



# ASHES IN OUR MOUTHS: The Aftermath of Kenya's Electoral Coup

By Akoko Akech



The epic legal battles which have defined Kenya's presidential contest this year ended, not with the loud bang of the Chief Justice David Maraga's gavel, but with a whimper and muted celebrations. In the end, it seems, even the resolute Justice David Maraga-led Supreme Court succumbed to political intimidations and Jubilee secured a hard-wrung, bloodstained but Pyrrhic victory.

But for the executioners of Kenya's [electoral coup](#), the legitimacy deficit occasioned by a low voter turnout, dubious legal victories and political violence, counts for little. The end justifies the means.

However, how Jubilee secured this victory -and the resistance it had engendered- provides insights into what we might expect to define political struggles in Kenya's competitive authoritarian regime, in the coming season of street battles.

It should worry all and sundry, who care for Kenya's liberal democratic aspirations. It is the harbinger of a political struggle characterized by civic activism and state sanctioned political violence, by the police and allied militias, as well as by resistance from the National Super Alliance/National Resistance Movement, but without any trusted arbiters of deep seated political grievances.

Jubilee secured the ultimate legal stamp of approval through a legal but morally dubious political

processes, made possible by the Executive's sleight of hand that outwitted both the Chief Justice and other litigants, buttressed by the government-instigated credible threat of apocalyptic genocidal political violence in the slums of Nairobi, and some instances of resistance by undisciplined and easily infiltrated protests by the opposition.

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The destructions of nascent democratic institutions, which Jubilee's twin tactics, legal and extra-legal, have left in their wake, may well mean that in Kenya's struggle for change, where civic action (lawfare) led by the urban middle class competes with, and sometimes complements, street fights between the urban poor and police, the latter encounters may dominate the struggle in the coming months. A look at how these have played out points to several worrying trends. Lawfare first.

## **Judiciary**

If the execution of the August 8 electoral coup had claimed the independent electoral commission, the police service, the police oversight authority, and Kenya's "main-street" media, then its backlash against the Supreme Court following the September 1 setback may have claimed the nascent independence of the judiciary, its transparent methods of determining disputes, and its polite but firm approach to litigants. And more.

In a first in Kenya's electoral history, the Cabinet Secretary in charge of security declared the day before the October 26 repeat presidential poll a public holiday. The decision rendered most courts inoperative, except the High Court and the Supreme Court, which had express permission from the Chief Justice to hear all the pending and urgent election-related cases, before them.

But something happened. First, the Supreme Court failed to muster the necessary quorum, at least five out of seven judges, to listen to a case filed by democracy activists seeking to stop the poll. Justice Maraga was hard pressed to explain the absence of some of the judges.

Despite his efforts, it is still hard to understand why only he and Justice Isaac Lenaola had reported to work on that day. The absence of the indisposed Justice Ibrahim and Philomena Mwilu, the Deputy Chief Justice, whose driver had been shot and wounded the previous day, may indeed be excused but where were Justices Njoki Ndungu, J.B. Ojwang' and Smokin Wanjala?

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Then, three judges at the Court of Appeal held a late night sitting which delivered a significant judgment, in curious circumstances and without listening to both parties to the case, which overturned an earlier ruling by the High Court that had declared the appointment of election officials unconstitutional. It was eerily reminiscent of the travesties of justice during the late- night Mwakenya trials of the 1980s.

The Court of Appeal did not have express permission from the Chief Justice to meet on this day as it was not one of the courts mentioned his October 24 memo which allowed sittings on the public

holiday. But it received and determined a petition, late at night, filed by one of the litigants, while during the day, other litigants could neither find a register nor a duty judge.

What's more, in marked departure from the Court of Appeal's judicial tradition, this late-night Court, without listening to both parties to the case, rescinded an earlier High Court decision that ruled that the IEBC had irregularly appointed the returning officers who were to preside over the re-run. Why did the grant of ex-parte orders under such circumstance? Why did the Court of Appeal President, Justice Kihara Kariuki, empanel only this court for only one of the many litigants on this day?

Glossed over by Kenya's 'main-street media,' this act and the subsequent ruling by Justices Erastus Githinji, Martha Koome and Fatuma Sichale, point to a judiciary with two centers of power- one de jure, under the authority of the Chief Justice, and another de facto one, but answerable to Justice Karikui or a power higher than the Chief Justice's, located somewhere else.

Justice Kihara's action bodes ill for the rule of law. Courts should be predictable and accessible to all. Late-night courts must be the anti-thesis of justice which must not only be done, but also be seen to be done, sometimes literally under the glare of television cameras, and especially when political stakes are high.

In November, the Supreme Court returned. If the six-judge bench of September 1 was firm, patient and polite, this time, they were irascible, a little impetuous and imperious. If last time the court was a lot more engaged, taking both an adversarial and inquisitorial approach to determine the first petition, this time round the court seemed detached. It took a purely adversarial approach, allowing the litigants to slug it out, more in its 2013 mode.

Unlike the confident, but split bench that delivered the historic September 1 ruling, the judges returned to work united but subdued.

This time, the Court was quorate with all but one of the seven judges present. They reported for duty without fail for seven consecutive days. But true to the black and crimson red robes and white bibs, the traditional colors of Kenya's judiciary, they were conservative to the core.

The court seemed disinterested in several aspects of the two petitions. It threw out most of the petitioners' prayers which suggests two possibilities: the petitions were either irredeemably defective, or that the court recoiled at the prospect of another bruising battle with the executive.

If it is the first, then there is little cause for alarm. No doubt, the Court's full judgment, when released, will shed light on why, in their eyes, the two petitions had "no merit."

The second possibility, however, also deserves attention. Was the court acting out of an instinct for self-preservation? Was it trying to avoid the kind of assault that the Jubilee government, the Independent Electoral and Boundaries Commission, the Ethics and Anti-Corruption Commission, as well as its own Justice Njoki Ndungu, had launched following the invalidation of the August election?

The judiciary had come under unrelenting assault after the September judgment. The executive had attacked the Court and its partners mostly on the strength of Justice Ndungu's claims that the majority judges did not scrutinize the relevant electoral reforms, something supposedly corroborated by Ezra Chiloba, the IEBC's chief executive officer. It targeted the Registrar of the Supreme Court, and the International Development Law Organization, which it accused of inappropriately influencing subversive jurisprudence, threatening the separation of powers between it and the judiciary.

In the second set of presidential petitions, the Supreme Court judges steered clear of the whole kit

and caboodle of the IEBC's paraphernalia: the servers, the Kenya Integrated Electoral Management System (KIEMS), the numerical and alphabetically designated forms: 34A, 34B, 34C, and 32C.

This was a big victory for the IEBC. The compromised electoral management body would no doubt welcome a process that neither made reference to servers and KIEMS kits, nor pressed hard to produce a voter register, without placing unreasonable financial barriers on the path of petitioners. These were black boxes of this year's general election, keeping the all-important record of how many Kenyans voted and whom they voted for.

The path to Kenya's Supreme Court denouement has been long and convoluted, sometimes defying easy comprehension, and has arguably left Kenya with a weaker, much less confident Judiciary.

When finally delivered the ruling, Chief Justice Maraga was brief. There was no grand opening statement, no more soaring ecclesiastical aspirations or temporally lofty nationalist ambitions as in September. Faith and courage seemed to have deserted the now united six-judge bench. The court, it seems, had been "fixed" to its rightful Third World size.

And, in Pontius Pilate like response to the Kenyans competing cries, "Give us Uhuruto or Democracy," they seem to have unanimously delivered all Kenyans into the hands of Uhuruto's well-planned conservative backlash against the 2010 constitution.

They gave Jubilee government a *Tano Tena*, five more years, without the hearty high-fives and thunderous applause that greeted the September's landmark decision. Rather, the good news was received with a tad luke-warm celebration within the wood-paneled courtroom, even among the battery of lawyers who had fought to hard to secure it. Clearly, the court didn't quite surprise the winning team.

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These events point to sinister happenings within the Judiciary and, possibly, an on-going internecine power struggle, captured in the condescending and hectoring tone of the Supreme Court minority's dissenting judgment in the first petition, and the rogue conduct of the Court of Appeal of dispensing selective late-night justice.

They do not augur well for the administration of justice. Not only is the ruling party contesting the Chief Justice's authority, but also his own colleagues are. Can the Supreme Court's newfound unity following the unanimous second verdict heal this rift and restore Justice Maraga's administrative authority over the entire judiciary?

The erosion of the legitimacy of the court, especially of the Chief Justice's authority and transparent procedures of determining political disputes, will increasingly only leave one avenue open for those who oppose Jubilee government, but are outnumbered in all the formal political arenas of Kenya's democracy including parliament: the streets. However, this is a rough terrain, especially for the easily baited and undisciplined NASA street protestors, as recent events demonstrate.

### **Street protests**

Kenya's street struggle for democracy has in part always been a gladiatorial contest between the police (including the paramilitary General Service Unit) and the urban poor. Since 2007, the

securocrats opposed to Kenya's democratization process have built a formidable and lethal police capacity against organized protest.

How the state has policed the street protest has also changed, borrowing a great deal from Apartheid South Africa: through masculine and menacing deployment of troops and specialized vehicles, mostly aimed at containing the protests within the slums, and turning broad party political disputes into a narrow ethnic and intra-slum violence. But this year's pattern of state orchestrated violence suggests something more insidious.

The State has kept the protests far away from the business districts of cities like Nairobi and Kisumu, and from the high-income neighborhoods adjoining the hundreds of urban slums. This provocative posture by the police has easily lured the NASA protestors to respond in kind, but with slings, and acts of arson, which is clearly no match for the deadly arsenal of the police. The protestors' casualties and location attest to this asymmetrical warfare. Nairobi's Kibra, Mathare, Kawangware, Lucky Summer and Baba Dogo, as well as Kisumu's Kondele, Obunga and Nyalenda "Carwash", have borne the brunt of the political violence this year.

However, in pattern reminiscent of the Apartheid police's repression of urban protests in South Africa, Julia Steers [notes](#) that police violence in the slums this August was aimed at decapitating the urban-poor's political community's leadership by turning some residents of the urban slums into snitches, who identify "protest organizers and known opposition supporters" who are then marked for murder. These tactics tear apart the social fabric of the urban poor, brew mistrust, and valorize intra-urban poor violence.

Similarly, in a replay of the 1969 anti-KPU strategy of repressing protests, the Jubilee government has particularly trained its guns on the protestors in the counties of Kisumu, Homa-Bay, Migori and Siaya, with deadly outcomes. By targeting the beachhead of NASA's core support base, this kind of violence courts a collective ethnic Luo backlash against the real or imagined supporters of the Jubilee party in living in these areas.

It also seeks to draw out a loud Luo response, which can be manipulated to reduce the broad-based NASA resistance against the Jubilee government into "a Luo only affair" for which several ready "cultural" and binary explanations abound. Such the "dynastic feuds between the Jaramogi Odinga and Jomo Kenyatta families" or "the Luo-Kikuyu historical rivalries," which mask the question of electoral justice at the heart of the current political conflicts.

In 2007, Mwai Kibaki's regime executed political violence against the real or imagined opposition supporters, from above through the police, and GSU, as well as from below through the Kikuyu militia known as the Mungiki. In this, the police, and the Mungiki, largely acted separately. Conversely, ODM, the opposition, executed political violence through spontaneous protests and various organized militia groups in the urban slums of Nairobi, in particular and in the Rift Valley.

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This year, though, the police and a militia group widely thought to be the Mungiki were acting jointly against the real or imagined opposition supporters. Many news reports suggest that the Mungiki were camouflaged in military fatigues or police uniforms. Numerous accounts of dread-locked police

wearing jeans, gunfire from unmarked cars, of police armed with both machetes and guns as well as protesters in opposition strongholds with gun wounds, slit-throats or deep machete wounds, suggest a blurring of boundaries between the police and the urban slum militias.

If police violence against protestors was previously justified in the name of protecting private property, the recent footage of policemen, including those in senior ranks, hurling rocks at or lobbing tear-gas canisters or shooting into vehicles carrying the NASA politicians, suggests that the police now act as agent-provocateurs.

At any rate, how Jubilee has unleashed state violence and how the police have largely stood by as “unknown gunmen” shoot and kill hapless slum dwellers, tells a story of a regime that desperately wants to retain state power at any cost.

Politically expedient, these acts by the incumbent were calculated to achieve several outcomes: increase the cost of individual’s participation in protests, drive Kenya to the edge of apocalyptic genocidal violence and thus force the judges to rule in a particular way.

These acts suggests that Kenya’s dreams of ever bringing the armed forces under democratic control, through institutions such the Independent Police Oversight Authority (IPOA), and getting rid of political militias, especially during the elections, are slowly evaporating. Ominously, Kenya is increasingly criminalizing the police and militarizing the criminals.

The blurring of the difference between the police and the militia, or the police as the militia of the ruling regime, delegitimizes the Police. It might lead to an increase in the formation of gangs by the urban communities on the receiving end of the violence of the police-militia violence and an arms race within the slums.

Jubilee’s bloodstained victory has come at a great cost to the nascent institutions of Kenya’s democracy: judicial reforms, police reforms, and electoral reforms. It now boasts the legal imprimatur of Kenya’s apex court.

It is a victory that has not only left many Kenya without a credible arbiter of political conflicts, precisely at the moment when political conflicts are escalating and divisions hardening, but also weakened both the Judiciary and criminalized the police. The police is steadily becoming the ruling party’s militia-writ large, with oversight institutions such as IPOA standing by as mere spectators in the agora of a deadly gladiatorial combat between the police and the urban poor. Kenya’s judiciary is shaken, precisely at the moment when Kenyans need a strong judiciary as the bulwark against Jubilee’s majoritarianism, its dictatorial ambitions, and a trigger-happy police force. While NASA’s protest movement has shown some creativity, it hasn’t truly demonstrated a disciplined non-violent or civic street protests, perhaps the only viable option out of the coming gladiatorial encounters.

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