

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Dear Mr. President, Honourable Members, Commissioners, Excellencies:

Re: Enforced Disappearance and extra-judicial killing of lawyer Willi Kimani

On June 23, 2016, lawyer Willie Kimani disappeared, along with his client Josphat Mwenda, following a court appearance in respect of the client's claim against police. The bodies of Mr. Kimani, his client, and their driver Joseph Muiruri were found a week later, on June 30, in the Ol-Donyo Sabuk River in Machakos County, about 70km northeast of Nairobi.¹ The post-mortem report indicates the victims were badly beaten and tortured before being killed.²

LRWC is gravely concerned that the disappearance and extra-judicial assassination of Mr. Kimani and his client was the culmination of a pattern of violations against Mr. Mwenda following the filing of his complaint against the police last year. Worse, these extra-judicial killings are themselves part of a broader pattern of abuse carried out by Kenyan police and

¹ See online: <http://www.bbc.com/news/world-africa-36682639>.

² "Willie Kimani: Kenyan police charged with murder", *BBC News*, 18 July 2016, online: <http://www.bbc.com/news/world-africa-36824522>.

security officials. While Kenya's own human rights body has identified 25 extra-judicial killings between 2013 and 2015,³ non-governmental watchdog Independent Medico-Legal Unit (IMLU) says the police killed 97 people in 2015 alone.⁴

On July 2, Inspector-General of Police Joseph Boinett confirmed that three AP officers, Frederick Leliman, Stephen Chebulet and Sylvia Wanjiku, were being held in relation to the killings. They appeared in court on Monday, July 4, 2016 where the judge ordered that they be held in custody for two weeks until investigations are carried out.

LRWC condemns in the strongest terms the enforced disappearance and extra-judicial killing of Mr. Kimani, Mr. Mwenda, and Mr. Muiruri, and urges authorities to conduct an immediate, thorough, impartial, and transparent investigation into these killings.

Kenya has a positive legal duty to prevent and punish enforced disappearances and extra-judicial killings. The murders of the three men constitute gross violations of their right to life as guaranteed by the *Constitution of Kenya*,⁵ the *African Charter on Human and Peoples' Rights*, the *Universal Declaration of Human Rights* (UDHR), and the *International Covenant on Civil and Political Rights* (ICCPR), to which Kenya is a State Party.

The *Declaration to Protect All People from Enforced Disappearances*⁶ confirms that state duties to effectively prevent and punish enforced disappearances are part of the duties under the ICCPR and UDHR to ensure rights to liberty and security, freedom from torture and equal protection of the law. The Declaration also confirms that

[n]o circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

Under the *UN Declaration on Human Rights Defenders*,⁷ Kenya has a duty to safeguard the ability of human rights defenders to make complaints about official policies and acts, to attend public hearings and trials, and to benefit from effective remedies. Importantly, Art. 12(2) imposes on States a responsibility "to take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration."

It is widely accepted that states must adopt and maintain effective measures to ensure the safety and independence of lawyers and the freedom to engage in their professional activities as lawyers and prosecutors without reprisals. The United Nations' *Basic Principles on the Role of Lawyers* ("*Basic Principles*")⁸ describe specific state duties that ensure the right to legal representation by ensuring the independence and safety of lawyers, including from interference

³ *Human Rights Baseline Survey Report 2016*, Kenya National Commission on Human Rights, online: http://www.knchr.org/Portals/0/GeneralReports/KNCHR_Human-Rights-Baseline-Survey-Report_2016.pdf.

⁴ See online: <http://www.imlu.org/>.

⁵ *Constitution of Kenya (2010)*, ss. 19-22, 26, online:

<https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf>.

⁶ A/RES/47/133, 18 1992 of the United Nations General Assembly.

⁷ A/RES/53/144 adopted 8 March 1999.

⁸ *The Basic Principles*, adopted by the Eighth United Nations' Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

by state and other actors. Article 16 of the *Basic Principles* provides that lawyers must be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference and that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. Article 17 requires that states shall adequately safeguard the security of lawyers who are threatened as a result of discharging their functions.

LRWC reminds Kenyan authorities that under the *Vienna Convention on the Law of Treaties*, States are bound by their treaty obligations and all treaty obligations must be performed in good faith (the principle of *pacta sunt servanda*).⁹ Article 27 of the *Vienna Convention* reads: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” This principle was part of international law long before the *Vienna Convention* came into force.

LRWC applauds the swift response of the Government of Kenya in investigating these crimes, including the detention of three AP officers. However, we remind you that failure to act quickly and effectively in the circumstances would constitute a violation of the ICCPR, and this applies to the murders of Mr. Kimeni and his colleagues as well as to the dozens (or perhaps hundreds) of enforced disappearances and extra-judicial killings reported by governmental and non-governmental organizations. The UN Human Rights Committee has stated:

There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.¹⁰ (emphasis added)

These outrageous crimes are an assault on the integrity of the State, the public order, and the rule of law, and they should be the concern not only of the police and the Independent Policing Oversight Authority (IPOA), but also of all levels of Kenya’s leadership, including the national assembly and the head of state. LRWC calls on the Government of Kenya to establish an Independent Commission of Inquiry in accordance with the requirements of the ICCPR Articles 1, 2 and 7, and the *UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, which establish that the inquiry must:

1. be conducted by investigators independent from state agents with alleged criminal involvement;
2. be capable of determining whether death occurred as a result of the illegal use of force;
3. lead to the identification and prosecution of suspects;
4. ensure that investigators take reasonable steps to secure evidence including eyewitness testimony, forensic evidence, objective analyses of clinical findings and conduct an autopsy that provides an accurate record of the injuries;
5. be prompt and reasonably expeditious;
6. afford sufficient public scrutiny of the investigation and the results to secure accountability; and

⁹ Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1980. U.N.T.S. Vol. 1155, p. 331 [Vienna Convention].

¹⁰ Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

7. afford to the victims' next-of-kin whatever involvement in the process is necessary to safeguard their interests and ensure the remedies to which they are entitled.

LRWC calls on the Government of Kenya to act immediately to:

- Conduct an immediate, thorough, impartial, and transparent investigation into the murders of Mr. Kimani, Mr. Mwenda, and Mr. Muiruri;
- Provide adequate reparations and avenues of redress for the families of the victims;
- Guarantee in all circumstances the physical integrity and security of human rights defenders, activists, advocates, their families, and their staff;
- Establish an Independent Commission of Inquiry to review cases of forced disappearance and extra-judicial killings and to address specific and systemic factors contributing to the high rate of disappearance and assassination in Kenya; and
- Comply with all provisions of the UN Declaration on Human Rights Defenders, in particular with Articles 1 and 12.2.

We look forward to your response.

Sincerely,



Gavin Magrath, Barrister and Solicitor, Director, LRWC

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