

## Kiambaaa Church Test Case and Dilemma of Kenya Criminal Justice in Prosecuting Post-election Violence Atrocities

There has been a lot of talk on the option at the Government disposal on how to deal with the perpetrators of the post election violence witnessed in between December 2007 and February 2008. One of the most absurd options now being touted by the government is the creation of a special division of the High Court to deal with the perpetrators. But even as this is happening two cases involving post election suspects have been going on in Nairobi and Nakuru and require an analysis on the preparedness and the competence on the Kenyan Criminal Justice System to deliver justice to the victims of the heinous crimes and bringing an end to impunity that has been going on in this country since the onset of the multi Party in the early 90s.

### **Republic V Stephen Kiprotich Leting and three others CC NO 34 Of 2008**

This case involved the Kiambaaa fire incident that occurred on the 1<sup>st</sup> of January 2008 at Assemblies of God Church at Uasin Gishu District. Four people, two brothers, Emanuel Kiptoo Lamai and Clement Kipkemei Lamai, Stephen Kiprotich Leting and Julius Nyongio Rono were charged with Seven counts of murder out of the over 30 people who were burnt in the church as they sought refuge from attackers who were allegedly fighting for what they claimed was stolen elections.

In the case the prosecution called a total of 31 witnesses in its bid to prove the case against the four accused persons. The conclusion of this case by a judgment read by Justice David Maraga on the 30<sup>th</sup> of April 2009 exactly one year three months after the incident seriously exposed the Kenyan criminal justice system also replicated the game of musical chairs by the Attorney General, The police and the Judiciary. Indeed the judgment is full of epithets to the investigation arm of the criminal justice systems.

Justice Maraga does not mince words after analyzing evidence in this case and starts by saying; “<sup>1</sup> I am not a politician only a judge who is outraged at the casual manner in which we are handling serious issues like security in this country and as a citizen I think I am entitled to express my outrage”. The judge was at pains to deliver this judgment and indeed says that the judiciary has been put in an awkward position by the shoddy investigation and the casual manner in which the police and the office of the Attorney General handled the case., “<sup>2</sup>I have to point out the shoddy police investigation in this case so that blame is placed where it belongs. Call it blame game or what you like but that is the truth of the matter”.

The court wondered how it was expected to convict when the police and the Attorney General did not place any evidence on record. The Court also questioned why the state only arraigned only four people in court while the number of attackers numbered well over 4000 people.

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<sup>1</sup> Republic V Stephen Kiprotich Leting and three others CC NO 34 Of 2008 page 32

<sup>2</sup> Opra cit page 34

Although this is a legitimate question, criminal law jurisprudence demands that everyone's case be treated on its own merit. That is why people are always charged with others not before the court. So much was the shoddy work by the police and the state law office that no witness adduced evidence against Clement Lamai and when he was put to his defense he opted to keep quiet.

It is against this background that the Rome Statutes comes in. It comes in and spells out the International Criminal Court threshold. From the courts own admission it goes without saying that the country through its police and the state Law Office were neither willing nor able to bring the perpetrators of post election violence to justice. This having been a test case the question for determination would be whether the special division of the High Court would be any deferent from the High Court in Nakuru and whether the same investigators would not do the same kind of job that they did in this case. I am of the opinion that our judiciary, the police and the state law office cannot be expected to be vehicles of justice in dealing with post election violence.

### **Republic v Edward Kirui CC No. 9 of 2008**

This is the second test case and unlike the case mentioned above this pits a police officer or a law enforcer against the republic. Indeed the case is important in illustrating the slow nature of our criminal judicial system in Kenya. Edward Kirui is charged with killing two demonstrators on 17th of January 2008 at Kondelee market, Kisumu in Nyanza Province. The constable was charged in March of 2008 and the case proceeded on at the pace of the criminal trials in Kenya. The case stalled for sometime this year when the trial judge Onesmus Mutungi was retried from the judiciary. The case had to be given to another judge. Although nothing much can be said about this case as it is still pending in the High Court, it would have been prudent for Justice Mutungi to conclude the case because he is well seized of the matter including the demeanor of the very first witness who adduced evidence. This should not be construed to imply that the new judge presiding over the matter is incompetent. Justice Mutungi has recorded evidence from over 25 witnesses by the time he was retried

### **Conclusion**

The Kiambaaa test case is instructive and speaks volume of the miscarriage of justice that is likely to visit victims if any outfit that does not meet international standards was to be set up to try post election violence atrocities. The second case also contravenes the jurisprudence globally that justice delayed is justice denied especially emanating from the administrative functions of the High Court.