



Will CJ Koome Obey Pharaoh or Will She Walk the Path To Free Wanjiku?

By Francis Omondi



Lady Justice Martha Koome's appointment as our Chief Justice is causing me angst. It gives me hope yet wrenches something in my gut. Her reputation as a defender of human rights is unquestioned. Yet a confession during her interview by the Judicial Service Commission showed a bias towards government. In *Requiem for a nun*, William Faulkner warns, "The past is never dead. It's not even past".

There is Koome's activist past, her legendary past as the chairperson of the Federation of Women Lawyers (FIDA). There is the Koome who, from 2001, led civil rights organisations in securing women's participation in the constitutional review. She frightened the Moi era regime which deemed her ideas dangerous. Koome pushed for children and women's rights, sought the release of people locked up on trumped-up charges, those whose rights the regime had violated. That they did not lock her up as well is inexplicable. That possibility frightened her then. Not anymore.

Justice Koome hasn't fought the government in a while. No sooner had she become a judge than she jettisoned activism. As she told the JSC panel, her work at FIDA was situational. As a judge, she said, "I have changed completely. . . . I am government, as the Chief Justice of the Republic of Kenya . . . I head the other part of government." This is her immediate past. And it makes many anxious.

Writing on race equality in the America of the 1940s, Faulkner's message was that some day, the people would rise above these divisions and recognise the ties that bind them. They would recognise the fundamental lie of racism. But the protagonist, with his very Southern attitudes and bigotries, fails that test, and hence the past is never dead. For Justice Koome, which of these pasts is past?

Our main worry is something that her 18 years as a judge have revealed. Petitioning the JSC to reject Koome's nomination, the President of the Law Society of Kenya Nelson Havi argued that her appointment would weaken the independence of the judiciary. Havi cited a questionable Saturday night sitting of the Court of Appeal during which Hon. Justice (rtd.) E.M. Githinji, Hon. Justice Fatuma Sichale and Hon. Justice M.K. Koome delivered a judgment ex parte (in the interests of one side only), a final order reversing a High Court ruling in the case of the Republic v IEBC Khelef Khalifa and another (2017) that had been delivered that very morning.

If Justice Koome is to deliver justice, she will have to find her true north again, her human rights past. Upholding justice must not be situational, Madam Chief Justice. Justice is about equal rights, and access to justice for those denied it. Delivery of justice must start within the judiciary.

While interviewing Justice Koome, Commissioner Everlyn Olwande spoke for the judges and magistrates when she expressed her fears using piercing allegory: Is the judiciary fast hurtling towards another purge? There was the radical surgery under Justice Aaron Ringera, and the judicial vetting that saw a host of judges evicted. The signal has always been to claim corruption within the judiciary.

In 2019, the state moved its war on graft to the judiciary. The Chief Public Prosecutor, Noordin Mohamed Haji, brought a charge against the Deputy Chief Justice Philomena Mwilu, that she had "abused her office for personal gain, undermining public integrity in the judiciary". Haji claimed he had instituted criminal proceedings against her in the public interest as he had gathered enough evidence for "a reasonable prospect of conviction".

But observers saw through the scheme. If the case had not been brought in order to force the JSC to eject the DCJ from office, then it was in fulfilment of the "we shall revisit" [promise made by the president to the judiciary](#). This, in my view, was the veiled fear in Commissioner Olwande's questions. It would be tragic if the Chief Justice were to cede her power to the executive.

The only hope the judiciary can hang on to is Justice Koome's statement that, "An institution like the Judiciary should be self-cleansing . . . from within and . . . not from without," to "ring-fence the independence of the judges, the judges' decision making and the institution," she said.

Chief Justice Koome's major challenge will be to deliver justice to Kenyans. With a compromised legislature and an executive that is working on its own agenda, as the custodian of law, the judiciary remains the only guardrail protecting Kenya from tumbling down the precipice of chaos.

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Governments have a propensity to oppress and Uhuru Kenyatta's government isn't unique in the little regard it has for justice. Justice Koome inherits a judiciary that has been battered to a pulp by the regime; punitive budget cuts, disregard of the courts' authority, derisive rhetoric. How else can we explain the president's delay in appointing the 41 judges recommended by the the JSC in mid-2019? Chief Justice Maraga complained that the delay had made work difficult for the courts while [Kwamchetsi Makokha](#) argued that the president's agenda was to diminish the stature of the judiciary.

I appeal to Chief Justice Koome's faith to make the judiciary work for Kenyans and in this regard, an episode in Exodus 1 demands our attention since it a turning point in human history. Its heroines are two outstanding women, Shiphrah and Puah. The Pharaoh instructed these two midwives thus: "When you are helping the Hebrew women during childbirth on the delivery stool, if you see that the baby is a boy, kill him; but if it is a girl, let her live" ([Exodus 1: 16](#)). But they did not carry out the order: "The midwives, however, feared God and did not do what the king of Egypt had told them to do; they let the boys live"(1:17).

Commenting on the episode, [Rabbi Jonathan Sacks](#) termed it as "the first recorded instance in history of civil disobedience". The two women refused to obey the order of their world's most powerful man, an order they judged unethical and inhuman. Questioned by Pharaoh they explained: "Hebrew women are not like Egyptian women; they are vigorous and give birth before the midwives arrive," (1: 19) to which he had no reply.

In refusing to follow the orders, Shiphrah and Puah showed that the ultimate sovereignty lies with God. The notion that sovereignty belongs to the people is a fallacy. Rabbi Jonathan Sacks argues that moral law transcends and may override the law of the state.

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During the 1946 Nuremburg trials, the war criminals' plea was that "they were merely obeying orders, given by a duly constituted and democratically elected government". But for the new legal concept of a crime against humanity, the guilt of the perpetrators of the holocaust would have remained unestablished. Sacks observes that "The Nuremberg principle gave legal substance to what the midwives instinctively understood, that there are orders that should not be obeyed, because they are immoral." So, any human order transgressing the will of God is by that fact alone *ultra vires*. Shiphrah and Puah were the first to teach humanity the moral limits of power.

We are a country, it seems, that is bankrupt of goodness. A space filled with the evil that we commit against each other. If we do not cooperate in shunning evil against others, a good judiciary will be as useless as a scarecrow after the harvest. We should do good because that is what a human being is supposed to do.

It confounds me how attractive evil is to others. We give undue attention to the whispers or the shouts of evil. Not that evil does not demand confrontation, but I wonder why it is so elevated. Toni Morrison, the winner of the 1993 Nobel Prize for Literature, noted that "Evil has a blockbuster audience; Goodness lurks backstage. Evil has vivid speech; Goodness bites its tongue."

To understand goodness, Toni explored the term altruism, selfless compassion for the "other". In her research, she learned something about altruism, its weight and its relevance in contemporary thought. What defined goodness for her was an incident that occurred within the Amish community of Pennsylvania in the United States. On the 2nd of October 2006, 32-year-old Charles C. Roberts arrived at the West Nickel Mines Amish School and ordered the male students to leave. He also allowed a pregnant woman and three women with babies to leave. Roberts then lined up 10 girls aged between 9 to 13 and shot them, killing five girls and injuring five others. Then he killed himself.

Although Roberts was not Amish, the community forgave him, refused to seek justice, demand vengeance, or even to judge him. They visited and comforted his widow and children, just as they embraced the relatives of the slain. In refusing to judge Roberts, the Amish community asserted that it was God's place to judge. They said nothing or very little to outside inquiry, held no press

conferences and submitted to no television interviews, only cautioning, "Do not think evil of this man." They buried their dead, then attended the killer's funeral the following day. Then they built a new schoolhouse, having torn down the old one.

Their silence following the slaughter, along with their deep concern for the killer's family, seemed to Toni characteristic of genuine "goodness" or altruism and she became fascinated with the term and its definition.

Toni Morrison found that altruism is not an instinctive act of selflessness, but a taught and learned one. Altruism can also be used to enhance the ego in a desperate attempt to decrease self-loathing. Others have argued that altruism is embedded in our genes to enable the sacrifice of self for others. Such sacrifice for kin and/or community is innate, they claim, and is built into our genes, just as we hold individual conquest of others to be an instinctive drive that serves evolution.

This goodness can be learned. We can be taught goodness until it becomes a habit of helping strangers and/or taking risks for others at our expense. We can override that instinct which inclines us to protect only our own kin or group and broaden it to include all the people we meet, an unquestioning compassion for all.

Justice John Khamoni (rtd) learnt this goodness and the Law Society of Kenya recognised him for his distinguished service in the administration of justice in 1999, an award which the then Chief Justice barred him from receiving. In 2015 Justice Khamoni was awarded the [Justice C. B. Madan prize](#) for his contribution to the administration of justice. Justice Khamoni is in my view an example of altruism within the judiciary.

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Justice Khamoni's acts of goodness were carried out at significant risk to his career in the judiciary. In November 1991, at the peak of the calls for political reforms, the movement's leaders were arrested and charged. A magistrate had refused the bail applications for James Orendo and Luke Oboko and the case had come before the newly appointed Justice Khamoni at the High Court in Kisumu. In that charged atmosphere, Khamoni considered the refusal to grant bail on purely legal grounds and both applicants were granted bail.

Justice Khamoni's vision of the criminal justice system was one that was averse to oppression. He held that the High Court had a duty to prevent vexatious and oppressive prosecutions, instituted for an improper purpose and hence an abuse of the court.

The two midwives, Shiprah and Puah, acted like good people. As did Justice Khamoni. By their acts we learn that they "feared God", a generic description of those who have a moral sense.

Do we wonder why Hon. Amos Wako changed during his 20 years as Kenya's Attorney General? He served as the LSK chairman from 1979 to 1981 and was a member of the UN Human Rights Committee between 1985 and 1992. The honour accorded him and the awe in which he was held reached beyond Kenya to places far away and in countries where the intelligence of Africans is the source of much amusement. Expecting that he would check the Nyayo era excesses turned out to be a futile dream. As head of the state law office, he oversaw the torture and oppression of Kenyans agitating for multi-party politics. Wako witnessed the wanton abuse of human rights without flinching. And although Kenya achieved multi-party rule and change of constitution during his tenure, the KANU government tethered him to the Goldenberg scandal during his entire time as

Attorney General which led to his being [sanctioned by the US government](#).

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The government is a toxic soil. This we now know. This soil is bad for certain kinds of flowers, to borrow the words of Claudia at the end of Toni Morrison's *The Bluest Eye*. Certain seeds this soil will not nurture, certain fruit it will not bear. Can Chief Justice Koome thrive in this soil?

When we say the past is just a prologue, we mean the past should not enslave us; rather we spring into the bright day from lessons learnt from that dark past. Prologue because we follow those such as Shifra and Puah who paved the way.

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