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CURBING CORRUPTION: IDEAS THAT WORK | JULY 2016

How Kenya Cleaned Up Its Courts

A new constitution gave judicial reformers an opportunity to earn back the people's trust. Here's what they did with it.

by Maya Gainer

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About the author

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“We found a judiciary that was designed to fail,” said Willy Mutunga, Kenya’s new chief justice, in a speech four months after his June 2011 confirmation to the post. “We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic.”

Many Kenyans doubtless agreed with Mutunga’s assessment. A popular joke, “Why hire a lawyer when you can buy a judge?” summed up many Kenyans’ views of their country’s judicial system. In 2011, Kenya had only 53 judges and 330 magistrates for a population of 41.4 million. There was a massive backlog of almost 1 million cases. Litigants often bribed staff to get earlier court dates or to “lose” case files and prevent hearings altogether. In 2010, 43 percent of Kenyans who sought services from the judiciary reported paying bribes, according to Transparency International.

Few of the judges responsible for managing court stations had any training or experience in administration, and many received no on-the-job guidance. With little knowledge of how the court system worked, the public was unable to demand higher-quality services, and the judiciary itself lacked systems to track cases or to hold judges and magistrates accountable for delays.

The courts were also widely seen as politically biased. Until the passage of a new constitution in 2010, the president had unilateral power to appoint not only the chief justice of the Court of Appeal, then Kenya’s highest court, but also all the members of the Judicial Service Commission, responsible for hiring and disciplining judges.

Kenya’s disputed December 2007 presidential election threw the public’s lack of trust in the judiciary into sharp relief. The ruling Party of National Unity was declared the winner of a close race, but the opposition Orange Democratic Movement accused the government of fraud, and both national and international observers said the tallies had been manipulated. However, opposition leaders refused to settle the issue in court because they believed their party would not receive a fair hearing.

In the weeks of violence following the election, approximately 1,200 Kenyans were killed and up to 600,000 were displaced. After an international mediation process, Kenya’s major parties formed a coalition government and appointed an independent commission to draft a new constitution that would address the underlying causes of the violence—the weakness of the judiciary among them.

The resulting 2010 constitution provided a clear mandate for judicial reform, specifying a restructured court system headed by a Supreme Court and separating the Judicial Service Commission from the executive. Funds to support the reform process came from a doubling of the national budget allocated to the judiciary in the 2011-2012 fiscal year, a \$120 million grant from the World Bank, and contributions from other organisations including Germany’s international development agency and the United Nations Development Program.

Mutunga—a lawyer, professor, and civil society activist who had spent 16 months detained without trial during the authoritarian regime of Daniel arap Moi—was

in charge of these ambitious efforts to transform Kenya's courts. He began by assembling a team to assess the judiciary's challenges and create a plan for reform. Two key members were Joel Ngugi, a High Court judge, and Duncan Okello, the chief justice's chief of staff. The team began to sort through the many previously proposed reforms—internal reports, recommendations from civil society organisations, and the work of a 2009 task force. They consulted extensively with judges, magistrates, and staff to ensure internal support for the reform agenda. "Even if you disagree with elements in it for subjective reasons, you cannot claim you were not part of the consultation," Okello said.

The result was a plan known as the Judiciary Transformation Framework, issued in May 2012, which identified four pillars of reform: "people-centered" delivery of justice; improving organisational culture and professionalism; ensuring adequate infrastructure and resources; and making better use of information technology.

The first pillar, which focused on ensuring access to justice and public engagement, included such actions as establishing customer care desks to answer questions, simplifying court procedures, creating a case management system, and strengthening complaint mechanisms. The second pillar focused on changing the judiciary's institutional culture, increasing training, and clarifying individuals' responsibilities. The third and fourth pillars sought to expand the court system, to computerise its procedures, and to upgrade its IT infrastructure.

To oversee the implementation of these plans, Mutunga appointed Ngugi as director of the Judiciary Transformation Secretariat, a new office charged with coordinating initiatives, tracking progress, and sharing best practices across courts.

The secretariat led 38 workshops across the country to present the new reform program to judicial employees. The workshops brought together judicial officers and support staff—including those, such as cleaners and drivers, who had never interacted with judges on an even footing.

The newly inclusive approach "was a culture shock for them," Ngugi said. "It immediately announced that things had changed." Okello agreed. "The overriding problem in this institution was cultural," he said. "The judiciary had developed a culture of unaccountability, distance, hierarchy... sometimes driven by a self-serving invocation of the principle of independence."

At each of these workshops, judicial officers and staff discussed challenges the judiciary faced and suggested strategies to respond. This process, said Ngugi, helped demonstrate that "the transformation framework was actually not an alien thing but something they themselves were saying." New training opportunities and increased salaries and benefits beckoned, but Ngugi and Okello also wanted to be sure the program had buy-in from its participants.

The vetting process required by the 2010 constitution, in which each judicial officer faced a board review to determine if he or she was fit to remain on the bench, also helped head off opposition. The judicial officers most likely to resist reforms—those

with histories of corruption, bias, or unreasonable delays—were also the ones most concerned about removal by the vetting board. The vetting process “gave us a great opportunity to carry out reforms,” Mutunga said. “We were able to do a lot of things because the internal resistance to reforms was already engaged by the vetting. They were fighting for their professions for almost three years.”

The list of tasks the reformers had to undertake was immense. The transformation framework called for streamlined court procedures and clearer processes for litigants trying to navigate the system. Court registrars took the lead on standardising and communicating administrative processes that had previously varied from court to court. Each court station was required to produce a service charter in the form of a billboard, listing requirements, fees, and timelines for each court process, and each level of the court system worked to produce a registry manual that clearly spelled out procedures for both staff and users.

Basic physical organisation of the case files was a priority—they were often difficult to locate, and that made it easy for unscrupulous staff members to remove important documents or hide whole files. The High Court registry reorganised and color-coded its files, and the registrars implemented a tracking system that required anyone who retrieved a file to leave a “tracer card” in its place so others could easily see who had it.

Introducing better monitoring and information sharing practices was essential. Initially, the reform team had wanted to roll out an electronic case management system to monitor delays, digitally store and share documents, and assign cases to judges randomly to limit corruption opportunities. Beginning in 2010, the magistrates’ court in Eldoret, a major city and county capital in western Kenya, piloted a court-level case management system with funding from the U.S. Agency for International Development and technical support from law reporting agency Kenya Law. The Eldoret system allowed judicial officers to easily track the status of a case in a court-level database and enabled litigants to check their cases’ statuses and receive updates such as hearing dates or reminders to pay outstanding fees via text message.

Similar systems were introduced piecemeal in other courts, but scaling up to the entire country proved more challenging.

Many courts had no internet connections, reliable electricity, or even computers. And because courts varied in their processes, it was impossible to develop a single nationwide system without first standardising procedures. “We started encouraging [court] stations to develop their own local solutions,” said Ngugi, but “this didn’t solve one of our major problems, which was having [centralised] access to data.”

In January 2013, the judiciary’s performance management committee began to develop a tracking tool to gather the information necessary to evaluate job performance, which collected much of the same data an electronic case management system would have. After almost three years of testing, the new tool—a simple Excel spreadsheet with drop-down menus customised for each

court's procedures, known as the Daily Court Returns Template—was rolled out in October 2015.

At the end of the day, an administrative officer at each station would update the spreadsheet and send a copy to the central directorate that monitored performance, sometimes from an Internet cafe if the court lacked a reliable Internet connection. The template allowed the directorate to track case assignments and processing times and facilitated distribution of caseloads. However, the tool did not allow document sharing, and it was difficult to verify the data that court stations submitted.

Mutunga understood that greater public engagement was essential to making reform work, and to this end he established an ombudsman's office in downtown Nairobi to collect and resolve citizen complaints. Ideally, citizens would be able to bring their complaints to the office, call, send text messages, letters, or emails. Staff logged complaints and set deadlines for a response in a database used by liaison officers at each court station. After receiving an alert from the database, liaison officers had to resolve the problem or provide an explanation within the allotted time. Inadequate responses or patterns of complaints could be grounds for disciplinary action against judges and administrative staff.

However, getting citizens to use the resource was a challenge. Kennedy Bidali, the first ombudsman, believed his team received only a fraction of the complaints they could have helped address. "We've tried the usual," he said—from appearing on radio and television programs to distributing written materials and T-shirts—"but it's not sufficient, and it's not easy."

Mutunga also integrated existing mechanisms into his reform program. Court Users Committees, which brought together judges, police, civil society organisations, and community leaders to share information and solve problems, had existed at many courts since 2006. The new transformation framework made these committees an official part of the justice system, and employed them to collect information about local issues and performance. In addition, committee members were better able to inform their communities about new policies, such as new procedures for traffic arrests and other small infractions.

In spite of these promising efforts, the judiciary's handling of the 2013 presidential election and ongoing corruption scandals raised questions about whether the reforms had been effective. After a close presidential race, the losing candidate, Raila Odinga, challenged the vote count in the Supreme Court.

The court dismissed Odinga's petition and unanimously ruled that the election had been conducted in accordance with the law and the constitution. The decision received intense criticism. George Kegoro, executive director of the Kenyan section of the International Commission of Jurists, criticised "the frailties of the process," saying that both how the court handled the case and the substance of the judgment contributed to "a huge loss of confidence in the judiciary."

Public trust in the judiciary was shaken further in August 2013, when the chief registrar—the court system’s head administrative officer—was alleged to have improperly spent a total of KSh2.2 billion (\$25 million at the time). She was dismissed, along with several other senior administrative staff implicated in the scandal.

This high-level administrative corruption drew attention to the persistence of graft throughout the judiciary. The reform program struggled to correct the problem, and in August 2015, Mutunga gave a much-publicised speech at the annual judges’ colloquium expressing concern about “reports on an upsurge in this immoral scourge.” In February 2016, an internal probe recommended that Supreme Court Justice Philip Tunoi be investigated further over allegations that he received a Ksh200 million (\$2 million) bribe to influence an election petition. However, the investigation wound down in June after a separate court case removed Tunoi from the bench when he reached the mandatory retirement age of 70.

Kenya’s judicial reforms have led to some concrete, measurable successes. The judiciary hired more than 200 new judges and magistrates and established 25 new court stations since 2011 in an effort to increase capacity and access to the judiciary in remote areas.

This, along with greater institutional pressure and streamlined procedures, helped begin to clear the massive backlog of cases, which stood at 311,800 as of 2014, from estimates of nearly a million only three years earlier. “We’ve recorded tremendous progress, especially on lost files,” said Okello.

“I think that, institutionally, knowing that somebody was paying attention put people on their best behavior.” Furthermore, in four years of operation, the Office of the Judiciary Ombudsperson handled more than 21,000 suggestions and complaints.

But, while public perception of the courts improved significantly in the early years of the reform effort, with Gallup citing that 61 percent of Kenyans had confidence in the judiciary in 2013, as compared to 27 percent in 2009, the gains eroded over time. From November 2013 to April 2015, Ipsos polls found that the number of Kenyans expressing “a lot of confidence” in the Supreme Court fell from 28 percent to 21 percent, and 21 percent to 12 percent for other courts—possibly reflecting high-profile controversies over corruption and the presidential election decision.

Nevertheless, there are signs that the focus on cultural change had paid dividends, said Chief Registrar Anne Amadi. “We are more conscious of the fact that judicial authority derives from the people,” she said “Every morning, when you’re coming to court, you’re coming to deliver justice; and you have to be able to demonstrate that you delivered it.”

Many cited Mutunga’s personal leadership as critical to the reform effort. After his retirement this June, much will depend on the next chief justice. “The chief justice has started the journey and set the direction, and after he leaves office, the strengthening of the transformation begins,” said Justice Reuben Nyakundi of the High Court. Although the judiciary’s future leadership was uncertain, many

said they believed that the policies launched by Mutunga had set the institution on a path to greater improvements. Mutunga himself said that some reforms, like increased salaries and data-driven decision making, would be difficult to reverse, but others, from cultural changes to fighting corruption, required sustained support.

“The foundation has been laid,” said Nyakudi. “Now we have to build on it.”



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