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The International Criminal Court (ICC) dismisses charges against deputy president William Ruto. The ICC prosecution can appeal the decision or bring new charges, but is unlikely to do so while Ruto remains in office. The Kenya Airports Authority (KAA) cancels \$650m airport expansion project at Nairobi's Jomo Kenyatta International Airport. The cancellation is linked to President Uhuru Kenyatta's (2013- present) efforts to curb malpractice in large-scale development projects. The International Monetary Fund (IMF) approves a \$1.49 billion two-year stand-by facility for Kenya. The World Bank separately agrees to provide Kenya with \$200m to support its fiscal devolution programme.

International Criminal Court declares Ruto mistrial

The **International Criminal Court (ICC)** in **The Hague (The Netherlands)** on 5 April dismissed all charges against deputy president **William Ruto** and co-accused journalist **Joshua arap Sang** over their alleged involvement in the 2007-2008 post-election violence.¹ The ruling for now ends any international attempt to hold the so-called **Ocampo Six** national political and security officials² accountable for the violence that followed the disputed election victory of former president **Mwai Kibaki** (2002-2013) in December 2007. While there is the possibility that **Kenya's** national courts could hold lower-level individuals to account, this is unlikely.³ In a majority ruling presiding ICC judge **Chile Eboe-Osuji** recommended a mistrial for Ruto and Sang, citing "a troubling incidence of witness interference and intolerable political meddling" that made a fair trial impossible.⁴ Judge **Robert Fremr** concurred that the evidence was insufficient to proceed and that he would have opted to acquit the two defendants.⁵ Judge **Olga Herrera Carbucciona** dissented, arguing that the ICC should allow the case to proceed.⁶

Because the ICC did not acquit Ruto and Sang, prosecutor **Fatou Bensouda** can either appeal the ICC ruling, or can bring the same or new charges again in the future. The prosecution is currently considering its response to the Ruto ruling.⁷ According to a former senior member of a legal team defending another Kenyan defendant at the ICC, it is unlikely that either Ruto or President **Uhuru Kenyatta** (2013- present) will face charges while in office.⁸

The collapse of the trial has implications for the authority of the ICC, which has received criticism for its failure to adequately secure evidence and protect witnesses. However, much of the responsibility for this lies with recalcitrant national and local leaders in Kenya. There are long-standing allegations that unidentified individuals are using bribery and harassment to dissuade prosecution witnesses from testifying.⁹ At least 17 witnesses have withdrawn after agreeing to testify for the prosecution.¹⁰

¹ Daily Nation, 5 Apr 2016.

² Francis Muthaura; Henry Kosgey; Mohammed Hussein Ali; Joshua arap Sang, opposition leader William Ruto; Uhuru Kenyatta.

³ Source, senior lawyer, Nairobi

⁴ Daily Nation, 5 Apr 2016.

⁵ Daily Nation, 5 Apr 2016.

⁶ Daily Nation, 5 Apr 2016.

⁷ Source, senior lawyer, Nairobi

⁸ Source, senior lawyer, Nairobi

⁹ Source, western diplomat, East Africa

¹⁰ Source, western diplomat, East Africa

Intimidation included public prayer rallies at which local politicians and community leaders accused the prosecution witnesses of lying, while there was constant speculation on social media about their identities.¹¹ The prosecution has repeatedly called on Kenyan authorities to hand over to the ICC **Walter Barasa, Paul Gicheru** and **Philip Bett** over alleged witness interference.¹² As a signatory to the **Rome Statute** that established the ICC, Kenya is legally obliged to arrest and transfer Barasa, Gicheru and Bett but has failed to do so. Following the Ruto ruling, the prosecution repeated previous allegations that the Kenyan government failed to cooperate in the protection of witnesses and the securing of evidence.¹³

The ruling will ease tensions in the ruling **Jubilee Alliance** government, which unites Kenyatta's **Kikuyu** ethnic group and Ruto's **Kalenjin**, ahead of the August 2017 general election, and increases the probability of Kenyatta standing again for president with Ruto as his running mate. Opposition leader **Raila Odinga** backed the ICC's decision. The ruling will improve relations with western governments, though these have remained pragmatic despite Kenya's apparent failure to comply with the ICC. The Kenyan government is likely to end its attempts to persuade all members of the **African Union** to withdraw from the ICC. There is uncertainty about how successful Kenya's regional advocacy on the issue proved, *"perhaps some nodding heads, but no more than that"*.¹⁴

Jomo Kenyatta International Airport expansion project collapses

The state-owned **Kenya Airports Authority (KAA)** has announced it is cancelling a \$650m airport expansion project at **Nairobi's Jomo Kenyatta International Airport (JKIA)**, exposing the complexity of large infrastructure projects in Kenya.¹⁵ The cancellation has raised questions about the exposure the government faces and the due diligence that went into the project before it began. The KAA, which manages civil airports and related infrastructure, and the transport ministry cancelled the **Greenfield Terminal Project** saying that the project would not yield reasonable commercial returns.¹⁶ Kenya was expected to finance \$100m of the project through an **African Development Bank (AfDB)** loan, and the AfDB reportedly advocated the cancellation of the project.¹⁷ The government has proposed an alternative strategy that will involve the construction of a second runway. Currently, JKIA operates on a single runway, only in operation 18 hours a day, resulting in airplanes queuing.

Kenyatta launched the Greenfield Terminal Project in December 2013. **China-based Anhui Construction** and **China National Aero-Technology International Engineering Corp (Catic)** were the contractors for the project. The Kenyan government has already paid the two companies \$4m despite their alleged failure to secure guarantees for the project.¹⁸ The contractors were meant to secure \$554m before the start of the project.¹⁹ Anhui put forward state-owned **Export Import Bank of China (Exim China)** and **China Development Bank** as its financiers but reportedly failed to secure the funds.²⁰ The China-based contractors may seek legal recourse for the cancelled contract.

*"The big question now is whether Anhui and Catic will seek compensation."*²¹

On the face of it the cancellation looks like poor planning and fiscal irresponsibility on the part of the planners but sources in the top rank of the transport and infrastructure ministry alleges that the

¹¹ Capital FM, 7 Apr 2016.

¹² Capital FM, 7 Apr 2016.

¹³ Capital FM, 7 Apr 2016.

¹⁴ Source, business consultant, Nairobi

¹⁵ East African, 3 Apr 2016.

¹⁶ East African, 3 Apr 2016.

¹⁷ East African, 3 Apr 2016.

¹⁸ East African, 3 Apr 2016.

¹⁹ East African, 3 Apr 2016.

²⁰ East African, 3 Apr 2016.

²¹ Source, journalist, Nairobi

move is part of Kenyatta's strategy to break cartels that are holding government infrastructure projects to ransom.²²

*"Historically large infrastructure projects have been cash cows for influential so-called 'tenderpreneurs' and politicians who have used the projects for financial gain through either procuring goods at inflated prices or soliciting kickbacks from contractors. The main areas these cartels have targeted are the roads, geothermal, construction and petroleum sectors."*²³

Sources in the government say that the Greenfield Project was no exception and a cartel of businessmen and politicians allied to the opposition **Coalition for Reforms and Democracy (CORD)** sought to cash in on the project. Through a series of senior appointments from the private sector, Kenyatta has attempted to curb government corruption in large-scale development projects. In the November 2014 cabinet reshuffle, Kenyatta appointed **James Macharia** as the new transport and infrastructure cabinet secretary, replacing **Michael Kamau** who was forced to step down after the **Ethics and Anti-Corruption Commission (EACC)** accused him of corruption.²⁴ Prior to entering government as health cabinet secretary, Macharia was CEO of **Nairobi Stock Exchange (NSE)**-listed **NIC Group**. Kenyatta also appointed **Irungu Nyakera** as the principal secretary in the same ministry. Nyakera was Macharia's protégé at NIC Bank before going to **Frontier Markets Fund Managers** where he managed billion-dollar infrastructure funds.

*"Since taking over the ministry the duo have been aggressively implementing policies that have seen a shakeup in the ports and rubbed senior politicians and businessmen the wrong way."*²⁵

In February, the government dismissed managing director of the **Kenya Ports Authority, Gichiri Ndua**, and other senior managers as a measure to curb the flow of contraband goods into both Kenya and **Uganda**.

*"In Macharia's view, the runaway smuggling of contraband goods, especially sugar, cars and ethanol, had become a national security threat."*²⁶

The transport and infrastructure ministry and the **Kenya Revenue Authority (KRA)** additionally shut down two container freight stations (CFSs) that the family of **Mombasa** governor **Ali Hassan Joho** own. The KRA linked the two stations to smuggling that was losing the treasury millions of dollars in lost taxes.²⁷ Joho's family are long linked to alleged corruption.

*"Joho has a younger brother widely reputed to be a large-scale drug dealer. Joho himself has no visible means of financing the lifestyle he enjoys."*²⁸

Property speculators who had hoped to benefit financially from selling land that is on the **Standard Gauge Railway** route were also disappointed after the ministry rejected offers and opted to reroute the railway track through public land.²⁹

Kenya signs agreements with international financial institutions

The **International Monetary Fund (IMF)** has approved a \$1.49 billion two-year stand-by facility for Kenya.³⁰ The precautionary facility will protect Kenya from exogenous economic shocks, and also highlights its continued good standing with international financial institutions. The new agreement consists of a \$990m stand-by arrangement and a \$495m stand-by credit facility.³¹ Kenya has

²² Source, journalist, Nairobi

²³ Source, journalist, Nairobi

²⁴ Source, journalist, Nairobi

²⁵ Source, journalist, Nairobi

²⁶ Source, journalist, Nairobi

²⁷ Daily Nation, 30 Jan 2016.

²⁸ Source, journalist, Mombasa

²⁹ Source, journalist, Nairobi

³⁰ Financial Services Monitor Worldwide, 15 Mar 2016.

³¹ Financial Services Monitor Worldwide, 15 Mar 2016.

immediate access to \$757.5m, with the remaining funds becoming incrementally available in four tranches subject to the completion of six monthly reviews.³² The IMF noted that the Kenyan economy remains vulnerable to shocks including less favourable global financial market conditions, security threats and extreme weather events.³³ The agreement replaces a \$688m one-year package that the IMF approved in February 2015. Kenya never drew on the original facility, instead securing a \$750m syndicated loan in October 2015. The IMF extended the previous agreement by a few weeks to allow the finalisation of the package. Kenya has committed to implementing IMF-backed reforms including improvements to its public financial management (see below). The IMF praised Kenya's commitment to decreasing the budget deficit and the **Central Bank of Kenya's** prudent management of inflation.³⁴ Treasury cabinet secretary **Henry Rotich** confirmed on 17 March that the government has submitted a supplementary budget for the fiscal year ending in June.³⁵ Parliament is expected to easily pass the spending plans. The supplementary budget introduces net cuts of approximately 50 billion Kenyan shillings (KSh) (\$493m).³⁶ The supplementary budget is predicated on a deficit of 8.1% of gross domestic product (GDP) for 2015/2016 and 6.9% for 2016/2017.³⁷ This compares favourably to previous government forecasts of 8.7% for the current financial year.³⁸

The **World Bank** has additionally agreed to provide Kenya with \$200m to support its fiscal devolution programme.³⁹ Devolution is key to improving fiscal discipline and accountability in Kenya. The World Bank programme focuses on developing capacity at national and county level in five 'key results areas': public finance management; monitoring and evaluation (M&E) and planning; human resources and performance management; devolution and inter-governmental relations; and civic education and public partnership.⁴⁰ The World Bank will finance 68% of the programme, and the Kenyan government the remaining 32%.⁴¹ The programme will help county governments improve the record of managing public finances.

The World Bank on 31 March forecast that Kenya would continue its current growth momentum: 5.6% in 2015, 5.9% in 2016, 6.0% in 2017 to 6.2% in 2018.⁴² The World Bank in its **Kenya Economic Update** identified four factors to support its growth outlook for Kenya: prudent monetary policy on inflation and commercial bank lending rates; decreased lower global crude oil prices easing production costs; fiscal consolidation easing pressure on the domestic credit market; and increased agricultural output with favourable weather conditions.⁴³ The World Bank identified vulnerabilities to growth including global financial market volatility related to monetary policy adjustment in western economies, deferred investment decisions beyond the 2017 general election, decreased infrastructure spending ahead of the elections, and domestic security threats.⁴⁴

Implications

The collapse of the Ruto trial has damaged the authority of the ICC. It appears that the ICC lacks the capacity to hold serving politicians to account. This will encourage politicians to seek to remain in office by whatever means necessary. The lack of accountability also has implications for Kenya. The ethnic faultlines and long-standing tensions that resulted in the post-election violence remain despite the **2010 Constitution** that aimed to address them. Devolution has, in fact, increased the significance

³² Financial Services Monitor Worldwide, 15 Mar 2016.

³³ Financial Services Monitor Worldwide, 15 Mar 2016.

³⁴ Financial Services Monitor Worldwide, 15 Mar 2016.

³⁵ Reuters, 17 Mar 2016.

³⁶ Reuters, 17 Mar 2016.

³⁷ Reuters, 17 Mar 2016.

³⁸ Reuters, 17 Mar 2016.

³⁹ Daily Nation, 19 Mar 2016.

⁴⁰ Daily Nation, 19 Mar 2016.

⁴¹ Daily Nation, 19 Mar 2016.

⁴² ENP Newswire, 1 Apr 2016.

⁴³ ENP Newswire, 1 Apr 2016.

⁴⁴ ENP Newswire, 1 Apr 2016.

of local political offices, raising tensions around elections. The collapse of the ICC case means there is little deterrence for national and local politicians to encourage violence to secure office.

Investors will welcome the collapse of the Greenfield Terminal Project if it proves that Kenyatta is serious about curbing government corruption in large-scale development projects. Changing an ingrained culture will, however, take time and meaningful deterrence will require the conviction of corrupt serving officials. Corruption risks for investors in Kenya will remain high.

The positive relationship between Kenya and international financial institutions reduces the risk of economic shocks from the international markets, general election, or security incidents.

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