

Defending Guardians of the Constitution against Ruinous Criticism: A Reply to Duncan O'kubasu

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Abstract

Court decisions on bail applications by governors who face prosecution over corruption related crimes have come under sharp criticism from those who believe orders barring the governors from accessing their offices during trial offend the law since they amount to constructive and unprocedural removal from office. One such critic is Duncan O'kubasu who has penned a piece criticizing the decision of Lady Justice Mumbi Ngugi in the *Moses Lenolkulal Case*. This paper responds to that criticism by highlighting several flaws in the arguments presented by O'kubasu. He starts by understating the threat that corruption poses to the Kenyan society as the basis for undermining the inter-agency collaboration to address the vice, as well as the Judiciary's own efforts as part of that collaboration. The rest of his arguments are founded on the wrong question, that is, whether the governors facing trial should be removed from office. Beyond these foundational errors, the rest of the paper contains a number of errors that culminate in his flawed conclusion that the decision amounts to ruinous judicial activism. When looked at in the context of the constant blame the Judiciary has faced in recent years when it has been labelled as the *weakest link in the fight against corruption* as well as the quest of the Kenyan people for ethical leadership, this paper argues that the decision is sound and Judges like Mumbi Ngugi J ought to be celebrated for sticking their necks out in defence of Chapter Six of the Constitution of Kenya.

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1. Introduction

In a little under one year, the people of Kenya will mark ten years since that most joyous occasion when hundreds of thousands gathered at Uhuru Park – with millions more watching from their homes - as President Mwai Kibaki signed into law the 2010 Constitution that came into effect on August 27, 2010.

The joy on the millions of faces across the nation came only in the aftermath of decades of poor governance that culminated in the chaos that followed the disputed 2007 presidential election results. The ease with which the chaos erupted, the rapid spread of the violence and the magnitude of destruction to life and property in such a short period pointed to deeper issues that fuelled the violence, prompting the AU-sponsored mediation team to focus not just on the political disagreement and the immediate humanitarian crisis, but also on the long-term issues that had contributed to the violence. Thus, among the issues earmarked for redress under the so-called Agenda IV¹ reforms was runaway corruption that had characterized public governance for decades, and which made public office the ultimate prize, leading to the life-or-death nature of our political contests.

Against this backdrop, the reform agenda undertook, among others, to review the Constitution as the basis for far reaching legal and institutional reforms, and to strengthen the policy, legal and institutional framework for increased public transparency and accountability, anti-corruption, ethics and integrity, including through the development of a national anticorruption policy, enactment of necessary legislation, and systems and capacity enhancements to strengthen the Kenya National Audit Office.

The 2010 Constitution was supposed to present a clean break from this dark past, and the millions of smiles that witnessed the promulgation of the Constitution were a celebration of the new Kenya that was to be ushered by this Constitution. Ethics and integrity among public officials were thus placed at the centre of the new order, and it was not by accident that the drafters dedicated an entire chapter to leadership and integrity. It is also quite telling that this chapter was placed as the sixth, coming only after the promulgation of the republic, citizenship, the bill of rights, and the chapter on land and environment.

It is quite easy to forget this historical background and context when one is writing a critique of court decisions that seek to implement the Constitution, as

¹ The annotated agenda of the National Dialogue & Reconciliation agreed to address (i) an immediate end to the violence, (ii) the resulting humanitarian crisis, (iii) a political settlement between the parties, and (iv) long term underlying issues.

is evident in the submission by Duncan O’kubasu. His paper is a scathing attack on Lady Justice Mumbi Ngugi following her decision to confirm lower court orders that restrained the Samburu County Governor, Hon. Moses Lenolkulal, from accessing his office during his trial on corruption related charges. Hon. Lady Justice Grace Ngenye who followed the ratio in *Lenolkulal* in her own decision in the *Waititu* case² has not been spared either.

In order to lay the basis for this attack, he begins by understating the threat that corruption poses to the socio-economic wellbeing of the Kenyan people. He then proceeds to mock the Judiciary as it seeks to play its part in the renewed and concerted multi-agency response to the vice.

2. The Executive, the Judiciary & Corruption

He sets off by arguing that the Judiciary, under the leadership of Chief Justice David Maraga, has lost its spine and is keen to be seen to be supporting the Kenyatta administration, particularly in its quest to deal with corruption. He blames Lady Justice Mumbi Ngugi for making “wide-ranging intuitive assumptions which are presumably influenced by the desire to feed the public with an assurance that the judiciary is together with the DPP on the fight against graft.”³ To buttress this position further, he also cites the interview with a magistrate who indicated that corruption is worse than murder.⁴

But corruption has far-reaching consequences than he is willing to admit. Corruption facilitates more heinous crimes such as terrorism as well as organized crime syndicates that run human, wildlife and drug trafficking.⁵ Numerous studies have showed that there is a direct link between corruption and poverty. It is the reason many African countries remain poor despite their vast natural and human resources.⁶

² Anti-Corruption Revision 30 of 2019 Consolidated with Revision Application 29 & 31 of 2019; [2019] eKLR.

³ O’kubasu, *Ruinous Activism*, 9.

⁴ At page 2.

⁵ Gounev, Philip and Tihomir Bezlov ‘Examining the Links between Organised Crime and Corruption’ Center for the Study of Democracy, European Commission, 2010; Shelley, Louise. “Unholy Trinity: Transnational Crime, Corruption, and Terrorism” Brown J. *World Aff.* 11 (2004): 101.

⁶ African Center for Economic Growth ‘The Link between Corruption and Poverty: Lessons from Kenya’ Case Studies. African Center for Economic Growth; Gyimah-Brempong, K. (2002). Corruption, economic growth, and income inequality in Africa. *Economics of Governance* 3:183-209.

Closer home, corruption is the reason poisonous food is permitted into the country, thereby jeopardizing the lives of millions of innocent consumers.⁷ Corruption is also the reason entire industries that supported vast segments of the population have collapsed, thereby exposing millions of Kenyans to abject poverty.⁸ More recently, corruption is the reason millions of Kenyans who were optimistic about development following the arrival of devolution have ended up disillusioned.⁹

Given these damaging consequences, the partnership between the various law enforcement institutions to address corruption should be celebrated rather than ridiculed. The current working relations between them is far from ideal and it may well be that the agenda of fighting corruption has been set by the executive, but this should not stop other arms of government from playing their part, provided they maintain their independence.

The zeal with which judicial officers are handling corruption cases must also be understood against the backdrop of the constant blame the Judiciary has faced in recent years from other law enforcement agencies in the war against corruption. Many of the institutions involved in fighting graft have labelled the Judiciary as the weakest link in this war,¹⁰ and this chorus has been picked by the Presidency¹¹ and by mainstream media houses that have echoed it through their newspaper

⁷ Ibrahim Oruko and David Mwere 'MPs bribed to throw out report on bad sugar' Daily Nation, 11 August 2018, Available at <https://www.nation.co.ke/news/Fury-over-MPs-linked-to-bribes-in-sugar-report/1056-4707480-ky51mdz/index.html>, Accessed 7 September 2019.

⁸ Nathan Ochunge and Brian Kisanji '15 targeted in probe on the looting of Mumias' The Standard, 4 September 2019, <https://www.standardmedia.co.ke/article/2001340639/15-targeted-in-probe-on-the-looting-of-mumias>, Accessed 8 September 2019, Shaban Makokha, How fall of Mumias Sugar sank with the fortunes of residents, Daily Nation, 9 June 2019, <https://www.nation.co.ke/business/How-fall-of-Mumias-sank-with-fortunes-of-residents/996-5150666-mrgxj1z/index.html>, Accessed 8 September 2019.

⁹ Vincent Achuka 'Sh1 trillion - Shocking numbers in the plunder of a nation' The Standard, 9 December 2018, <https://www.standardmedia.co.ke/business/article/2001305596/sh1-trillion-shocking-numbers-in-the-plunder-of-a-nation>, Accessed 8 September 2019; Rebecca Okwany, Delayed funding, corruption hurting devolution- Senators, Daily Nation, 15 February 2016, Available at <https://www.nation.co.ke/news/politics/Delayed-funding-graft-hurt-devolution-Senators/1064-3077144-j0g95oz/index.html>, Accessed 8 September 2019.

¹⁰ Judie Kaberia 'Courts 'weak link' in graft fight, governance summit hears' Capital News, 18 October 2016, Available at <https://www.capitalfm.co.ke/news/2016/10/courts-weak-link-graft-fight-governance-summit-hears/>, Accessed 8 September 2019.

¹¹ Waianae Wambu and George Njuge 'Clean up your own mess' President tells Judiciary as CJ Maraga defends record' The Standard, 26 January 2019, Available at <https://www.standardmedia.co.ke/article/2001310838/clean-up-your-own-mess-president-tells-judiciary-as-cj-maraga-defends-record>, Accessed 8 September 2019.

editorials¹². In the circumstances, the Judiciary has been forced to defend itself on numerous occasions both in and out of court.¹³

3. Setting the Framework for the Analysis

Aside from his understatement of the negative impacts of corruption and the unwarranted attacks against the institutional collaboration to address the vice, O’kubasu begins his analysis of the decision by framing the wrong issues. He says “One of the problematic issues that has arisen in the context of bail and bond... has been whether public officials who have been charged with offenses relating to corruption **should be removed from office**.” However, the removal from office of persons charged with corruption-related offences has not been an issue, and was certainly not an issue in the *Lenolkulal* case.

Section 62 of ACECA is about suspension as opposed to removal, and it provides that any public officer charged under the Act automatically stands suspended during the trial. Having framed the wrong issues so early on, his admonition of Lady Justice Mumbi Ngugi’s decision from this point on is without basis and is not deserving of a response. Still, I will follow him down this wrong path if only to highlight more of the flaws that permeate the rest of his arguments.

4. Rationale for Suspension

O’kubasu next faults the decision for dwelling on the rationale for suspending public officers facing prosecution instead of focusing on the rationale behind the exception to this rule. He argues here that the proper question to be posed should have focused on the rationale behind section 62 (6) and not behind section 62 (1). Without Section 62(1), Section 62(6) is meaningless.

It is baffling how judicial analysis can focus on the proviso to a rule without first examining the rule itself. This goes against the fundamental tenets of statutory interpretation, one of which is that statutes must be read as a whole.

¹² ‘Courts the weakest link in anti-graft war’ Daily Nation, 7 September 2019, Available at <https://www.nation.co.ke/oped/editorial/Courts-the-weakest-link-in-anti-graft-war/440804-5264630-3uqomiz/index.html>, Accessed 8 September 2019.

¹³ Allan Irungu ‘Maraga defends judiciary on ‘weakest link in graft fight’ claims’ Citizen Digital, 28 February 2019, Available at <https://citizentv.co.ke/news/maraga-defends-judiciary-on-weakest-link-in-graft-fight-claims-233606/>, Accessed 8 September 2019.

He then proceeds to offer some explanations for why public officers facing trial are suspended in order to illustrate why these reasons do not hold when it comes to ACECA. The reasons he mentions, citing the judgment by Ong’udi J in the *Swazuri* case, include the preservation of evidence and the protection of witnesses against interference or intimidation.

His arguments on this point sound convincing, but only to an untrained eye. Whereas it is a no-brainer that barring Governors from accessing their offices during prosecution does not help preserve evidence, or that a Governor who is merely barred from accessing his office still has the means to interfere with or intimidate witnesses, these are not the major reasons the suspension of officers facing prosecution or ordinary disciplinary proceedings is sought.

A few illustrations from the Constitution would help illustrate this point. If his arguments were right, all suspension would be meaningless, including instances where the Constitution itself requires it. Where a complaint raises sufficient ground for the removal of a Judge, for instance, the Judge stands suspended the moment the President appoints a Tribunal to investigate the alleged misconduct.¹⁴ Similarly, on receiving a petition seeking the removal of the Director of Public Prosecutions, the President is equally required to suspend the office holder as he appoints a Tribunal to investigate the allegations.¹⁵ The same rule applies when petitions seeking the removal of members of independent commissions are received by the President from the National Assembly.¹⁶

It is doubtful that such suspension is carried out to safeguard evidence or to protect witnesses. This is seen, for instance, in the fact that a Judge facing disciplinary proceedings will remain in office during initial inquiries by the Judicial Service Commission (JSC), and will only be suspended should the JSC recommend the establishment of a tribunal to further investigate the alleged misconduct. Indeed, the proceedings before the JSC are the most critical, and one who is inclined to interfere with witnesses is best placed to undermine the case at this preliminary stage before the matter reaches the formal inquiry by a Tribunal constituted by the President.¹⁷

¹⁴ Art 168.

¹⁵ Art 158.

¹⁶ Art 251.

¹⁷ When, for instance, Justice (Rtd) Dr. Nancy Baraza was facing JSC inquiries following her much publicized altercation with security guards at one of Nairobi’s shopping outlets, the Tribunal appointed by the President to investigate her conduct found that she had attempted to reach the key witness in order to compromise the investigations. The report notes that “On 27th June 2012, about one week

Additionally, suspension is automatic in the above cases even where the allegations of misconduct arise from events that take place outside the offices of the charged individuals.

As such, the central idea behind suspension during prosecution or disciplinary proceedings is to strip the concerned officer of his powers and duties until a verdict on the allegations is returned. This ensures that they are not discharging official duties when their character and integrity is under serious question. Whereas the preservation of evidence and the protection of witnesses may be achieved in the process of such suspension, these are merely ancillary to the central objective of suspension.

As rightfully suggested by O’kubasu, the admission of witnesses to a witness protection programme would be a more useful strategy for safeguarding their evidence if there are well-founded fears that the suspect may interfere with, or intimidate the witnesses.

It should also be said that if suspension has no meaningful purpose when governors are facing trial as has been suggested by O’kubasu, then perhaps the whole of Section 62 of ACECA should be scrapped from the statute books, for it will not make sense to argue that suspension serves no purpose for one set of public officers while it is useful for another set.

Where a Governor whose office enjoys constitutional protection is charged with corrupt practices, alongside, say, another senior county government official whose position does not enjoy such protection, the insistence to suspend one and not the other makes no practical or legal sense.

O’kubasu has also failed to reflect on why suspension of state and public officers is only required as a matter of course during the prosecution of corruption-related cases and not in other crimes.¹⁸

before the Tribunal was scheduled to start its hearings, and after the DCJ had been served with a list of witnesses as well as witness statements, she contacted Kerubo and Makhau. The DCJ’s testimony was that she wished to reconcile with Kerubo, while Kerubo stated that she asked them to change their evidence and to remove references that she (the DCJ) brandished a pistol and threatened to shoot Kerubo. That was a very serious undertaking conducted by a judicial officer. [...] The fact that she improperly contacted witnesses in the absence of the Lead Counsel to the Tribunal also raises concerns about her ability to refrain from future misconduct.” See Report and Recommendation into the Conduct of the Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR.

¹⁸ Section 41 of the Leadership & Integrity Act provides that Subject to the Constitution and any regulations for the enforcement of the Code made under this Act, a State officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary.

Suspension of employees facing prosecution or workplace disciplinary proceedings is a common practice across all forms of employment, including in the private sector. The only difference that suspension makes is that it stops an office holder from exercising the functions of his office. Evidence has showed that it does not stop one from approaching witnesses or threatening them.¹⁹ Whereas it may help create an ideal environment for investigations, there are many instances where investigations are completed even before suspension which only happens after the launch of formal disciplinary proceedings.

5. The Uniqueness of Public Service

He also faults the Judge's comments touching on the alleged moral ill health of suspects facing corruption cases. In adopting this angle of attack, he fails to acknowledge that the nature of public service requires complete trust and confidence in those exercising public power, and this is why the approach taken by Lady Justice Mumbi Ngugi is similar to that taken by the Australian Courts in *Hall v State of South Australia*.²⁰

In considering the validity of the suspension of a public sector employee suspected of workplace misconduct, the Court noted that the employment relationship in the public sector is distinct from that outside the public sector. The court emphasised the critical role that legislation regulating public sector employment plays in pursuit of the public interest. The court said that the integrity of the public service and maintenance of public confidence in it are driving forces behind public sector employment legislation.

In support of its observations about the nature of public sector employment, the court referred to the decision of Justice Finn of the Federal Court in *McManus v Scott-Charlton*²¹ and the decision of the High Court in *Commissioner of Taxation v Day*.²² The court quoted the following passage from *Day*:²³

The public service legislation in Australia has served and serves public and constitutional purposes as well as those of employment, as Finn J observed in *McManus v Scott-Charlton*. Such legislation facilitates government carrying into effect its constitutional obligations to act in the public interest. For reasons of that

¹⁹ Following her suspension, Dr. Nancy Baraza still approached a witness.

²⁰ [2010] SCSA 219.

²¹ (1996) 70 FCR 16.

²² (2008) 236 CLR 163.

²³ Para 34.

interest and of government the legislation contains a number of strictures and limitations which go beyond the implied contractual duty that would be owed to an employer by many employees. In securing values proper to a public service, those of integrity and the maintenance of public confidence in that integrity, the legislation provides for the regulation and enforcement of the private conduct of public servants.

Persons accused of any crimes while serving the public should therefore stand suspended from office pending the resolution of the cases they face. It is not about access to evidence or tampering with witnesses, but to ensure those exercising public power have the confidence of the people regarding their character and integrity. When that confidence is questioned as will happen when one is facing trial, it is only fair that they are stopped from exercising their functions until the cases are concluded.

6. The Presumption of Innocence

Contrary to the position taken by O’kubasu, the remarks regarding moral ill health do not in any way undermine the presumption of innocence. His view is that such remarks, coming from a superior court during bail terms revision proceedings, are likely to influence the mind-set of the lower court when it finally sets the matter for hearing.

Contrary to these fears, a court asking an accused to step aside from office pending trial has not convicted the accused before trial but is merely acting to restore confidence among members of the public in government officials. The suspect enjoys the right to be presumed innocent, and will have a better opportunity to defend himself in court by paying full attention to the trial rather than being distracted with official duties.

As such, what Judge Mumbi Ngugi is saying — without saying it — is that such people should absolutely be suspended from office during trial so they are stripped of their official powers temporarily, as opposed to the cosmetic restraint from accessing their physical offices. As O’kubasu has rightly pointed out, keeping a serving governor from his office does not in any way undermine his ability to influence witnesses or tamper with evidence, most or all of which will usually have been collected before arrest.

And so what is needed is suspension from office as that takes away completely the powers the office holder had, for as long as the suspension or trial lasts. Perhaps

Chapter Six should be amended so that anyone accused of corruption stands suspended automatically regardless of other provisions on removal from office for state and public officers.

7. The Constitutionality Conundrum

O’kubasu also charges that Justice Mumbi Ngugi “ventured into a declaration or somewhat commentary upon unconstitutionality of sections 62 (6) of ACECA when the question of section 62 (6) placement within Chapter six was not an issue for her determination.”²⁴ It is indeed true that the constitutionality of Section 62(6) as against Chapter Six was not a direct issue for determination. But it is also true that the decision does not make any firm findings on this issue, and the remarks made in that regard were merely *obiter*. As such, the lamentations against the court striking out legislation so casually against established principles are uncalled for.

Fortunately, this question was directly in issue in the *Alex Kyalo Mutuku* case²⁵ where employees of the Makueni County Assembly challenged the constitutionality of Section 62(6) of ACECA, claiming that the section violates their right under Article 50(2)(a) of the Constitution to be presumed innocent until proved guilty, that it is discriminatory as other public officers such as Members of Parliament are not suspended when undergoing trial, and finally, that suspension on half pay violates their socio-economic rights.

In dismissing the petition, the Court held that “the suspension of a person suspected or charged with a criminal offence is a perfectly rational and permissible administrative decision [which] allows for investigations to be carried out without interference from the employee involved. Viewed from that perspective, suspension is not a punishment but an administrative holding operation pending the outcome of further investigations or action.”

The claim that this proviso is discriminatory failed, but only because the Petitioners cited Article 99 of the Constitution for comparison yet this Article covers eligibility to run for office rather than suspension during trial. Article 99 provides that persons convicted of crimes are eligible to run for Parliament for as long as they have not exhausted all room for appeal against their conviction.

²⁴ At p 12.

²⁵ *Alex Kyalo Mutuku & 7 others v Ethics and Anti-Corruption Commission & 2 others* [2016] eKLR.

O’kubasu’s own view is that the exemption that certain public officers enjoy under Section 62(6) is not unconstitutional as it was intended to safeguard persons vetted for appointment to senior public offices, or those elected through universal suffrage, from the deployment of criminal law as a means to backdoor removal.

The poster child of this position is the Governor who can be removed only where the grounds in Article 181 are present, and only by following the process outlined in Section 33 of the County Governments Act. It is to be noted that even where the Senate is seized of a petition seeking the removal of a Governor, the Governor is to remain in office with full powers pending the conclusion of the impeachment proceedings.²⁶

The rationale for leaving Governors with their full powers during impeachment proceedings is not clear when the Constitution requires superior court judges, members of independent commissions and the DPP to be suspended when a tribunal has been constituted to investigate their conduct.

Lady Justice Mumbi Ngugi made similar observations in the *Alex Kyalo Case* where she expressed the view that:²⁷

Unlike the public service or other public sector employees, it seems that Parliament has not seen an ethical need to place sanctions on Members of Parliament charged with the commission of criminal offences. This, however, is not the ideal situation. ***Rather than public officers in other public sector seeking to be placed in the same situation as Members of Parliament in terms of accountability and adherence to Chapter Six of the Constitution, the reverse should be the case: that Members of Parliament should face the same sanctions and regulations as other public sector workers who are suspected of having committed criminal offences, and have been charged with regard thereto, or similar but appropriate sanctions that would apply to elected officials.***

I will also reiterate here the background and context to the 2010 Constitution and the leadership chapter that was to offer a clean break from a past tainted with all manner of corrupt and unethical leadership.

But the central issue is not as complicated. Fortunately, what the court was really dealing with in the *Lenolkulal* and the *Waititu* cases was a much smaller issue that touched only on the validity of orders barring the Governors from accessing their offices during trial. Arguments that such orders amount to constructive

²⁶ Sec 33(2)(b), County Governments Act.

²⁷ At para 81.

removal are invalid since there is no direct correlation between the exercise of the powers and functions of the Office of Governor and the physical space from where such functions are exercised. A Governor who is barred from accessing his office retains his full powers and can exercise them from any other location.

The Court was not called upon to examine the utility of such orders, but whether they offend the law. It may well be that there is no more evidence to be safeguarded, or that the governor may still interfere with witnesses, but these do not mean the orders offend the law.

Whereas I agree that there are risks for abuse of power by the ODPP — which is an extension of the Executive — and who may institute criminal proceedings with ulterior motives, there are mechanisms for ensuring accountability by the ODPP and seeking redress in case of abuse of prosecutorial powers. Additionally, ACECA mandates the expedition of trials where an officer is suspended, and such officials will know their fate within two years of arraignment.²⁸

8. Crisis? What Crisis?

In a last-ditch attempt to salvage his arguments, O’kubasu presents hyperbolic hypothetical situations to illustrate the crises the country would face when the decision in *Lenolkulal* is followed. He wonders, for instance, what would happen where both a Governor and his Deputy are charged, given that the *Lenolkulal* decision mentioned – albeit in passing – that a Deputy Governor would take over the functions of a Governor who is unable to act.

He attempts to demonstrate this crisis by citing statements attributed to the Kiambu Deputy Governor who reportedly stated that he was taking over the Governor’s functions following the decision that barred the Governor from accessing his office. However, the decision of the court was quite clearly intended to block physical access to the office and not the exercise of the powers of that office. Unfounded statements from an individual who misreads a court decision for his own selfish political ambitions cannot be used against the court. If anything, the Governor himself was seen shortly after the decision performing functions such as inspection of county projects and presiding over meetings away from his office, and no one has moved to charge him with contempt

²⁸ Sec 62(1). ACECA.

O’kubasu also wonders what would happen where four of the seven Judges of the Supreme Court are blocked from their offices if they are facing prosecution under ACECA.

The recent decision of the High Court in *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 Others*²⁹ presents two tests for dealing with criminal misconduct among judicial officers. In the first instance, cases involving misconduct with a criminal element committed in the course of official judicial functions, or which are so inextricably connected with the office or status of a judge should be handled first by the JSC which is to determine their suitability for office before the criminal justice process can kick in. If allegations of misconduct are serious then the judicial officers will be removed from office so that by the time the criminal process kicks in, the question of serving judicial officers being blocked from their offices will not arise.

The second test fashioned after lengthy analysis of comparative jurisprudence provides that where acts of a criminal nature are committed outside the scope of official judicial function, the judge or judicial officer can be investigated, arrested and prosecuted directly, without recourse to the disciplinary or removal process. Accordingly, serious offences such as theft, fraud, arson, rape or murder fall in the latter category.

Naturally, the violation of ACECA would fall under the first test which requires the matter to be handled by the JSC before the criminal process kicks in. As such, a case of four justices of the Supreme Court being blocked from office during prosecution for violating ACECA is highly unlikely. The more probable scenario will see them face the JSC first and if a probable case for their removal is made, they will be suspended as a Tribunal is appointed to interrogate the case.

In the 6,426 words in his paper, O’kubasu also fails to acknowledge two important facts: the first is that Governors, their deputies and other constitutional office holders are not immune from prosecution, while the second is that Governors who are facing trial under ACECA or other penal laws may well be denied bail if compelling reasons arise. Unfortunately, the provisions on the removal of Governors – or indeed other constitutional office holders – do not include pre-trial detention as a ground for removal. This is rightfully so given that pre-trial detention does not take away the presumption of innocence. But it takes away the

²⁹ *Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR.

ability of an office holder to engage in the day to day performance of his duties and a technical vacancy which cannot be filled through the procedures laid down for filling temporary vacancies.

Where a Governor is in office but is merely unable to perform the functions of his office, the deputy is permitted to perform both functions. Whether both the governor and the deputy are in office but are both unable to act – such as where both are in pre-trial detention, the law does not provide for the temporary exercise of the powers of that office.

What, then, should courts do when compelling reasons are presented that warrant the pre-trial detention of a Governor? Going by O’kubasu’s arguments, Governors and their deputies should never be denied bail and held in pre-trial detention since this will bar them from performing the functions of their office and result in a constitutional crisis.

Quite clearly, the constitutional crisis he alludes to is not one that was created by judicial interpretation, but by the Constitution itself. It is the Constitution and the County Governments Act that have failed to provide for the exercise of the powers of the office of governor where both the governor and his deputy are unable to perform their functions such as would happen when both are held in pre-trial detention.

Finally, the paper recommends the deployment of the Witness Protection Act as a more practical way of managing the risk of witness tampering and intimidation. However, as alluded to earlier, the suspension of persons facing trial seeks to address issues that far outweigh the safety and security of witnesses and their testimony. Indeed these can be addressed quite effectively through the Witness Protection Agency coupled with a better approach to investigations that will ensure witness statements and crucial evidence is collected and secured before arrest and arraignment.

The larger issue, however, is the propriety of persons facing such serious charges to continue discharging the functions of their offices during the pendency of their trials. The deployment of the Witness Protection Act cannot deal with this.

9. Conclusion

The phrase ‘judicial activism’ is often bandied around to condemn judges when they make decisions against the government (read executive and legislature).³⁰ It is an irony that O’kubasu levies this charge against a decision which appears to be in line with the government agenda. I have attempted to illustrate the reasons the collaboration between different government agencies in the fight against corruption is of paramount importance, and why the judiciary should not be condemned for playing its part. This may call for some level of judicial activism, but certainly not the harmful kind.

One of the strongest opponents of judicial activism is retired Attorney General Prof. Githu Muigai who spent most of his stint at the State Law Office battling against what were viewed by many as activist decisions from the High Court in Nairobi.³¹

In a recent debate between the retired Attorney General and retired Chief Justice Dr. Willy Mutunga hosted by the UoN School of Law,³² Mutunga reiterated his support for judicial activism that is seen in many of his public remarks and speeches,³³ while the retired Attorney General spoke vehemently against activism by Judges. It is an irony that on his retirement from the state law office, Prof. Githu Muigai has returned to practice in courts urging the same Judges he labelled as activists to uphold the fundamental rights and freedoms of private citizens he is now representing.³⁴

Like the former Attorney General, O’kubasu will in the fullness of time see the folly in his arguments and the wisdom in the sort of judicial activism that has

³⁰ Kenfrey Kiberenge ‘Judiciary criticised over trail of radical court rulings’ Daily Nation, 20 October 2012, available at <https://www.nation.co.ke/news/politics/Judiciary-criticised-over-radical-rulings/1064-1538376-hpm17oz/index.html>, accessed 8 September 2019.

³¹ Bernard Sanga ‘Attorney General Githu Muigai criticises Judiciary over injunctions’ The Standard, 23 August 2016, available at <https://www.standardmedia.co.ke/article/2000213018/attorney-general-githu-muigai-criticises-judiciary-over-injunctions>, accessed 7 September 2019.

³² ‘Law Titans battle on Constitutional Interpretation at Parklands School of Law’ available at <https://www.uonbi.ac.ke/content/law-titans-battle-constitutional-interpretation-parklands-school-law>, accessed 8 September 2019.

³³ Laban Wanambisi ‘2010 Constitution activist by origin, design and intent – Mutunga’ Capital News, June 16, 2016, available at <https://www.capitalfm.co.ke/news/2016/06/2010-constitution-activist-by-origin-design-and-intent-mutunga/>, accessed 7 September 2019.

³⁴ Sam Kiplagat ‘Betting firms want suspension on paybills lifted’ Daily Nation, 5 August 2019, Available at <https://mobile.nation.co.ke/news/Betting-firms-want-paybills-restored/1950946-5224180-pyp74uz/index.html>, accessed 8 September 2019.

been adopted by Lady Justice Mumbi Ngugi. In the meantime, when the story of the 2010 Constitution is finally written, I hope the task of writing it does not fall on Duncan O’kubasu, for it is my sincere hope that the authors will reserve a chapter for Lady Justice Mumbi Ngugi in acknowledgment of her consistency in defending and enforcing Chapter Six of the Constitution.

She has been the consistent voice in many landmark cases that touched on Chapter Six of the Constitution. In September 2012, she was on the bench alongside Justice George Odunga and Justice Prof. Joel Ngugi when the three upheld a petition that sought to block Mumo Matemu from taking office as Chair of the EACC when he had unresolved questions regarding his character and integrity.³⁵ Incidentally, all three Judges have been nominated and recommended by the JSC for appointment to the Court of Appeal, and were only awaiting formal appointment by H.E. the President by the time of publication.

In February 2014, she overturned the appointment of Ferdinand Ndung’u Waititu to chair the Board of the Athi Water Services Board owing to the failure of the Cabinet Secretary to conduct an inquiry into his character and integrity.³⁶ The nominee was later elected as Governor in Kiambu County and was facing prosecution for abuse of office by the time of publication. And in July 2019, she confirmed lower court orders barring the Samburu Governor from accessing his office during his trial over economic crimes.

This decision does not point to ruinous judicial activism as O’kubasu would have his readers believe. Instead, it is the sort of bold and progressive interpretation that breathes life to constitutional clauses that many have dismissed as non-justiciable, and will go a long way in helping realize the collective aspirations of the Kenyan people that were captured in the 2010 Constitution.

³⁵ *Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others* Nairobi High Court Petition 229 of 2012; [2012] eKLR. The decision was reversed by the Court of Appeal (See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No. 290 of 2012; [2013] eKLR) and a further appeal to the Supreme Court was overtaken by events when Mr. Matemu was removed from office before the Petition was set down for hearing.

³⁶ *Benson Riitho Mureithi v J. W. Wakhungu & 2 others*; High Court Petition No. 19 of 2014; [2014] eKLR. The decision was also reversed by the Court of Appeal (*Ferdinand Ndung’u Waititu v Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 others*, Nairobi Civil Appeal No. 176 of 2014; [2018] eKLR) on technical grounds.