

REPUBLIC OF KENYA



THE JUDICIARY

STATEMENT BY HON. DAVID K. MARAGA, CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA, ON THE JUDICIARY BUDGET CUTS. NOVEMBER 4, 2019.

Ladies and gentlemen,

I have called you here today to make a statement on the developing crisis in the Judiciary concerning budget cuts. I am making this statement to correct some of the misleading statements made last week regarding the cuts and to give Kenyans the big picture behind the drastic cuts to the Judiciary Budget. I would like the public to know the reason why we are currently not able to offer certain services to the public.

First, let me begin by thanking all those who have spoken in support of the Judiciary on the Budget cuts crisis. As you all know aspects of the crisis are subject to litigation and I will not touch on matters that are currently in court.

Under our Constitution as stated in Article 1, **All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.** The people of Kenya have delegated the exercise of that power to the three Arms of Government, that is, the Judiciary, the Legislature and the Executive as well as to the Independent Commissions established under the Constitution;

Parliament and the Legislative Assemblies are expected to exercise the people's legislative authority at the National and County levels respectively. The people's executive power is to be exercised by the National Executive at the National level and the Executive Structures at the County level. In the same breath, the people's Judicial authority is to be exercised by the Judiciary and Independent Tribunals established under the Constitution. All these organs are to exercise the functions delegated to each of them as stated in the Constitution.

For these organs to operate properly, they require to be reasonably funded.

Article 95(4)(b) bestows upon the National Assembly authority to appropriate funds for expenditure by the National Government and other National State organs.

Article 127(6)(c) provides that the Parliamentary Service Commission prepares the annual estimates of expenditure and forwards them to Parliament for approval;

Article 173(3) requires the Chief Registrar of the Judiciary to prepare and submit estimates of the Judiciary's expenditure each year to the National Assembly for approval;

Under **Article 221(1)** of the Constitution, the Cabinet Secretary responsible for finance submits to the National Assembly estimates of revenue and expenditure of the national government for the next year;

Upon consideration and approval of the budget estimates of Parliament, the Judiciary and the National Government, **Article 221(3) & (6)** provides that those estimates shall be included in an **Appropriation Bill** which shall be introduced in the National Assembly for purposes of authorizing the withdrawal from the Consolidated Fund of the money needed for the expenditure;

Once the Appropriation Act is passed **“the Cabinet Secretary for Finance has no control over the Parliamentary or Judiciary Budget. However he has, with the approval of the National Assembly, limited control over the National Government’s budget Under Article 225 of the Constitution.”**

Upon approval of the Judiciary Budget by the National Assembly, **Article 173(6)** directs the Treasury to deposit the Judiciary Budget in the Judiciary Fund. To the best of my recollection, the Constitution does not give such direction in respect of the budget of any other State Organ.

To that extent, the Constitution accords the Judiciary special treatment, and one may ask: why such a special treatment for the budgeting process for the Judiciary?

World over, in all democratic states governed by their respective Constitutions, **constitutional power is constrained power**. The Judiciary is entrusted with the duty of safeguarding and enforcing constitutionalism. As a result, full autonomy and independence of the Judiciary is guaranteed. This is to enable the Judiciary to function without any interference.

In essence, what this means, fellow Kenyans, is that no single Arm of Government is authorized to exercise all the Sovereign authority of the people. The three Arms of Government, that is, the Judiciary, the Executive and the Legislature are equal and each has to keep to its lane. To put it in simple terms, none of these three Arms of Government should control or direct how any other should exercise the power the people of Kenya have delegated to it as stated above.

Under our Constitution, as is the case with the constitutions of other democratic States, it is the Judiciary which has been given the power to ensure that each arm of Government keeps to its lane; that each arm exercises only the powers delegated to it.

This means that if Parliament passes any law that violates the Constitution, anybody can go to court and get an order declaring that law unconstitutional. This includes the President (head of the executive) who is bound to act within constitutional confines.

Fellow Kenyans, we are human beings and not many of us would like to be told they are wrong; You don't expect a government official to be happy when told that he has corruptly taken government resources. Therefore, in some decisions the Judiciary makes, it is bound to clash with officials in other arms of Government;

It is for this reason, in order to avoid those officials in other arms of Government crippling the operations of the Judiciary by starving it of funds, that our Constitution

established the Judiciary Fund and **Article 173(6)** directs the Treasury to deposit the Judiciary Budget in that Fund;

However, the provisions above have not been implemented by the Treasury as required by the Constitution. Immediately after the Promulgation of the Constitution, and pursuant to Article 173, the Judiciary tabled its 2011/12 & 2012/13 budget proposals in the National Assembly and they were approved. In 2013/14 financial year, the National Assembly allocated to the Judiciary **Kes. 17.827 billion** representing 0.99 per cent of the national budget — the highest budget the Judiciary has ever received.

The following year, however, the acting Chief Registrar of the Judiciary was directed to take the Judiciary Budget Estimates to Treasury and the Judiciary was thereafter put into the category of Governance, Justice, Law & Order Sector (GJLOS), comprising the Ministry of Internal Security, Police, the Attorney-General, IEBC, prisons, and others;

The main challenge with these arrangements is that some of the institutions in the GJLOS Sector (Internal Security, the Police, the Prisons, the State Law Office, etc) have some of the resources ring-fenced. The result is that the Judiciary is made to share the remaining little resources, resulting in serious underfunding of judicial core judicial functions. This is evidenced by the declining budgetary allocation to the Judiciary over the years.

- 2017/18 - Kshs.14.652 billion - 0.69 per cent of the National Budget;
- 2018/19 - Kshs.16.096 billion - 0.66 per cent of the National Budget;
- 2019/20 — Kshs.18.857 billion - 0.69 per cent.

As the Judiciary's budget is dwindling, the workload is rising tremendously. As you all know, many Kenyans come to court to have their disputes resolved and this has resulted in an average of 400,000 cases that are filed every year. With the current manpower, the Judiciary is only able to clear an average of 300,000 cases every year.

You will recall that in the last financial year, we were given a paltry Sh50 million as the development vote. And as if the

reductions are not bad enough, we have serious challenges with what we call Treasury Releases through the IFMIS system.

After a long struggle, we have now got the Judiciary Fund Regulations passed by Parliament and the Judiciary Fund is finally fully operationalized.

Last week, the Judicial Service Commission, as required by the Judiciary Fund Regulations, authorized the Judiciary to open a Judiciary Fund Account at Central Bank and that should be done today or tomorrow if no other roadblock is erected.

I have now instructed the Chief Registrar of the Judiciary to take our next Budget Proposals to Parliament, and not the Treasury, so that when we have no funds to build courts or even to operate as is happening now, the people of Kenya will know who to ask — their Members of Parliament.

Contrary to remarks that have been expressed by politicians and others who have denied the existence of

budget cuts in the Judiciary, the actual current situation is that a number of critical processes in the courts and the Judiciary will be severely crippled. We have been criticized of playing politics whenever we raise these concerns. The implication of these statements is that we may be deliberately holding funds to make a statement. However, I want to challenge Kenyans to understand that we cannot play games, especially with an important issue such as resourcing the Judiciary.

The truth of the matter is that the amount available to us in the system has been reduced. Only the amount that goes to salaries has been spared; our development and recurrent expenditure has been slashed by 50 per cent, which works out to Kshs 2.9 billion; and the entire ICT vote of Kshs.400 million has been cut!

Some of the areas of operation affected include: transport and fuel costs for judicial officers and the Judiciary, suspension of over 53 mobile courts across the country – which were important for purposes of enhancing judicial services to inaccessible/ marginalised areas with no coverage of physical courts. We have had to suspend

circuit courts of the Court of Appeal to Mombasa, Nakuru, Eldoret and Nyeri. This is additionally because of the few number of the judges of appeal. We have been able to clear 77 per cent of cases older than five years. However, this process will slow down because of lack of funds to implement strategies.

Court annexed mediation, another innovation that is meant to enhance expeditious disposal of matters will be stalled, as a direct result of the budget cuts. The current programmes have managed to unlock billions of shillings through mediation and this progress is endangered as a result of denial of resources. The digital transformation of the Judiciary through ICT is the most hit by the cuts. There is zero percent of resources available at this very moment. We are not even able pay for WiFi services in the courts! This has also thrown the plans we had put in place for harnessing technology into disarray — the e-filing project which we had started cannot go on and the electronic revenue collection initiative has been hampered. Plans to fully automate proceedings of the anti-corruption courts to speed up the hearing of cases have come a cropper, and so have plans to set up a virtual court to

serve the Kenyan diaspora. The key message here to Kenyans is that the strangling the Judiciary results in a failure to get expeditious delivery of services.

Budget cuts have been a consistent phenomenon and not an accident or isolated incident. Some of the incidents that we encounter are deliberate attempts to undermine the Judiciary. On many occasions, the Judiciary has not been given treatment that is commensurate to other organs of government. For instance, what public policy informs the decision to deny the Chief Justice the same official cars as those of the speakers of Parliament? Kenyans may recall that in the recent past, there was an attempt to deny the Chief Justice traffic clearance, which was accorded to other heads of arms of government and to officers in the executive who are far junior to the Office of the Chief Justice. Public condemnation and outcry led to a reversal of this decision.

The same contempt has been extended to public and state functions and access to important government facilities, such as the Ground VIP lounge at the airport. The Judiciary, for instance, is not able to host visiting Chief

Justices in these facilities. Even letters of invitation to the Chief Justice are signed off by very junior officers, in complete disregard of protocol.

The Office of the Chief Justice is an integral part of the state structure and I am exercising a mandate that is bestowed on me by the Constitution, through the Kenyan people. I am not serving at the pleasure of a few people in the executive who are bent on subjugating the Judiciary. I am demanding all these, not for personal gain. I want the Judiciary and the office of CJ to be accorded its rightful place in the Institutional architecture of this country.

Ladies and Gentlemen, nobody is doing me a favour; the Judiciary should not be given its budget on the basis of how well the CJ speaks to those who control public funds. The Budget is from public funds for service delivery to the public. I am told some people are even talking of vetting our Judges and Magistrates once again. But we will not allow that to happen. We are tired of being the punching bags. We have been vetted twice. If there is going to be another vetting, let it start from the Executive, then Parliament before coming to the Judiciary.

Let me say something about court decrees against the Government; The Government should lead in obeying the law. It should not lead in impunity; As though to hit at the Judiciary, the Government is not settling court decrees against it. And it's the decree holders who are being hit.

Regarding the fight against Corruption, I am totally with the President on this important fight. However, equally important is the due process must be followed. We have to manage our expectations and let due process run its course. We have started hearing corruption cases and are proceeding well on a day-to-day basis. But due to the complexity of the cases, the volume of documentation, the number of accused persons in each case and their lawyers, these cases will take time. Therefore, please bear with us.

As I have said before, we can't accept to be used as scapegoat, and the claims that the Judiciary is the weak link in the fight against corruption cannot be further from the truth. We call on other agencies to do their work and we will do ours dutifully and promptly. As I have said, time and again, if there is evidence we will convict but if the

evidence does not meet the legal threshold, we will acquit. I will defend my magistrates and judges if they do what's right, but I will also be the first to condemn any judicial officer who disgraces the Judiciary.

In Conclusion, I want to remind Kenyans that Judiciary staff are working under very difficult circumstances. I want to invite members of Parliament, especially the leadership of the relevant committees, to see the state of the Supreme Court Building and the chambers of judges and other facilities.

My final plea to you fellow Kenyans is this: Defend the Judiciary. You need a strong Judiciary to defend the rule of law and attract foreign investment. When there is a crisis and country is on a brink (as you will recall), the Judiciary will keep this country together.

For the Judiciary to effectively operate, it has to have financial autonomy. In the past, the Judiciary has recommended a minimum of 2.5 per cent of the national budget so as to function optimally. If our economy does not allow, give us a reasonable percentage.

THANK YOU VERY MUCH!

HON. DAVID K. MARAGA, EGH.

**CHIEF JUSTICE AND PRESIDENT OF THE SUPREME
COURT OF KENYA.**