



**CHAIRMAN’S REMARKS DURING THE OFFICIAL OPENING OF THE ANNUAL
PROSECUTION SERVICE CONVENTION, AT THE KENYA SCHOOL OF
GOVERNMENT, NAIROBI**
JUNE 22, 2017

“UPHOLDING INTEGRITY FOR ELECTORAL JUSTICE”

Your Excellency Ambassador Robert Codec
Your Excellency Ambassador Jutta Frasch
Keriako Tobiko, Director of Public Prosecutions, SC
Heads of Constitutional and Independent Offices present
Distinguished guests
Prosecution Counsel present

Good morning!

I am greatly pleased to be in the company of such distinguished ladies and gentlemen, and I thank you very much for inviting me and particularly so with the brief to speak on an issue of great importance not just to us as a Commission but to the Country at large. The Country has struggled under the continuous scourge of elected leaders, who are constantly adversely mentioned in matters of unethical conduct unfitting of state officers.

As a family of state prosecutors, your colloquium, or convention as you call it, comes at an important point in time, a time when the country is preparing itself for elections. I want

to thank my friend, the DPP for the choice of the topic of discussion. I wish to applaud you for the synergy and teamwork which will enable you achieve the objectives that you have set for yourselves and the preparations for the tasks ahead.

There has been increased scrutiny, on the quality of leadership that offers itself for election, perhaps due to an increased appreciation of the control political leadership bear on the destiny of our Country: but also perhaps due to clarity in Article 1 of our Constitution, which recognizes that:

“All sovereign power belongs to the people of Kenya...and the people may exercise this power either directly or through their democratically elected representatives.”

Dr. Rajendra Prasad, a former President of the Assembly of India [the Lok Sabha], commenting on the question of integrity, leadership and elections eloquently stated that:

“...If the people who are elected are capable, and men of character and integrity, then they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it, and India [LIKE KENYA TODAY] needs nothing more than a set of honest men who will have the interest of the country before them ... It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas ... We can only hope that the country will throw up such men in abundance.”

Electoral justice

My research has not yielded any fruits on acceptable definition of electoral justice, most commentators and scholars content to view it from their familiar lenses. Since I am an elections manager, allow me to also look at it from that perspective. An elections manager would consider electoral justice to be a key ingredient of “free and fair” elections.

In the decision of the Supreme Court of Uganda in **Col Kizza Besigye Vs Yoweri Kaguta Museveni and other**, Odoki CJ defined free and fair elections in the following terms:-

“to ensure that elections are free and fair, there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes.

Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or Government Ministers and officials do not have unfair advantage. The entire election process should have an atmosphere free from intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time.

Fairness and transparency must be adhered to in all stages of the electoral process. Those who commit electoral offences or otherwise, subvert the electoral process and should be subjected to severe sanction. The Electoral Commission must consider and determine election disputes speedily and fairly.”

As you may be aware, that citation from the Ugandan case is captured almost word for word in Article 81 of our Constitution. As we conduct elections, we must be alive to the test set out in that Article. It requires not just the EMB to do certain things, but also other state and non-state agencies to work in concert with the EMB to achieve the requirements of the Constitution. As the saying goes, war is too important to be left to the generals alone, elections similarly, are way too important to be left to the IEBC alone.

As you may be aware, elections is not an event; it is a process involving various activities at various stages. In elections lingo, we call it, the electoral cycle. This cycle involves planning, budgeting, voter registration, voter register inspection, candidate registration, electoral logistics (procurement and transportation), training of polling officials, polling day operations, results declaration and electoral dispute resolution [EDR].

You will note, the element of free and fair elections as captured by the judge encapsulates all the processes described in the electoral cycle. It is incumbent upon all of us to realize the ideals of our Constitution by doing that which it expects of us. I will be highlighting a few of those in my address today.

Integrity in leadership

The Kenyan electorate has now come to boldly demand, that their leaders must satisfy a certain minimum threshold, which threshold, the Kenyan people have set out in the law.

The resolve by the Kenyan electorate to instill integrity in the Country's leadership was recognized by the High Court by way of a three [3] Judge bench in **Trusted Society of Human Rights Alliance Vs Attorney General & 2 Others [2012]eKLR** where they held that,

“Kenyans were very clear in their intentions...They were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office...They intended that Chapter Six [of the Constitution] and Article 73 [in particular] will be enforced and implemented...They desired these collective commitments to ensure good governance in the Republic will be put into practice.”

The Commission's Constitutional mandate, in overseeing the vetting of candidates for electoral or selective positions, is set out Article 88 of the Constitution which establishes the Independent Electoral and Boundaries Commission. Article 88(4)(f) obliges the Commission to oversee the registration of candidates for election.

This constitutional provision is similarly provided for under Section 4(f) of the Independent Electoral and Boundaries Commission Act, 2011. Thus the responsibility of registering candidates, obligates us as a Commission, to review and vet the various candidates as against the standards required of them in law.

The Constitution under Article 73(2), sets-out the guiding principle on vetting, by entrenching that State officers shall be selected on the basis of personal integrity, competence and suitability; or election in free and fair and credible elections. The provision also proscribes in-objectivity, partiality, nepotism, favoritism, other improper motives or corrupt practices, in decision making, Article 10 similarly enjoins various State officers on national principles and values that oblige the execution of their mandates.

Additionally, Article 99 of the Constitution significantly set-out the qualifications and disqualifications for election as Member of Parliament i.e. variously the Senate and the National Assembly. Whereas Article 193 of the Constitution sets out the qualifications and disqualifications for election as a Member of County Assembly.

Significantly, Articles 99(1)(b) and 193(1)(b), of the Constitution both provide that, any prospective candidate for these positions is required to *inter alia* 'satisfy any education, moral and ethical requirements prescribed by the Constitution or by an Act of Parliament'.

The vetting on integrity requires the engagement of various stakeholders, involved in the process of electing or selecting candidates who subsequently appear before the Commission for possible registration as Candidates to contest for election.

First, the Political parties in conducting party primaries are under obligation to ensure that the candidates they nominate met the required ethical and moral standards. They are required to, at this instance of party primaries or what we is referred to as nominations, to weed out candidates who fall short.

On this front I must observe that we did witness various Political Parties, decline to nominate various persons, on account of various failings. Key example is Mr Thuo Mathenge who was turned away by the Jubilee Party on account of questionable academic qualifications. Ultimately, there is need for greater capacity within Political Parties, as well as readily availing technical support to enhance their discharge of this responsibility.

Secondly, the candidates themselves are enjoined to disclose all information statutorily required: even where such information may actually be prejudicial to their candidature.

The law requires candidates to depone a statutory declaration, where they would be affirming the authenticity of the information and documentation tendered before the Commission, for consideration. Indeed criminal prosecution from perjured candidates

should be undertaken to ensure this stage of vetting further effectively eliminates candidates who are unqualified and deter falsification and uttering of falsified documents.

The Supreme Court of India has explored this particular component and in **Rajbala Vs State of Haryana & Others – CWP-17690-2006 [2006]RD-P&H 9618** the Court observed that, persons seeking elections, were seeking office to implement laws which they themselves must demonstrate adherence to.

Lastly, the Public have variously been encouraged to tender information on the candidates presenting themselves for election. As a Commission we have established structures through which we have received various complaints from members of the Public against various candidates.

This complaints continue to be investigated, and subsequently the affected candidates are invited to respond to the allegations levelled against them. Following which the Commission makes a determination.

The Commission being the Constitutional body tasked with the ultimate responsibility of registering candidates, did constitute the Integrity Vetting Committee. This Committee, is tasked with reviewing the information received from the Chapter 6 Working Group and other stakeholders, against which information the Commission may resolve to bar candidates from registration to contest in elections.

The Courts have further recognized the lawful authority in barring of candidates, where in **Luka Angaiya Lubwayo & Another Vs Gerald Otieno Kajwang' & Another**, in discussing Article 38 of the Constitution on Political Rights and the freedom to make political choices it held that, *"...the People of Homa bay County are entitled to the free expression of that will [the will to elect leaders of their choosing regardless] without hindrance except in circumstances that are known to the Constitution".*

Additionally, the Court in **Michael Wachira Nderitu & 3 Others Vs Mary Wambui Munene AKA Mary Wambui & 4 Others [2013]eKLR** the Court stated that, *"the qualifications*

[under Article 99 of the Constitution] are not self-enforcing but are given effect by the IEBC...IEBC will consider whether a candidate meets the constitutional and statutory provisions entitling them to register a candidate to contest the election.”

Therefore, the Commission through the Integrity Vetting Committee, may limit exercise of the Political rights of members of a particular electoral area, by disqualifying a particular candidate who fails to satisfy the proscriptions recognized under the Constitution – which I had set-out above.

As a Country we have set ourselves on the right course in ensuring that we elect leaders who can stand against this test. The Commission appreciates that in delivering free, fair and credible elections: which we remain committed to; we must start, at ensuring that candidates who are registered to contest for elections, satisfy the legal threshold.

Methodology

We did recently receive a list of thirty-eight [38] aspirants from the EACC, which adversely mentioned 13 gubernatorial aspirants, 1 senatorial aspirant, 9 candidates for member of national assembly, 13 aspirants for members of county assembly and 2 aspirants for woman member of national assembly. However in 37 of the 38 the remarks were that all files are pending onward transition to the ODPP for lodging in Court, we are thus clearly unable to bar any of these aspirants on account of this report.

We also continue to receive communication from various local universities and the Commission for University Education on authenticity of various academic documents forwarded by candidates. As a Commission we will strictly enforce the findings received by us, where any of these candidates is found to fall short of the legal requirements.

We are however alive to the fundamental tenet of law on presumption of innocence, as enshrined under Article 50(1), 99(3) and 193(3) of the Constitution. As such where any

adverse finding is the subject of challenge on appeal, the law obliges us as a Commission, to register such a Candidate until the Appeal has been heard and determined.

The Constitution under Article 47, also calls for fair administrative action, such that, the Commission in reviewing whether or not to register a candidate, will need to ensure that the matter is determined in accordance with the rules on natural justice, particularly *AUDI ALTERAM PARTEM* – the right to be heard. This may impede the expeditious resolution of the matters under review, especially noting that the electoral process is time-bound and elections could be held before the outstanding integrity issues have been resolved.

The exercise also faces the challenge of delays in tendering of reports from the various collaborating agencies. The synergies leveraged with the concerned agencies, including the establishment of the Chapter 6 Working Group, is a significant step in ensuring that we uphold integrity, in the upcoming general elections.

Role of the DPP

The Office of the Director of Public prosecution is extremely pivotal in achieving the goal of free and fair elections. Just to recall the decision of the Supreme Court of Uganda free and fair elections requires that candidates, voters and political parties whose acts or omissions offend the electoral law must be swiftly prosecuted or otherwise dealt with in accordance with the law.

The recent amendments to the Elections Act, in addition to the Constitutional provisions appropriately vest the responsibility of prosecutions of elections offences solely on the ODPP. As a prosecution service, you have immense weight of responsibility on your shoulders. But I have no doubt, that with the capacity of people I see in this room, you will make the country proud.

Allow me to highlight one area which has received immense publicity in the recent past; the question of use of state resources by candidates in campaigns. The Commission published a notice on 14th April, 2017 in accordance with Section 14 of the Elections Offences Act. All prospective candidates were required to register public assets in their

possession by virtue of their offices within 14 days of the said date and hence the Commission provided a deadline of 2nd May, 2017.

However, only 12 candidates registered with the Commission, implying that it is only those 12 candidates who are entitled to enjoy state assets in the course of this campaign period, and even then, it is only those declared assets. In the event any other candidate is found using state resources, such candidates would be committing elections offences and would be liable to prosecution.

As a Commission, we will further be recommending that the ODPP proffers criminal charges against Parties who uttered false documents, as established through the vetting. The criminal charges should deter any future aspirants from pursuing the same path.

As I conclude, allow me to remind all of us where we have come from, and where we must never return; by quoting Justice Joahne Kriegler, who chaired the Independent Review Commission which investigated the 2007 elections. The Commission's report provides:-

“nobody would have dreamt of seriously acting against people in high places, or even ‘highish’ places. The Attorney General certainly didn’t lie awake at night worrying about all those crimes being committed with not a finger being lifted to stop them. If the police were concerned about this state of affairs, they were certainly very patient. The ECK, with its powers under the National Assembly and Presidential Elections Act, the Code of Conduct thereto and the Electoral Offences Act which include power to prosecute never really bit anybody. Public opinion cheered on the impunity so long as it seemed to benefit the side they supported.”

It was not for lack of laws that the country went to the precipice in 2007; all the institutions simply failed to do that which was required of them. And the public cheered on.

That was the dark past of our history; we are determined never to go back anywhere near there. I trust you are too. Therefore I urge us to be zealous and uncompromising in the discharge of our respective mandates.

I thank you for listening to me, and I thank you for inviting me to this auspicious occasion and I want to wish you the very best as you hold this convention.

Thank you very much ladies and gentlemen. God Bless you and God bless Kenya.

W.W. CHEBUKATI

CHAIRMAN