

PAUL MWANGI

— THE —

BLACK  
BAR

FOREWORD BY

HIS EXCELLENCY HON. RAILA ODINGA

# THE BLACK BAR

BY PAUL MWANGI

CORRUPTION AND POLITICAL INTRIGUE  
WITHIN KENYA'S LEGAL FRATENITY

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“It is certainly not our task to build the future in advance and to settle all problems for all time; but it is just certainly our task to criticize the existing world as ruthlessly, in the sense that we must not be afraid of our conclusion and equally unafraid of coming into conflict with the prevailing powers”

Karl Marx

“When I despair, I remember that the way of truth and love has always won. Throughout history, there have been tyrants and murderers, and for some time they can look invincible. But in the end they always fall, always!”

Mahatma Gandhi

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## **Dedication**

*“Dedicated to my late father, Peter Mwangi, who served as a lay magistrate for almost four decades, and who inspired me to the legal profession.”*

*And to all the men and women of courage in Kenya, dead or alive, who have paid so dearly for our liberties.*

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**FOREWORD BY  
HIS EXCELLENCY HON. RAILA ODINGA**

**THE RULE OF LAW WITHERS IN AN UNHEALTHY  
LEGAL PROFESSION**

Lawyers have always been recognized as the protectors of the Rule of Law. Indeed, when Shakespeare wrote in Henry VI “The first thing we do, let’s kill all the lawyers”, it was a testimony to the fact that where lawyers honestly discharge their duty to society, they guard against lawlessness and become the single most principal assurance of the “Rule of Law”.

Safeguarding the Rule of Law is one of the areas where Kenya has performed badly, giving way to impunity and utter chaos and left the weak and the poor absolutely at the mercy of the rich and the powerful. “The Black Bar” looks at this history and exposes how lawyers in Kenya have in history been accessories to the derogation of the rule of law.

During colonial times, lawyers watched as the imperial British government entrenched a cruel and racist administration under which the native African enjoyed neither human rights nor an equal protection of the law. In fact, the colonial government designed a legal system specifically for the natives that was founded on the premise of the sub-humanity of the African. Lawyers defended that system and greatly thrived under it.

After independence, as Africans joined the legal profession, lawyers again stood by as the Kenyan Constitution was dismantled and, in the words of J.M. Kariuki, ‘Kamau was substituted for Smith, Odongo for Jones and Kiplagat for Keith’. The cruel racist colonial administration was replaced by a home grown

oppressive system of government which though emphatic about the right to equal protection of the law for all often became the threat from whom the people needed protection.

In many instances, the legal profession acceded to the bad governance and abuse of authority that followed independence. In other instances, lawyers joined the system of government itself as active participants in the design and implementation of a legal system that not just enabled but justified the excesses of the day. Lawyers became accessories of the State and the powerful individuals on how to use the law to perpetuate and defend impunity and oppression.

Yet, in other instances, the lawyers became a threat in their own right, preying on Kenyans and earning the description “Kenya’s whities or the wood pile”.

It took a committed revolutionary group of Kenyans in every sector of the society to see a change in the downward trend Kenya had taken since independence. Among the clergy, the politicians, economists, sociologists and lawyers, young patriotic Kenyans raised their voices with the common purpose of changing the fortunes of their countrymen. I remember these years very fondly, though I did spend a large period of that time in a jail cell as a political detainee for raising my voice in support of the struggle.

Unfortunately, the success at changing the premises upon which mis-rule had been established was short-lived as lawyers again joined and supported reactionary movements.

They concocted philosophies and hypothesis to justify the resistance to reform and designed ways to use institutions of the law to entrench a new form of authoritarianism. Lawyers helped authoritarianism to exist by law.

In the process, the lawyers themselves, as they had done before, became a threat to the people by their own right, and became accessories to all the excesses of

bad governance. In this latter phase, financial corruption and appointments to high public offices became the currency with which lawyers were rewarded for aiding and abetting bad governance, an unfortunate development that started in the 1990's and goes on till today.

The correlation between the Rule of Law and the health of the legal profession is undeniable. Lawyers are first and foremost the “Knights of the Rule of Law”. They are commissioned to fight in the battles where bad people attempt to oust the law and rule by their passions; where legal processes, procedures and institutions are being knelt on by bad men, or manipulated to assist in the pursuit of nefarious objectives.

On a wider perspective, the legal profession is the nursery in which the Judiciary is raised. Judges, on their part, are the custodians of the Rule of Law. It is their mandate to superintend the law and ensure that it always is effective in creating and maintaining a society where no person is above the law and that all persons enjoy equal protection of the Law.

The first step at establishing and protecting the Rule of Law must therefore be addressing the health of the legal profession. There can be no Rule of Law without a healthy legal profession. Without lawyers fighting against those who promote bad governance and judges pro-actively ensuring that those battles are won, the citizen is left defenseless and at the tender mercies of unscrupulous politicians and merchants who ransack taxes and other public resources.

It is time we pay serious attention to the health of Kenya's Legal Profession. Beginning from the study of law, admission to advocacy, and professional ethics to terms of employment, we must ensure that we have a profession that is capable of giving Kenyans honest lawyers and judges capable of protecting and upholding the Rule of Law.

## **PREFACE**

One principle upon which lawyers in the underdeveloped countries, and particularly in Africa, differ with their comrades in the developed countries is that of the independence of the Bar. Lawyers in the developed world, and in organizations like the International Bar Association, have attempted to impress upon the Bar Associations of the underdeveloped world the necessity of rising above the day to day politics of their societies and avoiding the rough and tumble of political agitation. The lawyers in the underdeveloped world have however shunned the advice and maintain that they owe it to their societies to secure freedom and justice for all.

The difference between these two views is to be found in the realities of the respective societies. In the developed countries, the practice of law has grown away from tradition and lawyers have had a definite role to play in those societies amidst other institutions. Even where there has been no tradition influencing legal practice, the profession has been built alongside strong democratic institutions and the role of the lawyers in such societies has equally been defined.

This has never been the case for Africa. Lawyers in Africa have been born in colonialism, educated under neo-colonialism and function under dictatorships. They hold law degrees amidst oceans of illiteracy, which sometimes exceed 90%. They are the only people who can discern the glaring abuses of human rights and other excesses of their respective governments. The Bar Association is usually the only institution in which they can associate and through which they can press for reforms. They find it immoral to remain independent and non-partisan in the politics of their countries.

The reality in Africa is reflected in its philosophy of legal education. Legal education in Africa is not just aimed at producing legal technicians but also at creating 'agents of development'. A guide book to law schools published in the early 1960's stated " ... The lawyer in East Africa has to be much more than a competent legal technician. With the coming of independence, the manifold problems that beset developing countries have to be faced, and in doing this, great changes will have to be made in the framework of society. Lawyers have a vital part to play in these developments, for upon them will fall a major share of the work of putting into practice the principles and ideas of their colleagues in the fields of politics, economics and science, and ensuring that the resultant system works fairly and efficiently. Legal education must take account of these facts, and see that students are made aware of and prepared for their future role".

This book is a story about a group of lawyers in Africa who were trained as 'agents of development' but who had to watch helplessly as their country slipped into dictatorship. It is the story of a Bar Association that had to fight the forces of neo-colonialism and tyranny to secure for the citizenry the ideals of independence.

The story discusses the politics of the formation, growth and development of the legal profession in Kenya and of the Law Society of Kenya against the background of colonialism, neocolonialism and dictatorship.

Spanning the entire twentieth century, the story reviews the concept of independence of the Bar by looking at the political reality in Kenya and by placing lawyers within a particular social and political context. The aim is to display the intricate relationship between lawyers and politics, and between the independence of the Bar and the practice of democracy.

I ask the reader of this book to bear in mind the circumstances under which it is authored. By way of excuse, I would like to state that this book would have been substantially finer were it based on a developed country. The author

in Africa has to work with a poor information infrastructure. There are few records of history and many important occurrences have been lost for good. Even where such records may exist, they are usually lost in poor document management.

Information is also unavailable due to government restrictions. Documents that are by any standards harmless are protected under the Official Secrets Act which in fact prohibits the disclosure of information held by the government, whatever its nature. The “right to know” is non-existent and a freedom of information law is unheard of.

The government places the most restriction. Governments in Africa have little regard for fundamental civil liberties and the concept of freedom of expression is a nicety. Every author who writes criticizing the government or a government official, however mildly, is a sure target for state wrath. The only assurance that a research can be completed and a book published, is the maintenance of as much secrecy as possible. This, however, means that many a recommended interview with persons who still hold positions of power may not be conducted. A single interview that prods too deeply may see both the author and the project doomed to oblivion. This is the reality under which I publish this story. There are many details I would have wished to include but after one year of research I had to conclude them to be non-existent. There are many players, especially in the colonial period, whose names and roles cannot be found in any record. There are many people I would have wished to question on information I received, but that would have been self-defeatist. To be fair to the reader and to the persons affected by the information, I have revealed the details of the information, the credibility of its source and have discussed its reliability. Where I have felt that some information was unreliable, I have said so despite the absence of empirical evidence or reaction of the affected person.

But these restrictions should be no excuse where I have failed to express myself dearly, or at all. For such failures I can only apologize and hope that, nevertheless, you enjoy reading this book. P.M.

# THE WHITE BAR

## Chapter 1

It was a sunny afternoon, hot and dry. The judge's chambers were still and silent but for the monotonous rattle of the fan hanging from the middle of the ceiling and the gentle artificial breeze it created.

From his window, the old colonial judge beheld the streets below. Standing at three storeys, the High Court building was the highest in the city and allowed the judge a generous view of the world around him. He watched as African labourers tended the boulevards, pruning the palm trees and weeding the flowers. In the adjacent street, a white gentleman helped his lady load a painting into their horse-drawn carriage. Further away from them several white couples sat at a sidewalk cafe and sipped tea from tiny china cups as they listened to a ten-man orchestra. He spotted his wife walking towards the cafe and looked at his watch. It was four o'clock. Another thirty minutes before he could join her. He turned to face the middle-aged gentleman who sat across his desk.

"It's a crying shame, your honour, it's a crying shame," the judge lamented.

"What, my lord?" The gentlemen enquired, startled out of his reverie.

"The Mau Mau terrorists. After all we have done for this country. These people would still be in the bush had it not been for us. And the damned natives would now stab us in the back."

“Talk of stabbing in the back. A 52-year-old African houseboy turns on his employers and slays them. The entire family of seven slaughtered. He says he was ordered to do so by the Mau Mau. I wonder what the Mau Mau stand to gain from all this carnage.”

“So do I Mr. Attorney-General, so do I. I often wish we could leave and see how far they would get. Why can’t they realize that they need us to run this country - to create jobs, maintain peace, administer justice?”

“It is our added duty to make them realise that. And we cannot do so unless we are here. So we’ve got to meet these challenges together. We stand or fall together. No-one should expect to survive if these Kikuyu terrorists take over. Damned gangsters will drain blood from anything that’s white. So I do what I can as Attorney General, you do what you can as Chief Justice. As the Governor says, we all have a role to play.”

“If only London could be more helpful.” The Chief Justice pulled up his chair and sat down. From the cigar box on his desk he removed a thick cigar, bit off the tip and lit it. “I appreciate what London has done so far,” he continued, blowing smoke upward towards the fan. “But it is not enough. Times are getting harder and we need more assistance. And it doesn’t help calling blacks to the Bar.”

“Oh yes,” concurred the Attorney General. “They’ll be nothing but trouble. I hear the first black barrister is already here. What’s his name?”

“I’ll be damned if I can remember.” He opened the top drawer of his desk and pulled out a file. “Chiedo More Gem Argwings Kodhek. This is his application for admission to practice here.”

“What audacity! Next they’ll want us to admit the Mau Mau terrorists into Her Majesty’s Armed Forces. If I were you, My Lord, I wouldn’t be fooled by

the legal training. No matter what the sheepskin looks like, it's still the same old wolf."

"Trust me, Your Honour, trust me."

Further down the corridor a very sleepy lawyer was trying in vain to prosecute an ex-parte application before a very sleepy judge. Not even the fan above could temper the tropical heat in the oak-panelled chamber.

"Why don't we try this tomorrow afternoon, say 2.30pm," volunteered the Judge. "I'm sorry I have a hearing in the morning, otherwise I would make it earlier."

"My Lord, I ask for the indulgence of this court," the lawyer pleaded. "I find myself in a certain amount of difficulty concerning this coming Saturday's 'Shaggy Dog Show'. I happen to be in the organizing committee and we have agreed on a meeting tomorrow afternoon to which I had confirmed attendance."

"I'm only too aware of the show," the judge responded. "I've entered my Chihuahua for the contest. In fact, she is the reason I declined the appointment to the panel of judges."

"She's a beauty, My Lord, your Chihuahua. I was greatly attracted to her last year; her outstanding grace I mean. I believe she emerged second, My Lord?"

"She was second to a Pekinese owned by a farmer in the Rift Valley. But the poor Pekinese has since departed, God rest her soul. I'm hoping my little darling will be luckier this time round. Anyway, what date then?"

"My Lord, it would not be my wish to inconvenience this court any further than I have already done but I am proceeding on vacation to England some time after the show. If it is agreeable to you My Lord, I pray that the matter be adjourned with a view to fixing a hearing date upon my return to Africa."

‘Well then, orders as prayed,’ pronounced the judge as he yawned and stretched in his chair.

“Most obliged, My Lord,” the lawyer replied gratefully.

“Please call on me before you leave for England. I am sure I could use your company.”

“Certainly, My Lord”.

The lawyer left the Judge’s chambers and as he stepped into the corridor he saw the Chief Justice and Attorney-General walking towards him. He immediately stood against the wall and waited patiently as they approached.

“How do you plan to tame the beast and save this country from this nationalistic balderdash?” he overheard the Chief Justice ask as the pair approached. When they were next to him, he bowed towards them and uttered the relevant greetings.

“Good afternoon My Lord, Your Honour.” Despite his posture his voice was strong and clear.

“Good afternoon Counsel,” the two responded as they walked past.

“In my entire legal career I have never met such a seemingly impossible challenge as Jomo Kenyatta. If Sir Thomas More were alive and in my shoes, I wonder whether he would give the devil the benefit of the Law,” the Attorney General was saying as they fell out of earshot.

Through force of habit, the lawyer walked towards the stairs that led to the lawyers’ common room on the ground floor of the High Court building. It was November 1952. Unknown to him, or to any of his fellow colleagues at the Bar, nothing was ever going to be the same again.

Soon, they would have to fight for even the air they breathed in this Black Country.

Elsewhere in the city, Dennis Nowell Pritt, a senior London barrister of the rank of Queen's Counsel and a world renowned political lawyer, was having difficulty booking into a hotel. He had arrived at the Embakasi airport in the morning, welcomed by hundreds of cheering Africans along the road from the airport to the hotel. His arrival had created tension in the Kenyan colony and the soldiers from the British army who were literally all over the city clutched at their rifles more menacingly.

"But I made a reservation for two, didn't I?" Mr. Pritt was protesting. His hands were stretched out across the reception desk.

"Yes sir, there seems to have been an oversight when the bookings were made. What was the name of your friend again?" asked the receptionist, trying to hide his distaste as he glanced at the West Indian lawyer accompanying Mr. Pritt.

"Mr. Dudley Thompson. He is a professional colleague from Tanganyika," Pritt replied.

The receptionist made another quick search through the booking register and shook his head gently.

"I'm sorry sir, there is nothing. You will have to book your friend into another hotel."

"My room was a double, wasn't it?" enquired Pritt.

"Yes sir."

"Good, book Mr. Thompson in. I'll share the room with him," Pritt demanded.

“But sir ...” the receptionist began to protest, overcome with consternation.

“Is there any particular problem?” inquired Pritt.

“No sir,” the receptionist replied apologetically. “Allow me to confirm the bedding arrangement before I commit the hotel. If you’ll excuse me for a moment ...” The receptionist hurried away down a corridor.

“Racists, disgusting racists,” sputtered Pritt.

“It comes with the territory. I bet you ten to one I won’t spend even a single night in this hotel,” said Pritt’s companion.

“Don’t be such a pessimist. Next you’ll be betting me that we’ll lose the case.”

“Ten to one on that too. I know this place. This is home. Could we agree on your one pound to my ten?” Thompson teased.

“You don’t have that kind of money, do you?”

“I don’t need it.”

“Well, if only for the fun of it, you’re on.”

“Excuse me sir.” It was the receptionist. “It appears we are doing nothing right today. There is only one bed in your room. I am told the other had to be removed for repairs this morning. It’s a real shame, isn’t it?”

“That’s one pound for me,” announced Thompson.

“Why don’t you wait til the case is over. We may just end up owing a pound to each other. No, I forget. You may just end up owing me nine pounds!” Pritt was cordial and jocular despite his obvious anger.

“I doubt it Pritt, I doubt it. Why don’t you settle down while I go where I belong? I’ll call you when I’m settled in a black-friendly hotel, if you’ll still be here.”

“You don’t suppose they’d throw me out. Now, that is nothing short of superstition.” “Ten to one?” Thompson teased again.

“Go away. But why would they do that?” Pritt enquired in bewilderment. They had already moved away from the desk and were talking privately some distance to one side.

“Not would, they will. The reason: Kenyatta. When your colleagues here refused to touch him they were not being stupid, just cautious.”

“Why me? Because I’m white?”

“Not just you, but mostly because you are white. They feel betrayed by one of their own. But it’s happening to us too. Mr. Sethi was arrested at the airport when he arrived from New Delhi. They detained him for several hours then released him, but only after they had barred him from going anywhere near the trial. So enjoy your stay in this hotel while you can.”

“I’m sorry about this, Dudley. It’s all my fault, I should have known,” Pritt apologized.

“It’s nothing to me. I told you this is home. I live with it every day of my life. I may not like it or accept it but I’m able to face it without breaking down in tears. I had better leave before they throw me out. I still have time to look for a colour- friendly hotel.”

“Why don’t we have dinner together, say at eight?”

“If you can get a hotel or restaurant that can host both of us, that would be a splendid idea. I’ll call you at seven-thirty.”

They shook hands and Thompson picked up his two suitcases and walked towards the door. None of the porters who stood around the lobby offered to help, despite the obvious difficulties he was having with the luggage. Pritt was still staring after him, crestfallen, when Thompson loaded his luggage into a rickshaw and left.

There was a flurry of activity at the only school in the town of Kapenguria. It was a small, dusty school. Kapenguria could boast of no particular beauty. Its usual inhabitants were scrawny-looking African children whose brown khaki uniforms and pale skins closely matched the desert soil. But on this day, December 3rd 1952, none of the children was in sight. In fact, the only Africans at the school were members of the colonial police force who stood guard all around the compound. The place was otherwise filled with English soldiers dressed in full combat gear. There were also armoured tanks that stood rumbling at strategic points around the compound.

The school comprised of one central block which housed the administrative offices and staff room, and two side blocks that comprised the classrooms. The door of the classroom in the middle of the block on the right bore a cardboard placard with the notice - SILENCE: COURT IN SESSION. Inside, Deputy Public Prosecutor Somerhough was delivering the opening remarks in the case of Republic V Jomo Kenyatta and five others.

Jomo Kenyatta listened nonchalantly to the prosecutor’s remarks. He sat in between the other accused persons looking through the window at the row of pit latrines outside. Although he outwardly appeared composed, he was nevertheless slightly shaken from his recent experiences. Prior to his arrest, he had been living in the fast lane, addressing political rallies, chairing political meetings, holding court, paying courtesy calls on government officials and generally upholding his image as the hero of the native population. But now

he was always in handcuffs, constantly surrounded by armed soldiers and kept in solitary confinement, Even the comfort of a sympathetic crowd was denied him, as Kapenguria had been declared a restricted area for the full period of his trial.

However, Kenyatta still managed to hide his loneliness behind his charismatic demeanour; any stranger in the makeshift courtroom would have easily singled him out as the central figure of the trial. He discharged an electricity that dwarfed the personalities of all in the courtroom despite his heavily bearded face from which two buckteeth protruded, greying hair, a dirty leather jacket and crumpled corduroy trousers.

Kenyatta was a mystery, explained Somerhough, describing him to be “in a class by himself”. No-one, not even Kenyatta himself, knew when he was born.

“I do not know when I was born, what date, what month or what year - but I think I am over fifty,” he stated later in the trial. His political career had begun in the 1920s as an official of the Kikuyu Central Association. This political body had been set up to agitate against the compulsory acquisition of all land in Kenya by the Crown and the turning of all African tribes into “tenants at will of the crown”. Although the acquisition had been effected in 1915 through the Crown Lands Ordinance, it was not until 1928 that Africans had become aware of it, and initiated political action against the wrongful acts of the British Empire.

In just about one year, Kenyatta had become the General Secretary of the Kikuyu Central Association. It was in this capacity that he left the Colony in 1929 to go to England to make representations on behalf of the Association. He returned in 1930 and left again in 1931, this time staying away for 15 years. It is this second visit to England that carved out for him a reputation that was larger than life. He lectured for over five years to British soldiers during the Second World War in various parts of England. He travelled to Belgium, Holland, Switzerland, Italy, France, Poland, Estonia, Bulgaria, Denmark,

Sweden, Norway and Russia. He spent two years at the Moscow University and later studied anthropology at the London School of Economics for three years, crowning his education in London by writing a thesis on Kikuyu customary law under the supervision of the great anthropologist Professor Malinowski. The thesis was published under the title 'Facing Mount Kenya'. During the fifteen years that he spent abroad, Kenyatta interacted with personalities like Marcus Garvey, George Padmore, Kwame Nkrumah, William DuBois, Bernard Shaw, Peter Abrahams, the British Secretary of State for the Colonies, the Archbishop of Canterbury and Moderator of the Church of Scotland. He also delivered political speeches at Trafalgar Square.

He returned to the Kenya colony in 1946 as a formidable Pan-Africanist. By then, the Kikuyu Central Association had been proscribed. Attempts to negotiate with the Government over the issue, which included two visits to the Governor of the Colony Sir Philip Mitchell, proved fruitless. He gave up the matter as a lost cause and joined another body that had just been formed - the Kenya African Union (KAU). KAU embraced him and appointed him as its president in 1947.

With Kenyatta as president, KAU was instrumental in fostering African consciousness and was a central force in the nascent African nationalist politics. KAU's agenda was larger than that of the Kikuyu Central Association and included demands for independence of the colony. By preaching against Western ideology and lifestyle and exalting African values, KAU attracted the sympathy of the native citizens and its membership grew to over 100,000 people. By 1948, only one year after its formation, KAU was so influential among the Africans that the settler community in Kenya demanded the deportation of Jomo Kenyatta.

Hand in hand with the growth of KAU was that of the Mau Mau, an African terrorist group of indeterminable origin. It was a secret society that had developed among displaced Kikuyu peasants in the Aberdare forest. Its sole

purpose was to throw out the white man from Kikuyu land. To do this, it employed savage terrorist tactics aimed at the white settlers.

Mau Mau was sustained by the collaboration of the surrounding Kikuyu tribesmen. The terrorists proceeded from the premise that since all Kikuyus stood to gain from their activities; each Kikuyu owed them a duty to assist. They used traditional oathing rituals to enrol the Kikuyus into their network. The ritual mainly consisted of eating stinking, rotten meat and making a solemn oath that stated:

“I do hereby acknowledge that I will do all that is in my power to assist the Mau Mau in driving out the White man from our land. Should I ever fail to do so, may this oath consume me.”

Traditional oaths were revered by the Kikuyu people. The belief that dire consequences would befall a person who went against the oath was so strong that an oathed Kikuyu person would do anything the Mau Mau demanded. The Mau Mau thus made it mandatory for all the Kikuyu people to take the oath; those who did not voluntarily take part in the rituals were forced to undergo the oathing after great punishment. Those who adamantly refused were hacked to death.

Through these rituals, the influence of the Mau Mau spread throughout the Kikuyu population. The Mau Mau made demands on each and every Kikuyu - from housewives they demanded food, from the police they demanded guns, from the servants in the settlers' homes they demanded white blood. To get to a white settler they would force the household cook to take an oath and require him to slaughter the family. Those who were simply beheaded were the lucky ones. In one notorious incident they cut up an African Colonial Chief bit by bit, packed the flesh into a sack and delivered the package to the colonial government. In another, they buried a white man alive, head down, after forcing termites and other insects into his rectum.

The terror was paralyzing. It was this secret society that Kenyatta was charged with master-minding.

“May it please Your Honour, I would ask Your Honour to take notice of the prohibition of this society published in the gazette of the colony, and its effective date which is 12th August 1950,” Somerhaugh continued. “The crown cannot bind itself to any particular place in the colony where the society is managed. The society is the Mau Mau. It is a society which has no records. It appears to have no official list of members. It does not carry banners. Some details of its meetings and its rites, the instruments of which were got from the bushes, will be heard later in the proceedings. Arches of banana leaves, the African fruit known as the Apple of Sodom, eyes of sheep, blood and earth, these are what are used in oathing rituals. The crown case is going to be that Mau Mau is part of the Kenya African Union - a militant wing.”

Kenyatta shuffled slightly in his seat and Mr. Somerhaugh stopped talking and stood silently for a while. Everyone cast their eyes on Kenyatta warily, while the English soldiers cocked their rifles. Even his fellow prisoners stared towards him, wondering whether their leader was conveying a secret message to them. But Kenyatta's concentration was focussed fully on the judge and he steadfastly ignored the disturbance he had created.

Reassured by the silence, the Deputy Public Prosecutor continued: “Your Honour, the Crown wishes to impress upon this court the gravity of the Mau Mau threat. Everyone in this court, apart from the accused persons and their lawyers, has his life in danger. But the persons under the worst danger are the prosecution witnesses who will appear in this court. Most of them are from the Kikuyu tribe. When they leave this court after their testimony, they will go back to Kikuyuland, the centre of Mau Mau activity. For this reason, your honour, it is the prayer of the Crown that should any of them request that his or her name should not be disclosed, this court will kindly order the press not to disclose it.”

“Your honour, I object!” Mr. Pritt, the leader of the defence lawyers, rose to speak.

“Truly, Mr. Pritt?” interjected the Magistrate.

“Yes your honour, truly. The prosecution wishes by its prayer to further blanket this trial. Already we are 300 miles away from Nairobi. This town is a restricted area for the period of the trial. The only people who could maintain this trial, a public trial, the only way this court will be, if I dare say, an open court, is the press. But the Crown wants to muffle it. If this trial is not meant to be a public trial, then we could hold it in camera and get it done with. But we cannot hold in darkness and yet call it an open trial. The orders sought by the Crown will only grant leave to witnesses to commit perjury under the cover of darkness.”

“Your Honour,” the D.P.P. was up even before the defence counsel had sat

“The counsel is suggesting that this court grant leave to witnesses to commit suicide in open air.”

“Hear! Hear!” The magistrate intervened. “This court does not wish to send its witnesses to certain death. Witnesses are however free to commit suicide any other time at their own free will. The orders sought by the crown will therefore issue where appropriate. Could we go back to the statement of the prosecution It’s almost 4p.m.”

“Your Honour, that is the end of the prosecution’s statement. Unless your honour adjourns this session, I am ready to proceed with the crown’s first witness.”

Before the magistrate pronounced the adjournment, all the pressmen in the court-room were out and rushing to their various stations to telegraph

reports of the day's proceedings. The cameramen stayed behind to photograph Kenyatta and his co-accused as they left the courtroom.

That evening, editors in London were perusing through the dispatches, looking for the newsworthy occurrences. Day 1 of the five-month Kenyatta trial had ended.

The objection by Mr. Pritt was not the last that he would lose in the trial. He was later to protest against the generality of the charges. The charges simply stated that Kenyatta and his co-accused had managed the "Mau Mau" between August 12th 1950 and October 21st 1952. Mr. Pritt took great exception to this mode of drafting charges saying:

"This is the only case I have ever heard of in my life in which the defendant on charges - serious charges - to which they might be sentenced to seven-years imprisonment - very serious charges - it is the only case I have ever heard of in my life in which they have been prosecuted with no particulars of any description being given, particulars even being refused."

"As each thing comes up, as each new incident comes up, I hear a completely new story that I have never heard in my life. In fact, I cannot know until four o'clock in the afternoon whether my clients have ever heard of it in their lives. I do not know whether they are going to tell me it is true, or a distortion, or a complete invention, until four o'clock every afternoon. I am as ignorant of it as any beggar in the streets of Nairobi, perhaps even more. When they tell me that a particular witness may put it right, I have to plan how to get the witness from three hundred miles away. This is a gross, cruel, deliberate injustice."

"Let me say that never has any man in the whole course of history stood his trial in England in a single criminal court on a charge involving a sentence of seven years' penal servitude without every line and title of the evidence that is to be given against him on his trial being given beforehand with the express

intention that he shall know, as the government of Kenya is determined that I shall not know, of the case before him in time for him to answer.”

“I think the answer to that is that Kenya is unfortunately suffering at the present time from an emergency,” replied the magistrate.

“I know sir, it is because of that,” retorted Pritt. “The emergency is being taken advantage of by the government of Kenya to give my clients the minimum chance to defend themselves. I am employed by my clients to see they shall get as much and I have your co-operation with me in that, sir, I am happy to say.”

“To order the crown to give further particulars would, I consider, be equivalent to ordering the Crown to show what evidence it proposes to give, and that I am not prepared to do,” the Magistrate pronounced, rejecting the objection.

What Pritt came short of saying was that the trial was stage-managed. It had begun with the proclamation of a state of emergency over the colony in an effort to rout the “Mau Mau.” Then Kenyatta, all top leaders of KAU and more than 50,000 Kikuyu men were arrested. The hordes of Kikuyu people, who comprised more than 25 per cent of the population of Nairobi, were detained in various concentration camps around the country. Kenyatta and his co-accused, who were the leaders’ of KAU, were charged with managing the “Mau Mau”.

But Kenyatta had on several occasions denounced the “Mau Mau” and the terror it was unleashing on the white settlers. And he was a democratically elected representative of the people. Given time, however, he was bound to do for Kenya what Mahatma Gandhi had done for India. Hence the staged-managed trial, the chief actors of which were the Magistrate and the witnesses.

The Magistrate was Mr. Justice Ramsey Thacker, a retired Judge of the Kenya Supreme Court bench. He was reputed for his pro-government stand and racist attitudes and with him as magistrate the colonial government was

certain Kenyatta would be convicted. The government sought him out from his retirement and contracted him for the assignment under special letters patent.

The witnesses came in as supporting actors. There were 47 of them, their total fees well beyond £10,000. Some received it in cash, others in career opportunity. Worried that they might crumble in court when confronted by “Kenyatta’s formidable personality”, the government coached and drilled them on their testimony. They were fed lavishly on milk, meat, beer, whisky and even brandy during these training sessions. For protection they had armoured tanks and heavily armed soldiers 24 hours a day.

By the time the trial began the colonial government had it all set up. There was only one small flaw - in the form of the balding middle-aged lawyer, Dennis Nowell Pritt, and the panel of about ten other lawyers who were appearing for Kenyatta on a voluntary basis. Not that they would affect the outcome of the trial. All they could do was lengthen procedures, complicate the trial, breath all the oxygen in the courtroom, disturb everyone’s conscience and generally give the trial a bad name. That was enough reason for all who had wanted Kenyatta silenced to desire to take Shakespeare seriously and first kill all the lawyers.

Paradoxically, making up part of the group of those who wanted to take Shakespeare seriously was the Law Society of Kenya (LSK). Composed mainly of English barristers and solicitors, the Society looked sympathetically to the efforts being made by the government to stop the slaughter of the English settlers and to defeat the attempts of the likes of Kenyatta to abolish the privileges of the white population in the colony. The future of the English lawyers in the colony was so inextricably entwined with that of colonialism that it occasioned them no alarm that the government could violate the basic human rights of the local population the way it did. At the height of the state of Emergency, when the Colonial Government was literally executing genocide upon the Kikuyu people, the most senior lawyer in Kenya, Sir Humphrey Slade,

had called upon the government to impose harsher measures on the Africans in answer to the rise in “Mau Mau” terrorism.

The interlacing of fortunes occurred during the establishment of the legal profession in the colony. It began in 1901 when the colonial government promulgated rules to govern the practice of law in the colony. These rules were simple and only meant to establish a basis on which lawyers who came to the colony could form a Bar. By the end of the year, several lawyers had migrated to the colony and were practicing law under these rules.

A Protectorate having been declared over Kenya in 1897, the history of the legal profession can be said to be as old as that of colonialism. The two systems grew up together; the government developing the profession as it did its own system of governance. As their numbers increased, the lawyers pressed the government for legal provisions that would grant them self-governing powers such as those enjoyed by the lawyers in England. In 1929 they were granted full monopoly over the practice of law in Kenya and began to press for a statutory legal body and statutory rules of practice. These were granted in 1949 and embodied in the Law Society of Kenya Act.

Although founded as a self-regulating Bar, the Law Society of Kenya could not divorce itself from the emotions of government involvement in its establishment. For 50 years, the lawyers had held out their arms in supplication asking for a favour here and a privilege there. For fifty years the government had listened sympathetically to the lawyers and granted them their prayers; and for all it had done the government only wanted a small favour in return. That the lawyers stay away from the local politics.

However, even without the government asking for a small return, the lawyers were under pressure to assist the government against the local African population. This pressure emanated from their economic and social status. Lawyers were a privileged lot, perhaps the most privileged group of Englishmen in the colony who a writer in 1953 described as “legal tycoons”.

Their chambers were exquisitely furnished and more palatial than those of their colleagues in England. They hardly worked beyond 4.30pm, after which time they could only be found in the club or theatre. Due to their grandiose lifestyles, they mainly practised in Nairobi, then described by an observer as “ugly, mercenary, parasitic, unhealthy, and an untrue reflection of the conditions prevailing in Kenya”. Nairobi was like any other town in England, only more colourful and livelier.

The interests of the lawyers were thus diametrically opposed to those of the native population in the colony. In fact, the lawyers and the Africans were totally isolated from each other. In 1930, the government had passed the Native Tribunals Act which denied lawyers the right to be heard in native tribunals. It is in these tribunals that all cases involving Africans were heard. What little contact previously existed with the African population dwindled and by 1952 was virtually non-existent. This is the way the government wanted the LSK to work and it expressed its wishes to the Society in no uncertain terms. In 1926, a senior commissioner had told of an Asian lawyer attempting to represent an African, emphatically stating: “I do not want my natives to waste their money on lawyers’ fees.”

The small population of Asian lawyers was more sympathetic to the Africans. They themselves were classified as second rate citizens under the colour bar social system of colonial Kenya. Unlike the English, they saw their future in an Independent Kenya and several of them joined the panel of counsels that assisted Mr. Pritt in the Kapenguria trial. The Englishmen however kept away and refused to comment or assist in the trial. The Kenya African Union attempted to secure their services but its request was flatly rejected. KAU resorted to going to London and engaging Mr. Pritt. Upon his arrival, the combined force of the government, the settler community and the LSK was employed to make it impossible for him to work effectively. Police officers hounded him out of the hotels he booked into, opening his correspondence, going through his personal belongings and eventually having him kicked out. He ended up residing in the house of an Indian merchant, J.M. Desai, whose

house was searched twice by the police. Several people who had turned up to welcome him at the airport were detained. When the trial was over, KAU held a tea party for Pritt where they presented him with a gift of a monkey-skin coat for himself and a shopping basket for his wife. The presenter, F.W. Odede, who was then acting President of KAU, was detained immediately thereafter. On their part, the white settlers began to issue death threats against Pritt and against anyone who tried to assist him. They shouted him down as he walked the streets. When it appeared that they would certainly kill him, he asked for and got police protection. Distrusting the police (with good reason), his African supporters organized a security system and guarded him day and night.

Faced with these formidable hostilities, Pritt wrote letters to Members of Parliament in England and also held a press conference at which he complained about the treatment he was receiving. The government alleged that he was casting aspersions on the administration of justice in the colony and he was charged with contempt of court. The trial at Kapenguria was adjourned while the contempt trial was held at the Supreme Court in Nairobi. He was acquitted. By then he could not help but be passionate and when after the contempt trial the Attorney- General came to shake his hand, he put his own hand firmly behind his back and told him: "No, I'm very sorry. I can't shake hands with you."

As if not to be left out, the Law Society of Kenya also threw in its contribution to his tribulations. During the contempt trial, the prosecution asked him why he had come all the way from England to defend Kenyatta while there were other lawyers in Kenya. The question was an attempt to portray him as a communist who had come to spread the Marxist gospel in the colony. Pritt replied that he had found it just to do so, as no English lawyer in Kenya was prepared to defend Kenyatta.

The LSK immediately lodged a complaint against him with his Bar Council in England. They alleged that Pritt was guilty of professional misconduct by wrongly accusing his professional colleagues in Kenya of impropriety. The Bar Council in England dismissed the complaint, taking 30 seconds to reach its decision.

A lot of time was wasted in these onslaughts against Pritt and, much as they were unsuccessful in killing his spirit, they threatened to make his continued stay in the colony unaffordable for KAU. Pritt therefore volunteered to stay on and see the trial to its end without further costs to KAU, but it was all to no avail. Kenyatta and his co-accused were found guilty on all counts as charged.

For those who were conversant with the administration of justice in the colony, this outcome was not surprising. Miscarriages of justice were ingrained in the colonial system. In 1903 an African gentleman by the name of Lohira wa Esondyi had been sentenced to 18-months imprisonment and 25 strokes of the cane for a crime whose maximum sentence was three months with no strokes.

For Kenyatta, it was seven years of hard labour with a recommendation that he be indefinitely detained after the sentence. Though seven years was the maximum sentence, the judge regretted that it was inadequate given what Kenyatta had done. But Kenyatta was expecting no leniency from the court. When asked to mitigate his sentence, he stated: "I am asking for no mercy at all ... We have grievances ... We will not ask to be excused for asking that those grievances be righted. Your Honour, I may say that we do not accept your finding of guilty."

In their turn, the other accused persons - Fred Kubai, Richard Achieng' Oneko, Bildad Kaggia, Kungu Karumba and Paul Ngei - all told the judge: "You can impose any sentence you like."

The injustice committed on them did not become overt until 1959 when the key witness against Kenyatta, Rawson Macharia, swore an affidavit and confessed

to his perjury. He disclosed how the government had secured witnesses through bribery to enable the conviction of Kenyatta. In his case it had been a scholarship to study in Britain. To save face, the colonial government insisted that his former testimony was true and charged him with perjury in his confession affidavit. He was found guilty and jailed for two years.

Kenyatta's conviction was appealed against up to the judicial committee of the Privy Council in England. Apart from the conviction of Richard Achieng' Oneko which had been overturned by the Supreme Court of Kenya, all the others were confirmed by the refusal of their Lordships in the privy council to even entertain the petition.

Back in the colony a renewed wave of "Mau Mau" terrorism was at its peak and the lands occupied by the Kikuyu people were under a "reign of terror". A soldier who had cut off the testicles of an African gentleman and placed another under a leash (with a wire tied to his pierced ear) while using him as a guide, bragged that he could shoot who he liked so long as they were black. Another company of soldiers reported a good day - for though it had found no "Mau Mau", there were many elephants, rhinoceros, baboons and assorted types of buck. The Director of Operations himself, Major General Hinde, made a public statement saying it would be a good thing to expel all Kikuyu tribesmen from their reserves for the rest of their lives and to put them in a swill tub. By the end of the State of Emergency about 7,000 people had been killed by government forces, 1,000 injured, 3,000 captured and 120,000 placed in custody. Not one word of protest was uttered by the Law Society of Kenya. In fact, the settler community had established a legal fund to aid soldiers charged with brutality and the White lawyers greatly benefited from this fund.

Meanwhile, the prisoner Kenyatta, who was already over 50 years old, worked nine hours a day breaking stones in the deserts of the Northern Frontier District. For the first six months of their incarceration, the prisoners were forced to dig out 10-foot deep graves in the rocky terrain, graves in which they were assured eternal residence by their captors. They were allowed no visitors,

no newspapers and only one censored letter from a relative every month. Their food was unsavoury and inadequate. Halfway through their sentences, they had physically wasted away and were convinced that the struggle for independence, which they had spearheaded, had by then failed.

## Chapter 2

The period after the conviction of Kenyatta in 1953 was, apart from the ongoing war against the “Mau Mau”, relatively uneventful and the Law Society of Kenya enjoyed a respite from the challenges of African Nationalism. Up to 1960, the white lawyers easily dealt with the challenges to their privileges in the Colony. But one challenge had proved to be almost unbeatable; the awakened interest of the Africans in the practice of Law.

The colonial government was intent on not promoting the education of the native population. The only education it provided to the local inhabitants of the colony was two-to-three-year courses for teachers, chiefs, policemen, health inspectors and what may generally be called “Community Development Assistants”. This education was meant to develop a class of “African leaders”.

For the Europeans, the government provided a very rich education. So good were the schools established for the white children that today they are the best in the country.

Their traditions and facilities are still the most outstanding. The government also provided well-funded scholarship schemes to enable these students to study in universities outside the colony. Naturally, therefore, Africans could gain no access to the professions. Yet they comprised more than 95% of the population of the colony.

The Africans had thus begun to initiate and promote scholarship among themselves. Realising there was no place for them in the colonial education system; they began to build their own schools. The Kikuyu Central Association, for example, initiated the “Kikuyu Independent Schools Association” where the few Africans who had been lucky enough to acquire a basic education as

“African leaders” taught African children and provided them with the education that was specially reserved for white children. The best students from these schools were then sent to universities abroad, mostly to India, on community funded scholarships.

At first the white community viewed these African schools as a farce. But as more and more Africans began to leave the country to acquire university degrees abroad, the schools became a cause of concern. The Law Society of Kenya was particularly worried since the majority of the African students were enrolling for Law degrees in the foreign universities. Racial bigotry in the 1940s was so intense that the white lawyers were horrified by the prospect of having Africans as professional colleagues. They found it distasteful enough dealing with the Asians. If it were to become imperative that Africans join the Bar, they wanted to determine which African. They did not intend to compromise their racial prejudices for disciples of Jomo Kenyatta armed with law degrees. The LSK thus began to pressurise the government to protect it from the impending plague and in 1946 the government had gladly proscribed 300 Kikuyu Independent schools and more than 60,000 children were sent home. The leaders of the school system retained an English lawyer in London to challenge the action of the government. When the lawyer arrived in the colony to investigate the case, he was declared a prohibited immigrant.

By the time the first of these African lawyers returned to the colony, the Law Society of Kenya was ready with its own solutions. The Society had secured the promulgation of inhibitive rules that would constrict the entry of the Africans into the legal profession. These rules required a 12-month residential training for all people called to the Bar in England or admitted as solicitors of the Supreme Court in England and a 24-month residential training for all people who had been called to the Bar in other jurisdictions. The Chief Justice was granted powers to waive this requirement for any applicant and the Law Society of Kenya secured the exercise of these powers in favour of white applicants. One such instance involved the case of a young South African lawyer called Duirs. He had come to Kenya and applied to be admitted

to practice in the colony. But the Kenyan Bar did not wish to open itself up to South African lawyers, and Duirs' application was rejected. While he was still pondering on his future, the South African rugby team visited the colony and Duirs played a splendid game for Kenya against his home team. His application was reconsidered and accepted, the residential training waived and employment offered and accepted. The residential training requirement was very effective against the Africans. Some did not have the patience to wait for another two years before they could secure employment as lawyers. Even where they had the patience, their local sponsors did not. A lot of money had been spent on these students and their communities were anxious for them to begin employing their education in some useful venture. No community was ready to pour its resources into some bottomless pit whose benefit was not forthcoming. Those who were under no pressure to secure gainful employment could not procure training in the local firms. Even the Asian lawyers were not ready to help, as they now viewed the new African lawyers as a threat to their small practices. But one African lawyer, Chiedo More Gem Argwings-Kodhek, did not labour under any of these problems and had it all coming his way; but only for a time.

Argwings-Kodhek was the first Kenyan African lawyer ever. He had been called to the Bar at Lincoln's Inn in 1951 before he returned to Kenya and patiently swallowed his painful dose of residential training. The Law Society of Kenya reluctantly recommended that he be admitted to practice in the colony and all the while looked around for a mallet to smash him back into oblivion. He was the monster that white lawyers dreaded. Argwings-Kodhek dripped with African Nationalism and there was little doubt to what useful venture he was going to employ his education. Impatiently, the white lawyers waited, cork in hand, for this genie to go back into his bottle.

It seems he was a very careful man, for they waited until 1957. But eventually they ensnared him. Someone investigated his small law practice and discovered that he did not keep properly written books of accounts.

For example, he did not distinguish by use of proper titles his clients' accounts nor properly show all his monetary dealings. The matter was immediately brought to the attention of Her Majesty's Supreme Court at Nairobi and on July 10th 1957 the court ordered that his name be struck off the Roll of Advocates. But he was still a barrister. So the matter was taken further and the complaint was placed before his Bar Council in England. On October 5th 1958 the Masters of the Bench of the Honourable Society of Lincoln's Inn ordered that Argwings-Kodhek be disbarred and expelled from Lincoln's Inn and further, from the Law Society of Kenya - and that the order be advertised. All this while there was no allegation of fraud against him.

Two months after this, a complaint was lodged against an Asian lawyer, Shri Ram Gautama, by his client. Mr. Gautama was acting for his client in the sale of some property that was being compulsorily acquired. During the negotiations, Mr. Gautama managed to negotiate for an increased award in compensation for his client. He withheld this information from his client then persuaded the client to accept that he be charged per percentage of monies he negotiated over and above the previous offer and if he failed, he wouldn't charge at all. The deal was completed. Mr. Gautama took his percentage then he slammed his client with a bill of cost. He was suspended for two years. Earlier in the year an English lawyer, Mr. BJ Robson, cheated for his client in an Immigration Statutory Declaration form in order to enable the client to obtain a certificate to immigrate into the colony. He was arrested, charged in a court of law and convicted for the offence. A complaint was lodged in the Law Society of Kenya against him. He was admonished.

Towards 1960, the colonial structure in Kenya began to crumble under the increasing pressure of the nationalist movement. The colonial government was finding it more and more difficult to churn out solutions as the challenges demanded. 1959 saw Kenyatta complete his sentence, in answer to which the colonial government issued a retention order against him and he was indefinitely detained in the desert town of Maralal. The action of the government was met with the formation of a new nationalist association, the Nairobi People's

Convention which launched a “Release Kenyatta” campaign. While still seeking a solution to this campaign, the government had to seek explanations when it was reported that several African detainees had been beaten to death at their detention camp in the town of Hola.

Unlike the government in the colony, the government in England looked at the situation less optimistically and concluded that it couldn't hold on much longer. The Nationalist movement had become too widespread and united and had resulted in a very high political consciousness among the native population. The nationalist leaders had by 1960 formed a political party, the Kenya African National Union (KANU), for which they had conducted democratic elections with Kenyatta being voted in as President in absentia. A confrontation with such a united native population could only result in a white bloodbath. In May 1960, the government in England thus hosted the first Constitutional Conference at Lancaster House, London, to debate the establishment of parliamentary institutions in Kenya based on the Westminster model and to prepare the country for Independence.

It was against this background that a conference on the future of law in Africa had been held in London in December 1959. In attendance was England's most lovable Judge, the Right Honourable Lord Denning. The conference appears to have made a very great impression on Lord Denning and he became convinced of the necessity of establishing a system of training for African Lawyers which would enable them to take over control of the Bar when power was transferred to an independent government. He became the chief advocate for the cause and, in September 1960, visited Kenya as the Chairman of the Denning Committee on Legal Education for students from Africa.

Lord Denning was in Kenya between September and October of that year and during this period held several meetings with the leaders of the legal profession in the country. These meetings were held in the chambers of the President of Her Majesty's Court of Appeal for East Africa, Sir Kenneth O'Connor. Apart

from the two of them, also in attendance was the acting Chief Justice of Kenya Mr. Justice Rudd, the Legal Secretary of the East African High Commission C.D. Newbold, the acting Attorney-General D.W. Conroy, Kenya's Minister for Education W.A. C. Mathieson and a representative of the Law Society of Kenya Gerald Harris, who alternated attendance with Mackie Robertson.

Prior to this meeting there had been one held on November 21st 1959 under the auspices of the Law Society of Kenya. It was chaired by a Mr. Justice O'Brien Kelly. The purpose of the meeting had been to look into the possibility of establishing a system through which local qualifications for admission to the Bar could be acquired as a substitute for foreign qualifications. The matter had been viewed as one that though requiring action, was of no urgency. A sub-committee consisting of three lawyers, E.P. Nowrojee, Gerald Harris and Hannigan, had been formed to look further into the question. By the time the Denning meetings were held, which was about a year since, the matter had not been addressed further nor had the sub-committee submitted any report.

The bottom line to local qualifications to the Bar was Africans. The Law Society of Kenya, therefore, seemed to be wishing the matter away and Lord Denning had to literally force the matter on it. What should have been a discussion ended up being an interrogation whereby Lord Denning would tell the meeting what should be done and he would register their comments.

One of the issues Lord Denning most passionately argued for was the establishment of a Law Faculty at the University College of Dar es Salaam in Tanganyika and a Law School in Nairobi. Lord Denning volunteered to secure the services of one of his friends as a Principal of the Law School. In objection, the Law Society of Kenya stated that it did not wish to admit Law degrees from the University College of Dar es Salaam since the college had been established mainly on political grounds, to wit, to promote African scholarship. As for the Law School, the Law Society argued that it had received no intimation that Africans wanted the legal qualifications to the Kenyan Bar altered. The last objection was particularly frivolous since as at 1959 only

250 Africans had been educated up to pt grade and only eight were in private practice as lawyers.

Lord Denning also put forward other suggestions that were unpopular with the legal fraternity in the Colony. He wanted some of the former native magistrates trained to sit as judges with appellate jurisdiction over magistrates in the native court system and further suggested the initiation of specialized courses to train African lay Magistrates. When the acting Chief Justice objected, saying that these magistrates were already too old to be trained as judges, Lord Denning pointed out that the system was working well in Nigeria.

The meeting ended without any substantive agreements being reached. Lord Denning went back to England where he published the report of the Denning Committee on Legal Education for Students from Africa. The report was handed over to the colonial government for implementation and it caused the first of many conflicts between the government and the Law Society of Kenya as the society fought to maintain its control over the legal profession in the colony.

Through concessions and victories, the government and the Law Society of Kenya family agreed on the mode of implementation and it was contained in the Advocates Act of 1961. But the Society was never able to bring itself to accept the establishment of a Law Faculty at Dar es Salaam, for this meant it no longer had full control over the acquisition of legal qualifications to join the Bar. The leading authority on the legal profession in Kenya, Professor Yash Pal Ghai, in a book authored with Professor McAuslan in 1968, wrote: “The result of the opposition was that the first two or three classes of Africans from the University of East Africa’s Law Faculty did not find themselves made welcome by the Bar in Nairobi ... There was now a residue of hostility between the African graduates educated in East Africa and the non-African Bar educated ... in the United Kingdom.”

But finally the Africans had, through the magnanimous intervention of Lord Denning, won what had previously been a fantastic expectation, the direct and easy access to legal training and to the Bar. As for Lord Denning, he won the hearts of the entire population of potential African lawyers in East Africa, and when they enrolled in the University College of Dar es Salaam, they founded the Denning Law Society in his honour, and Lord Denning wrote severally for their journal.

What the Law Society of Kenya lost in the swings it fought to gain on the bends. Through the Advocates Act of 1961, it attempted to neutralise the effects of the Faculty of Law at Dar es Salaam. It wanted the act to totally disregard the degree in Law from Dar es Salaam and instead provide for a system of articulated clerkship as the sole means of entering the profession. This would have meant a resumption of control over graduates from Dar es Salaam by requiring them to report to the Society for leave to enrol into clerkship. This the government refused, insisting that the articulated clerkship system and the degree in Law from Dar es Salaam be alternative means. In that case, the Law Society of Kenya argued, all graduates from Dar es Salaam should undergo a three-year practical course under a law firm. Again the government refused and placed the period of the practical course at one year.

To add insult to injury, the government adopted the recommendation of the Denning Committee and established a Council of Legal Education to take control of the acquisition of legal qualifications. Seeing the Council as the *pis aller*, the Society put up a spirited battle to secure a majority representation in its composition. Again it lost. The government proposed that the Council be composed of two judges, the Attorney-General or his representative, a law teacher appointed by the Attorney-General and three members nominated by the Law Society of Kenya.

The Society was enraged. The government that had for so long provided for it was when the society needed it most, not only neglecting it but being actually hostile to its interests. In a passionate and infantile reaction, the Society called

off all bets with the government and waged a “no-holds-barred” battle to hold its own. Using its members in the Legislative Council, it brought pressure to bear upon the Minister of Legal Affairs who was the chief proponent of the government’s viewpoint. A member of the Law Society of Kenya himself, the Society importunately urged him to consider the feelings of the other lawyers on the matter, pointing out to him that he was the sole voice of dissent among all the lawyers in the colony, and doing all it could to make him feel and appear like Judas Iscariot. The Minister was cowed, his voice reduced to a whisper. But the whisper still spoke for the government.

LSK resorted to soliciting support from foreign human rights organisations in England like the International Commission of Jurists and Justice. Quoting the rule applicable in England but tactfully not mentioning those that were averse to its self-aggrandisement, it argued that the government was interfering with the independence of the Bar and violating the Rule of Law. To quieten the Society, the government offered to increase the representation of members of the Society by one, thus granting it an equal number of votes with the rest of the members.

The Society wailed the more. When the Council was finally legislated, the Society refused to nominate its representatives and boycotted all meetings called by the Council. For about half a year, the Council met while the Society sulked and the stand-off became increasingly embarrassing. The government made another attempt to appease the Society by amending the Advocates Act to provide that the law teacher member shall be elected by the Council and not appointed by the Attorney-General. Assuaged by this act of parental concern, the Society accepted the half-bread and called off the boycott.

While this conflict was going on, the colonial government bowed to pro-independence pressure and released Kenyatta from detention. His release invigorated the demands for immediate independence and by 1962 the drive towards the United Kingdom’s withdrawal from the colony was at full speed. But while the other colonial organizations prepared themselves for life under

an African government, the Society continued to concern itself with paltry pettifoggery. Matters like whether or not it should abandon its male chauvinism and accept the first lady guests to its dinners took priority in its agenda. Not even the declaration of Independence of the country on December 12th 1963 seemed to wince its withers, nor the fact that the dreaded Jomo Kenyatta had led KANU through an electoral victory and was now the country's Prime Minister.

The confidence of the white lawyers stemmed largely from the structure of the independence government. The Independence Constitution, accepted by all the parties to the Constitutional Conference, provided that Kenya would be a dominion under a Governor-General appointed by the Queen of England. Kenyatta's position as Prime Minister was thus subordinate and the Governor-General could by exercising his power, especially those of dissolving Parliament, easily control Kenyatta's Government.

The Constitution also greatly strait-jacketed the Executive arm of government. By employing a well-thought-out system of checks and balances, the Constitution made it virtually impossible for the Executive to abuse its powers of government. The Constitution paid particular attention to the plight of white settlers and tribal minorities and had established a Senate as a check to the House of Representatives. The political party representing the minorities, the Kenya African Democratic Union (KADU) could thus be effective in protecting white settler rights in the country. It was an ideal system of government, radiating the genius of minds like former United States Supreme Court Judge Thurgood Marshall, one of the Constitutional consultants.

But exactly one year after independence, on December 12th 1964, a terrible thing happened; Kenya declared itself an independent republic and began dismantling the constitutional structure. Ever since independence, Kenyatta and his fellow Pan-Africanists had looked at the constitution with discontent. Given a free choice, they would have rejected it at the outset but its acceptance

by them had been the price they had to pay for early independence. They wanted a document that could allow the unhindered expression of Pan-Africanist enthusiasm. What they had was a document under which, if they broke wind, they would have their action placed under scrutiny and condemned as a violation of the people's right to a clean environment.

Through the vote of a parliamentary electoral college, Jomo Kenyatta ascended to the Presidency of the new Republic. Now the pugilist was unleashed; he was in total control, with no Governor-General to contend with. He began arousing the Pan-Africanist passions of the African population. Talk about colonialism was revived, Kenyatta alerting the African citizens of the inequalities in the independent country created by colonialism and of the need to correct them. The now "free" Africans got carried away by the charisma and political oratory of their new President. In his political rallies, they would collapse helplessly into hysteria. Kenyatta would pronounce things like:

"From today henceforth, I declare that every citizen of Kenya, may he be white, black, green, yellow or red will be remunerated under the same scale only according to merit."

"Moto!" (Swahili word for fire), the crowd would roar back.

"We are tired of licking the arse of the white man. We are now independent," Kenyatta would press on.

"Moto!" the crowd would roar back again, this time accompanied by the beat of African talking drums and blowing horns.

"KANU moto," he would agitate them further.

"Moto!"

"KANU moto!"

“Moto!” The response by then would rattle the stadium.

With all issues painted either black or white, Kenyatta had no problem redrafting the Constitution and re-organising the structure of government. He convinced the African citizens that the colonial government had given them a Constitution that would forever keep them divided and reliant on England. The independent Africans thus examined with suspicion all the structures of government bequeathed upon them by the former colonisers, adopting a “when in doubt, kill” approach. Parliament began to sit way into the night, at times until midnight, debating on the Independent Constitution and amending it.

The amendments began to get out of hand, eating slowly into enshrined parts of the Constitution. The white settlers panicked and through the minority party, the Kenya African Democratic Union (KADU), put up resistance to the Kenyatta KANU manoeuvres. To fight back, Kenyatta went around the country preaching against the opposition. He portrayed the African members of KADU as traitors who were serving neo-colonialist causes for personal gain. Of course these few opposition members could not withstand the ire of an entire nation. To dishearten them further, Kenyatta secured the promulgation of a Referendum Act whereby if the Senate defeated a Constitution Amendment Bill, the Bill would be presented to the people and if they voted in its favour, then it would become Law if subsequently adopted by a simple majority of the House of Representatives, where KANU had 105 members against KADU's 22.

Confident that he had neutralised the powers of the Senate, Kenyatta presented a Constitutional Amendment Bill to dissolve the Senate and retain a one-house Parliament. The Bill increased the number of constituencies to 41, the exact number of senators in the Upper House, and declared that upon the passing of the Bill, each incumbent senator would be the Member of Parliament in the new House for a particular constituency. To make it worth the while of the Senators, their tenure as representatives was extended by two years, thus saving them from an early election. The deal was irresistible. The leader of

KADU, the late Ronald Ngala, rose in Parliament one day and led his colleagues across the floor into KANU and the Senate was soon thereafter dissolved.

Everyone was now a Pan-African convertee and a member of KANU. KANU became a religion with Kenyatta as its god; omniscient, omnipresent and omnipotent. His first thunder and lightning was Sessional Paper No I of 1965. It called for the immediate Africanisation of all commercial sectors in the economy.

That really jolted the Law Society of Kenya. Awakened from its slumber of complacency, the Society looked fretfully at the raging Pan-Africanist fire consuming the country. Every time it closed its eyes to sleep it was startled back to reality by nightmares of the Kenyatta trial and the state of emergency, of the African Independence Schools and Argwings-Kodhek (now a Member of Parliament).

Doom loomed.

“Are you placing any bets?” Michael asked Derek as they watched the horses being led to the course in a single file. “I think I want to back Black Devil. He looks like a winner to me.”

“I think you’re getting soft in the head. How can you back a horse by that name in this political era?” Derek replied without moving his eyes from his binoculars. “I would only bet on it if it sat for an intelligence quiz against Kenyatta.”

“God save us all, Derek!” Michael hissed under his breath, looking nervously around him. “How dare you ...” He was unable to speak any further.

“Get a hold of yourself, Michael. I know there are moles all over the place but what’s the worst they can do - deport you?” Derek kept his eyes on the binoculars, surveying the woods around the green race course.

“With your tongue that is the best they would do to you.” Trembling slightly, Michael reached into his hip pocket for a cigarette and lit it.

“Anyway, it won’t get to that. I’m looking for a purchaser interested in my practise and I’ll get the hell out of here. I’ll go back to England and invest in some stable partnership. If I were you, I’d quit while I’m still ahead.”

“I’ll stay on. Faint heart never...”

“Shut up, Michael,” Derek interrupted. “They’re off.” The horses broke into a gallop across the first stretch. Michael put his binoculars back to his eyes and joined Derek in the viewing. There was silence as the horses rounded the course and only the voice of the commentator could be heard from the public address system. When the horses entered the last stretch, the reaction of the crowd defied its social stratification. Those on the dais stood up, binoculars to eyes, and with composure watched the horses’ race to the finish line.

Most of these were Englishmen, with a few Asians and Africans. On both sides of the dais, where purely African spectators stood on the open grass, the crowds cheered loudly and excitedly. Rising above them all was the voice of the commentator as he reported Black Devil’s clear lead to victory.

“I must admit there’s something to be said about your intuition,” Derek teased.

“You were saying you will hold on”.

“Yes, and play it as it comes. I’m 43 years old. I have four teenage children and the oldest is due for university. After the last of them has graduated from university, then I’ll think of retiring to England or right here, maybe at the coast. But I won’t risk selling what I have and try to start anew in England. That would be gambling with the life of my children.”

“Who says you’ll have that long? These guys are serious. They want us out.”

Derek was now concentrating on the conversation.

“It’s different in the legal profession. If they kick us out now, who will take over? Do you know how many Africans took out practising certificates this year? Only twelve, out of three hundred and three advocates. It’s going to be about 10 years before they can afford to talk of Africanising the profession. They still need us and I don’t intend to be here longer than they do.”

“Well, that’s for you. I am 60 years old, my two sons and daughters are happily married and making a good living in England. I don’t want to start playing cat and mouse games with revolutionaries when I can go to England and retire in peace. If not for me, at least for my wife. I can’t wait until they hound us out of here. It would kill her.”

Although the pioneers of the Faculty of Law at Dar es Salaam had already begun trickling back into the country, they were yet to be perceived as a threat to the established white practitioners. Many of these new African lawyers had joined the central and local government as Magistrates, State Counsels, Town Clerks or Legal Officers. Only a few had had the courage to measure swords with the white lawyers. Commenting on the position then, Professor Yash Ghai and Professor MacAuslan said “There is no reason to suppose that the private branch of the profession will not equally come under fire when Africans begin to join it in significant numbers, as may soon occur, and consider that their prospects of obtaining work are hindered by non-African advocates.”

“The pressure which now exists on the Bar may explain its present role but does not excuse its past deficiencies. One of the most serious of these has been its general failure to try and identify itself a little more with the African population of Kenya ... since few Africans have obtained any benefit, direct or indirect from, or have a stake in, a strong and independent legal profession, few will defend it against government pressure, particularly when that is put in terms of Africanisation. It will be seen for what it has always held itself out to

be, part of the non-African commercial sector of the community, and as such entitled to no special privileges or attention.”

“The Bar then is in a vulnerable position. It is in that position because of its racial composition, its seeming irrelevance to the needs of most Kenyans, and its apparent inability or unwillingness to do anything about improving its organisation and work. Unless it can convince a significant number of people that it can perform important services for the community, it will fail to obtain the support it needs to resist present encroachments of the government, which are not always directed at desirable ends. It may be that the Government would not tolerate a Bar which was more actively involved in society, but at least an effort could be made, and it is that which is so conspicuously lacking at present. Thus, far from being a pressure group for Constitutionalism and the Rule of Law, the Bar is unable to ensure the existence of two essential prerequisites for such a role - independence from government pressure, and public understanding and support for itself.”

# THE EMERGENCE OF THE BLACK BAR

## Chapter 3

It was six o'clock in the evening on the slopes of the Aberdare forests. Smoke from the scattered grass-thatched mud houses rose into the sky and diffused into the descending evening mist. The area was quiet, the silence broken only by the occasional moo of the cows or clucking of the chickens. It was a concentration area, build by the colonial government under the emergency regulations. It was surrounded by a barbed wire fence and a 10-foot trench in which sharpened stakes had been erected. Such concentration areas littered the country that was known as Kikuyu land and were meant to isolate the Mau Mau terrorists. Everyone not within the concentration area during curfew hours was shot on sight. To filter the traffic were several armed African askaris (soldiers) at the sole entrance.

Although the year was 1958 and the inhabitants of this concentration area had lived under these conditions since 1952 when the State of Emergency was declared, they had not yet recovered from the trauma of being transported from their homes and re-settled in the camps. They had had to dig the trenches themselves under armed supervision. Several had been arrested and taken to detention camps. Others had been shot dead. The camp was so crowded that they had to graze their cattle in the forest during the day and be sure to be back by 6pm or risk death. For a people who told time by the sun this was not always possible. But they were a religious people and they thanked God for small mercies: That they lived on the equinox and sunset varied only slightly.

Before 1952, an evening such as this would have brought a bustle of activity to the homestead. There was dinner to prepare, cows to milk and feed, cow food to be fetched from the farms to keep the cows full through the night, chicken

to chase and lock up, water to fetch from the river down the valley, and all in time for the children to eat and go sit on granny's lap for a bedtime story or two. In the traditional division of labour system that was so rigidly adhered to by the Kikuyu people, the women undertook all the tasks that were in any way connected to the kitchen and the children. The young boys locked up the chickens, milked and fed the cows while the young girls helped their mothers, especially in drawing water from the river. The men sat under a tree or in a hut and discussed politics. Every evening was thus also an assemblage of age-groups according to their gender. The result was spectacular, an electric atmosphere of camaraderie.

But on that day, September 7th 1958, there was no electricity in the air. Everyone moved around discharging their duties in a low-key glum atmosphere, their emotions spent from days of oppression. The State of Emergency was nearing an end but they didn't know. All they knew was that it had been six years since they were bundled up like prisoners for nothing they had done, that Kenyatta had been jailed and silenced, that their pre-emergency homesteads had been razed to the ground and their land alienated, and that this deplorable state could go on forever. Their hearts were shattered.

But the heart of one 13-year-old boy was thumping strongly and incessantly against his heaving chest as he lay on his bed panting. The sweat kept flowing from his body, soaking into his already wet khaki shirt and shorts. Despite his fright, thoughts raced across his mind, building up anger in him. What if he had actually been sick? He kept wondering.

The boy's name was Lee Gacuiga Muthoga. He had just escaped being run over by a white colonial administrator driving a Land Rover. The near fatal incidence had occurred as part of a mischievous practical joke conceived by him and an age-mate friend. It was about five O' clock and they were taking the six mile walk back home from school. Although they walked the distance in the morning, having woken up at five to make it to school by eight, the distance was especially disheartening at the end of the day. The school being

down the valley, they had to walk uphill every evening, and this, combined with eight hours of learning with nothing to eat all day, got their delinquent minds working when they saw dust rising behind them on the road to the camp.

“I wish I had a car,” Muthoga told his friend as they trudged along the dusty road, dragging their school bags on the ground.

“Would you carry me, if you had your own car?” his friend inquired.

“Yes, why not?”

“Well, I’m sorry but I couldn’t carry you if I had the car. I’d have to carry my mother, my father, grandpa, grandma, my eleven brothers and sisters, I mean there’d always be a relative to carry.”

“Oh yes, I hadn’t seen it that way. But my father is in detention, so I guess you could take his seat when you need a ride.”

“It’s not that I wouldn’t want to do the same for you, I hope you understand. I’m sorry but ... “

“Hey, hey, hey,” Muthoga interrupted. “Why don’t we get the car first? You are ... what did the teacher call it? Do you remember this saying about a cart and a horse?”

“Putting the cat behind the horse. I don’t understand it. Why shouldn’t you put a cat behind a horse? I thought horses are more important because Englishmen ride on them, therefore they should always come first.”

“It’s not cat. It’s cart, C-A-R-T,” Muthoga corrected his friend. And the saying is that you shouldn’t put the cart before the horse. You know why?”

“Lee give me some Leeway until we get to the leeward side.” They both burst out laughing.

“What do you say we hike a lift from this car?”

“Lee, we are in enough trouble already. Your mother has yet to punish us for frying eels in her cooking pan. Not to mention the egg-shells she found buried in the garden.”

“All we are doing is simply asking for a lift home. What is wrong with that? We are not stealing the car.”

“No white man is going to give two black boys a lift. It has not happened before and it will not happen now.”

“You expect us to get it voluntarily? Get serious. I’ll lie down and pretend to be sick. You come over me and wave to the car. They’ll stop. When we get to the dispensary, tell them you are going to call my mother. I’ll find my way out.”

“Muthoga, you’re out of your mind.”

“The car is almost here. Come on, quick.” He quickly dropped to the ground, pulling his friend along. As his friend struggled to stand up, the Land Rover rounded the bend and came into their full view. It was a police car.

“Holy Mother of God,” Muthoga cursed. In the driver’s seat was an Englishman dressed in the brown colonial administrator’s uniform. At the back of the car were several African soldiers with rifles. The car was driving directly towards them and from the sound of it, at an increasing speed. The two boys remained transfixed in their positions as the car came roaring towards them.

“I’m out of here. Let go of me, Lee.” The boy did not wait to be released by his comrade but lashed out and whipped Lee’s hand off from the hold it had on his shirt-front. He rose from his kneeling position, spontaneously followed by his friend and the two boys skirted into the bushes beside the road. Behind them

the Land Rover screeched to a halt. The white administrator shouted at them as they disappeared into the bushes.

“If you boys ever stop my car again I will run over you.” But the boys were long gone.

For Lee, this was the second time in his young life that he had had a confrontation with a white man. The first time was in 1952, immediately after the declaration of the State of Emergency, when his father was arrested. He was only seven years old then. He had been walking with his mother from the market towards the camp when a Land Rover stopped beside them. His father put out his head from the back and informed his mother that he had been detained and was en route to a detention camp. Three days later, a white administrator, accompanied by several African askaris, arrived at their home and began interrogating his mother. He couldn't hear what was being said as he stood some distance away. Then, all of a sudden, the white administrator began whacking his mother with the official cane he carried. As the third stroke landed, Lee felt the blood rise to his head and he lost control. He rushed to where the Company stood and grabbed the cane from the white man, throwing his small body against him. Almost thrown off his feet, the administrator grabbed back the cane and gained control of himself moments before he hit the boy. An uncomfortable moment followed as the two stared at one another, their eyes burning with fury. The askaris had already cocked their guns and they held them pointed at the boy. Lee stepped back, still staring defiantly, and slowly walked back to where he stood. No more whacking followed.

The memories of that day came flooding his mind as he lay on his cheap cane bed panting. It was not fair, he kept thinking. It was unjust. But unlike the rest of the villagers, his heart had hope. One day, he thought, the country would be free and there could be justice. The white administrator would be punished. And he wanted to be the one to do it. If he could be a judge, he could have the white man severely punished for beating his mother and wanting to run him over with his car. To enable his juvenile fantasy, he resolved to work hard in

school and become a judge. Yes, he would become a judge, he said to himself as he fought back the tears that welled up in his eyes.

The greatest obstacle to Lee's juvenile fantasy was himself. A school headmaster was later in life to describe him as "totally not amenable to school discipline."

His delinquency had begun before he went to school, and was in fact the reason his parents took him to school - to keep him away. He breathed all the oxygen at home, took up all the space and generally kept everyone on the verge of insanity. But school only helped to aggravate his delinquency. His parents had lost control and could only pray that God maintain guidance. But even God has limits and in 1964 He, too, began to lose his patience.

It was the month of May and Lee was due to sit for his final 'O' Level examinations. The school was St. Paul's High School, a catholic institution. He was the only non-Catholic student in the entire school. During his time at the school, Lee and the administration had shared a most acrimonious relationship as he persistently criticised catholic theology with the insensitivity of a Protestant. So did he criticise the administration itself on its managerial policies. During this particular month, the school administration was not too careful with its menu. Lee and a few cronies took a plateful of food one evening and sneaked with it into the headmaster's compound where they attempted to feed it to his dog. The dog declined. The boys went back to the dining hall and revealed the information to the rest of the students. A convention was immediately convened and it resolved that the school go on a hunger strike. The resolution was unanimously adopted.

The headmaster, Fr. Joseph Lentil, happened to be nearby when the deliberations of the convention began and he peeped from outside and witnessed the entire proceedings. When the last speech was delivered, he walked in and stood in the doorway. One by one the boys noticed his presence and fell silent. The noise in the dining hall abated slowly until the entire hall was still. Without raising

his voice, Fr. Lentil informed the students that they were all suspended from school indefinitely.

The suspension period was not long, and within two weeks many of the boys had received letters summoning them back to school. At the end of the third week, all of them were back but Lee was still at home.

No letter came. At the end of the fourth week, he began to get worried and decided to go and learn his fate.

Fr. Lentil had sealed it: no school, no examination. The possibility of being expelled had never occurred to Lee. Looking at it when it was announced caused him apoplexy. All the dreams of once becoming a judge crumbled. All the energy of pent-up anger, which he had formerly so well diverted in rebellion, came flowing into him. Yet another Englishman wanted to destroy him. In spite of all his pleas to Fr. Lentil, he was met with a denial. He got angrier each time. When he gave up the attempt and stormed out of the Headmaster's office, the tears were rolling down his face again, for the second time in his life.

He walked blindly to the school store and picked up a machete. Before Fr. Lentil could resettle, Lee was back, brandishing the machete dangerously. He locked the door to the outside and advanced towards the priest.

It was either Lee's tearful war-cry or Fr. Lentil's passionate pleas for a truce that attracted the school community to the headmaster's office. Within a few minutes, the office was surrounded by students and members of staff who beseeched Lee to lay down the machete. Lee did not hear them. He stood at the centre of the office puffing, holding the machete by his side. As the minutes passed, his anger ebbed and the absurdity of the situation became apparent. Now he had control of his senses. But he couldn't concede to the "no examination" sentence. So he took a chance and agreed to Fr. Lentil's solution that the matter be referred to a meeting of members of the teaching staff.

The meeting was convened immediately thereafter and Lee was invited to present his case, on condition that he first returns the machete to the store. His presentation was not articulate, marred by agitated thoughts and a broken voice. Neither was it strong, preceded as it was by his reputation of delinquency. In its resolution, the meeting found against him on all grounds he presented, refusing to accept that he had been victimised for the sins of the fellow students. The only concession Lee won was a relaxation of the “no examination” sentence. The school administration allowed him to sit for the national examinations at the school on condition that he remain outside the school until November when the first paper would be sat; that he would not enter the school more than five minutes before any paper began; and would leave within five minutes of its conclusion, and that no student would ever speak to him or be within ten yards of him. He went back home more confused than happy. What was he going to tell his mother?

Lee stayed at home for the next three months and prepared for the coming examination. During the same period, he raised money to enable him to reside near the school. It was impossible to live at home and travel the 60km to school every day for an examination. So towards the end of September he left home and went to live at the school’s local market. The accommodation available was a one-room flat with nothing in it. The money he had managed to raise was only enough for his rent and food and he couldn’t afford to buy any furniture. He had to contend with what the landlord offered - one table in the daytime served as his chair and reading table. At night it served as his bed.

Yet all went well, the examinations began and it looked like Lee and Fr. Lentil may never have to meet again. Then he ran out of money. That meant no food. For two days he fought the hunger as he tried to think of ways of making some money. By the third day he was too hungry to think of something constructive and he took the only option available. He went to the school fence, cut a hole through it and made his way to the dining hall. There was more than enough to eat for dinner.

The students were co-operative despite the rule that forbade them from being within ten yards of Lee. They sheltered him from the prying eyes of the prefects and kept away an extra share for his breakfast and lunch. That way he only needed to sneak into the school in the evening for dinner. It was one such evening when Fr. Lentil walked right up to the table at which Lee sat. Very much unlike their last encounter, he was calm and composed, taking a few moments to look the haggard delinquent up and down.

“What are you doing here?” Fr. Lentil asked. The other boys took the chance to slip away from the table, not forgetting to carry their food with them.

“I’m eating, sir.”

“So I see Muthoga. But what are you doing here?” The school captain had joined the headmaster at the table and both stood in a condescending stance beside their seated captive.

“I’m sorry, sir, but I don’t understand your question,” Lee replied. He was slightly shaken and his voice betrayed his nervousness.

“Muthoga, five months ago you said the food was not fit for dogs. Now here you are, stealing it.”

“I am not stealing, sir.”

“Oh ... someone gave you permission to eat? So, you are not stealing dog food, you asked someone for permission to eat dog food.” Fr. Lentil was loving every minute of the conversation.

“Sir, I don’t need anyone’s permission to remain alive. If I didn’t come here to eat I would have starved. I have no food. It isn’t just that I should die of hunger when others are eating.” The argumentative tone of the conversation was returning Lee’s confidence and he now spoke more firmly.

“Said the prodigal son. Why didn’t you come to me, ask for my forgiveness like the prodigal son did?” There was an uncomfortable silence as Lee looked for an answer.

“This is my first day here, sir. I was too hungry to wait for tomorrow morning,” he lied.

“So I may expect you in my office tomorrow? With a letter of apology, I suppose.”

“No sir,” Lee’s voice was hard. The taunting was beginning to anger him. “I did not do any wrong when I said what I did. I was expressing my honest opinion about the food. I can’t apologize for that.”

“Well then. That leaves us with your illegal entry into the school compound. Is there any reason why I shouldn’t deal with you and all those who assisted you in this criminal act?” Fr. Lentil was managing to stay above the emotions of the conversation.

“No-one assisted me, sir. I am solely to blame.”

“And solely you shall cry. I shall discontinue you from any further participation in the examination and will have you arrested should you ever step into this compound again. What do you think of that?”

Lee did not reply. He remained silent, looking at his half-eaten dinner. It seemed there was no way out of the situation.

“Muthoga, I do not wish to condemn you without hearing you. Not this time. Maybe you have something to say, with the help of a machete for example.”

The sneer hurt deep. A defiant countenance came over Lee’s face and he raised his eyes and gazed at the wall ahead. Unconsciously, he bit into his lower lip.

Fr. Lentil let the moment linger for a while before he turned to the school captain.

“I want him escorted out of this compound to his door, wherever he is living. He is your responsibility from today. If I ever see him in this compound outside examination hours, it is you I will blame. In this school Muthoga is persona non grata”

By Fr. Lentil’s grace Lee survived the encounter. With the help of his friends in the school, he received his food through the undiscovered hole in the fence. And before long it was all over. The examinations were completed and he went back home.

It came as a surprise when Lee qualified for high school. It was almost ridiculous.

Fr. Lentil, particularly, was confounded. He had written the boy off months ago and didn’t expect Lee’s fortunes to turn out as well as they had. The priest had written to all the best schools in the country, warning them of the dangers of admitting Lee to their high school programme. It was Fr. Lentil whose report said that Lee was “totally not amenable to school discipline”. He had good reason to say so. But he was also generous enough to say that the boy was “extremely hard working” - also with good reason.

Kenyatta College in the city of Nairobi was the only school that did not heed Fr. Lentil’s warning and it came to regret it in 1966. Lee was in his final year of high school. It happened that the junior students at the school began to complain about the utterances of a Mr. Parker, a teacher at the college. Mr. Parker was allegedly liberal with racist doctrines and spent a lot of time tutoring the junior students on the inferiority of the African race. The senior students took up the issue and formed a delegation to the government to petition for Mr. Parker’s deportation. Lee was at the centre of the idea.

The delegation went to the Ministry of Education offices and demanded to see the Permanent Secretary. He refused to see them. They left his offices and went to the Minister's office. The Minister granted them an audience, promised to investigate the matter and ordered them to go back to school. Not satisfied with the result, the delegation went to the Ministry of Home Affairs. Although they managed to see the Minister, the result was no more satisfactory. They were ordered to go back and not to leave the school compound again.

By the time they arrived back from their escapades, the Principal had got wind of the delegation and decided to expel all its members from the college. He had called in the police who stood guard at the gate to prevent their entry. In answer to the order, the delegation quoted the instructions of the two Ministers to the effect that they stay put within the school compound. The principal insisted on an expulsion but the officer in charge of the eviction squad thought it unwise. After a brief discussion, they decided to place all the members of the delegation under house arrest. Lee and his friends were immediately apprehended and detained in one hall of residence.

As a result, the guard was posted at the door to the room of each detainee. In return for this development, the detained students began misusing the officers. They would send the guard to buy them cigarettes, and when he came back they remembered they didn't have a match-box and would send him back again; after five minutes they needed cashew-nuts, after ten minutes it was Coca-Cola, then biscuits ... The guards couldn't refuse to do it. It was their duty to do all that was necessary to maintain the boys inside the halls. But they didn't like it either. So they kept out of sight, and that was all the detainees needed to jump out of the window and shock the guards by re-emerging through the main door.

All over the country, there were young students like Lee taking advantage of the democratic institutions of the newly independent country. The independence of the country had brought about a change of fortune for them and they were now assured of a future similar to that of any white student in the country.

The events that comprised the struggle for independence had occurred at a time when these young students were at their most impressionable stage of life. They had experienced the bitter end of the colour bar system. They had lived through the State of Emergency and witnessed the derogation of the basic rights of their people. Their education had been terminated by the proscription of the independent school associations. They had all listened to Kenyatta and fallen prey to the power of his spell. Each ended up as a KANU activist and ardent Pan-Africanist.

For those of them who decided to take a degree in Law, the University of East - Africa at Dar es Salaam did what was left to be done in turning them into socialist revolutionaries. Phillip Ochieng', in his book "I accuse the press: An insider's view of the media and politics in Africa", describes the university during this period as follows:

"In all my 26 years of experience as a newspaperman in all the three East African countries, I do not recall anything like the kind of openness and depth of debate such as took place in Tanzania between 1967 and 1975. The University of Dar es Salaam became the intellectual Mecca of all Africa, attracting thinkers from all over the world. There were such celebrated names as Walter Rodney of Guyana, John Saul of Canada, Kwesi Botchwey of Ghana, Marga and John Holness and Clive Thomas of Jamaica, Giovanni Arrighi of Italy, Orton Chirwa and Kanyama Chiume of Malawi (Chirwa was in later years to be convicted, together with his wife, for treason by President Kamuzu Banda of Malawi and died in jail in October 1992 having seen his wife only once) Yoweri Museveni and Mahmoud Mandani of Uganda (Museveni later became a belligerent, formed the National Resistance Army and took over power from the warring factions in Uganda where he is now President) Manuel Gottlieb of the United States, Arnold Kettle, John Loxley, Lionel Cliffe and John Iliffe of the United Kingdom ... though all contributed ideas freely and with relatively little fear of being victimised by the state they ranged from the far right to the far left.

“The Tanzanian capital was also the headquarters of all the progressive liberation movements in Africa, the most famous of which were the Front for the Liberation of Mozambique (Frelimo), the Popular Movement for the Liberation of Angola (MPLA), the nationalist movement in Guinea Bissau and Cape Verde Islands (PAIGC), the Zimbabwe African National Union (ZANU), the Pan-Africanist Congress of Azania (PAC), the African National Congress (ANC), Western Sahara’s Front for the liberation of Saguiet and Rio de Oro (Polisario), and the South-West African People’s Organisation (SWAPO). Moreover, Dar es Salaam enjoyed the permanent presence of or regular visits by such African intellectual luminaries as Agostinho Neto and Lopo do Nascimento of Angola, Marcelino dos Santo, Sergio Vienna, Jorge Rebello, Samora Machel Gater became president of Mozambique and was subsequently assassinated), Janet Mondlane, Joachim Chissano (succeeded Samora Machel as President of Mozambique) and Hernando Guebuza of Mozambique, Albert Rene Gater became President of Seychelles) and Guy Simon of the Seychelles, Amilcar Cabral of Guinea Bissau, Robert Mugabe Gater became President of Zimbabwe) and Nathan Shamuyarira of Zimbabwe, Gora Ebrahim and Oliver Tambo of South Africa and Sam Nujoma of Namibia Gater became President of Narnibia).”

Unfortunately for Lee, he received an invitation to study for the degree of Bachelor of Arts at the Royal University College in Nairobi. He received the letter of invitation at a time when he was thinking the world of himself. Only several weeks before, Sir Kenneth Bolton, the Editor-in-Chief of “The Standard” newspaper (which was the oldest and highest circulating newspaper in Kenya), had travelled 140km from Nairobi to Lee’s home in the Aberdares to offer him employment as a journalist. The two had met at Kenyatta College where Lee was an active debating club member. He had declined to take up the offer in the expectation that he would be leaving to study Law at Dar es Salaam. The admission to a BA course meant that he wouldn’t be leaving the country after all.

The very day he received the letter, he made his first international telephone call to Tanzania and spoke to the Registrar of the University of East Africa at Dar es Salaam. He poured his heart out into the ear of the Registrar and pleaded with him to intervene. Lee's ambition touched the heart of the Registrar and two weeks later he received a letter offering him a place at Dar es Salaam.

That was how he came to join other Kenyan law students at Dar es Salaam in their inculcation into revolutionary socialism. The free intellectual atmosphere allowed him the first free expression of himself. He began to contribute to the Denning Law Journal and rose to become its Editor-in-Chief. He also became a leader of the Association of Kenya Students at Dar es Salaam. It was in this latter capacity that he got into his first conflict with Kenyatta's government in Kenya and almost earned himself an expulsion from the University of East Africa.

It arose from an incident on October 28th 1969 at Kisumu town in Western Kenya where President Kenyatta's entourage was stoned by members of the Luo community. The incident was a culmination of political tensions that had grown over time between members of the Kikuyu and Luo tribes. These two ethnic communities were the largest in the country and had assisted KANU with the elections of 1963 over KADU. Jaramogi Oginga Odinga, the leader of the Luo community, had become the country's Vice-President.

Towards 1966, however, the relationship between President Kenyatta and Vice-President Odinga deteriorated. The chief cause was a group of Kikuyu leaders who surrounded the President and virtually ruled the country. They had drawn the President further and further away from the ideals upon which KANU had been founded, abandoning the "African socialism" which Kenyatta had advocated and adopting a ruthless form of capitalism. Mr. Odinga, being a socialist, was increasingly disillusioned by the turn of events and the fact that three years after independence the multitudes of peasants in the country were yet to feel the effect of a government of their own. More disheartening was the fact that Mr. Odinga had refused to form a government after the 1961 elections

insisting that that could only be done by Kenyatta, who was in detention at the time. Kenyatta had to be subsequently released.

Mr. Odinga had consequently begun to take on Kenyatta personally and each of the two went around the country drumming up support against the other. They criticised each other in political rallies and formed factions within Parliament. By 1966 there was no doubt that Odinga would challenge Kenyatta in the next Presidential election.

In answer to this threat, Kenyatta used the help of the second most popular leader of the Luo Community, Joseph Tom Mboya. Tom Mboya was known as the father of the trade union movement in the country. Coupled with his young age and high level of intelligence, he had been able to rise above the tribal politics that Kenyatta and Odinga played and was respected as a true national leader. He therefore had no problems convincing KANU that there was need to have four Vice-Presidents in the country in order to have a better distribution of power. KANU adopted the proposal and Odinga was relegated to being merely one of the four. Odinga immediately resigned and formed the Kenya People's Union, the first opposition party since the dissolution of KADU in 1964.

The KPU never took root as the Kenyatta government marshalled the entire state machinery to frustrate it. It was denied licenses to hold political rallies, its meetings were broken up by paid unruly mobs, and the state media was used to propagate against it. Only in Odinga's Nyanza province was the party's backing significant.

But Kenyatta's cronies' problems were not solved by the political destruction of Odinga. Tom Mboya soon acquired Odinga's popularity at a national level. Though Kenyatta liked Mboya's style and relied on him to maintain proper relations with the Western countries that adored the young politician, the Kikuyu faction around him wanted him to drop Mboya. The concern was over the Kenyatta succession. The Kikuyu faction was wary of the political

marriage between Kenyatta and Mboya and feared that the latter would be annointed as a successor.

Kenyatta was about 75 years old then and the Kikuyu faction was thus not being paranoid about succession. With Kenyatta's refusal to drop Mboya, the Kikuyu faction decided to solve the problem in their own way. In 1969, Tom Mboya was shot dead on a Nairobi street as he emerged from a pharmacy.

Immediately, the dominoes began to fall. The only chance for a Luo president had been taken away. The previous chance had been crushed. It did not help matters when the man arrested as the chief murder suspect was a Kikuyu. Riots of angry members of the Luo community rocked the city. Raging battles were fought on the streets between the Luo rioters and sympathisers against the police. So spectacular was the explosion into civil disobedience that it is said today that the trend of slits in skirts were introduced in Kenya during that period, by women attempting to loosen up for a run.

When it was all over, Kenyatta's government was smarting with embarrassment. His popularity was at its lowest. An evil mind somewhere thought that even with all being lost, revenge was sweet. The presidential entourage was thus mobilised to Kisumu town, the centre of Luo land and stronghold of the Luo community in the country. By the end of the visit, there was never any more doubt as to who was in control.

Like Odinga, the students in Dar es Salaam were equally disillusioned by the political trends at home. The Kenyatta who had been their role model compared dismally to the Kenyatta whose security personnel had killed the rioters in Kisumu by shooting needlessly into the crowd. Similarly, too did the political economy at home compare to that of Tanzania in which the peasant farmer was placed first. In discharge of their patriotic duty, they wrote a terse letter to President Kenyatta and told him what they thought of the activities of his government. The letter was addressed care of State House, Nairobi.

A diplomatic incidence ensued. Apart from irking President Kenyatta, the letter greatly embarrassed the University of East Africa and the Tanzanian government. Although Tanzania had become a refuge for Kenyan immigrants, this was the first time that Kenyatta was being challenged from the territory. It was left to the Principal at the University, Dr. Wilbert Chagula, to determine whether the students should be deported back to Kenya as per request of the Kenyatta government.

Lee and his comrade leaders of the Association of Kenyan Students were summoned to Dr. Chagula's office. They were charged with breaching a university regulation that required all addresses to any Minister, Assistant Minister, civil servant or any other government official by any student to be made through the Principal. A finding of guilty would have entitled the university to suspend or expel them. That would have been a grave result in the light of the rumour that passed around the university to the effect that security forces were camped at the border town of Namanga awaiting their deportation.

To Dr. Chagula's amazement, the students argued that they had not breached the rule as their address had been made to the President. Since the regulation only provided for Ministers, civil servants and government officials, they argued, they had complied with the rule.

Unable to counter their arguments, Dr. Chagula discharged them, leaving the university and the Kenyatta government to seek an alternative remedy. That came in the form of an amendment of the regulation to provide for the President, and the admission, one week later, of about 20 Kenyan State intelligence officers to take various courses at the University of East Africa.

The next year, 1970, Lee and his classmates graduated with LL.B degrees. They returned to a Kenya that was very different from the one they had left in 1967: A Kenya in which Kenyatta was more of a villain than a hero, where the Kenyan was no longer his brother's keeper, where the neo-colonialist and

the bourgeoisie had replaced the colonialist and where the white lawyers still controlled the legal profession. They saw themselves coming into the country as second messiahs, to liberate Kenya from the neo-colonialists and the bourgeoisie.

But first they had to liberate themselves from the white lawyers who were using every means possible to please the government and thus maintain their control of the profession. The stage was set for a ruthless conflict between the White Bar and the emergent Black Bar: The Armageddon.

# THE ARMAGEDDON

## Chapter 4

Their first mistake was to underestimate the clout the white bar wielded with the Kenyatta government. For this reason, the Armageddon took place over a period of 10 years or so. Their second mistake was to overestimate the commitment of the Kenyatta government to Sessional Paper No.1 of 1965. They believed that the reason why the paper had not been applied to the legal profession was the low number African lawyers in the country. As the Faculty of Law at Dar es Salaam had increased their number to about 125 lawyers, they thought that all that remained was to call upon the government to initiate the process of Africanisation in the profession. They thus landed into the country shooting from the hip.

Later when the dust had settled, there were no white lawyers lying dead on the ground. Instead, towering over them, smoking guns in hand, was the Honourable Attorney-General Charles Mugane Njonjo, the valiant Black Knight otherwise popularly known as Sir Charles. It was then that they realised their first mistake.

Charles Njonjo was born in 1920, the son of a powerful colonial Chief, Senior Chief Josiah Njonjo. Of all the children born in Kenya before independence, Charles Njonjo was the most privileged. He grew up like an English child, never experiencing the problems of his compatriots. At a time when no African child could secure an education, Njonjo is said to have attended an English school to which, rumour has it, he was conveyed on a white horse. He went to University in South Africa where he spent a considerable number of years on

the right side of the apartheid line. From South Africa he proceeded straight to England and joined Gray's Inn where he was called to the Bar.

Young Njonjo was a man to be pitied. In Kenya, he was isolated from his African brethren. He had nothing in common with his countrymen. His education was by far superior to that of his compatriots. So too was his upbringing. The only people he could get along with were the English. The result was that his entire thought process was English-oriented. Notions like Africanisation were sheer nonsense to Njonjo.

The white community in Kenya, especially the White Bar, was very quick to realise how valuable Njonjo could be to their cause. Njonjo willingly became their great defender, always rising in their defence. They and Njonjo entered into a symbiotic relationship where they relied on Njonjo to use his position in government to defend them while he used them to expand his power and influence. With the high number of expatriates in the country, Njonjo became extremely powerful. His reason for rejecting Africanisation ceased being one of lack of identity and became one of protecting his own power and influence. He thus hated the fire-spitting revolutionary lawyers from Dar es Salaam and they in turn hated him. In fact, Njonjo came to earn a reputation as the person the Black Bar hated most.

It was Muthoga who launched the first phase of the Armageddon and invited Njonjo's wrath onto the Black Bar when in 1971, while still at the Law School in Nairobi awaiting to sit his Bar examinations, he wrote to Njonjo and demanded that the government assist qualified African advocates with loans to establish legal practices. He wanted a committee of various government officers to be established and funded for this purpose. His argument was that the African lawyer was in the middle of a vicious circle. The banks and financial institutions could only lend money to those who had collateral, yet almost all the African lawyers were from peasant farmer families that were usually landless.

“I must point out,” wrote Muthoga, “that many of us are anxious to serve our country in private practice but are compelled by sheer necessity to go to industry and take up non legal appointments for failure to get places in already established legal firms which are predominantly manned by non-citizens.” He copied the letter to the Permanent Secretary of the Treasury, the Director of Personnel of the Government, the President of the Law Society of Kenya, the Chairman of the Council of Legal Education and the Principal of the Kenya School of Law.

Two of the above officers replied: The Principal of the Law School and the office of the Attorney-General. Conspicuously absent was a reply from the President of the Law Society of Kenya Mr. S.N. Waruhiu. Waruhiu was the first African president of the LSK. He was thus the best placed to fight for the interests of the African lawyer. The fact that he didn't seem interested in doing so could have had something to do with his background. Waruhiu, like Njonjo, was the son of a powerful colonial chief, Senior Chief Waruhiu. He therefore did not have the kind of childhood the new African lawyers had. Although his was not as privileged as Njonjo's, it was enough to alienate him from the Pan-Africanist ambitions of his fellow African lawyers. There was also the fact that he came directly under the control of the White Bar, as the only African member of the Council of the LSK. He had of course been observed and vetted before being allowed access to the highest office in the LSK. If that was not enough reason to shun Pan-Africanism, he had his own personal reason. His father had been slain in the most inhuman manner by the “Mau Mau” terrorists.

In his reply Mr. Tudor Jackson, the Principal of the Law School, regretted that he could not be of assistance since back in 1969 he had tried to do something in the same vein but “was defeated by a combination of the Treasury, the Banks and the Industrial and Commercial Development Corporation (ICDC).” Surprisingly, Mr. Jackson is English and possibly the only white lawyer then willing to assist the emergent Black Bar.

Mr. Njonjo's reply was signed by one of his many English assistants Mr. Montgomery. He wrote:

"I would advise you that this matter was considered by the government over two years ago and it was decided that the government could not provide the money or guarantee loans to advocates. The government considers that advocates should negotiate their own loans with banks or other financial institutions." Despite this setback, the Black Bar continued to press the government to assist in the Africanisation of the legal profession. The emphasis shifted from direct financial assistance to equal opportunity, and the demands became more extreme.

In a paper he wrote on the young African advocate during that period, Human Rights activist and Robert F. Kennedy Memorial award winner Dr. Gibson Kamau Kuria, a product of the Faculty of Law at Dar es Salaam, said:

"His plight has been caused by an adroit design and execution of the policy of slowing down Africanisation of the legal profession with a view to preserving the privileges the essentially non-African profession enjoyed during the colonial rule. This policy has been devised and executed by non-Africans. The confidence that he can make a competent lawyer has been taken away; the policy referred to seeks to tell him that he cannot make progress unless he acts as the junior partner to a white. Big law firms tend to attract big business; small firms tend to attract small business; there is no way of breaking the vicious circle without the assistance of government."

Kamau Kuria called for the discrimination of non-white Advocates by preventing them from engaging in certain spheres of practise for the sake of pro-African affirmative action. Particularly, he wanted all parastatal clients taken away from the white law firms or any African law firm with too big a share and all non-citizen whites to be barred from practising in the country.

Nothing however, came out of the appeals to government. The members of the Black Bar were left with the option of either joining the white firms or

the public service. Muthoga firstly joined the Attorney-General's chambers, Njonjo's home turf, where the superiority of the white lawyer over the black lawyer was greatly emphasised. Within a few months Muthoga, unable to compromise himself to Njonjo's philosophy, resigned and took up the offer of employment at his former pupil masters, Hamilton, Harrison & Mathews.

He was at Hamilton, Harrison & Mathews (HH&M) only for a few months, after which he left to set up his own practice. Although HH&M was not as racist as the A-G's chambers, the black lawyers in the firm were subjected to unequal opportunities with the white lawyers who were imported from England. Further, Muthoga became the personal lawyer for the most outspoken critic of the Kenyatta government, Mr. Josiah Mwangi Kariuki. Muthoga had met Mr. Kariuki, popularly known as JM, while he was still a student at Dar es Salaam and JM was a Member of Parliament. The two discovered they shared a lot in common. Not only had JM been in detention with Muthoga's father, the two were terribly ambitious and believed in public welfare. When Muthoga joined HH & M, JM approached him for legal advice on various matters, especially concerning his fiery parliamentary debates. Though JM was a multi-millionaire and the only Kenyan to own a private jet, he was unacceptable to HH&M due to his anti-government stand. Muthoga had thus to choose between the two and he chose JM.

It was while Muthoga was running his own practice that the Black Bar renewed its onslaught on the White Bar. This time the Black lawyers used political action from the floor of Parliament through their members who had turned to politics and sympathisers like JM. But even this was unfruitful against the White Bar. When it was criticised for discriminating against Africans in the white law firms, its members gave partnership to a few Africans. These were, however, "letterhead partnerships", giving no proprietary interests to the Africans and only meant to impress. But with the "letterhead partnerships", the White Bar was able to dispel the allegations of its critics and even to attract more work from the government. What political action the White Bar

could not handle it enrolled the assistance of Sir Charles whose eloquence was formidable.

These defeats hurt the members of the Black Bar deeply. They became disillusioned about their beloved country and profession. The result was that they kept away from the activities of the LSK. The White Bar, too, was no longer interested in the LSK. Its members looked at the profession in a parochial way, caring no more what they could do for it. The eventuality of the Africanisation of the profession was a matter of time and the white lawyers had thus no interest in the future of the LSK. Lacking any committed members, the Society began to wither away. A Special General Meeting it called in October 1972 had to be adjourned for lack of quorum. Even when in a later meeting a resolution was tabled calling for substantial increases in subscriptions, quorum was obtained only by scouring the coffee houses.

That was how only 29 people came to vote when a resolution calling for the amendment of Section 13 of the Law Society of Kenya Act was tabled. Section 13 governed the election of the President and Vice-President of the LSK (now Chairman and Vice-Chairman after a statute passed in 1973 forbade the use of the term President unless in reference to Jomo Kenyatta). Under the provisions of Section 13, these two offices could only be held by past members of the Council of the LSK. Candidates to these offices were also elected by sitting members of the Council.

Since Africans had yet to even begin participating in the Council, Section 13 meant it would take several years before they could secure a majority in the Council and thus elect an African President.

It was a lawyer called Kibuchi who saw Section 13 as a way in which the Black Bar could take over control of the LSK and thus determine the destiny of its members. He thus published a resolution to be voted for in the Ordinary General meeting of February 2nd 1974 which read:

“The provisions of S.13 of the Law Society of Kenya Act relating to the election of the Chairman and Vice-Chairman have outlived its intended purpose or usefulness and are not in the best interests of the society nor with the principle of democratic choice. S.13 should be amended to ensure that the Chairman and Vice-Chairman of the Society are henceforth elected by the members of the Society as a whole and the Attorney-General be advised of the resolution and asked to amend the Act.’

The resolution was beaten by one vote, 15-14. Realising that they could lose on this new battlefield, the White Bar decided to hit back. In a Council meeting of March 11th 1974, the Council noted the amendment proposed and resolved that a letter be written to Njonjo advising him against such an amendment. Only two Africans sat in the Council against a force of nine non-Africans. There was no way they could stop the resolution. Informally Njonjo was asked to amend the Advocates Act to increase the period of residential training to two years. This Njonjo did through the Statute Law (Miscellaneous Amendment) Bill, 1974. The intention of the Bill was to slow down the entry of Africans into the legal profession by discouraging them from Law since in their poverty they couldn't wait those two years to begin earning. Through its sympathisers in Parliament, the Black Bar secured the defeat of the Bill.

The Black Bar was rejuvenated by this new possibility. Its members began to campaign for support of the motion in preparation for the next year's Annual General Meeting. This was held on February 8th 1975 and the resolution was tabled and moved by a lawyer called Richard Otieno Kwach. He was supported by five lawyers - Maina, Kagiri, Muthoga, Gautama and Juma. All but Gautama were Africans. He was opposed by seven lawyers - Thompson, Deverell, Hamilton, Harragin, Le Pelley, Kapila and Green. All but Kapila were English. The resolution was passed with a victory margin of 15 votes: 38-23. Significantly, there were 22 English lawyers in attendance.

The White Bar did not concede defeat. Hoping for a more favourable result it demanded that a poll be taken to register the views of all the members of the

Society. But already Black lawyers were the majority, and the poll was returned confirming their victory. Kwach and Gautama were immediately appointed to draft the precise formula of the amendment for onward transmission to Njonjo. Not even Njonjo could save the White Bar from this one. Unlike for his comrades, for Lee Muthoga, the joy was short-lived. On March 2nd 1975, his client and benefactor Josiah Mwangi Kariuki was assassinated.

## Chapter 5

“Why ... Ohh why ... Ohh why they shot him down? Why ... Ohh why ... Ohh why they shot him down?” The crowd of university students sang as they walked in a procession towards the Office of the President. The procession stretched past the Parliament buildings where the crowd had stopped to offer prayers to the departed soul of JM and went way beyond the Hotel Intercontinental and General Post Office. The students had boycotted lectures that morning and taken to the streets, carrying placards with messages like “JM SUPERSTAR” and “BRITISH HOME GUARDS - GO HOME”. So far, the riot police kept away from the irate students.

JM's body had been discovered by two Maasai elders on March 3rd 1975 in the Ngong forest, about thirty miles from the city of Nairobi. He had died on the previous night, shot five times with three 7.62mm calibre and two .38mm calibre bullets fired from automatic pistols. By the time the body was collected from the forest, it had been sampled by hyenas and was already partially decomposed.

Even before the National Assembly appointed a Select Committee to investigate the death of JM, there was no doubt that the government was responsible. Events leading up to JM's death revealed the involvement of government officials at the highest level in the murder. In fact, the murder plot was so intricate it touched on the entire state machinery. The Select Committee stated in its report that it had “been left with no alternative but to draw the painful but necessary inference that the investigations carried out by the police [were] neither thorough nor genuine, and that the police knew who the culprits actually [were] but [were] unwilling to proceed against them.”

JM'S revolutionary politics had begun when he was 24 years of age. He was then an ardent supporter of the Kenya African Union, to whose membership he enrolled many Africans. As a result of his political activities, he was detained for seven years under the Emergency Regulations then in force. At the detention camp, he led protestations against the harsh treatment of the detainees by writing to the District Commissioner. His protestations were successful and the situation was rectified. He tried making similar protestations at Manyani detention camp to where he was transferred. He earned himself 24 strokes of the cane. When a committee was eventually sent to the camp, he made his protestations again and earned himself 12 strokes of the cane and seven-days solitary confinement. He emerged from confinement to make further protestations to the colonial office in England. The situation was subsequently improved.

When he was released from detention, he went to England and enrolled in Oxford University. It was during his stay in Oxford that he wrote his autobiography "Mau Mau Detainee" which was published in 1963. On his return to Kenya, Mzee Kenyatta appointed him as his private secretary until the elections of 1963 when JM contested for and secured a parliamentary seat. In 1964 he was charged with the formation of a National Youth Service to assist school drop-outs. The programme was a success and is still in existence today. He left the country the following year to study economics in the United States, a study programme under which he was instructed on anti-poverty schemes. He returned to Kenya to launch a one-man anti-poverty campaign, a campaign which gained nationwide support when he was appointed as Assistant Minister to the Kenyatta government in 1968.

By 1971 JM had successfully steered himself onto a collision course with the Kenyatta government and the clique of Kikuyu bourgeoisie surrounding the President. While this clique believed that every leader should take what he could and shut up, JM was making statements of the following nature:

“A small but powerful group of greedy self-seeking elite in the form of politicians, civil servants and businessmen has steadily but very surely monopolised the fruits of independence to the exclusion of the people. We do not want a Kenya of ten millionaires and ten million beggars.”

What possibly infuriated the self-seeking elite was the fact that JM preached the doctrine of the welfare state while he himself was very wealthy. They thought of him either as a hypocrite or a selfish person who wished to prevent others from being as wealthy as he was. Those who were wealthy felt guilty watching him give generously to charitable causes and settle the landless in his vast estates and hearing him demand for the introduction of restrictions on land acquisition. Their guilt turned to annoyance when he said:

“I believe firmly that substituting Kamau for Smith, Odongo for Jones, and Kiplagat for Keith does not solve what the gallant fighters of our Uhuru [freedom] considered an imposed and undesirable social injustice”.

In the eyes of the public, JM was a messiah. He was seen as the “Kenyatta” who would liberate the people from the dictatorship of the Kenyatta who liberated them from British colonisation. He was a man with a mission, a mission supported by not only the entire citizenry but also majority of the Members of Parliament and several Cabinet Ministers. His unmentionable bid for the Presidency was silently endorsed throughout the nation.

The Kenyatta government reacted by banning nearly all his political and non-political meetings on grounds of security. Even his 42nd birthday party, to which he had invited many dignitaries, was banned. In the January of 1974 after a meeting in his constituency to which he had invited Members of Parliament and Cabinet Ministers was cancelled, he reacted to the government actions from the floor of Parliament stating: “This anti-JM campaign is now bordering on stupidity and constituting an encroachment on the constitutional and human rights of the people whose interest I have sworn to represent.”

Nothing changed, even when the general elections of 1974 were called. All but one of JM's campaign rallies were cancelled for "security reasons". He could only inform his constituents of his candidature through posters. Otherwise he could not conduct any election campaign and his opponents enjoyed an unfair advantage over him. That notwithstanding, he was re-elected by a total of 16,000 votes. His two rivals polled 5,000 together. The resounding victory sent a message to the Kenyatta government: JM was a man of the people.

Despite the obvious danger he was in, JM was confident that Kenyatta could not order his killing. He told one of his three wives: "Kenyatta cannot kill me." And in fact, about a month before his death, Kenyatta hosted him at his Gatundu home and the two discussed their political differences. They reached an agreement whereby JM agreed to get off Kenyatta's case slightly. Kenyatta was more worried about the embarrassment JM was causing him. It was this meeting that made his death definite. The Kikuyu clique was not ready to contend with a Kenyatta- friendly JM vying for succession. JM began to sense the danger he was in when he was dropped from the government. He knew his life was in danger, and told parliament as much. That did not stop the Kikuyu bourgeoisie. Soon thereafter, someone shot at JM's car. He went to make a report to the police station where they told him, in jest, that he was not the only one; that in fact, their own police car had also been shot at earlier in the day. The reaction of the police seemed to suggest that they knew something was afoot. For some strange reason, this did not seem to scare JM. Neither did he seem to be scared by the spate of bomb explosions that occurred in Nairobi and Mombasa in February of 1975. One of the explosions occurred on March 1<sup>st</sup> 1975 at a bus terminus and 27 people were killed. JM visited the scene and consoled those who had been injured.

While he was doing this, a man who purported to be his close friend was working with the police to try and implicate him in the bombings. The man went by the nickname "Mark Twist" and was described by the Parliamentary Select Committee as "a criminal of the worst possible character". Three days before the bombing he had been sentenced to three-years imprisonment for

fraud. Yet on March 2<sup>nd</sup> 1975, he sat in the office of the Director of the Criminal Investigation Department, Mr. Ignatius Nderi, talking to JM over the phone.

The call was an attempt to implicate JM in the bombing. When it failed, the convict was freed to enable him to follow JM and gather information. The police say that he was granted bail pending appeal. But March 2<sup>nd</sup> was a Sunday and no courts were sitting. And it is on March 2<sup>nd</sup> that JM was killed. One man who featured prominently in the investigation into JM's death was his close friend Ben Gethi, the commandant of the paramilitary wing of the Kenya Police known as the General Service Unit. Gethi was seen sharing a drink with JM at the International Casino at 1.30am on March 2<sup>nd</sup>. He later went to see JM at his house at 10am, was seen with him in the afternoon at the Ngong racecourse and in the evening at the Hilton Hotel. JM was last seen alive leaving the Hilton Hotel at 7pm in the company of Gethi, that of a Chief Inspector of Police, the Late Patrick Shaw (a man notorious for the number of criminals he had shot dead and suspected of being a state hit-man) and other police officers. The entourage left the hotel in several vehicles belonging to the Criminal Investigations Department. JM was murdered an hour or two later.

Although JM's body was discovered on March 3<sup>rd</sup> and a report made to the police, the matter was officially unknown until March 12<sup>th</sup>. JM's body lay in the city mortuary as an "unidentified body" for 10 days. Fingerprints taken for identification were returned marked "untraced" by police headquarters. But when taken to the Ministry of Labour, they were identified in ten minutes. The family of the deceased and members of Parliament were called to identify the body. Thus the police failed in their plan to bury the body as unclaimed and unidentified.

Six days before the body was identified, on March 6<sup>th</sup> 1975, JM's family reported that he was missing and questions were asked in Parliament. The government promised to give an answer the next day. In the meantime, it compelled all the

news media not to publish the fact that JM's whereabouts were in doubt. The news item was never published.

The next day, a government Minister told the house that investigations on JM's disappearance had been instituted. That very morning, the CID picked up a man and asked him to make a statement on his involvement in JM's murder. In his statement, the arrested person wrote that he had seen Nderi, the CID director, accompanied by Patrick Shaw at the Hilton on the material night.

Realizing the plot was unwinding, the police initiated a cover-up. The arrested person was asked to re-write his statement and when he refused he was tortured and detained at the Kamiti Maximum Prison. The Vice-President and Minister for Home Affairs, Hon. Daniel arap Moi, also represented to the house that JM was alive, a statement which was buttressed by a report carried in the Daily Nation to the effect that JM was in Zambia and booked in at the Hotel Intercontinental in Lusaka. The report, written by the Chief Editor, Mr. George Githii, went as far as to state that the Hotel had confirmed the information. Both Moi and Githii appear to have acted in ignorance and could have been procured to make the respective statements.

JM's death was reported by the media on the morning of March 12<sup>th</sup>. A press statement by JM's lawyer, Lee Muthoga, was also published, calling the death political and demanding a public enquiry. Parliament met that day and adjourned after five minutes. The University students boycotted lectures and Muthoga was threatened with death.

It was on March 12<sup>th</sup> that university students carried the coffin of Mr. George Githii and later burnt it with copies of the Daily Nation. It was also on that day that they slaughtered a red cockerel, the symbol of the ruling party of KANU, outside the office of the President, demonstrating their intention to end President Kenyatta's rule. That was when the riot police struck. The peaceful demonstration became a riot. Running battles were fought daily on the streets of the city between university students and their sympathisers on

one side, and riot police and the General Service Unit on the other. Yet again, the country seemed on the brink of chaos.

It was the resolution of the National Assembly on March 14<sup>th</sup> 1975 to appoint a select committee to investigate JM's disappearance and murder which tempered the volatile climate in the country. Vainly, the people of Kenya hoped that the action by Parliament would expose the involvement of the Kenyatta government in the murder. They had good reason to hope for this. The heat that was being generated from the house threatened to sear everyone connected to JM's murder, however remotely. The Vice-President, Moi, was one of the people who found himself on the receiving end for his misrepresentations and he had a terrible experience against the irate Honourable members as he apologised: "I am sorry ... I am sorry ... I could not have hidden the truth from you if I knew it."

But the indignation of the National Assembly came to nought. The government frustrated all the efforts of the Select Committee to uncover the truth of the murder. In its report, the Committee remarked:

"The Committee started its work, as expected, with a good deal of enthusiasm supported overwhelmingly by public opinion. This enthusiasm, however, was soon dampened by a growing and sobering realisation that the murder of JM was no ordinary murder. The Kenya Police Force under its Commissioner, Mr. Bernard Hinga, instead of regarding the Committee's work as complementary to its own and the Committee as its ally in the task of leaving 'no stone unturned' to uncover the whole truth about the murder of JM, chose instead, from the very outset, the path of non-cooperation and a determined cover-up-exercise. Lack of co-operation manifested itself in ways from hostility and rudeness ... to taking refuge in the Official Secrets Act..."

All the government officers who were in a position to assist the Committee frustrated the investigation. The Minister of State in the Office of the President, the late Hon. Mbiyu Koinange, refused to attend a meeting to which

the Committee invited him. Neither did he apologise for non-attendance. His juniors in the Police Force and Provincial Administration either lied to the Committee or refused to co-operate. One such instance concerned the investigation already carried out by the police. The CID director refused to reveal any information to the Committee despite the fact that he was under a legal obligation to do so. His superior, Mr. Bernard Hinga, supported him. After some lobbying, however, Hinga allowed a sub-committee of the Committee to inspect the exhibits and statements of the police investigation. Nderi complied with the arrangement and allowed the sub-committee to look at the investigation files, but not to read them. He claimed that Hinga had only authorised that the sub-committee be shown the files to look at but not to read. Hinga confirmed that Nderi's view was the correct one.

In respect of anyone suspected of having witnessed anything material, "the technique of the CID team ... was to harass, threaten, intimidate and even torture them. Witnesses called by the Committee to testify to events at Hilton Hotel on the evening of March 2<sup>nd</sup>, 1975 were found to have passed through the hands of the Police ..."

During the three months in which the Select Committee was in operation, it held 46 meetings and interviewed 123 witnesses; yet it uncovered nothing substantive. Its conclusions and recommendations only called for further investigations and the dismissal of some police officers. The Police Commissioner, the CID director, two senior and three junior police officers were recommended for dismissal. To be investigated were Mr. Ben Gethi, Mr. Patrick Shaw, Hon. Mbiyu Koinange and his bodyguard, a Mayor, a councillor, a District Commissioner, a Senior Superintendent of Police, the Deputy Director of the National Youth Service and four civilians.

The government ignored the report of the Committee despite the fact that it was adopted by Parliament, with a Cabinet Minister voting against the government. Not one single person was ever charged with the murder of JM. Not even Ben Gethi who the Committee found to have taken an active part in

the murder, nor three civilians who a police officer told the Committee were probable co-murderers. To add insult to injury on the people of Kenya, Ben Gethi was promoted to the post of Police Commissioner by President Daniel arap Moi. 18 years later, more still are the questions unanswered. Did Kenyatta approve the murder of JM? How involved was his best friend Mbiyu Koinange? What was JM's wrist watch doing in a police station after the murder? Why were the police lying? Why didn't Kenyatta attend JM's funeral? Why did White police or military officers raid JM's home just before the murder? Were they British troops as alleged? Is it true that Kenyatta took refuge in a United States Warship in Mombasa? Did Hon. Daniel arap Moi know something he never revealed?

As at 1975, Kenya was in its 12th year of independence. Nothing much seemed to have changed. The disrespect of law and institutions, the abuse of government powers and the suppression of the people by any means that plagued Kenya in the colonial era still persisted. In death, the words of JM made more sense to the country and particularly to the LSK, now under African control:

“I believe firmly that substituting Kamau for Smith, Odongo for Jones and Kiplagat for Keith does not solve what the gallant fighters of our Uhuru considered an imposed and undesirable social injustice.”

## Chapter 6

While the investigation on the murder of JM was going on, the victorious Black Bar was busy “substituting Kamau for Smith, Odongo for Jones and Kiplagat for Keith”. But it wasn’t working out very smoothly as Njonjo was delaying the amendment to the Law Society of Kenya Act. The Black Bar had hoped it would elect its own Chairman immediately but this was not possible until 1977. It took Njonjo two years to effect the amendment. Within that time, the Africans had to contend with two additional English Chairmen.

The person affected most was Richard Otieno Kwach. Having successfully coordinated the passing of the resolution to amend Section 13 of the Law Society of Kenya Act, he was top seeded for the Chairman’s post. In the meantime, however, he joined the white law firm of Hamilton, Harrison & Mathews. The Pan-Africanists wrote him off and when the elections of 1977 came, they convinced the Asian lawyer who assisted him to co-ordinate the passing of the resolution, K.C. Gautama, to stand against him. And for having something to do with white lawyers, Kwach lost his only chance of becoming Chairman of the law Society.

Gautama served as Chairman of LSK for two years, a period during which the Pan-Africanists collided repeatedly with Njonjo. The Black lawyers, who now monopolised the positions in the Council and Committees of the Society, used the LSK podium to criticise the misdeeds of Njonjo and the Kenyatta government. They were led in these endeavours by Lee Muthoga and his close friend Amos Wako. Unlike previously, they could now meet Njonjo face to face and tell him what they thought of his actions.

Their first collision with Njonjo occurred the very same year they assumed office. The East African Court of Appeal, which exercised appellate jurisdiction

over the High Courts of Kenya, Uganda and Tanzania, had been disbanded and Njonjo had published a Bill for the establishment of the Court of Appeal for Kenya. But rather than establish it as a distinct court, Njonjo wanted the Court of Appeal constituted from the High Court judges whenever necessary. That way, the Appeal Court would be a branch of the High Court and the Chief Justice, who would appoint the judges to appellate duty, could determine which judges would decide on particular cases.

The Black Bar, familiar with the worst of Njonjo, knew what his intentions were. Vowing not to allow him to manipulate the appellate system in the country, the LSK paid him a courtesy call and expressed their reservations about the independence of the intended Court of Appeal. Njonjo, pampered by years of conformity from the White Bar, did not see how this matter concerned the LSK. “Take, for example, you,” Njonjo said, pointing at Muthoga. “Why are you concerned? What business do you have with the Constitution of the court?”

“Sir, should His Excellency the President ever deem it fit that I should be a judge, I hope to join a dignified bench and to take my seat thereat with dignity,” Muthoga replied.

“Oh no, don’t even dream about it,” Njonjo replied, laughing sneeringly.

“Muthoga, so long as I will have something to do with it you shall never sit on the bench in this country.”

“Very well, sir. I have to listen to you. You are the Attorney-General. The day I will become Attorney-General, it will be your turn to do the listening.” Muthoga was having difficulties hiding his anger.

Throughout the meeting, Muthoga and Njonjo exchanged the most unpleasant remarks they could in the most unpleasant manner. By the time the meeting

was over, some members of the Council were already miles away from the presence of Charles Njonjo lest he order their immediate arrest and detention.

It may have been cowardly of the few members of the Council who nearly broke their limbs trying to get through Njonjo's door in flight, but it was not paranoid. Njonjo was eminently capable of having them arrested. In the August of 1978, President Kenyatta died at the age of 86. The Council of the LSK decided to publish a statement calling for the democratic election of the country's new President. That did not fit within the plans Njonjo had for Daniel arap Moi, whom he hoped to install as President and later to edge him out. Yes, Njonjo wanted to become President, but the only way to achieve that was to thwart democracy. When he was told that the LSK wished to have the new President democratically elected, he sent stern warnings to the members of the Council and had them followed by the police.

The Council called a meeting in the offices of lawyer Paul Muite to draft a public statement. Njonjo heard of it and on that day, when all the members of the Council had assembled, he sent policemen to arrest them.

A source called Muite's office minutes before the police arrived and told the lawyers to run. They did, and were lucky to get into an elevator seconds before the police walked out from another. The lawyers went to the basement of the building and completed their statement in hiding. Njonjo in return called all the mass media houses and swore to proscribe any which so much as implied that such a statement existed. No-one dared.

That only made the Black Bar fierier. When Amos Wako succeeded Gautama as Chairman 1979, relations between Njonjo and the African lawyers were at the lowest ebb. Njonjo had then decreed that he would no longer meet the Council of the LSK but would allow their representations to be forwarded by its Chairman. That placed Wako in a very vulnerable position. He continuously found himself personally answerable to Njonjo. Njonjo would send messages

to him and his Vice-Chairman Muthoga saying: “Tell those two boys I’m going to detain them if they don’t shut up.”

At other times, Njonjo would summon all the partners of the white law firm of Kaplan & Stratton where Wako had been granted a partnership. He would challenge Wako in front of them, threatening to detain him, and advising the partners to vote him out of the firm. The pressure was too much for Wako and he began to temper his statements and to be co-operative with Njonjo. His reputation was saved by the April 1980 resignation of Njonjo from the post of Attorney-General.

The reprieve was short-lived as Njonjo re-emerged, this time even more powerful. He went into politics, was elected into Parliament and appointed Minister of Constitutional Affairs. The Ministry was specially created for him, so that he could retain his control over all the legal sectors in the country. But it was Muthoga who had to contend with the worst of it when he assumed office as Chairman of LSK in 1981.

Under Muthoga, whose pet hobby was human rights in Kenya, the LSK and the government seemed to be on a permanent collision course. The government was strengthened in its belief that lawyers were an unnecessary irritant and enjoyed a stature in the political life of the country that they didn’t deserve. The White Bar was particularly worried as its concern centred around its profit and loss account. The more the government fought the LSK, the more white lawyers suffered as part of the whole. This was not their agenda when they chose to remain in Kenya rather than go to England as many had done.

The solution lay in either placing the members of the White Bar back in control of the profession or placing the profession back under government dependence. The latter, if not both, could be achieved by removing the statutory authority of the LSK and leaving it to the members of the profession to register a voluntary Bar Association. That would make the Black Bar just another of the law societies in the country and, if necessary, would give the

Registrar of Societies power to deregister it. It was the perfect solution for the White Bar, Njonjo and the Moi government against the only concerted voice of dissent in the country.

The leading White lawyers in Kenya thereby constituted themselves into a committee to draft the appropriate legislation. Under the new law, the Law Society of Kenya Act would be repealed and the LSK would cease to be a mandatory Bar Association for all Advocates of the High Court of Kenya. Lawyers would be free to register Bar Associations under the Societies Act to assume the responsibilities of the depromulgated LSK. Under the Societies Act, the Registrar of Societies, whose superiors are the Attorney-General and the Minister of Constitutional Affairs, would have wide-ranging powers to interfere with the conduct of the new Bar Associations, to allow or deny registration of its officials and Constitution, to demand the holding of elections, to disallow the amendment of the Constitution or registration of new officials, to investigate the affairs of the Society and in his discretion to deregister it.

The Council of the LSK was informed by a sympathiser within the White Bar of the intended legislation. It was also informed of the government's sympathies towards the project. There was no telling what would happen when the bill was finally tabled in Parliament. The chances that Parliament could throw out a Bill by a government that was becoming increasingly dictatorial were not good. Furthermore, in those days, no-one was particularly fond of lawyers. Although the Black Bar had reversed the former trends where lawyers did not address themselves to the problems of the general populace, their endeavours were yet to be appreciated. Most of the conflicts between the Black Bar and the government occurred away from the public media and the people of Kenya were largely ignorant of the attempts being made by the Black Bar to curb maladministration. It was unlikely that anyone would stand up in support of the LSK.

Knowing that one of President Moi's strategies of destroying enemies is to make them his friends, Muthoga decided to give him a chance to befriend the Black Bar. He approached a woman who was known to enjoy cordial relations with His Excellency and asked her to procure an appointment for the Council of the LSK. The meeting had to be arranged and held outside official channels lest Njonjo hear of and sabotage it. And as Njonjo's tentacles spread all over the country, Muthoga hid the fact of the meeting from all including his fellow members of the Council.

President Moi agreed to grant the LSK Council an audience and invited them for a breakfast meeting at the State House. Muthoga still maintained silence about the meeting and the day before the visit the members of the Council of the LSK were still unaware that they had a date with the President. It was later that day when Muthoga invited them for an urgent meeting where he informed them that they would be having breakfast with the President the next morning.

Over breakfast, they educated Moi on the role and significance of the Bar in the country. They told him that the reason they criticised the government was because some of its officers never followed the law. They assured him that lawyers, despite their criticisms, were loyal to him and would be the first to rise in his defence.

In the middle of the meeting, Njonjo came, huffing and puffing, to the State House. He had just heard of the meeting from an inside source. He requested that he be allowed into the meeting as the Minister for Constitutional affairs, but Muthoga had specifically requested for a closed door meeting, and it was not lost to Moi that there was no love lost between the Black Bar and Njonjo. As Moi intended to make the Black Bar his bosom friends, he declined to allow Njonjo into the meeting.

Muthoga played along with Moi's political game. He extended an invitation to the President to attend the 1982 LSK annual dinner as the Guest of Honour.

The dinner, which was scheduled for February, was doomed to failure. No-one wanted to be associated with a government-unfriendly LSK. Only 140 lawyers had confirmed attendance. There were all indications that no judges or the Attorney-General would attend. If Moi attended, the dinner would not only be successful since all would have to attend, but also Muthoga and his Council would acquire enough clout to meet their challenges.

When State House confirmed that the President and a number of select Ministers would attend the dinner, the number of lawyers attending immediately increased to 450. All the judges invited attended, and so did the Attorney-General. The dinner bookings were in such high demand that the venue had to be re-located to a larger hotel and then declared “house-full”. The only conspicuous absence was that of Charles Njonjo. He had sent a message to Muthoga instructing him not to bother sending him an invitation, for he wouldn’t attend. Muthoga replied and told Njonjo that he had had no intention of inviting him in the first place.

During the dinner, the Council of the LSK appointed President Moi as an Honorary Member of the Law Society of Kenya, an honour the President accepted. With that, the Black Bar knew it had won. No-one could now dare suggest that the LSK be depromulgated. But much as that was a source of comfort, it was no assurance of security. The White Bar was mercenary without limit and for as long as Njonjo was powerful, they would strike again. The attempted overthrow of Moi’s government on August 1st 1982 therefore came as a blessing to the Black Bar.

The *coup d’etat* lasted no more than 12 hours, having been staged by a selection of Kenya Air Force personnel. The combined force of the Kenya Army and the General Service easily overcame the mutineering soldiers and in 24-hours normalcy was being restored and investigations begun.

According to the investigations, the *coup d’etat* resulted from a disagreement over leadership between the Kenya Army, the General Service Unit and the

Kenya Air Force. All these armed forces had planned to stage a coup on August 5th 1982 with the help of South African military personnel and Israeli agents. Njonjo, through his friend Ben Gethi, had the support of the GSU. He was also the beneficiary of the South African and the Israeli support. The Kenya Army and the Kenya Air Force had their own choice of President. The Kenya Air Force thus betrayed the rest and struck first.

It was revealed that when the GSU, which was built from scratch by Gethi, was called into action on August 1st, it did not know whether to fight the Kenya Army or the Kenya Air Force as the two were now on opposite sides. It was further revealed that Gethi suppressed Njonjo's role in the coup by tearing up all confessionary statements that mentioned Njonjo.

Barely one year before, Njonjo's cousin, Andrew Mungai Muthemba, had been charged with treason. It had been proved that he had attempted to purchase firearms and ammunition and recruit men from the Kenya Air Force so as to overthrow Moi. Although the Judge held that the evidence was not weighty enough to support a conviction, and that the allegation that Njonjo supported his cousin in the venture was malicious, Njonjo had been labelled an extremely suspicious character. His downfall was now imminent.

It was President Moi who sounded Njonjo's death knell in the May of 1983 when he told the country that someone was being groomed by foreign powers to take over from him. What the President was actually doing was blowing the horn calling for the start of the game through which he intended to wipe Njonjo's face off Kenya's political landscape forever. With his statement, the President threw the country into confusion. Barely one year before there had been an attempted coup against his government. It was rather unthinkable that anyone could thereafter challenge the President's position after the whole country had displayed, through demonstrations in the streets and delegations to the State House, unwavering loyalty to him. And the last person who the country would have identified as the culprit was Charles Mugane Njonjo. Everyone knew that he and President Moi were inseparable bosom friends. A

photograph of Moi was not complete without Njonjo by side. For that reason; the downfall of Njonjo was most reminiscent of that of Thomas Beckett at the hands of King Henry II over 900 years ago. Immediately after the President made his allegation, various politicians came out in condemnation of the unnamed person, challenging him to come out into the open. By the end of the uproar, the unnamed person had been branded “traitor”. The game was then inched forward by a KANU Parliamentary Secretary and one of the President’s, men Mr. Francis Mutwol, who stated that the “traitor” was a Cabinet Minister with lots of property abroad and locally. Spontaneously, all Cabinet Ministers condemned the traitor in their midst. Only one Cabinet Minister did not join them - Charles Njonjo. He was out of the country.

The identification of the “traitor” was narrowed down to a Cabinet Minister who wore three piece suits. Now, only Njonjo invariably wore three piece suits. So there was now no doubt who was being referred to. All doubts were settled when it was further stated that the name of the traitor featured prominently in Kenya’s first treason case against Andrew Muthemba. It was at this most inopportune moment that Njonjo came back to the country. His timing could not have been worse.

Njonjo immediately denied that the reference was to him and reiterated his loyalty to the President. He didn’t seem to be taking the matter seriously, obviously under-estimating President Moi’s ability to pull the rug out from under his feet. He had never had a very high opinion of Moi’s intelligence. He is quoted as having once said in reference to Moi: “You see, the problem with your friend is that he doesn’t know what he is doing.”

Njonjo dismissed the onslaught on him and proceeded to attend a prayer meeting in his constituency where the preacher quoted from the Bible saying that if the leading sheep limped, the flock would never get to the pasture. References were also made to Daniel and the lion’s den. The reference was of course to Moi. It seems that Njonjo, sensing he was running out of time, decided to hasten his game. All around the country, politicians called for the

detention of the “traitor”, his ostracisation and appealed that he be stripped of his citizenship. But so far Moi had played his cards close to his chest. After the prayer meeting of June 12th 1983, the President realised that Njonjo was moving in for the kill. He played his ace. On June 15th 1983, while in Parliament, a Cabinet Minister, Hon. Elijah Mwangale, the Chairman of the Select Committee on JM’s murder, publicly identified Njonjo as the traitor.

Njonjo collapsed into fits of apoplexy. He angrily challenged Hon. Mwangale to repeat his statement outside the House. Instead, the whole house shouted Njonjo down, calling him a traitor. It was a moment every Pan-Africanist, especially Lee Muthoga and his friends at the Black Bar, would have given their right hands to witness. Possibly no group of countrymen had ever had so much sadistic indulgence since the French guillotined King Louis XVI.

After jeering Njonjo to their hearts’ content, the MPs proposed a motion to discuss the traitor issue. But the Speaker of the House, Hon. Moses Keino, was a Njonjo faithful. He ruled against the motion. In doing so he ran against the force of the entire House and he was forced to resign his position as Speaker.

The Parliamentary session of June 15th ended with Njonjo flat on his face. For the first time in his life the man was rattled. And just about everyone in the country was having a ball at his expense. All and sundry unleashed condemnations, as scathing as they desired, of the fallen angel. When he next went to Parliament on June 29th, the Members of Parliament descended on him, forcing him to falsely confess that he was the limping sheep referred to in the prayer meeting. The members were overjoyed to see that they had managed to strip the almighty Njonjo of his decency. As for the reference to Daniel and the lions’ den, Njonjo swore that it had been twisted by the media.

Definite that he had neutralised Njonjo’s powers, President Moi suspended his Ministerial appointment that very day, June 29th. Then he immediately made arrangements for a long, painful and traumatic political annihilation of his former friend. It was in the form of a Judicial Commission to inquire into the

conduct of Charles Njonjo. The “Prosecuting” Counsel was the High Priest of the Black Bar, Lee Muthoga.

For all that may be said against the Judicial Commission on Njonjo, for all the political motives for which Moi established it, for all the political machinations with which he constituted its membership, it was the most important political development in Kenya’s history. It showed Kenyans what happens in the corridors of power. It revealed the high level of political decadence in the society. Most importantly, it warned Kenyans never to trust their politicians, a warning Kenyans ignored to their near peril.

Either everyone had something against Njonjo, and that is very likely, or Moi deliberately constituted the Judicial Commission in such a way that Njonjo was never going to walk away a free man. Muthoga was an ideal leading counsel, being just about the only person who openly didn’t fear Njonjo and in fact hated him. Not that he was liable to cut down every law in Kenya to get at the devil. When informed of the intention of the government to appoint him, he expressed doubt about the propriety of his appointment. The government said it could release him of the onus if he could advise on another, more appropriate, counsel. He couldn’t think of one, or he needed slight insistence. Nevertheless, he pursued the object of his mandate to the very end, despite continued death threats which made it necessary that he be placed under police protection.

Three judges were appointed as Commissioners to preside over the inquiry. They were Justice Cecil Miller, Justice Chunilal Madan and Justice Effie Owuor. Justice Miller and Justice Madan may have had a bone to pick with Njonjo. Miller had been working in Kenya as a contract judge in the 1970s. But so lazy was he that his contract was bound not to be renewed. His fate was decided by Njonjo who accepted him as a protege, granted him Kenyan citizenship and secured for him a constitutional tenure as a Judge of the High Court. But Miller’s appetite was insatiable and he wanted to be Chief Justice after Sir James Wicks in 1982. To Njonjo, that went against the grain for Miller was from the West Indies and Black. With the Commission of Inquiry,

Miller had a chance to enjoy direct access to the President and thus ask for the favour. The price of course was Njonjo. Further, Miller would have wanted to make a racist attack on Njonjo who had discriminated against him on similar racial considerations.

It is easy to impute any ill on Miller for he was capable of any number of them. With Madan, it is a less straightforward case. Justice Madan was to the Kenyan Bench what Lord Denning was to the English one. He was due for promotion to the post of Chief Justice in the early 1970s but Njonjo's attitude was a hurdle he couldn't overcome. When Sir John Ainley resigned in 1968, Njonjo preferred Kitili Mwendwa, an African, who was the son of a Colonial Chief. Kitili Mwendwa resigned in 1971 and Njonjo picked Sir James Wicks for the post and later, in 1982, Sir Alfred Simpson. If Njonjo didn't go, Madan was never going to see the seat of Chief Justice. The problem Njonjo had with Madan was that Madan was a freedom fighter.

He had joined the struggle for independence as an Asian representative in the Legislative Council. He was a very outspoken activist for Asian political rights and supported his fellow politicians in the Pan-Africanist movement. It is also likely that Njonjo was envious of Madan, who was called to the Bar at Middle Temple Inn in 1933, at the record age of 21 years. He was the youngest Barrister ever at the Temple. He immediately set up his own practise and was a civic representative at 23 years. The colonial government appointed him to the High Court in 1961, when Njonjo held no position of repute, and was later honoured by Queen Elizabeth II as a Queen's Counsel. For this latter honour particularly, Njonjo could never have forgiven Madan. Njonjo is said to have hoped for a knighthood that never came. All in all, there was no love lost between Madan and Njonjo, and Moi knew that.

The proceedings of the Commission began smoothly but slowly generated heat. The friction was between Njonjo's counsel, Mr. Deverell from Kaplan & Stratton, and Lee Muthoga. Deverell regarded the Commission as a kangaroo court in which his client was presumed guilty and not expected to prove

otherwise. He held all the officers, from the commissioners to the counsels, in contempt. And his language expressed his attitude loud and clear. The commissioners, on various occasions, paid him back in kind.

“We,” the commissioners once commented on Mr. Deverell’s remarks, “leave this legally tragic episode there because we do not wish to soil our own language, save to add that it was nauseating and we are appalled to hear such language of the gutters being used by an Advocate of the High Court of Kenya. This is the rudest remark we have heard an Advocate address members of a Judicial Tribunal in our long judicial careers.”

“Obviously Mr. Deverell does not think much of us. This does not trouble us. In our very long judicial experience, we have come across many impetuous upstarts like him. They come, they go, and as it behoves, they fade away. Mr. Deverell is a confused person because he is a pompous person.” It got worse when Muthoga asked to have Njonjo placed in the witness box. Deverell put up a spirited battle against the application, arguing that Njonjo should first be furnished with particulars of the case against him. But Njonjo was not being charged, as the Commission said, he was being investigated. Deverell refused to accept the distinction. When finally, Njonjo was placed on the dock, Deverell shielded him from Muthoga’s onslaught using most unorthodox tactics, sometimes even answering Muthoga’s questions to Njonjo. The Commissioners constantly reminded Deverell that Njonjo was not his last born baby. Deverell’s resistance did not hinder Muthoga’s pursuit of Njonjo who eventually pleaded: “Muthoga, please don’t remind me of the old days.”

Njonjo refused to counter any of the evidence adduced against him. He did not explain why he had amassed an armoury of firearms which were stored in the Nairobi house of Yani Haryanto, a tycoon friend of his from the orient. Neither could the Chief Licensing Officer, Mr. Alan Walker, explain how Njonjo procured him to personally licence his firearms at the airport, or why the firearms were of a military character, and why he closed his eyes to their importation by Njonjo. The importation of military firearms, and the invitation

by Njonjo of high-ranking officers of the South African Armed Forces into Kenya, made a likely case against Njonjo that he intended to undermine the security of the state. In the very least, it was a slap on Kenya's face for it was strict government policy that no citizens of the apartheid regime of South Africa may enter Kenya.

Neither did Njonjo meet the allegations that he had constituted a political camp within Parliament with the intention of passing a vote of no confidence against Moi. Numerous politicians told the Commission that they had received financial assistance from Njonjo in exchange for a pledge of loyalty to him. One Member of Parliament testified how Njonjo tried to stuff money into his pocket during a session in the House. In its report, the Commission wrote: "The evidence relating to these allegations boggles the mind."

Other evidence showed that Njonjo was party to a conspiracy to overthrow the government of the Republic of Seychelles in November 1981, which was embarrassing to Kenya for President Moi was at that time the Chairman of the Organisation of African Unity. So too was he party to a conspiracy to overthrow the government of the Republic of Kenya in August 1982 using South African and Israeli mercenaries. The coup was planned to take place on the 5th day of the month and was stunted by the Air Force four days before.

And the list grew longer, especially under the heading "Misuse of the office of Attorney-General". Njonjo was in possession of five diplomatic passports, all of which were concurrently valid. Three of them had the same serial number while one of them was the only one of its kind in the country, being bound in hard cover. This latter passport was not on official record at the immigration department. And when he travelled by Kenya Airways, Njonjo carried 270kg of excess baggage. An airport official who attempted to invoice him for it lost his job.

As Attorney-General also, Njonjo authorized the release of dangerous criminals from prison whether or not they were entitled to parole. One of

these prisoners had been sentenced to death for murder, a sentence which was later reversed on appeal to 10-years imprisonment for manslaughter; while another of the prisoners had been sentenced to 19-years imprisonment without parole for robbery with violence. The latter release was made despite the protestation of the Commissioner of Prisons who wrote to Njonjo saying: “The Government takes a very serious view of the offence of armed robbery ... I do not think anybody should have any sympathy with this type of person in our society ... It is ridiculous to suggest that they should be given remission as if they had committed a petty offence.” Njonjo also had two MPs convicted and sentenced to five-years imprisonment each for theft in order to show them that he was in power. He had them released two years later. The release was effected at Njonjo’s house, which the Commissioner of Prisons referred to as “very abnormal”. At the time of the release, Njonjo had already retired from the office of Attorney-General and held no government office and had no authority whatsoever.

To crown all his misdeeds, Njonjo turned out to be a perjurer. He vehemently denied, before the Commission, that he had paid money to the former Member of Parliament for Kikuyu Constituency so that he could resign and enable Njonjo’s candidature.

**Muthoga:** In consideration of resigning his seat was he to be paid anything?

**Njonjo:** No.

**Muthoga:** He was not to be paid anything?

**Njonjo:** He was not, my Lords.

**Muthoga:** Was he paid?

**Njonjo:** He was not paid, My Lords.

**Muthoga:** Was he paid any money for any purpose?

**Njonjo:** My Lords, Mr. Amos Ng'ang'a was paid no money at all. No money.

**Muthoga:** For any consideration.

**Njonjo:** For any.

**Muthoga:** Not a shilling?

**Njonjo:** Not a penny.

**Muthoga:** You did not pay him a shilling at all in relation to his Parliamentary Seat?

**Njonjo:** My Lords, I paid Amos Ng'ang'a not a shilling as is being suggested by the  
leading counsel. No money at all.

**Muthoga:** Did anyone pay him any money?

**Njonjo:** I am not aware of anybody paying Mr. Amos Ng'ang'a any money to relinquish  
his parliamentary seat.

**Muthoga:** Did anybody pay him any money for any other purpose or consideration?

**Deverell:** My Lords, when my learned friend says "any other money for any other purpose" would he not be a little more precise because that would mean somebody paying him Sh 5 for sale of ice-cream or something like that.

**Muthoga:** Please Mr. Deverell. Please Mr. Deverell.

**Justice Owuor:** I think Mr. Muthoga added the words “in consideration” at the end.

**Muthoga:** For any other consideration?

**Deverell:** But “for any other consideration” would include buying ice-cream or selling ice-cream.

**Justice Miller:** You keep making your jokes. You Mr. Deverell, keep on making your jokes. In the long run you may find it is not going to accrue to your credibility and your status before this inquiry. You keep on making your jokes. You take out your cold ice-cream and push it into your mouth. Proceed please.

**Muthoga:** And did he request for any money?

**Njonjo:** Mr. Amos Ng’ang’a never requested any money from me.

**Muthoga:** And was he reimbursed?

**Njonjo:** No discussion took place on what the leading counsel calls reimbursement.

**Muthoga:** Of expenses?

**Njonjo:** Of expenses.

**Muthoga:** Mr. Njonjo, I put it to you that you did pay Sh160, 000

**Njonjo:** Mr. Ng’ang’a?

**Muthoga:** Yes. Did you?

**Njonjo:** My Lords, I do not recall paying Mr. Ng'ang'a Sh160,000 or any money at all to do with relinquishing his seat.

**Justice Miller:** Did you pay him that sum of money for any other purpose?

**Njonjo:** I do not remember My Lords.

The next day, Njonjo admitted to the Commission that he did pay Mr. Amos Ng'ang'a Sh160,000 but he could not recall for what purpose.

In desperation, Njonjo finally asked to make a personal statement, in which he apologised that the proceedings had become necessary but paid tribute to them as a reflection of the christian wisdom and fairness of President Moi. He also added, for good measure, that he was now humbled. As the Commissioners later observed, he was appealing for clemency from Moi.

When the report of the Commissioners was complete and furnished on Moi, the President pardoned his former friend. But he did not return his impounded passport and Njonjo was marooned inside Kenya for some years. The clemency was a kind gesture but it had no effect on Njonjo's political life. The clemency was merely a wreath. Njonjo has never been heard of since on the political scene. He was expelled from KANU, then the sole political party, along with all the politicians who were in any way associated with him. Such was their number that the period of the purge became known as "the year of the big broom".

The relief of the Black Bar was embodied in the words of Muthoga after the close of the Inquiry. Said he: "I do not regret what I have done, and if Njonjo re-rose, I would do it all over again." At long last, the High Priest of the White Bar was vanquished. When Njonjo applied for a practising licence from the Law Society of Kenya, the Council voted against the issuance. The lawyers felt that whatever the colour of the three-piece suit, it is still the same

old crook. They did not ever again want to have anything to do with Charles Mugane Njonjo.

Another dramatic display of the power of the Black Bar occurred in 1986 at the Law Firm of Hamilton, Harrison & Mathews. The firm is the oldest in the country, having been formed in 1927 by an amalgamation of two law firms, Allen & Hamilton and Harrison & Mathews, both of which were established in 1902. It enlarged further in 1977 when it merged with another law firm, Bryson Inamdar & Bowyer. Although this latter merger collapsed in 1985, Hamilton, Harrison & Mathews remained as the most imposing feature on Kenya's legal landscape and a sore in the hearts of many African lawyers. The firm was so awesome that among the circles of the Black Bar, its abbreviation H,H&M translated into High, High & Mighty .

But Hamilton, Harrison & Mathews was also the most suicidal of all White law firms. Unlike others that granted letter-head partnerships to Africans in answer to the call for Africanisation, Hamilton, Harrison & Mathews granted full proprietary partnerships. From 1973 the firm began to admit its African associates into partnership, assisting them to secure financing and purchase the shares. Although their shares were negligible compared to those of the more senior white lawyers, they were admitted into management on an equal participation basis and, even more important, granted an equal vote with the older partners.

Most of the new partners were lawyers who had qualified to practise through Articles of Clerkship under the firm. Some of them had been at the firm from as early as 1964. The white lawyers had therefore felt comfortable with them, comfortable enough to even employ Richard Otieno Kwach as an associate and later to offer him partnership. They were confident that loyalty to the firm would outweigh any racial loyalties the African lawyers may have. And it seemed to be so until 1980 when the Africans held equal representation at the firm. There were now five African partners and five non-African partners.

The main cause of their collision was non-racial. It concerned a new source of competition, the purely African law firms like Waruhiu & Muite, Muthoga & Gaturu, Oraro & Rachier etc. Previously, the white law firms had complete monopoly over some clients, especially the multi-national corporations like Barclays Bank, Standard Chartered Bank, Del Monte, British American Tobacco etc. They secured work for these corporations through the personal relations between their partners and the management personnel of the corporations. From 1963, however, the management of these corporations slowly came into the hands of Africans. By 1980, very few companies in Kenya were still solely run by Europeans. The change in management personnel meant that the African lawyers now enjoyed access to these companies where their former village mates or college mates were at the helm, and were slowly stealing the clientele away from the white law firms.

The new African partners in Hamilton, Harrison & Mathews felt they could assist the firm through the competition by taking on a greater role as “rainmakers”. They were the only ones who could compete effectively for work with the pure African law firms. The European partners, however, did not like the situation that would be created by such an eventuality. The African partners would become the most important members of the firm and with their clout could take control of Hamilton, Harrison & Mathews. The European partners therefore refused to approve the new plan of action.

The refusal brought to light other problems that existed in the firm. There was the issue of African representation in the Accounts Committee of the firm, of a larger African representation in the Management Committee and of subtle racial discrimination of the firm’s supporting staff. Combined with the retirement in 1960 of the only truly respected leader of the firm, James Hamilton, a son of the founding Hamilton, the newly emerged problems split the firm along racial lines into two warring factions.

James Hamilton’s position as leader of the fund was inherited by John Sylvester, who was portrayed in subsequent court documents as an eccentric, egocentric

and an outright wickedly underhanded character. John Sylvester would not have an African, however qualified, for his secretary and insisted on a white one. He held the firm's parties at his house where 70% of the guests would be his personal friends. He was accused of dealing with the firm's clients behind the backs of his fellow partners. As leader of the firm, he bred ill-will between the partners as he tried to have some of them voted out of partnership. He falsely accused Kwach of moonlighting and kerb-crawling and campaigned for his resignation. He also attempted to force the resignation of a fellow European partner, Michael Lewis Somen, but both moves were thwarted.

It was during Sylvester's tenure that the divisions in the firm deepened. Whenever the African partners proposed a motion on the management of the firm, the European partners would vote against it. Whenever the dictates of good sense forced them to vote in the affirmative, the European-controlled Management Board employed fabian tactics and no action was taken on the motion. The African partners were not amused and became fully inflamed when despite a clear agreement the European partners refused to accept any other African partner. It had been agreed that two very qualified and well-connected Africans be employed and offered partnership. The African partners had approached such two comrades, convinced them to resign their positions and join the firm, only for the European partners to refuse to vote in favour of the promised partnership. The reasons of refusal, unmentioned as they were, were obvious.

The Africans reacted by forcing the firm to a deadlock. Beginning 1986, they demanded that every motion passed in the firm be accompanied by a deadline for implementation. They insisted on putting every single communication on paper and demanded explanations for every unaccomplished deed. They also adopted the strategy of voting as a bloc against the non-Africans. That undoubtedly worsened the situation. On the morning of July 28th 1986, all five African partners gave notice of their resignation from Hamilton, Harrison & Mathews.

That didn't help either. The non-African partners, feeling they now had the upper hand as the sole partners of the firm, delayed the issue of settlement. They cancelled all meetings scheduled between them and the former African partners and refused to place the accounts of the firm in the hands of an interim Settlement Committee. The African partners gave them a one-day notice period to hold a meeting and when that too failed, they went to court seeking the dissolution of the firm.

In the suit, the African partners prayed that the firm be placed under receivership and its business wound up. They laid out all the misdeeds of John Sylvester as grounds for dissolution as well as the grounds that the court could not trust the non-African partners to make long-term payments as agreed in the partnership deed as their spouses were citizens of England and they were thus likely to skip the jurisdiction of the court. Most of their claims may not have achieved anything.

In fact, their very claim for dissolution may have been denied as they had already resigned from the firm. But it was the remaining partners who could not afford a long and protracted court battle, even if they could win on the most crucial issues like dissolution. Already the press had picked up the matter and it was elsewhere attracting negative publicity. They had to eat humble pie and succumb to the negotiating table.

In return for a very lucrative settlement, the African partners agreed to drop the litigation and allow the non-Africans to carry on business under the partnership name. With the settlement money and all the clients from their former firm that they could take away, they established a very successful law firm under the name Ndung'u, Njoroge & Kwach. Later, Kwach was appointed as a judge of the Court of Appeal.

# THE FALL OF THE BLACK BAR

## Chapter 7

An honest politician, said one American Republican, is one who when bought will stay bought. Therein lies one difference between honest lawyers and honest politicians. It came to be the cause of renewed hostilities between the LSK and President Moi. When President Moi buys, he buys mind and soul. His faithfuls neither see, hear nor say anything against Moi.

Before the truce between Moi and the LSK was called in mid-1981, one of the leaders of the Black Bar, Dr. John Khaminwa, led the first challenge to Moi's Presidential powers. He was arguing a case in which the Deputy Director of Intelligence, Mwangi Stephen Muriithi, had sued the Attorney-General challenging Moi's powers to sack him. Khaminwa argued that as Muriithi was employed by the Public Service Commission, he could not be dismissed unless disciplinary proceedings were instituted before the independent PSC. But another section of the Constitution said that the President could dismiss any civil servant at his pleasure. This section, Dr. Khaminwa argued, was subordinate to the protection of civil servants under the PSC and if effected, could nullify that protection. In any case, he argued, the letter dismissing Muriithi had been signed by the Chief Secretary and not the President.

Muriithi was another victim of the Kalenjinisation of the Kenyan Society. When Moi assumed the Presidency in 1978, the top item on his agenda was to weed out the previously invisible Kikuyu people from the society and to put in their place his own Kalenjin tribesmen. As a Kalenjin himself, he believed that the Kalenjin should be the new aristocracy and that the Kikuyu should be driven out of the privileged position they had held during the Kenyatta era.

It was not easy for Moi trying to fight a class of people who were extremely wealthy and powerful. Thus he handled the matter cautiously, scheming wisely, and destroying one person at a time. Where the Kikuyu person in question held a sensitive or powerful position in government, Moi subordinated him to a Kalenjin who would slowly sap power from the prey until it was possible to retire him without consequence. Such was the position of the Director of Intelligence, Mr. Kanyotu, and hence the need to replace his deputy, Muriithi, with a Kalenjin. But Muriithi was no pushover.

It was a very embarrassing litigation for President Moi. Kenyatta had dismissed civil servants without anyone daring to challenge him. But Kenyatta was not the kind of dictator who one could take to court. He was the kind of President who, in a fit of senile indiscretion, called Parliament buildings and instructed the Speaker to initiate immediate use of the Kiswahili language in the debates. His instructions were followed without query, despite the fact that the Constitution only allowed for the use of English. By taking Moi to court, Muriithi was also expressing an opinion of Moi as President.

Moi may be described, in Percy B. Shelley's words in "Rosalind and Helen", as a coward to the strong and a tyrant to the weak. He did not have the courage to move in against Muriithi until the High Court upheld his powers of dismissal. In the judgement of Justice Hancox, the Constitution intended that the President should enjoy the same powers of dismissal as the English Monarch did under a royal prerogative. Immediately after the judgement was read, Muriithi and his lawyer Dr. Khaminwa were arrested and detained without trial.

Dr. Khaminwa was also engaged in another challenge of Moi's powers. He was acting for one of Kenya's most radical and spitfire socialist politicians, George Moseti Anyona. Anyona had been detained by Kenyatta in 1977, picked up from the precincts of Parliament by plain-clothes policemen. He had presented evidence in the House that the Attorney-General Charles Njonjo had influenced the cancellation of tenders worth £50 million in railway equipment which had been awarded to an international firm and secured the tenders for a

British firm. Anyona wanted a Parliamentary Select Committee to investigate the award to the latter firm.

When he was released from detention by Moi after Kenyatta's death, Anyona found he had no place in the monolithic KANU party. In 1982, in concert with the father of opposition in Kenya, Jaramogi Oginga Odinga, he sought the registration of a socialist party to compete with KANU. Moi had him arrested and detained, and also had Odinga placed under house arrest. Khaminwa went to court challenging the detention. In the meantime, Moi had inserted in the Constitution a new Section, Section 2A, which declared KANU the only legitimate political party in the country. The Constitutional Bill was passed, with 158 ayes and no dissenting vote.

The LSK reacted strongly against the new developments. It condemned the detentions, regretting that Moi had gone back on his word that there would be no more detentions without trial in the country. In particular, it regretted that Dr. Khaminwa had been detained for discharging his professional duties for this was an interference with the independence of the Bar. Section 2A was not spared. The LSK expressed its reservations about the section, seeing it as a derogation of the freedom of democratic choice, and urging that a referendum be held to seek the views of the Kenya citizens on the matter.

These anti-government reactions were occurring barely two months after the truce between the LSK and President Moi. Moi felt betrayed. No-one was his friend who criticised any of his actions. His view that lawyers were turn-coats was speedily bearing upon his mind as they continuously reacted against his increased tyranny.

The breaking point came after the attempted coup on August 1st 1982. Moi expected such sympathy from the lawyers as to close their eyes as he broke down all laws to get at the devil. But when the court martials began, the members of the Black Bar became actively involved in the defence of the mutineering soldiers by lodging appeals in the High Court. They also challenged the post-

coup detentions, especially that of another of their professional colleague Willy Mutunga. To Moi, this had nothing to do with independence of the Bar. It was crystal clear apostasy.

President Moi turned against the Black Bar. In his mind developed an enduring hatred for lawyers and all they stood for; constitutionalism and the rule of law. Using the public media, he began to insult lawyers in unsavoury language, saying they were local agents of foreign masters abroad and criticising them for believing they were the only thinking Kenyans.

On July 3rd 1986, he detained a law student Gacheche wa Miano for his political views. On October 8th 1986, he detained Wanyiri Kihoro, a lawyer, for suing the government for torture and illegal detention. Kihoro had been held and tortured for three months. He was held in detention until July 1st 1989. On December 22 1986 he detained lawyer Mirugi Kariuki on grounds that he was a member of Mwakenya, an illegal organisation set up to end the Moi regime. On March 6th 1987 he detained the 1988 Robert F. Kennedy Human Rights Award winner Dr. Gibson Kamau Kuria, also on grounds of belonging to Mwakenya. Two days prior to his detention, Kuria had given the Attorney-General notice of intention to sue the government on behalf of two detainees. Both Mirugi Kariuki and Kamau Kuria's offices and residential houses were searched without a warrant and both were tortured while in detention.

Ironically, the words of Professor Yash Ghai and MacAuslan were applying to the Black Bar. They had said of the White Bar that unless it can convince a significant number of people that it can perform important services for the community, it will fail to obtain the support it needs to resist ... encroachments of the government ... "While the Black Bar had since its emergence identified with the aspirations of Kenyans, it was deteriorating in performance and speedily losing sight of its ideals and aspirations.

The plague afflicting the Black Bar was an invasion by badly-trained and disoriented lawyers from the University of Nairobi. Beginning 1970, the

University of Nairobi admitted students to study law in its newly established Faculty. Though this was the ultimate realisation of the goal to establish local training institutions for lawyers, the Faculty was a far cry from the Faculty of Law at Dar es Salaam. It was best criticised by human rights lawyer Kiraitu Murungi in his third year LL.B thesis in 1977.

The chief problem, according to Kiraitu Murungi, lay in the lecturers. Due to a shortage of local intelligentsia, the university had for lecturers post-graduates of Masters level and full-time practitioners. Hardly any of them could hold a candle to the law lecturers at Dar es Salaam. They were not experts in the fields in which they lectured and many had not studied the subjects they taught beyond their undergraduate years.

Most had no previous teaching experience and conducted lectures by reading out materials for the students to write. There was no discussion except for one or two students asking the teacher to repeat a sentence. The full-time practitioners were worse. They had very little time to prepare for lectures and were content to done through lecture notes prepared years before.

The only chance that a law student has to sharpen his skills is during tutorial sessions. At Dar es Salaam, students were required to present legal arguments in favour of or against legal propositions or to act as prosecutors or defenders in moot courts. The sessions were chaired by the lecturers though each student had during his stay at the University, to present arguments before a judge of the High Court of Tanzania. At Nairobi, tutorials were a travesty.

Kiraitu Murungi accused the lecturers at Nairobi of using tutorials to exercise their sadistic talents and courtroom prowess, saying: "In front of a bespectacled intelligent looking and smiling teacher, the panic-stricken sweating student looks like a clown and a source of attraction to the rest of the class. He feels like a criminal in the dock. He feels small and pathetic. Given the ability he could sink through the floor."

Others, he said, “became ‘Chairmen’ and think about other things when the student is trying to answer a question or intelligently avoid it and automatically shout ‘NEXT!’ when the student stops.” The tutorials that came close to being discussions were those where dialogue was conducted between the teacher and “a few loud-mouthed chaps”. In such tutorials, the rest of the class were merely spectators. They had thus been nicknamed “jiburudisheni”, a Swahili word for “entertain yourselves”, after a popular television programme.

What made it worse was the academic arrogance of the lecturers. They viewed any exercise of academic freedom by the students as delinquency and forbade them, at the pain of failure, from holding any view apart from the “correct view” as expounded in the lecture hall. One law professor told students that they could think what they wanted but at the end of the day his word was law.

Also restricting academic freedom at the faculty was the State. The University of Nairobi was crawling with undercover state security agents and informers. They attended lectures and took notes of what the lecturers said. One lecturer, Robert Martin, was arrested for preaching Marxism during a lecture on the nature of law and its social functions.

The State also influenced the award of scholarships and promotions. These were not granted on merit but along the lines of political affiliation. Lecturers who did not teach Marxist thoughts and who were persuaded towards a legal philosophy that justified a dictatorial government were rewarded with promotions and lucrative scholarships and research grants. Many law lecturers thus ended up in the gutters and had nothing to do with their free time other than spend it.

The overall effect was to totally confuse the students. Those lecturers with a capitalist leaning taught them to be practitioners and induced them to believe in the money they would make. Those with a Marxist bent taught them to be reformers, to think of the common man and the injustices visited upon him

by the state. The students became the tools of a war between pro- and anti-government lecturers.

Most of the students became apolitical in the confusion. They were utterly disoriented, taught on the one hand that they couldn't question the law, and on the other that the law was a bourgeois mysticism. The only kind of orientation they had can be discerned from the words of one student who Kiraitu Murungi quotes: "We want to complete our studies and partake (of) the fruits of Uhuru [independence] like everybody else in Kenya."

No-one, however, had taught them how to be honest and professional in the pursuit of these fruits of independence. In fact, no-one ever told them what the fruits of independence were. So they adopted the definition of "Fruits of Independence" as laid out in the dictionaries of President Kenyatta and the ruling Kikuyu aristocracy: making money at any cost. Kenyatta and the ruling Kikuyu aristocracy had only one warning for those who wished to adopt their definition of "fruits of independence". It was in the form of a traditional song sung by the Kikuyu people when they played their version of hide and seek. It went: "My little bird, hide; for if they see you, I will disown you."

Awaiting the law students was a Garden of Eden: the insurance industry. An Act of Parliament passed after independence made it compulsory for all motor vehicles to be insured against third party claims arising out of motor accidents. The provisions of the Act also enabled every claimant to sue an insurer directly without claiming from the insured. Every third party insurance claim was thus a sure harvest for every claimant. Unfortunately, the majority of Kenyans had never heard of the Act and many a claim lapsed unmade.

The new lawyers needed no Eve or serpent to tempt them to eat the forbidden fruit of ambulance chasing. All over the country lay illiterate peasants with graves of loved ones, broken femurs, tibias, ulnas, quadriplegia etc. that they had collected from motor vehicle accidents - a situation that, in accordance with African custom, they had accepted as fate. These new lawyers never

complained about the dominance of White lawyers in the profession; they didn't need to. Every lawyer who adopted ambulance chasing in personal injury practice became an instant success.

Unlike the early generation at the Black Bar, the new lawyers knew no ethics. Their role models were not the fighters for justice of the post-independence era but the ruthless capitalists of the Kenyatta aristocracy. And legal practise was nothing more than an economic activity to them. They thus did not stop at ambulance chasing and chamberty. They proceeded further to theft and corruption. They cheated their clients out of settlements, either by investing the monies and paying the clients in installments or by taking it away altogether. The illiterate peasants knew no better. Given an amount of say Shs50,000 for a deceased relative, the peasant would be so busy planning their new timber house they couldn't care less whether the amount was Shs500,000. It usually was.

Their greed knew no bounds and they turned on the insurance companies. They formed fraud cartels through which fictitious claims were made with a police officer on one side to supply false accident reports and a medical doctor on the other to supply false medical reports. The lawyers went on a plunder, usually assisted by a claims manager in the insurance company who had studied law at the University of Nairobi. They made the Dar es Salaam lawyers look like novices, considering how quickly they made their first million in less than three years of practice.

In turn they became role models for their juniors at the law faculty, and the University of Nairobi became a training ground for alternative lawyering. As their numbers increased, the profession lost the ideals and aspirations of the Black Bar. The concern over abuses of human rights ceased. So too did the reputation of lawyers as defenders of the common man. If anything, the lawyer became the common man's worst enemy. The lawyer was more concerned with the money than the work and would not handle any case in which there were no adequate returns. Neither would he handle a case once

the money was paid and would instead seek another case which he would not handle once the money was paid. On February 28th 1987, the then Chairman of the LSK G.B.M. Kariuki correctly observed:

“Professional standards have fallen so low that unless the society urgently devises a way of arresting the situation, the public is going to lose confidence completely in the society members.”

The concern over the rise of decadence in the LSK had begun early in 1984 when the then Chairman Mutula Kilonzo, successor to office of Lee Muthoga, revealed that more than 40 advocates were practicing without practicing certificates. This was followed by the revelation in 1985 that 58 lawyers had been disciplined by the LSK for offences committed between 1983 and 1985. By the end of 1986, the number had risen to 100 lawyers. The concern extended to the level of incompetence with Justice Mrs. Joyce Aluoch stating that some lawyers were shabbily dressed in crumpled gowns which look “as if they have been used as pillows”. The Chief Justice, Justice Miller, decried the dishonesty and corruption among lawyers and said he would issue specific rules to arrest the conduct of lawyers who do not maintain the noble standards of the profession.

The debate also found its way to the National Assembly where the members expressed concern over the level of professional misconduct and urged the Attorney-General to arrest and prosecute crooked lawyers. The press referring to the lawyers as “Kenya’s Whiteys in the woodpile”, also urged the government - to take action. Under the headline banner “Lawyers’ dirty tricks exposed”, the Sunday Nation of July 21st 1985 denounced ambulance chasing and swindling in personal injury cases. Its sister paper the Daily Nation, in the editorial of September 15th 1986 headlined “Defend the people from these sharks” stated: “It is urgent that we do something to block this legal loophole so as to defend our people from these young sharks.”

Nothing changed. As long as the system through which the young sharks were produced still lay in place, there was going to be no change. Kiraitu Murungi had stated in his thesis: “For true changes to be possible, it would be necessary to have a new breed of teachers, a new breed of students and a new breed of methods.” The only new breed of anything that emerged was thieving styles.

The earlier generation of the Black Bar did little to arrest the decadence in the profession. For one, it was preoccupied with the renewed hostilities with President Moi. The President had the upper hand this time round as no-one was ready to stand up for the LSK. No-one was bothered by the detention of its members and when Amnesty International on July 21st 1987 listed the Kenya government as one of the world’s leading abusers of human rights and independence of the Bar, Kenyans accepted the government criticism of the Amnesty report as “a document without any substance and which does not deserve any merit or credibility.” The President was confident enough to rebuff overtures made by the LSK Chairman GBM Kariuki for another truce.

The Black Bar was also losing its unity of purpose as it discovered division lines in itself. When Lee Muthoga’s tenure as Chairman of the LSK lapsed in 1983, the person most qualified to succeed was Paul Muite. Muite had not only served as Muthoga’s Vice-Chairman for two years, he was one of the leading exponents of the ideals and aspirations of the Black Bar. But alas, Muite was also one of Njonjo’s lawyers in the Commission of Inquiry and unfortunately also one of Njonjo’s friends. Prior to the 1980 election of the LSK Chairman he published an article in which he expressed admiration for Njonjo. Like had been done to Kwach, Mutula Kilonzo was fronted against Muite in the election and Muite lost. So too did the LSK lose Muite.

The new LSK unity was usually for the wrong purpose. Lawyers managed to unite in the insurance fraud cartels, and at the LSK Disciplinary Committee the LSK found it increasingly difficult to enroll prosecutors before the Disciplinary Committee who would not collude with the accused person. Frequently, lawyers assisted each other when faced with malpractice charges and always

refused to institute court proceedings against fellow lawyers. The LSK also stood up for its crooked members in the face of external attack. On March 19th 1990, the Association of Kenya Insurers wrote a letter to the LSK in which it declared that insurance companies would no longer pay insurance settlements directly to advocates. The Association, concerned by the level of dishonesty in the profession, stated that insurance companies would henceforth draft two cheques for every settlement; one for the settlement amount in the name of the client and another for legal fees in the name of the advocate. The LSK Council reacted by advising its members to reject all such payments.

No wonder therefore that the Black Bar lost all the clout it had wielded in the years between 1977 and 1983. When Sir Alfred Simpson retired from the post of Chief Justice in October 1985 and the Chairman of the LSK, GBM Kariuki, asked President Moi to take the chance to Africanise the position, the President replied by telling lawyers to first put their house in order before commenting on the Judiciary. Citing the high level of professional misconduct, he told the LSK that it had not raised a finger against its members' malpractices and urged lawyers to realise that they were not angels. When Moi proposed to abolish the security of tenure for judges and the LSK protested against the move, the Vice-President Josephat Karanja dismissed lawyers as "colonial anachronistic cobwebs" and the LSK as an "irritating irrelevance". The people of Kenya had no reason to believe otherwise.

The LSK was in no position to resist the rise in President Moi's dictatorship. It watched helplessly as the security of tenure of all constitutional offices - the judges, the Attorney-General, the Controller and Auditor-General and the Public Service Commissioners - was removed without dissent in Parliament. KANU, now the sole legitimate political party under Section 2A of the Constitution, proceeded to usurp the position of Parliament. Rules were passed to require all persons who wished to enter Parliament on a KANU ticket to swear allegiance to President Moi. The party also established the KANU Disciplinary Committee which enforced loyalty to Moi. In 1984, the

party expelled 14 senior politicians for having associated with Hon. Charles Njonjo.

The dictatorship climaxed in 1989, “the year of the big purge”. In preparation to weed out politicians who were not very enthusiastic about loyalty to Moi, KANU passed the queue voting rules. Under the rules, KANU’s parliamentary nominations for the 1988 general elections were to be held through a voting system that required each candidate or his agent to stand in a queue with his supporter. The returning officer would take the ballot by counting the number of people in the queue. If the candidate amassed 70% of the number of people voting, KANU would allow him to proceed to the election unopposed.

The greater majority of the registered voters were unwilling to expose their political preferences and they stayed away from the elections. KANU was thus able to rig in those it wanted in the National Assembly through the 70% requirement. Once the queues were disbanded there was no way of ascertaining what the actual numbers were. It all lay with the returning officer to play around with the figures as the party required. A Christian magazine, *Beyond*, released an analysis of the election. It revealed that in some constituencies where candidates were elected on the 70% rule, about 99% of the elected voters had abstained from voting. The magazine was immediately banned and its editor arrested and charged.

The Parliament that sat in 1989 was thus the worst ever. But not satisfied with its subservience, Moi had more than 15 senior politicians, some of them Cabinet Ministers, purged from the party, thus losing their representative posts. The House became known as Moi’s rubber stamp. On June 28th 1989, it banned the country’s highest circulating newspaper, the *Daily Nation*, from reporting parliamentary proceedings after a motion of censure was passed against the paper for “persistent misreporting”, “being anti-government” and “trying to create despondency in the country”. The Parliament, by doing so, helped Moi silence the only independent newspaper of the time.

Accused of usurping the powers of Parliament, the party was defended by its National Chairman Okiki Amayo who said there was no conflict between the Parliament and the Party since the Parliament was one of the institutions of the KANU government. Thus The Weekly Review rightly summarised 1989 as “the year in which there was no longer any argument as to whether the ruling party was the supreme institution in the country”.

As for the LSK and its critical faction the Black Bar, it had become, to all intents and purposes, an “irritating irrelevance”.

# THE ROLE OF THE JUDICIARY

## Chapter 8

The government's closest ally in oppressing the people of Kenya, and in frustrating the Black Bar, was the Judiciary. Both through utter incompetence and willful subservience of the executive, judges and magistrates in Kenya twisted the law in support of the government and reduced the judiciary into an ineffective guard of the fundamental liberties of the people. It is a fair summary of the history of the judiciary to state that it totally failed to discharge the obligation that was placed upon it by the 1963 Independence Constitution.

Initially, the problem with the judiciary was the legacy of its pre-Independence experience under colonialism. In the colonial government's ordering of business, the judiciary was placed as one of the executive departments under the Attorney-General. Magistrates were regarded as discharging an executive function and in many instances doubled up as District Commissioners. They came under the direct control of the Provincial Commissioners who were regarded as their superiors. In their turn, judges came under the direct control of the Attorney-General whom the Chief justice regarded as his superior. The entire judicial department thus had an executive approach to its duties. It was guided more by the concern over maintenance of order than the administration of justice.

The establishment of the judiciary as an independent arm of government by the 1963 Independence Constitution did not change this executive psyche. The judicial officers continued to regard themselves as part of the executive arm of government and never appreciated the need to operate independently of

the State's directions. In a survey it carried out in 1966, the Council of the Law Society of Kenya found that judicial officers were operating like they had done in the colonial era. One magistrate was said to be holding his court in camera by expelling all strangers to the proceedings. Another dosed the doors to the court and would not allow anyone to enter or leave the room once proceedings had started. Not even advocates were allowed to leave the court-room after presenting their cases, whether or not they had other business to attend to or clients to represent before other courts. They were forced to sit until the court session was over.

In respect to one High Court, the survey stated: "The Court hardly sits for longer than two hours a day, the sittings are short and haphazard with the effect that advocates have to loiter in the court corridors for hours on end waiting to see if the court might sit."

And of one magistrate the survey said: "He collaborates with police in their inequitable conduct. He remands suspects even for trivial traffic transgressions. He openly condones police brutality. He will remand suspects in police custody at the request of the police even where the accused objects."

The relations between magistrates and advocates also remained as acrimonious as they had been under colonial government. The Native Tribunals Act of 1930 had created suspicions between advocates and magistrates by setting them apart. Advocates regarded magistrates no differently than they did the police, while magistrates thought advocates were shysters. Thus the LSK survey could state of one Senior Resident Magistrate: "The officer is arrogant and contemptuous of Advocates and has singled out a few of them who do not as a matter of course get bail or adjournments for their client in his court."

The Council gave one anecdote in its survey of an Officer in Charge of a Police Division (OCPD) who wrote to a court bailiff warning him not to execute a distress warrant without security clearance. The OCPD was attempting to protect the judgement debtor from the due process of law. Seeking action

against the police officer for contempt of court, the lawyer for the judgement holder, Mr. Pravin Bowry, wrote 11 letters over a ten-month period to the Senior Deputy Registrar of the High Court. He received no reply.

This pro-government attitude of the Judiciary was to the benefit of the dictatorial regimes of Kenyatta and Moi and they worked to maintain the status quo. Not only did the two presidents refuse to remove the existing barriers to an independent judiciary, they burdened the judiciary the more to keep it dependent on government. For instance, the judiciary was maintained as a department of government headed by the Attorney-General despite constitutional provisions that declared it independent. Thus, judges were often seen moving in and out of Charles Njonjo's office where they consorted with him over matters pending before them. Chief Justice Sir James Wicks was known to have re-written a judgement upon Njonjo's instigation. Referred to among the ranks of the Black Bar as "Njonjo's Boy", Sir James always addressed Njonjo by the title "Sir". It was for his subservience that the Kenyatta government amended the law on retirement of Chief Justices three times to retain Sir James Wicks until he was 74 years old.

Another method used by the Kenyatta regime to maintain a subservient judiciary was the employment of foreign judges on a contractual basis. Since independence, the English government, through its Overseas Development Administration, had helped Kenya retain expatriate judges by subsidising their salaries. These expatriate judges were employed on 2-year contracts under which the ODA paid two-thirds of their salaries. By threatening not to renew contracts, the Kenyatta government could influence the conduct of judges in the discharge of their functions. It thus became the policy of the government to maintain an expatriate bench and that of the Black Bar to fight for its Africanisation.

But any interference of the Kenyatta government in the judiciary was a gewgaw compared to that of Moi. President Kenyatta's Judiciary was never really tested. The country was young, the concerns were mundane, and the exercise

of autocratic rule relatively tempered. On the one hand, Kenyatta avoided involvement in the politics of the day and it was left to people like Charles Njonjo to do the requisite manipulations. The centre of state power thus never came crashing down on the people nor on the bench and interferences were thus more subtle than they otherwise could have been. On the other hand, the people of Kenya were relatively new to the concepts of western democracy and it took some time for them to begin understanding their rights as citizens.

With President Moi, it was very different. The people had become very conscious of their fundamental human rights and were a more demanding citizenry than they had been under President Kenyatta. President Moi himself was a less charismatic leader and found it impossible to maintain loyalty without involving himself in the politics of the day. His prints can thus be found in every act of manipulation of the judiciary.

Further, this lack of charisma meant that his exercise of autocracy was less tempered, and the resulting resistance to his rule presented the judiciary with the test it never faced under President Kenyatta. Previously, the judiciary had been tested only on the issue of detention without trial whereby it had sided with the Kenyatta government and held that it could not look behind a detention order. Under Moi the judiciary was tested on all aspects of human rights under the Constitution. Its reaction can be seen from review of the bench under two regimes, that of Chief Justice Cecil Henry Ethelwood Miller of Guyana and Chief Justice Allan Winston Robin Hancox of England.

The fact that Justice Miller should never have ascended to the post of Chief Justice makes it an undeniable truth that by so appointing him President Moi was merely employing another tool in extending his dictatorial rule. As a person, Chief Justice Miller was an eccentric character, a racist Pan-Africanist but also mentally unstable.

He is said to have done such wacky things as lecture advocates on the virtues of the Black race and recount to them how he “dusted” the Aryan race as a

World War II Royal Air Force pilot. He did even more wacky things when he turned violent. For example, he broke the legs of a taxi driver, and crippled him, with a baseball bat when the poor man dropped his wife home one night and Miller mistook the nature of the transaction. President Moi's government shielded him from liability for his loony actions and for his other embarrassing drunken frenzies.

For that protection, Miller was eternally grateful to President Moi and did what he could to pay back. As a judge, Miller was very pro-government. In 1981 he confessed in a judgement that he interpreted and applied laws in close conformity with government policy. Together with Sir James Wicks, they had in 1979 made such an interpretation of the law and declared that Kenya's Court of Appeal had no jurisdiction to hear appeals on matters of the enshrined fundamental civil liberties in the constitution. And in 1988, he declared that the entire Bill of Rights under the Kenyan Constitution was unenforceable and that no citizen could seek redress in the High court for contravention of his fundamental civil liberties because the Chief Justice (himself) had not made the rules of practice and procedure for constitutional application. This was despite the fact that the making of such rules was only permissive and that the LSK had always called for the making of the rules. This unwavering support of the government as a judge resulted in members of the Black Bar complaining that he was behaving like a civil servant.

His grasp of the law was equally deplorable. In a matrimonial case he declared a man to be married to a woman he had cohabited with and with whom they had borne children despite an existing statutory marriage with another woman. In effect, the man became legally married to the two women. In effect too, Miller made the man liable to a charge of bigamy. Another incidence that testifies to his incompetence occurred during the Commission of Inquiry into the conduct of Charles Njonjo. Miller had Chief Justice Sir Alfred Simpson summoned before the commission to testify on his conduct of the Muthemba treason trial. Judicial officers in Kenya, however, enjoy constitutional immunity

in the exercise of their duties and Sir Alfred, who in jest appeared before the commissioners, refused to answer any questions put to him. There was no doubt that Miller had goofed.

The incidence nevertheless brought to light Simpson's role as another "Njonjo boy". In his judgement over the Muthemba treason trial, Simpson had 'found most of the counts against the accused proved but had proceeded to state that the evidence was not weighty enough to support a conviction. And regarding the accused's confession that he had acted at the instance of his cousin Charles Njonjo, the Chief Justice criticised Muthemba for having tried to tarnish the "honourable minister's well-earned reputation". No-one who was living in Kenya during that period, and who was a holder of high office like Sir Alfred Simpson, could have honestly referred to Njonjo's reputation as "well-earned". It had thus been Miller's intention to expose Simpson's subservience to Njonjo, but instead he merely revealed his own incompetence.

Miller's appointment as Chief Justice in 1986 was very much in line with President Moi's Machiavellianism. One of the methods used by President Moi in earning the loyalty of public officers is to promote beggars into kings. Moi often picks a man from the gutters and places him in an influential position where the man would sacrifice his first son to remain. So it was for Chief Justice Miller. The judge not only received total immunity from liability for his actions, which would have supported his discharge from the bench and even subjected him to criminal proceedings, he was also awarded citizenship, a large plantation and a Mercedes Benz limousine for his official car. The administration of justice in Kenya paid dearly for the favours.

On April 6th 1987, a gentleman by the name of Stephen Mbaraka Karanja bade his wife goodbye and left his home in the town of Limuru to visit his lawyers in Nairobi. Though Limuru is only about 10 kilometres from the city, Stephen never found his way back. On April 8th, a stranger informed his wife that Stephen had been arrested by CID officers in Nairobi.

Karanja's wife began a search for her husband and visited the CID headquarters where she made inquiries. But the CID denied having arrested her husband. She proceeded to visit all the police stations in the city inquiring whether her husband was detained in any of them. The search was fruitless. After seven weeks of the fruitless search, she instructed a firm of lawyers to apply for a writ of *habeas corpus* ordering the CID Director to produce her husband in court.

Little did she know that her husband was six weeks dead.

The application came up for hearing before Mr. Justice Derek Schofield on May 27th 1987. That was when a State Counsel in the Attorney-General's chambers informed the court that Karanja had been shot dead by CID officers on April 12th 1987. According to the State Counsel, Karanja had attempted to escape from custody and was shot as he was running away.

Two months before his death, Karanja had been arrested by CID officers on allegations that he had stolen a car. He had been detained for five days. Upon his release, he instructed his lawyers to write to the director of the CID informing him that legal action would be instituted for the unlawful detention. The Director, Noah arap Too, replied to the firm, saying that if they knew the type of character Karanja was, they would not be "pestering" him with "silly threats".

Justice Schofield refused to accept the statement made by the State Counsel and ordered that the CID furnish the court with affidavits saying that Karanja had been shot dead. The CID filed two affidavits. One was by the CID Director, in which he stated that Karanja had been shot at Eldoret, 400 kilometres away from Nairobi, adding that a full investigation had been instituted on the matter.

The second affidavit was sworn by one of Karanja's assailants. The police Sergeant stated that Karanja was being investigated for armed robbery to which he had confessed and was in the process of directing CID officers to

firearms in an Eldoret forest area when he attempted to escape. He explained how the CID officers had tried to prevent the escape and had to finally fatally shoot the unarmed running man. He also explained how Karanja's body was treated thereafter, from the performance of a post mortem examination to burial at the Eldoret Municipal Cemetery.

Again Justice Schofield refused to let the matter rest. Terming the actions of the police as "callous to the extreme", the judge ordered for the exhumation of the body, the performance of an independent post mortem and the transfer of the inquest proceedings from Eldoret to Nairobi.

After two days of exhumations, Karanja's body could not be traced. Neither the cemetery assistants who had buried Karanja nor the doctor who had performed the post mortem examination could identify Karanja's body at the cemetery. But prior to the unsuccessful exhumations, the police and cemetery assistants had exhumed Karanja's body, properly identified it and returned it to the grave. The Judge therefore took it that the Director had refused to comply with his order and he issued a notice to him to appear in court and show cause why he should not be committed for contempt of court.

It was Miller who was sent by the President to Justice Schofield to tell him to layoff the case. But the Judge would have none of that. He in turn asked the Chief Justice to request the President not to interfere with his judicial duties. If the Chief Justice failed to do so, the judge said, he would personally tell the president to keep his hands off the matter. Miller didn't wait for the threat to be made good. On August 11th 1987, he summoned the lawyers for Karanja's family and had the file on the matter placed before him. Without any application being made, and indeed without any reason to sit as judge over the matter, he ordered that the case be transferred to another judge. He stated in his ruling:

"This matter in progress was brought to my attention on August 4th 1987. I thereupon called for and examined the record of proceedings so far, with

no settled view as to what may or may not have been potential or actual impressions conveyed to the public. However, the next day, on the morning of August 5th 1987, there appeared in the Standard newspaper a leading article concerning the matter, and from what appeared therein, I became satisfied that it is in the interest of the judiciary *vis-a-vis* the public generally that the matter be taken over by any other judge.

“Perhaps it will remain difficult for members of the public who are not legally trained to realise that probable remarks made by judges and magistrates whilst hearing matters are not of necessity part of their considered judgement in the final analysis.”

Karanja’s family lawyer, Mr. O.T. Ngwiri, protested.

**Ngwiri:** Can the Chief Justice of the Republic of Kenya give me a hearing?

**Miller:** I have made a ruling that this matter is stood over until judges return from their vacation.

**Ngwiri:** As much as I respect that order, I would like to know why this case has been taken over from my Lord Justice Schofield without any formal applications being made, heard and settled.

**Miller:** That is all for today.

One month later, Ngwiri made an application to have the hearing of the case restored to Justice Schofield. The Senior Deputy Registrar replied to him saying the Chief Justice was too busy to grant the matter his immediate attention. Miller later transferred the matter to Justice Akilano Akiwumi, at that time a government apologist, who ruled that once it had been stated that Karanja was dead, the matter could not have proceeded further since a judge could not order the production of a dead body. To Justice Akiwumi, the words

“the person or body of” used customarily in orders of *habeus corpus* did not mean dead body.

In the meantime, Justice Schofield had in protest resigned from his judicial post and left the country. Before he left, the Law Society of Kenya hosted him in honour of his defence of the independence of the judiciary. The party was treated by the government as an act of war and the Solicitor-General, Mr. Teddy Aswani, who was so ill-advised as to be the only high-ranking government officer present, was subsequently fired.

But Miller’s worst nightmare came a year later over a conflict with another High Court Judge, Mr. Justice Patrick O’Connor. Miller had severally interfered with matters being handled by the judge in the same fashion as he had with Justice Schofield, i.e. transferring the matters to pro-government judges. Justice O’Connor did not suffer the practice gladly. He continuously offered resistance to the Chief Justice until Miller resolved to transfer him to an out-station in the provinces. O’Connor defied the transfer order.

Justice O’Connor’s stand was that it was the responsibility of the Judicial Service commission, and not the Chief Justice, to transfer High Court judges from one station to another. He therefore brought the matter before the commission for reconsideration. Further, he felt that his transfer was not normal in the light of the peculiar circumstances surrounding it and he wanted those circumstances to be considered. Awaiting the decision of the commission, O’Connor continued to attend to his office in Nairobi.

Miller reiterated by directing that O’Connor be allocated no work. Every day O’Connor would present himself to court but there would be nothing for him to do. Miller in the meantime consulted with the president seeking a solution to the stand-off. The two reached a perfect agreement. They resolved to remove the security of tenure for judges to enable the dismissal of errant Judges like Patrick O’Connor.

At least, Miller thought this was the true reason for the removal of the security of tenure for judges. He was so busy thinking how he would get back at Justice O' Connor, he probably did not see that President Moi was merely extending his autocratic tentacles to the Judiciary. More probable, however, is that he saw but didn't care. Or even worse he could have believed in the necessity of removing the security of tenure for judges.

Hardly had the Attorney-General of the day, Mr. Mathew Guy Muli, sat down after securing the rubber stamping of the Bill removing the security of tenure of office for himself and the Controller and Auditor-General, then he was up again with the Bill on judges. This latter Bill would also affect members of the Public Service Commission. Explaining the purpose of the Bill, the Attorney-General said:

“We are only streamlining the procedure so that the President as head of government and executive has unfettered discretion in the matter. This does not mean that in an appropriate case he cannot order an inquiry into the conduct of any incumbent.”

But the Attorney-General did not say how he expected the President to ensnare himself with the procedure of appointing an independent tribunal to inquire into the conduct of any officer, however appropriate the case could be, when the President could simply fire the incumbent. In fact, rather than initiate any sensible debate on the matter, the Attorney-General let the Members of Parliament indulge in tomfoolery before they voted as government required. The members dug into the history of the Judiciary and raised instances where its members had failed. Top of the agenda were the sex scandals of judges like Justice Butler Sloss. No issue on constitutionalism and the rule of law was ever mentioned. When asked by the Vice-President Dr. Josephat Karanja what the country should do to judges who had erred, the house roared back in unison: “Fire them! Fire them!” The bill sailed through with a 131-0 vote.

Chief Justice Miller could hardly wait. On September 26th 1988, he wrote to Justice Patrick O'Connor and dismissed him from the judiciary. The following day he called a press conference where he explained his actions, referring to Justice O'Connor as "the defiant judge". This action resulted in a lot of controversy as Justice O'Connor and others contested the competence of the Chief Justice to dismiss his fellow members of the judiciary. It was the government that came out in support of the Chief Justice. The Head of the Civil Service and Secretary to the Cabinet, Mr. Joseph Arap Leting, stated in a press release:

"I wish to inform the public and all interested parties that in relieving Mr. O'Connor of his duties, the Chief Justice, who is Chairman of the Judicial Service Commission, acted within the powers vested in him by the Constitution of this country ... Adequate disciplinary procedures exist in our Constitution ... It is, therefore, unnecessary for His Excellency the President to be dragged in whenever such procedures are put into effect."

Now more fruitful than ever, the symbiotic relationship between Chief Justice Miller and the government continued. Barely days after he had fired O'Connor, Miller went out to lunch and had too much to drink. He came back to his office and opened an ever-closed box which held what he called his "disposal orders", his will on how his body was to be treated upon his death. That sent a warning signal to the staff at his office for the small box was always sealed. He then began to march like a soldier around the chambers, calling out his step and commanding himself through a march drill.

The policemen posted outside his office (no other Chief Justice had ever required an armed guard outside his office but Miller) called the Commissioner of Police as the situation threatened to get out of hand, which it finally did. Miller emerged from his chambers shouting and punching the air. When one of the policemen attempted to stop him from leaving the building, Miller punched him and threw him to the ground. He then rushed to the High Court parking lot where he took off his pants, placed one shoe on his head and began to

march again. Once in a while he would stand and shout “Nyayo. Nyayo.” (The word ‘Nyayo’ is President Moi’s political slogan). As a crowd began to gather, and after some press men had filled their films with the juiciest photographs of the decade, the Commissioner of Police arrived.

He and his men managed to wrestle Miller into a car and took him home. No newspaper, radio or television station ever made any mention of the matter.

It was therefore with good reason that President Moi retained Miller as head of the Judiciary until his death on September 5th 1989 of Sceptomania. Even after death President Moi continued to protect his late friend. Miller’s family stayed on for many months at the official residence of the Chief Justice. Armed policemen continued to guard the residence and to keep away his widow, who Miller in his will had denied custody of the children. It was only after two years of unrelenting court battles that Miller’s widow saw her children and eventually gained custody of them. The government had owed him enough to wish to enforce his vengeance posthumously.

To give the devil his due, Miller was not an absolute fiend. During his tenure as Chief Justice he managed to totally Africanise the Court of Appeal. This singular achievement turned out to be an acceptable apology for his conduct and the head of the appeal court once stated: “They may twaddle about the performance of the Honourable Chief Justice. They may huff and puff but they do not alter the hard fact that the Chief Justice has a mission to Kenyanise the judiciary”. Miller also managed to divorce the Judiciary from the Attorney-General’s office. Under the organisation of government business Order No. I of 1989, the judicial department was listed as the 28th department of government under the charge of the Chief Justice.

Miller was succeeded by Alan Robin Winston Hancox. Whereas during Miller’s tenure the government relied on the ingenuity of the Chief Justice to initiate pro-government actions, during Hancox tenure the government literally moved into the courts and ruled them. It was Chief Justice Hancox

who was at the helm when President Moi's dictatorship was at its worst, and his service in the Judiciary was part and parcel of that autocracy.

Chief Justice Hancox was born in England in 1932 where he underwent his education. He was called to the Bar in 1954 and came to Kenya in 1957 as a Resident Magistrate but was transferred the same year to the Attorney-General's chambers as State Counsel. He left for Nigeria in 1961 to serve as a Resident Magistrate, coming back to Kenya in 1963 as Senior Resident Magistrate and later was promoted to the High Court Bench in 1969. He was appointed to serve in the Court of Appeal in 1982, transferred as Chairman of the Kenya Law Reform Commission in 1987 and retained this latter appointment until his assumption of the position of Chief Justice.

Hancox came to the helm in the light of his judgement in *Mwangi Stephen Muriithi vs The Attorney-General* where he was accused of giving the President a "blank cheque". His judgement was dismissed by a local human rights lawyer Wachira Maina in the *Nairobi Law Monthly* as "the voice of a quasi-guardian reading his own "platonic constitution". The lawyer added:

"There can only be two explanations for the conclusions that Hancox comes to. Either he does not care about the logical consistency and conceptual integrity of his judgement or else he is looking for the most 'reasoned' route to a conclusion already reached. The first is the way of a cynic. The second is the way of a village fortune-teller: predict an event and then work for its fulfillment through absurd routes."

One of his first publicized statements upon his appointment urged lawyers to be loyal to the President. This statement was met with stiff criticism from the lawyers who said they owed their loyalty to the Constitution in accordance with their oath of office. Hancox' most ardent critic, lawyer Paul Muite, is on record as having said:

“Since the head of the country is a particular person, the appeal that individual lawyers manifest loyalty to him could be taken to mean sharing the political opinion of the Head of State. This would entail a denial of justice to those who do not share the political opinions of a particular head of state.”

The lawyers argued that as democracy is built on institutions, one of which is the Presidency, one cannot be loyal to the Constitution without being loyal to the Presidency. But, they added, it was conceivable that one could be loyal to the President and disloyal to the Constitution. They therefore accused Hancox of trying to place an individual above the Constitution.

However, Hancox’ most outrageous statement was in March 1990 when he addressed an LSK annual dinner. He said:

“This country of Kenya in which we live is an outstanding example to our neighbours of how things can be done and how they should be done. We have had, for over twenty years now, a stable government and a reputed administration. All the other countries around us must be looking on with admiration, and I dare say, tinged with a little envy, at our achievements. Kenya has outstripped everybody.”

The LSK was scandalised. One lawyer quickly agreed with the Chief justice that Kenya had outstripped everybody, particularly the Attorney-General Controller and Auditor General, members of the Public Service Commission and judges who had indeed been stripped of their security of tenure and independence.

In response to criticisms from the Bar, Hancox excluded the LSK from all official judicial functions, departing from a long tradition inherited from England. The admission of Advocates at the High Court began to be conducted without any representatives from the Bar Association. So too was the commissioning of magistrates and the paying of tribute to departed members of the bench.

Hancox also refused to accept any courtesy calls from the Council of the LSK, regardless of the matter at hand.

Nevertheless, Hancox religiously upheld the tradition of a subservient judiciary. His tenure was faced by the rise of the pro-democracy movement and he denied the heralders thereof any access to justice in the courts. Unlike Miller, Hancox never directly involved himself in any cases before the courts and relied on government supporters at the bench. The most notorious of these were the Chief Magistrate Mango and the Duty Judge Norbury Dugdale, to whom Hancox lent his full support.

Chief Magistrates Mango's subservience to the executive whim would have been embarrassing to any self-respecting government. It is before Mango that the Attorney-General prosecuted all cases instituted for political purposes, for the pure reason that Mango did what the prosecution demanded. Thus in the 1988-89 crackdown on government critics, Mango handled most of the over 80 sedition cases in which the accused persons were convicted on their own plea of guilty. Mango never inquired into how the plea had been obtained even where torture was apparent. When one prisoner complained that he had been tortured, Mango ruled that the subordinate court could not deal with such a claim for lack of jurisdiction. Mango never granted bail when the prosecution objected nor did he, without the consent of the prosecution allow tortured suspects to receive medical treatment. President Moi rewarded him for his service with an appointment to the High Court bench.

He was no better as a judge. Soon, an application on behalf of a detained person seeking an order compelling the government to allow the detainees to sign an affidavit for filing in court came before him. Mango ruled that the application was bad since no actual constitutional provision had been proven to have been violated by the government's denying the detainee access to the courts.

His successor as Chief Magistrate was of the same ilk. Omondi Tunya handled his position with the same dishonesty as Mango and with the same determination to please the Executive. Such was the case when one lawyer, Beatrice Nduta, was charged before him with malicious damage to property. Nduta's prosecution arose out of a private disagreement with the Attorney-General's son-in-law, Philip Murgor. Murgor was then a Senior State Counsel at the A-G's chambers. He had a private disagreement with Nduta and this led to a scuffle between the two at a popular night-spot during which a waiter was showered with a drink. So Murgor tried to have the last laugh by having Nduta charged with causing malicious damage to the waiter's suit.

When the matter came up in court, 30 lawyers led by the then government's worst critic at the Bar, Paul Muite, appeared for Nduta. They applied for bail but the prosecution demanded that she be remanded in jail for two weeks to enable the prosecution to compile evidence. Muite thereby sought to support his application by enlightening the court with the circumstances of the case. But Tunya had his instructions.

**Muite:** Your Honour, for Justice to prevail let the accused be released on bail. The circumstances under which she is charged are ...

**Tunya:** Don't give evidence and don't touch on the evidence leading to the circumstances of the case.

**Muite:** Your Honour, please just give me an opportunity. When deciding on bail it is essential that the court know the circumstances leading to the charge.

**Tunya.** Details of the circumstances cannot be stated to me. And if you keep arguing I'll adjourn.

**Muite:** We have to discharge our duty. I stand here to submit. ..

**Tunya:** Do you insist on that?

**Muite:** Your Honour, I am stating the circumstance ...

**Tunya:** (banging the table) I will give the ruling tomorrow (He rushed out of the courtroom.)

The lawyers immediately appealed against the ruling and were granted bail by the High Court. They also lodged a complaint against the Chief Magistrate with the Chief Justice. But Justice Hancox reacted by placing the blame on the defence lawyers. In his reply to the letter of complaint signed by Paul Muite, Hancox said: "Your account of the proceedings in the Chief Magistrate's court does not agree with that of the Magistrates or others present. It appears that including yourself, no fewer than 28 lawyers appeared to represent the accused. I am reliably informed that all or nearly all of those present indulged in jeering and barracking the Magistrate so that the proceedings could not be conducted in an orderly manner or at all. In my opinion the Magistrate rightly took the only course possible and left the court. It is dismaying that a lawyer of your standing and accomplishment who has been listened to with respect in most courts of the republic should be involved in behaviour of this kind."

Muite responded to Hancox' reaction by challenging him to punish any of the lawyers who had acted as alleged, conduct which Muite conceded was contempt of court and serious professional misconduct". He further challenged Hancox to set up a committee to independently and impartially investigate the incident and to provide evidence for contempt of court proceedings. Hancox retreated into a tactful silence.

It was either Hancox himself or a high ranking government officer with the blessing of the Chief Justice who was issuing orders to members of the bench. There could be no other explanation to the unreasonable defence the Chief Justice accorded the two Chief Magistrates, and indeed other outright dishonest members of the bench.

Such as Justice Norbury Dugdale.

Upon his assumption of the post of Chief Justice, Hancox appointed Justice Dugdale as the High Court Duty Judge. It was the onus of the Duty Judge to deal with all urgent applications made to the High Court and allocate them for hearing to other judges. Such applications included petitions under the Bill of Rights. However, Dugdale always allocated such matters to himself and made a total mess of them.

He began by confirming the holding of Justice Miller to the effect that the Kenya Bill of Rights was unenforceable. He stated: “The originating motion under Section 84 of the Constitution has no legal foundation and there is no merit in the application and it amounts to nothing in fact or in law.” When he was asked to set up a constitutional court to decide on an issue under the Bill of Rights he added: “This is a deliberate attempt to circumvent the intentions of the legislature which cannot be allowed. The application comes before this court for allocation to a suitable court. There being no such court, the application is dismissed with costs.”

Where Dugdale could not get away with a dishonest finding, he took it out on the advocate or the applicant and decided the matter on his perception of the character of either. When asked to order the Attorney-General to allow an accused in a treason trial to engage an English Queen’s Counsel, Dugdale went for the accused’s advocate Ms. Martha Karua, saying: “How often does a court have to hear the same points being brought up by advocates? Is such an application mischievous or due to ignorance of the law? There is no basis in fact or law for these allegations which are rejected by the court. The court finds the allegations as not only speculative but also indicative of the mischievous submissions that have characterized the presentation of the applicant’s case.”

When asked to declare the one-party system and Section 2A of the Constitution inconsistent with freedom of association, Dugdale attacked the applicant and his advocate: “Mr. Kariuki for the applicant used harsh words about Section 2A of the Constitution and said the court should strike it out. Neither the harsh words nor the suggestion make any intelligible sense.” And of the applicant’s

affidavit he said: “The further consideration is that the statement is made for propaganda purposes and to stir up and excite the public.”

It was also before Dugdale that Kenya’s most significant suit on the environment came. The matter in issue was a public area known as Uhuru (Freedom) Park. The park is not only the largest open public area within the city centre, it also has great significance to free Kenya as the venue renamed to commemorate the country’s independence. The Moi government was allocating a portion of it to the sole political party KANU to put up a 60-storey building in partnership with the English media magnate Robert Maxwell. Wangari Maathai, the country’s leading environmental activist, went to court and Dugdale said of her:

“The Plaintiff has strong views that it would be preferable if the building of the complex never took place in the interests of many people who had not been directly consulted. Of course many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this is a special case. Her personal views are immaterial.”

Whenever he was challenged on his views Justice Dugdale turned violent. While asking him to establish a constitutional court, Dr. Gibson Kamau Kuria also asked the judge to disqualify himself from the case due to his bias on the issue. Dugdale retorted: “This is nonsense Mr. Kuria. You are a senior advocate so you should understand the rules. They are simple, I need not show you the book. You want me to hear the application for a bench of five judges and then disqualify myself. Then this is a waste of time.”

When yet another lawyer asked him to disqualify himself, the judge called in the police, who came brandishing handcuffs and asked the lawyer to proceed with his application, saying: “You have said enough. Say more and you have had it.” For his effectiveness at suppressing all challenges to the government, Hancox retained Dugdale as Duty Judge for over five years in spite of opposition from lawyers who demanded rotation of the appointment. Hancox made sure that all matters in which the government was challenged came before Justice

Dugdale. When the registry failed to comply with his orders, he called in the police to enforce his orders.

On September 28th 1990, the Attorney-General declared the sole human rights publication in Kenya, *The Nairobi Law Monthly*, a prohibited publication. The editor filed an application in court seeking a temporary stay of the banning order pending a full challenge thereof before the courts. The court clerks did not recognize the nature of the application and they placed the file before Justice Frank Shields who granted the stay. One hour after the ruling was delivered; the police moved into the courts and picked up several court clerks. An investigation of the matter began and for three full days court clerks were picked up and interrogated by the police.

Such were the liberties that the government took with the Judiciary. In an earlier incident, in December 1986, a High Court Judge Justice Tank had ordered that the government produce a detained person in court. This was not done and the detained person's lawyer complained to the Judge about the government's contempt of the court. The Deputy Public Prosecutor Bernard Chunga, when replying to the complaint, began to shout at the Judge, ordering him on how to rule on the matter. The Judge adjourned the matter to make consultations with higher authorities and when he came back he vacated his earlier order in favour of the detained person.

It therefore came as no surprise that in 1991, 107 lawyers signed a petition to Chief Justice Hancox and Justice Dugdale beseeching them to resign from the Judiciary for the sake of the welfare of the country. The government responded by supporting the two judges and lambasting the lawyers. A cabinet minister termed the petition as "insanity of the worst order" while the KANU Secretary General said the LSK was functioning "as a political lunatic".

Two years later, the lawyers told off Chief Justice Hancox and accused him of behaving like a member of the KANU youth wing. The criticism arose out of the Chief Justice's bending to the whim of President Moi. During a public rally, Moi had accused magistrates of colluding with people found in possession of

firearms by granting them bail. Hancox, in response to the President's scandal mongering, issued a circular that tacitly warned magistrates against granting bail to persons charged with the illegal possession of firearms and requiring them to inform him directly of any case in which the prosecution counsel did not object to bail. After the criticisms were published in the print media, the state-owned Kenya Broadcasting Corporation television read an editorial statement in support of the Chief Justice.

Since the appointment of Chief Justice Miller in 1986, the performance of the Kenyan Judiciary provided unchallengeable testimony to the truth of the words of Baron de Montesquieu in *De L'esprit des Lois* when he wrote in 1748: "There is no liberty if the power of judgment be not separated from the legislative and executive powers." The sole cause of this deplorable and shameful performance was the weakness of both Justice Miller and Justice Hancox, and the villainous purpose for which President Moi appointed them to office. The one-year performance of Chief Justice Chunilal Bhagwandas Madan between October 1985 and November 1986 emphasizes this conclusion.

Chief Justice Madan's appointment as head of the Judiciary was long overdue by 1985. Former Chief Justice Sir James Wicks said to him on appointment: "I have known you over the years, and it would have served the judiciary better had you taken over from me." That would have been in 1982. But Sir James Wicks was too self-praising in his compliment. The truth is that it was Madan and not Wicks who should have assumed the post of Chief Justice in 1971. Only the politics wouldn't allow.

President Kenyatta and President Moi were both scared of Justice Madan. His performance as a lawyer, politician and puisne judge revealed an independent minded revolutionary whose deeply religious and conscientious character promised the presidents a Chief Justice they could not control. None ever intended to appoint him as Chief Justice. Kenyatta's government kept altering the retirement age for Chief Justices to maintain Sir James Wicks rather than retire him and contend with Madan. When Kenyatta died in 1978, Sir James

Wicks was 77 years old, three years older than the normal retirement age. Moi maintained him until he was 80 years old and then proceeded to appoint Sir Alfred Simpson. Simpson retired at the early age of 71 years, Madan was 73 years old, only one year to his retirement. It would have been an abomination to appoint any other person to the post in the face of Madan's seniority and all persons of goodwill in the legal and political circles expected President Moi to honour Madan with the appointment. Not because Madan would make a change since the time to do that had run out on him; simply as a tribute to his distinguished career. President Moi must have reasoned that one year was too short for Madan to cause the government any problems. He was very mistaken. Madan had the chance to bite only once, and he bit very deep. The chance was availed to him by one of Kenya's leading businessmen - Stanley Munga Githunguri. The issue in question was an attempt by the Moi government to destroy the businessman. The exact cause of acrimony between President Moi and Mr. Githunguri is unsettled and there are two theories. The first, which Mr. Githunguri himself propounds, is that he was a victim of 'Kalenjinisation' of the Kenyan society. The second, which Githunguri denies, is that he collided with President Moi over a woman named Elizabeth Karungari. She had since 1965 worked as Kenyatta's personal secretary and as a lady-in-waiting to Mama Ngina Kenyatta, Kenya's First Lady. Both Moi and Githunguri were interested in her. Moi at the time was a trim, handsome and innocent-looking gentleman of relatively good means. But that was not enough to remain competitive in the face of millionaire businessman Githunguri who changed Moi's fortunes drastically when he entered the scene. The Vice-President lost his chance with the woman to Githunguri who proceeded to marry her.

When interviewing Githunguri, I suggested this theory and he denied it. Firstly, I must say that his denial was not very convincing. Secondly, it contradicts information I received from other very reliable and well-informed sources, and conventional wisdom on the lips of the entire nation. And further, Githunguri's theory of Kalenjinization does not explain the vehement determination with which Moi pursued him over the years.

It began in 1979; barely months after Moi had been elected to succeed President Kenyatta. Githunguri was then still Chairman of the government-owned National Bank of Kenya. He came to his office one morning to find 12 Criminal Investigation Department officers at his reception. They demanded to search his office without a search warrant, a request he obliged. Inside his office they found foreign currency that they claimed he was holding contrary to the foreign exchange regulations. Githunguri insisted that he held the currency on behalf of the bank, being its Chairman. He further stressed that the currency was in the bank premises and not in his private house. The police officers took him with them to the station and asked him to record a statement. He did so after being cautioned that it could be used against him in court. Hoping to ease the pressure on himself, he resigned from the bank.

The issue was investigated for some time until 1980 when the Central Bank wrote to Githunguri, informing him that he wouldn't be charged and that the file on the matter had been closed. The foreign currency was credited to his account, his papers and files returned to him and the matter forgotten. It arose briefly in July 1981 from a question asked on the floor of Parliament. The then Attorney-General reiterated on record the decision of his office not to prosecute Githunguri. The businessman was in fact in the public gallery of Parliament on that day and heard the assurances first hand. The former Attorney-General, then Minister for Constitutional affairs, also commented on the matter from the floor of Parliament and said it was he who had found the charge merited and had made the decision not to prosecute.

The decision not to prosecute Githunguri has been mired in controversy. It had been made by Hon. Charles Njonjo, who hails from the same district as Githunguri - in Kenya that means a lot. They were both proteges of President Jomo Kenyatta, and were part of the Kikuyu aristocracy that surrounded the President. They naturally owed it to each other to protect one another, especially from the new Kalenjinisation. Even more significant is that Githunguri was safe as long as the Kikuyus remained powerful. Two successors of Charles Njonjo as Attorney-General were Kikuyu. During their

tenure Njonjo was Minister for Constitutional Affairs; a post which, combined with his political power, allowed him to influence the holders of the post. Then Njonjo fell from power and the Attorney-General's post was removed from the Kikuyus, and Githunguri came tumbling down again. This may, however, only be a coincidence of theories and incidences.

That was in 1984 after Hon. Mathew Guy Muli, a former puisne judge, was appointed Attorney-General. Githunguri was arrested, charged before the Chief Magistrate with contravening the Exchange Control Act, and remanded in custody. As per custom, the magistrate had specific instructions on the issue of bail, which was only obtained after an urgent appeal was lodged in the High Court against the lower court's ruling remanding the suspect. Githunguri stonewalled the trial by filing a constitutional reference in the High Court seeking to have the attempt to charge him declared unconstitutional. His lawyers argued that once the Attorney-General has decided not to charge a person, and he informs the said person that he would not charge him, it amounts to oppressive use of powers for the Attorney-General to revive the matter six years later.

The Constitutional Court was presided over by Chief Justice Sir Alfred Simpson. In his judgement, he found that although the powers of the Attorney-General to prosecute were not exhausted by a decision not to institute criminal proceedings, the powers should not be used unless good and valid reasons exist for doing so. But he went further to say that the Chief Magistrate was "at liberty to proceed with the trial unless the Attorney-General in the light of the answers decided to terminate the proceedings or the accused applied for a prohibitory order." The Attorney-General refused to terminate the proceedings and Githunguri applied for a prohibitory order.

The application first came before two judges of the High Court, Justice (Mrs.) Joyce Aluoch and Justice Derek Schofield. The two judges were unable to reach a unanimous decision and they informed the Chief Justice, now Justice Madan, of their failure. Madan divested the two judges of the matter and ordered that

it be heard again by three judges of the High Court. He sat on the new court as the Presiding Judge.

Madan began by dismissing the Constitutional Court as improper, saying that none of the questions laid before it concerned the interpretation of the constitution. In his opinion, the matter was one of infringement of fundamental civil liberties and he thus treated the application as one under Section 84 of the Constitution; the same Constitution that three years later Chief Justice Miller was to declare inoperative, thereby making the Bill of Rights unenforceable. Then, one by one, Madan destroyed the Attorney-General's arguments.

To the statement that no *mala fides* had been proved against the Attorney-General, Madan replied: "The court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil? It is too long, too much delay. The Attorney-General is not bound to tell the court the reason but... the total silence of the unexplained delays does raise a presumption of unfairness."

To the argument that the applicant acquiesced in his own prosecution by appearing in court, (a rather silly argument), Madan answered: "The applicant appeared in court in answer to the summons, perhaps he was taken there under escort. He pleaded not guilty to the charges. No accused person acquiesces in his own prosecution on a criminal charge, not even for riding a bicycle without a light. An accused person goes to a criminal court trembling. He comes out somewhat shredded and shorn. He has no other option. It is not acquiescence; it is submission to the power of the law."

When the State further argued that the court has no power to prohibit the Attorney-General as that would be interference with his constitutional powers, Madan said: "This argument of his, Deputy Public Prosecutor Mr. Bernard Chunga, compels us to say that he kept free-wheeling for a long time before us because perhaps he did not understand the real purport of the application. No one is challenging the powers of the Attorney-General, nor would anyone succeed.

What this application is questioning is the mode of exercising these powers... His is a strange argument indeed, one which begs itself. The less said about it the better.”

The learned Chief Justice concluded the case with one of the most eloquent speeches ever to emanate from the Kenyan bench. Said he:

“These proceedings have put our Constitution on the anvil. They are the subjects of considerable notoriety. They will become a milestone in the legal history of Kenya. The country is watching us. Africa is watching us. Other countries outside, some with their own peculiar systems of administering justice, are waiting to see how we will decide this case.

“We ... speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honored and respected by the people. The people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights. The people know and believe that destroy the rule of law and you destroy justice, thereby also destroying the society. Justice of any other kind would be as shocking as the crime itself. The ideals of justice keep the people buoyant. The courts of justice must reflect the opinion of the people.

“We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the court will be within a reasonable time as required by the Constitution. The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the chambers of the Attorney- General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly. “We are of the opinion that two indefeasible reasons make it imperative that

this application succeed. First, as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and the property restored to him ... "This prosecution will therefore be an abuse of the process of the court, oppressive and vexatious.

"We have come to believe that in this instance there are likely to be members of the public who think that notwithstanding the disesteem generated by the attempt to resurrect the charges against the applicant which were publicly proclaimed to have been dropped, the files closed and an assurance given that the appellant will not be prosecuted, the applicant should still be taken to court for law-breakers must be punished for the crimes they commit. As is their custom such body of public opinion will not stop to consider that the applicant has to be proved guilty in order to be punished, and his trial has not yet taken place.

"There will be a second school of thought who while not forgetting that the appellant may be guilty of serious contraventions of the provisions of the Exchange Control Act, they will reason to themselves that scoundrel or innocent, enough is enough. In addition, an undertaking was given officially that the applicant would not be prosecuted. That undertaking must be honoured in the circumstances of this case not only because it came from the high office of the Attorney- General of the Republic of Kenya, but also the members of the society are entitled to an orderly and tranquil life and not be subjected to vicissitudes of law especially when there have been no subsequent fresh events to justify it.

"We believe that the members of this second school of thought are in a far bigger majority and they think like we do. It is not in the public interest to continue with the applicant's prosecution. This is one of the few occasions when public policy is logical. A prosecution is not to be made good by what it

turns up. It is good or bad when it starts. ‘The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. The present incumbent of the office of the Attorney-General is in a difficult position through no fault of his own. His right to prosecute has receded by having the ground tactically cut off from under his feet completely by the Attorney-General who decided not to prosecute. He ensured by publicly informing the applicant accordingly. The Attorney-General who succeeded him practiced inertia. ‘The second Attorney-General who succeeded him reinforced the applicant’s case by stating in the National Assembly that it had been decided not to prosecute the applicant.

“Stanley Munga Githunguri. You have been beseeching the court for an order’ of prohibition. Take the order. This court gives it to you. When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.

“Ooh ... What a man!” Githunguri exclaimed seven years later when we discussed the judgement. He had escaped gaol by the skin of his teeth. His case remains as the only instance when the Kenyan judiciary has stood courageously against the state in its attempt to derogate the fundamental rights of the citizen. As Madan himself had predicted, the case became a milestone in the legal history of Kenya. Sadly, for Kenya, that was the only everlasting contribution to the legal system that Madan made. His one year in office, which ended on November 11th 1986, was not long enough to implement any of his ambitious reforms in the judiciary. Most of what he managed to implement went with him or withered under the shadows of Justice Miller who succeeded him. It was a shame that the power schemes of the politicians had denied the country the benefit of such a gifted and courageous legal and judicial officer as Madan was. On the day of his retirement, his 74th birthday, the government sent him a birthday card in jest. His personal belongings were removed from the Chief Justice’s chambers that very day and placed in the corridor. When he died on September 22nd 1989, the national grief was captured by a Kenyan writer H.E. Mohammed when he wrote: “From time to time there appears on the

earth a rare and delightful man of resplendent charm whose eminent qualities shed a wonderful lustre around us.”

Had he been at the helm for just five years, Madan would have changed the judiciary irreversibly. He could have saved the hundreds of people who were jailed on phony sedition charges in the late 1980s. He could have saved the lives that were lost in the pro-democracy riots resulting from the judiciary’s refusal to overrule the one-party state. He could have saved the country from the disastrous multi-party elections of 1992 and availed it a smoother transition from autocracy to democracy. But he wasn’t there when all that happened. And unlucky Githunguri, Madan was not there when President Moi came for him yet again. Githunguri owned the “Lilian Towers”, one of the most prestigious hotels in Africa. The hotel was initially managed by world-renowned business mogul Adnan Khashoggi as the “Mount Kenya Safari Club”. It passed on to Roland “Tiny” Rowland and was managed as “Nairobi Safari Club” and eventually rested with the Pullman International chain of hotels.

Some time in 1988, Githunguri received a call from one of Moi’s African Business agents, Ketan Somaia. Somaia sought a meeting with the millionaire, which Githunguri consented to. At the meeting, the Asian businessman expressed his interest in purchasing the Lilian Towers. Githunguri said he would be willing to sell if the price was right. Somaia offered 400 million shillings, then worth about 16 million dollars. But the hotel had cost Githunguri about 800 million shillings (32 million dollars). He rejected the offer but Somaia insisted on the same price. The meeting ended on a “no sale” note and Githunguri thought that was the last he would hear of it - until two weeks later when he received a statutory notice of sale of the Lilian Towers for alleged default in repayment of his loan.

The notice was issued by a local bank, Jimba Credit Corporation Limited. Jimba Credit had co-financed the Lilian Towers with the International Development Bank and was one of Githunguri’s regular financiers. Its financial dealings were however irregular and that made the bank vulnerable to “orders from

above” that it received to Githunguri’s detriment. The basis of the notice for sale was two loans: one granted to Githunguri personally and another to one of his companies, Tassia Coffee Estates Limited. The bank alleged that Githunguri had defaulted on the repayment of these loans to the tune of 40 million shillings in consequence of which it consolidated the loans with another to Lilian Towers and sought to sell the hotel.

Githunguri states that he never actually received the sale notice. It was from the International Development Bank that he received information about the intended sale. To this day he claims he has never seen the sale notice that was allegedly sent to him. He adds that the amount Jimba Credit wanted from him was inflated by 24 million shillings and the stated amount of 40 million shillings was a fraud. Upon these grounds he went to court seeking for an injunction against the bank.

In his application, Githunguri objected to the sale on two other grounds. Firstly, he argued that Jimba Credit was not entitled to consolidate the three unrelated loans and thereby sell the hotel. Secondly, he argued that Jimba Credit had over-advanced monies to him on the Lilian Towers loan contrary to the Banking Act. Section 10 thereof stated that:

“A licensed bank or licensed financial institution shall not in Kenya

(a) grant to any person any advance or credit facility or give any financial guarantee or incur any other liability on behalf of any person, so that the total value of the advances, credit facility, financial guarantees and other liabilities in respect of that person: at any time exceed five per cent of the total deposit liabilities of that bank or financial institution or more than one hundred per cent of its paid up capital or assigned capital and unimpaired reserves, whichever is the greater.”

The Act describes such a transaction as “prohibited business” and this, Githunguri added, made the charge illegal and unenforceable. On these grounds, he went to court. But first he wanted temporary restriction orders stopping the sale until the suit was determined. Temporary restriction orders would

have stone-walled Jimba's sale attempts for several years. The arguments were thus conducted by the lawyers on both sides with immense zeal, which afflicted the judge eventually. In his ruling Justice Mbaluto totally ignored the nature of the application before him and proceeded to decide on the matter like he was deciding on the substantive suit. And convinced that Githunguri didn't have a case, he dismissed his application. Githunguri ran to the Court of Appeal. As the Court of Appeal was to hold, the High Court Judge had got it all wrong. All that had been required of him was a decision as to whether the matter at hand was serious enough to warrant the stopping of the sale until the matter was settled. He had however, decided the question whether Jimba Credit should sell the hotel, which none of the parties had asked him to do. But knowing that Moi's shadow was cast on the case, at the very least it could have darkened his thoughts. He thus went as far as to hold that even if the hotel were sold, Githunguri would not suffer irreparable damage which could not be compensated by an award of damages.

Saying the Judge's ruling was "faulty", the Court of Appeal reversed the decision and granted temporary restriction orders. It also ordered that the substantive suit be heard by another judge other than Justice Mbaluto and condemned Jimba Credit to pay Githunguri's legal costs incurred in the application. The judgement of the Court of Appeal was delivered on February 13th 1989. Four months later, on June 15th 1989, The Attorney-General Hon. Mathew Muli published a new Banking Act. One of its sections stated:

"For the avoidance of doubt, no contravention of the provisions of this Act or the Central Bank of Kenya Act shall affect or invalidate in any way any contractual obligation between an institution and any other person." In the next subsection it added:

"The provisions of subsection (1) shall apply with retrospective effect to the Banking Act (now repealed)."

Moi still wanted Githunguri's hotel. "I can only interpret the significance of the amendment to have been construed against my particular point of defence, since they chose to make the amendment and to backdate it when my case is an issue in court," Githunguri lamented after the amendment: "An attempt is being made to forcibly obtain my property through devious means by jealous individuals."

But the games lost the element of surprise when the Court of Appeal granted restriction orders. Githunguri was granted enough time to organise his finances and they couldn't ambush him again without first asking the appeal court to waive its orders. They thus painfully let go and concentrated on harassing the businessman like treating him as a murder suspect in 1990 when a Cabinet Minister was murdered. State Intelligence agents called the Lilian Towers and asked to see him. Without calling his lawyers, he went to their offices immediately after the call and answered their questions, refused to write a statement and gave them a piece of his mind. Usually, that makes them go easy on you, and it did. He hasn't seen them since.

It is only for brief moments that the judiciary wakes up and does an honest job. The rest of the time the judges are busy lazing around and taking bribes. Unashamedly. After we were called to the Bar, one of our classmates didn't take a month finding a judge who could share booty with men charged with robbery with violence in exchange for their freedom. The clean judges at the Kenyan Judiciary could sit comfortably in a family car.

# THE ROLE OF THE ATTORNEY GENERAL

## Chapter 9

Maybe that is the way it is supposed to be, but Attorney-Generals in Kenya have always acted as hitmen for the government. They never portray that public defender image that goes with their post and instead emerge as mercenary cut-throats. With only one exception, all the country's Attorney-Generals have performed well below accepted standards of professionalism and in fact badly enough to earn them the wrath of all but the government.

That exception is James Boro Karugu, a barrister-at-law called to the Bar at Lincoln's Inn in 1964. Karugu was a professional *par excellence*. Within six years at the Attorney-General's chambers he rose to the position of Deputy Public Prosecutor and succeeded Charles Njonjo as Attorney-General on April 25th 1980. He was to hold the position for only one year after which he decided to resign.

Karugu was too honest to survive. The times called for knaves like Charles Njonjo and Mathew Muli, self-seeking politicians without conscience. Karugu was the type of man who did an honest job or no job at all. He was thus always at variance with Njonjo. For instance, he was against a right to "shoot to kill" granted to police officers by the government with the support of Njonjo; he resisted attempts by the government to prefer phoney charges against its cities; and he also refused to compromise charges in favour of the government's pets.

At one time, Njonjo tried to have his cousin Andrew Muthemba charged with a lesser offence, to which he was ready to plead guilty, but Karugu insisted on the treason charge. Njonjo was not amused. He claimed that Karugu was

messing up the Attorney-General's office, and tried unsuccessfully to convince President Moi to combine the offices of Minister for Constitutional Affairs and Attorney-General and to appoint him to the new office.

Karugu was succeeded by a man who stands a very good chance of winning distinction as the world's dimmest Attorney-General. His name is Joseph Kamau Kamere. Kamere was the most unlikely candidate for the post. No-one believed it when it was announced over the radio that President Moi had appointed him as the new Attorney-General, not even Kamere's wife. She was quoted as having said: "I was shocked and could not believe it."

And with good reason. The man was dim, tactless and lacking in decorum. He disclosed this on his very first official function during his inaugural sitting in Parliament. In Kenya, Attorney-Generals are also ex-officio Members of Parliament and upon appointment attend to the Speaker to be sworn in as members of the House and to deliver their maiden speech. While any self-respecting A-G would take this chance to win the support of the house, Kamere used it to create enemies. In his maiden speech, he thanked Moi for appointing him as AG since the appointment made him a Member of Parliament without going through an election. He proceeded to sympathise with his fellow members who had to be elected since they were "heavily laden with election debts" and could not "sleep properly". He concluded that he was luckier than they were since he had no worries,

The house nearly caved in from the resulting uproar. Temporarily disregarding the standing orders, the members howled back at the new AG, demanding substantiation, a withdrawal and a resignation. Kamere just sat back and smiled sheepishly, saying he had no apologies to make. Although he did withdraw the remark, the members made all his future appearances a nightmare. When he came to move government Bills, the members cross-examined him on every triviality of grammar and sometimes sent him back to make minor corrections. It was no easier for Kamere with the Black Bar. Added to his generosity of mind was his subservience to Charles Njonjo. In November 1981, the LSK

organised a cocktail to felicitate two newly appointed judges. Kamere was invited to attend. After consultations with Njonjo, Kamere demanded that the LSK furnish him with a copy of the speech to be delivered by the LSK Chairman as a condition to his attendance. That effectively meant Mr. Paul Muite, the LSK Vice Chairman, who was holding on for Chairman Mr. Lee Muthoga who was temporarily out of the country. Muite refused to furnish the AG with his speech and Kamere in turn refused to attend.

At the cocktails, Muite delivered what came to be known as the “colour of the goat” speech. Castigating Kamere for non-attendance, he equated the AG to the guest who, invited to a goat roasting party, demanded to know what the colour of the goat to be slaughtered is. Naturally Kamere took the speech most unkindly and was hostile to the LSK as often as he could in future.

One example is when Lee Muthoga delivered a speech criticising the Kenyan Judiciary. In his speech he accused the judges of bending over backwards to accommodate the wishes of the Executive even when those wishes were illegal. Kamere summoned him to his office and informed him that he was awaiting instructions to institute contempt of court proceedings against him. In reply Muthoga expressed astonishment that Kamere as Attorney-General should have to await instructions to institute the proceedings. He implored Kamere to charge him with contempt of court, saying it was the Attorney-General’s duty to do so if he thought a crime had been committed. Kamere backed down.

The next the Black Bar heard of Kamere he was unsuccessfully trying to defend himself in Parliament against evidence that he had improperly received 3 million shillings in the form of a loan from the Bank of Baroda, at a time when the bank was under investigation for illegal foreign exchange repatriation. This was followed by a suit against Kamere filed by a German businessman who alleged that Kamere had improperly detained his BMW and Mercedes Benz cars. It was all too much for poor Kamere who had to resign from office and has never been heard of since.

The government had thought Kamere would be a faithful errand boy but

hadn't reckoned with the requirement of intelligence. Kamere turned out to be good at carrying out instructions but terrible at managing his post. With his continuous professional blunders he became an embarrassment and a liability to his masters. Kamere in his turn had overestimated himself. He thought he was wealthy, having been a legal practitioner of the middle-class income group and at the time, one of the top earning public servants. He had also thought that by merely being Attorney-General he was powerful. To his surprise, he realised he was one of the poorest Members of Parliament. It dawned on him that election debts were easily paid and fortunes made from kickbacks. He also realised that he was one of the weakest people in Kenya. Very junior people wielded more power than him, derived straight from the President's bosom. He came to know too late in the day that all power in Kenya comes from the President.

Kamere's successor was not very different from him, only that he was in office longer than his predecessor was and messed up all the more. Hon. Mathew Guy Muli was taken from the High Court bench to assume the office of Attorney-General. Unlike Kamere, Muli needed no prompting in facilitating the abuse of power by the Moi government. He readily perverted legal philosophy to hoodwink the country as it adopted autocracy through democratic means. When he moved the Constitutional Bills removing the security of tenure for all constitutional offices, Muli explained that the concept of security of tenure was a relic of colonialism and was "inconsistent and obnoxious" as it ran against the prerogative power of the President to dismiss civil servants. It did not wince his withers to stand in Parliament and move a Bill removing his security of tenure as Attorney-General.

As public prosecutor, Muli employed all means available to put behind bars those the government wished to silence. Occasionally he would appear before the court and make a speech which would intimidate the Magistrate into convicting the accused. After the 1982 attempted coup against the government of President Moi, five university students were charged in court with the offence of participating in an illegal meeting. During the proceedings,

Muli appeared in court and delivered a speech condemning the students and likening their behaviour to that of “thankless donkeys”. The students were convicted. On appeal, the two High Court Judges castigated Muli, saying: “We are of the view that parts of the Attorney-General’s address were irrelevant and were calculated to prejudice and influence the court to the detriment of the applicants.” The same court had occasion to chastise him again for the same behaviour in the prosecution of a leading human rights lawyer, Gitobu Imanyara, saying: “The Attorney-General in his address introduced matters irrelevant to this case. Also from the manner in which they were introduced, they were prejudicial to the appellant.”

Also arising from the 1982 attempted coup d’etat was the prosecution of the Kenya Air Force Commander Major General Kariuki. Kariuki was charged before the Court Martial with failing to report the impending mutiny to his superiors. The Commander maintained he made a report to the Chief of General Staff and prayed for witness summons requiring General Mulinge to appear before the Court Martial to testify. The Court Martial agreed. The day before the summons were issued, Muli wrote to the Court Martial stating that the Chief of General Staff must not give evidence. On receipt of the letter, the Court Martial refused to issue the summons. Major General Kariuki was subsequently found guilty and jailed for four years, The Judge-Advocate who presided over the trial was appointed as a Judge of the High Court one week after the conviction.

Following Kariuki to prison was another letter from Muli instructing the Commissioner of Prisons not to grant Kariuki any remission of sentence. The Prisons Act however states that such denial of parole, which is prescribed as one third of the jail term, may only occur on account of misconduct or breach of prison regulations. Kariuki’s lawyer, Paul Muite, thus made an application to the High Court to have Muli’s directive quashed as illegal and ultra vires. On the eve of the hearing of the application, the Attorney-General requested that Kariuki withdraw his application in exchange for presidential clemency. Kariuki conceded to the offer and withdrew. No clemency was granted. Neither

was parole. Kariuki's lawyer wrote to Muli reminding him of the undertaking, to which Muli replied angrily, demanding that Muite withdraw the letter. Kariuki served the full four years of his sentence.

It was during Muli's tenure that President Moi broke down all centres of dissidence against his government. Students, lecturers and politicians were sentenced to serve long jail terms on charges of seditious libel, most on their own plea of guilty. Many came to court protesting that they had been tortured, an allegation which Muli's officers always denied even in the most evident cases. Others alleged that senior officers in Muli's office were present witnessing their torture and assisting in the extraction of confessions. Mr. Bernard Chunga, the Director of Public Prosecution, was mentioned as being part of the torturing teams. He was usually the prosecutor when the tortured suspects were brought to court.

And where the wealthy were involved, Muli exercised his powers in the exact opposite direction by entering pleas of *nolle prosequi*. A weekly magazine commented that it "often appeared strange ... the regularity with which they were entered for wealthy individuals, particularly Asian businessmen charged with involvement in major cash rackets." But unlike Kamere there was no hard evidence of financial impropriety in his dealings with suspects. However, in 1986, the Auditor General accused Muli of paying himself extra for performing his duties as Attorney-General. He had authorised payment to himself of Kshs.500, 000 for appearing three times as *amicus curiae* in the Judicial Inquiry investigating Charles Njonjo.

It was therefore for good reason that Muli was described as a "confused Attorney-General" who was "thin-skinned" and had "a poor grasp of the Constitution and the law". That bothered neither Moi nor Muli. Muli continued to serve the President faithfully and assisted him in perpetuating his autocracy. In 1990, when pro-democracy activists rose against Section 2A of the Constitution, which Muli had engineered through Parliament, he warned them that they were contravening the law since the Constitution forbade multi-partyism.

The interpretation of the law could not have been more perverted, and it was not double jeopardy for Kenya when Moi appointed Muli as an Appeal Court Judge in 1991. Muli's deputy and Moi's hatchet-man, Bernard Chunga, was nine years later appointed as the Chief Justice of the Kenyan Judiciary, and entrusted to secure the rights of the people.

Muli's successor in office was one of the world's leading lawyers, Amos Wako. A graduate of law from the University of Dar es Salaam, Wako also held a Bachelor of Science degree in Economics and a Master of laws degree from the University of London. He was admitted as an Advocate in 1970 and in 1977 elected as a Fellow of the International Academy of Trial lawyers. In 1978, he was elected Secretary-General of the African Bar Association and the following year as Chairman of the Law Society of Kenya. He held both posts until 1981. He also served as the Secretary-General of the Inter-African Union of Lawyers, as a member of the Commission of International Affairs of the All African Conference of Churches, a member of the Committee of Experts on the African Charter of Human and People's Rights and also member of the committee of experts on the Charter of the Organization of African Unity.

At home he served as the Chairman of the Association of Professional Studies in East Africa, Chairman of the Public Law Institute and member of the Faculty Board of Law of the University of Nairobi, editorial board of the Law Reports Kenya, Egerton University Council and Council of Legal Education.

Outside Africa, Wako served as Africa's representative to the Board of Trustees of the United Nations Voluntary Fund, Special Rapporteur of the United Nations Commission on Human Rights, Vice-Chairman of the United Nations Human Rights Committee, Member of the International Advisory Panel of the Robert F. Kennedy Memorial Human Rights Award, Executive Committee Member of the International Commission of Jurists, Deputy Secretary General of the International Bar Association, Chairman of IBA's 1990 Biennial Conference member of the Advisory Board of the World

Organisation Against Torture and Special Envoy of the Secretary-General of the United Nations.

Wako was the most eminent and qualified public officer in the country at the time of his appointment. His commitment to human rights and the rule of law was in little dispute, not only due to his impressive resume but also arising from his stint as a member of the Black Bar. For that reason, many Kenyans overlooked the indicators of Wako's appointment, resulting in tenure similar to Muli's. They excused his refusal, in the March 1991 Annual General Meeting of the LSK, to vote for a resolution calling on the government to abolish detention without trial. They excused his giving the President a blank cheque in his maiden speech to Parliament when he declared that no man, save the President, is above the law. They ignored Dr. Gibson Kamau Kuria when he warned that Wako's appointment was "a disaster for Kenya". Only after they saw him driving a brand new state-of-the-art Mercedes Benz 300 SEL did Kenyans take a second look at him.

As predicted by Kamau Kuria, Wako's appointment turned out to be a disaster. His Waterloo was the genocide in Kenya's Rift Valley Province. KANU leaders from the Maasai and Kalenjin ethnic groups incited their tribesmen to pick up arms and chase away all the Kikuyu people living in the province. The aim was to expel from that electoral zone all those who would likely vote against KANU in the elections. The result was 1,000 deaths, displacement of 50,000 people and loss of millions of shillings in property. Despite the fact that the culprits were known and in fact mentioned in a parliamentary report on the clashes, not a single one of them was prosecuted. Instead those leaders of the Kikuyu people who called upon the Kikuyu to defend themselves and attempted to organise defensive action were promptly arrested and charged in court.

Wako extended the same discriminatory practices when dealing with the politicians. He allowed KANU politicians to hold meetings any time they wished, with or without a permit, and to issue any threat desired against members of the political opposition. One cabinet minister asked his constituents

to arm themselves with machetes against pro-democracy advocates, while an administrative officer asked KANU youth wingers to slash off the fingers of anyone exhibiting the opposition two-finger salute in the form of a “V” sign. When any opposition figure did anything even remotely like it, Wako had him arrested and charged.

So long as the injustice was occasioned on the opposition, Wako was comfortable to sit back and watch. Many times during 1992 and early 1993 the police went on the rampage, indiscriminately breaking up peaceful demonstrations by beating up demonstrators, destroying property and looting business premises. In one instance an opposition MP was beaten up so badly by the police that he had to be hospitalised. Wako took no action - not even when the police in Nakuru, the Rift Valley Province headquarters, destroyed over 600 shops during the night. Wako never uttered a word.

To add insult to injury, he clamped down on the press, making it impossible for the media to criticise him and the KANU government. Over a period of about one year, the police confiscated more than 300,000 magazines whose estimated worth was 13 million shillings, and harassed, abducted, assaulted, arrested or charged every editor conceived as anti-government. Whenever the matter was taken to court, Wako defended the abuses as legal.

Further, he introduced amendments to the Defamation Act that laid down the minimum amount of damages that a court could grant in a libel suit. For instance, where the libel concerns allegations of an offence punishable by death, the court cannot grant less than one million shillings. The new law suppressed further discussion on several suspicious deaths, including, particularly, the genocide. Following the tradition laid down by Justice Muli, Wako further allowed himself to be used as an errand boy by KANU. In March 1992, with the intention of preparing the country for a multi-party system of government, Wako published a Constitutional Amendment Bill that provided for a Prime Minister and reduced the powers of the President. Eight days later,

the KANU parliamentary group met and issued an order to him to “withdraw it completely”. He promptly complied.

But the most dramatic instance of his treachery occurred in November 1992. On the 3rd of that month, the Electoral Commission surprised the opposition with an election date that gave it barely a month to prepare for the general election. The opposition was granted about ten days of the one-month period to conduct nationwide nominations of their Parliamentary and Presidential candidates. The law, however, to everyone’s knowledge, provided for at least twenty-one days for parties to conduct their nominations. Lawyers for the opposition parties reviewed the statutes and legal notices and discovered to their horror that Wako had sneakily published a legal notice amending the electoral law. Using his powers to rectify clerical or typographical errors, Wako amended the words “a period not less than twenty-one days” to read “*not more than* twenty-one days.” The purported amendment empowered the Electoral Commission to give the opposition one day to hold nationwide nominations. It was outrageous.

Several delegations were sent to Wako asking him to revoke the legal notice and to advise the Electoral Commission to change the election date. Wako defended himself saying his action was legal, forcing the opposition to go to court. Ruling that the purported amendment was “null and void”, the High Court censured the Attorney-General for “mischievously” slotting in the amendment in excess of his power and for suspicious purposes. The ruling was delivered by a reborn and courageous Justice Mbaluto.

Just several months earlier, the opposition had asked President Moi to announce the election date well in advance, to which President Moi had declared that the election date was his “secret weapon” against them. The intention was to call the election when the opposition was least prepared and most disorganised. For a country that had been under single-party dictatorship for almost 30 years, that was not unlikely. Moi was, however, faced with the requirement that not less than six-weeks elapse between the calling of an election and

the taking of the poll. To reduce that period, he would have needed to take an Amendment Act to Parliament and that would have sent warning signals to the opposition. Wako's evil genius was thus indispensable in achieving the President's objectives.

With that ill-fated attempt at cheating the country out of a free and fair election, Wako's reputation as a human rights lawyer and in fact as an honest person was lost. Opinion leaders began castigating him openly, calling upon him to resign. One opposition political party commented that he was behaving like a KANU youth winger. And indeed, that is exactly what Kenya's Attorney-Generals had been over the years; KANU youth wingers.

# THE FINAL CONFLICT

## Chapter 10

At the end of 1989, the government had contained opposition from all the sectors of the country. It managed to keep all these sectors under tight control, with the exception of the Law Society of Kenya and the National Council of Churches in Kenya (NCCCK). Although the government had managed to contain the counter- action from these two institutions, it could not manipulate them like it did other institutions.

What President Moi wanted was “total” control. He was paranoid about dissent and the remotest possibility of opposition activated him into extreme action. However, his system of “reward and punishment” which had successfully won over the universities and trade unions was not successful with the church and the Bar. The church was uncontrollable due to Moi’s own mistake. In 1978 he had won the support of the majority of the country’s population by portraying himself as a God-fearing person. He attended church services every Sunday, which services were largely covered by the entire public media. He was a guest in every religious ceremony of every religion or denomination. For a country where almost every citizen follows a form of religious persuasion, Moi became a messiah of sorts. When the religious leaders began to question his rule, Moi could not discredit them without alienating the populace.

Not just because, unlike other sectors, Moi could not install himself as a leader in the churches. (Elsewhere he was the leading farmer, or worker, or trade unionist etc. His voice presided over that of all other leaders in the relevant sector.) In the church, the clergy were not replaceable by a layman, even by one who had befriended the 200-odd competing religious denominations in Kenya.

Moi's inability to discredit the religious leaders was also due to their public standing. They did not have any political ambitions and every criticism from them was objective. They never faced the danger, which befell the LSK, of being accused of ulterior motives or treasonable objectives. Neither did they face the danger of being called liars. Not even Moi in his customary effrontery could dare accuse the clergy of dishonesty; not before Kenyans.

The most he could get away with was to criticise the largest conglomeration of churches, the NCKK. That way he never risked offending a specific religious grouping. In some cases, he would single out a particular clergyman for criticism. For instance, the Presbyterian Church of East Africa (PCEA) clergymen were some of the most vocal critics of his government, but he never engaged the PCEA head-on. Instead he would single out a particular clergyman (his most favourite was Rev. Dr. Timothy Njoya) for rebuke.

The NCKK gained prominence as a shield for the churches when they discussed issues directly attacking Moi. It granted comfort and security for churches and clergymen who used the NCKK as a podium to address President Moi. They knew that the President was wary of the possibility that the Council would act in concert to protect one of their own, by enrolling mass support for themselves. The position of the Bar, however, was very different. Moi had managed to turn public sentiment against lawyers. But the lawyers had a greater influence on international policy towards Kenya than the churches. Unlike clergymen, lawyers have a stronger bond of fraternity that cuts across borders. The attack on a lawyer, however insignificant, is an affront against the entire fraternity internationally. It is an invitation for numerous letters of protest from all corners of the globe.

The interpretation of the attack is a more grievous consequence. The attack of a lawyer is a confession by the government that it has absolutely no regard for the rule of law. Police entry into a lawyer's office is sacrilegious. A government can explain, with a fair measure of apparent credibility, high-handed action against a journalist or a clergyman - never a lawyer.

The LSK therefore remained a thorn in Moi's flesh. The lawyers could act individually or in concert, and still attract international attention either way. Luckily for the President, his show of force against a few lawyers and numerous non-lawyer critics had left the individual lawyer very shaken. The average LSK member was intimidated. Only a handful were ready to risk their lives fighting autocracy. The rest threw their weight behind the LSK Council hoping it would say what they feared to state as individuals.

At the beginning of the 1990s, the sole human rights publication in Kenya, The Nairobi Law Monthly, reported: "Since the Kenya Parliament amended Kenya's Constitution in 1982 and entrenched KANU as the sole lawful political organization in Kenya the National Council of Churches in Kenya (NCCCK) and the Law Society of Kenya (LSK) have been accused by politicians of having assumed the role of an 'unofficial opposition party'. The reason for this is that the two organizations have been consistent in speaking out on issues that the government and Members of Parliament claim to be their special preserve as representatives of public opinion."

Despite the advantage of international standing that the LSK had over the NCCCK, it operated under one pitiful vulnerability; it was susceptible to penetration by the politicians. It was a weakness Moi had identified as early as 1986 and one that he began to make use of. His intention was to alter the composition and leadership of the LSK and subsequently use it to further his political ambitions.

Changing the composition of the LSK could only be done by interfering with the admission of students to the Faculty of Law of the University of Nairobi, the only source of legal education in Kenya. Historically, entry into the Faculty of Law was difficult. The Faculty boasted the highest cut-off points for applicants and, with only one hundred places available, comprised the best students in Kenya.

In 1986, Moi imposed a policy on the University under which a particular number of students from “marginalised” areas had to be admitted to the Law Faculty regardless of their performance in high school. The rationale given for the policy was that without some drastic measures in affirmative action, the under-developed tribes in Kenya would never participate in the economic activities in the country. In practice, the policy would promote the under-developed tribes at the expense of the academic standards of the university. For that reason, the move was widely resented. Further, the policy was used to pump into the Law Faculty students’ tribes considered loyal to Moi’s regime. Some of these students had not scored the required grades and a few, it was said, had not qualified to be at the university at all.

Once at the university the students were organized into a lodge that was patronised by the President. Under the auspices of the lodge, they consulted with the President and with other political leaders close to him. During the consultations, the students were wined, dined and indoctrinated. They were made to view themselves as parties to inter-class rivalry whereby the critical lawyers were members of privileged tribes who wanted to maintain the status quo at the expense of the smaller tribes.

By enrolling an increasing number of indoctrinated Kalenjin students into the Faculty of Law, Moi stood to gain control of the LSK. In just a few years, the LSK would have been invaded by a die-hard pro-government faction that would neutralise the critical crusaders. And even though the new apologists would take time before they achieved a ruling majority in the society, they could counter the critical bar often and effectively enough to shake its credibility. Pitifully, most of the new students lacked the necessary brilliance to become indomitable crusaders and the requisite dexterity to pass their Bar exams. In the first year, 90 per cent of their lot performed so dismally that the Faculty Board recommended some of them to re-sit their papers and others to repeat the year. The evening before the results were released, orders were issued that the students proceed to their second year. The Faculty Board was left to organise how that would happen.

The first gang of these “Moi youths” graduated, battered and incompetent. Though they had sailed through the course with no casualties, the strain had sobered their sycophancy and they left the University less confident about themselves than had been planned. For one, though the Faculty Board was bound to pass them, it did no more than that and they thus accounted for the worst performance throughout the course. Secondly, they realised there was little they could do against the strong anti-Moi sentiments in the profession, such as was displayed in the February of 1990.

On the 13th day of that month, it was reported over the national radio that the Minister for Foreign Affairs, Dr. Robert Ouko, had gone missing. The announcement came days after the Minister had arrived from the United States where he had accompanied President Moi on a state visit. Rumour had already begun to circulate about the fiasco the visit had turned out to be and about how President George Bush had refused to see President Moi, preferring to hold talks with Dr. Ouko instead.

As the days passed with no trace of Ouko, suspicions of foul play began to mount. The developments were too reminiscent of the murder of JM Kariuki fourteen years earlier. Even before the Minister was found murdered at a small hill near his home town of Kisumu, the public had passed judgement on the government and found it guilty of the murder.

Dr. Ouko had been shot through the head with a 38 calibre revolver and his body burnt beyond recognition. He had been shot at point-blank range through the top of his skull as he knelt on the ground. His body had then been soaked in diesel and set ablaze. The gun, a machete and a plastic jerrican had been placed beside his body. As the details of the gruesome murder were broadcast, the country was paralysed by the shocking mystery surrounding the crime. There was no known reason why anyone would murder Dr. Ouko. Although he was favoured by the Western countries as a successor to President Moi, his loyalty to the President was without doubt and he had achieved distinction as a defender of the Moi government. The government was thus an unlikely

suspect until the post mortem results were released. They stated that Dr. Ouko had committed suicide.

The law students at the University of Nairobi were among the first to react. Leading a large group of students from other faculties at the university, they staged a demonstration in the city condemning the post mortem results. “No suicide, No cover- up!” they chanted along the way. They carried placards condemning the government for the ruthless murder and calling on it to resign. When the demonstrations were reported in the media the next day, bloody riots erupted in Nairobi and Kisumu. In Kisumu, police had to open fire on irate mourners who demanded to see Dr. Ouko’s remains.

The murder of Dr. Ouko and the subsequent riots occurred at a most inopportune time. A political crisis was already brewing in the country as one-party regimes in Eastern Europe began to crumble. On New Year’s day, forty days before Dr. Ouko was pronounced missing, Rev. Dr. Timothy Njoya blew up a storm when he prophesied that all the one-party regimes in Africa would collapse as they had been modelled after the unsuccessful regimes in Eastern Europe.

Rev. Njoya’s statement was an incitement not only due to its representative value as a voice of the majority but also for the courage of the clergymen in uttering it. Eleven years of the Moi era had made it inconceivable that anyone could publicly proclaim that the KANU regime would fail. Njoya’s prophecy was thus dismissed by the KANU National Chairman Peter Oloo Aringo as “absolute madness and folly”. A cabinet minister threatened him with detention, saying: “Let me remind him that the Honourable (late) Jean Marie Seroney and Martin Shikuku were both plucked out of Parliament in the 1970’s and taken to detention when the government felt that that would be the best way to safeguard the country’s security and interests.”

However, emboldened by the clergyman’s statement, opposition figures came out to express their opinions on the political situation. Martin Shikuku, an

ardent opposition figure and former parliamentarian who had been detained without trial by President Kenyatta and later expelled from KANU in the Moi era, called for the dissolution of Parliament and repeal of Section 2A. Another critical clergyman, Archbishop Dr. Henry Okullu, also called for the repeal of Section 2A and the limitation of the presidential term to two. Their calls were supported by several human rights lawyers in Nairobi.

The public reaction to the murder of Dr. Ouko and to the apparent government involvement in the killing got mixed up with the clamour for democratisation. Relying merely on the suspicious circumstances of the murder, the public lashed out against the government in a violent expression of discontent. For one week, Nairobi and Kisumu were paralysed by riots as blazing barricades were erected and cars set on fire. It seemed like it would never stop. Then President Moi attended Dr. Ouko's requiem services in Nairobi and travelled to Kisumu and to attend his burial. The public was dumbfounded. The expectation had been that Moi would be so overcome by shame and remorse that he would abstain from attending the funeral as Kenyatta had done in 1975 when JM Kariuki was murdered. Seeing him brave the riots in both Nairobi and Kisumu cast doubts on the presumption of guilt and gave credibility to his reassurances that "no stone would be left unturned" until Dr. Ouko's murderers were apprehended and punished. After the funeral, the police began arresting pro-democracy advocates for questioning, attempting to establish a link between the murder and the new advocates of democracy.

But the forces of democratisation were growing stronger every day. Fully pre-occupied with attempts to cover up the Minister's death, the government was unable to pay full attention to the calls for democratisation. The pro-democracy advocates took advantage of this weakness and of country-wide discontent. At a May 3rd press conference, two former cabinet ministers, Kenneth Matiba and Charles Rubia, who had been expelled from KANU, told the country that the one-party system of government was the major cause of political, economic and social ills in Kenya. "The single party system must go now and not tomorrow," they declared. "27 years of experiment are enough." They

called for the repeal of Section 2A, dissolution of Parliament and holding of new free and fair elections.

Three weeks later, the government suffered another blow. On the dawn of May 25th, officers of the Nairobi City Commission invaded the shanty village of Muoroto one kilometre from the city centre and ordered all inhabitants to pack up and leave. Using bulldozers, they indiscriminately demolished the slums. The slum dwellers, who had lived in Muoroto for years and knew no other home, fought back. A bloody riot resulted.

The clash between police and City Commission officers on one side and the slum dwellers on the other left about 10 people dead and an unknown number injured. Though the government denied that anyone had died, press photographs showed a baby as it was mangled by a bulldozer that demolished a house in which she was asleep. Sensing it was losing control; the government dropped its deception tactics and adopted a stem hard-tackle solution.

For publishing damaging coverage of the Muoroto riots, The East African Standard, a daily newspaper, found itself in trouble. Its Managing Director Francis Muhindi and Deputy Editor-in-Chief Mitch Odero were arrested and charged with publishing fake and alarming reports on the eviction. The City Commission went all out to 'clean up' the city. Hawkers and shoe shiners were banned from entering the city centre and another slum area, Kibagare, was demolished. More than 30,000 people were left homeless. When they tried to rebuild their homes, the City Commission descended once more with its bulldozers.

A Catholic nun, who was working among these homeless people, lamented that she had "never seen such suffering in her lifetime".

This crackdown of the political unrest created a class of hopeless city mobs that spent their days erecting barricades around the city and fighting with the police. Every action the government undertook only made the situation worse

and created for the advocates of pluralism their most effective weapon, a “Paris mob”, desperate and politicised. When the fervour was at its peak, Kenneth Matiba and Charles Rubia announced that they would hold a public rally on July 7th, with which intention they applied to the government for a licence.

Ever since they held their May 3rd press conference, Matiba and Rubia had ascended to the stature of freedom fighters. They were always followed by intelligence agents and city residents alike, having crowds converging everywhere

They stopped. That was usually outside the offices of their lawyer, Paul Muite, the former member of “the bad four”. Both were extremely wealthy businessmen who would in normal circumstances be fighting for the status quo. That they were identifying with the cause of the impoverished in Kenya made them look like demigods in the eyes of “the Paris mob”. Their call for a political rally thus sounded like a death-knell to the KANU government.

Adding to the intrigue was the history of the grounds where the meeting was to be held. The Kamukunji grounds had been used in the pre-independence period as a political meeting place, where the Independence activists addressed city dwellers. It was a freedom court, a symbol of hope. Worse, it neighboured Muoroto and other city slums which had become the bastion of resistance.

Tension mounted as the date of the rally neared. The rally was now known as “Saba Saba”, Swahili words for “Seven Seven”, representing the date and month of the meeting. Moi started holding political rallies around the country hoping that he could drum up support against Matiba and Rubia. During the rallies, he discussed the multi-party issue and finally declared the debate closed. He told the country that the people had decided against multi-partyism, relying on the rallies he had held as an indicator. Archbishop Dr. Henry Okullu replied to the order and told Moi it was not possible to end the debate as it had not yet started. Matiba and Rubia in turn vowed to hold the meeting with or without a licence.

Despite the desperate attempts the government made to scare the people away from the proposed meeting, Matiba and Rubia continued to receive support from other pro-democracy activists. For instance, the Nairobi Provincial Commissioner said the July 7th meeting would not be licensed and warned that he would take legal action against anyone attending the meeting. A warning from State House also threatened to deal with the utmost severity with any person showing blatant disregard of law and order. The security agents who trailed Matiba and Rubia began breaking into Muite's office and breaking up their consultations. Saying Muite was misusing his privileges as an advocate to host "illegal meetings", the government placed policemen permanently at Muite's door to prevent any consultations taking place. The lawyer pleaded advocate/client confidentiality but to no avail. Policemen, dressed in civilian clothes, raided Matiba's residence during the night and inflicted near fatal cut-wounds on his wife. Matiba was away in the coastal town of Mombasa when it happened but he was undeterred. "I want them to know that even if I am silenced Kenya will still continue in the spirit of truth in my absence," Matiba defiantly stated. The meeting was still on.

Supporting Matiba and Rubia were their lawyer Paul Muite, lawyer Dr. John Khaminwa (a former detainee under the Moi regime) Lawyer Gibson Kamau Kuria (also a former detainee under Moi and now holder of the 1988 Robert F. Kennedy Human Rights Award), his law practice partner Kiraitu Murungi, Lawyer Gitobu Imanyara, editor of a local human rights publication The Nairobi Law Monthly, and Engineer Raila Odinga (son of Oginga Odinga and two-time detainee under both Kenyatta and Moi). More support came from the masses. Two musicians released musical cassettes with political messages; one song was called the "Muoroto song" and another "Matiba's Tribulations". These were played in public service vehicles and in music shops for passing city workers on the streets to listen to. Also played were cassettes containing the fiery speeches of Mzee Jomo Kenyatta. By the end of June, the tension had reached fever pitch. The government was equally determined that the meeting would not take place.

President Moi reiterated that he would preserve State security at any cost. “It is not about to be negotiated in Kenya today or any time in the future,” he said. The Chief of General Staff, General Mohammoud Mohammed, publicly assured the President that the armed forces were ready to assist in preserving law and order. It didn’t help. No one backed off. The meeting was still on. Moi even appointed a committee, Known as to KANU Review Committee, to go around the country and listen to the grievances of the people. The committee was headed by the Vice President George Saitoti who sat with other KANU leaders. The ploy also failed. The government played its final card. On July 4th Matiba, Rubia, Khaminwa, Imanyara, Odinga and another lawyer, Mohamed Ibrahim, a law practice partner of Paul Muite, were arrested and detained under the Preservation of Public Security Act. Paul Muite escaped arrest and went underground for several weeks. Kamau Kuria managed to run to the American Embassy and fled the country to a life of exile teaching Law at Harvard University. He was joined by his partner Kiraitu Murungi who was in Ethiopia at the time he heard of the crackdown.

That too did not stop the rally. Surrounded by fully armed policemen and paramilitary General Service Unit Commandos, thousands of people came to Kamukunji dancing to traditional folk songs, waving tree branches and flashing the V-salute which had become a symbol of multi-partyism. All businessmen had closed shop for fear of violence. Public transport vehicles were kept off the road, also out of fear. At around mid-day, the inevitable clash occurred.

Unruly crowds engaged the police and commandos in running battles in the city. Roads were barricaded with burning tyres, business premises were looted, cars were overturned and set on fire. The riots spread to other towns. The whole country seemed to be erupting into a riot. The Police Commissioner was authorised to use all means at his disposal to quell the riots. They lasted three days and claimed twenty lives as per official figures, though the casualty rate is believed to have been much higher. In a presidential statement about the riots, Moi dismissed them as the work of “hooligans and drug addicts.”

The second scheme employed by the government to control the belligerent LSK was the manipulation of its elections. Since the amendment of the provisions regulating the election of the Chairman of the LSK, the critical Black Bar had exercised an unfettered choice of its Chairmen, who were usually the most outstanding critics of the government in power. The government had over the years restrained itself with commendable resilience from interfering with the LSK elections, but when all other measures failed, the control of the leadership of the LSK became the only viable alternative.

Some of the measures had been too weak to succeed. There was, for instance, the attempt to affiliate the LSK to KANU. The Director of International and Legal affairs for KANU, Mr. Stephen Mwenesi, had in 1989 suggested that the Law Society be affiliated to KANU in order to enhance national unity. The suggestion was received with consternation for its insidious ambition and naked, absurdity. In a face-saving about-turn, President Moi reacted faster than the LSK Council and rejected Mwenesi's proposal as "absurd and obnoxious" as lawyers in Kenya were "brainwashed" by and acted as "puppets" of foreign masters.

When that move failed, the government amended the Trade Licensing Act to require all professionals to take out trade licenses. All other professions were allowed to pay the licensing fees through their professional associations but lawyers were excluded from the privilege, thus condemning them to apply for licenses direct from the government. The new law was met with so much opposition from the lawyers that the government swept the issue under the carpet and said nothing more of it.

The LSK elections attracted the government's attention also due to the candidature of Paul Muite in the 1990 elections. Since 1989, the position of Chairman had been held by the lacklustre and ideologically pale law partner at Kaplan and Stratton, Mr. Fred Ojiambo. He was one of the letterhead partners of the white law firm who only gained prominence from fighting back against Muite. The birth of the democratisation process brought the issue of effective

leadership of the LSK back on the agenda and the March 1990 elections became a chance for the activist lawyers to lead the Bar in fighting against tyranny.

There was no complaint against Ojiambo's leadership apart from his being the wrong man at the right place. He was a professional lawyer whose main concern was, like that of the White Bar, the wellbeing of the legal profession. He was also a born again Christian and preacher in the Baptist Church. Once in a while he exhibited some political inspiration, like on November 14th 1989 when he released a press statement criticising the government for requiring members of the Somali community in Kenya to go through a nationality screening process. Yet, once-in a while he exhibited unforgivable preposterousness. On March 17th 1989 he had written to members of LSK asking them to contribute generously to a proposed Presidential Fund for disabled people. The fund had caused national chaos as civil servants were forced to contribute an amount that was deducted directly from their pay in order to boost Moi's ego. Those who could opt not to contribute, like the lawyers, preferred not to have anything to do with it.

But between the time Muite was nominated to run for chairmanship and the time the elections were held, Ojiambo turned into a KANU hawk. He became the foundation upon which a new faction of the LSK was built; a faction of KANU lawyers. There was no direct evidence of the cause of the pro-government stand he adopted but later indications directed towards wealth and power. Moi is a specialist in the politics of division. He injected into the profession the notion that Muite intended to use the Law Society as a political platform to enable him to assume the leadership of the country. It was not a difficult idea to sell. Muite had indicated that he wanted to assume leadership of the LSK in order to herald the struggle for democratisation. Moi only exaggerated Muite's ambition.

While most lawyers wanted to see democratic practices adopted by the KANU government, many were uncomfortable with the possibility that Muite would use them and their society for his selfish ends. From this doubtful lot, Moi

picked a few influential ones and promised them wealth and power, if they managed to hang on to the LSK leadership. As a result, the profession was divided into three factions.

The first was led by Paul Muite, supported by Gibson Kamau Kuria and other top human rights lawyers. It was a faction of messiahs, determined to change at any cost the course Kenya had taken. They were ready to sacrifice their careers and lives to speak up and force the government to adopt multi-party democracy. Most were the unrelenting remnants of the critical Black Bar of the 1970s.

The second faction was led by Fred Ojiambo. It comprised the government apologists interested in maintaining the status quo. Some of them were remnants of the 1970 Black Bar who for some reason had shunned the path they were placed on at Dar es Salaam and taken the one exactly opposite. Most were graduates of the University of Nairobi. In their world there were no poor peasants and tyrannical governments; just wealth and power.

The third faction was led by Lee Muthoga. It comprised the moderates. Some were former 1970 Black Bar members whose revolutionary zeal had been tempered by age, early success or professional dealings with the Government. Most were graduates of the University of Nairobi who had either made their money or failed altogether. Though they sympathised with democracy, they either thought the Moi government was not as bad as the first faction said, or they believed in an apolitical LSK.

These three factions had been fully formed by the time the election date of March 10th arrived and they became the new political reality of the LSK. The division between Black and White was no longer relevant, though most of the English lawyers sided with Ojiambo in his pro-government faction.

The inter-faction war was already in progress by the time the news hit the media. Ojiambo, sensing probable defeat, had begun laying out plans for

rigging the elections. He firstly fired the Secretary of the LSK, Miss Catherine Gathaara, whose statutory duty was to supervise the elections. Then he appointed an office secretary in place of Miss Gathaara at the LSK offices to be acting Secretary of the LSK. He refused to appoint a Returning officer, thus placing the elections directly under his supervision, He only appointed an acting Secretary, the LSK Vice-Chairman, three weeks before voting ended.

The acrimony of the elections only became public when twelve lawyers published a manifesto in support of Paul Muite. The manifesto, entitled “The Law Society Elections: Why We Are Supporting Paul Muite for Chairman”, was signed by some prominent lawyers like Kamau Kuria, Kiraitu Murungi, Dr. Oki Ooko Ombaka, the Director of the Public Law Institute, Miss Abida Ali, a senior official of the International Federation of Women Lawyers and two lecturers of Law at the University of Nairobi, Mr. Smokin Wanjala and Prof. Kivutha Kibwana. The manifesto was circulated among members of the profession and reported in a local daily. The manifesto stated in part:

“We have talked and talked and talked. We could go on and on. We are responsible for this existential morass. We have substituted words for action. Our words are not enough to remove the complaints. Our words must be matched by positive action. We have left the Law Society to run on its own momentum. Invariably, the Vice-Chairman will inherit from the office of the outgoing Chairman, and then the Vice-Chairman will inherit from the former Vice-Chairman and so on and so on. Is it any wonder that the Law Society is not delivering the goods? What do we do with our ballot papers? Toss them in dustbins, push them aside and attend to the client? We must put a stop to this.”

The story re-surfaced in another daily under the title “Big rift looming within the legal fraternity.” Other stories of electoral irregularities followed. Some of the irregularities were spelled out in a letter Kiraitu Murungi wrote to Ojiambo which said:

“There are certain irregularities which will no doubt mar the elections unless a solution is found immediately. These are:’

(1) A great majority of lawyers in Nairobi who have expressed their intention to vote for Paul Muite (including myself) have not received their ballot papers, although lawyers in such distant places as Mombasa and Kisumu have received theirs. This is surprising as this morning the secretary of the LSK informed Charles Nyachae and I that over 500 ballot papers had already been returned to the Law Society.

(2) This morning you were seen at the Court corridors carrying a bundle of ballot papers and pressurising advocates to vote for you on the spot. Some advocates succumbed to the pressure.

(3) When we checked at the Law Society Secretariat this morning, we were informed by the secretary of LSK that all ballot papers had been posted to the eligible members by Friday December 1st, 1989. When we asked her for a postage record showing (a) the persons to whom the ballot papers were posted and (b) when they were posted to them she did not have any such record. It is therefore not possible to tell the number of ballot papers sent out, to whom they were sent, and when they were sent.

(4) When I asked to be supplied with a ballot paper, (the secretary of the LSK) told me that I had to write to the Law Society applying for one. She informed us that it is not possible for a member to be supplied with more than one ballot paper. One wonders when you got the bundle of ballot papers you had in the court corridors.

(5) We have also got information that a ballot paper that had been returned to the Law Society, duly sealed, has been opened and destroyed because the voter had voted for the ‘wrong’ candidate.”

Other complaints were that Ojiambo had unilaterally appointed scrutineers of the ballot who were known to be his supporters and that some incumbent

members of the Council were assisting Ojiambo in circulating ballot papers to advocates and coercing them to vote for him. Kamau Kuria attempted to curb one of the irregularities by acting as an agent of necessity and photocopying ballot papers for advocates who had not received any. The Vice-Chairman, Lawrence Gitau, wrote to him and declared his actions unlawful.

Another attempt made to save the Society from a fraudulent election was the holding of a meeting between Muite and Ojiambo. The meeting, requested by Ojiambo to discuss the allegations of irregularities and chaired by Lawrence Gitau, agreed that Ojiambo would propose to the LSK Council that the poll taking place be nullified and a fresh poll be taken. When the matter was placed before the Council, it rejected all allegations of irregularity and then stated that it did not have any powers to nullify an election.

Ojiambo reacted to the Muite onslaught through his chief supporters Kokonya Mukolongolo, a member of the incumbent Council, who described Muite's supporters as "agents of confusion", and David Mereka, a millionaire lawyer who was an elected KANU official. Mereka issued a scathing press statement (for which Muite sued him under defamation laws) saying:

"I am personally not aware as a member of the Law Society of Kenya, of the weakening of institutions for the maintenance of the rule of law and the administration of justice.

"I feel strongly that it would be wrong at this stage in the development of the Law Society of Kenya for members to elect a Chairman who is totally opposed to all government measures. I hasten to add that under the Law Society of Kenya Act, the aims and objectives of the Law Society of Kenya are *inter alia* to support the government. I, therefore, urge members of the Law Society not to elect a Chairman who will put us on a permanent collision course with the government. Mr. Muite is not 'the right candidate'.

“It is common knowledge that Mr. Muite has fallen foul of the government which has seen it fit to withdraw his passport because unlike most other loyal citizens he is not the type of person who would project the correct image of our beloved republic to the international community.”

After Muite instituted the defamation law suit, Mereka released another press statement saying that if Muite accepted an out-of-court settlement, he Mereka would with a lot of difficulty offer damages totalling five cents which he considered fair and reasonable after serious deliberations with his lawyers.

Concerned by the ruthless exchange in the press between the two camps, particularly between Ojiambo and Kuria, Muthoga wrote to both beseeching them to declare a ceasefire. “There is no cause,” he wrote, “and there can be no cause, for a gentleman of honour to use with reference to a fellow colleague at the Bar the type of language used in those press reports. No amount of mistake or error can justify a trading of insults in the same way as some less endowed people do.”

But Muthoga’s new game of moderation had no place in this conflict. Muthoga had acted for so long for both sides, the government and its critics, that he could now exercise pragmatism. But people like Kuria had always acted for the critics and Ojiambo for the establishment. They could not compromise. Theirs was a crusade.

With this background, the Annual General Meeting of the LSK was held on March 10th, 1990. It was during this meeting that the election results were to be announced. Unlike previously, the meeting started promptly at 10 am and registered a high turn-out. The conference hall was packed beyond capacity, the attendants filling the corridor and spilling outside the building. It was the best attended AGM in the society’s history.

The meeting opened with a bang, with Kuria interrupting the Chairman to complain that the motion of lawyer Japheth Shamalla to nullify the election of Chairman had been left out. A heated exchange ensued as to why the motion

was excluded from the agenda. The Council explained that at the time Shamalla had sent the notice of motion, he had not renewed his LSK membership and was thus not a member. Shamalla argued that he had sent his notice prior to the expiry of his membership and explained that, in any event, the legal position was that he was an LSK member, the non-payment of his yearly subscription notwithstanding. Both sides exchanged equally strong arguments and the matter could only be resolved by seeking leave of the AGM to include the motion. An overwhelming majority voted for inclusion.

Item No. I on the agenda was then called. It was confirmation of the minutes of the previous AGM and it went without a hitch. The second item was the accounts of the Society and that too was dealt with smoothly. The third was the Chairman's report. Ojiambo explained why the LSK Biennial Conference, which had been scheduled to take place between March 7th and 9th 1990, had been cancelled at the last minute. He said that the conference had been prepared so badly that even papers to be discussed were not ready by March 6th, and it had to be postponed to a later date.

Kuria rose and accused Ojiambo of lying to the members. He informed the members that Ojiambo had unilaterally cancelled the conference after the government objected to the topics to be discussed. He relied on a written report of the conference committee members which stated that by March 6th every detail of the conference was ready, including the arrival dates of international participants. The report also stated that Ojiambo had called the conference Chairman G.B.M. Kariuki to a coffee shop where two pro-government lawyers Mutula Kilonzo and George Oraro, informed them of the government's disquietude with the conference topics and presenters. The conference title was "Law: African Values". The topics to be discussed included "Forum on Judicial and Legislative Attitude towards African Values"; "The Judiciary in Kenya and the search for a Philosophy of Law"; "Constitutional Rights of the Individual in Kenyan Law and Practice"; "Constitutional Development in Africa in the 1990s in the light of Political, Constitutional and Economic changes in the USSR, Eastern Europe and Southern Africa";

and “Kenya’s Constitutional Theory: The Myth of Africinity.” On listening to the government’s objections, Ojiarnbo declared the conference cancelled and issued a press statement to that effect.

The revelation by Kuria caused a heated exchange at the AGM. Most of the members were astounded by Ojiambo’s actions and many unflattering epithets were used to describe his character. When the Vice-Chairman attempted to distance himself from the report, which he had signed, the AGM collapsed into chaos with the members hurling insults against each other. Order was only restored by voting that the item be deferred until the elections were discussed.

The elections were item No.4 on the agenda. It was suggested that since the conduct of Ojiambo in regard to the elections would be discussed, he vacate the seat of Chairman of the AGM to allow full debate. Ojiambo refused to vacate. Shamalla was then asked to prosecute his motion. Discussion was called for after the prosecution. Ojiambo frustrated the debate by refusing to call on his critics to speak. His supporters, particularly the pro-government lawyers like George Oraro, Joe Okwach, Mutula Kilonzo and Kokonya Mukolongolo, would rise without his leave and talk as long as they wished. The opposing voices resorted to shouting their views above those of the speakers on the floor. The AGM became so disorderly that Ojiambo warned that violence would erupt and pleaded for the motion to be put to a vote. Joe Okwach attempted to stonewall the vote by suggesting that a poll should be taken instead. The Chairman seconded the suggestion. The rest of the AGM rejected the suggestion. A vote was taken and Shamalla’s motion was carried. Only 22 people voted for Ojiarnbo.

After the vote, Okwach still demanded that a poll be taken to validate the vote. Ojiambo allowed the suggestion and declared it carried. That left the question of the results of the election. As Shamalla’s motion had been carried, Ojiambo was forced to rule that the scrutineers could not announce the results of the elections of Chairman. But Amos Wako objected to the ruling, saying that all results had to be read. Ojiambo changed his ruling based on Wako’s observation.

Ignoring arguments that he was *functus officio*, he took the scrutineers' report and declared himself elected as Chairman. The AGM stared back in silence. Only a handful of people clapped.

The debate went back to the deferred item of the biennial conference. Mohamed Ibrahim moved a motion of no confidence in Ojiambo. Ojiambo refused to put it to vote. The AGM then asked him to resign. At that point, Ojiambo declared the meeting over.

At the end of the AGM, Ojiambo walked away with the Chairmanship but Muite left with the LSK. The moderators, who comprised the majority of the membership of LSK, were so outraged by Ojiambo's conduct that they leaned towards Muite's extremism. They now believed Muite's claim that Ojiambo had rigged the polls. To make the best of the situation, Kuria and 14 other lawyers issued a notice under the Law Society of Kenya Act asking that a Special General Meeting be held for the purpose of passing a special resolution to remove Ojiambo from office.

Ojiambo reacted by releasing a statement which accused Kuria and Muite of resorting to "gangsterism and hitlerism". He denied having declared himself Chairman of LSK, saying the Laws of Kenya did. Kuria and Muite, he said, were influencing a few malleable and gullible lawyers into extra-legal methods to hijack the leadership of the society. "I have nothing to gain from being or continuing to be the Chairman of the Law Society," he added. "But I am your Chairman. If you don't like it, go to court."

He was supported by Mkolongolo who cast blame on everybody including the local press and the British Broadcasting Corporation for being against Ojiambo. He accused Muite of hiring a gang of hecklers to disrupt the AGM, of being a tribalist and reasserted that Muite was an agent of confusion and disinformation. Also rising to Ojiambo's defence was none other than President Moi who publicly declared Ojiambo the validly elected Chairman of LSK.

However, the result of the poll requested at the AGM was still pending, and so too was the Special General Meeting requested by Kuria. Despite their insistence that Muite had no support of the majority of the LSK membership, Ojiambo and his camp decided not to take chances with the poll or the SGM. They filed a suit, through Kokonya Mkolongolo, as plaintiffs seeking an injunction to stop the poll and the SGM. The suit was filed against the Law Society of Kenya and Kamau Kuria together with the other 14 lawyers.

Concerning the poll, Mkolongolo claimed that the scrutineers report which was read at the AGM was conclusive on the result of the election and the society now had powers to conduct a poll to determine whether there should be fresh elections for the position of Chairman. And on the SGM, he claimed that the attempt to remove the Ojiambo from office was unlawful for, no matter what irregularities may have been committed in the election, the result could not be altered. He thus prayed for a declaration that Ojiambo was legally elected as the Chairman of LSK, that the poll and the proposed SGM were unlawful, and an injunction to stop both the poll and the SGM.

Ojiambo registered initial victory by refusing to instruct lawyers to represent the Society and, with the failure of the LSK to defend itself against the action; all orders sought were entered against it. Kuria and the rest, however, filed a defence averring that the court should not interfere with matters that related to the internal administration of the society. They stated that the society had, through its AGM, directed that a poll be conducted and the court could not interfere with that decision, neither could the court prevent the society from holding a Special General Meeting in conformity with its constitution.

The suit was placed before Justice Akilano Akiwumi, of the Stephen Mbaraka Karanja fame. He naturally ruled in favour of Ojiambo. "In my view," he observed, "It is for better that the status quo be maintained so that this great society can continue as it is doing."

But he had to pervert the law to reach that decision. The rule he purported to rely on required him to decide the matter on a balance of convenience, that is, either the convenience of the plaintiff or that of the defendant. Akiwurni ruled in favour of the plaintiff but based on the larger convenience of the Society, which was in this case a defendant. He decided the case as though it was Mkolongolo and the LSK versus Kamau Kuria and the 14 lawyers. Nevertheless, Ojiambo's assertion that the law of Kenya declared him Chairman of LSK became true, though belatedly.

Now in control of the core of the resistance, the government enhanced its crackdown on pro-democracy lawyers. Apart from increased arrests and detentions, government officials issued threats against anyone supporting the democratisation movement. A KANU branch chairman, William Leitich, called on KANU youthwingers to cut off the fingers of anyone found flashing the two-finger V-sign of the opposition. A Cabinet Minister, Arthur Magugu, called on his constituents to arm themselves with machetes and another minister, William ole Ntimama, urged his tribesmen to carry spears and dubs and attack all opposition supporters. The worst came from another Cabinet Minister, Peter Okondo, who warned two renowned pro-democracy clerics, Bishops Alexander Muge and Dr. Henry Okullu, against stepping into the Minister's home district. "If they try, they will see fire and may not leave alive," he said. Bishop Muge ignored the threat and visited the district three days later. On his way back, he was killed in a mysterious car accident. "I may be a small man, but I am very dangerous," Okondo boasted about the tragedy.

In the unfruitful inquest that followed, Bishop Muge's family was represented by Pheroze Nowrojee, a popular human rights advocate. During the proceedings, he wrote to the Court Registrar to complain about the deliberate delay of the court in arriving at a decision. On the strength of the letter, the Attorney-General Mathew Muli instituted contempt of court proceedings against Nowrojee. The trial was attended by more than 100 pro-democracy lawyers, representatives of the American Bar Association, the International

Commission of Jurists and Association of the Bar of the City of New York. Nowrojee was acquitted.

Other human rights lawyers that were harassed included Mirugi Kariuki, Rumba Kinuthia and Gitobu Imanyara. Kariuki and Kinuthia were charged, together with two others, with high treason. The government alleged that they had undergone guerilla training and were in possession of weapons for the purpose of overthrowing the government. They were both subjected to severe torture. Kinuthia's wife, sister and brother were also arrested and charged with concealment of treason.

Gitobu Imanyara's woes had started way back in March 1990. An Assistant Minister had criticised his publication, *The Nairobi Law Monthly*, of being "subversive" and "permanently abusing the government". Soon afterwards, a state security agent called on him in his office and asked the lawyer to accompany him. Imanyara refused to go and the officer left. The lawyer immediately released a public statement saying:

"If they come for me ... I will go knowing fully that I have made my contribution in my own small way towards restoring my beloved democratic Kenya ... I will accompany these agents of terror because I have no physical power to resist them. I go knowing that there are millions of Kenyans who are silent and painfully bearing it out with me ... I am not intimidated by the threat of the ban of *The Nairobi Law Monthly*, detention or imprisonment on trumped-up charges or manipulated trial."

They never came, until early July when he was arrested and together with others, detained. He was released three weeks later, on July 25th, but arrested the following day and charged with sedition, failing to register the magazine correctly and failing to submit financial returns. He was released on bail a week later.

Several months later, on September 28th, the Attorney-General published a gazette notice, which declared all past, present and future issues of *The Nairobi Law Monthly* prohibited publications. Imanyara filed suit in the High Court seeking a temporary stay of the banning order. The applications came before Justice Franks Shields, an opposition sympathiser, and he granted the orders. For the next three weeks, police officers arrested and interrogated court clerks to establish how Justice Shields got to hear the case.

By the end of the year, the Kenyan government was registered by human rights associations as one of the top ten abusers of lawyers. One association reported:

“In 1990, the government of Kenya launched a campaign against prominent human rights lawyers as part of its attempt to silence the movement for a multi-party system. It has sought to undermine the independence of the bar through the arrest and detention of numerous human rights lawyers, interference with elections of the Law Society of Kenya, and the attempted banning of *The Nairobi Law Monthly*...

“The current attacks against lawyers in Kenya is part of ongoing repression by a government that has frequently arrested lawyers for activities it views as hostile to it. Many of the lawyers whose cases are described ... have been detained in years past for such activities as their defence of politically unpopular clients and speaking out against conditions of detention and the denial of constitutional guarantees in Kenya.”

The government was not very bothered by the criticism as it now had the LSK as its mouthpiece. During the 23rd Biennial Conference of the International Bar Association in New York, Amos Wako downplayed the gravity of the situation in Kenya in a speech he delivered defending the government of Kenya. His speech was intriguing since the conference had been scheduled to be held in Nairobi but was cancelled by the IBA in response to the deteriorating situation.

The 1990 IBA conference had been at the centre of the Muite/Ojiambo controversy in March. It was to be the first IBA conference held in Africa and was scheduled to bring together more than 5,000 lawyers from all over the world. As Chairman of the LSK, Muite had the advantage of speaking from an international podium and inviting the whole conference to witness the suppression of democracy in Kenya. The reverberation of his testimony in all comers of the globe when the lawyers dispersed would have caused the government great damage to its image, and it was thus intent on keeping Muite and the IBA conference as far apart as possible.

But with Ojiambo as the host Chairman, Moi would have attended the conference and sweet-talked the international community to his view. It would also be possible to keep the pro-democracy lawyers away from the podium and to deny them any opportunity to air their views credibly. Ojiambo's significance in this was betrayed by Justice Akiwumi who held that it was in the interest of the Society and the IBA conference that Ojiambo remain Chairman of LSK.

When Ojiambo was confirmed as the Chairman, Muite and his camp began to campaign against the holding of the IBA conference in Nairobi. In a statement issued against the conference, Kamau Kuria stated: "In my judgment, the LSK lacks the moral authority to host the 23rd Biennial Conference of the IBA. If the independence of the Bar and democracy are more honoured in breach than in observance, what moral authority do we have of hosting an organisation which is based on an acceptance of the above two ideals."

Ironically, it was the government rather than the Muite faction that caused the conference to be re-scheduled. When the state machinery was activated to silence the pro-democracy lawyers, the western embassies sent red signals to their countries and warned of the increasing instability. The louder the lawyers screamed, the harsher the government became, making the country more and more unstable.

And so the year ended, the most exciting year of the LSK. As 1991 dawned, its events were being predetermined by three facts: That Muite would win the 1991 LSK election, that the clamour for democratisation would continue and that the government would enhance its repression.

## Chapter 11

The government won the opening rounds of 1991 with little difficulty. It began by re-arresting Gitobu Imanyara on March 1st and charging him with other counts of sedition. The charges were based on an editorial he had written in February, which talked of tribalism in the government. He was remanded at Kamiti Maximum Prison where he became terribly ill and had to be transferred to Kenyatta National Hospital. At the hospital, he was handcuffed to his bed and guarded round the clock.

Next it refused to register the National Democratic Party, a party launched by veteran opposition leader Jaramogi Oginga Odinga. The party had been launched in February 1991 in defiance of Section 2A and to KANU's monopoly of the political scene. The government treated the launching of the party like a circus act and was not in the least shaken by the unfruitful attempt.

The next round, however, went to the pro-democracy activists. On March 9th 1991, Paul Muite won the 1991 LSK elections for Chairman against a little known upcountry lawyer in Ojiambo's camp. The victory was pre-ordained, the entire membership of the LSK, apart from the few pro-government lawyers, being solidly behind Muite; and his camp being very watchful this time. The previous year's rigging had been largely enabled by the presumption that every lawyer was a person of honour and could never engage in rigging a Bar election, a presumption that gave Ojiambo ample opportunity to rig without immediate suspicion. In the 1991 election everyone was hawk-eyed and every measure necessary to prevent a repeat of the 1990 election was insisted upon.

The AGM, which declared Muite the new Chairman of the LSK, was as stormy as the previous one. Knowing that Muite's victory was imminent, the pro-government faction, now led by former chairman Mutula Kilonzo, made

attempts to prevent the reading of the scrutineers' report. Raising the issue immediately the meeting began, Kilonzo argued that as Mkolongolo's case against LSK was not fully determined, the society could not deal with the issue of elections. He told the meeting that it was not yet conclusively determined whether Ojiambo had been validly elected or not and it was necessary to first settle the last year's election before dealing with the new one.

The argument, supported by Joe Okwach, was meant to defer Muite's assumption to chairmanship and perpetuate Ojiambo's reign. The hostility with which the argument was received was so intimidating that even Mkolongolo disowned it. Finally, the matter was put to vote and all lawyers but Mutula Kilonzo and David Mereka voted for declaration of the results.

Then followed another contentious matter: a motion submitted by lawyer Paul Wamae calling upon the government to repeal the Preservation of Public Security Act. The motion was strongly supported by the lawyers who had been previously detained, like Dr. John Khaminwa. While the pro-government faction agreed that detention without trial was objectionable in principle, they said the LSK was not the proper forum to call for its abrogation. Detention being the ultimate sanction the government possessed against dissent, the pro-government lawyers knew that such a motion was an act of aggression against the authorities. But their disquiet notwithstanding, the motion was carried by another overwhelming majority.

Then the election results were announced. Apart from Muite who was elected Chairman, G.B.M. Kariuki, a former controversial chairman and human rights activist, was elected to the council; Willy Mutunga, a former detainee, was elected as Vice-Chairman; Martha Karua, Japheth Shamalla and G. Akhaabi, all human rights advocates, were also elected to the Council.

Even before the AGM started, Kilonzo held a press conference where he swore to fight Muite at all costs. "If he is elected Chairman, we will fight him right from day one," he declared. After the results, he reiterated his stand saying:

“Our principal concern is that Muite’s political posturing has pitted the Law Society against the government ... It is therefore imperative that Muite resign forthwith and continue his fight for his political cripples outside the LSK without damaging the essence and structure of the LSK for generations to come ... If Muite does not resign I appeal to all lawyers of goodwill of this country to form a rainbow coalition to remove him and his clique.”

Such unapologetic support for the Moi government was typical of Mutula Kilonzo. During an International Commission of Jurists seminar the previous year, he had stood up and told off Kamau Kuria, proclaimed his loyalty to the government and proudly displayed his red KANU shirt. He made no secret of the fact that he desired to be appointed Attorney-General and popular humour had it that he took his Mercedes Benz limousine to D.T. Dobie, the local Mercedes Benz dealers, so that they could drill a hole on the front left side for the official flag. Unfortunately for him, when the position was up for grabs, Amos Wako had more support within the Cabinet. Kilonzo has never been heard of since.

Muite was undeterred by Kilonzo’s declaration of war and he hit the ground running. That very evening after the AGM, he hosted a dinner at the Hotel Intercontinental, a dinner that was attended by several judges of the High Court. In his speech, Muite thanked the members for voting him to office and for passing the motion on detention without trial. Then he continued:

“The Kenyan government must continue to be told by us lawyers that the greatest threat to public security is not us lawyers when we speak out, it is not the clergy when they speak out. It is not Martin Shikuku, Dr. Timothy Njoya, Masinde Muliro, Archbishop Manasses Kuria, Bishop Okullu or indeed any other Kenyans. The greatest danger to public security is the Kenyan government itself. It can remove that danger by adhering to the Constitution, in theory and in practice. By faithfully subscribing to the Rule of Law, democracy and respect for fundamental human rights, ‘threat to public security’ will become a thing of the past.

“It is the function of your Society to be the watchdog against any erosion or violation of these ideals. It would be immoral in my view for your society to compromise on these ideals or trade them in, in return for government favours. Principles cannot be compromised.

“Under my Chairmanship, your Society will endeavour to work with the government and judiciary but not, and I repeat not, at the expense of compromising on issues of principle. The rule of law must reign supreme. Then and only then can there be a shared moral platform between the lawyers and the government. Then and only then can prosperity for us as a profession and as a nation be assured. Let us not live in the shackles of the past inhibited by views that speaking out on important public issues is politics. If it is, so be it.”

Muite concluded by calling upon the government to respect the freedom of association as provided for in the Constitution by registering Oginga Odinga’s National Democratic Party, by releasing Raila Odinga, Kenneth Matiba and Charles Rubia from detention, and by calling upon the members to remember Gitobu Irnanyara in remand.

The government’s reaction was spontaneous. President Moi warned that the introduction of politics into the LSK was a threat to the administration of justice to the country. Expressing surprise that some judges had attended the LSK dinner, Moi strongly criticised the passing of the motion calling on the repeal of the Preservation of Public Security Act. The President was joined in his criticism by his right hand man, also known as “Moi’s shadow” and “The Total Man”, Cabinet Minister Nicholas Biwott. Biwott warned Muite that he was entering politics at his own risk and termed the LSK Chairman’s challenge to the government “treasonous”.

In turn, the LSK Council issued a statement registering its support for Muite and for the sentiments he had expressed in his address. “The new Council has no wish to be distracted from the purpose for which it was elected, which

includes taking all the necessary steps for the promotion and attainment of the Rule of Law, Democracy and Human Rights,” the Council said. The statement was answered with a law suit. On March 14th 1991, four Nairobi lawyers applied to court for an injunction order restraining Muite from presiding over or participating in any LSK meetings and from conducting the business and affairs or from issuing any statements on behalf of the Law Society of Kenya.

The four lawyers were Aaron Ringera, Philip Kandie, Nancy Baraza and Nesbit Onyango. Evidence that emerged later revealed that they had instituted the suit on behalf of the government. Ringera, who was leading the Plaintiffs, was a former law practice partner of Kamau Kuria and Kiraitu Murungi. He had been wooed away from the two by George Oraro, a prominent pro-government lawyer who offered him a partnership. The shift was believed to have been instigated and sponsored by the government in order to destroy Kamau Kuria.

The other three Plaintiffs were paid mercenaries. According to a confession sworn by Nancy Baraza one year later, the Plaintiffs had been “used as pawns” by anti-Muite crusaders. Baraza denied ever having been paid to institute the suit. In her confession, and in an interview with me, Baraza said she had been tricked into becoming a Plaintiff by Mutula Kilonzo. Kilonzo, her former employer, had invited her to his office one evening. Upon her arrival there, she met Kilonzo, Wako and former Justice of Appeal Zacheaus Chesoni, who was later appointed to the post of Chairman of the Electoral Commission. Also at Kilonzo’s office were other prominent pro-government lawyers who she was not given an opportunity to meet.

Baraza says Kilonzo talked to her about Paul Muite and how the LSK Chairman was using the Society to further the cause of a Kikuyu presidency. He also told her that it was necessary for members of the LSK to protect their society from such misuse, to which Baraza conceded. She then agreed to sign an acknowledgement that she was ready to be part of such litigation. That was the last she saw of Kilonzo until a report was aired on television one evening, stating that the four Plaintiffs had sued Muite and his council. The following

day she went to complain to Kilonzo and threatened to withdraw from the suit. Police officers were then sent to her office to intimidate her, and she lost the courage to expose Kilonzo and his clique.

Another source, however, contradicts Baraza's story. According to the information I obtained from the source, Baraza was a hired mercenary and a willing Plaintiff. The only differences that arose between her and Kilonzo concerned her fees. When asked how much money she wanted in order to sue, she reportedly said Kshs600,000/-. She later learned that one of the other Plaintiffs had asked for and obtained Kshs2.5 million. That was when she tried to back out and the police intimidation occurred.

I was more inclined to believe the second story. Baraza's story presumes extreme ignorance, which is not easily imputable on a lawyer of her experience. How plausible is it that an experienced legal practitioner could sign a document and innocently plead ignorance of its contents? Secondly, Baraza said she could not withdraw from the suit because she was threatened. But one year later she confessed without any fear of retribution. And two months after the first suit she, in company with the same Plaintiffs, instituted a second suit against Paul Muite and the LSK Council. She does not explain why, not having been a consenting party to the first suit, she allowed herself to be part of the second suit. Further, during the period in question, Baraza had come through some grave personal turmoil, which included a divorce, a dissolution of her partnership in Law practice and the loss of some substantial amounts of money to a trickster, which left her vulnerable both mentally and financially.

Whichever of the two versions is true, the Plaintiffs did go to court in a government-sponsored litigation which was decided by a government-bent judge, Justice Dugdale, and confirmed by Justice Mango, former Chief Magistrate. They issued an injunction restraining the LSK Council from making statements which were political in nature and contrary to the Constitution of Kenya and the Law Society of Kenya Act; from campaigning or calling for the registration of any political party and a multi-party system of government;

from conducting the business of the LSK in any manner political; from making any statements that may cause public dissatisfaction and prejudicially affect the peace and good order of the Republic; and particularly prohibited Muite from presiding over or participating in LSK Council meetings or in any way conducting the business and affairs of or issuing any statements or participating in any manner whatsoever in any activity of LSK as its Chairman.

The suit was followed with a backlash on the LSK. Chief Justice Hancox broke from a long-standing tradition and refused to involve the LSK in any manner in the admission of new advocates to the Bar. He also refused to grant the Council an audience even on crucial matters affecting the profession. He was joined in snubbing the Society by every government official including the Attorney-General, the Commissioner of Police, the Registrar General and the Commissioner of Lands. A government order also prohibited any contact between pro-democracy advocates and diplomatic representatives from Western democracies. The four Plaintiffs had thus justifiably pleaded their fears to the court (and the court expressed similar fears) that the government may consider proscribing the LSK over Muite's crusade.

The government had thought that an order of the court and the fear of going to jail would contain Muite and his Council. But the courts had lost a lot of credibility over the years and by 1991 were almost held in contempt by the pro-democracy lawyers. They would, for instance, appear in court in droves, (over 30 lawyers appeared for Imanyara in his sedition case and for Pheroze Nowrojee in a contempt of court case), and insist on being put on record by the Magistrate. They would also file cases in court challenging laws that were repressive, like Section 2A of the Constitution, and use the chance to send messages to the public that Kenya was under dictatorship. Justice Dugdale would keep throwing out the suits and the lawyers would keep filing them, turning the courts into a political battleground.

Out of sheer contempt for the disgraced courts and his own die-hard confrontational style, Muite defied the injunction. On May 13th 1991, two

weeks after Justice Dugdale's orders were confirmed by Justice Mango, Muite convened a Council meeting, presided over it and discussed matters that were later to be considered political. A press release issued after the meeting read: "Council of the Law Society of Kenya met today May 13th 1991. Mr. P.K. Muite, the LSK Chairman, presided over the meeting. Council takes the view that the injunction does not restrain the Chairman from presiding unless the meeting is political. This Council meeting, like all Council meetings, discussed normal LSK business and not politics.

"Council wishes to record its great difficulties in discerning the judicial basis of the rulings/injunctions by the Hon. Mr. Justice Dugdale and the Hon. Mr. Justice Mango in NBIHCCC No. 1330 of 1991. Accordingly, Council has given instructions for an appeal to be lodged with the Court of Appeal of Kenya. In the meantime, Council notes that Section 4 of the LSK Act as interpreted by Justice Dugdale and Mango does not make it and/or its Chairman forfeit the collective and individual freedoms of conscience and speech as enshrined in the Kenya Constitution *ipso facto* on being elected to office. The crux of the Plaintiffs complaint in the suit in which these injunctions/orders have been made is that the Council and its Chairman will be deemed to be speaking on behalf of other members including the Plaintiffs and that the Plaintiffs will be seen to be sharing the Council's views.

"Council is accordingly of the view that provided that it or its Chairman make it clear that the views expressed are those of the Chairman and or Council and not those of the Plaintiffs, there cannot be breach of the court order/injunction.

"Council takes this opportunity to state that while appreciating the struggle by Kenyans towards the restoration of democracy and human rights in the country, the Council is very concerned that there are many instances from which it is quite clear that in their efforts to suppress and even punish the advocates of fundamental rights, the Authorities were readily assisted by a section of our judiciary. There has been a line of decisions and rulings by the

Hon. Mr. Justice Dugdale, the judicial basis of which is extremely difficult to discern.

“The Hon. Chief Justice R.A. Hancox has, since his appointment in 1987, retained Mr. Justice Dugdale as the ‘permanent’ duty judge. The Chief Justice himself decided the Mwangi Stephen Muriithi case which has rendered havoc to civil servants’ security jobs. Council has similar difficulties in following the W basis of some of the rulings and judgements of the Hon. Mr. Justice Porter.

“If judges and magistrates are to continue being held in high esteem by the public and Council, their judgements and rulings must accord with the expectations, sense of fairness and justice, of reasonable lawyers and members of the public.

Council has also received numerous complaints from members in this regard. “Council is of the view that a tribunal ought to be set up in terms of Section 62 of the Kenya Constitution to inquire into the ability of his Lordship the Chief Justice and the Honourable Mr. Justice Dugdale to perform the duties of their office with a view to removing them should the tribunal so recommend. Council would argue in detail before such tribunal for the removal of the two judges.”

The immediate reaction came from pro-government lawyers headed by Maxwell Ombogo who accused Muite of “vainly heading a clique of disgruntled lawyers who have miserably failed in their duties and whose aim is to incite the public against the law for their own selfish interests.” The second reaction came from Ringera, Kandie, Baraza and Kajwang who filed suit at the High Court seeking to have Muite and the LSK Council committed to civil jail for contempt of court.

The contempt of court proceedings lasted five months, during which period Muite and the LSK Council scored continuous victories over the government. The suit bolstered Muite’s reputation among Kenyans who saw him as the

bastion of resistance to tyranny. Hundreds of people appeared outside the court to listen to the submissions and they would carry Muite shoulder-high as he left the courts.

The pro-government faction, on the other hand, lost all its assumed credibility. Those who had tolerated its support for the government found the attempt to put Muite and the Council behind bars unacceptable within the legal fraternity. The objection was expressed through open hostility towards the leaders of the faction. Ringera and his co-plaintiffs particularly received the worst treatment. Their fellow practitioners openly avoided any contact with them in the court corridors and in the coffee houses. They were forced to share their own company, shunned by their professional colleagues.

A popular saying has it that agony for the Kenyan lawyer is entering Trattoria (a famous Italian Restaurant near the High Court patronised by senior members of the bar) and having no-one to talk to. Baraza soon became seriously affected by the excommunication and begun attending psychotherapy sessions. Her therapist eventually convinced her that the only remedy was to purge herself of the guilt, and in 1992 she finally publicly confessed and prayed for forgiveness from the members of the LSK and the country. Ringera also succumbed to the exclusion. His hair turned grey, his face sullen, and he had to resort to the company of less animated new advocates for his professional communion.

The contempt of court suit also brought a lot of international scrutiny to bear on Kenya and the human rights situation. Representatives from human rights and bar associations from all over the world came to Kenya as observers of the proceedings while others sent letters of protest to the government and letters of sympathy and support to the LSK.

Also receiving international acclaim was Gitobu Irnanyara, who was still in remand prison. In March he had been awarded the World Press Review International Editor of the Year Award, 1990. In May he received the

1991 International Prize for Freedom from Liberal International. In June he also received the 1991 Golden Pen of Freedom from the International Federation of Newspaper Publishers. He also received the 1991 Percy Qoboza Foreign Journalist Award, 1991 International Human Rights Law Group Human Rights Award, 1991 Nieman Fellows at Harvard University, and the 1991 Louis M. Lyons Award for Conscience and Integrity in Journalism. Kamau Kuria, who was still in exile in the USA, was also honoured with a Doctorate degree in Law by the Lewis and Clark North Western School of Law.

Emboldened by the support, Muite and the LSK Council pressed the government even harder. On June 12th, Bishop Henry Okullu announced that two commissioners from the Church had agreed with the LSK to host nationwide prayer symposia to discuss “justice and peace in a free democratic Kenya.” The two commissioners were drawn from the politically notorious Church of the Province of Kenya, CPK (nicknamed Church of Politics of Kenya) and the National Council of Churches of Kenya (NCCCK). The secretary of the convention, named the Justice and Peace Convention, was Paul Muite. The agenda was the widespread poverty caused by economical mismanagement, the worsening political crises, the pervading climate of fear and uncertainty, the non-involvement of the majority in government and the isolation of Kenya by the world community.

The KANU national Chairman, Peter Oloo Aringo, reacted to the Convention by accusing some foreign embassies of clandestinely funding and sponsoring the prayers in order to destabilise the government. He was supported by cabinet ministers and pro-government lawyers who warned Kenyans against attending the prayers. Concerned that the government may use force to disperse the prayer sessions, Bishop Okuliu postponed the prayers indefinitely, but urged Kenyans not to give up the struggle.

In early September, 107 lawyers issued a public statement calling on Chief Justice Hancox to resign. The statement laid out all the misdeeds of Hancox

in office, from his open support for the government to excluding the LSK from official functions. The statement was supported by Muite who incorporated it in an open letter he sent to the British Secretary of State for Foreign Affairs, Douglas Hurd. In his letter Muite charged the British government with a moral duty to assist in peaceful and democratic changes in her former colony by withdrawing its sponsorship of Chief Justice Hancox and Justice Dugdale. He also called on the international community to cancel all financial assistance to Kenya until the government agreed to undertake political reforms. Muite's statements were described by the government as "insanity of the worst order."

The government's spirit had by then been greatly dampened by the outpouring of criticism from around the world and at home. It still made attempts to silence Muite. His car was ambushed and stoned on five different occasions and was once showered with human excrement; he was continuously trailed by security agents and threatened with death; the Commissioner of Income Tax attempted to distress him for alleged taxes; he was even declared a *persona non-grata* in the Rift Valley province, Moi's ethnic homestead, by the provincial representatives in the government. But the attempts were all futile. As a last resort KANU, through its Secretary General Joseph Kamotho, advised the government to deregister the LSK. Aware of the implications of such a move to the international reputation of his government, Moi declined to do so, saying there were enough patriotic lawyers in the society to vote out the subversive elements.

By October 23rd, when the judgement in the contempt of court case was pronounced, the decision of the court was more or less predictable. While the government still wanted Muite and the LSK Council punished for contempt, it did not want to invite more international censure and possibly sanctions by sending all the eight lawyers to jail. It was perhaps the knowledge of the government's dilemma that further gave Muite the courage to address the court as he did at the close of submissions.

"The LSK has not asked to be elected to parliament," said Muite. "Speaking about good governance is the right of every Kenyan. It cannot be curtailed

by a court order. For a court of justice to purport to do so is to act immorally and unconstitutionally. It is a crime against the people and a violation of the Constitution. It is a perversion of justice. Let us not therefore shadow-box in the present proceedings or indulge in pretenses.

“The LSK Council is before your Lordship today and on the doorsteps of prison because those in power are determined to remain in power courtesy of the security forces and the judiciary but without the consent of the people of Kenya. That is why they want us behind bars. If our going to prison will hasten the day when Kenya can have a truly free and independent judiciary, hasten the day when the Kenyan people can freely elect their leaders and, if our going to prison will assist in the achievement of meaningful and peaceful reforms, then the Council of The Law Society of Kenya considers their imprisonment a small price to pay to avoid the bloodshed, loss of life and suffering which will otherwise inevitably be paid ... Our prayer is that by the time we come out of prison the reforms Kenyans need so urgently will have been realised. Our faith while in prison will be the knowledge that the present leadership will not and cannot stop the tide - the LSK and its Council will have played its part and paid its share of the sacrifice.”

They were all found guilty as they had expected but instead of jail were fined Kshs 10,000/= each, and warned not to insult W officers. The judgement of Justice Mwera, who had presided over the proceedings, was however belittled by two new developments. The first was the award granted the day before the judgement by the American Bar Association (ABA) to the LSK Council. In awarding its annual International Human Rights Award to the Council, the ABA described the society as “one of the few institutions that have been able to remain active in opposing human rights violations and the erosion of the rule of law in Kenya.” The second development was the acrid reaction of the Robert F. Kennedy Memorial Center for Human Rights which criticized the judgement saying: “By coming dangerously close to destroying the independence of the legal profession, this punishment undermines the Kenyan

legal system's ability to protect human rights. The center calls on the United States Congress, the Bush administration and Bar Associations around the world to condemn the High Court's decision."

The case marked the last determined attempt to silence the LSK. In fact, the government stopped treating the suppression of the legal profession as one of its official policies and left the dirty games to its officers who were still spirited enough to continue with the campaign, such as Justice Mbiti, a judge who Moi had appointed to the bench. After the LSK Council was convicted for contempt of court, Ms Martha Karua, a Council member, appeared before him in a divorce case. Her opposing counsel, Nora Nyaanga, objected to Karua's appearance before the court arguing that since she had been found guilty of contempt of court, she should be barred from addressing the court until she had purged her contempt by way of an apology.

Karua submitted that as she had already been convicted, the court could not put her in jeopardy a second time. As the case had already been concluded, the judge could not reopen the matter and purport to enhance the punishment. She flatly refused to apologise to the High Court in spite of the judge's insistence that she do so. The judge then ordered that Karua be barred from addressing the High Court until she had tendered an apology for her contempt.

Karua came back later before the same judge with an application that he stays his order pending her appeal against it. She told the judge that law practice was her only source of income and unless the order was stayed until the appeal was determined, she would suffer irreparable damage. The judge replied: "You are interfering with my livelihood. When you say that judges are not independent what do you think we are doing here? Now I cannot go anywhere especially abroad without getting embarrassed." He flatly refused to grant the stay sought. Karua appealed and without much ado the Court of Appeal granted a stay of the order, and ordered that she continue addressing the court until final determination of the appeal.

Meanwhile, the LSK made good use of its international acclaim to get the international community to force the Moi government to adopt political reforms. In an editorial in *The Nairobi Law Monthly* of September, Gitobu Imanyara called for the “suspension or withholding of financial assistance that is channeled through government or government-controlled agencies” until democratic reforms were undertaken. The LSK also asked the government to register a new political movement launched by Jaramogi Oginga Odinga in mid-August. The movement, called the Forum for Restoration of Democracy (FORD), was speedily becoming an association of all pro-democracy activists and the foundation for an opposition political party.

The significance of FORD had worried the government from the time of its launch. Moi called it “illegal” and KANU termed it a “bogus dub” of “retired politicians”. The Secretary-General Joseph Kamotho called its formation “folly, cheap and lame” and its members “laggard and senile.” Other KANU activists called upon Kenyans to shun the coalition, going as far as preaching against Ford cars and anything bearing the name Ford.

The excitement that had been directed towards Matiba and Rubia was now directed to FORD. The movement virtually took on the stature of a religion, adopting the V-sign two-finger salute that had been used during Matiba’s and Rubia’s campaign. Citizens would express their defiance by publicly saluting each other using the V-sign. In turn, the police arrested people and charged them with threatening to create a breach of the peace when they displayed the V-sign. Government departments also began firing employees suspected of being FORD sympathisers.

The significance of FORD was further enhanced by the open support it received from pro-democracy lawyers. Members of the LSK Council and other activists like Imanyara, Shamalla and Orengo, openly consulted with FORD founders and bestowed on it the blessing of LSK supporters. Kenya was soon infected by a bad case of what was baptised “Ford Fever.”

To display its nationwide support, FORD had called for a public meeting at Kamukunji to be held on October 5th. The government had refused to issue a licence for the meeting and FORD had taken the government to court. The suit had been given to Justice Dugdale who had procrastinated over the proceedings, forcing FORD to withdraw the suit on October 3rd. The coalition then announced that it would hold another meeting at the same venue on November 16th.

Again the government refused to issue a licence for the meeting. This time, FORD vowed it would hold the meeting with or without a licence. Paul Muite supported FORD in its argument that it did not require a licence to hold a meeting saying the right of association under the Constitution could not be derogated by the Public Order Act, which required licensing. He called upon Kenyans to disregard Acts of Parliament that demeaned their Constitutional rights and advised them that they were under no moral obligation to obey immoral laws.

The government resorted to the use of force. On November 14th, Odinga and George Nthenge, both founding members of FORD, were arrested. Also arrested were Imanyara and two other prominent FORD sympathisers. They were all put in police helicopters and flown out of the city. When the other founders and sympathisers heard of the arrests, they went underground. They all emerged on November 16th and attempted to go to Kamukunji where thousands of supporters were awaiting them. A police dragnet was in place and they were all arrested, also put in police helicopters and flown out of the city. The dragnet netted Masinde Muliro and Martin Shikuku, both founding members of FORD, Salim Ndamwe, a prominent FORD supporter, and lawyers Muite, Shamalla and Orengo.

The arrested activists resurfaced in their home towns where they were charged with publishing, printing, circulating, distributing and advertising notices to hold an illegal meeting. Those who went to Kamukunji were invaded by the

GSU and arrested. Over 90 people were charged in court with breaching the peace and displaying the V-salute.

The government had hoped to remove the heat from Nairobi by not charging the activists in the city. Instead, it took the heat to the hinterland. The upcountry population jammed the courts to see the popular activists it had only read about in the newspapers or heard over the radio. The activists were cheered and carried shoulder high, and they addressed the crowds as the upcountry police watched. In Meru, where Imanyara was charged, three KANU officials announced their resignation from KANU, accusing it of being tyrannical.

Finally, Moi got the message. In 1990 he had announced that Kenya would need more than 20 years before it could even consider adopting a multi-party system of government. When Kenya's donors, outraged by the November 16th crackdown, said they would reconsider financial assistance to the country, Moi changed his tune and began talking of two years. But it was too late. On November 26th, after a meeting in Paris, the Western donors froze balance of payment support to the Kenya government. The decision spelled doom for the Kenyan economy. Moi could no longer continue to deceive himself. A collapse of the economy, combined with a highly agitated populace, was the perfect recipe for a revolution.

On December 3rd 1991, Moi announced that Section 2A of the Constitution would be repealed and opposition political parties registered.

## EPILOGUE

The immediate effect of the repeal of Section 2A of the Constitution was to transfer power from the LSK to the new opposition political parties. This was chiefly because the LSK was never a political party and did not thus enjoy a representative capacity, and partly because when the pro-democracy advocates in the LSK joined the new political organisations, the significance of the Society in the new political scene was minimal. The majority of the activists joined the Forum for the Restoration of Democracy (FORD) where they earned the title “young turks” and were elected to the party’s National Executive Council. Paul Muite was elected as the First Vice Chairman, second in hierarchy to Oginga Odinga. Gitobu Imanyara was elected to the post of Secretary General; Wamalwa Kijana, also a lawyer, was elected as the Second Vice Chairman; George Kapten, a lawyer, was elected as the Second Deputy National Director of Elections; James Orengo was elected as the Secretary for Constitutional and Legal Affairs; John Khaminwa was elected as the Assistant Secretary for Constitutional and Legal Affairs; Kiraitu Murungi was elected as the Secretary for Human Rights and Democratisation. Other lawyers who joined or associated closely with FORD were Mohamed Ibrahim, Pheroze Nowrojee, Garvace Akhaabi, Japheth Shamalla and Martha Njoka.

The legalisation of political pluralism and the shift of political competence and personnel from the LSK to the registered opposition political parties left the Bar Association hollow - indeed spent. Issues of democracy were now being tackled by the political parties and the public no longer looked upon the Society to speak up against the government. The doctrine of separation of the powers of government began to take root in the new political scheme, with the political parties handling all issues that required direct political action, and the Society handling those issues that required legal action.

The separation of powers, however, did not come about as a result of the country's realisation that government should be divided between different institutions; it arose due to changes in the political structure. The doctrine of separation of powers presumes a government that meets some minimum standard of democracy. But Kenya had since independence operated beneath that level, denying some institutions the right to exist. The only way institutions like the LSK could be effective in securing the observance of law by government was by taking on the role of the non-existent institutions.

Any other course of action would have been morally outrageous. It would have meant that the lawyers watch helplessly as the country went underground rather than step out of the restrictions of an ideal system. It would have resulted in the Executive benefiting from insisting on a system of government that it did not adhere to.

In Africa, the doctrine of separation of powers operates like a Mafiosi agreement: you don't touch my turf, I don't touch yours. If one of the families breaches the agreement and invades another's turf, the infringed family has only two courses of action. One, it could decide to observe its obligation under the agreement and let itself be run over by the aggressing family. The submissive family would never be judged as ever breaching the agreement. The second course of action is to breach the agreement and fight back. There are no arbiters.

The LSK chose the second course of action, unlike the Judiciary and Parliament, which preferred to submit. It is paradoxical that the LSK fulfilled the agreement by breaching it, and the Judiciary and Parliament breached the agreement by preserving it. In this way, the agreement was meant to prevent tyranny and preserve democracy. If the two goals were achieved, then the agreement was fulfilled. When the Kenyatta and Moi regimes breached the agreement, the Judiciary and Parliament decided to submit and play by the one-sided rules.

The LSK, however, forced a new understanding on the regimes: You touch my turf, I touch yours. By doing so, it forced the government to respect the territory of other institutions. If all the other institutions had dealt with the government in that way, matters would have turned out differently. And the LSK would have remained above the rough and tumble of everyday politics