In Whose Interest? Reflecting on the High Court Ruling Against John Githongo

By Rasna Warah

The awarding of a hefty Sh27 million ($270,000) in damages to the former minister Christopher Ndarathi Murungaru by the High Court judge Joseph Sergon has sent a chilling message to all those who might be inclined to report corruption or wrongdoing within government: do so at your own peril.

Murungaru's libel case against anti-corruption activist and former Governance and Ethics Permanent Secretary, John Githongo, has raised serious questions about whether court decisions are being made without due reference to constitutionally-protected rights and freedoms and whether Kenya's judiciary has been "captured" by the state.

These questions were recently discussed and debated at a public forum in Nairobi organised by various civil society organisations, and attended by prominent legal minds, including the former justice minister and NARC leader, Martha Karua, who described the Sh27 million award by the judge as "outrageous". Karua, who has been accused by her critics of not doing enough to protect Githongo when she served in Mwai Kibaki's administration (when the so-called Anglo Leasing scandal that implicated Murungaru and others in government was exposed), stated that the case will make people afraid of coming out and reporting corruption within government. She further claimed that when she realised that many of the Anglo Leasing contracts that Githongo had exposed in what

is known as the "Githongo Dossier" were fraudulent, she made several attempts to have the government not honour them, but was thwarted in her attempts by none other than the then Attorney General, Amos Wako.

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Wachira Maina, a constitutional lawyer and governance consultant, believes that this case illustrates how "state institutions have been repurposed for private gain". He wondered why Murungaru had not sued the *Nation* newspaper, which published the dossier, suggesting that the case was a personal vendetta against a soft target who could be financially crippled by the case. As George Kegoro, the Executive Director of the Kenya Human Rights Commission, pointed out, "This case was about isolating John and exposing him financially. It was to embarrass and ruin him and to silence him."

The amount awarded to the plaintiff also seemed unusually large. As Jill Ghai noted, "If you lose a leg in an accident in Kenya, the most you get awarded is 2 million shillings, so 27 million for damages is outrageous."

"The court did not consider that Anglo Leasing happened under Murungaru's watch," said Maina. He further pointed out that every ruling in the courts must "pass the constitutional test", which this ruling clearly did not. "There is no single reference in the judgement to the constitution. Judges are not only expected to apply the constitution, but are also expected to interpret law to reflect the constitution."

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Several countries are reconsidering their libel laws and amending them so that they do not impinge on freedom of speech and the right to access to information, which are constitutional rights in many countries, including Kenya. These rights and freedoms become even more salient when the publication of certain information is in the public interest. The UK's Defamation Act of 2013, for instance, curtailed what is known as "libel tourism" (libel cases brought by people who go to court in countries where they are most likely to be awarded large amounts of money in damages) and extended to the mass media the "qualified privilege" defence, which provides protection from a defamation lawsuit for journalists who publish information that is in the public interest.

Perceived injury to an individual versus public interest

The core issue in the Murungaru v Githongo case remains whether the revelation of the Anglo Leasing scandal – which was not just exposed in the *Nation* newspaper that published the Githongo Dossier in 2006, but was also extensively documented by the British journalist Michela Wrong in her book, *It's Our Turn to Eat: The Story of a Kenyan Whistleblower,* published in 2009 – was in the public interest. Did the public have the right to know the people and events that constituted the Anglo Leasing scandal? Definitely, because billions of Kenyan taxpayers' shillings were involved, and the contracts signed had to do with national security. (The Anglo Leasing scandal, as the corruption scam that Githongo exposed has come to be known, was a series of fictitious security contracts

signed with shell companies by the Moi and Kibaki governments that cost the Kenyan taxpayer millions of dollars. According to reliable estimates, the contracts were worth more than $700 million, of which an estimated $250 million was paid out). Some of those implicated are currently facing trial in the Kenyan courts.

> Kimeu said that the role of the judiciary is to interpret the law, and to do so in line with the aspirations of the people. “This case was about Kenyans and their money,” he stated. “The case made an example of John – it is basically telling us to lie low. If you speak out, it is to your personal detriment.”

Moreover, the court must determine that there was “actual malice” on the part of Githongo when he claimed that Murungaru and four other high-level government officials orchestrated the Anglo Leasing scam. So, for instance, there needed to be evidence that Githongo deliberately tried to malign Murungaru in order to cause harm to him or to damage his personal or professional reputation. (Murungaru claimed that he lost his parliamentary seat as a result of Githongo’s allegations, which is neither here nor there.) As Samuel Kimeu, the Executive Director of Transparency International-Kenya, rightly asked, “How is it that a perceived injury to one person trumps the public interest?”

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Kimeu highlighted that there is currently no law in Kenya that protects whistleblowers, which makes exposing wrongdoing a daunting task, and that this particular libel case has had a “disorienting” effect on those who protect the public interest.

Integrity issues

Prof. Kibe Mungai, an advocate of the High Court, admitted that many judges and public officers in Kenya disregard the constitution, especially on issues to do with integrity and values. However, as I have noted in previous articles, the precedent was set by none other than the current presidency, Uhuru Kenyatta and William Ruto, who stood for the highest political office in the land despite being indicted by the International Criminal Court (ICC) for crimes against humanity. By doing so, they contravened Article 73 of the constitution that states that “authority assigned to a State officer is a public trust to be exercised in a manner that … promotes public confidence in the integrity of the office”.

In my opinion, Kenyatta and Ruto should have disqualified themselves as candidates in the 2013 election (but could have stood for political office when or if they were acquitted). While I believe that the ICC process has proved to be flawed and perhaps even discriminatory, and that Mwai Kibaki and Raila Odinga – respectively the head of state and the leader of the opposition during the post-election violence in 2007/8 – should have borne ultimate responsibility for the deaths and destruction during that time, I think that by putting themselves up as candidates, Kenyatta and Ruto rubbished both the ICC and the Kenyan constitution – an unfortunate development that severely eroded Kenya’s reputation as a country that upholds the rule of law and which had a detrimental effect on the country’s political landscape.

The constitution, in particular Chapter 6 on Leadership and Integrity, was further ignored by a large segment of the Kenyan electorate, which went ahead and voted for Kenyatta and Ruto, not despite

the fact that they were indicted, but *because* they were. The country has been on a downward spiral constitutionally since then, and we the Kenyan voters, have only ourselves to blame.

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George Kegoro believes that the case, which took 13 years to conclude, was flawed from the start. First, in March 2015, the previous judge, Justice David Onyancha, disqualified himself from the case on the grounds that there had been attempts to compromise him, while providing no details about who the compromisers were. This raised the question about whether his successor, Justice Sergon, was considered to be a more pliable judge by those who tried to compromise his predecessor.

Moreover, Justice Sergon proceeded as if Anglo Leasing never happened. As Kegoro argued in an opinion piece published in the *Standard*:

> "Besides underrepresenting issues of process in the final judgement, Justice Sergon totally ignored questions of context. The suit against Githongo arose from the Anglo Leasing scandal that gripped the country in 2006, giving rise to a tumultuous political situation that almost toppled the young Kibaki government. The fallout from the scandal included the resignation of Githongo from government before he went into exile in the United Kingdom. Also, a number of high officials, including Murungaru and [former finance minister David] Mwiraria, eventually lost office or were charged in court in relation to the scandal over which there was significant public outrage… Allowing Murungaru's claim against Githongo has given judicial approval to a blinkered and contrived self-view by the former minister, which is at variance with how the general public has come to view him…"

Yet, in his ruling, Sergon stated: "There were no iota of evidence presented by the defendant and his witness linking the plaintiff to the corrupt practices. Therefore the contents of the dossier in the absence of evidence to establish their truthfulness means that the publication is and was defamatory of the plaintiff."

Justice Sergon also failed to recognise that the role of a whistleblower is not to bring forth evidence, but simply to raise suspicion about possible wrongdoing that will, hopefully, result in a full investigation by the relevant authorities.

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Githongo has said that he will appeal the High Court decision, and a crowd-funding mechanism to raise Sh27 million has already been put in place in case he loses the appeal.

Kenya's legal history is littered with bad judgements and excessive punishments, not just for those who raise their voices against injustices and human rights violations but also for those ordinary citizens who cannot afford savvy lawyers or who lack access to political influence (like chicken thieves who end up eight years behind bars because a judge deemed that a hungry man who steals a chicken is more criminal than a man who robs an entire country).

We must also not forget that Kamlesh Pattni, the mastermind of the Goldenberg scandal in the early 1990s, which almost brought Kenya to its knees economically, is still enjoying fresh air and living large. The Murungaru v Githongo case might just outrage Kenyans enough for them to demand more accountability from governments that steal and from courts that continuously thwart or ignore the will and aspirations of a fatigued citizenry yearning for a more just and humane society.

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