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Kenya Research project by Robert M. Press [see: Press, Robert M. (2006) *Peaceful Resistance: Advancing Human Rights and Civil Liberties*. Aldershot, U. K.: Ashgate.]

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Interview conducted by Robert M. Press (bob.press@usm.edu; press.bob@gmail.com)

Interviewee: Lee Muthoga, attorney

Location of interview: Nairobi, Kenya in his law office at the end of his busy day

Date of interviews: November 13, 2002

Transcription by Press includes research notations in brackets by the interviewer and emphasis added in places in bold. BP= interviewer Bob Press; LM= interviewee Lee Muthoga. Multiple ?? indicate unclear transcription or unverified notation.

Biographical information:

Education: LLB (equivalent of bachelor's degree); Kikuyu; Presbyterian; no political affiliation since multi-party politics began in 1992. As an attorney, he defended human rights activists accused by the government. But he disagreed over activists who wanted to turn the Law Society of Kenya into an opposition organization, preferring instead to seek consensus among its members and work quietly behind the scenes for political pluralism.

LM I have not changed my views on pluralism. The views I held in 1990 and that I expressed at the Naivasha seminar are the same I hold now. That is that pluralism is not equal to democracy. Democracy is much, much wider than pluralism; that it is not enough to have political pluralism to say you have got democracy. Even after we have had political, the right to more than one political party, I said then that we would still have to do a lot of work before we can realize democracy.

As it turned out, political pluralism, although it has increased considerably the practices of democracy to a large extent it has not given us the real democratic administration that we were yearning for. **We still are as oppressed as we were then.**

BP Pluralism didn't do it alone

LM It didn't do it alone. So we need to cultivate – I said then and I still say now – **the only way to protect democracy is by establishing institutions that nurse and nurture democracy. Individuals cannot protect democracy;** they haven't got the capacity to protect democracy because they are limited by both time and space. A person can only live here so long. An institution can live here the rest of the century and more. So when we think about expanding democratic institutes, democratic administration, we must think about creating institutions that nurture it, that protect the rights, the civil liberties of the individual, that are democratic in their own outlook, that cherish democracy, and that go out of their way to insure that the practice of democracy becomes the norm.

BP The norm; a change of norms is what you're looking for.

LM Yes, a change of norm, induced by the creation of institutional capacity for the nation. Because the nation is not one man; it's not one institution; it's all of us put together. The nation has arrived which transcends the right of any single individual.

BP What kind of institutions are you talking about, Lee?

LM Yes. I'm talking about institutions such as, at the moment we have seen this country go to where it is because **we killed all the institutions that previously assured the exercise of democracy**. Political parties are one institution we killed and which we are now trying to re-establish. Civil society institutions are other institutions which we are raising, and until and unless we have raised [them] to become nurses of democracy, we still have got a long way to go. We have also got to look at the primary institutions, state institutions that exist. And the primary state institutions include those set up by the state constitution. The National Assembly; how democratic is it... ? How do we get our people to become members of the National Assembly. Once we select them, what powers do they have? And what we really have to do and have been hoping to do all these years is to undo what the Moi regime has done the last 20 or so years it has been in power, which is to kill Parliament and substitute it with himself, so that he becomes a giver of authority.

LM (on the role of individuals). There's always, always a need for torchbearers, for the men who made the sacrifices; the stewardships of the day. The rallies. The movement of change is always people-spear[headed]. But what I am saying is that if there are only individuals without institutional support, they will [fade] away. In time they will die out – without leaving a mark... Institutions come in to give a sense of permanency in the ideals [unclear] but you do always need the Desmond Tutus, the Mandelas,

BP Some of these people were not that famous; they were ordinary lawyers, people who were just trying to do their job, some of them and a few of them had courage and acted on principle; others were self-serving; but they weren't all Mandelas. Some of them were just ordinary lawyers.

LM That is correct. But in their context a Mandela is a Mandela in terms of his context. Take the case of Kenya. Take people like Gibson Kamau Kuria; take people like Koigi Wamwere – the people who have the courage to DARE. Take Matiba; Rubia; that kind of group; people who have the courage to say: Now, we believe in this; are we are prepared to pay the price...? They may not... reach the status of Mandela. But when I used Mandela [as an example] I'm just giving a case

BP. It may help me with some of the theoretical arguments... There was a moment [in 1991] when Gibson, for example, was pushing for let's make LSK push for multi-party. You were saying "no." Why?

LM (sighs). I was saying: remember LSK is still a member's organization. Remember it is not an NGO. It has a certain mandate which it may not compromise; its mandate is not 100 percent NGO. The difference between me and Gibson Kamau Kuria then – and now – is this: Gibson sees an LSK as almost like an NGO, like NCEC, like it can devote its entire resources to NGO work, human rights work. I keep telling him, no; it can't. It has got a membership following, it is a trade union of sorts of its members. So while it has a legitimate role to advance the cause of members – and of society generally – it cannot just go into advancement of society alone. The difference between him and me was always on the basis of how much society advancement is LSK to indulge in as opposed to how much membership-. If we spent our resources in improving

judicial reform, penal(?) reform, we would still improve our democratic practice quite considerably. He was saying: Look, OK, those are secondary things, those are mundane things, those are trade union things. Let us talk more about the people in prison, the people without a voice –

BP The detainees.

LM Yes. –and so forth. And I was saying there is ICJ [International Commission of Jurists – Kenya Section], there is NCEC [National Convention Executive Council], there are a lot of other people whose whole formula is that. We should let them do that also.

BP What was the aim of LSK then, in your opinion.

LM It is mixed. It has to advance the working condition of its members. That is what it was set up for. It has to assist the government in improving the judicial service. It has to improve the quality of administration of justice, and law and order, and, too, it has to serve the public. This service to the public is a secondary, not a first role, whereas organizations like ICJ, human rights and service to the public is a first role. They also indulge in looking to see if the improvement of judicial welfare, or whatever it is, but those are secondary causes to serve the primary purpose of advancing human rights.

BP So it wasn't really that some members of LSK might have been against multi-party and therefore you don't force them to endorse it; it was a matter of the aim of LSK is not a political aim.

LM The position was this, that the course of multi-party is now at this time being spoken out of a political speaking. Because it is being seen as a political endeavor, LSK cannot enter it as such because we are supposed to – we have members of all political opinions. There are those who espouse the opinion that we ought to remain a single party political state; there are those who espouse the view that we ought to have a multi-party state. Now I was saying, alright, while I think the advancement of democratic principles requires a competitive politics as an element of social and political advancement, I cannot advocate it on a partisan basis. Because to do so from [LSK] is to fail to recognize the purpose of which LSK was formed.

BP You were chair in which years?

LM I was chair in the early '80s: 81-82.

BP There was another issue on detainees. I think you and Gibson had a difference on that too. You were great sparring partners. I think he was saying we need to turn LSK attention toward detainees, and you said no.

LM On detainees we never disagreed. I was his lawyer in the detention tribunal. In 87. I went to Naivasha; I went to Chimatoa [spelling?? of a prison??]; I was lawyer for Gibson, I was lawyer for Markus Stephen Muriithi [spelling??], and so forth in the detention tribunals and so forth. I used to do a lot of detention work.

90 The only difference between me and Gibson again, in that one, was that I used engagement, was it containment – was it Nixon who said we contain China and engage in China. I was working to show the system that the use of detention as a control mission is wrong, and it is not even helpful to the system.

BP But you didn't want LSK to get on that horse.

LM As an LSK, no. As an LSK no. Because then all you could do is to condemn it because it's a violation of human rights. That I didn't mind. But you see Gibson took the activist view and of course he got himself injured and paid the price, which of course it is something to admire him for. But I take the view myself that there are more ways to skin a cat than to drown it. And it is

therefore not essential that a cat must be drowned to be killed. [His analogy falls apart, but his point is clear: that confrontation is not the only way to try to change a system; he prefers long-term construction of institutions to safeguard human rights and for the LSK to work within the system rather than outside it.]

BP You were not anxious to go to detention.

LM Certainly not.

BP Nobody is.

LM And I was – but I was willing to take the risk of arguing the case against detention.

BP Which you did when you represented Gibson.

LM Yes. Both when I represented Gibson and when I talked with authorities, which I was able to do, which Gibson was not able to do because authorities wouldn't listen to them [confrontational activists].

TACTIC – keeping open communication with the government

BP Do you feel like you kept some of the avenues of communication open where others did not?

[IMPACT of his quiet approach – a court victory]

LM Certainly (emphasis). At least I did one thing, one thing I certainly know I achieved. I achieved in getting the detaining officer, Mr. Phillip Kilonzo [spelling?? title: Commissioner of Police ??] to recognize that a detainee is not a prisoner, so that a lot of detainees who had previously been treated as a prisoner, were previously deprived of a lot of their things...that was restored. 87 I think it was Gibson case; Muriithi's case, and Koigi's case.

BP **So you achieved something.**

LM Yes. And my argument was that basically it becomes – it is a security (emphasis) concern. When you detain someone, you aren't actually saying he is a criminal because you haven't proved his guilt. The law continues to say he is innocent until he is proved guilty. What we are saying is that...as a person making decisions relating to public security you fear that his continued freedom may prejudice public security. Therefore all you need to do is to insure he is – where his actions can not violate public security.

BP You don't have to torture him –

LM You don't have to torture him; you don't have to deprive him of reading material. You don't have to punish him.

BP **You won that case.**

LM **Yes.** And it was a good thing because it then made them, even people who were being looked after always by the regular prison warder-

BP When [Paul] Muite came in [1991??] that surfaced...your divergent views on the role of LSK.

LM Yes. Muite and his Council went out, Muite went out to make LSK a stepping stone for his political venture. Now that I disapproved of and I still disapprove of it. There is great temptation in using LSK for political adventure. It's a very tempting stance, but I think it had to be resisted.

BP And you did

LM Yes, and I did.

BP Did you find yourself unpopular sometimes among some of your fellow lawyers for your stance.

[LSK divided, weakened]

LM Yes, yes I did. Quite a number of them. Some of it has dragged on until now. But I think most people agree that the schism, the division that was made by Muite at that time is still what we are suffering from today.

BP Explain that again because I'm not sure I get what you mean. The split in LSK you mean?

LM Yes. The Muite stance broke the LSK into two, into the [Fred] Ojiambo and [Gibson] Kamau [Kuria] camps. That division has lived on since that time.

The years before that time, if I ...blew the whistle for the LSK to do an action, I could count on 90 percent to do the action. Certainly every black lawyer, and a considerable amount of Asian lawyers and a few white lawyers. Now, today, since the break of that [Muite period], the Law Society is divided into two, virtually two groups.

BP Has that hurt its effectiveness?

LM Yes, quite measurably because it's not as authoritative as it used to be. In those days, even Attorney General Charles Njonjo used to listen to us when he wouldn't listen to anybody else.

BP When you look back on the things that changed state behavior in terms of human rights, level of repression, what pushed the government to make some changes from time to time?

[IMPACT of world and domestic pressures]

LM Well, you see things were happening also on the world stage. You remember the Iron Curtain was coming down [actually falling down], society was opening both here and there [Eastern Europe, Russia], and those forces were pulling through. And other previously unheard of organizations, even the church, for example [were] getting more activist than it had before, so that all these forces combined to make the state more [willing to make concessions]. And, two, the state made- the great error of the state, the 1988 'Molongo' [spelling??] [queuing] election. And I think that is the watershed. That is the time when people got to know their government lies. What they thought their government was, it wasn't. And that is really **where** the preparing measure for **change began**.

And then of course it was nursed by the fact that there were changes [domestic??] and international... And, again, with people like Rubia and Matiba beginning to talk, and talk, and talk.

BP At what point did those individual acts of courage and whatever happen – when did that begin to become an institutionalized pressure for change?

LM Toward the close of that decade [the 1980s]. Just as it was closing down, When after the Molongo [queue voting] there's so many people who became flabbergasted by what they saw in the result of those elections. People really felt called to move, Dr. [David] Gitari, an outspoken Anglican Bishop], Matiba, Rubia. They all began now. Then of course there was the repression, the *Mwakenya repression that had been going on which now began getting very much to the root of the system and making the system feel quite uncomfortable, the kind of [unclear].

[Mwakenya was an underground movement that surfaced in the mid 1980s. though it may never have been large, it provided President Daniel arap Moi with an excuse to crack down hard, including with torture, on many suspected dissidents.]

BP What was the impact of Mwakenya?

LM Quite substantial in terms of making the government very worried about the extent of damage she can suffer from the underground movement. Myself, I think if Mwakenya wasn't there, the change might not have come as quickly as it's been.

BP Kind of like a shock troop.

LM Yeah.

BP How big was it, though?

LM It's very difficult to assess because a lot of it was kept under lock and key. Most of the trials were done in secret.

BP Kangaroo courts?

Muthoga hears Mwakenya appeals]

LM Kangaroo courts? We were talking about people in hundreds. Probably not thousands, hundreds of people tried. I know round about in 89 I was appointed Commissioner of Assiza [like an acting judge]. I know in my sessions, criminal appeal sessions...we had 20 or 30 or so appeals from convictions. We were not there for a long time. There must be a lot of others we don't know of.

BP Not everyone was arrested.

LM No.

BP But I think sometimes people got arrested who really didn't do much.

LM Yeah. A lot of people got arrested for mere suspicion. But you know now to be arrested for Mwakenya, all that needed to happen was for those security types operatives to not like you. And then you drink a beer and you say something that nobody likes and you are visited at 4 o'clock in the morning. And by 6 o'clock you are admitting the offense and you are in prison by 7 o'clock.

BP The torture is well documented.

LM Yeah.

[field note: you have to listen very very carefully to the tape; here I thought he was saying Kenya was still an authoritative state; I asked for confirmation and he even gave it – but of the first statement, that is is NOT authoritarian but “reasonably open.” My notes caught the point soon after in another statement.]

BP It was a police state at that time...Today would you describe Kenya as an authoritative state still or not?

LM No, I think it is reasonably open.

BP It is not?

LM I think it is

BP It is?

LM I think it is reasonably open. We can say a lot of things we could not have said before; we can talk of things we never talked of before. Yes, it is not the greatest democracy, but I think basically the space one enjoys – individual freedoms – has expanded quite considerably.

BP Expanded but still would it still be legitimate to call it an authoritative state?

LM It's still – state manipulation is still very high. But its more manipulation than oppression. You understand the difference?

BP I didn't get clear: are you saying it [Kenya] is or is not an authoritative state today?

LM I am saying today it is not an authoritarian state per se. It is still very much a manipulated state as opposed to oppressed. We suffer more from manipulation than oppression. In other

words we have a Parliament there and it sits. But it is made to pass laws we don't like, which is different from not having a Parliament at all and one person passing the laws. So that Moi's – the concentration of power in the presidency has enabled Moi to literally manipulate, operate the state as a tool for his own [benefit] in spite of Parliament openness.

BP In your own works, have you done anything else, that you could point to personally, or as :LSK chairman that you could say: this was definitely a tactic, a strategy that was taken to advance human rights in Kenya.

LM (pause). Oh, what would I say? (pause). Nothing comes in mind straight away.

BP You're being too modest. You've represented some controversial clients.

LM That's definitely [true]. I have represented some controversial clients; I've represented some political activists and anti-establishment figures like Mark Muithoga [spelling; named above//], Cherezon Mutahi [??], Wangari Maatahi, groups like those.

BP When did you represent her? That was not the Greenbelt, the Park [issue]?

[Muthoga worked with the government: Saitoti Commission and Njonjo Commission]

LM No, that was earlier when she was charged with contempt of court with the editor of Viva [??] magazine. I can't remember whether it was 84 [??]. And of course I participated in the so-called Saitoti Committee.

BP What was your position there?

LM - a Committee appointed by KANU to recommend amendments to its rules, including whether or not the country should become multi-party.

End of Side A, Tape 1 of 1

Start of Side B, Tape 1 of 1

LM Although the committee recommended opposition what the people wanted [as measured by their statements to the committee], I and John Ghutto [??] and Edna Gachukia, and the Rev. Dr. Gitonga [spelling, title??] we issued the minority report. We made the President fully aware of the truth as to what people wanted. And we made it quite clear that people were in earnest asking for political pluralism. I think that my own participation in that, to the extent I can assess it, was very helpful in preventing a majority from taking steps that might have been very backward.

BP To clamp down further?

LM Yes, or to fail to bring up the fact that there was really sincere agitation.

BP That would have been in 1989

LM 89-90, yeah.

BP So you went against the majority in that?

LM Yes, the four of us issued a minority report. We couldn't sway the majority. There were 17 ministers...there was no way we could turn it around. Seventeen against four. The result was that the majority-

BP Were the four of you [dissenting] lawyers, attorneys?

LM No, I was the only lawyer involved. Two were preachers [John Ghutto?? Wrong I think;] Dr. Edward Gitonga, Bishop of the Redeemed Gospel Church [??] and the other was Mrs. Edna Gachukia [title, profession?? I had dinner at her house in 99] And of course the Njonjo Commission of which you obviously are familiar – 83/84. I was Counsel, leading Counsel for the Commission

BP You're a hard man to categorize. You always have been.

LM (laughs)

BP That's why I always enjoy coming to see you.

LM (laughs)

End of transcript and interview