

Achieving Woman
Rolling the honour



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Balancing simplicity, excellence
in Justice Administration



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The Advocate

The LSK Magazine

VOLUME 1, ISSUE 1 • AUGUST 2014



The Spirit of the Law *Constitutional Tension Between the Three Arms of Government*

- Bursting Anglo Leasing Ghosts
- Complaints Commission
- Improving Professional Ethics
- Effectuate Death Penalty
- Turning Tears To Cheers

The Re-birth

It is a new dawn for *The Advocate Magazine* as the Law Society of Kenya (LSK) strives to improve service delivery to our 11,196 members.

The re-birth of the Magazine is to inform, educate and entertain readers with legal news articles, jokes, caricatures, features, opinions and columns.

In this issue, we have features and profiles of Judges and senior lawyers who have left a mark in spinning the wheels of justice in both The Bar and Bench.

Most of the personalities have recently been honoured by the Society for excellence in the administration of justice and striving to uphold the Rule of Law for over 40 years.

For instance, we have articles on Court of Appeal Judge Justice John Wycliffe Mwalati Mwera, Dr. John

Mugalasinga Khaminwa and Ms. Judy Thongori who has made a mark in Family Law.

The Chamber Break page entails legal jokes towards giving members a break from drafting heaps of submissions, litigation, certifying and ensuring due diligence on conveyancing documents.

We have also midwived a cartoon strip (*Wa-akili*) towards exploring the daily life of lawyers and their clients.

There are also articles on selected activities of the Society including public interest litigation cases, Continuing Legal Education (CLE) seminars, conferences, developments and sports.

For mentorship of young lawyers, *The Advocate* has a page on Wise Counsel that mainly entails practice experiences by Senior Counsel (SC) and lawyers.



We thank the LSK Council, editorial team, members and advertisers for making it possible to produce this issue.

The Editorial team welcomes both constructive criticism and ideas to make the publication better.

The Advocate Magazine also appreciates articles from members with a flair for writing. We would appreciate your articles and Letters to the Editor for publication which can be emailed to editor@lsk.or.ke. **Enjoy the reading!**

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The Advocate

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Rolling the honour

Judy Thongori likes to cook for her family when out of Court and Chambers. Local television comedy *Papa Shirandula* and drama *Mother in Law* are her favourite programmes.

By **HAROLD AYODO**

She is the first woman to be inducted into the celebrated Law Society of Kenya (LSK) Roll of Honour.

Her zeal and passion to her calling leading to monumental jurisprudence on Family Law has no doubt left a mark in legal practice.

It was therefore, not a surprise when the Premier Bar Association in the country inducted Ms. Judy Wanjeri Thongori into The Roll of Honour.

Ms. Thongori who was also presented with a prestigious award at a colourful LSK Annual Dinner Dance at the Intercontinental Hotel, Nairobi was humbled to be honoured by the Society.

"I am deeply humbled to be recognized by fellow learned friends and also be the first woman to be inducted into the Roll of Honour," Ms. Thongori says.

The Chief Justice Dr. Willy Mutunga, Court of Appeal Judges, Judges of the High Court, Magistrates and Advocates from East Africa were present at the annual occasion.

Other VIPs who graced the occasion included British High Commissioner Mr. Christian Turner and the Judges and Magistrates Vetting Board (JMVB) Chairman Mr. Sharad Rao.

Ms. Thongori says that her passion for legal practice

shifted to top gear when she was admitted to The Bar on December 9, 1988.

"My mother inspired me as she really believed in education. My teachers also motivated me," she says.

Ms. Thongori says that she chose to study Law after cajoling by her career master, even though she was not so confident of her ability.

The sole proprietor of Judy Thongori & Company Advocates says that joining the Federation of Women Lawyers (Fida-Kenya) as a young Advocate was a game changer.

"Senior Advocates who included Former Deputy Chief Justice Nancy Baraza, Court of Appeal Judge Lady Justice Martha Koome and Cabinet Minister Ms. Martha Karua encouraged me to join Fida-Kenya, which was then a force to reckon with," she says.

The lawyer whose 80 per cent of her legal practice entails Family Law and Succession never regrets joining the women lawyers' organization.

"We played a major role as a legal institution towards fighting

for democratic space in the country," Ms. Thongori recalls.

The mother of two children (Eric and Tracy) says that when not in Court of Chambers, cooking for her family is her cup of tea.

"I am an amazing cook and ever experimenting. I however, like preparing pine crumble for my family," she says.

Ms. Thongori who was married to John - an Advocate of the High Court - in 1994 says that her love for family justice made her adore two local television programmes.

"My favourite comedy is *Papa Shirandula* and *Mother-n-Law* on Citizen TV. When programming does not favour my schedule, my children record them for my convenient watching," she says.

Ms. Thongori whose classmates include Court of Appeal Judge Lady Justice Jamila Mohammed and Senior Counsel Prof. Patricia Kameri-Mbote encourages writing of Wills.

"After all the energy you put in acquiring property and/or bringing up a family, you should be more concerned with where the property will be and



how the family will fare upon your death." Ms. Thongori who recently presented a paper at a two-day Continuing Legal Education (CLE) Seminar on Family Disputes in Nyeri says family values are important in society.

According to Ms. Thongori, the recently passed Matrimonial Property Act 2013 may not be perfect to some people but it is a stride from the colonial Married Women Property Act of 1882.

"We now have a law that defines matrimonial property, provides for monetary and non-monetary contribution toward acquisition of the investments," Ms. Thongori says.



"We now have a law that defines matrimonial property, provides for monetary and non-monetary contribution toward acquisition of the investments."

— Ms. Thongori says



Ms. Judy Thongori receiving her award from LSK Chairman Mr. Eric Mutua. Looking on is Chief Justice Dr. Willy Mutunga and LSK Vice Chairperson Ms. Lilian Renee Omondi.

According to the renowned family lawyer, the law also provide for prenuptial agreements on property.

Ms. Thongori has been on the forefront in championing gender issues having honed her skills while working for Fida-Kenya as Deputy Executive Director and Head of Litigation between 1997 and 2003.

“At Fida-Kenya, I understood the connection between law and development and employing law as a tool for social engineering,” She says

Ms. Thongori who reiterates her passion on family law issues is an ardent believer that the family is the basic unit of a society and the base of social order.

“Article 45 of the Constitution is clear on the importance of family, which is the basic unit of society,” Ms. Thongori says.

Ms. Thongori says that the supreme law talks about family values that must be up held in the wake of the Constitutional dispensation.

She encourages younger female Advocates of the High Court to work hard to up hold the Rule of Law.

“Young Advocates should also embrace specialization in legal practice towards curving niches in the esteemed profession,” Ms. Thongori says.

The LSK Vice Chairperson Ms. Lilian Renee Omondi who read the citation when Ms. Thongori was honoured said that she left an indelible mark and set standards worthy of emulation.

“Induction into the LSK Roll of Honour is arguably the greatest accolade and tribute that an advocate can be paid by peers. Yet in truth, the very few special people who get to grace the golden face of the Roll are truly peerless and in a class of their own,” Ms. Omondi says.

Ms. Thongori who was born when Kenya attained independence is a first born of two other siblings.

Ms. Thongori grew up in the present Kangema Constituency in Muranga County, attended a

village primary school before joining Kahuhia Girls High School for both ‘O’ and ‘A’ Levels- between 1977 and 1982.

Ms. Thongori acquired her degree in Law from the University of Nairobi before proceeding to the Kenya School of Law (KSL) for Bar Examinations and before admission to the Roll of Advocates in 1988.

She worked at Muthoga Gaturu & Company Advocates, Machira & Company Advocates and Ndungu Njoroge & Kwach Advocates between 1990 and 1997.

Ms. Thongori has consulted for the Government of Kenya and the World Bank among many others institutions on various legal sector reform initiatives.

According to the LSK Vice Chairperson, Ms.

Thongori has zeal and passion to her calling” Ms. Thongori through her work, has been monumental in development of jurisprudence on family law,” Ms. Omondi says.

The Roll of Honour

- 1) Achhroo Kapila (1998)
- 2) Chunilal Madan (1999)
- 3) Satish Gautama (2001)
- 4) Samuel Njoroge Waruhiu (2002)
- 5) William Deverell (2003)
- 6) Nzamba Kitonga (2004)
- 7) Samuel Mutua Kivuitu (2006)
- 8) Justice Lee Muthoga, (2007)
- 9) Prof. Githu Muigai, SC (2009)
- 10) Ahmednasir Abdullahi (2010)
- 11) Hon. Kenneth Marende
- 12) Kanaiyalal Mohanlal Pandya (2012)
- 13) Judy Wanjeri Thongori
- 14) Dr. John Mugalasinga Khaminwa



EALS President and LSK Council Member Mr James Aggrey Mwamu arguing Anglo Leasing cases at the High Court.

Bursting Anglo Leasing ghosts

The Anglo Leasing ghosts have refused to go away despite a recent controversial payment by the Government of Sh1.4 billion to two firms.

It has been a roller coaster as the Law Society of Kenya (LSK) battled in court in a bid to stop the payment to Universal Satspace (North America) LLC in public interest.

LSK argued through lawyers Mr. James Mwamu, Mr. Anthony Khamati and Ms. Nyathira Muthuma that the payment is a constitutional breach and against the will of Kenyans.

“The decision to pay is baseless, based on untenable grounds and the company being paid was neither registered nor allowed to do transactions of such big amounts,” Mr. Mwamu argued.



Justice David Majanja

Mwamu further argued that the Judgment of the High Court of Justice Queens Bench (Claim No. 2006 Folio 881) to pay Universal Satpace (North America) LLC was biased.

Universal Satpace (North America) LLC in September 2006 sued the Government over claims of \$12,366,816 (Sh1.4 billion) at the Justice Queen's Bench Division Commercial Court in England.

The English court entered judgment entered against the Government of Kenya after its defence and counterclaim was struck out on December 20, 2013.

The High Court Constitutional and Human Rights Division Judge Justice David Majanja directed that the petition be served to the Attorney General (AG) and Treasury Cabinet Secretary.

"I direct that the petition and application be served on the Respondents (AG and Treasury Cabinet Secretary) before further directions and orders," Justice Majanja ordered.

The LSK filed a petition under a

certificate of urgency against a backdrop of heated public and media debate over the Anglo Leasing type contracts.

"The Judgment sought arises from the infamous Anglo Leasing contracts which have been the subject of investigations by the Kenya Anti-Corruption Authority, the predecessor to the Ethics and Anti-Corruption Authority," Justice Majanja said.

Justice Majanja said that the LSK urged the court to grant interim relief to prevent Treasury Cabinet Secretary from paying out the monies pursuant to the Judgment.

Justice Majanja said that LSK submitted that the Judgment to pay was obtained in breach of rules of natural justice and Kenya was also denied an opportunity to put forth a formidable defence.

"I am alive to the fact that this is an *ex-parte* hearing and the Judge hearing the matter will have the opportunity to assess the pith and substance of the allegations," Justice Majanja ruled.

Justice Majanja further ruled that whereas, he was satisfied that the

matter is urgent, he was not convinced that *ex-parte* orders are merited without service to respondents.

"Stopping Finance Cabinet Secretary Henry Rotich from making the payment amounts to interfering with MPs' role in checking Government's financial expenditure," Justice Majanja ruled.

Mr. Mwamu who is the East Africa Law Society (EALS) President took the battle to the Court of Appeal after Justice Majanja declined to issue orders stopping the Anglo Leasing payments.

Mr. Mwamu who is also a Council Member of the LSK drafted the Notice of Appeal in line with Rule 75 of the Court of Appeal Rules before serving the AG Prof. Githu Muigai.

The LSK Secretary/ CEO Mr. Apollo Mboya, HSC says that the Society appealed against the entire Ruling by High Court Judge Justice David Majanja refusing to grant conservatory orders.

Mr. Mboya says that the LSK was dissatisfied with the Ruling that empowered Parliament to decide on the Sh1.4 billion payment to

Universal Satpace (North America) LLC.

Mr Mboya says that LSK also sought to enforce principles of public finance in Article 201 of the Constitution requiring public money to be used in a prudent and responsible manner.

"I direct that the petition and application be served on the Respondents (AG and Treasury Cabinet Secretary) before further directions and orders."

— Justice David Majanja



“I humbly appeal to all of us to make Kenya better for all of us... let us strive to do away with arrogance and impunity.”

— Justice Mwera

Balancing simplicity, excellence in Justice Administration

BY HAROLD AYODO

Court of Appeal Judge Justice John Wycliffe Mwalati Mwera is by all means down to earth despite his social standing. It may raise eyebrows but the learned Judge has never owned a mobile phone even as telecommunication firms step up competition to unleash latest devices in the market.

As automobile conglomerates stumble over each other to manufacture smooth rides, Justice Mwera still cruises in his vintage Renault.

Many have passed him while strolling within his residence without noticing that he is a seasoned nut in the wheels of justice.

His favourite pass time when not writing Judgments and Rulings is watching the *Mashemeji Derby* (Gor Mahia vs. AFC Leopards).

Justice Mwera who adores *Zilizopendwa* music carries in his car a traditional cup made out of a bull’s horn for sipping his favourite drink.

For four decades, which span a period of momentous changes in the history of Kenya, his selfless contributions to the administration of justice has been instrumental in moulding the legal system.

When the LSK honoured him for Distinguished Service in the Administration of Justice,

Senior Lawyer Mr. Steven Adere who read his citation said that the Judge still owns a Renault *Roho*.

“The Renault *Roho* is a car whose technology would embarrass a mother in law because of the manner of engaging the gear in and out,” Mr. Adere said.

The Court of Appeal Judge who has left a mark in the administration of justice fell in love with a fellow student at University of Dar-es-salaam whom he eventually married.

The honour bestowed upon the Appellate Judge is the acknowledgement by LSK of his accomplishments, valuable contributions to the nation, administration of justice and the legal profession as a whole.

“The award represents and is equivalent to the Nobel Peace Prize to me after serving as a Judicial Officer for over 40 years,” Justice Mwera says.

The Appellate Judge who was admitted as an Advocate of the High Court of Kenya in September 15, 1975 says that he dedicates the award to his family, friends and Kenyans.

“I humbly appeal to all of us to make Kenya better for all of us...let us strive to do away with arrogance and impunity,” Justice Mwera says.

The Judge who played volleyball in school was born in 1946



Justice Mwera humbly receiving the Excellence in Justice Award. Below being congratulated by the LSK Vice Chairperson, Ms Lillian Rene Omondi.

in Malava, Kakamega County attended Malava Primary School before proceeding to Ingotse Mission Secondary School.

Justice Mwera went to Kenyatta College between 1968-9 before proceeding to study law at University of Dar-es-salaam.

"I graduated and began my career in the Judiciary in 1974 as a District Magistrate from where I rose through the ranks to the position of the Registrar of the High Court," Justice Mwera said.

The Appellate Judge was appointed High Court Judge in 1999 after working as Registrar of the High Court for 14 years.

Justice Mwera embodies the spirit of philanthropy and



served as an official of the Kabras Association in Nairobi during the 1970s and 80s.

The Association concerned itself with the general welfare

and cultural activities of his Kabras Community and their meeting joint was the famous Misango in Makadara. The Appellate Judge who has the

height of a National Basket Association (NBA) basketball star is also a member of the Karen Plains Resident Association.



Dr. John Mugalasinga Khaminwa receiving the Award.

Battling for the Rule of Law

By HAROLD AYODO

He spent nearly two years in detention following his alleged radical political views in the run up to multi-party politics during the early nineties.

Some of the dingy rooms where he was inhumanely detained were too dark for him to differentiate night and day.

Dr. John Mugalasinga Khaminwa was huddled in cells crowded with convicted rapists and murderers awaiting the hang man’s noose or serving life in prison.

The outspoken senior lawyer who has practiced law for 44

years was occasionally detained in solitary confinement as the country agitated for multi-party democracy.

The insurmountable hurdles he overcame are among reasons the Law Society of Kenya (LSK) inducted him to the prestigious Roll of Honour this year.

The induction to the Roll of Honour is arguably the greatest accolade and tribute that an advocate can be paid by peers.

His battles with the Government in the run up to multi-party democracy guaranteed him space in maximum prisons with hard

core criminals convicted of criminal offences.

“The Government of former President Moi detained me twice over my views and stand on democracy when Kenya was a one party State,” Dr. Khaminwa says.

The holder of a Masters in International Law from New York University Law School endured Government surveillance from the 1980s when the intelligence would monitor conversations of those considered as enemies of the State.

Dr. Khaminwa who has been a pupil master

to several advocates was detained from 1982-1983 and 1990 in connection with the attempted *Saba Saba* political rally to agitate for a multi-party State.

On *Saba Saba* (July 7, 1990), pro-democracy demonstrations rocked Nairobi and other towns countrywide as protesters demanded a multi-party State.

Dr. Khaminwa took on cases the one-party State was not happy with - including those trying to promote multi-party democracy.

The senior lawyer vividly recalled how he used litigation and activism to challenge State

power to realise multi-party democracy.

One of his original contributions to the struggle against authoritarianism was a court precedent which provided for "bail pending arrest."

While the phrase sounded backward because people usually sought bail after arrest, he exploited the strange wording to create precedent as a tool in the legal battle against repression.

"Many years have flown by but I still insist that lawyers must fight for democratic space, uphold the Constitution and the Rule of Law," Dr Khaminwa says.

Dr. Khaminwa recounted his ordeal in maximum prisons to Judges, Magistrates and Lawyers during the recent LSK Annual Dinner & Dance at the Intercontinental Hotel, Nairobi.

"I was given *Agano Jipya* (a Swahili Bible) when in solitary confinement. I found it very hard to read but there was nothing I could do or anyone to talk to," Dr, Khaminwa says.

The senior lawyer who was admitted to The Bar on August 27, 1970 says that he was once



*"I still insist that
Lawyers must
fight for democratic
space, uphold the
Constitution and
the Rule of Law."*

— Dr. John M. Khaminwa

shuffled between maximum prisons countrywide for over 18 months.

"I was outspoken on democracy and the Government hauled me between Kamiti, Naivasha, Manyani and Hola prisons among others," Dr. Khaminwa says.

When out of detention, legal practice was still not a bed of

roses as he had to overcome insurmountable hurdles for briefs.

"I was being trailed by armed police officers who constantly parked their cars outside my gate and office at Jubilee Building in Nairobi," Dr. Khaminwa says.

According to Dr Khaminwa, police harassed most of his clients - who were perceived to be a thorn in Government's flesh - when going to his chamber.

The Special Branch (then secret police) also kept tab on people who walked in and out of his law firm.

"I was among the few lawyers who had the gut to represent outspoken radical political leaders and citizens perceived to criticize the Kanu Government," Dr. Khaminwa says.

The senior lawyer says that political activists preferred to give him briefs as he was not afraid of taking the Government head on.

"There were instances when I was told to quit legal practice but I could not because I stood for both democracy and the Rule of Law," Dr. Khaminwa says.

When LSK inducted him to The Roll of Honour on March 15 this year, Dr. Khaminwa admitted that the prestigious award was a surprise.

"I never imagined that I would be honoured by the Law Society of Kenya (LSK) that I have served for nearly five decades," Dr. Khaminwa says.

The seasoned lawyer says that he was humbled when he read a letter from the LSK Secretary/CEO Mr. Apollo Mboya, HSC informing him of the honour.

"I read the letter from Mr. Mboya twice before I started recollecting how my life has been over the past 44 years in legal practice - it has been a roller coaster," Mr. Khaminwa says.

Dr. Khaminwa paid tribute to his employees over the years and specifically mentioned Lucy who is the tea lady in his law firm whom he says has been a team player.

Lawyers, Judges and Magistrates gave a standing ovation to Dr. Khaminwa when LSK Chairman Mr. Eric Mutua presented him a trophy after induction to the Roll of Honour.



Practice areas:

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Conveyancing, Immigration, Intellectual
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AG lauds LSK over **pro bono** services

Prof. Githu Muigai says Government is in the process of setting up a legal aid institution

The Attorney General Prof. Githu Muigai attending to a client during the LSK Legal Awareness Week at the Milimani Law Courts Parking Yard in Nairobi.

N AIROBI, KENYA: The public is increasingly benefitting from pro bono services during the annual Law Society of Kenya (LSK) Legal Awareness Week.

The week which, is scheduled for September 15th to 19th attracts several clients with mainly matters on land, family, human rights, contracts, succession, labour and the Constitution.

The Attorney General (AG) Prof. Githu Muigai encourages the public to take advantage of the free legal services.

"Offering week long *pro bono* services is a noble move by the LSK. It is particularly a blessing to members of the public who cannot afford legal services," Prof. Muigai who was the Guest of Honour last year said.

Prof Muigai said that the theme of the week - Access to Justice through *pro bono* Representation - last year was

in line with emerging legal concerns.

According to statistics, the increase in the number of lawyers who offered *pro bono* services last year compared to 2012 is a pointer that the Legal Awareness Week making head ways.

In Nairobi, 651 lawyers advised the public at the Milimani Law Courts Parking Yard compared to 489 lawyers who turned up in 2012.

Approximately 561 advocates advised clients in Mombasa compared to 473 in 2012. Kisii County also witnessed an increase as 52 Advocates turned up compared to 41 over the same period.

The script was the same in Nakuru following an increase from 38 lawyers in 2012 to 48 last year as opposed to Eldoret that witnessed a sharp decline from 84 in 2012 to 68 last year.

The AG, Makeni Senator Mr. Mutula Kilonzo Jr. and

former Director of Public Prosecutions Mr. Philip Murgor were among initial Advocates who served clients in Nairobi.

Prof. Muigai said that Articles 21(1), 35, 48 and 50 (1) of the Constitution provides for access to justice.

"Article 48 of the Constitution provides that the State shall ensure access to justice for all....," Prof Muigai said.

Article 52 of the supreme law gives accused persons the right to be represented during the trial process.

"The right to legal representation ought to be one of the basic criteria against which the fairness of a trial may be assessed," the AG said.

Prof. Muigai said that the Government through his office and Department of Justice is in the process of setting up the free legal aid institution.

The AG says that lack of access to justice has a direct

link to poverty which, impacts negatively on achieving Vision 2030.

"We must be alive to the fact that very few Kenyans can afford to pay for legal services or are even aware of their rights," Prof. Muigai says.

Prof. Muigai said that promoting the administration of justice and the rule of law and enhancing access to justice through *pro bono* representations are among priorities of his office and the Department of Justice.

"The Kenya Vision 2030 acknowledges that the economic growth alone is insufficient for achieving meaningful improvement in the quality of life of the poor, marginalized and vulnerable members of the society," Prof. Muigai said.

The LSK Vice Chairperson Ms. Lilian Renee Omondi encouraged members countrywide to participate in the noble cause.

Celebrating Pro Bono Lawyers

Members honoured for outstanding contribution in economic, social and cultural rights matters

Nairobi, Kenya: Lawyers offering pro bono services are setting the pace in fighting for rights of the less fortunate in society.

Four lawyers who not only blazed the trail but also made landmark contributions to economic social and cultural rights recently scooped *The Pro Bono Lawyer of the Year Award*.

The winners of the inaugural prestigious award included Ms. Carol Mburugu, Mr. Elisha Ongoya, Mr. John Chigiti and Mr. Tony Mulekyo.

The Nomination Committee analyzed several cases filed in Court before settling for deserving winners feted during a

gala at The Law Society of Kenya (LSK) Secretariat in Lavington, Nairobi.

The Committee comprised of Mr. Otieno Ombok (Kenya Community Media Network), Ms. Eva Muthuri (Family Health Kenya) and Mr. Gilbert Onyango (East Africa Centre for Human Rights).

Others are Ms. Zaphida Chege (East African Centre for Human Rights), Mr. Moses Opiyo, Ms. Salome Awuonda (Amnesty International Kenya (AIK)) and LSK Deputy Secretary Mr. Collins Odhiambo.

The East African Centre for Human Rights (EACHR) Regional Director Mr. Gilbert

Onyango who read the winners names said The LSK and AIK sponsored the Pro Bono award.

"It is an award for honoring and celebrating the outstanding Pro Bono contribution of lawyers in ESCR," Mr. Onyango said.

Mr. Onyango gave reasons why the Nomination Committee awarded the lawyers adding that more would be feted this year.

"Ms. Mburugu was nominated for promotion of the right to housing particularly in the case of *Satrose Ayuma vs. Kenya Railway Staff Benefit Retirement Scheme and Two Others*," Mr. Onyango said.

Ms. Mburugu got a positive judgment that was delivered in August 2013 as the Court enforced the petitioner's right

to housing.

"The court found that the Muthurwa evictions in 2012 were unconstitutional. She has also filed cases on other economic and social rights such as the right to health," Mr. Onyango said.

Mr. Elisha Ongoya who is also a law lecturer at Kabarak University was nominated following his legal achievements with regard to the right to housing.

"Over the years, he (Ongoya) has filed several cases challenging the violation of the right to housing," Mr. Onyango who is also an Advocate of the High Court of Kenya said.

"Mr. Ongoya has also been very instrumental in pushing the boundary with regard to litigating landmark cases in Kenya," Mr. Onyango said.

International Criminal Court (ICC) Counsel Mr. John Chigiti and Mr. Tony Mulekyo were jointly nominated for their role in the Muthurwa cases and protection of clients living in informal settlements.

"They were able to fight the demolition and/or eviction of the residents and were also instrumental in assisting in the development of the eviction guidelines," Mr. Onyango said.

The Committee posted a call for nominations on the websites of the Law Society of Kenya and Amnesty International Kenya together with an advertisement in one of the mainstream dailies.

"The advertisements were followed by the development of a criterion for selecting the winner of the awards," Mr. Onyango said.



Kituo Cha Sheria Programme Officer (Legal Aid) Ms. Carol Mburugu (right) receives The Pro Bono Lawyer of the Year Award from LSK Vice Chairperson Ms. Lilian Renee Omondi.



Advocates Complaints Commissioner (ACC) Ms. Naomi Wagereka (left) and Committee on Continuing Legal Education (CCLE) Representative Ms. Josephine Mongare during a Continuing Legal Education CLE Seminar in Nairobi.

Complaints Commission: Communicate to clients

Lawyers say some clients call them late at night demanding to know the progress of their matters.

N AIROBI, KENYA: Eighty per cent of complaints against lawyers before the Advocates Complaints Commission (ACC) are failure to communicate to clients.

ACC Commissioner Ms. Naomi Wagereka says that lack of proper communication between Advocates and clients leads to professional misunderstandings.

"Failure to communicate with clients timely and

effectively violates rules of professional responsibility, which is the main cause of advocate disciplinary matters," Ms. Wagereka says.

Ms. Wagereka was speaking during a Continuing Legal Education (CLE) Seminar on *Criminal Law & Practice: New Perspectives* at The Hilton Hotel in Nairobi.

The ACC Commissioner who delivered a lecture on Professional Ethics says that consumer protection is an

overriding prerequisite as enshrined under Article 46 of The Constitution.

"Slightly over 80 per cent of clients who come to us (ACC) feel that their Advocates do not keep them abreast with developments of their matters," Ms. Wagereka says.

The Commission derives its mandate from the provisions of the Advocates Act and is constituted for the purpose of enquiring into complaints against Advocates.

It investigates complaints, reconciles parties, dismisses complaints that do not disclose offences and prosecutes disciplinary

offences brought before the Disciplinary Tribunal.

Ms. Wagereka says that the Commission encourages solving complaints through Alternate Dispute Resolution (ADR) in line with the Supreme Law.

However, some Advocates also raised concerns during plenary session that a section of clients were troublesome and even called them at midnight inquiring of progress of their cases.

For instance, Mr. Kabaru Ndegwa said that there should be a Clients Complaints Commission (CCC) where Advocates could complain on 'unprofessional' clients.

"Some complaints against advocates before the ACC do not warrant to be heard as lawyers act professionally but clients err," Mr. Kabaru said amid laughter from advocates.

The Commissioner took advocates through its process of receiving complaints and writing to advocates on the same.

"We also vet some complaints which have no basis and advise the complainants accordingly. We refer others to the Advocates Disciplinary Tribunal," Ms. Wagereka said.

Ms. Wagereka called on senior advocates to encourage their younger counterparts to embrace professional ethics in line with the noble profession.

"The clientele we deal with today are well informed and know their rights...let us (Advocates) maintain professionalism that is tradition and customary with legal practice globally," Ms. Wagereka said.

Ms. Wagereka said that the ACC has moved across the country sensitizing the public on their mandate.

"The main grievance we get from the ground is clients are not kept up to date with the progress of their matters," Ms. Wagereka said.

Ms. Wagereka said that clients need to know progress of their cases, how long matters would take legal fees, mention and hearing dates.

"Clients also want to be informed on when matters are concluded, outcome, amount incurred in disbursements and discussion of legal fees at the instruction stage," Ms. Wagereka said.

Improving professional ethics

Cases filed against lawyers before the Disciplinary Tribunal increased from 186 in 2012 to 223 last year.



LSK Deputy CEO (Compliance & Ethics) Ms. Mercy Wambua.

The Law Society of Kenya (LSK) Deputy Secretary (Compliance and Ethics) Ms. Mercy Wambua says that the Tribunal heard and determined 174 cases last year alone.

"The completed cases included matters that were filed in previous years. The conclusion was an improvement compare to the 104 that were finalized in 2012," Ms. Wambua says.

According to the Deputy Secretary, approximately 502 cases remain outstanding over the last 11 years.

Ms. Wambua explained that 2,057 cases were opened against advocates between 2004 and last year with the highest (358) recorded in 2007 and the least (67) in 2005.

"Approximately 1,555 cases were concluded while 502 remained outstanding during the same period (2004 to 2013)," Ms. Wambua says.

Ms. Wambua says that out of the 174 heard and determined disciplinary cases, one advocate was struck off the Roll, suspended (18), fined (71) and admonished (20).

"The Tribunal settled 24 matters, terminated (one), acquitted (19) advocates while 40 complaints were withdrawn," Ms. Wambua says.

The Deputy Secretary says that 63 per cent of the disciplinary complaints were against advocates practicing as sole proprietors while 20 per cent involved those in partnerships.

Ms. Wambua detailed the statistics in a presentation titled *Analysis of the Advocates' Disciplinary Process in Kenya* at a recent

Continuing Legal Education (CLE) Seminar in Nakuru.

The Deputy Secretary said that common minor charges before the Tribunal include failure to keep the client informed, inadequate/delayed services and dishonesty.

"Failure to account, explain mode of charging, practicing without a valid certificate, lack of competence, diligence, ordinary decency and sexual harassment are also among complaints," Ms. Wambua said.

The Disciplinary Committee that heard and determine matters last year entailed Mr. Ezekiel Wanjama (Chairman), Ms. Dorcas Kitaa, Mr. Ambrose Weda, Mr. Louis Onguto and Gladys K. Wamaita.

Mr. Beauttah Siganga and Ms. Naomi Wagereka who were also members of the Committee joined the Advocates Complaints Commission as Chairperson and Commissioner respectively.

"LSK Vice Chairperson Ms. Lilian Renee Omondi and Council Member Ms. Grace Okumu stepped in for Mr. Siganga and Ms. Wagereka in line with the Advocates Act," Ms. Wambua said.

Section 58 (1) of the Advocates Act provides that the Committee may act as Tribunal of either three or five members, and may require the LSK Chairman or Vice Chairman or both or any other member of the Council to sit as an additional member or members of the Committee to constitute the Tribunal.

"Members of the Committee facilitated several Continuing Legal Education (CLE) Seminars on professional ethics countrywide last year," Ms. Wambua says.

The Deputy CEO said that under the LSK Strategic Plan 2012-2016, the professional body committed to strengthen its capacity and enforce appropriate standards towards professionalism.

"LSK is encouraging mentorship of young lawyers by senior advocates and has infused professional ethics in the CLE calendar," Ms. Wambua says.

According to the Deputy Secretary, plans are in the pipeline to set up an Inspectorate Unit of LSK to assist with enforcement of professional ethics.

"The Inspectorate will even assist with the execution of decisions of the Disciplinary Tribunal," Ms. Wambua said.

Regional Lawyers' Conference Deliberate on Improving Profession, Growing Law Firms



MOMBASA, KENYA: Curtains came down on the East Africa Law Society (EALS) Annual Conference with calls to establish active Cross Border

Legal Practice (CBLP) in the region.

Partners from established law firms from several jurisdictions globally also made presentations on how they successfully run firms with over

1,000 associates in different countries.

The EALS President Mr. James Mwamu said that CBLP and expanding of law firms is the way to go in the wake of rapid legal changes and

advancements on the global economy.

“EALS has seen the need to engage in capacity building of its members by giving them necessary tools to compete with the best in the world and

The East Africa Law Society (EALS) President Mr. James Aggrey Mwamu addressing the Annual Conference and General Meeting in Mombasa.



Lawyers register at the East Africa Law Society (EALS) Annual Conference and General Meeting in Mombasa last year.

adopt modern techniques of doing business," Mwamu said.

The EALS President was speaking at the EALS Annual Conference and Annual General Meeting (AGM) at The Whitesands Beach Resort and Spa in Mombasa.

The theme of the conference was *Raising the Bar: The Changing Environment for the Legal Profession in East Africa*.

The conference brought together lawyers from Kenya, Uganda, Tanzania, Rwanda, Burundi, Zanzibar, Ethiopia, South Sudan, Brazil and the European Union (EU) among other countries.

Speakers and panelists from Brazil and the EU pitched for forming of big law firms with partners and associates in several jurisdictions.

"Brazil has slightly over 780,000 lawyers with 350,000 in Sao Paulo alone...big established law firms attract more clients," Dr. Horacio Bernades Neto from Brazil said.

Dr. Neto, Mr. Pascal Mayuer (France) and Ms. Katherine Bird (UK) made presentations on *The State of Implementation of Cross Border Legal Practice in East Africa*.

"Cross border practice thrives among countries in the EU and EA can follow suit with its brilliant lawyers," Ms. Bird said.

"EALS has seen the need to engage in capacity building of its members by giving them necessary tools to compete with the best in the world and adopt modern techniques of doing business."

— James Aggrey Mwamu

The EALS CEO Mr. Tito Byenkya said that cross border practice in the region is the way to go arguing that several international and regional legal networks exist across the continent.

"EA partner States and the National Law Societies must facilitate CBLP if they are to benefit from lucrative international businesses or transactions," Mr. Byenkya said.

Mr. Byenkya said that CBLP is inevitable and lawyers from EA must play their part in defining the inevitability lest it assumes a form of its own.

"Bar Associations must play a lead role in influencing the review of their legal and policy regimes to facilitate CBLP and change perceptions," Mr. Byenkya said.

Mr. Byenkya said that the EALS will play its part in convening Law Societies at the regional level to move the agenda forward.

Kigali to host regional lawyers' conference

N AIROBI, KENYA: Rwandan President His Excellency Paul Kagame will open The East Africa Law Society (EALS) Annual Conference and General Meeting set for Kigali this year.

The EALS President Mr. James Mwamu says that the 19th Conference and General Meeting will be from November 13th to 15th at the Kigali Serena Hotel.

According to Mr. Mwamu who is also the Law Society of Kenya (LSK) Council Member, the theme this year is *Advancing the Legal Profession in East Africa: Trends and Patterns*.

"Rwandan President His Excellency Paul Kagame will open the Conference and General Meeting while Rwanda Bar Association Battonier Mr. Athanase Rutabingwa will deliver opening remarks," Mr. Mwamu said.

The EALS President who will deliver the introductory remarks said that the key note address will seek to examine latest trends of law.

"Emerging trends in legal practice in the region range

from Alternate Dispute Resolution (ADR), intellectual property, new media platforms and boutique law," Mr. Mwamu says.

The President says that others include the general background of regional integration, globalization and propose avenues which the legal profession can harness and leverage them.

"This year's Annual Conference and General Meeting is particularly noteworthy as it comes at a time when the East African Community (EAC) is celebrating 15 years of existence," Mr. Mwamu says.

The EALS President says that it has also been five years since the establishment of the East African Community Common Market Protocol.

"The Protocol calls for free movement of labour and services across borders of the partner States among others," Mr. Mwamu says.

According to the EALS President, it is without doubt that the case for an EAC is compelling - it has the potential to build and benefit

from economies of scale and accelerate competition.

"EAC can unite the region and a proper implementation of guiding documents such as the Protocol for the establishment of an EAC Common Market is positive," Mr. Mwamu says.

The EALS President says that an analysis of the progress towards implementation of the Protocol indicates some challenges.

"There still remains stringent and non-conforming measures on the free movement of professional services within which free movement of legal services also lies," Mr. Mwamu says.

Mr. Mwamu says that 73 per cent of non-conforming measures across the partner States with regard to implementation of the Protocol are on the free movement of professional services.

Focusing solely on the legal sector, the recent World Bank/ EAC Common Market Protocol Scorecard notes that while four of the five partner States (The United Republic of Tanzania did not assent to this

Schedule) have committed to allow free movement of legal services under the EAC Common Market Protocol schedules, there still exist non-conforming measures which frustrate the realization of this ideal.

Mr. Mwamu says that much has been gained by the legal profession over the past 15 years of the East African Community and 19 years of the East Africa Law Society.

"Much still remains to be done to ensure full realization of both institutions (EAC and EALS)," Mr. Mwamu says.

The EALS President says that this year's conference will offer an opportunity for the legal profession to reflect on the past 15 and 19 years of the EAC and EALS.

"The Conference will seek to identify the gains made during the period in terms of business growth and cross border legal practice in the region while also ventilating the trends in legal practice and how the regions legal practitioners can best position themselves to harness them," Mr. Mwamu says.



19th

Annual Conference
and General Meeting

14th and 15th November, 2014
Kigali, Rwanda

Why LSK challenged new insurance law

The Law Society of Kenya (LSK) moved to court over a new provision in the Insurance Act that caps at Sh3 million damages in respect to passengers in motor vehicle accidents.

The premier Bar Association in the country says that the provision in the Insurance (Motor Vehicle, Third Party Risks) Amendment Act 2013 is unconstitutional.

The LSK Secretary / CEO Mr. Apollo Mboya, HSC says that the professional body instructed senior lawyer Mr. Fred Ngatia to file a suit at the High Court challenging the law.

President Uhuru Kenyatta assented to the law on December 24th last year despite representation to him and Parliament.

For starters, The Insurance (Motor Vehicle, Third Party Risks), Amendment Bill, 2013 amended the Insurance (Motor Vehicle Third Party Risks), Act Cap 405 and thereby introduced a Schedule of structured payment of compensation under the Act similar to the Work Injury Benefits Act providing a maximum compensation in respect of death or fixed compensation for each body part based on individual income levels, nature

and extent of injury sustained among others.

The Finance Minister in 2009, through a Gazette Notice introduced Section 5(b) to the Insurance (Motor Vehicle Third Party Risks), Act capping damages to Sh3 million in respect to passengers in any motor vehicle whether Private, PSV or Commercial.

According to Mr Mboya, the new law would deny accident victims the right to choose between the scheme and litigation and also undervalue certain degrees of disablement.

"The scheme is designed in such a manner as to deny victims legal representation as matter of right," Mr. Mboya says.

The Secretary/CEO says that the amendment will not serve the best interest of the public and continuously requires review of compensation amounts taking into account inflationary factors.

Mr Mboya says that courts are still awarding more than Sh3 million as damages since majority of insured/clients were exposed to execution for over and above the amount.

"Insurance companies increased premiums for anyone who proposes cover in excess of the Sh3 million for



Mr Apollo Mboya, LSK Secretary/CEO.

passengers injured or death caused by the insured motor vehicle," Mr Mboya says.

The Association of Kenya Insurers (AKI) was recently enjoined in the suit as an interested party following orders by High Court Judge Justice David Majanja.

Justice Majanja certified the LSK petition urgent and directed LSK to serve the AG (Respondent) immediately.

"By restricting the sum payable as compensation, the insurers are given unfettered discretion to determine the amount to be paid," LSK argues in the petition.

The LSK argues that the law would stifle competition and deny accident victims the right to choose between various schemes as compensation for various degrees of disablement are predetermined.

"Curtailing maximum sum payable as compensation in the event of a motor vehicle accident is con-

stitutionally bestowed upon the Judiciary to be decided in an independent judicial forum," the LSK argues.

According to the law, losing the top part of the thumb attracts compensation of Sh150,000 while the whole thumb would be paid Sh750,000 if on the dominant hand or Sh300,000 if not.

The loss of top part of index finger is to be compensated at Sh150,000 while that of the whole finger would cost Sh300,000.

The structured compensation has a specific formula for determining compensation for blindness, loss of toes, hearing, amputation, and paralysis, injuries to the spine, genital organs and reproductive systems.

"Section 5 (b) is oblivious of the situation of the victim, deprive them opportunity for fair judicial evaluation and the whole Act ought to be declared unconstitutional in its entirety," LSK argues in its petition.

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Architectural impression of the LSK International Arbitration Centre.

Members to deliberate funding International Arbitration Centre

N AIROBI, KENYA: A Special General Meeting (SGM) will be held towards deliberations on raising funds to construct the ultra-modern Law Society of Kenya (LSK) International Arbitration Centre.

LSK Chairman Mr. Eric Mutua says that the Council will call the SGM in due course following its importance.

"We want members to deeply deliberate on the proposed seven storied building on our (LSK) plot in South C, Nairobi and how to finance the same," Mr. Mutua said.

The LSK Chairman said that the Council resolved to develop the plot following a go-ahead by members during the AGM in March last year.

This year, the Chairman said during the Annual General Meeting (AGM) at The Intercontinental Hotel, Nairobi in March that the building has several amenities.

"The seven storey building will have a court room, large collapsible arbitration room which can accommodate up to 30 people and 11 (eleven) small arbitration rooms to accommodate 10(ten) people each and 6 (six) retiring rooms," Mr. Mutua said.

The LSK Chairman said that there will also be a large ground floor hall to accommodate 660 people, 48 five star hotel rooms and a business centre, three floors for office space, a resident lounge, kitchen and dining.

"There will be two underground parking bays for 200 cars, a 300 capacity restaurant, video conference room with a Skype facility, a library and a pent house," Mr. Mutua said.

The project managers (Mwanzoni Ltd) who made a presentation to members said that the Quantity Surveyor has estimated the total cost of the building in South C at Sh1.2 billion.

"Five AGMs have in the past made resolutions that we (LSK) develop our land in South C," Mr. Mutua said.

The Chairman said that the Council engaged necessary consultants towards construction of the Centre following a resolution of the AGM on March 16 last year.

"The Council engaged PKF (financial advisors) and Mwanzoni Ltd (project managers)," Mr. Mutua said.

Mr. Mutua said that current planned activities include holding a SGM for approval of the appropriate financial model.

"Commencing fund raising, contractor pre-qualification and seeking input of the project team in the preparation of the detailed plan are also among planned activities," Mr. Mutua said.

The Chairman said that other activities include submission of scheme design concepts to the Nairobi County Government for approval and commencement of a detailed design stage.

"The National Environment Management Authority (Nema) Consultant procurement process is complete and Environmental Impact Assessment (EIA) studies are in progress," Mr. Mutua said.

Mutua said that Surveyors have commenced surveying the site and geotechnical studies will follow before the final report is availed.

The seven storey building will have:

- A court room
- Large collapsible arbitration room
- 11 small arbitration rooms
- 6 retiring rooms
- Large ground floor hall
- 48 five star hotel rooms
- A business centre
- Office space (3 floors)
- A resident lounge, kitchen and dining
- Huge restaurant
- Video conference room
- A library
- A pent house
- Underground parking

Solicitor General urge lawyers to fight graft

Director of Public Prosecutions **Mr. Keriako Tobiko** says some lawyers are used as intermediaries and accomplices to corruption

NAIROBI, KENYA: Solicitor General Mr. Njee Muturi has urged lawyers to play lead roles in fighting grand corruption in the country.

Mr. Muturi said that the country loses billions of shillings annually from graft which can be contained for economic development.

"Uncollected revenue running into billions of shillings is lost in corrupt dealings annually at the expense of development," Mr. Muturi said.

The Solicitor General was delivering a key note address during the opening of the International Bar Association (IBA) Workshop on Anti-Corruption Strategy for the Legal Profession at The Intercontinental Hotel in Nairobi.

The LSK supported the International Bar Association (IBA), the Organization of Economic Cooperation and Development (OECD) and the United Nations Office on Drugs and Crime (UNODC) in the organization of the Anti-Corruption Workshop for Legal Professionals.

"The noble legal profession must play a pivotal role to fight corruption. The legal profession should be like Ceasar's wife – beyond reproach," Mr. Muturi said.

The Solicitor General encouraged lawyers to be torchbearers in fighting graft as transformative reforms in the Judiciary continue.

"There were rampant cases of bribery in the Judiciary before the purge in 2003...Judicial reforms must be encouraged

towards integrity," Mr. Muturi said.

Mr. Muturi said that corruption is also slowly eroding the confidence of the public in the legal profession.

The Solicitor General called for increased capacity to argue and win cases against corruption as the Judiciary is now reformed.

Speaking at the same function, the Director of Public Prosecutions (DPP) Mr. Keriako Tobiko said that bribery is an offence under the Economic Crimes Act.

The DPP regretted that Kenya was ranked poorly by the recent Transparency International (TI) Report on graft.

"Some lawyers are used as intermediaries and accomplices to corruption. My



Director of Public Prosecutions (DPP) Mr. Keriako Tobiko during the International Bar Association (IBA) Conference at The Laico Regency in Nairobi.

office is handling cases where Advocates are involved in cases of fraud," Mr. Tobiko said.

The DPP said that lawyers are quick to pre-empt investigations where they are involved.

"There should be a distinction between the professional role of Advocates and those who are involved in economic crimes," Mr. Tobiko said.

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CJ: Honour pioneer African lawyer

Dr. Willy Mutunga proposes ways to immortalize Argwings Kodhek, celebrates lawyers for championing for constitutional reforms and democracy



Chief Justice Dr. Willy Mutunga addressing Lawyers at a recent Annual Dinner Dance at The Intercontinental Hotel in Nairobi.

NAIROBI, KENYA: Chief Justice Dr Willy Mutunga has challenged the Law Society of Kenya (LSK) to fete the first native lawyer in the country.

"LSK should seek ways to immortalize the late lawyer Argwings Charles Michael George Kodhek who was the first native Advocate to set up a law firm in Nairobi," Dr Mutunga said.

The pioneer native lawyer allegedly died in a road accident on January 29, 1969 along Hurlingham Road, which was later renamed Argwings Kodhek Road in Nairobi.

The late Kodhek made a name defending Mau Mau suspects following the declaration of a state of emergency throughout Kenya by the Colonial Government. Kodhek was also the first African to set up a political party in Nairobi - the Nairobi District African Congress, which later merged with the Kenya African National Union (Kanu).

Dr Mutunga who is also the President of the Supreme Court said that LSK can have Gitanga Road where its secretariat sits' renamed Argwings Kodhek Road. Kodhek was also a Foreign Affairs Minister.

"LSK can even construct a modern building where its Secretariat sits along Gitanga Road in Lavington and name it The Argwings Kodhek building," Dr Mutunga said.

The CJ said that the Premier Bar Association could also

organize a series of legal lectures and talks in honour of the departed learned friend.

"Legal Scholars and Lawyers from overseas can be invited to give talks and lectures towards immortalizing Argwings Kodhek," Dr Mutunga said.

The CJ said that LSK had been on the fore fronting championing for rights of the citizens from the 1970s to date.

Dr Mutunga was speaking during the LSK Dinner Dance where he was the Chief Guest at the Intercontinental Hotel in Nairobi.

Court of Appeal Judges, Judges of the High Court, Magistrates and Advocates of the High Court from East Africa attended the function.

British High Commissioner Christian Turner and the Judges and Magistrates Vetting Board Chairman Sharad Rao were also among the distinguished guests.

The late Kodhek was born in 1923 in Nyawara, Gem, Siaya in Central Nyanza and educated at St Mary's School, Yala and Maseno School.

He proceeded to Makerere University College in Uganda before proceeding to study law at the University of Wales following a scholarship in 1947.

Mr. Kodhek graduated as a lawyer and social scientist and proceeded for further studies at St Andrews in Scotland and returned to Kenya in 1951 and went into legal practice as the first black lawyer in the country.



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Effectuate Death Penalty



By **ERIC CHUMA MWENDWA**

The arguments for or against capital punishment have been ongoing since Cain killed his brother Abel and I have no doubt that they will continue long after this article has ceased to hold any interest for readers. My intention herein is not so much to identify with any of the known positions as to interrogate the failure of the executive in our country to give effect to the penalty as lawfully meted out by courts of legitimate jurisdiction.

I submit that this failure by the Executive has had a grave effect on our penal system as presently crafted. One of the main objectives of our penal system is to deter potential or would-be offenders from engaging in crime. The death penalty by its very nature is at the apex in the deterrence component of punishment. However from September 1987 there has been a deliberate policy by successive governments to render nugatory any death sentences handed down by courts by refusal to sign the warrants of death.

The representatives of the people in their presumed wisdom determined to impose the highest possible sentence for capital offences to show the repugnance with which society held their commission. Moral considerations aside, it is open defiance by the executive to refuse or neglect to ensure that those sentences, once passed down, are expeditiously carried out. It could even be termed active resistance to the popular will of the citizenry.

The death sentence remains a legally recognized punishment under the laws of this country. Should the popular will be that it

is no longer desirable to execute such offenders then it is imperative that an amendment be undertaken on the penal code to do away with what has now become a sentence only in the books. Indeed there now exists the option of putting the question to a referendum and have a direct election by the people on the question.

The procedure under Section 332 of the Criminal Procedure Code seems designed to defeat the ends of justice by subjecting the decision of courts of law to the overriding influence of the President. This is a clear case where the universally

recognized doctrine of Separation of Powers is disregarded and/or subverted by a provision of the law. As it were, the President who is the de facto head of the Executive arm of Government now sits as an appellate authority from decisions of properly constituted courts of law.

The Power of Mercy Act 2011, which gives life to Article 133 of the Constitution, makes provision for sentences to be commuted, varied or pardoned in deserving cases referred by the Advisory Committee on the Power of Mercy. This is another example of provisions of the law that seem to propagate disregard



The Supreme Court in session.



for the doctrine of separation of powers. The mandate bestowed by the Act needs to be exercised cautiously, with sobriety and judiciousness.

Let me submit that it is reprehensible and legally untenable that judicial discretion should be fettered by the imposition of mandatory sentences. Judicial discretion is what lends a human face to the trial and potential conviction of suspected offenders. Without it, highly trained Judicial Officers are reduced to mere rubber stamps in a system that seems tailored to give effect to the retributive aspect of punishment at the

expense of all else. It is time that Parliament re-examined and interrogated the rationale behind the decision to do so.

We must also be alive to the obvious fact that having a sentence that is not carried out can be labeled torturous and inhumane punishment. One can draw parallels with the fabled sword of Damocles; sentences handed out and that hang over the heads of convicted men and women on death row. Let us either carry out the sentences or abolish the punishment from the books once and for all.

Mr. Mwendwa is an Advocate of the High Court of Kenya

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Seniority remains tradition in legal profession

Front Seats in Court are reserved for Senior Counsel and Lawyers

Senior Counsel Mr. Fred Ojiambo addressing newly admitted Advocates at a Continuing Legal Education (CLE) Seminar at Panari Hotel on a Saturday.

N AIROBI, KENYA: Senior Counsel have urged the young lawyers to uphold nobility of the legal profession.

According to the Senior Counsel (SC), professional ethics and etiquette are among core pillars of the profession.

While addressing newly admitted advocates at a Continuing Legal Education (CLE) Seminar at Panari Hotel in Nairobi, three seasoned lawyers concurred on upholding dignity of The Bar.

According to Mr. Joe Okwach who was admitted to the Roll of Advocates on September 26, 1975, the

profession is not about the amount of money earned.

“My over 35 years’ experience as a Member of The Bar made me learn that it is more about the positive contributions you make to society than money earned,” Mr. Okwach says.

According to Okwach, lawyers should always remember that their core duty is to serve society in an honourable and beneficial manner.

“Lawyers must be people of integrity, honesty, respectful and always remember that rules of professional etiquette apply

everywhere – not only in court,” Mr. Okwach says.

The SC detailed his sentiments in a paper he presented to the newly admitted advocates titled *The Lawyer outside the Court Room*.

Mr. Okwach who was the Law Society of Kenya (LSK) Chairman between 1986 and 1988 says that lawyers who join politics are not absolved from professional ethics and etiquette.

“Lawyers who join politics should always remember that they are advocate first. Therefore, they must behave with dignity,” Mr. Okwach says.

Mr. Fred Ojiambo who was admitted to the Roll

on October 21, 1975 says that an advocate must be distinguished for integrity as the legal practice is not a trade but a dignified profession.

“Nobility is a pillar of the legal profession. Good grooming and etiquette are also very important as a lawyer must dress and behave well,” Mr. Ojiambo says.

The SC who was LSK Chairman between 1988 and 1990 cautioned against the use of sarcastic language and talking down colleagues in Court.

“Writing abusive letters to colleagues should be a valid basis for disciplinary action. Sarcasm must be avoided at all costs,” Mr. Ojiambo says.



“My over 35 years’ experience as a Member of The Bar made me learn that it is more about the positive contributions you make to society than money earned.”

Mr. Joe Okwach

Mr. Ojiambo who presented a paper titled *Grooming and Professional Etiquette* said that rudeness to the Court and Tribunal is inexcusable and sitting in court must be respected.

“The first row of seats in Court should be reserved for Senior Counsel and Senior lawyers in that order. Seniority is a tradition in the legal profession,” Mr. Ojiambo says.

According to Senior Counsel Prof. Tom Ojienda who is the LSK Representative in the Judicial Service Commission (JSC), senior lawyers must hold

the hands of their younger counterparts.

“Young Advocates should learn the ropes of practice from their seniors who should be beyond reproach.

Prof. Ojienda who was admitted to the Roll of Advocates on February 18, 1993 says that lawyers should charge fees according to professional services offered and expenses incurred.

“Senior lawyers should also pay young lawyers decent salaries towards motivating them into the profession,” says Prof. Ojienda who is also

a former President of the East Africa Law Society.

“Lawyers who are less than two years in practice should earn salaries of between Sh60,000 to Sh120,000 monthly,” Prof Ojienda says.

Prof. Ojienda who presented a paper titled *The Advocates Remuneration Order* says that the LSK should come up with a salary structure for Advocates.

“Some law firms in major towns pay newly admitted Advocates Sh25,000 monthly, which in my view is way below the required pay,” Prof. Ojienda says.

Turning tears to cheers

Mr. Elkington overcame insurmountable challenges to become a law graduate after his mother dumped him two weeks after delivery at the sprawling Majengo slums in Nairobi.

By **HAROLD AYODO**

Mr. Steven Ogolla is a living testimony of how the Advocates' Benevolent Association Kenya School of Law Scholarship is turning around humble lives.

He is among bright but disadvantaged law graduates that have benefitted from the noble scholarship that has turned dreams into reality.

Mr. Ogolla who braved misfortunes in double doses today works at the International Commission for Jurists (ICJ) Kenya as a Programme Officer (Human Rights).

Mr. Ogolla who thrived in adversity is counting his blessings as he is currently writing his Masters in Law (LLM) thesis titled The Right to Social Security.

"I sat the Kenya Certificate of Secondary Education (KCSE) thrice before I finally obtained a mean grade of A Minus and admitted to study Law as a Joint

Admission Board (Jab) student," he says.

Mr. Ogolla who was admitted to the Law School in 2007 recounts how he almost ditched his dream of becoming an Advocate until the Advocates' Benevolent Association (ABA) Kenya School of Law (KSL) Scholarship came to his aid.

"My father is a casual worker in Nairobi and mother sells vegetables and paraffin at Sega Market in Siaya County and could not afford the Sh190,000 fees charged at the Kenya School of Law," Mr. Ogolla says.

"I had no hopes of proceeding to the KSL and be admitted as an Advocate of the High Court of Kenya. I even deferred once over lack of fees," Mr. Ogolla says.

Fortunately, Mr. Ogolla says he applied to be considered for the Advocates' Benevolent Association Kenya School of Law Scholarship Fund, which changed his life in 2012.

"I got a call from the ABA



Mr. Steven Ogolla is one of the beneficiaries of Advocates' Benevolent Association Kenya School of Law Scholarship

Program Officer Ms. Beatrice Mwangi who informed me to collect my letter as a beneficiary...it is a phone call that I will live to remember as it opened for me other doors," Mr. Ogolla says.

After sitting Bar examinations at the KSL, he got internship at The Konrad Adenauer Stiftung (Rule of Law Programme for Sub Saharan Africa).

"The German institution paid my Masters of Law fees at the University of Nairobi (UoN) where I started classes last year," Mr. Ogolla says.

Mr. Ogolla says that the scholarship has also opened a new page in their family. "I come from a family of casuals... out of nine children, it is only my younger sister and I who

have gone past Standard Eight... the scholarship opened a new lease of life and the sky is the limit for me," Mr. Ogolla says.

Mr. Ogolla is not alone as the ABA KSL Scholarship has paid full and partial fees to eight bright but disadvantaged law graduates at a cost of Sh770,000 this year alone.

The beneficiaries are living examples of students who underwent insurmountable hurdles to graduate with degrees in Law from public universities.

Take the case of Ms. Joy Wakarena who is an orphan says that she felt numb when she received a call informing her that the ABA has awarded her full scholarship.

"The scholarship has turned my life around...I never

imagined that I would raise the Sh190,000 fees at the KSL...I will now realize my dream of becoming an Advocate," Ms. Wakarena said.

For Mr. Paul Elkington, his mother allegedly dumped him when he was two weeks old.

"I went to school through hardships and had never seen my parents until I met my father recently," Mr. Elkington says.

Mr. Elkington who was born in the sprawling Majengo slums in Nairobi did a barrage of odd jobs to raise his school fees before admission at the KSL hit the rocks.

For Mr. Enock Otieno who is an orphan who lost his parents in primary school, admission to

the KSL was a dream.

"I struggled through education from primary school to the University of Nairobi (UoN) School of Law where the Higher Education Loans Board (HELB) bailed me out," Mr. Otieno says.

According to Mr. Barrack Chirchir who has 18 siblings, it is not a bed of roses losing your mother in a polygamous family.

"I lost my mother in Standard Three and had to do menial jobs to study...I knew that I wanted to be a lawyer at that tender age," Mr. Chirchir who studied at Starehe Boys Centre says.

For Ms. Harriet Moraa, her father who was an Advocate of

the High Court of Kenya passed on before she joined KSL.

"My mother managed to raise Sh90,000 before the ABA KSL Scholarship topped up with Sh100,000. I could not believe it. I am touched," Ms. Moraa said.

Mr. Neville Ogutu whose father is an Advocate of the High Court of Kenya says that life took a twist after his father suffered stroke in 2004 and diagnosed with diabetes in 2005.

"My mother is a house wife and my father's illness meant that all avenues were closed. I had resolved to look for a job and save my fees, which would take years," Mr. Ogutu says.

Mr. Roger Owiso who is from a family of 15 children says his full Scholarship is reason for a better life.

"The full Scholarship is God sent. I lack words to express my joy that I thought it was a hoax when I received a call from Ms. Mwangi that I am a beneficiary," Mr. Owiso says.

Herman Omiti says the Scholarship is a dream-come true as it was his second application in two successive years.

"I applied last year and missed the opportunity, which forced me to defer my admissions at The KSL. I am now humbled to be admitted," Mr. Omiti says.



The Advocates' Benevolent Association Kenya School of Law Scholarship Beneficiaries 2014 when they paid a courtesy call at the LSK Secretariat in Lavington Nairobi.

Stage set for Annual Conference

N AIROBI, KENYA: The Law Society of Kenya (LSK) Annual Conference will be held at the Leisure Lodge Beach and Golf Resort, Kwale County this year.

The conference that attracts over 700 lawyers locally, regionally and internationally is set to kick off from August 13th to 17th, 2014.

The theme this year is *The Spirit of the Law: Constitutional Tension between the Three Arms of the Government*.

It will further focus on four sub themes which include *Making and Breaking the Law: Justice in the wake of Disobedience and Judicial Cowardice*.

Others themes are *Extractive Sector Analysis and Policy Engagement in Kenya, Homeland Security: Legal and Policy Dilemma to Tackle Terrorism and Justice is a Premium: The Hazards of Legal Practice*.

The LSK Secretary/CEO Mr. Apollo Mboya, HSC has encouraged members to register early towards enjoying

the discounted 'early bird' rates.

Last year, curtains came down on the Conference after a heated discourse on devolution after in-depth presentations by political leaders, scholars and constitutional lawyers at the Leisure Lodge Resort, Kwale County.

Political leaders drawn from the Cord and Jubilee Alliance elicited heated debate during plenary after their presentations on devolution in line with the Constitution.

Deputy President Mr. William Ruto who officially opened Conference after delivering the key note address said that the Jubilee Government remains committed to devolution.

The theme of the Conference that attracted over 700 lawyers was *Realizing Devolution and Decentralization under the Constitution*.

Former Prime Minister Raila Odinga said that the Government has no intention of implementing devolution and called for a change from a

Presidential to Parliamentary system of Government.

"Globally, devolution has never been successful under a Presidential system of Government," Mr. Odinga said.

Raila who presented a research paper titled *Devolution in Kenya: Prospects, Challenges and the Future* said that the Constitution should also be amended to increase resources from the National Government to Counties.

"What we have today is a clique of the wealthy who want to maintain the status quo and hold Wanjiku (ordinary citizen) at ransom... the Government has deployed various mechanisms to ensure devolution dies a slow and painful death," Mr. Odinga said.

Former Vice President Mr. Kalonzo Musyoka said that the Constitution provides for restructuring of the Colonial Provincial Administration which the Jubilee Coalition has entrenched.

"County Commissioners, chiefs and their assistants are a pointer that Governors



are not fully recognized," Mr. Kalonzo said.

Mr. Kalonzo said that the 'core elite' is on the process of reinventing itself to reap benefits of what he termed a centralized system.

"The Constitution should be amended to end the supremacy stalemate between the Senate and National Assembly to protect the devolution and convert the Speaker into President or Chairman of Parliament," Kalonzo said.

Chamber Break!



A lawyer's dog broke loose and ran out of his manicured compound in Karen and bit the neighbor's watchman. The following morning, the watchman went to the lawyer's up market office and asked, "If a dog running unleashed bites a man in a neighbourhood does the man have a right to demand compensation?" "Absolutely," answered the lawyer.

"Then you owe me Sh10,000. Your dog unleashed and ran out of your compound and bit my leg," the watchman said.

The lawyer writes an open cheque and hands it over to the complainant who dashes out of his office.

Two days later, the watchman finds a fee note from the lawyer demanding Sh25,000 for consultation.

WA-AKILI





Deputy President William Ruto delivering the Key Note Address at the LSK Annual Conference at The Leisure Lodge Resort, Kwale County last year.

The former VP said that a Parliamentary system is more accountable compared to the current Presidential system of Government.

Mr. Kalonzo presented a paper titled *The Elusive Chase for a Democratic Governance and the Promise of a Devolved Government*.

The Chairman of the Governors' Council Mr. Isaac Ruto who is from the

ruling Jubilee coalition says the writing is clear on the wall that the Government is fighting to kill devolution and render Senate irrelevant. "Governors are being harassed and seduced to weaken their resolve on devolution," Ruto said. The Bomet Governor said that he supports a Parliamentary system of Government and ideological positions taken by the Cord

coalition on implementation of the Constitution and devolution.

Mr. Abdikadir Mohammed who is the advisor of President Uhuru Kenyatta on the Constitution says that there is no crisis in implementing the Constitution.

"There is no reason to amend the Constitution as devolution is on course. It is easy to get holes in the Constitution but it is currently not the time to implement it," Mr Abdikadir said.

Mr. Abdikadir who is also a former Mandera MP officially closed the Conference on behalf of Attorney General Prof Githu Muigai.

LSK Chairman Mr. Eric Mutua said that the Constitution is the supreme law and Chapter 11 provides for devolution to be implemented.

"The Government has made attempts to implement devolution and we (LSK) encourage it to keep up with both the letter and spirit of the Constitution," Mutua said.



You Might Be A Lawyer If... You are charging someone for reading these jokes. The shortest sentence you have ever written was more than eighty words long. You have a daughter named Sue and a son named Bill. Your other car is a BMW.

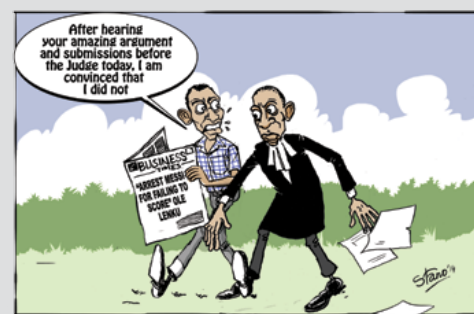
When you look in a mirror, you see a lawyer. When your wife says "I love you," you cross-examine her.



A lawyer who practices criminal law was elated when the High Court acquitted her client of robbery with violence charges last week.

As they strolled out of Milimani Law Courts, the lawyer turned to his client and asked, "Now that you are a free man, can you tell me truly whether you committed the crime?"

Client: "After hearing your amazing argument and submissions before the Judge today, I am convinced that I did not"



New Council takes oath



Ms. Jeniffer Shamallah



Mr. Godfrey Kitiwa

Nairobi, Kenya: The duly elected Law Society of Kenya (LSK) Council Members were sworn into office during the Annual General Meeting (AGM) in Nairobi.

Justice Lee Muthoga swore in the 12 Council Members elected during the hotly contested LSK Council elections on February 6, 2014.

"The swearing in of the duly elected Council is a feasible commitment to endear them to service during their two year tenure," Justice Muthoga said.

The leaders took oath during the LSK AGM held at The Intercontinental Hotel in Nairobi on March 15.

Justice Muthoga said that members of the Society need a selfless service from the newly elected Council.

"We thank the out-going Council for a job well done over the past two years and expect the new office to take the baton," Justice Muthoga said.

The officials who were sworn in are Mr. Dennis Mosota, Mr. Eric Theuri, Mr. Allan Kosgey, Ms. Jennifer Shamalla and Ms. Gertrude Angote, Mr. Allen Gichuhi and Mr. James Mwamu.

Ms. Grace Okumu (Coast representative), Ms. Caroline Khasoa, Mr. Godfrey Kitiwa (up country representatives), Ms. Lilian Omondi (Vice Chairperson) and Mr. Eric Mutua (Chairperson) were also sworn in.

Senior Counsel Mr. Paul Wamae and Prof. Tom Ojienda said that swearing Council Members into office was a step in the right direction.

"The outgoing Council did a commendable and remarkable job especially on developments of the LSK International Arbitration Centre in South C," Mr. Wamae said.

The Senior Counsel pleaded with the in-coming Council to ensure that the project whose cost is estimated at Sh1.2 billion succeeds.

"We should borrow as little as we can and strive to support the project individually," Mr. Wamae said.

Prof. Ojienda congratulated the previous Council adding that the move to take oath of office by the in-coming Council would guarantee selfless leadership, transparency and accountability.



Mr. Allen Gichuhi



Ms. Gertrude Angote



Ms. Grace Okumu



Mr. Eric Theuri



Mr. Dennis Mosota



Ms. Caroline Khasoa



Mr. Alan Kosgey

Bailing serious crime suspects

There was a time in this country when players in the justice sector realized that even with regard to capital offences, it was unfair not to have a window to release suspects on bond. How would one say a suspect is innocent till proven guilty, if that suspect's liberty was thrown out of the window pending trial? It was for this reason that provisions of Article 49(1)(h) were embedded in the Constitution to reinforce the principle that the right to be released on bond was a fundamental right regardless

of whether one had committed a capital offence or not.

It is therefore amazing, that barely three years after promulgation of the Constitution, the masses are up in arms calling for a review of the application of this right. Many are condemning the Judiciary stating that such suspects do not deserve to be released pending tri-

By **GUANDARU THUITA**



al. With these calls, one is left wondering what Kenyans really want – you give them liberty they say it is too much, you reduce it, they claim you are shackling them.

These calls have even been made by Deputy President (DP) Mr. William Ruto who recently accused the Judiciary of imposing lenient bond terms on terrorism suspects. What

a paradox? Had it not been for rationality in grant of bail terms at the ICC whereby he walked free after executing a personal bond, the DP who is himself accused of even more heinous crimes against humanity would not have been free to rise to his current position.

Perhaps, it was as a result of such high calls that a Kibera Magistrate who also serves as a Commissioner of the Judicial Service Commission (JSC) decided to impose a herculean bond of Kshs. 5 million each with sureties to a driver and a conductor who were

unfortunate enough to be in control of a Thika Road bus that suffered a bomb attack. How I wish they were taken for counseling after such an incident rather than remand.

The calls and reactions of such judicial officers raise eyebrows whether the grant of bail terms has a new condition - to wit, the road side declarations of politicians. As stated in numerous authorities including Ng'ang'a Vs. Republic (1985) KLR 451, the purpose of bail is to ensure that the accused person attends court for his trial. Bail should

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Course ready for golf tourney

The course is ready for the prestigious Law Society of Kenya (LSK) Chairman's Golf Tournament at the Leisure Lodge Golf Resort in Kwale County.

The tournament that shuts the curtains of the Annual

Conference attracts golfers from major clubs countrywide.

Last year, the event drew golfers from Leisure Golf Club, Nyali Golf Club, Mombasa Golf Club, Malindi Golf Club and guests with valid handicaps.

Mr. Ken Okeyo emerged the overall winner last year



continued from page 33

not be granted where the accused will fail to turn up, or will commit further offences or will otherwise obstruct the course of justice. The burden of proving these so called "compelling reasons" for denial of bond is on the prosecution.

I therefore agree with Chief Justice Mutunga when he recently turned the heat on prosecutors asking them to be giving compelling reasons to justify the denial of bail to a serious crime suspect. The police investigators must realize that the use of the phrase "compelling" in the Constitution is not for ornamental purposes. The police must get up from their slumber and conduct serious investigations and background checks on suspects before opposing or con-



ceding to applications for bail.

Having been engaged in the criminal justice system as an advocate, I came through many instances where an accused would be charged with an unbailable offence simply because he refused to part with a bribe or the investi-

gating officer was acting at the behest of a complainant hell bent on using the police to settle a score or the officer was just overzealous but lacking in intelligence.

My submissions are that as long as the police

Iranian nationals Mr. Sayed Mousavi (left) and Mr. Ahmad Abolfathi Mohammad recently charged with possession of explosives'.

have powers to arrest, draw charge sheets and prosecute at the same time, the justice system will never be just. I would rather they stick to investigations and maintenance of law and order while the actual charging becomes an

exclusive reserve of the Director of Public Prosecutions (DPP) and his officers. I rest my case!

Mr. Thuita is an Advocate of the High Court of Kenya, Advocate gourdarrow@gmail.com



“Although the greens were challenging, I was able to lead the board,”

— Ken Okeyo

following a rare birdie sank in the opening nine at The Par 72 Leisure Lodge Golf Resort in Kwale County.

“Although the greens were challenging, I was able to lead the board,” Mr. Okeyo said after receiving his award from LSK Chairman Mr. Eric Mutua.

The handicap 14 posted a total of 39 stable ford points to beat

a team of 150 golfers including lawyers. The LSK Member winner Mr. Larry Wambua (Handicap 6) had a total of 37 points having played a 16-21 with runners up handicap 6 Eric Nyongesa playing a 13-19 for 32 points. The Club’s Member winner was Handicap 25 Walter Odhiambo on 36 points (25-11) followed by Handicap 19 Bill Ryder on 35 points (19-16).



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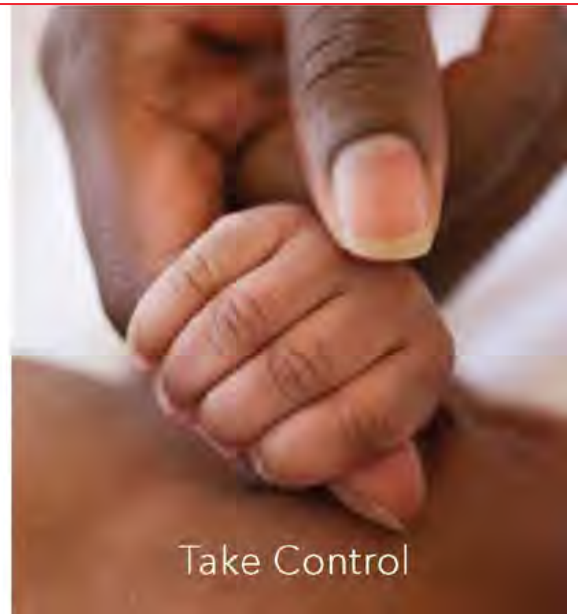
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