm Ltd had made several deposits amounting to millions of shillings with no clear intention of the usage of the funds. They further alleged that Viwandani ward member of county assembly Samuel Nyangwara had also made cash deposits of One Million Eight Hundred and Fifty Thousand to the foundations bank accounts with no clear explanation of what the funds were meant for.

### **The Court Actions and Decisions**

Following the first attacks, the Foundation proceeded to the High Court challenging the unlawful and arbitrary procedure through which the NGO Board sought to freeze its accounts. Justice Joseph Onguto issued an order stopping the Ethics and Anti-Corruption Commission from investigating the Foundations accounts at Family Bank.

Regarding the second attacks, the High Court temporarily stayed deregistration of the EKF, pending the hearing and determination of the case lodged by the then Nairobi Governor challenging the decision of the NGOs Coordination Board to deregister the organization.<sup>47</sup> The Foundation through its lawyer Willis Otieno argued that the board failed to follow the due process in deregistering the organization and that in doing so, they had violated its rights.

On the 17<sup>th</sup> of December 2017, Justice Odunga in Judicial Review Miscellaneous Application No 178 of 2017, R (Applicant) and The Non-Governmental Organizations Coordination Board (Respondent) Ex Parte: The Evans Kidero Foundation issued an order of certiorari quashing the decision of the respondent communicated in a letter dated the 21<sup>st</sup> of February 2017 and referenced NGBO.5/30A/8/VOL,XI. He further issued an order of prohibition prohibiting the respondents and the State from implementing the impugned decision communicated in the letter dated the 21<sup>st</sup> of February 2017 and referenced NGBB/5/30A/A/VOL/XI.<sup>48</sup>

## **3.4 Actions targeted at Human Rights Defenders**

### **3.4.1 Violent disruption of protests and arbitrary arrests of unarmed protestors**

On 13<sup>th</sup> February 2014, a number of CSOs and members of the public organized a demonstration to protest against the rising corruption in government, increasing insecurity, unemployment, poverty, mutilation of the Constitution and poor leadership among other issues.

In accordance with the law, they notified the police as required. They were to converge at the Freedom Corner Gardens at Uhuru Park, Nairobi at 1130 hours and thereafter proceed to Kenya's Parliament to present a petition to Members of Parliament, again, in accordance with the Constitution.

#### **The Attacks**

Upon arrival at the Freedom Corner, they noticed heavy police presence who had cordoned off the entire *Uhuru* (meaning, freedom) Park, effectively sealing access to the Freedom Corner. The officer leading the operation ordered them to disperse and at this point the police suddenly unleashed tear gas upon the

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<sup>47</sup> <https://citizentv.co.ke/news/court-halts-deregistration-of-evans-kidero-foundation-158909/>

<sup>48</sup> <http://kenyalaw.org/caselaw/cases/view/144051>

demonstrators and violently dispersed them.<sup>49</sup> Later, the first to the fourth Respondents, Wilfred Olal and one ‘Nelson Mandela’ were arrested after returning to the venue to check whether their compatriots had been injured. **Court Actions**

In the petition, the applicants, who were among those arrested, averred that they had notified the police of their intention to demonstrate as required by law. They submitted that they were not informed of the reasons for their arrest. When presented in court they were charged of rioting after proclamation, for resisting arrest and for behaving disorderly in a police building.

They submitted that demonstration was a constitutional right recognized in both the Constitution and the international human rights instruments to which Kenya is a party, and stated that disruption of a legally called and organized demonstration is unacceptable in a free and democratic society such as Kenya.

### **Court Decisions**

The court held that the police did not act in accordance with relevant provisions of the Penal Code and hence they had infringed on the on the constitutional rights of the petitioners. The court also noted that the criminal prosecution was tainted with ulterior motives such as curtailing the rights of the petitioners to exercise their right to assemble, associate, demonstrate and exercise their freedom.

The court granted the declarations sought; which were that the decision to arrest, detain and mount criminal charges against the first to fourth petitioners was undertaken without any factual basis and was a flagrant abuse of police powers and judicial process, hence unconstitutional; and therefore, the arrest and detention of petitioners was a gross violation of the provisions of the various Articles of the Constitution, citing some such as Articles 19, 20 (1), 28, 29, 32, 33, 37 and 49 of the Constitution.<sup>50</sup>As Justice John Mativo stated:

*“Considering the nature of the violations of the constitutional rights, the above legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, and considering the short stint the petitioners were held in police cells, I find that each of the petitioners is entitled to an award of damages. Doing the best I can, I find that an award of Ksh. 250,000 to each of the petitioners, i.e. first to fourth petitioners would be reasonable in the circumstances.”<sup>51</sup>*

### **3.4.2 Extra Judicial Executions of Human Rights Defenders**

On 4<sup>th</sup> July 2016, Kenyan HRDs launched street protests calling for justice in the case of human rights advocate Willie Kimani whose body was recovered from Ol-Donyo Sabuk River, on 1<sup>st</sup> July 2016, alongside that of his client, Josephat Mwenda and their taxi driver, Joseph Muiruri. The three men were abducted as they were returning home from Josephat Mwenda’s court hearing around 1200 midday on 23 June 2016.<sup>52</sup>

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<sup>49</sup> Constitutional Petition 323 of 2014, <http://kenyalaw.org/caselaw/cases/view/137643/>, accessed October 07, 2018

<sup>50</sup> See full judgment, <http://kenyalaw.org/caselaw/cases/view/137643/>, accessed October 07, 2018

<sup>51</sup> Ibid

<sup>52</sup> See, *Case History: Willie Kimani, Front Line Defenders*, <https://www.frontlinedefenders.org/en/case/case-history-willie-kimani>, accessed October 07, 2018.

Willie Kimani was an advocate of the High Court of Kenya who was affiliated with the Law Society of Kenya (LSK) and also served on the board of Rights Promotion Protection (RPP) (formerly in 1990s referred to as the Release Political Prisoners Trust), a membership human rights organization whose mission is to empower individuals and communities to protect and realise their rights through knowledge based advocacy and other related interventions.

In his capacity as a lawyer, he also worked at the International Justice Mission (IJM) in Nairobi, Kenya. The IJM is a USA-based international organisation that focuses on legal protection of vulnerable populations, including people experiencing poverty, from abuses of power at the government level.

The three bodies were found on 1 July 2016 in the Ol-Donyo Sabuk River, northeast of Nairobi, with apparent signs of torture including chopped-off fingers, gouged eyeballs and with their arms tied behind their backs. They had been abducted on 23 June 2016 in Nairobi following a court hearing for a complaint that Josephat Mwenda had filed after he had reportedly been shot and injured by a police officer in April 2015.

After filing a complaint against the police, with the Independent Policing Oversight Authority (IPOA), Josephat Mwenda was subsequently charged with crimes of possessing drugs, gambling in public and resisting arrest. As his advocate, Willie Kimani was defending Josephat Mwenda through all legal proceedings.

Willie Kimani, a vibrant and courageous human rights defender was murdered by agents of state in retaliation for his peaceful, legitimate work in the defence of human rights in Kenya, raising major concerns about intimidation of human rights defenders and restriction of civic space in the country through extra judicial killings.<sup>53</sup>

### **Court Actions and Decisions**

In a petition filed by the Law Society of Kenya (LSK) to the High Court in seeking to establish criminal culpability of three suspected police officers, the court noted that, the circumstances under which the three deceased petitioners were held was not only unlawful but also in breach of their constitutional right to liberty.<sup>54</sup> What made it worse was that the deceased petitioners were confined outside the authority of the law. The court ruled that it was clear that Willie Kimani was killed in the course of performing his duties as an advocate and that the three had been abducted and murdered by police officers to defeat justice.

The police officers, and the entire National Police Service, were not spared either when the court cited lack of cooperation by the police with the IPOA law. In the words of Justice Luka Kimaru:

*“It was clear to this court that part of the difficulty that IPOA had in investigating Mwenda’s complaint was the obvious lack of cooperation accorded to IPOA by the Police Service hierarchy. It seems that the attitude of the Police Service hierarchy is that IPOA is an irritating body, which at best should be ignored and at worst should be obstructed from fulfilling its mandate under the Independent Policing Oversight Authority Act. It is shocking that some elements in the Police*

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<sup>53</sup> Ibid

<sup>54</sup>, Miscellaneous Criminal Application No 244 of 2016, Law Society of Kenya & 3 others v Attorney General & 3 others [2016] eKLR, <http://kenyalaw.org/caselaw/cases/view/124821/>, accessed October 07 2018.

*Service still think that they can operate without civilian oversight or that the Police Service is a closed shop where a civilian authority mandated by law cannot inquire into misconduct by its members. As observed in the two reports cited above, it is to the benefit of the Police Service for members of the public to have confidence that any complaint lodged against a member of the Police Service shall be investigated and accorded the seriousness that it deserves. In that regard, it was apparent to this court that if the Police Service had accorded due cooperation to IPOA when it was investigating the complaint lodged by Mwenda, in all likelihood, the deceased petitioners would still be alive today.”<sup>55</sup>*

### **3.4.3 Case Challenging the Right to Protest under the Constitution and Public Order Act**

In a Petition<sup>56</sup> filed by Ngunjiri Wambugu against the Inspector General of the National Police Service, the Cabinet Secretary for Interior and Coordination of National Government and the Attorney General. The petitioners amongst others sought a declaration that the fundamental rights to demonstrate, to assemble, to picket and to present petitions to public authorities is conditional on protestors or demonstrators conducting themselves peaceably and unarmed with any weapons including stones.

The Petitioner also sought an order from court directing the respondents to formulate and or amend the requisite law and regulation to ensure that demonstrations are peaceful and held as per the constitution including inter alia prescription for demarcation of demonstration zones with appropriate penalties when they go outside the expectations of the law,

The petition was founded upon numerous grounds, more specifically in the conduct protestors during the Anti-IEBC demonstrations in April 2016 that allegedly saw protestors injure people, engage in unlawful activities that resulted in destruction of property. It’s against this backdrop that the petitioner sought to have regulations formulated to guide citizens in exercising their right to picket, assemble and demonstrate arguing that if the same was not regulated, Kenyan’s would suffer irreparable harm as a result of protests.

The Court found that the fundamental rights under Article 37 of the Constitution is conditional on the protestors or demonstrators conducting themselves peaceably and unarmed that police officers are legally obligated to maintain law and order. The court also issued an order directing the respondents to formulate and or amend requisite law and regulations to ensure demonstrations are peaceful and held within the confines of the Constitution.

The Court also directed the respondents to demarcate demonstration zones for protestors. The Court also directed the respondents to formulate a Code of Conduct for convenors of demonstrations. This decision by the High Court has been viewed by Human Rights Defenders as restrictive and would make it practically difficult for them to peacefully assembly, picket and demonstrate in any part of Kenya as it would require protestors to only demonstrate within gazetted zones.

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<sup>55</sup> Ibid

<sup>56</sup> <http://kenyalaw.org/caselaw/cases/view/178860/>

## 3.5 Court Action towards CSOs, Media House, Bloggers and Journalists

### 3.5.1 The Enforcement of the PBO Act

In January 2013, the former President Mwai Kibaki assented into law the Public Benefits Organizations (PBOs) Act of 2013, as a new legal framework that was intended to ensure a better regulated, more efficient, transparent and publicly accountable civil society sector with effective leadership.

However, between January 2013 and July 2015, 5 attempted were draconian amendments to the Act through parliament were made. These included: provisions to introduce capping of foreign funding; prohibition on direct funding to PBOs; provisions to classify PBOs as foreign agents; provisions to introduce ‘classification’ of PBOs; and the requirement of prior disclosure of embassies to fund PBOs, among several others.<sup>57</sup> The attempts by Kenyan Parliament to amend a fairly progressive law (the PBOs Act) were indeed a malicious intent to cripple the CSOs.

#### Court Actions and Decisions

In August 2015, several NGOs filed a suit in the High Court against the Cabinet Secretary for the Ministry of Devolution and Planning seeking court orders to compel the Cabinet Secretary to commence the PBOs Act. On October 31<sup>st</sup> 2016, the High Court gave a ruling compelling the government to gazette the Commencement Date by 11<sup>th</sup> November 2016. Despite this court order, the Act was not operationalized, to date.

Subsequently, the CSOs resorted to going back to court, and on 23<sup>rd</sup> May 2017, and the High Court found the Cabinet Secretary (CS) in charge of the Ministry of Interior and Coordination of National Government in contempt of court for failing to adhere or abide the previous court order of October 2016.

In the latter case, the court ordered, again, commencement within 30 days from the date of that judgment. The 30 days lapsed, and the Act is yet to be commenced, to date of this publication. The executive arm of government, and specifically the current Cabinet Secretary in the Ministry of Interior, remains in contempt of court.

### 3.5.2 Repressive laws – The Kenya Information and Communication Act

On 17<sup>th</sup> April 2015, Jackson Ndare filed a petition at the High Court<sup>58</sup> challenging the constitutionality of Section 29 of the Kenya Information and Communications Act. The basis of the challenge was that it criminalizes publication of certain information in vague and overbroad terms, has a chilling effect on the guarantee to freedom of expression, and creates an offence without establishing the motive element on the part of the accused person. The Section provided as follows:

*“A person who by means of a licensed telecommunication system: a) sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or b), sends a*

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<sup>57</sup> See Report of the *first National Summit of PBO Leaders on Expanding Civic Space and Implementation of the Public Benefits Organizations Act*, October 2016. Visit <https://www.khrc.or.ke/civic-space-publications/140-report-of-the-first-national-summit-of-pbo-leaders-on-expanding-civic-space-and-towards-implementation-of-the-public-benefits-organizations-act-2013/file.html>, accessed October 06, 2018

<sup>58</sup> Petition No 149 of 2015, Geoffrey Andare v Attorney General & 2 others [2016] eKLR, <http://kenyalaw.org/caselaw/cases/view/121033/>, accessed October 08 2018

*message that he [or she] knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both.*<sup>59</sup>

The above Section creates a chilling effect on the guarantee to freedom of expression. It creates an offence without establishing the guilt consciousness on the part of the accused person.

### **Court Decision**

In declaring the above Section as unconstitutional, the court said that failure to define words like ‘grossly offensive’, ‘indecent’ ‘obscene’ or ‘menacing character’ leaves them to the subjective interpretation of the court. The court added that determining how a message causes ‘annoyance’, ‘inconvenience’, ‘needless anxiety’ is also very subjective. In her words, Justice Mumbi Ngugi had this to say:

*“Article 23(3) of the Constitution grants this court power to issue “appropriate orders” in a petition brought under Article 22 of the Constitution. In this case, the court was concerned with the constitutionality of Section 29 of the Kenya Information and Communications Act, and has come to the conclusion that the Section is unconstitutional for being couched in overbroad and vague terms that violate or threaten the right to freedom of association guaranteed under Article 33 of the Constitution. I have, however, not found a violation of the petitioner’s rights under Article 50(2) (n).”*<sup>60</sup>

### **3.5.3 Surveillance by the State**

In February 2017, the Communications Authority of Kenya (CAK) directed that telecommunication companies allow it to implant gadgets on all networks in the country that have the ability to listen, read and track down activities of the tens of millions of Kenyans who have access to mobile devices. This was a directive that was clearly in breach of the Constitution, which in Article 31 of guarantees the right of privacy for all Kenyans. This Article, under paragraph 31 (d) unequivocally states that:

*“every person has the right to privacy, which includes the right not to have the privacy of their communications infringed”.*

### **Court Action**

In a case filed in the Nairobi High Court by Okiya Omtatah, the petitioner’s assertion was that the government of Kenya had secretly embarked on a plan to monitor the population by installing a communication surveillance system: known as the, dubbed Device Management System (DMS) on mobile

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<sup>59</sup> See Section 29 of the Kenya Information and Communications Act. Visit: <https://cfllegal.com/the-constitutionality-of-section-29-of-the-kenya-information-and-communication-act/>, accessed October 07 2018.

<sup>60</sup> See full judgment, Petition No 149 of 2015, Loc Cit

phone networks operated by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties that included, respectively: Orange-Telkom Kenya; Airtel Network Kenya; and Safaricom.<sup>61</sup>

The reason cited by the government to justify the system for eavesdropping on private communications was that the DMS was required to monitor and identify stolen handsets, counterfeit phones, and devices that have not been type-approved by the regulator.

However, the petitioner noted that the government had been silent on; first, the systems' capabilities for spying on calls, texts and reviewing mobile money transactions; and second, how it will protect the privacy of individuals once the information is collected by the second respondent and shared with third parties. The petitioner submitted that there are better ways of getting the information without sharing to a third party.

The petitioner argued that Article 31 of the Constitution entitles everyone the right to privacy and that intercepting communication infringes that right. He submitted that Section 27A (3) of Kenya Information and Communications (KICA) Act<sup>62</sup> obligates the third Interested Party to keep in a secure and confidential manner and not to disclose the subscribers registration details without the written consent of the subscriber.

Further, the petitioner averred that Regulation 15 of the Kenya Information and Communications (Consumer Protection) Regulations, 2010 protect consumer privacy by requiring that an operator should not monitor, disclose or allow any person to monitor or disclose, the content of any information of any subscriber transmitted through licensed system by listening, tapping, storage or other kinds of interception or surveillance of communications and related data.

One of the issues was whether the DMS system threatens or violates the Right to privacy of the subscribers of the first, second and third Interested Parties: and if so, whether the limitation meets the Constitution's Article 24 limitation test. The court noted that phone conversation and transaction fell in the ambit of "private life" and that the right to privacy was a fundamental human right.

### **Court Decision**

The court thus issued a declaration that first Respondent (the CAK) request and or purported intention and or decision and or plan contained in its letter dated 31<sup>st</sup> January 2017 addressed to the first, second and third Interested Parties seeking to integrate the DMS to the first, second and third Interested Parties networks to inter alia create connectivity between the DMS and the first, second and third Interested Parties system to access information of their subscribers on their network is a threat to the subscribers privacy, hence a breach of the subscribers constitutionally guaranteed rights to privacy, therefore unconstitutional null and void. In Justice John Mativo's words:

*"A declaration be and is hereby issued declaring that the first Respondents decision to set up connectivity links between the DMS and the first, second and third Interested Parties networks communicated in its letter dated 6<sup>th</sup> February 2017 is unconstitutional, null and void to the extent that it was arrived at unilaterally, without adequate public participation and that it a*

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<sup>61</sup> Constitutional Petition No. 53 of 2017, Okiya Omtatah Okoiti vs. Communication Authority of Kenya & 8 others [2018] eKLR. Visit: <http://kenyalaw.org/caselaw/cases/view/151117/>, accessed October 08, 2018.

<sup>62</sup> <https://ca.go.ke/wp-content/uploads/2018/02/Kenya-Information-Communications-Act-1.pdf>



*threat to the right to privacy of the first, second and third interested parties subscribers and a gross violation of their constitutionally and statutory protected consumer rights.”*<sup>63</sup>

### **3.5.4 Unconstitutional Shut Down of Media Houses**

Incidentally in January 2018, and without warning and giving any reasons, the Ministry of Interior and Coordination of National Government switched off (or literally shut down) free to air transmission on television channels owned by Nation Television (NTV), Kenya Television Network (KTN) and Citizen Television owned by the Royal Media Services (RMS).

This action by the government had followed a recent announcement from the official opposition that they would swear in the opposition leader, Rt Hon Raila Odinga, former prime minister of Kenya from 2008-2013 as “the people’s president”. The CAK proceeded to switch off the signals of the television and various radio stations under the Royal Media Services at exactly ten minutes after 9 am on Tuesday, January 30 from broadcasting the actual ‘swearing-in’ of opposition leader, Raila Odinga, as the ‘people’s president’.

### **Court Actions and Decisions**

In a case filed at the High Court in Nairobi, Okiya Omtatah argued that the move by the government to shut down television stations including those mentioned above, was a violation of Articles 33, 34 and 35 of the Constitution which guarantee the freedom of expression, freedom of the media and access to information respectively. The petitioner argued that there was an immediate cause for concern over the constitutionality of the government’s action of switching off.

### **3.6 Actions to Protect Sexual Minorities**

Founded by six young legal advocates, the National Gay and Lesbian Human Rights Commission (NGLHRC) announced its foundation at its inaugural Gay and Lesbian Awards in December 2012. Held in Nairobi’s City Hall, the Awards affirmed the ‘Kenyaness’ of the LGBTIQ community while demanding for their inclusion in public and social organizing spaces. Since then, NGLHRC has been encouraging diversity and agitating for public dialogue on sex, sexuality, gender and non-conformity.<sup>64</sup>

### **The Attacks**

On 2<sup>nd</sup> April 2013, Eric Gitari, sought to register an NGO with the NGO Coordination Board. The core objectives of the proposed organization, according to the petitioner, would be the advancement of human rights. Specifically, the proposed NGO would seek to address the violence and human rights abuses suffered by gay and lesbian persons. The NGOs Coordination Board, however, had rejected his application for registration on the basis that the people whose rights the proposed NGO will seek to protect are gay and lesbian persons.

### **The Court Actions**

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<sup>63</sup> Ibid

<sup>64</sup> <https://www.nglhrc.com/about-us#history>, accessed October 08, 2018

In a petition before the High Court in Nairobi the petitioner contended that the NGO Board had on numerous occasions refused to register the National Gay and Lesbian Human Rights Commission but had suggested that they could accept other names that did not include the words “gay” and “lesbian.”<sup>65</sup>

During the hearings, the NGO Coordination Board argued that its refusal to register the National Gay and Lesbian Coalition resulted from the fact that the organization would campaign for the rights of the LGBTIQ community contrary to Sections 162 (a) and (c) and 165 of the Penal Code that criminalizes same-sex sexual conduct.

The petitioner further contended that their rights to freedom of association, dignity, equality and right not to be discriminated against had been violated. It is also his contention that the justifications presented by the Board for infringing these rights are ill-conceived. The petitioner further argued that the refusal to reserve and register the proposed NGO is tantamount to a denial of the right to equality before the law, and is a denial of the freedom of expression as well as the freedom to access information irrespective of one’s sexual orientation.

### **The Court Decision**

The Court rejected the argument by the NGOs Coordination Board and ordered for the registration of the NGLHRC. The court also held that the denial by the NGO Coordination Board to register an LGBTIQ organization amounted to discrimination on grounds of sexual orientation. In this case, however, the government through the State Law Office immediately lodged an appeal to the decision, preventing the implementation of this positive ruling. The appeal was thrown out, and hence it is obligatory for the NGOs Coordination Board to register NGLHRC.<sup>66</sup>

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<sup>65</sup> See Petition 440, Eric Gitari v Non- Governmental Organizations Co-ordination Board & 4 others [2015] eKLR

<sup>66</sup> <https://www.nglhrc.com/litigation>, accessed October 14, 2020

#### **4 CONCLUSION**

Evidently, since 2013, the clawing back the gains of the Constitution and attendant laws of Kenya has been the hallmark of Jubilee government. The cases demonstrated above have particularly shown that the government, especially the executive arm through the NGOs Coordination Board and other agencies, has deliberately, blatantly and with impunity, disregarded the very tenets of democracy as enshrined in the Bill of Rights of the Constitution.

With such unabated destruction of the democratic and civic spaces, for the CSOs and other actors to operate, the judiciary arm of government has demonstrated to be the neutral arbiter in these battles between civil society and the State. Without these judgments delivered in courts of law, the State would have, by now, crashed the civil society to smithereens.

Whereas this case digest applauds the efforts of the judicial activism of the courts, especially the High Court, it admonishes and castigates the blatant efforts by the executive arm to disrespect the Constitution and other laws. Without public interest litigation, crowned by litigious activists, CSOs and other independent organizations would have folded a long time ago.



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