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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: Honorable Paul Muite, Member of Parliament

Location of interview (part one of two): Nairobi, Kenya; in his law office

Date of interviews: July 23, 2002

The transcription is by Bob Press. Research notes by Press are shown either in brackets, parenthesis or underlined, as well as tape recording numbers. The rest consists of the statement by Mr. Muite.

Biographical note at the time of the interview: Mr. Muite is an attorney and politician; first elected to Parliament in 1992. He was a resident of Nairobi 87-97. He described himself as an “internal refugee” from 1988-1989 because the government had retained his passport. He has an honors law degree from the University of London. He is Kikuyu; Christian (Anglican), and is married. He was a member of the political party Ford Kenya (92-94); Safina (94 to present); currently party leader of the political party Safina. In my research, he was consistently ranked, along with attorney and Member of Parliament Gitobu Imanyara as one of the two leading human rights activists in Kenya during the study period of 1987-2002. (Imanyara is the only activist approached in this study who did not consent to an interview; the author used archival information to explain his role in Kenya’s political transition.)

Side one; tape one (of two)

Historical background:

10: “Eighty-seven can only be understood in the context of ’78.” [President Moi took office in August 1978. Muite was an early activist along with Gibson Kamau Kuria, Amos Wako, the late Massimi, Lee Muthoga, Dr. Ojwang (professor at the University of Nairobi), as lawyers, seeking the Africanization of the Law Society of Kenya and the judiciary,]“taking on the attorney general; taking on the state, really.”[Their efforts to educate Kenyans about the legal provisions for what happens when an incumbent President dies in office nearly landed them in detention.]

[The constitution of Kenya provides in the case of a President dying in office for the Vice President to take office for ninety days, after which there shall be an election? Verify. So, how was the election avoided?]

Moi’s ascension to power

28 “Moi was orchestrated into power. The Kenyan people were denied the opportunity of electing a President. He was not elected. He was orchestrated single-handily by Mr. Charles Njonjo who was then the powerful Attorney General. Mr. Njonjo was a King maker. Between August of 1978 and August 1982, the President wasn’t truly running the country. It was a cabal of the powerful Mafia around Njonjo, including GG Kariuki, including Vice President Moi Kibaki, who was imposed on Moi; he was never his choice, including the military heads, police, civil service, all that machinery. It was a Kenyatta machine. So he was not his own man.”

45. “Therefore there was a period of relative peace. Intimidation, yes; but no outrageous repression. In 1981, early 1982, already there was a dissatisfied faction on the part of politicians being locked out of

politics by the de facto one party state: principally Jaramogi [Oginga Odinga; Kenya's Vice President from 1964-1966 and long time opposition leader after that] and George Anyona who took advantage of the fact that the late [President] Njomo [Kenyatta] was using authority rather than power to intimidate people into silence. A benevolent dictator.”

59: “He died without having Kenya made a de jure one party state. So Jaramogi, Anyona, and Gathango (?) took advantage of the then constitutional position that we were a de jure (emphasis) multi-party state, to apply for the registration of a political party, which caused extreme excitement [in 1982]. The excitement caused led to Moi using Njonjo and Mr. [Mwai] Kibaki, who was then Vice President and Leader of Government Business to rush through the amendment of the constitution that made Kenya a de jure one party state....No opposition, was permitted, even within Parliament. So you can say that that was the genesis of things going completely overboard. Members of Parliament were intimidated. It's not that they were unanimous. You dare speak and you go to detention. It was an amazing show of power; raw power.”

[The proposed amendment passed in a matter of an hour or so and was signed by the President the same day. Verify]

Post-coup attempt: dissent forced underground

“Mukaru Ngang'a [spelling?], a political scientist wrote a piece published in the paper saying that when you outlaw by law dissent, criminalize dissent, you push that dissent underground. Jaramogi's son, Raila [later Prime Minister under President Mwai Kibaki], got in touch with the Luo elements in the Air Force and they planned the [unsuccessful] military coup [of 1982] which of course has the blessings of the late Jaramogi. Purely a Raila affair. I know that because I acted as counsel for the then Air Force Commander, Major Gen. Peter Kariuki [spelling]. So I know Raila was the brainchild behind the attempted coup.”

[As a defense counsel in the court martial, Muite was given the entire investigative file.]

Purges

104: “The consequence of the August 1982 coup was to give Moi the opportunity to achieve a number of things:

One, to come out as his own man, in the sense that he readily accepted the false allegations that his Kingmaker, Njonjo, and the Kikuyus, were behind the attempted coup. But that was being used as an excuse because he knew that it was the Luos who were behind it; the coup. Even Jaramogi was put under house arrest; Raila was detained. So he knew. But publicly, for political purposes, he pretended. Therefore he proceeded to purge Kenyatta's people in the civil service, the police and the army. The first casualty, of course, was Njonjo.”

Ruling by raw power, not charisma or authority

120: “But I think Moi then realized he had a weak political peace. Therefore he deliberately promoted the tactics of divide and rule; ethnic card as an instrument of governance to retain power. He particularly targeted the Kikuyu community, although even in the Kikuyu community he was playing the districts against each other: the pro Njonjo people against the people who are against Njonjo.

“The second thing that happened that is significant is he went completely berserk. I mean...whereas Jomo [Kenyatta] ran the country and intimidated people because of his charisma and authority (emphasis), Moi had none: no charisma, no authority, so he had to use raw power...over doing things.”

140: “The 1983 Njonjo Commission of Inquiry was an example of abuse of power and abuse of the judiciary to settle political ‘wars.’ He then went on a rampage of repression. And you see its like, ‘OK, there was this attempted coup; there must be other coups.’”

1983-1987: repression

“ He stepped up repression like you’ve never known – in late 82, immediately after [the attempted coup.] So the darkest years, in terms of repression, were between 83 and 87, reaching the apex about ’86, ’87.”

152: “They [The Moi regime] invented the famous Mwakenya;* gave tremendous power to the secret police: the special branch, to be renamed Directorate of State Security and Intelligence. And between ’83 and ’87, many Kenyans perished in torture chambers. And you have a lot of masochists around that period; people being extra-judicially executed in custody of police. People are being thrown from the 18th floor of Nyayo House to their death. Not only did people see [this], but they would have arranged – there were pictures in the papers of somebody in there falling. And then they say: ‘Oh, we were questioning him and he jumped out. They had torture chambers, actually, in the basement of Nyayo House. All that happened between ’83 and ’87.’”

[The government’s use of torture, including holding detainees for days at a time in cells partially flooded with water during this period, is well-documented by Amnesty International and Human Rights Watch. Mwakenya is the name given to a subversive group. According to David Throup and Charles Hornsby (*Multi-Party Politics in Kenya* (1998). London: James Currey], it emerged in 1986-1987 “as the state engaged in a wave of detentions, arrests and imprisonment of alleged subversives involved in this movement. Whether this organization ever had any real importance is questionable, since it did little to harass the state, but it provided a convenient excuse to crack down on independent political activity.]

?170 [Mwakenya]. “You couldn’t talk publicly [against the government]; you couldn’t even mention the name of the President. So people who would meet would be branded Mwakenya. I mean sedition [law] was abused. There was a PCEA priest going to prison for 18 months because in his own diary he had written something critical. [Rev. Munde]. A journalist, Walith (?) Gicheru (?), who is now in a wheelchair, paralyzed for life. They threw him from the third floor of his flat. He was a journalist who had written critical things; pushed him down and dropped him. They made sure he hit the concrete with his head. He was camping outside...he was a photo journalist. [The underground opposition was] not anything that was a threat to the state. It was grossly exaggerated. I mean dissent has always been around, but there was no organized group that was planning to take over the government by force of arms. There may have been a few people going for military training outside [Kenya]. There was no genuine threat. And I know this because I defended a number of these people.”

1988: Absolute concentration of power

180: “When this was going on at the Parliamentary level, legal level, constitutional level, Moi was also going berserk, passing laws, removing the security of tenure of judges [1988?] of the Attorney General, the Auditor General, absolute (emphasis) concentration of power in the institution of the president; amending the constitution to say that civil servants served at his pleasure and therefore he can sack them and rule everyone [including] the police. He absolutely concentrated power in his own hands.”

1988 queue voting: bitter reactions from ordinary Kenyans

210: “So there was a lot of build up of resentment. You couldn’t breathe. Therefore what happened towards the end of ’87, when he concentrated all these powers in himself, he overreached himself when he changed the election laws to say the general election of 1988 had to be by queue voting. That was opposed by us, as lawyers; that was opposed by the religious sector, but nevertheless it was rammed through. But the consequence of the 1988 elections was such that it robbed the government, in the eyes of the ordinary people, of any credibility made of it. The eyes of the ordinary people. Because it was they who queued behind a Parliamentary candidate and they could see that this candidate [not the one favored by the government] has a longer queue. And the District Commissioner would announce that the other fellow has won. So the positive aspect of this was that everyone became bitter; the ordinary people, not just the intelligentsia. [That was a shift in public sentiment and awareness of rights.] The 1988 queue vote elections were the beginning of a cohesive, though initially unorganized [opposition]. But there had begun to coalesce, [there was] a convergence of dissent from the civil society, from the lawyers, and from the politicians (emphasis), some of whom, like [Kenneth] Matiba, had supported queue voting but were the victims of the queue voting. The churches, the lawyers...at that time the most vocal civil sector were the lawyers.” [Dissenters also included] politicians who had become victims of this rigging.

Then the other important factor was Moi was beginning to have sufficient confidence of getting rid of Kibaki; he got rid of him. So there was a lot of activity between ’88 and ’89.”

258: “A lot of consultations were taking place; quite a few took place in my house: Matiba, Rubia, Job Omino (spelling?), now a Deputy Speaker in the National Assembly. Later we consulted with a number of Bishops, including the late Henry Okullu; later Jaramogi. That was the birth of the agitation for the repeal of Section 2A [prohibiting more than one party] for multipartyism.”

1991: Law Society of Kenya [LSK] chairmanship of Muite challenged by opponents

?272: [Muite was elected chairman of the Law Society in 1991, but opponents in the LSK managed to get a court injunction against his making political statements as chairman. In his maiden speech as chairman, he had voiced strong criticism of the Moi government and called for registration of Odinga’s new party. An LSK motion to abolish detention passed nearly unanimously. Willy Mutunga was elected vice chair with Muite. Muite claimed he had been threatened days before the LSK election when he was suspiciously rammed by a land rover then confronted by six people who came out of it and asked if he wanted to report it to the police. He felt threatened and declined then drove away. He also claimed he had been followed by two white saloons.

In March 1991, the State issued an injunction against Muite aimed at preventing him from acting as chairman of LSK. The injunction had been sought by attorneys unhappy with his election and followed his strong pro-reform speech as the new chair. LSK vice chair Willy Mutunga chaired the first LSK Council meeting which gave full support to Muite. There appeared to be no merits to the legal bar against him and it was seen unlikely to hold unless his election was shown to be irregular, which no one had suggested. In July 1991, the Kenya Court of Appeals allowed Muite to resume active chairmanship of the Kenya Law Society. But he was barred from making political statements. His opponents seemed determined to try to block him by whatever method they could devise. Muite announced he would appeal the ban on his making political statements. (What was the final outcome?)]

313 “We just escaped prison.”

Seeking political change via changing tactics

1988: Tactic: using statements

[Example: criticizing Moi's removal of security of tenure of judges, the attorney general, the auditor general.]

“Initially even a statement critical of government was sufficient act...in terms of challenging authoritarianism [to result in possible detention]. Of course over time, the government became immune [to critical statements] ...or even disclosures.”

Tactic: using the judiciary as a political forum the media could cite

331: “The judiciary itself – we used it as a platform [in sedition cases]. There was a time also when the media, particularly the mainstream [e.g. *The Daily Nation*], was observing self censorship. They would not publish statements critical [to the government]. When you talk about circumstances changing the question of taking advantage (emphasis) of a situation – you look around and you come up with an initiative. For example, when we realized the media would not cover statements critical of the government, we discovered that as long as they were covering proceedings in court, they would publish it. (laughs) So we would file a case, knowing that its going to be decided against us and it [the media] would say everything that we needed to say in [the case]. That was a deliberate strategy that we adopted. And the paper would cover it fully. (laughs) And the government would be mad, but since it's in court, you know, they couldn't hammer the papers because the papers were merely covering it. In the end we would lose those cases. But our objective was not to win the cases; it was first of all to expose the judiciary, to expose the Executive because of the exposure in the media. And it worked beautifully. That was a strategy that [human rights attorney] Gibson Kamu Kuria and I promoted. We still use it, even today. It doesn't matter that the case is going to be decided against you. The objectives cannot be stopped.”

The government counters by using “shameless judges”

365: “But mind you, the government would hand the cases to very shameless judges sometimes. I remember one of the cases, when I was defending Koigi [verify date]. The case was given to a very bad judge. He let the state counsel for the Attorney General's case argue the entire case in open court. It was being covered by the media. But because they knew that what I had to say on behalf of the defense would be embarrassing to the government, without batting an eye, the judge told me: ‘Mr. Muite, you go and write your submissions and hand them over to me. I will read them.’ And I remember arguing: ‘Listen, when the constitution says that cases will be heard in open court, so that people will be able to listen and...make up their minds as to whether justice has been done.’ The origin, the principal behind [that] was that justice must not only be done but must be seen to be done. [The judge responded, he recalled] ‘Mr. Muite, don't argue with me because you are now approaching the boundary’...she [Judge Joyce Alu] was now intimidating me with sending me to prison for contempt of court. The constitution [was] not going to be complied with. [Muite told the judge] my instructions are that we will not hand over to you written submissions (laughs). So I just walked out. Of course she proceeded to write a judgment against [the defendants].”

400: “They [the government] were wising up...As soon as they realized what we were after then they would give politically-sensitive cases in which the government had an interest to ruthless judges who would actually intimidate lawyers (emphasis) for making submissions.”

Another shift of tactics: using expanded court documents to inform the public via the media

413: “So we had to improvise a strategy and the improvisation was that although the rules of pleading require you to sort of just highlight [charges or the defense] – we follow the British legal system, which is based on morality. So the rules require you to merely give a synopsis of your case without stating your case or the evidence. So we also had to change strategies within that narrow strategy of using the court forum and forget the rules of pleading, the rules of synopsis. And we got to this habit of saying everything we wanted to say, in writing, in the document to be found in court. During an appeal, you argue your entire case; you don’t just put the grounds of appeal (laughs). And the papers would cover it. It was a document (laughs). And even if they applied for it to be struck out because it does not apply with the rules of pleading, the papers would still cover it. Sometimes it would be struck out, but it would still be covered. [The documents would charge] The AG [Attorney General] has done this; this police officer has done this...”

The power of the Special Branch The George Anyona sedition case

441: “The Anyona case was different because it was the government that was abusing the criminal process to send to prison politically undesirable people. [But, Muite noted, the defendants’ periodic dismissal of their attorneys, including Muite, so that the defendants could speak themselves and make their political statements, as] part of a strategy. That [case] was an example of the power which the Special Branch [secret police] was wielding. They were a ‘government’ unto themselves; not subject to anyone.

[It was a very small courtroom.] I was cross examining a Special Branch officer, a very tall guy. He was very close to me; he was seated not far from me. He didn’t like the cross examination. So he’d take a minute or two minutes very arrogantly staring at me [then] say: ‘I’m not going to answer that question.’ And I would say to the judge: ‘The question is proper, legitimate. Can you tell the witness – I was quite firm – we are not in the Nyayo House chamber of tortures; we are in a court of law. That [the torture chambers] is his domain, but this is not his domain.’ And the Magistrate was terrified (laughs). He would order the witness to answer the question. The witness proceeded to tell me: ‘One of these days you will come to where I am; I’ll have you; you will see’ (Muite laughs). [He said that] in the presence of the Magistrate. [He was threatening Muite in court] and refusing to answer the questions.”

Special Branch turns the tables against Muite

491: “Exactly what he [the Special Branch officer] said came to pass. Fortunately it was not in Nyayo House and the situation had changed [human rights had been expanded]. This was 1991; November; the Kamakunji [a site of political rallies in Nairobi] of November. When I was arrested in Kamukunji and taken to [police area headquarters], who do I find? The same police officer, with a grin, a wide grin. And he pulls out my belt and orders to me to strip down, stark naked, swinging the belt around me. [The officer said:] “Didn’t I tell you we would meet (Muite laughs). Now you are under my power. But the situation had changed [human rights advances in Kenya and continuing international pressure, practically precluded harming leaders of the opposition]. We were in the dungeons, in the basement of the offices of area headquarters. It’s not a very pleasant experience when you as a grown up man are ordered to remove even your underpants, be the way you came out of your mother’s stomach; people are just looking at you. Then they drive you around a forest in the middle of the night and asking: ‘Where are we going to kill him (Muite laughs).’ Eventually they end up locking you up in a police station and you are charged after a couple of days, I spent about ten days in Kamiti Prison. It can be very intimidating. It’s just that the situation had slightly changed. Perhaps sometimes when you are very high profile and everybody knows they have arrested you, then they sort of hold back. But you can see them,

you can see their hands shaking when they are trying to restrain themselves from hitting you, particularly when you sort of answer them firmly.”

New tactic: seeking international support on legal grounds

540: “It began when I was elected chairman of the Law Society. I had a legal point here: using the legal knowledge to argue constitutional issues that have tremendous political implications. For example, 1990. I suddenly realized that it was important to win the moral support of the international community. We were lucky in having [U.S. Ambassador] Smith Hempstone and the German Ambassador [Multzberg – spelling?]. So when you talk about tactics, I sat down with these people...The debate about multi-party is there; public debate. The government’s stock answer as to why they would not permit a public meeting for those calling for multi-party was because Kenya was legally, constitutionally, a one party state. In other words they were using the law to justify the action. So it occurred to me that there was a need to demolish that argument. So I said we need some precedents fast (?). I told them, let’s look at this constitution. This is our Bill of Rights, this constitution. The freedom of association is a separate thing – a distinct (emphasis), fundamental right, distinct from freedom of assembly (?). It’s also separate from freedom of expression – speech. [separate from the ban against having more than one political party]. Section 2 added only one sentence: there shall be only one political party in Kenya: KANU. Full stop. There was no attempt (emphasis), in their hurry to enact, to harmonize Section 2 with the Bill of Rights (emphasis). So the freedom of association was there; the freedom of assembly was there; freedom of speech was there (emphasis). So I said Moi is actually wrong, even on the narrow interpretation of the law, to say people can not exercise their constitutional right of assembly because Kenya is a one-party state. They are using the wrong argument.”

(End of part one)