



(DRAFT VERSION)

**TRANSFORMING THE COURTS:
JUDICIAL SECTOR REFORMS IN KENYA, 2011-2015**

SYNOPSIS

When Willy Mutunga became Kenya's chief justice in 2011, he made reducing delay and corruption in the judiciary a top priority. Drawing on previous plans to address the same issues, Mutunga and his team developed a far-reaching reform program, the Judiciary Transformation Framework. Their goals included addressing administrative problems that had hindered citizens' access to justice and opening up a historically closed institution to public engagement. Judges, magistrates, and court staff helped court registrars to standardize and speed up administrative processes. Early efforts to introduce new technologies to reduce delays—one of Kenya's 2012–14 Open Government Partnership commitments—failed to achieve nationwide implementation. But the newly created Performance Management Directorate developed a case tracking system that enabled nationwide monitoring of delays and workloads. The newly established Office of the Judiciary Ombudsperson and strengthened Court Users' Committees opened lines of communication for citizens to raise complaints, suggest changes, and receive responses. Although many reforms were in the early stages in 2015, Mutunga and his team developed and implemented policies that changed how the judiciary served the Kenyan public.

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INTRODUCTION

In October 2011, four months after taking over as head of Kenya's judiciary, Chief Justice Willy Mutunga delivered a speech outlining the challenges facing the country's court system: "We found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a judiciary that was designed to fail."¹

Mutunga's stark language may have been surprising for his audience of judges, officials, and civil society leaders, but few would dispute his assessment. For decades, Kenya's judiciary had been known for inefficiency, corruption, and political bias. As chief justice, Mutunga, a lawyer, professor, and civil society activist who had spent 16 months detained without trial during the authoritarian regime of Daniel Arap Moi, had initiated an ambitious effort to turn the courts around.²

Kenya's courts had an enormous backlog, estimated as high as one million,³ and it was not unusual for litigants to wait years for a hearing date, let alone a decision. Cumbersome procedures dragged out the process of getting to trial, and judges and magistrates (collectively known as judicial officers) and lawyers regularly adjourned hearings for dubious reasons. Records frequently disappeared—often because of haphazard procedures, but sometimes because of deliberate efforts to delay cases.

Accountability mechanisms were extremely weak, in part because the judiciary was a mystery to many Kenyans. “The population does not understand how courts work, [or] why they work the way they do,” said executive director George

Kegoro of the Kenya section of the International Commission of Jurists. Citizens did not have the knowledge to demand quality services, and the judiciary lacked systems to track the status of cases and hold judicial officers accountable for delays.

A lack of resources compounded organizational problems: in 2011, Kenya had only 53 judges and 330 magistrates⁴ for a population of 41.4 million.⁵ (Magistrates handled all but the most serious criminal cases and civil cases up to a legally limited monetary amount.) According to the United Nations Office on Drugs and Crime, similarly sized Argentina and Colombia had 2,019 and 4,805 judicial officers, respectively.⁶ The locations of the courts also meant that many

KENYA'S COURT SYSTEM

At the top of Kenya's court system was the Supreme Court, which heard appeals of cases decided by the Court of Appeal and had original jurisdiction over cases on presidential elections. The Supreme Court, located in Nairobi, also had the power to hear appeals from other courts or tribunals if prescribed by law, determine the validity of a declaration of a state of emergency, and issue advisory opinions on issues relating to the newly devolved system of county governments.

The Court of Appeal, which had been Kenya's highest court until the 2010 constitution established the Supreme Court, heard appeals from the High Court. The Court of Appeal had originally been located only in Nairobi, but in 2013 the court established permanent stations in the towns of Nyeri, in central Kenya; Malindi, on the coast; and Kisumu, in the west.

The High Court, which in 2011 had 17 stations around the country, had jurisdiction over all civil, criminal, and constitutional cases, and also heard appeals from the subordinate courts. The 2010 constitution also established two specialized courts, the Employment and Labor Relations Court and the Land and Environmental Court, which had the same status as High Courts.

Magistrates' courts handled the majority of civil and criminal cases in Kenya. The magistrates' courts had jurisdiction over all criminal cases except for murder, treason, and crimes under international law, and over civil cases up to a limit depending on the seniority of the magistrate (seven million shillings for the highest-ranking magistrates). In 2011, there were 111 magistrates' courts. Other subordinate courts included the Kadhis' courts, where Muslims could choose to have marriage, divorce, or succession cases settled according to Islamic law, courts martial, and tribunals established by parliament.¹

¹ “Courts Overview,” *Judiciary of Kenya*, 2014, accessed October 16, 2015, <http://www.judiciary.go.ke/portal/page/courts-overview>; see also Constitution of Kenya 2010, Chapter 10.

Kenyans had to travel long distances to access the judicial system, creating an “inherent cost” that was a barrier for poor citizens, Kegoro said.

A popular saying, “why hire a lawyer when you can buy a judge?” summed up many Kenyans’ views of judicial integrity. Given the long delays and cumbersome procedures, it was common for those involved in hearings, motions, and other processes to pay for expediency. “The registry staff would give hearing dates to litigants depending on who bribed them to get an earlier date,” said Apollo Mboya, chief executive of the Law Society of Kenya, the national bar association.

Corruption also influenced the outcomes of cases; a litigant or lawyer might bribe administrative staff to “lose” the case file, Mboya said, thereby preventing opponents from receiving a hearing, or litigants might simply pay judicial officers to rule in their favor. According to Transparency International’s 2010 Global Corruption Barometer, 43% of Kenyans who had sought services from the judiciary reported paying a bribe.⁷

The courts also had a reputation for political bias. The judiciary was perceived as “a partial umpire,” Kegoro said, rather than a neutral mediator. Until the passage of a new constitution in 2010, the president had unilateral power to appoint the chief justice of the Court of Appeal, which was Kenya’s highest court up to that time. The president also appointed all members of the Judicial Service Commission, which was responsible for hiring and disciplining judges—either directly or because presidential appointees such as the attorney general automatically received membership⁸—and the judiciary’s budget was controlled by the Ministry of Finance.⁹

The combination of inefficiency, corruption, and bias meant that few Kenyans believed that the courts would resolve their grievances fairly. The most consequential example of this loss of public trust occurred in December 2007, when

the opposition and government disputed the results of the presidential election. The opposition Orange Democratic Movement accused the government of fraud, but its leaders refused to settle the issue in court because they believed their party would not receive a fair hearing.¹⁰ The disputed election led to weeks of violence, in which approximately 1,200 Kenyans were killed, and was resolved only through an international mediation process. In the wake of the violence, a 2008 Gallup poll found that only 36% of Kenyans expressed confidence in the courts. Public confidence fell further in 2009, reaching a low of 27%.¹¹

After the 2007–08 crisis, Kenya’s major parties formed a coalition government and appointed an independent commission to draft a new constitution that would address the underlying causes of the violence—the weakness of the judiciary among them.

“During the constitutional review, members of the public wanted the entire judiciary to go home,” Mboya said. The drafters of the 2010 constitution seriously considered removing all serving judicial officers and requiring them to reapply, with no guarantee they would return to the bench. Although they eventually opted against such a drastic measure, the document created a clear mandate for judicial reform.

The 2010 constitution required the courts to deliver justice to all Kenyans, regardless of economic or social status, and without delay or undue regard for technicalities.¹² It also restructured the institution, bringing in new leadership through the creation of the Supreme Court and reconstituting the Judicial Service Commission to make it independent of the executive branch.

The new constitution passed a national referendum in August 2010 with 68% of the vote.¹³ Following its passage, in mid-2011, the Judicial Service Commission, president, and parliament chose a new chief justice through a far more open process than before. There was a

public call for applications, and candidates were interviewed on live television. The president appointed the final candidate based on the commission's recommendation and with the approval of the legislature.

At the end of the grueling appointment process, Mutunga, a longtime reformer who had made his career in civil society rather than the judiciary, became the new chief justice.

With the passage of the 2010 constitution, Mutunga had seen a chance to change the system from the inside. "I applied for the job because I realized that there was a project of creating a new judiciary—I had been involved in constitution-making for quite a while and I thought this was my opportunity to participate in the implementation," he said.

However, he added, "I knew that it wasn't going to be easy." Although there was widespread understanding of the judiciary's problems and agreement on the need for far-reaching reforms, past efforts had produced little progress.

THE CHALLENGE

Institutional culture and structural impediments stood in the way of Mutunga and his team as they worked to develop and implement an ambitious plan to make the courts more efficient and open, increase professionalism, and expand the court system. The reformers had to revamp a system that operated in an atmosphere of entitlement and opacity. To do so, they had to overcome internal resistance, strengthen weak accountability mechanisms, and find the resources necessary to do it.

"The overriding problem in this institution was cultural," said Duncan Okello, chief of staff in the office of the chief justice. Since the colonial era, he said, "the judiciary had developed a culture of unaccountability, distance, hierarchy, and opacity, sometimes driven by a self-serving invocation of the principle of independence."

Although some degree of isolation was typical around the world to avoid jeopardizing the appearance of fairness, in Kenya the practice went beyond norms of maintaining impartiality and created a gulf between judges and the people they served and worked with. Increasing openness to the public and collaboration among judicial officers and staff were essential to implementing reforms, but doing so required a major change of attitudes.

Judicial officers had long been able to get away with corruption, incompetence, and laziness, and reforms were likely to meet resistance from those who had taken advantage of the weak system. Mutunga expected his efforts to spark a backlash from some judicial officers and their allies outside the courts. "When you transform, you're challenging certain vested interests that profit from the status quo that you want to change, and it's not easy because they will fight back," he said.

Enlisting genuine commitment from judicial officers was critical, given the geographically dispersed court system and lack of accountability mechanisms. Leaders in Nairobi faced a principal-agent problem. They lacked reliable information about what judicial officers around the country were doing, and monitoring every court would become even more challenging as the system expanded, in terms of the number of judicial officers as well as the number of courts. Although strengthening oversight and supervision was an important step, such actions would have little effect if judicial officers refused to change their ways.

Judicial accountability was a particularly difficult problem because Kenyans had little knowledge of how the court system worked, and those who did understand—especially lawyers—often were involved in corruption or delays. For reforms to take root, users of the justice system—whether lawyers or everyday citizens—had to

understand how the courts should function and demand that judicial officers deliver quality services.

Capacity also posed a challenge. The judges and magistrates who managed court stations where one or more judicial officers worked typically did not have training or experience in administration. At the time, leading a station was a matter of seniority, said Chief Registrar Anne Amadi, so “you become the most senior and then you head a station, but there has been no formal process of preparing you for that role, so you learn on the job”—without clearly documented procedures to help. In the critical area of registry operations, “There had been no document to reference, whether you are new or old in the organization, that gives you administrative guidelines,” and no training, said Justice Reuben Nyakundi of the High Court, which heard many civil, criminal, and constitutional cases. Providing training and tools was a crucial step to ensure judicial officers at the local level could follow through on the priorities set by the leadership.

Finally, an ambitious reform program required substantial resources. Hiring new judicial officers, building more courts, developing information and communication systems, and conducting public outreach were expensive plans to carry out, and the judiciary’s budget was low relative to other government institutions and to judiciaries around the world. In 2010–11, Kenya’s courts received 3.9 billion shillings (about US\$48 million at the time) from the government. That represented about 0.5% of the national budget, compared with an international benchmark of 2.5% cited as a goal by the Kenyan judiciary.¹⁴ Although the 2010 constitution and 2011 Judicial Service Act removed the judiciary’s budget from the control of the executive, its allocation was still subject to parliamentary approval, and the

judiciary had to compete with other government institutions for resources.

FRAMING A RESPONSE

After taking office in June 2011, Mutunga put together a team to take stock of the judiciary’s challenges and develop a blueprint for reform. Key members were Joel Ngugi, a High Court judge who had previously taught law at the University of Washington, and Okello, chief of staff in the office of the chief justice. Both had worked outside the judiciary until 2011, bringing a fresh perspective to the institution’s longstanding challenges—and its prescriptions for change.

The strategy team had abundant material to draw upon. The judiciary had already done numerous internal reports proposing reforms, and civil society organizations had also made recommendations. Most recently, a 2009–10 task force led by Justice William Ouko had pulled together information from previous reports and had recommended more than 100 measures to address issues like hiring and case backlogs. According to Ouko, “there were 13 reports on the judiciary and the reforms that it required,” so his task force’s role was to produce recommendations based on earlier materials.

Only a few past initiatives had made substantive progress. Since 2006, for instance, many courts had established Court Users’ Committees or adopted other mechanisms for public engagement, and a handful had recently developed case management systems.

With so many existing plans for reform, Mutunga said that the 2012–16 strategy his team developed, called the Judiciary Transformation Framework, “was not reinventing the wheel.” There were “a lot of good recommendations and proposals that were not implemented because there was no political will on the part of the

leadership,” he said. Rather than starting from scratch, the framework was intended to create a common understanding of priorities and structure them in a way that facilitated implementation.

Although the framework drew heavily on ideas that already had internal buy-in, the strategy team also engaged in extensive consultations with judges, magistrates, and staff to ensure their support. “Even if you disagree with elements within it for subjective reasons, you cannot claim you were not part of the consultation,” Okello said. However, consultations outside the judiciary were limited, he recalled. After completing a draft, the team sent it to a nongovernmental legal aid organization and two professors for comments. Although the external reviews were “an afterthought,” Okello said, they were useful in improving the framework.

The final document, issued in May 2012, structured judicial reform around four “pillars”: people-centered delivery of justice, organizational culture and professionalism of staff, adequate infrastructure and resources, and information technology as an enabler for justice. Each pillar consisted of several “key result areas,” which grouped together specific actions to achieve the goal.

The first pillar listed access to justice as a result area, encompassing actions such as the establishment of customer care desks to answer questions, simplification of court procedures, and creation of a case management system. The first pillar also covered public and stakeholder engagement, including strengthening complaint mechanisms and providing more formal structures for Court Users’ Committees. The second pillar focused on changing the institutional culture, increasing training, and clarifying responsibilities. The third and fourth pillars sought to expand the court system and its budget and to increase the use of ICT, respectively.

The strategy was extremely broad, Okello acknowledged, but “given the problems that the

judiciary had, it was difficult to say there’s any one thing that was a priority and the others were not . . . You needed to move like a bulldozer and attack [everything], and of course that has its challenges.”

To oversee implementation of the framework, Mutunga appointed Ngugi as director of a newly created Judiciary Transformation Secretariat. The secretariat’s role was to coordinate the implementation of the framework, conduct activities to promote it, notably workshops with judicial officers and staff, and monitor progress. Ngugi also headed the Judicial Training Institute, and because the framework placed a strong emphasis on training, many of the activities overlapped.

Other offices and committees played key roles in implementing the Judiciary Transformation Framework. The chief justice had always been responsible for overseeing the administration of the judiciary as well as serving as a judge, but his office had no policymaking capacity. Mutunga said that instead of a policy team, his only staff at the time of his appointment was “eight bodyguards and two secretaries.”

To carry out the reform program, he restructured the office, creating Okello’s position as chief of staff and hiring experienced staff to plan and coordinate new initiatives. Mutunga also created new administrative departments, notably the Directorate of Public Affairs and Communications and the Performance Management Directorate, and formed issue-specific committees led by judges to further develop how specific components of the transformation framework, such as performance management, should be carried out.

A significantly increased budget put the judiciary in a financial position to carry out the transformation program. For the 2011–12 financial year, the judiciary’s budget allocation from parliament nearly doubled to 7.5 billion shillings (about US\$91 million), and the amount continued to increase for the next several years,

reflecting the high priority placed on judicial reform. The judiciary also attracted donor support. In November 2012, the World Bank began a US\$120 million project to support judicial reforms. Other donors, such as Germany's international development program GIZ and the United Nations Development Programme, also committed funds to various aspects of the transformation program.

As the judiciary sought to open up its operations, Kenya offered a broader commitment to transparency by joining the Open Government Partnership, a multilateral initiative to promote transparency and public integrity, in December 2011. The action plan submitted in February 2012 by Bitange Ndemo, then permanent secretary at the Ministry of Information and Communications, and his team included two elements of judicial reform as commitments: the integration of new technologies to speed up court processes and the independent vetting process that reviewed the records of judges serving before the 2010 constitution went into force.

GETTING DOWN TO WORK

After Mutunga's appointment as chief justice in June 2011 and the completion of the Judiciary Transformation Framework in May 2012, reformers on his staff and across the judiciary worked to implement policies to promote efficiency and transparency, ranging from organizing registries to monitoring cases and responding to public feedback. Practices varied across the court system, but initiatives carried out during Mutunga's tenure laid a foundation for longer-term reform.

Building a reform culture

Securing support from judges, magistrates, and staff was a critical first step toward the transformation Mutunga and his team envisioned.

Consultations were important not only to collect ideas and offer reassurance, Mutunga said, but “because they also disarm those who are going to resist . . . Having been heard and having been part of the consensus, they have no business sabotaging [the reforms].”

After finalizing the Judiciary Transformation Framework, Ngugi led thirty-eight “transformation workshops” across the country, intended to present the reform program and shake up the judiciary's culture. The workshops brought together judges, magistrates, and support staff—including staff such as cleaners and drivers, who had never interacted with judges on an even footing. During the workshops, Ngugi and staff from the transformation secretariat explained the reform program, and participants discussed challenges that they faced in achieving the goals of the framework and collectively developed plans to address them.

Okello said that it helped to “position the Judiciary Transformation Framework as an advancement of the reform efforts that the old judiciary had proposed . . . ‘This just happens to be the right moment to implement some of the things you yourselves have said in the past.’”

The framework's emphasis on the careers and wellbeing of judicial officers and staff—notably training opportunities and increased salaries and benefits—also helped secure buy-in. By starting with popular changes, Okello said, “You put them in a position where transformation is all about them . . . People would say, yes, we'd like all these things, and we'd say that's what transformation is all about.”

Judicial staff in particular formed a base of support, Mutunga said. They had historically received extremely low compensation, “so giving the judicial staff good salaries and [benefits] was basically one way of telling them that these reforms are about you and you've got to protect them.” He added that staff support also was a

practical matter, because the group made up the vast majority of the judiciary’s nearly 5,000 workers.

Another strategy Mutunga adopted was to emphasize the importance of the judicial system as an institution. “Do you want [to work in] an institution that is known for its corruption? Do you want an institution where every time there’s a constitution-making project, Kenyans say disband these people?” he recalled saying to judicial officers. “That message resonated with some judges as well . . . There might be people whom you perceive as resisters, but you can actually convince them.”

The new constitution offered a valuable way to ground discussions of reform, Mutunga said, especially as judges deliberated over cases. “As you interpret the constitutional provisions of equity, transparency . . . asking people to internalize them and to reflect them is a very powerful argument,” he said.

At the same time, Mutunga took symbolic steps to signal that the judiciary’s culture had to change. One of his first acts as chief justice was to ban the wigs that judges had worn since the colonial era, a move meant to reduce the perceived divide between the jurists and everyone else. In an internal signal that judicial work was a mutual effort, all court staff were allowed a tea break—a Kenyan workplace ritual previously reserved for judicial officers and the highest-ranking administrative staff. The move “revolutionized” internal power relations, Okello said. He joked that “We had our own progressive Tea Party movement,” referencing the antiestablishment political group in the U.S.

External events also helped create space for reform. The 2010 constitution’s measures for restructuring the judiciary included a vetting process, in which an independent board of Kenyan lawyers, civil society leaders, and foreign judges reviewed the record of each judicial officer serving before the adoption of the constitution and determined whether he or she was suitable to

remain on the bench. The vetting process “gave us a great opportunity to carry out reforms,” Mutunga said. “We were able to do a lot of things because the internal resistance to reforms was already engaged by the vetting. They were fighting for their professions for almost three years.” The same judges who were most likely to oppose internal reforms—those who had a history of corruption, political bias, or not working hard—were the ones who would be most concerned about removal by the vetting board.

Simplifying and communicating procedures

To help litigants navigate the snarled judicial system, the transformation framework called on courts to streamline procedures where possible and make the processes clearer. Registrars, who handled administrative issues for each level of the court system, led efforts to standardize and clearly communicate administrative processes.

Because administrative processes varied at each level—and in practice across courts—registrars had to tailor solutions to their specific situations. The aim was to have a registry manual for each court, although as of 2015 the High Court had finalized and published one; the Court of Appeal and magistrates’ courts were in the process of developing them. In each case, it was a consultative process, designed to find out what each court station was doing and reach a consensus on the best practices to adopt nationwide.

Improving operations at the registries where case files were stored was an important step to reduce delays. Because many registries were physically disorganized, locating case files was a common problem. Without an effective system to keep track of the files, unscrupulous staff could easily hide them or remove critical documents in order to derail a case.

To better organize the stacks of paper files, registries serving the High Court and magistrates’ courts adopted simple measures to make the files easier to locate and trace. Color-coding the files

based on the type of case—such as criminal or children’s cases—enabled staff to tell at a glance if something was in the wrong place, said Caroline Kabucho, assistant registrar of the magistrates’ courts. In addition to color-coding, the High Court, which comprised several specialized divisions, reorganized their files to store the ones for each division separately.

Equally important was the challenge of keeping track of who had specific files. Eunice Mutie, who worked as a legal and program officer in the office of the High Court registrar, described a system of “tracer cards,” which staff placed on the shelf where the file was stored whenever it was retrieved for any reason, for instance to a courtroom, so that anyone looking for the file could immediately trace its location. Registries also tracked the movement of the files in written books called “movement registers,” which Kabucho stressed offered an avenue for accountability. “You trace it back to who had the file . . . If I gave it to you and you signed that it’s complete, [and] by the time you’re handing it over to the next person, it’s not complete, somebody has to be held liable for the missing file or missing documents,” she said.

Making it easier to find files was not the only issue. It was also important to communicate to litigants the documentation needed in order for their case to move forward. The High Court registry developed a checklist of standardized requirements that applied to all venues, which Nyakundi, a High Court judge based in Kajiado who had worked on the registry manual, said was critical to avoid confusion arising from processes that varied across courts.

The courts developed other procedures designed to clarify and speed court procedures. The Court of Appeal introduced “practice directions” that required pretrial conferences to ensure that the case was ready, in order to avoid situations in which a case went for a full hearing and then was adjourned. The directions also limited the amount of materials submitted so that

judges had to spend less time going through the files.¹⁵

To communicate processes to litigants, each court station was required to produce a service charter: a billboard that listed the requirements, fees, and timelines for each court process. The charters helped prevent improper payments, said Director of Performance Management Nyoike Wamwea, by clearly stating what citizens could expect. Kabucho added that the process of developing the timelines laid out in the charters and registry manuals helped the registrars gain a better understanding of the courts’ staffing requirements.

Monitoring cases

A long-awaited reform to reduce delay was the introduction of a case management system. Until 2015, no centralized system existed for tracking the status of a case, how long it had taken to progress from step to step, and who was responsible. Developing one proved a long and challenging process.

Initially, Mutunga and his team had hoped to introduce a nationwide electronic case management system in cooperation with the ICT Authority, a separate agency within the Ministry of Information and Communications. The system was intended to enable oversight and monitoring of delays, make it easier for litigants to receive information about the status of their case, and allocate cases to judges randomly to prevent the practice of “gatekeeping,” in which wealthy or powerful litigants worked to have their case heard by a judge they considered favorable. To build additional support for the plan, in 2012 the ICT Authority made the introduction of a case allocation system and other technologies a part of Kenya’s commitments to the Open Government Partnership (see text box).

Beginning in 2010, the magistrates’ court in Eldoret, a major city and county capital in western Kenya, had piloted a court-level case management system with funding from the U.S.

Agency for International Development and technical support from Kenya Law, the law reporting agency, which had substantial experience with ICT and databases. The system was intended as “a testing ground,” said Long’et Terer of Kenya Law. “It’s a fairly simple system, but it showed all of us that it’s possible to have a system in place.” The Eldoret system allowed judicial officers to easily track the status of a case in a court-level database and enabled litigants to check their case’s status and receive updates, such as hearing dates or reminders to pay outstanding fees, via text message. Similar systems were introduced piecemeal in other courts, including in the town of Kapsabet, a county capital southwest of Eldoret, and at the Court of Appeal.

However, scaling up an electronic case management system to the entire country was no easy matter. Not all courts had the secure internet connections—or even the hardware—necessary to transmit the information. “If the court does not have the basics, it cannot support ICT... if there is a court without reliable power, ICT will not work. If it’s a court without computers, it won’t work,” said ICT Assistant Director Josephat Karanja. An internal survey in 2014 found that 40% of courts had no reliable internet connection.¹⁶ Many judicial officers and staff also had limited computer skills.

Furthermore, the introduction of new technologies often faced resistance. Ndemo, the permanent secretary in the Ministry of Information and Communications during early efforts to develop an electronic case management system, said that although some judges were convinced, “there were others who thought we were intruding.” Without broad internal support, the process stalled. Okello said that early on, some staff undermined implementation by requesting bids for systems that would not work, or slowing the process of hiring support staff.

The variation in processes across courts also meant that it was impossible to develop a nationwide system without first reviewing and standardizing manual procedures. Karanja said that it was not practical to create a slightly different system for each court, especially since the goal was to share information and facilitate central-level supervision. “If you want to take the system from Eldoret to Mombasa, you have to tweak it,” he said. “Let us document and standardize the processes and procedures, and then ICT will work.”

Eventually, the judiciary shifted gears. In January 2013, Mutunga established a committee to develop a performance management system for the judiciary. To provide the data necessary to evaluate the performance of court stations and individual judicial officers, the committee and Performance Management Directorate developed a new case tracking tool. After nearly three years of consultations with judicial officers and testing, the directorate released the final version of the tool, known as the Daily Court Returns Template, in October 2015.

The Daily Court Returns Template tracked many of the same things that had been envisioned for the electronic database. According to Lyna Sarapai, a senior resident magistrate who coordinated the process in the office of the chief justice the system “tracked most of the case events that are captured in multiple manual registers in one place,” enabling monitoring of courts’ activities and providing detailed data to aid decision-making.

The template included information about each active case, the judicial officer responsible for it, and the date at which it had moved from each step in the process to the next. As a case progressed from filing to judgment, the Performance Management Directorate could track how long each step took and whether it had

OGP IN KENYA: SEEKING BROAD SUPPORT

In December 2011, Kenya joined the Open Government Partnership (OGP), a multi-country initiative to promote transparency, accountability, and integrity in government. Bitange Ndemo, then the permanent secretary of the Ministry of Information and Communications, said that he and his team at the ICT Authority, an agency within the ministry that had spearheaded Kenya's recently launched open data initiative, saw OGP as an opportunity to provide an "outside push" to sustain open data and to expand their work on transparency.

Working closely with a small group of civil society organizations that had been involved in the open data effort, the ICT Authority quickly submitted an OGP Action Plan in February 2012. The action plan commitments focused on programs that the ICT Authority planned to implement and that needed support, said Kaburo Kobia, who coordinated OGP at the authority. "Other than those we were already working on IT projects for, we didn't collaborate with any other ministries or agencies in developing the commitments . . . That's why I think we stuck to projects that were already happening, so that we're not involving agencies and making plans for them that they had no idea about." Introducing new technologies to "increase expediency" in the judiciary was one component of the Action Plan.

However, increasing the use of ICT in the judiciary proved challenging. With limited infrastructure and widely varying procedures, immediately developing a nationwide case allocation and tracking system proved impractical. Attempts to introduce a case management system and other technologies, such as audiovisual recording of proceedings, also met resistance. Telling judges that the initiative was an OGP commitment "doesn't work," Ndemo said. "If they don't want it, they don't want it."

The lack of broad sectoral participation in developing the action plan and limited communication afterward meant that OGP did not offer an avenue for strengthening political will internally. Chief Justice Willy Mutunga said he did not remember OGP playing a role in the judiciary's efforts to introduce new technologies, and Duncan Okello, his chief of staff, added that he had "stumbled upon it" some time after the early technology initiative had stalled.

Furthermore, low public awareness about the initiative and involvement of a narrow band of civil society groups meant that OGP was not the preferred tool for civil society in general to demand accountability. "Kenya has a strong commitment to openness . . . but honestly our commitment to OGP is not what is driving the desire to get these projects done and create more transparency," Kobia said.

In 2015, the ICT Authority was working to strengthen OGP and improve its position within the government. After speaking with coordinating agencies in other countries, Kobia said, the ICT Authority recognized that "this is not our core work," and decided it would be important to move coordination to an office, such as that of the president or deputy president, that would be a more natural fit for the role. Interest in OGP rose after the initiative was included on the agenda for U.S. President Barack Obama's visit to Kenya. Kobia was optimistic that the high-level interest sparked by the visit could create an opportunity for the initiative to achieve its potential. However, given the limited government and public engagement up to 2015, Ndemo said, "I can't say there's a direct impact that OGP has had on the country, but it's helped the discussion around openness."

exceeded specified timelines. Information about the type of case also enabled analysis of workloads, since a simple plea for disorderly conduct required far less time and effort than a murder case.

The format of the tool, a comparatively simple Microsoft Excel spreadsheet with drop-down menus customized to align with each court's procedures, made it easier to roll out than a brand-new database. However, the simplicity of the tool had its drawbacks. An administrative officer at each court station had to update the tool each day and send a copy to the Performance Management Directorate in Nairobi—occasionally from an internet café, if the court lacked a reliable internet connection. Staff at the directorate conducted a monthly analysis of data across courts and over time, which required them to manually transfer the data into the statistical and analytics software programs, whereas a database would have allowed them to easily select what they needed for more complex analysis. Data collection was also a challenge. It was difficult to verify the data court stations submitted, and although the directorate conducted spot checks, some people “are still giving us data that isn’t accurate,” Mutunga said.

“Initially there was resistance, sometimes in the form of incomplete or inaccurate submissions,” but over time the hard-working officers grew to appreciate data as a way of distinguishing themselves, Okello said. The data fed into performance agreements signed at the court level, and Amadi, the chief registrar, said that the high-level focus on accountability and the use of the data to make decisions on resources motivated staff to cooperate. In 2015, the Performance Management Directorate was also in the process of deciding on rewards such as bonuses for the top performers.

Responding to complaints

Although procedural and organizational improvements were intended to prevent many

judicial problems, Mutunga and his team also wanted to ensure that citizens had an active role. In September 2011, Muntunga appointed Kennedy Bidali, a magistrate and deputy registrar, as the judiciary’s first internal ombudsperson. The Office of the Judicial Ombudsperson, a department within the office of the chief justice, was responsible for collecting and resolving citizen complaints about administrative issues.

Citizens had the option of bringing their complaints to the office located in the Supreme Court building in downtown Nairobi, calling, or sending a text message, letter, or email. It was then up to the team at the ombudsperson’s office to identify the administrative issues they could help the person with.

Not surprisingly, citizens’ complaints often involved non-administrative matters that were beyond the office’s purview, Bidali said. Some complainants were unhappy with a verdict or wanted legal assistance, in which case staff might refer them to legal aid organizations for pro bono advice.

Determining some clients’ precise complaints was also a challenge. People often had long and emotional stories of what had gone wrong, said Mary Njoki, one of the officers who handled complaints, and “it’s up to you to get the relevant information” by asking targeted questions about how their cases had proceeded.

Staff at the ombudsperson’s office entered a brief description of each complaint, along with identifying information about the person and case, into a database used by its staff in Nairobi and liaison officers—typically administrative staff who would not be a source of complaints, such as a human resources officer—at each court station. After a complaint was in the database, staffers sent a deadline for a response to the liaison officers.

Liaison officers were required to solve the problem or offer an explanation within the allotted time, sending the response back to Nairobi through the database. Nyakundi, who

had handled complaints when he worked in court administration, said that the position of the ombudsperson's office within that of the chief justice created a sense of urgency for court staff: "Once you open the system and see the red flag, it means that matter is of grave concern," he said. "You need to move fast to resolve the complaint."

The Nairobi staff reviewed each response, and if satisfied, contacted the complainant. Responding was a simple process if the complainant had provided an email address, but more time was needed to respond to those who left just a mailing address or phone number. Inadequate responses or patterns of complaints could be grounds for disciplinary action.

Getting citizens to use the resource was a challenge. The office struggled to publicize itself, and Bidali and his team believed they received only a fraction of the complaints they could help with. "We've tried the usual," Bidali said, from appearing on radio and television programs to distributing written materials and t-shirts, "but it's not sufficient, and it's not easy." Expanding the office's reach was a continuing effort in 2015.

Engaging civil society and the public

Mutunga and his team saw public awareness and participation as critical to the success of the judicial reform program. "The constitution doesn't allow for a judiciary that's aloof," Mutunga said. But beyond the inherent value of public engagement with the courts, he added that there were practical reasons as well: citizen participation would help create pressure to deliver services and provide leverage for the judiciary's leaders to implement reforms.

Court Users' Committees (CUCs) offered an important mechanism for transparency and public participation. Since 2006, many courts had created CUCs, which brought together the local judge or magistrate, representatives of other agencies involved in the judicial system such as police and corrections, civil society organizations,

and community leaders. The Judiciary Transformation Framework and 2011 Judicial Service Act created a formal role for the committees and sought to increase their effectiveness.

First organized in 2006 by the Kenya Magistrates and Judges Association to identify and resolve court-level problems, the CUCs had recorded numerous successes at the local level, said Janet Munywoki, director of the Legal Resources Foundation, a nongovernmental legal aid organization that supported the establishment and operation of many of the committees. For example, she said, one committee had worked with the local hospital to waive fees for sexual assault survivors who needed medical examinations in order to press charges. Others offered avenues for alternative dispute resolution. But the committees often struggled with limited capacity and resources, and some of the problems they dealt with required policy decisions beyond their control.

With the passage of the Judicial Service Act in 2011, the committees became an official part of the justice system, with the goal of promoting a coordinated, efficient, and consultative approach to justice.¹⁷ The act also created a national equivalent: the National Council on the Administration of Justice, which brought together the heads of the same agencies and organizations represented in the CUCs to make policy decisions on issues that affected courts around the country, such as procedural adjustments for cases involving children and bail guidelines.

CUCs reported to the council each quarter, helping its members to identify problems or best practices that had national relevance. However, the reports that committees submitted were often disorganized or incomplete. In 2015, as part of the drive to formalize the CUCs, a subcommittee of the council led by Sarapai and the Legal Resources Foundation developed reporting and work plan templates for the CUCs. The new templates created a standard format for

committees to submit the issues they had discussed, their plans and timelines for addressing them, and any matters that needed attention at the national level.

In addition to enabling nongovernmental organizations, community leaders, and the public to raise issues directly with the judiciary, Nyakundi said that the committees were “one of our vehicles to communicate to the citizens.” When the judiciary introduced a new policy, such as new procedures for traffic arrests, members helped inform their communities.

The judiciary adopted several other communication strategies. Individual court stations held “Open Days” in which the judges and magistrates held informal meetings with the public and answered questions about the judiciary and its work, a practice that had been initiated during the previous decade and later expanded. Judicial officers also held other public events, such as the 2012 Judicial Marches, in which they walked through neighborhoods to talk to people on the street.

In the past, citizens “were not quite sure we were human beings,” Ouko said, so direct interaction was important—and needed to become more institutionalized. Munywoki applauded the informality of the settings, saying they helped convey that “any person can feel comfortable entering the judicial process.”

Mutunga and the Judicial Service Commission also created the Directorate of Public Affairs and Communications, the first time that the judiciary had an office dedicated to providing public information. The directorate was responsible for media strategy and developing informational materials, as well as supporting public events. The Judicial Service Act also required the chief justice to provide a yearly update on the state of the judiciary. The combination of direct engagement, media, and publicly available reports helped make the judiciary far more transparent than it had been before.

OVERCOMING OBSTACLES

Public trust in the courts suffered two major blows during the reform process. The first centered on the Supreme Court’s handling of the contested 2013 presidential election. The second was a corruption scandal that drew public attention to graft among high-level administrative staff—and the persistence of the problem throughout the court system.

On March 4, 2013, Kenyans went to the polls for the first time since the 2007–08 electoral crisis and the adoption of the 2010 constitution. Five days later, the Independent Electoral and Boundaries Commission declared Deputy Prime Minister Uhuru Kenyatta, who at the time was under indictment by the International Criminal Court for his alleged role in the 2007–08 violence, the winner with 50.07 percent of the vote—barely enough to avoid a runoff.¹⁸

Kenyatta’s main rival, then–Prime Minister Raila Odinga, challenged the results in court. Odinga, as well as the nongovernmental Africa Center for Open Governance, called for new elections on the grounds that voter registration had been inaccurate, electronic voting equipment had failed, and there had been discrepancies during the vote-counting process.¹⁹ The case went directly to the Supreme Court, which the 2010 constitution had given original jurisdiction over presidential election cases.

Mutunga announced the court’s unanimous verdict in a brief statement from the bench on March 30. The petitions were dismissed; the court ruled that the election had been conducted in accordance with the law and the constitution, and the result was valid.²⁰

The decision, and the detailed judgment published on April 16, received intense criticism. For instance, Seema Shah of the Africa Center for Open Governance, which had filed one of the cases, called the judgment “disappointing, mostly for its blatant failure to confront the evidence” by not providing an in-depth examination of discrepancies in voter registration numbers.²¹

Constitutional lawyer Wachira Maina, writing in *The East African*, criticized the court's use of a "mean-spirited, cramped" Nigerian precedent to place a high burden of proof on Odinga.²² Kegoro, of the International Commission of Jurists, criticized "the frailties of the process," saying that both how the court handled the case and the substance of the judgment "have been at the heart of a huge loss of confidence in the judiciary."

Any decision in a hotly contested presidential election was guaranteed to be controversial, Okello said, but "it is precisely for that reason that the management of that process is probably more important than the outcome," and that aspect could have been handled better. However, he noted that the case documents had been provided to law schools to allow them to examine the evidence and to "help demonstrate to the public that the Supreme Court had nothing to hide." But despite efforts to explain the decision, the Supreme Court's role in the presidential election cost the judiciary some of the goodwill it had accumulated over the previous year and a half of reforms.

The judiciary's credibility took another blow in August 2013, when the chief registrar was alleged to have made improper payments totaling an estimated 2.2 billion shillings (about US\$25 million at the time).²³ The Judicial Service Commission dismissed the chief registrar in October, and later removed several other senior administrative staff implicated in the scandal. (As of fall 2015, the former registrar and six other former judiciary staff were on trial for the improper procurement of a 310 million shilling official residence for the chief justice.²⁴)

The corruption allegations at the center of the judiciary had broad repercussions. Not only did the system's image suffer, but the dismissal of several top administrative staff posed a practical problem for the implementation of reforms. Procurements were delayed, and the scandal made it difficult for the administrative

directorates involved to work with the rest of the judiciary. For instance, the irregular procurements included ICT projects, which contributed to the challenge of getting cooperation with new systems, Karanja said. In all the audits, "you'd find that a number of the projects were ICT-related, so that gave us a very bad name."

In response, the new chief registrar, Amadi, introduced controls that would make it harder for large-scale malpractice to happen again. Internal finance and administrative procedures had not been documented and there was no procurement plan for the judiciary, which led to an unstructured procurement process that could easily be manipulated by unscrupulous officers. Amadi began to introduce clear, documented administrative plans and procedures, which she said had helped prevent similar problems. In addition, weekly financial meetings were held to track expenditures.

The 2013 findings of high-level administrative corruption drew attention to the persistence of graft throughout the judiciary. The reform program struggled to address the problem, and in August 2015, Mutunga gave a much-publicized speech at the annual judges' colloquium, expressing concern about "reports on an upsurge in this immoral scourge."²⁵ Although the judiciary and National Council on the Administration of Justice introduced some preventative measures, such as adjustments to the procedures for traffic arrests to reduce opportunities for bribes, and the vetting process had removed some judges believed to be corrupt, dismantling powerful corruption networks remained a major problem. Many observers called for the Judicial Service Commission play a more active role in investigating and disciplining judicial officers suspected of corruption.

"The public image of the institution suffered considerably with the [election] petition and the corruption in the administrative wing," Okello said. Both the election ruling and the corruption scandal generated significant media and public

criticism. However, allowing intense public scrutiny was a way to “demonstrate that we are transparent and we are accountable,” Director of Public Affairs Naim Bilal Yaseen said. “As much as [these issues] have affected our image, the public can now trust that we have nothing to hide.” Okello added that they chose to respond by placing more emphasis on face-to-face forums between citizens and judges, in the hopes that positive personal interactions help would counter the bad news. But the process of rebuilding public trust was a gradual one.

ASSESSING RESULTS

As of fall 2015, several key initiatives to make the judiciary more efficient and transparent were underway, but most were in the early stages of implementation.

After years of design and testing—and of changing strategies—the judiciary finally adopted a nationwide case tracking system, the Daily Court Returns Template, which was finalized in October 2015. With the new emphasis on data, “there’s greater accountability in the administration of justice,” Amadi said, and “just the fact that we have data to help us in decision-making is a huge thing.” Although the tool was still in the early stages, Wamwea said that it was expected to contribute to improvements in the proportion of reported cases that had been completed, lessening case backlogs.

At each level of the court system, registrars also worked to standardize and speed up the handling of case files and other administrative procedures. As of October 2015, the registry manual for the High Court had been finalized and published, while those for the magistrates’ courts and Court of Appeal were undergoing review by judicial officers and staff. The courts were in the process of implementing practices outlined in the manuals, but the extent of their implementation varied. “There’s been tremendous improvement,” in record management, Mboya of the Law Society said, “but we’re not yet there.”

Each court also was required to set up a Court Users’ Committee and create a customer care desk and service charter to share information about court processes and address local-level problems. The customer care desks allowed litigants to ask procedural questions and get help navigating the system. “One change we’re very happy about is the customer care desks,” said Munywoki, of the Legal Resources Foundation. “It means that the judiciary is more than willing to give information . . . It’s open, anyone can access information.” However, the quality of such sources of help varied from court to court.

During four years in operation, the Office of the Judiciary Ombudsperson handled more than 21,000 complaints and suggestions. According to Okello, the office also served as a deterrent: “We’ve recorded tremendous progress, especially on lost files . . . I think institutionally, people knowing that somebody was paying attention put people on their best behavior.”

Pressure from monitoring and performance contracts and streamlined procedures contributed to gradual reductions in the judiciary’s backlog. However, the largest reductions in the backlog came from special initiatives to clear old cases, either by dismissing those no longer active or prioritizing hearings for those that still needed attention. As of 2014, the most recent year for which case audit data were available, the backlog of cases pending for more than a year stood at 311,800.²⁶

Several other reforms made major contributions to efficiency in the judiciary. Beginning in 2011, the institution embarked on a major expansion, hiring nearly 225 new judges and magistrates and establishing twenty-five new courts. The new facilities eased access for many Kenyans in remote areas, and the new judicial officers helped reduce delays. The Judiciary Transformation Framework also placed a strong emphasis on training. Teaching staff administrative skills they previously had to learn on the job was extremely important, Kabucho

said, and training sessions enabled judicial officers and staff to share local best practices.

Public perceptions of the judiciary improved in the early years of the reform program. In 2013, a Gallup poll found 61% of Kenyans had confidence in the judiciary, compared to a low of 27% in 2009.²⁷ However, later polls suggested that the gains faded. Between November 2013 and April 2015, Ipsos polls found that the percentage of Kenyans expressing “a lot” of confidence in the courts fell from 28% to 21% for the Supreme Court, and from 21% to 12% for other courts.²⁸ One likely explanation was that high-profile controversies over the Supreme Court’s 2013 election ruling and corruption by top administrative staff eroded trust in the judiciary despite the reform effort.

REFLECTIONS

Achieving far-reaching change in the judiciary was challenging, and managing resistance was a constant effort. Internally, “the idea of collective leadership is very important,” Chief Justice Willy Mutunga said. Consultations with judicial officers formed a critical part of numerous initiatives, from setting timelines for administrative processes to designing the Daily Court Returns Template, as well as the Judiciary Transformation Framework itself. A critical strategic principle was that the involvement of potential opponents would undercut resistance later on.

An overarching goal of the transformation program was to shift the judiciary’s culture toward public service and away from isolation and to open the door to citizens’ understanding of how the system worked.

Chief Registrar Anne Amadi said that a change of the internal mindset paved the way for more concrete reforms. “We are more conscious of the fact that judicial authority derives from the people,” she said. “Every morning when you’re

coming to court, you’re coming to deliver justice, and you have to be able to demonstrate that you delivered it.”

George Kegoro, executive director of the International Commission of Jurists–Kenya, said that the efforts of Justice Joel Ngugi and the Judiciary Training Institute were creating a culture of personal change, “so that individually people [take] greater responsibility for the common good,” and judicial officers were gradually becoming more respectful of their clients and colleagues.

Cementing a shift in culture was difficult, however. Professor Yash Ghai said that a great deal depended on the individual judge, and “some see the new era that we are trying to usher in, [but] some are just the old style.”

“The new judicial culture of humanizing justice is still not consolidated,” Mutunga said, and required a long-term effort to take root.

Sustaining reforms required outside support, but Kenya’s judiciary faced frequent challenges from other branches of government. To some extent, tense relations were a predictable consequence of the transition to a new constitutional order. The principle of checks and balances “is supposed to inconvenience those relationships,” especially as the branches adjusted to their roles under the new constitution, said Duncan Okello, chief of staff of the office of the chief justice. However, several interviewees said that some instances went beyond the natural tensions of a system of checks and balances and threatened the rule of law, such as the executive branch disobeying court orders, notably refusing to comply with a court-ordered pay increase for teachers in 2015,²⁹ and the legislature cutting the judiciary’s budget in a perceived act of retaliation for a February 2015 ruling that the Constituency Development Fund, used to fund grassroots development projects, was unconstitutional and had to be amended.³⁰

As with judicial officers, the preferred way of handling tensions between branches was dialogue. Mutunga reached out to leaders of other institutions to “explain what we do and what we don’t do” according to the constitution and stress that “that other arms of the state benefit from an independent judiciary.” However, he said that in 2015 it was not yet clear whether attempts to improve communication between branches would have an effect.

Although they were pleased with the gains of 2011–15, Mutunga and his staff said that not all were guaranteed to last. Mutunga said some changes were “indestructible,” such as improved salaries and benefits, training, and data-driven decision-making, but he believed that other bigger-picture changes, from judicial culture to fighting corruption, could be reversed without continued support.

Mutunga’s personal leadership was critical to the reform effort. “Willy Mutunga’s personal example has helped immensely” in developing a

more open judiciary, Kegoro said, “although getting it institutionalized will take a long, long time.” Mutunga’s strong backing of specific reforms such as performance management and the office of the ombudsperson was essential to move the initiatives forward and ensure cooperation.

With Mutunga planning to retire in June 2016, a great deal depended on the vision of his successor. “The chief justice has started the journey and set the direction, and after he leaves office, the strengthening of the transformation begins,” said Justice Reuben Nyakundi of the High Court. Apollo Mboya of the Law Society of Kenya put it more bluntly: “If they get a bad leader, that’s it.”

Although the judiciary’s future leadership was uncertain, many believed that the transformation program Mutunga initiated had set the institution on a path to greater improvements. “The foundation has been laid,” Nyakundi said, “but now we have to build on it.”

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