

## AFRICA RISK CONSULTING

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#### Kenya Summary 12 December 2014

*International Criminal Court (ICC) prosecutors drop charges against President Uhuru Kenyatta (2013 – present) due to lack of evidence. They may soon do the same in the separate case against deputy president William Ruto. Kenyatta dismisses interior cabinet secretary Joseph Ole Lenku, and police chief David Kimaiyo resigns, following Islamist attacks in Mandera County. Treasury secretary Henry Rotich says that the government will increase spending by 10% in the next financial year as it continues to prioritise infrastructure investment. Directors of United Kingdom (UK) based Smith & Ouzman appear in court in Kenya on bribery charges.*

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#### The International Criminal Court drops charges against Kenyatta

**International Criminal Court (ICC)** prosecutors dropped charges against President **Uhuru Kenyatta** (2013 – present) on 5 December, citing a lack of evidence.<sup>1</sup> The crimes against humanity charges related to his alleged role in orchestrating the violence that followed the 2007 presidential elections, in which some 1,300 people were killed and several hundred thousand displaced. The dropping of the charges was not a surprise (see *ARC Kenya September 2014 Briefing*). The case against Kenyatta turned on the willingness of Kenya's government to hand over reported documentary evidence against him.

In addition, there have been persistent allegations of a campaign of bribery and intimidation targeting witnesses in Kenyatta's case to dissuade them from testifying.<sup>2</sup>

*"The case had been collapsing for some time. In fact, I am frankly surprised that the tribunal did not avail itself of any number of opportunities over the last two years to quietly dispose of it while saving some face. Instead, the ICC handed down a public rebuke to prosecutor **Fatou Bensouda**."*<sup>3</sup>

The dropping of the case is not an acquittal for Kenyatta, but it does mean that western governments will now resume normal relations and contacts with him and his administration, many with some relief, as they had to manage their engagement with him carefully in order to comply with ICC rules. The ICC can still, at least theoretically, re-open the case or bring new charges in a different form. In practice, however, this is only likely to happen if a new president opposed to Kenyatta takes office.<sup>4</sup> According to a Kenyan lawyer involved with the ICC Kenya cases,

*"[the election] violence will catch up with him one day, but as a private citizen".*<sup>5</sup>

Now that the ICC has dropped the case against Kenyatta, it is more than likely that the case against his deputy **William Ruto** will go the same way. There is more evidence against Ruto than there was against Kenyatta, but if the ICC convicts Ruto after letting Kenyatta off, parts of Kenya may experience a replay of the violence of 2008, which was triggered by an explosive mix of long-standing ethnic **Kalenjin** grievances against ethnic **Kikuyu** in the **Rift Valley**, notably on land ownership. There would be a perception among Kalenjin groups that their *de facto* leader Ruto, who opposed Kenyatta

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<sup>1</sup> Daily Nation, 5 Dec 2014.

<sup>2</sup> Source, journalist, Nairobi

<sup>3</sup> Source, analyst, Nairobi

<sup>4</sup> Source, journalist, Nairobi

<sup>5</sup> Source, partner in law firm, Nairobi

(a Kikuyu) in 2007 but was instrumental in securing Kenyatta's election as president in 2013, is being sacrificed. Ruto is accused of organising violence against Kikuyus in 2008; a spontaneous repeat of 2008 is unlikely but Ruto and his supporters are capable of organising revenge incidents aimed at Kikuyu communities if his case does not follow Kenyatta's out the ICC's back door.

### **Kenyatta dismisses interior cabinet secretary Joseph Ole Lenku**

Two particularly bloody attacks carried out by Islamists in November resulted in interior cabinet secretary **Joseph Ole Lenku** and police chief **David Kimaiyo** leaving office. Kimaiyo resigned but Kenyatta dismissed Ole Lenku, an act that was *"long awaited... even though he knows where the government's skeletons are"*.<sup>6</sup> Kenyatta appointed Ole Lenku soon after coming to power in 2013. Both the attacks that cost Ole Lenku his job took place in **Mandera County**, in the extreme north-east of the country, along the border with **Somalia**.

On 22 November, Islamists attacked a bus heading from **Mandera** town to **Nairobi**, separated non-Muslim passengers from the Muslims on the basis of ability to recite the Islamic creed, and executed 28 non-Muslims.<sup>7</sup> The Somalia-based **al Shabaab** militant group said that the attack was in retaliation for Kenyan security forces' raids earlier the same month on four mosques in the port city of **Mombasa**.

In a separate incident on 1 December, gunmen attacked a quarry in Mandera County at dawn, killing 36 non-Muslim workers.<sup>8</sup> Professionals working in the largely Muslim and ethnic Somali north-eastern regions often come from further south in Kenya, where Christians make up about 80% of the population. Their places of work, churches and bars in the north-east are soft targets for Islamist militants. Several major unions – including those for civil servants – have warned their members to leave the restive north-east until the government can ensure their safety.

The removal of Ole Lenku and Kimaiyo, who resigned ostensibly for personal reasons, came as no surprise.

*"In any democracy – indeed, any functional government – there has to be accountability for both successes and failures... and the recent, repeated attacks inside Kenya have underscored the serious lapses in Kenyan security."*<sup>9</sup>

Ole Lenku, whose background is in hotel management, was popularly mocked as the *"innkeeper"*. As for Kimaiyo, many Kenyans complained that his biggest achievement in office had been setting up and maintaining a **Twitter** account. Apart from working social media, he also appeared to channel much of his energy into a turf war with **Johnston Kavuludi**, the head of the **National Police Service Commission**, the civilian body set up to oversee the police force.

There is a sense among security analysts that Kenyatta and his advisers have used this reshuffle to scapegoat individuals rather than implement wider, and necessary, security reforms.

*"One has to ask how in a country on the frontline with a failed state like Somalia, one from which extremist spillover is an all-too-regular occurrence, a man or woman with no training or experience in security matters could have been appointed to the position that Ole Lenku occupied and how anyone should be surprised, whatever his achievements in other fields, that the situation deteriorated on his watch. Consequently, his shortcomings may be his own, but there may have to be accountability at a higher level for the former cabinet secretary being put into [that] position."*<sup>10</sup>

<sup>6</sup> Source, political analyst, Nairobi

<sup>7</sup> Standard, 22 Nov 2014.

<sup>8</sup> Daily Nation, 1 Dec 2014.

<sup>9</sup> Source, political analyst, Nairobi

<sup>10</sup> Source, political analyst, Nairobi

Kenya has suffered a series of attacks since invading Somalia as part of a wider coalition in 2011 to attack al Shabaab. Both Ole Lenku and Kimaiyo had been under fire for security lapses ever since the September 2013 attack on **Westgate** shopping mall in Nairobi, in which at least 67 people were killed, and had held on stubbornly to their positions. A sum total of four gunmen had held the mall captive for four days while Kenyan army units, which were eventually called in to take on the gunmen, busied themselves looting a supermarket downstairs.

### Kenya to continue high spending on infrastructure

Treasury secretary **Henry Rotich** has said that the government will increase spending by 10% in the next financial year, raising concerns about Kenya's level of external debt.<sup>11</sup> Rotich told a pre-budget meeting that the 2015 budget will be 1.849 trillion Kenyan shillings (KSh) (\$20 billion). Spending for the 2014 – 2015 financial year is scheduled to be KSh 1.581 trillion (\$18.03 billion).<sup>12</sup> Rotich said that the government would “*significantly increase capital investment*” by prioritising the development of key infrastructure including new roads and power generation plants.<sup>13</sup> The Treasury forecasts growth of 6.1% for the financial year that ends June 2015, 7% in 2015 – 2016 and 7.3% in 2016 – 2017, on the back of high levels of infrastructure investment.<sup>14</sup>

The **International Monetary Fund (IMF)** will be concerned that non-capital spending, which includes recurring costs such as wages, is expected to rise from KSh572.4 billion (\$6.3 billion) to KSh 684.8 billion (\$7.17 billion) in 2015 – 2016 and to KSh 803 billion (\$8.88 billion) in 2017 – 2018. The IMF has repeatedly called for Kenya to exercise greater financial discipline. An IMF report in early December 2013 recommended a substantial cut in the number of Kenyan civil servants to rein in the public sector payroll: at the time, such spending accounted for a smaller KSh 460 billion shillings (\$5.1 billion), corresponding to roughly 13% of GDP. The IMF wanted this figure halved within three years to curtail Kenya's debt, but the government plans are an almost 75% increase on the 2013 figure.

The government plans to draw on both international and domestic sources to bridge a forecast budget deficit of 7.8% of GDP in 2014 and 6.8% in 2015. The task has been helped by some fancy statistical footwork. Kenya's debt had previously been estimated at 57% of GDP but this fell in 2013 after an official statistical recalculation made Kenya's economy 25% larger than previously estimated. Net external financing in the form of both grants and loans will increase from KSh 193.3 billion (\$2.14 billion) in 2014 to KSh289.6 billion (\$3.20 billion) in 2015. In December, Kenya received the first tranche of its KSh213 billion (\$2.36 billion) concessional loan from **China's Export Import Bank (China Exim)** for the construction of the Mombasa standard-gauge railway. The government also launched a tap sale of its debut **Eurobond** in December, raising an additional \$750m.

Debt is an increasingly contentious issue, both domestically and with the IMF. In December, the treasury increased Kenya's debt ceiling from KSh1.2 trillion (\$13 billion) to KSh 2.5 trillion (\$27 billion).<sup>15</sup> The Parliamentary budget and appropriations committee hesitated to back this increase, but the national assembly eventually passed a bill on 9 December supporting the new ceiling.<sup>16</sup> During the pre-budget presentation, the budget committee had criticised the treasury for its failure to ensure efficient spending by government ministries, agencies and state owned enterprises.<sup>17</sup> Budget committee chair **Mutava Musyimi** cited the high proportion of project costs allocated to wages as evidence of inefficiency.<sup>18</sup>

11 Reuters, 9 Dec 2014.

12 Budget Speech, 12 Jun 2014.

13 Reuters, 9 Dec 2014.

14 Daily Nation, 8 Dec 2014.

15 Source, business consultant, Nairobi

16 Source, business consultant, Nairobi

17 Standard, 9 Dec 2014.

18 Standard, 9 Dec 2014.

Tax revenue is projected to increase 15% in 2015 – 2016. This is not just due to the projected economic expansion but also the implementation of the 5% capital gains tax on the sale of assets and stocks and shares, which comes into force on 1 January 2015. The capital gains tax (CGT) is set out in the **Finance Act 2014**, which Kenyatta ratified in September. Despite private sector grumbles that the tax is ill-defined and doesn't account for inflation,<sup>19</sup> it is unlikely to be large enough or complicated enough to deter investors. Kenya's market size, resource potential and strategic location as the gateway to **East Africa** remain attractive and the CGT is broadly in line with those imposed by its neighbours, **Tanzania** and **Uganda**. The CGT's short-term impact has been to accelerate deals, as companies look to beat its implementation date. In November, **Equity Bank** warned that the planned sale of its stake in mortgage firm **Housing Finance** could collapse if not completed before January.<sup>20</sup>

### UK firm bribery trial begins in London

Directors of **United Kingdom (UK)**-based **Smith & Ouzman** appeared in a **London** court in November on bribery charges related to business activities in Kenya. The trial followed a **Serious Fraud Office (SFO)** investigation and is indicative of a more aggressive approach by the SFO. It is also a reminder that UK bribery legislation is applicable to all UK nationals and bodies incorporated under UK laws operating anywhere in the world.<sup>21</sup>

The allegations relate to the awarding of concessions from the **Kenya National Examination Council** and the **Kenya Electoral Commission**.<sup>22</sup> The so called "*chicken gang*" scam, a reference to the name that Smith & Ouzman gave to Kenyans in internal correspondence, allegedly involved paying "*commissions*" to Kenyan officials and covering the officials' travels costs during their regular visits to London.

Corruption remains a major hindrance to conducting business in Kenya. Smith & Ouzman's alleged transgressions are not uncommon but they appear to have been "*incredibly careless*"<sup>23</sup> in how they engaged with and managed relations with officials. According to an **Ernst & Young** survey, 27% of senior executives in Kenya suspect fraud in their companies, the fourth highest in surveyed African countries after **Egypt** (44%), **Nigeria** (30%) and **Namibia** (28%).<sup>24</sup>

**Transparency International** released its global **Corruption Perceptions Index (CPI)** on 3 December. This leading international corruption study measures "*perceived levels of public sector corruption*" and ranks countries based on a "*corruption perception*" scale ranging from 0 (highly corrupt) to 100 (perfect). 'Perception of corruption' is important as it identifies a general culture of distrust under which the practice of corruption flourishes. Kenya's 2014 CPI score was 25, a slight decrease on its score of 27 in 2013 and 2012. Overall, Kenya ranked 145<sup>th</sup> of the 175 countries assessed. In East Africa, its ranking was only better than **South Sudan** (171<sup>st</sup>) and **Somalia** (174<sup>th</sup>). It came below **Ethiopia** (110<sup>th</sup>), **Uganda** (142<sup>nd</sup>), and **Tanzania** (119<sup>th</sup>).

### Implications

In many ways, the dismissal of the case against Kenyatta has wider implications for the ICC rather than Kenya. While the ICC may have lost credibility (the charges against Kenyatta were widely regarded to have substance, except among his allies and supporters), the Kenyan government has been operating for a number of months under the assumption that the charges would be dropped. The ICC will be reluctant to continue the case against Ruto. Unfortunately, in seeking to avoid further

<sup>19</sup> Source, business consultant, Nairobi

<sup>20</sup> Business Daily, 24 Nov 2014.

<sup>21</sup> FT, 25 October 2013

<sup>22</sup> Business Daily, 10 Nov 2014.

<sup>23</sup> Source, journalist, Nairobi

<sup>24</sup> Daily Nation, 27 Nov 2014.

bloodshed, it will at the same time send out the message that leaders who incite their communities to commit wide-scale ethnic violence benefit from the impunity that has characterised electoral violence in Kenya for decades. This will again make investors nervous around Kenya's electoral cycle.

Similarly, the extremist violence in Mandera has again spooked the foreign exchange market. Frequent al Shabaab attacks over the past year have kept tourists away from Kenya and it is now apparent that this December, which along with July and August traditionally forms the peak tourist season, will also be severely affected. The absence of tourists reduces the amount of hard currency coming in and puts pressure on the Kenyan shilling. It also has a huge impact on employment, notably in places like Mombasa where al Shabaab and other extremist groups do their recruiting. If the calls by the unions are heeded, a withdrawal of civil servants from regions such as Mandera will further aggravate local perceptions that the Nairobi government ignores or marginalises them.

The pre-budget statement shows a continuation of Kenya's expansionary policy by drawing upon both domestic and international sources of financing to meet high levels of infrastructure spending. This will increase pressure on the fiscal deficit, though higher revenue collection in the short-term from increased income taxes is possible and could go some way to addressing concerns about the sustainability of the capital expenditure targets.

The Smith & Ouzman case serves as a reminder of the increasingly trans-national costs of corruption: it can lead to criminal prosecution or regulatory censure both at company and senior management levels, as well as exclusion from contract bidding processes, and damage to global reputation, brand and share prices. The company and its managers have not yet been convicted, but the allegations in the case are by no means isolated in the context of doing business in Kenya (and East Africa more broadly). Other companies could find themselves at risk if they do not adopt stricter anti-corruption procedures, especially in the context of public sector procurement.