

Kenya

@Abusive use of the law: Koigi wa Wamwere and three other prisoners of conscience on trial for their lives

1. Introduction

The trial of Koigi wa Wamwere, Charles Kuria Wamwere, James Maigwa and G.G. Njuguna Ngengi began on 12 April 1994 and is still continuing. They have been charged with attempted robbery with violence following an alleged raid on Bahati police station near Nakuru, 150 kilometres (kms) northwest of Nairobi, on 2 November 1993. If convicted they face mandatory death sentences. Amnesty International believes that the charges against them are false and that all four are prisoners of conscience. All four men have been detained since November 1993.

Koigi wa Wamwere, a human rights activist, a former member of parliament and a former prisoner of conscience, is a prominent critic of the Kenyan government¹. Following his release from prison in January 1993, after treason charges against him were dropped, Koigi wa Wamwere was openly involved in politics, operating within the new multi-party framework. He did not join any of the other opposition parties but, after some involvement with the Released Political Prisoners (RPP) group (a non-violent campaigning group), formed his own human rights organization. There is no evidence of his involvement in any clandestine violent opposition group, or revival of the Kenya Patriotic Front (KPF), which he had formed in the late 1980s while in exile in Norway. At the time of his arrest, in November 1993, Koigi wa Wamwere was on bail for sedition and other charges following his imprisonment in September 1993 for a month. Amnesty International had appealed for his release as a prisoner of conscience. Charles Kuria Wamwere, Koigi wa Wamwere's brother, James Maigwa, his cousin and G.G. Njuguna Ngengi, a councillor from Molo, 160 kms northwest of Nairobi, and a former army officer, are also known critics of the government.

The trial of these four defendants appears to be part of a pattern of harassment of human rights activists, opposition figures and journalists, and especially those who, like Koigi wa Wamwere, have been attempting to investigate or report incidents of political violence in the Rift Valley and other parts of Kenya. Government involvement has been alleged in the ethnic-based violence which has killed around 1,500 people and displaced more than 300,000 since it began in December 1991. Although opposition political parties operate openly and freely, opposition members of parliament, human rights activists, journalists and other government critics have been

¹Koigi wa Wamwere has been in detention twice without charge or trial under the Preservation of Public Security Act (PPSA), from 1975 to 1978 and again from 1982 to 1984 when Amnesty International adopted him as a prisoner of conscience. He was arrested again in October 1990 and jointly charged together with his cousin, Geoffrey Kuria Kariuki, and two prominent human rights lawyers, Mirugi Kariuki and Rumba Kinuthia, with treason. They faced mandatory death sentences if convicted. They were released in January 1993 when the charges against them were dropped before the trial had started. Amnesty International had taken up their cases for investigation and was concerned that they might not receive a fair trial.

arrested in connection with peaceful demonstrations, speeches, publications or investigations into human rights abuses. Whole editions of newspapers and publications critical of government policy have been impounded and printing presses have been put out of action.² Since January 1994 over 20 journalists have been intimidated, harassed, arrested, fined or imprisoned and on 11 July one foreign journalist was deported after being held incommunicado for eight hours. Amnesty International took up the case of two journalists, Bedan Mbugua and David Makali, imprisoned in June for contempt of court, as prisoners of conscience.³ In August the Kenyan Post Office impounded copies of a report by the US-based Robert Kennedy Foundation which was critical of the Kenyan government, and had been sent to the Kenya Human Rights Commission (KHRC), a local human rights monitoring organization.

These actions by the Kenyan authorities have seriously undermined the right to freedom of expression in Kenya.⁴ However, what is of particular concern in the case of Koigi wa Wamwere and his co-defendants are the charges under which they are being held. With the increasingly high profile of human rights, many governments are becoming more sophisticated in actions against human rights activists. Different laws and charges are increasingly being used so that critics appear to be detained not for their non-violent political activity, but on the grounds that they are criminals. Governments can then pretend that there are no political prisoners in their country since all are held under criminal laws. In Kenya, non-violent critics of the government who have been arrested, many of whom have been prisoners of conscience, have either been held for short periods and then released without charge, or charged with "sedition" or related offences such as subversion, and released on bail after a few days or weeks. Both charges permit the imprisonment of non-violent critics of the government. Charges against them have then been dropped after some months. In a new disturbing development, the government has now evidently decided to use capital criminal charges (which are not bailable) against people whose only offence is that they are non-violent critics of the Kenyan government. Amnesty International is concerned at what appears to be abusive use of what Kenyans call their "Hanging" law and the arbitrary detention of political prisoners, some of whom may, like Koigi wa Wamwere, be prisoners of conscience.

The evidence against Koigi wa Wamwere and his three co-accused is weak. All four men have alibis. Koigi wa Wamwere, for example, was in Nairobi and is said to have stayed at the house of Gibson Kamau Kuria, a prominent human rights lawyer and former prisoner of conscience. Yet the police have made no attempt to investigate their alibis. Three men were said by the police to have been shot during the raid, which began at 2.30 a.m. on 2 November 1993, but the post mortem

² See *Amnesty International Report 1994*, entry on Kenya, and *Kenya: Multipartyism Betrayed in Kenya*, Human Rights Watch/Africa, July 1994.

³ They were imprisoned on 12 June 1994 and were sentenced to five and four months respectively following their refusal to pay a fine and apologize to the court. They had been found guilty of contempt of court after an article in *The People* criticized a judgement in the Court of Appeal. For further details see *The imprisonment of two prisoners of conscience - Bedan Mbugua and David Makali*, 27 July 1994, (AI Index: AFR 32/12/94).

⁴ The quarterly report of the Kenya Human Rights Commission for April to June 1994 estimates that over 40 people were arrested for political reasons, including 33 politicians, during this period. The US Department of State Country Reports on Human Rights for 1993 noted that 36 of the 85 opposition members of Parliament were jailed for short periods during the year.

reports on all three men place the time of their deaths before the raid began. If they were in fact killed before the incident this would suggest that the incident itself may have been fabricated and the bodies of people killed in different circumstances used to suggest it had occurred. Many human rights activists and others in Kenya see this trial as a test case. If these four men are found guilty and sentenced to death it will have serious implications for freedom of expression in Kenya.

2. The arrest of Koigi wa Wamwere in September 1993

On 2 September 1993 Koigi wa Wamwere returned to Kenya from Norway, where he had been living with his family since his release from prison on 19 January 1993.⁵ Shortly after his return he formed a human rights organization, the National Democratic and Human Rights Organisation (NDEHURIO). He was arrested on 18 September 1993, while he and a prominent human rights lawyer, Mirugi Kariuki, were travelling to the Burnt Forest area in Uasin Gishu district, Rift Valley Province, with Mirugi Kariuki's wife, Susan Wangui, and two others. Two more people, Geoffrey Kuria Kariuki and John Kinyanjui Njoroge, a member of the RPP, were arrested in Nakuru on the same day. All eight were held incommunicado in Nakuru police station and some of them were reportedly tortured by the police. Amnesty International appealed for their release as prisoners of conscience.

On 22 September 1993 seven of those arrested were charged with:

- 1) alleged possession of an AK 47 rifle, a grenade and rounds of ammunition without a firearms certificate;
- 2) sedition - possession of NDEHURIO leaflets and other pamphlets;
- 3) violation of the Molo Burnt Forest Lodian Security Regulations 1993.

These security regulations became available in government bookshops on 22 September 1993. They were published on 20 September and back-dated to 17 September 1993. Koigi wa Wamwere and the others denied the charges and applied for bail. Susan Wangui was released on bail. John Kinyanjui Njoroge was released without charge, but he was rearrested on 6 October and held until 24 November on account of a radio interview he gave to the British Broadcasting Corporation (BBC) alleging that he had been tortured by the police. Geoffrey Kuria Kariuki and two others were released on 6 October. Koigi wa Wamwere and Mirugi Kariuki were not released on bail until 19 October, having been further charged on 5 October with "administering an unlawful oath".

3. The arrest of Koigi wa Wamwere and his co-defendants in November 1993

⁵Koigi wa Wamwere had previously fled to Norway and had been recognized as a refugee there since 1987. His family were allowed to join him there in 1988 and have remained in Norway since his imprisonment in 1990.

During October 1993 there had been renewed political violence in Rift Valley Province and over 20 people were killed in one incident in Narok District. The Minister for Local Government, William ole Ntimama, and several other government ministers were accused by the opposition of inciting the violence, following a statement the minister had made openly defending Maasai warriors in their armed conflict with members of other (mainly Kikuyu) ethnic groups over land. President Daniel arap Moi publicly criticised the opposition and the press on 28 October 1993 for telling lies and inciting violence and he directed the police to arrest anyone spreading rumours and false information.

On 29 October the Catholic Bishops in Kenya issued an open pastoral letter to President Daniel arap Moi sharply criticizing the government's involvement in the political violence, stating that "all these abominations are done in your name, by some of your cabinet ministers, by your District Commissioners, your District Officers, your civil servants, your 'elite military' General Service Unit and police."⁶ Peaceful demonstrations on 29 October by students from Jomo Kenyatta University College of Agriculture and Technology and, on 2 November, by students from Kenyatta University demanding an end to the political violence and the resignation of the Minister for Local Government, were violently suppressed by the police. A number of students were injured and several female students were reportedly raped. During the last week in October matatu⁷ drivers and touts organized a widespread strike protesting at government involvement in the political violence. The strike began in Molo, Rift Valley Province, and spread to Nairobi before it was called off at the beginning of November.

In the early morning of 2 November 1993, the authorities announced that a violent attempt to seize firearms from Bahati Police Post, near Nakuru, had taken place. Two men were alleged to have died during the raid and a third later in hospital. Shortly after the raid, newspapers reported that the Nakuru Officer-in-Charge claimed the raid was carried out by matatu touts from Nakuru who had travelled to Bahati police station in a lorry. This was one of three apparent raids on police stations in the area that were alleged by the authorities to have occurred between 30 October and 2 November 1993. In response to the apparently deteriorating security situation, President Daniel arap Moi, in a radio broadcast on 4 November 1993, accused the opposition of causing the situation by "pursuing parochial political objectives through campaigns of misinformation, distortion of facts and actual incitement of wananchi (citizens) in a bid to discredit the government.... It is evident that the so-called ethnic clashes were staged by the same individuals through leaflets, offensive audio-cassettes and publications. It is regrettable that a significant number of religious personalities actively participated in these unfortunate campaigns". The President urged the Commissioner of Police to "use all apparatus at his disposal" to restore security.

In early November 1993 there were widespread arrests which appeared to be part of a crack-down by security forces (similar to the police operation in the mid-1980s against government critics accused of being supporters of Mwakenya - a clandestine socialist opposition organization). Around 250 people were arrested in Nakuru alone between 3 and 5 November. Most of those arrested were hawkers and matatu touts who had been involved in the strike, many of whom were

⁶ On 29 October 1993 Article 19 issued a report, *Kenya: Shooting the Messenger*, which was also very critical of the Kenyan authorities involvement in the political violence. The report noted that "The violence is a subject of particular embarrassment because the consultative group of aid donors to Kenya is due to meet on 22 November to decide whether to restore full aid to Kenya".

⁷ Matatus are small vans or buses used for private local transport.

charged with minor offences and released on bail. However, a number of prominent Kikuyu political figures were also arrested including Bishop Joseph Kimani, Member of Parliament for Nakuru North, former members of parliament Ngengi Muigai and George Mwicigi, a former Nakuru mayor, Joseck Thuo, and the former Commander of the Kenya Air Force, Major General Peter Kariuki. Although most of those arrested were released within a few days, some were held illegally for over two weeks before being released without charge. (Under Kenyan law people who have been arrested must be charged within 24 hours, or 14 days for a suspected capital offence, or released.) Bishop Joseph Kimani had been arrested on 2 November outside Bahati Police station which he visited shortly after the raid. He was charged on 3 November with having publishing a false rumour three months earlier and was released the following week - the charge was later dropped.⁸

Koigi wa Wamwere had a bail hearing pending - he had applied to vary his conditions of bail to enable him to travel to Norway to be with his wife who was expecting a baby in the middle of November. Under his bail conditions, Koigi wa Wamwere was required to report weekly to Nakuru Police Station and his passport was confiscated. The application was heard in the Nakuru Magistrate's Court on 1 November 1993. The magistrate ruled that Koigi wa Wamwere's passport should be returned and that he be allowed to leave the country for two weeks. However the police were unwilling to release his passport and applied for a reversal of the ruling.⁹

Koigi wa Wamwere travelled to Nairobi with two friends on 1 November 1993. The entire time he was in Nairobi he is said to have stayed at the house of Gibson Kamau Kuria. That night he had dinner with Gibson Kamau Kuria and his wife at their home with three friends, Antony Njoroge Njui, Karin Kristopherson and Maina Kamami. The next four days in Nairobi he was reportedly followed everywhere by the police. Early on 5 November he returned to Nakuru for a court hearing regarding the returning of his passport. He was arrested by police at the office of his lawyer, Mirugi Kariuki, at 7.45 am and was held incommunicado until 9 November. On 10 November Koigi wa Wamwere was charged with attempted robbery with violence of Bahati Police Station together with his brother, John Njoroge Wamwere, his cousin, Geoffrey Kuria Kariuki, Wilfred Kinuthia Ngengi, the brother of G.G. Njuguna Ngengi and two others - Stefan Kariuki Muigai, Francis Ngigi Kabete. All six pleaded not guilty.

The following week, nine other people were arrested and subsequently charged with the same offence, including G.G. Njuguna Ngengi, James Maigwa and Charles Kuria Wamwere who were arrested on 17 November. G.G. Njuguna Ngengi, who is actively involved in local politics in Molo - where there has been considerable political violence - was arrested at the house of a relative in Nairobi. He had previously been arrested several times before, including with his family in May 1992, when they were allegedly tortured, and in February 1993 when he was charged with possessing

⁸ Bishop Joseph Kimani had publicly criticised the government in August when, following unannounced crop spraying in his constituency, a large number of livestock had died.

⁹ On 22 November 1993 the consultative group of aid donors to Kenya was due to meet in Paris to discuss the restoration of aid to Kenya. Aid had been suspended in 1991. Some critics of the Kenyan Government had been urging the donor countries not to restore aid to Kenya because of the alleged government involvement in the political violence. Koigi wa Wamwere's lawyers believe he was prevented from leaving Kenya to ensure he did not lobby donor governments due to attend this meeting. The meeting considered and agreed the restoration of aid to Kenya.

firearms.¹⁰ After falling ill in police custody he had been released on bail in August 1993 and subsequently hospitalized in Nairobi until 17 October 1993. He suffers from kidney problems and is currently in very poor health. James Maigwa was arrested in Thika, 40 kms northeast of Nairobi, and was taken to Ngong Police Station where he was reportedly tortured. He was later taken to Nakuru Police Station. Charles Kuria Wamwere, a former teacher, was arrested in Nairobi, where he was held for a short period before being taken to Nakuru Police Station too.¹¹ In January 1994 he contracted typhoid in Nakuru Prison and was eventually transferred to hospital the following month following repeated requests from his lawyers and national and international human rights organizations.

At least five of those arrested and subsequently charged with attempted robbery with violence of Bahati Police station were reportedly tortured while they were held by the police in incommunicado detention. The police can hold people suspected of "having committed or (being) about to commit an offence punishable by death" without charge for investigation for up to 14 days. This violates Articles 9 (2) and 14 (3) (a) of the International Covenant of Civil and Political Rights, to which Kenya acceded in May 1972, which require that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Three of the defendants subsequently received hospital treatment for their injuries which included a burst ear drum, a ruptured bladder and a fractured leg. Amnesty International is unaware of any official investigation of these reports of torture.

On 20 November 1993 Dr S.K. Mwangi, who had been giving medical treatment to prisoners recently detained, was arrested. He was due to present a medical report to the court on Koigi wa Wamwere and four others, including Geoffrey Kuria Kariuki who was ill with acute typhoid, on 22 November. Dr S.K. Mwangi was held incommunicado for three days before being charged with sedition and possession of explosives and released on bail. He denied the charge and it was later dropped. Amnesty International believes that his arrest was really due to his attempts to arrange independent medical treatment for these prisoners. Another doctor, a human rights activist, had attempted to visit these prisoners shortly after their arrest and had been denied access and threatened by the police.

All 15 were charged with the attempted robbery with violence of Bahati Police station under Section 297 (2) of the Penal Code and denied bail. Once charged with a capital crime, any defendant is held on remand in prison. Under the 1988 amendment to the Constitution, bail is not granted for any crime which carries the death penalty. Koigi wa Wamwere and the three others have been held on remand since November 1993.¹² The trial, due to begin in Nakuru Magistrates Court on 14

¹⁰ The Nakuru magistrate hearing his case had protested at police intimidation following a police raid on the magistrate's court during which court files were removed. G.G Njuguna Ngengi's file had been amongst those removed by the police. (*Kenya Jurist*, Vol.3 No. 3, September - December 1993).

¹¹ Charles Kuria Wamwere was sentenced to four years' imprisonment in 1990 for "taking an illegal oath" to join an illegal organization. Amnesty International believed he was probably a prisoner of conscience and expressed concern that he had not received a fair trial under international standards and that he had pleaded guilty as a result of torture.

¹² On 31 January 1994 Koigi wa Wamwere's father died. He has not yet been buried. Koigi wa Wamwere and his brother-in-law have not been allowed to attend his funeral and his mother has stated that the body of her late husband will only be

December 1993, was adjourned at the request of the prosecution because the police file was being examined by the Attorney General. On 28 January 1994 the Attorney General instructed that charges against 11 of the defendants, including Geoffrey Kuria Kariuki, be dropped and they were subsequently released.

4. Other related cases involving robbery with violence charges

a) The Ndeiya Six

The raid on Bahati Police station near Nakuru was one of three raids which allegedly occurred between 30 October and 2 November 1993. The first was a raid on the Chief's Camp in Ndeiya in Limuru town near Nairobi on the night of 30-31 October. The second was a raid at the Assistant Chief's Camp in Thogoto in Kikuyu town, Kiambu district, on the morning of 2 November, in the course of which an administrative policeman was reportedly killed. Following both raids residents of the area accused paramilitary troops from the General Services Unit and the police of beatings, looting and rape. No one appears to have been charged by the police in connection with the second raid. However six men were arrested in November 1993 and were initially charged with breaking into the Ndeiya Chief's Camp (they were subsequently referred to as the 'Ndeiya Six') and stealing five guns, several rounds of ammunition and three tear-gas grenades, and with assisting a prisoner to escape. The wife of one of the accused, David Njenga Ngugi, an official of the opposition Democratic Party, was arrested at the same time and held for several days in the same cell as the accused men.¹³ All six were released on bail but were immediately re-arrested. On 16 November 1993 they were charged with robbery with violence and thereby prevented from obtaining bail. The earlier lesser charges against them were subsequently withdrawn.

The case against the Ndeiya Six was dismissed seven months later on 10 June 1994 by the Nairobi Chief Resident Magistrate (Onesmus Githinji). The magistrate refused to accept their confessions which he considered to have clearly been obtained as a result of torture, and ruled that there was no evidence to warrant their standing trial. All six men were badly tortured at the time of their arrest. They were whipped, forced to walk on sharp objects and had their finger and toe nails removed. David Njenga Ngugi, who had been unable to walk at his appearances in court in November 1993, was still using crutches during their trial in May 1994. The magistrate censured the police and directed the Commissioner of Police to take immediate action against the men responsible for the torture of the defendants. The magistrate has since been removed from Nairobi to Kitui, 130 kms west of Nairobi. Amnesty International is not aware of any investigation or arrests in connection with torture of the Ndeiya Six. Since his release David Njenga Ngugi has reportedly been harassed by the police. Two of the Ndeiya Six are currently suing the Attorney General for damages and costs.

b) Josephine Nyawira Ngengi and others

buried with her sons in attendance. Kikuyu custom prescribes that the first-born male child must participate in the burial of his parents.

¹³ Amnesty International has received reports that women are occasionally held in the same cells as men while in police custody in Kenya. This appears to be an attempt to intimidate women prisoners and there have been allegations that male prisoners have been encouraged by the police to harass and even rape women held in the same cell.

On 8 May 1994 Josephine Nyawira Ngengi, the sister of G.G. Njuguna Ngengi, was arrested in Nakuru. Josephine Nyawira Ngengi, a member of RPP, had been attending the trial of her brother since it began in April. She had previously actively campaigned for the release of political prisoners in Kenya. In 1992 she had participated in the hunger-strike by female relatives and friends campaigning for the release of Koigi wa Wamwere and other political prisoners.

Josephine Nyawira Ngengi was held illegally and incommunicado for 22 days before being brought to court on 30 May and remanded in custody. On 10 June 1994 she was charged with 18 others with robbery with violence of a supermarket in Nakuru in January 1994. A number of those charged, including Josephine Nyawira Ngengi, alleged that they had been tortured while in police custody. Their trial began in the Nakuru magistrate's court in mid-August 1994 but was adjourned on 17 August for a week after all four complainants failed to identify any of the defendants and stated that no women had been involved in the robbery. On 24 August the prosecution entered a *nolle prosequi* (withdrawal of prosecution) and the defendants were released the next day. However, all 19 were immediately re-arrested and transferred to police stations outside Nakuru. Josephine Nyawira Ngengi and eight others of the 19 were subsequently charged in three different police stations with three separate counts of robbery with violence:

- in Nyahururu, 60 kms northeast of Nakuru, they were charged on 30 August 1994 with the robbery of a supermarket in January, and illegally possessing pistols, ammunition and a stolen car, and with illegal possession of four hand-grenades, high-powered pistols and 16 rounds of ammunition at Kiriaini village, Muranga District;
- in Embu, 140 kms east of Nakuru, with robbery with violence in April 1994 (details unknown);
- in Nyeri, 100 kms east of Nakuru, with robbery with violence in May 1994 (details unknown).

The three cases are proceeding separately and , the defendants currently face three separate trials, which will result in the cases taking longer than if the charges are combined. The defendants appear to be being harassed by the Kenyan authorities through the re-introduction of the original charge of robbery with violence in Nakuru after the prosecution had entered a *nolle prosequi* and the separation of the charges against them. All nine have denied the charges and are currently being held on remand in Nyahururu. Three of the 19 are also believed to have been charged with a separate robbery with violence. Seven others were later released, six unconditionally, and one on bail.

Amnesty International is concerned that Josephine Nyawira Ngengi may have been arrested because of her relationship to G.G. Njuguna Ngengi and her membership of the RPP and is investigating whether in fact she and some of those arrested with her are prisoners of conscience detained for their non-violent opposition to the government. The organization is also concerned at reports that Josephine Nyawira Ngengi, and some of those held with her, have been tortured.

c) Geoffrey Kuria Kariuki and others

On 9 July 1994 Geoffrey Kuria Kariuki was arrested with two others. He had previously been arrested in November 1993 and charged with attempted robbery with violence of Bahati Police station, but was released in January 1994. Geoffrey Kuria Kariuki was held incommunicado for 10 days and reportedly severely tortured. On 15 July his lawyers filed a *habeas corpus* application in the High Court

because of fears for his life. He was brought to court on 19 July and charged with five others with attempted robbery with violence in Nakuru on 9 July. Among those charged with him were Michael Kung'u, a relative of Koigi wa Wamwere, and John Kinyanjui Njoroge, who had been arrested in September 1993 with Koigi wa Wamwere and subsequently been released without charge. They had initially been brought to court outside court hours on 18 July but defence lawyers, who had not been allowed access to their clients, protested and the proceedings were delayed until the following day. Their plea was not taken, following allegations of torture by the defence, and the magistrate ordered that they be examined by a doctor.

On 20 July the doctor who examined the defendants recommended that Geoffrey Kuria Kariuki, who had serious head injuries, receive a CT (computer axial tomography) brain scan and that John Kinyanjui Njoroge receive treatment for a ruptured ear drum. Medical treatment was also recommended for two other defendants in the same case, one of whom had a ruptured bladder. Geoffrey Kuria Kariuki had not received a CT scan by the middle of October 1994, over three months later. Shortly after their arrest Antony Njuguna Njui, a potential defence witness in the case of Koigi wa Wamwere, was also arrested and charged with the same offence. He was also reported to have been tortured. Amnesty International expressed concern that the arrest of Geoffrey Kuria Kariuki, Michael Kung'u, John Kinyanjui Njoroge and Antony Njuguna Njui may have been related to the case of Koigi wa Wamwere and is investigating whether in fact they are prisoners of conscience detained for their non-violent opposition to the government. The organization has also expressed concern at reports of their torture.¹⁴

5. Amnesty International's concerns that Koigi wa Wamwere and his three co-defendants are not receiving a fair trial

Since the trial of Koigi wa Wamwere and his three co-defendants began in April 1994 it has been attended regularly by observers from international human rights organizations and legal organizations. They have included Amnesty International, the Norwegian Bar Association's Human Rights Committee, the British Bar Association's Human Rights Committee, the International Bar Association and the International Committee of Jurists. Representatives from human rights groups within Kenya and the Law Society of Kenya have also attended. Observers have raised a number of concerns which relate specifically to the conduct of the trial and the evidence and have questioned the impartiality of the court. A clear impression has been made on observers that the four accused are not receiving a fair trial under national or international standards.

In commenting on this trial while it is *sub judice* (under legal consideration), Amnesty International is expressing its serious concern that four prisoner of conscience are not receiving a fair trial and may, as a result, be sentenced to death on the basis of national law. Because Amnesty International is concerned with issues of fair trial and death penalty, it decided to act now, even though the trial has not yet finished. Fair trial is one of the most important human rights of detainees which are established in the International Covenant on Civil and Political Rights, to which Kenya has

¹⁴ Amnesty International Urgent Action (UA), AI Index: AFR 32/10/94, 15 July 1994 and UA follow up, AI Index: AFR 32/11/94, 20 July 1994.

acceded, and also in the African Charter on Human and Peoples' Rights, to which Kenya acceded in February 1992. As for the death penalty, although it is still a statutory penalty in many countries, many more have abolished it in a clear indication of a trend by the community of nations to move towards a complete abolition. Indeed, apart from its extreme cruelty, degrading and inhuman characteristics, the death penalty has not been proved to deter crime where it exists.

a) Procedural issues in the case

Koigi wa Wamwere, Charles Kuria Wamwere, James Maigwa and G.G. Njuguna Ngengi are charged with attempted robbery with violence contrary to Section 297 (2) of the Kenyan Penal Code. This is punishable by a mandatory death sentence. Amnesty International is concerned that defendants facing the death penalty in magistrates' courts do not receive a fair trial.

Defendants charged with robbery with violence or attempted robbery with violence are tried in magistrates' courts by the Chief Magistrate or Senior Resident Magistrate sitting alone without assessors. Legal aid is unavailable in magistrates' courts. The majority of offenders convicted of robbery with violence or attempted robbery with violence and sentenced to death do not have legal representation because they cannot afford lawyers. This is contrary to Article 14 (3)(d) of the International Covenant on Civil and Political Rights and Section 76 (1)(d) of the Kenyan Constitution. The lawyers who have been representing Koigi wa Wamwere and the other three defendants are providing their services for free.

The defence are given inadequate time to prepare their case. There is no advance disclosure to the defence either of prosecution evidence or of lists of prosecution witnesses in trials in magistrates' courts. This prevents defendants from having adequate time to prepare to meet the case against them as required by Article 14 (3) of the International Covenant on Civil and Political Rights and Principle 21 of the UN Basic Principles on The Role of Lawyers.¹⁵ This is a serious handicap for the defence, particularly in a case as complicated as Koigi wa Wamwere's.

There is no independent record of the proceedings. There is no short-hand writer or stenographer in the magistrates' courts. The court record of the evidence, known as the proceedings, is taken by the magistrate. The independence of the magistrate has been questioned by observers. He was noted, for example, leading and supporting prosecution witnesses, constantly interrupting defence lawyers during their cross-examination and sometimes stopping the proceedings in the middle of cross-examination by the defence counsel prior to the normal ending time of a court session. He also allowed questions not permitted for re-examination under Kenyan rules of evidence to be asked by the prosecutor, even when they were objected to by the defence counsel, and the recalling of prosecution witnesses, which is highly irregular. Observers have queried the accuracy of the official record of the proceedings. Defence lawyers have also challenged the accuracy of the court record and

¹⁵ Prosecution evidence is not provided to the defence until a witness has finished his or her direct testimony. The defence is then shown the original hand-written witness statement of that witness for the first time to use for cross-examination. They cannot retain it and photocopies of it are not provided. The cross-referencing of witness statements and study of such statements is therefore very difficult. There is also no list of evidence and the defence does not know which witnesses are coming next.

have asked for copies of the proceedings on a number of occasions. The magistrate has refused to provide a copy of the proceedings until the trial has finished.¹⁶

Defendants charged with murder or treason also face the death penalty. However, defendants charged with these crimes are tried in the High Court by a judge and three assessors who act as jurors, they have access to legal aid and the defendant has advance disclosure of the prosecution case at least 14 days before committal.

b) The Prosecution's case

The prosecution's case seems to be insufficiently supported by the evidence. According to the prosecution there was a raid on Bahati Police station at 2.30 am on 2 November 1993. Two armed police officers were on duty at the time. The raid began when three men entered Bahati police station with a fourth man they accused of stealing a radio. While the police officers were dealing with this complaint a number of men - possibly 11 or 12 - entered the police station carrying swords and knives and intent on robbing the police station. The radio thief threatened the police with a home made gun. He and two other "raiders" were shot, the others escaped, and no one was arrested at the time of the raid.

The prosecution maintain that the four accused were identified participating in the raid. However, there is no mention of the four accused in the official police record of the raid made in the Occurrence Book and the accused were not arrested immediately after the raid, despite the fact that Koigi wa Wamwere was under police surveillance and Charles Kuria Wamwere attended a session at Nakuru Magistrate's Court on 9 November 1993. Charles Kuria Wamwere was not arrested until 17 November. However a record was made in the Occurrence Book of the arrest of a radio thief, David Ndung'u Gitachu, and the names and addresses of the three men who brought him into Bahati Police Station. Also, at a press conference held at Bahati Police station shortly after the raid, the officer in charge of the police division claimed that the attackers were matatu touts from Nakuru town transported to the scene by a lorry.

Furthermore the testimonies of the two eye witnesses, the two police officers, are contradictory and do not concur with the Occurrence Book at Bahati Police Station - into which all activities at the station are recorded. Observers noted that these differences included what words were spoken by the "robbers"; where the two police officers were placed; who screamed; who shot; the briefing of the OCP (chief officer at the station) and the timing of the raid. For example, the two officers maintain the raid began at 2.30 a.m., the fighting started 15 minutes later and lasted ten minutes, the officer in charge of the station was then briefed for ten minutes and subsequently the report of the raid was noted in the Occurrence Book - i.e. 35 minutes later. However, the time of the entry in the Occurrence Book recording the raid is 2.45 a.m. not 3.05 a.m., and only 15 minutes after the officers said the raid started.¹⁷ Also the prosecution claims that the raid started when the radio thief was brought into the station, but that no one was arrested that night. Yet the Occurrence Book

¹⁶ A copy of the first three months of the trial was given to the defence following a High Court order. The order was made in order to facilitate a constitutional application by the defence in the High Court in June 1994.

¹⁷ Report: Trial Observation, *Republic v. Koigi wa Wamwere (and 3 co-defendants)* 3 May 1993, by Gro Hillestad Thune, Norwegian Lawyer and Member of the European Commission of Human Rights.

records 12 prisoners in custody at Bahati Police Station at the beginning of the night shift and 13 at the end. Furthermore, observers noted that the Occurrence Book recorded the arrest of the radio thief as mentioned above.

Several observers expressed concern at the lack of forensic evidence to support the prosecution's case. For example, the police allege that one of the men who died was shot in the chest in the report room and remained there all night. However, photographs of the body exhibited by the police, do not show any blood on the clothes or the body and the prosecution admit there is no evidence of any blood on the floor of the report room.

c) The defence

The defence have raised several points which seem to indicate that the armed robbery may have been fabricated. These include: the lack of evidence to support the contention that three men were shot during the raid, indications that evidence produced by the prosecution has been tampered with to support the prosecution's case and the fact that the police have not thoroughly investigated the case.

The prosecution maintain that three "raiders" were shot during the raid, two were killed and one, Jackson Mutonyi Ndegwa, was fatally wounded and died later. However the post mortem reports on all three men place the time of their deaths before 2.30 a.m. on 2 November 1993. One of the bodies was so decomposed that the post mortem which was conducted on 5 November 1993 records the time of death as at least three weeks earlier. The statements by relatives of the dead men do not support the prosecution's contention that the men died during the raid. One of the three men was reported by his brother-in-law, Dominic Kamanga, to have been in police custody on 1 November and therefore unable to participate in the raid. Dominic Kamanga stated in court that he was informed of his brother-in-law's arrest by the Nakuru District Criminal Investigation Department Officer (DCIO). He was arrested by the police following his statement, reportedly on the order of the magistrate, and was subsequently charged with perjury on 14 June 1994. He was reportedly tortured by police investigating his perjury case. According to the wife of one of the dead men, the clothing he is seen wearing in the police photographs of his body does not belong to him. He was last seen by his wife the day before the raid. Following a statement in court by the defence counsel that she would be providing evidence to this effect in court, the witness was intimidated by the police.

Some of the evidence appears to have been tampered with. The home-made gun alleged to have been used during the raid was shown as being incapable of firing when exhibited by the prosecution in May 1994, but when re-exhibited in court in September, an attempt to repair it had clearly been made. The gun had been in police custody during this period.¹⁸ Several entries in the Occurrence Book also appeared to have been altered, for example one observer noted that the time of the entry recording the radio thief being brought into the station, searched and placed in the police cells, had clearly been changed from 12.15 a.m. to 2.30 a.m. to support the police claim that the raid began at 2.30 a.m.

¹⁸ If the gun does not fit the description of a gun within the Firearms Act, because it is incapable of firing, then the charge of attempted robbery with violence would have to be replaced by a lesser charge. The capital crime of actual or attempted robbery with violence is only preferred if one or more guns are used during the robbery. If no gun is used the lesser charges of assault with intent to steal or demanding property with menace, under sections 298 and 299 of the Kenyan Penal Code, would be preferred. These carry sentences of five years or 14 years' imprisonment respectively.

There has been no attempt by the police to investigate the alibis of the four accused, although these were disclosed in statements to police upon arrest in November 1993, a year ago. Also there appears to have been no attempt by the police to investigate the names and addresses of the radio thief and the other three men recorded in the Occurrence Book as having entered Bahati Police Station on the night of 1 November 1993.

However, despite the defence's contention that the attempted robbery was fabricated for political reasons, they have not been allowed to conduct a defence on this basis. Observers expressed concern that this will prevent the accused from receiving a fair trial.

"There are many incidents in this case indicating that Koigi was not at, or in the neighbourhood of, the stage of the offence at the alleged point of time. If this is correct it seems difficult to explain the charge on any other basis than that the case is politically grounded. To refuse him to plead on this basis will mean to refuse him (any) defence at all."¹⁹

d) Intimidation and harassment of the defendants, observers and others attending the trial

The four defendants have stated that they have been intimidated or harassed by prison officials and police officers on a number of occasions. Nakuru Court house is heavily guarded and up to 19 prison warders guard the defendants. Amnesty International has received reports that they have been beaten, refused food and denied adequate medical treatment. For example in May 1994 James Maigwa was kicked and punched at Nakuru Magistrates Court by a police officer for no apparent reason during a break in the day's proceedings, and all four men were denied supper on 27 September and breakfast on 28 September 1994, reportedly because of misconduct in court. Amnesty International received reports that G.G. Njuguna Ngengi was discharged early from hospital in August 1994 to enable the trial to reconvene. G.G. Njuguna Ngengi had been admitted to Nakuru Provincial Hospital suffering from high blood pressure and swollen legs on 4 July, and the trial had been adjourned. He had been previously hospitalized in February 1994 for two months. He was reported to have developed a blood clot in his right foot while in hospital in August which may need surgery. He was discharged on 25 August, reportedly after the hospital was put under pressure by the authorities to discharge him in order for the trial to continue. On several occasions since his discharge the defence counsel have expressed concern at his state of health.

A number of people attending the trial have been harassed, intimidated or arrested. On 27 September 12 members of the public were removed from the court and arrested for wearing T-shirts of the RPP and the Kenya Human Rights Commission. Two other members of the RPP were arrested the following day when they went to Nakuru Police Station to inquire about their colleagues. All 14 were held in incommunicado detention. Eight were released on 30 September and the other four were released on 4 October - all without charge. Observers reported that this incident had significantly reduced the number of people attending the trial.

¹⁹ Report on the Observation of Court Trial, Republic of Kenya versus Koigi wa Wamwere and three co-accused in Nakuru, Kenya, 19-22 September 1994, by Tor Bohler, Vice Chairman of the International Bar Association's Standing Committee on Human Rights and The Just Rule of Law, and Chairman of The Norwegian Bar Association's Committee on Human Rights, 28 September 1994.

Paul Muite, the main lawyer for the defence, has also complained of harassment by the police. Following the arrest of members of the RPP he was obliged to attend Nakuru police station and asked to make a statement about the RPP. He was reportedly accused by the police of paying the RPP to attend in order to help Koigi wa Wamwere escape.

The defence counsel expressed concern at the intimidation of the press after the magistrate called journalists from the two main newspapers reporting the trial into his chambers. Observers noted that the magistrate regularly addresses the journalists in court at the beginning of the session and comments on the previous day's reporting.

Observers attending the first month of the trial were ordered by the magistrate not to take notes. This ruling was reversed on 17 May following a number of protests to the Kenyan Attorney General. On 1 October one of the trial observers was detained and severely intimidated by security officials on his departure from Kenya. Ian Robbins, a British barrister who was attending the trial on behalf of the British Bar Human Rights Committee and the human rights organization *Article 19*, was questioned for nearly two hours at Jomo Kenyatta airport by police and immigration officials and his notes of the proceedings were examined. This was his second visit to Kenya to observe the trial and it appears to be an attempt to intimidate international observers attending or planning to attend the trial.

6. The challenge to the case in the High Court

In mid-June 1994 the defence counsel put a constitutional application to the High Court asking for the case against Koigi wa Wamwere and his three co-defendants to be dismissed. They maintained that the magistrate was biased in favour of the prosecution and that their clients were not receiving a fair trial, as was their right under Section 77 of the Kenyan Constitution. Defence lawyers withdrew from the case on 9 June 1994, after they had been refused leave for an application of postponement of the trial for seven days. Their application for postponement had been made after the arrest of Dominic Kamanga mentioned earlier on page 13. The trial was subsequently postponed to allow the defendants time to find new lawyers and because of G.G. Njuguna Ngengi's ill-health. The trial resumed on 26 August.

The defence lawyers proceeded with the constitutional application in the High Court. The case began on 18 July 1994 and was heard in the High Court (by Justice Lady Joyce Aluoch). Initial submissions were given orally by the defence lawyers and the lawyer for the prosecution was allowed to present his case orally in court. However, the defence team were not allowed to give oral submissions in reply to the prosecution's case and were ordered to provide written submissions instead. The defence lawyers refused to do so and asked the judge to re-consider her ruling stating that to provide written submissions would be to deprive their clients of rights provided under Section 77 (10) of the Constitution which states:

"except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public".

Defence lawyers also argued that an oral reply was more persuasive to the court. Their view was that as the State had been allowed to submit orally, they too should be allowed to do so. Written submissions would not have been seen by the press, who have been reporting this case quite widely. (The defence counsel have focused considerably on obtaining publicity within Kenya on this case because of their concerns that the defendants will not receive a fair trial²⁰.) The judge declined to re-consider her ruling and the proceedings were concluded without any replies submitted by the defence. The judge dismissed the constitutional application on 15 August 1994 and directed that the trial in Nakuru should proceed to its conclusion before the same magistrate.

7. Appeals to the High Court and Court of Appeal

If convicted of attempted robbery with violence Koigi wa Wamwere and his co-defendants will have the right of appeal to the High Court and further to the Court of Appeal. However, there is no time-limit within which appeals are heard and the process often takes several years. Furthermore they will not qualify for state legal aid during their subsequent appeals. If their appeals fail they can appeal to the President of Kenya under section 27 of the Constitution of Kenya, which provides for the Prerogative of Mercy. There are currently believed to be about 400 people under sentence of death, including over 30 convicted in 1993, but Amnesty International has not received any reports of executions since 1988. However, prison conditions in Kenya are harsh. There is severe overcrowding and frequently shortages of food, clean water and basic medication. This has resulted in a significant number of deaths amongst the prison population; for example 250 prisoners were reported to have died in Nakuru Prison alone since September 1992. A number of prisoners on death row have died awaiting the result of their appeals.

8. Amnesty International's recommendations

Amnesty International is calling for the immediate release of Koigi wa Wamwere, Charles Kuria Wamwere, James Maigwa and G.G. Njuguna Ngengi on the grounds that they are prisoners of conscience imprisoned for their non-violent opposition to the government. Koigi wa Wamwere appears to be targeted by the Kenyan authorities because of his opposition to the government and the others to have been because of their relationship to Koigi wa Wamwere and their opposition to the Kenyan Government.

The organization believes that the charges against them have been fabricated and that the police are making abusive use of the law on armed robbery to detain, on non-bailable charges, non-violent critics of the government. The abusive use of criminal charges to detain political prisoners undermines the Kenya Government's claim to be abiding by the rule of law. Actual and attempted robbery with violence is a non-bailable offence. This charge appears to have been used against

²⁰ National and international human rights organizations have questioned the independence of the Kenyan Judiciary. Raising concern, for example that the President appoints the Chief Justice and Judges of the High Court and also members of the Judicial Service Commission which appoints other members of the Judiciary. See *Independence Without Freedom: The Legitimization of Repressive Laws and Practices in Kenya*, Kenya Human Rights Commission, February 1994.

Koigi wa Wamwere and other political prisoners as a way of detaining them for long periods, even if the evidence against them is weak.

Amnesty International is also calling for a review of the charges against others charged with actual or attempted robbery, notably Josephine Nyawira Ngegi and her co-defendants, and Geoffrey Kuria Kariuki and his co-defendants, which in both cases may also have been fabricated. The organization is calling for their release if they are indeed being imprisoned for their peaceful political and human rights activities.

Further, Amnesty International is calling on the Kenyan Government to review its procedures in Magistrates' Courts to ensure that all trials follow international standards of fair trial and urges that all capital cases be transferred from Magistrates' Courts to the High Court in the first instance. Amnesty International opposes the death penalty in all cases as the ultimate form of cruel, inhuman and degrading punishment. The organization is also calling on the Kenyan Government to introduce safeguards against torture and has expressed concern at the reported torture of defendants charged with actual or attempted robbery with violence, and the government's lack of action either to prevent or to punish its use.