

ACCESS TO JUSTICE AS A HUMAN RIGHT FOR THE PEOPLE OF KENYA'S COAST¹

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The Hon. Chief Justice of the Republic of Kenya, dignitaries, ladies and gentlemen,
all protocols observed

1. Let me begin by congratulating the Muslims for Human Rights ('MUHURI') on this occasion of the launch of the Mombasa Legal Aid Clinic. I have for over a decade now had close interactions with MUHURI and I greatly admire the courage, fortitude and innovation with which MUHURI has proceeded to advocate for the rights and freedoms of the people who live here. On a personal, perhaps immodest note, I must say that I think I played my own small role in ensuring MUHURI's success in the way I mentored its current Director, Hussein Khalid, when he worked under me at the Centre for Law and Research International.
2. I had been asked to speak about access to justice as a human right. What I actually shall speak about is justice as a human right, the considerations and priorities which should guide State and non state actors as they vigilantly seek to ensure that the people of the Coast access justice on an equal basis with the rest of the country.
3. Article 48 of the Constitution of Kenya (2010) is fairly succinct in what it provides. It states: 'The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice'.

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4. A couple of years since promulgation of the Constitution, Kenyans are increasingly asking themselves what real tangible benefits have accrued to them since 27 August 2010. State and non state agencies must increasingly work to ensure that Kenyans do not fall back into cynical dismissal of the institutions and values which we so solemnly signed up to on promulgation day and for which so many were killed or maimed.
5. To my mind, a number of questions should concern us State or non-state officers: When the people of the Coast wake up each morning, when they leave their abodes, it is to face what? If each young man wearing a beard or each woman wearing a *buibui* knows they are liable only on account of their perceived profile to be bundled into an anonymous car and tortured for their looks, where is justice? If political organising is going to be proscribed simply because it is happening at the Coast and not in the GEMA or KAMATUSA heartlands, where is justice?
6. During my tenure as a Commissioner at the Kenya National Commission on Human Rights ('KNCHR'), I have heard many excuses why State agencies violate the rights of individuals or why such agencies decline to assist those whose rights have been violated. Here are two such excuses.
7. Excuse one arises when we fail to recognise that it is the law that should defer to human rights and that enforcing laws strictly could be violative of human rights. There are those of us who say they cannot intervene when a demonstrator is beaten up while attending an illegal demonstration: that if Limuru II is declared illegal then demonstrators are 'asking' for it if they get beaten.
8. In Mombasa, usually after Friday prayers, younger people may spill onto the streets to express themselves on any number of issues. First, could this be illegal any more under our new Constitution? No, I don't think so: at least not when the limitations clause in the Bill of Rights is interpreted correctly. But, second, when such demonstrators are injured or killed by our security forces, is it not now incumbent on

The Director of Public Prosecutions, the Attorney General, the KNCHR and so many other state agencies to make robust responses?

9. Excuse two arises from this approach which confuses between institutional duties and responsibilities and personal preferences and proclivities. How do our personal views or moralities as State officers impact how our institutions execute their constitutional or statutory mandates? As a punctilious State officer, will you leave a person to be tortured or otherwise violated simply because such person has advanced ethnocentric or fundamentalist views – because they espouse GEMA, Mungiki, KAMATUSA or MRC doctrines which you disapprove?
10. So, what does all this mean for justice for the people who MUHURI serves here at the Coast?
11. First, ensuring that the people of the Coast do access justice requires actions that confirm that extra-judicial killings are a thing of the past. The recent killing of Samir Khan does not encourage the view that impunity is about to be eradicated in this country.
12. Only this week, with the first decisions from the Vetting of Judges and Magistrates Board, Kenyans are witnessing the rather rare message that their institutions can really be reshaped post-promulgation. Yet we have far more numerous illustrations of unchanging, unresponsive institutions: MPs voting themselves more perks and indeed in the ongoing failure to establish the National Police Service Commission.
13. Second, justice here will not be realised effectively before Kenyans speak with far more candour about the Wapwani-Wabara dynamic. Surely justice issues exist which make the Wapwani to feel less than charitable to their up-country compatriots – for indeed compatriots we all are and should remain. The MRC must use just means to articulate its political agenda. That necessarily means that a safe political space must be created within which those just means may be used.

14. Third, I wish to address the emphasis in Article 48 of the Constitution that justice shall not be impeded. I gather that MUHURI are proposing an innovative approach under which individuals may use court facilities to record complaints which then will be forwarded to Article 59 Commissions. That indeed is innovative and we should all work to make it happen because by that one stroke many more people in many more counties will reach Article 59 Commissions. Yet, it would be wrong to assume that the Judiciary or even the KNCHR are exclusive custodians of justice.

15. Our experience as KNCHR of nearly ten years has included working with institutions at the community level such as the Luo Council of Elders and the Njuri Nceke which possess communal recognition and may on that basis mete justice. The key approach here entails eschewing inflexibility and nurturing innovation. For example KNCHR now wishes to work with the Somali Council of Elders to deploy the Maslaha approach to ensuring their communities' human rights. My appeal then is that the Kaya Elders here too could crown fewer politicians and partner in helping to ensure the rights of individuals in their communities.

16. As a final point, I should say that the KNCHR which until now has had only limited permanent reach in most parts of the country now plans to establish regional offices to cover all of Kenya's counties. Our third office which we should open in the next financial year will be in Mombasa; so we do look forward to working even more closely with MUHURI.

Thank you.