REPUBLIC OF KENYA

THE JUDICIARY

SPEECH BY HON. DAVID K. MARAGA, CHIEF JUSTICE AND CHAIRMAN OF THE NATIONAL COUNCIL ON THE ADMINISTRATION OF JUSTICE (NCAJ) DURING THE LAUNCH OF THE STATE OF THE JUDICIARY AND ADMINISTRATION OF JUSTICE REPORT (SOJAR)

ON JANUARY 23, 2020.

Your Excellency the President & Commander in Chief of the Defence Forces of the Republic of Kenya,

The Honourable Speaker of the National Assembly,

The Honourable Speaker of the Senate,

The Honourable Judges,

The Honourable Attorney General,

Cabinet Secretaries,

The Governor of Central Bank,

Members of the Judicial Service Commission,

The Chief Registrar of the Judiciary,

Development Partners,

Hon. Magistrates and Judicial staff,

Heads of Agencies of the NCAJ,

Distinguished Guests,

Ladies and Gentlemen:

It is my great pleasure and honour to present to you the 8th State of the Judiciary and Administration of Justice Report (SOJAR) for the year 2018/2019. The Report, a requirement under Section 5(2)(b) of the Judicial Service Act` and a necessary incidence of Articles 10 and 159 of the Constitution, has become a key aspect of accountability for the Judiciary and a means of communicating to the public and the co-equal Arms of Government the measures and steps taken to enhance the administration of justice in the country and meet the justice needs of the nation. This Report also invites comments, compliments and critiques from members of the public, other Arms of Government and our stakeholders. It invites and encourages the open-minded engagement which is the staple of constructive civic

discourse that feeds constitutional democracies such as ours.

Indeed, this annual event has become an important occasion, not just for the Judiciary but also for the entire justice sector, to reflect on the steps and gains made, as well as challenges that we face in the administration of justice.

The Report gives the Judiciary the opportunity to demonstrate how we have executed our mandate in accordance with the Constitution. It also gives us an opportunity to measure ourselves against the key institutional documents that provide specific and programmatic guidance to the different delivery and implementation units of the

Judiciary. These institutional prescriptions include the Judiciary Transformation Framework (JTF), Sustaining Judiciary Transformation (SJT) and the Judiciary Corporate Strategic Plan, among other strategic and policy documents that continue to guide the Judiciary.

We shall not tire of seeking ways of improving our systems and structures in order to serve the people of Kenya and her economy better. For instance, we commenced, during the period under review, a comprehensive process of re-organisation of the Judiciary structures and systems to ensure an optimal allocation of our current and future human and financial resources. This entails the re-organisation of the Judiciary's directorates, registries and other delivery units; job

evaluation and re-classification; and development of new career guidelines to provide for clear progression in the Judiciary.

Yet, we do not have any doubt that the real proof of our progress as an institution will be expressed, not through the brilliance of our strategic intentions or the finesse in our institutional structures, but in the impact we are having in the delivery of services to Wananchi and the goals of public interest including the acceleration of economic development and social stability. At the end of the day, it is our actual score in the execution of our mandate and the targets we have set for ourselves in meeting the justice needs of the nation, such as the reduction of case backlog, improvement in individual and institutional efficiencies and the

entrenchment of a culture of indubitable integrity which are the real indicators of progress. The report we launch today has captured all these variables in great detail.

One of the more important and widely recognized indicators of judicial performance is simply the numbers of cases resolved in a comparative perspective. The Judiciary has adopted global standards of assessing our performance using yardsticks such as backlog reduction and case clearance rates. Using this standard of performance, the Judiciary did well in the period under review. While the Report contains the different figures analysed in different ways and under different matrixes, the following are important markers in telling the story:

- ***First***, at the end of the Year under review (2018/2019), we reduced the backlog of cases which are five years or older from **170,186** to **38,781.** This is important because one of the most critical goals the Judiciary had set for itself in the SJT is to drastically reduce or eliminate from our system, cases which are older than five years. The focus is now shifting to cases that are four years and below and this will ensure that we maintain the focus on addressing cases that have overstayed in our system, even as we focus on more recent cases.

- ***Second***, at the end of the reporting period, case backlog of all cases stood at **341,056** compared to **372,928** in the previous year (2017/ 2018). This

represents a **nine per cent** reduction in the overall case backlog in the Judiciary.

- ***Third***, case clearance rate, the rate at which cases are filed as compared to the rate at which they are resolved, was an impressive **97 percent:** During the period under review, a total of **484,349** cases were filed in all courts (comprising **343,109** criminal cases and **141,240** civil cases). During the same period, we resolved **469,359 cases**.

These are, by any objective measure, impressive numbers. The simple fact is that our Courts are working diligently and expeditiously to resolve cases filed before them. However, the objective fact is also that these numbers do not match the urgent and real justice needs of Kenyans and the Kenyan economy at present. To meet the justice

needs of Kenyans and have our justice system play the optimal role it is expected to play to accelerate economic development and deepen social stability, the capacity of the Courts to resolve more cases and at a faster rate must be improved. This is because the number of filed cases in our system per year has been consistently rising.

In order to increase operational efficiencies and improve access to justice for all Kenyans and in deference to the principles in Article 159 of the Constitution, the Judiciary employs alternative dispute resolution mechanisms.

In particular, the Judiciary has established a Court-Annexed Mediation (CAM) programme

which now covers Court stations in 12 counties across the country. The programme is already adding greatly to our speed of justice delivery. During the reporting period, for example, a total of **2,905** matters were referred to CAM out of which **1,879** were processed. In the relatively short time of its implementation, the CAM programme has facilitated the release of approximately **Kes.7.2 billion** in funds that were tied in litigation. These early and positive results demonstrate the great potential of that programme to assist in addressing the perennial challenge of the rising workload in our courts and facilitate the release of funds tied in litigation to the economy.

Your Excellency, Ladies and Gentlemen,

You may also be aware that we are at an advanced stage in laying the policy framework for the **Small Claims Courts**. As the name suggests, these courts are meant to handle matters whose value is Kes. 200,000/= with proposals to increase the threshold to Kes. 500,000/=. The objective of the Small Claims Courts is to ensure that disputes are resolved in timely, cost effective, and simplified manner that is less a complex process than the normal court processes. The rules have been approved by Parliament and, with funding that we have sought, we hope to move forward with the operationalisation of those courts to enable us deal with disputes that need not go through the formal court processes.

In addition to these two programmes, the Judiciary has continued to encourage and promote the use of Arbitration in dispute resolution and recently, in conjunction with the Nairobi Center for International Arbitration, we developed a Policy on Alternative Dispute Resolution. Finally, the Judiciary is at an advanced stage of developing an Alternative Justice Systems – which will mainstream traditional, informal, and other means of accessing justice. The totality of these processes will enable the Judiciary to live up to constitutional principles and objectives in the administration of justice.

Your Excellency, Ladies and Gentlemen:

Despite all these efforts to channel appropriate cases to other fora outside the

formal Courts, it is a fact that at the end of the day, the increase in the number of cases filed, has necessitated calls for a concomitant increase in the judicial resources available to deal with the increase in judicial workload. However, our reality is that we have seen annual reductions; sometimes drastic ones, in the human and financial resources available to the Judiciary in the midst of this rising judicial workload. The following data is indicative of this worrying trend of reduction of judicial resources:

- Save for the Supreme Court, all other Superior Courts, that is, the Court of Appeal, the High Court, the Environment and Land Court, and the Employment and Labour Relations Court are, at present, operating at about fifty percent of their establishment. The Court of Appeal

which is functionally the Court of last resort for most disputes had, as at 31st December 2019, an overall backlog of **6,782** appeals. Indeed, the constitutional and institutional imperative to decentralize the services of the Court of Appeal which led to the establishment of Court of Appeal stations in Kisumu, Nyeri and Malindi - with sub-registries in other parts of the country in order to take the services of the Court closer to the people has been affected by the shortage of judges. Due to attrition (mainly retirement of Judges) we now have only half of the required number of Court of Appeal judges. These are not sufficient to sustain the benches that we had put in place to serve the regions. As a result, in December last year, we had to make the

painful but necessary decision to recall all the judges to Nairobi.

- The Land and Environment Court which has the exclusive first instance jurisdiction in arguably the most important economic resource in Kenya – land – has a backlog of **17,833**
- The Employment and Labour Relations Court has a backlog of **13,264** cases.
- The Magistracy has a backlog of **425,161.** The JSC has recently recommended the recruitment and appointment of **100** more Magistrates. We hope to get the support of all the other Arms of Government and agencies of Government in this process.
- The overall judiciary staff establishment is only at 55%.

Beyond the numbers of the men and women who toil to resolve filed cases and serve justice seekers in the court registries, judicial capacity is also badly hampered by inadequate financial resources and infrastructure.

Your Excellency, Ladies and Gentlemen:

The Judiciary, as is indeed the case with all other Arms of Government and public institutions, wholly relies on public funds to support its operations and activities. Despite the rising justice needs and case filings, **there has been a consistent shortfall in the amount of money allocated to the Judiciary** over time. Indeed, in some years, the budgetary provisions have represented

less than half of the total resource needs of the Judiciary. This has been compounded by disruptive budget cuts effected mid-stream within a Financial Year that affect planned projects and activities. We have had situations where the Judiciary's balances in the Integrated Financial Management System, commonly known as IFMIS, are abruptly reduced and in some instances withdrawn altogether, almost completely grounding the Judiciary's operations in the process. Add to this the constant unpredictability of the exchequer disbursements and you will agree with me that these are issues that must be addressed if we are to execute our mandate effectively.

These funding shortfalls and disruptions need to be considered in the context of the

rising workload in the Judiciary as demonstrated above.

Apart from lack of resources to retain the appropriate levels of staff, the funding shortfall has also hindered the implementation of projects that are critical to the transformation of the Judiciary and enhancement of access to justice. Since the inception of judicial reforms, the Judiciary has prioritized the leveraging of ICT for improved service delivery. However, we have not made the expected progress over the years due to the declining funding.

While we have made some improvements such as connecting almost all courts to the internet and implementing pilot projects in

digitization and automation of court processes, the bulk of the ICT plans have not been implemented. In the Year under review, our total infrastructure budget was a paltry **Sh50 million**, and it was from this that we were expected to fund our ICT and other projects. Indeed, even in the most recent cuts, ICT was one of the main casualties with the **Kes. 400 million** that had been allocated for ICT infrastructure being scrapped off although that has now been restored.

Our plan has always been to modernize our systems and to harness technology to ensure the improvement of our services. In this regard, we have put in place an elaborate plan for the expansion of case tracking systems to all the courts; digitization of the processes in the courts and registries (e-filing, e-payment, e-service, etc.) among other

technology-based processes geared at enhancing access to justice.

As you are aware **your Excellency**, the remittance from the Kenyans in the diaspora forms the highest foreign exchange earner for the country. Quite a number of them have cases in our court. We have also put in place plans to establish virtual courts to assist in taking evidence and proceedings from them, thereby reducing their costs and time spent to travel and attend to proceedings locally. However, the uncertainty and inadequacy of funding has stood in the way of these plans.

Your Excellency, Ladies and Gentlemen:

Apart from ICT, another major casualty of the unpredictable and inadequate funding is the

construction of new courts and improvement of existing ones. There are 38 on-going court constructions, 17 of which are funded by the Government and the rest through a World Bank loan facility that expires later this year. While three court buildings were completed during the reporting period, none of them were from the GoK-funded list. And while many of the World Bank projects are nearing completion, almost all the GoK ones made little or no progress as depicted graphically in the report we launch today.

We are of course aware of the limited resources available in the country and the competing needs. That is why plans for some of our infrastructural projects such as the planned Court of Appeal building in Nairobi and the High Court buildings in Eldoret,

Meru and Kisii, necessary and urgent as they are, have been shelved until next financial year. I therefore urge the concerned institutions, especially Parliament and the National Treasury, to ensure a fairer balance in the allocation of the limited resources. More importantly, there should be meaningful consultations and meticulous adherence to the relevant constitutional and legal provisions that govern these processes.

Your Excellency, ladies and gentlemen:

It is an established principle and practice that due to the nature of the responsibilities vested in the Judiciaries, certain protections and guarantees have been put in place to ensure that the Judiciary is able to execute its core functions independently and with minimal interference. This is why the

Constitution requires the Chief Registrar of the Judiciary to table the Judiciary budget estimates directly before the National Assembly for approval. While this provision was complied with in 2011/12 and 2012/13, from 2013/14 the then Acting Chief Registrar was directed to present the proposals to the Treasury, where the Judiciary's budget was lumped together with other institutions in the GJLOS Sector. The two years when we presented the proposals to the National Assembly still remain the years when we received our highest levels of funding.

Going forward, it will be necessary to pay due regard to all constitutional and legal guarantees that are designed to protect and enhance the institutional independence and operational efficiency of the Judiciary. We have, for example, already communicated, in

deference to the Constitution and the law, that starting with the current financial year we will, as Parliament does, present our budget estimates to the National Assembly, as opposed to the Treasury, as is demanded by **Article 173 (3)** of the Constitution and **Section 37 (4)** of the Public Finance Management Act.

Furthermore, the National Assembly approved the Judiciary Fund regulations, paving the way for the operationalisation of the Judiciary Fund in accordance with the Constitution. We have taken practical steps to set up the fund and there is no doubt that this will address many of the resource related challenges that afflict the Judiciary.

Your Excellency, Ladies and Gentlemen:

I have dwelt on the concept of judicial independence not for pedantic but for practical reasons. The Constitution demands and insists on Judicial Independence not for historical and sentimental nostalgia or philosophical elegance but in order to realize pragmatic objectives. Judicial independence is necessary and pivotal for stability and the rule of law to prevail.

The rule of law is the fulcrum on which the modern nation state turns. The rule of law is the oxygen of democracy – the spring from which lawful power is drawn and exercised. It is an essential part in the proper functioning of modern constitutional democracies. Without it, the state risks losing its legitimacy; and without it, the citizens'

consent to be governed logically collapses. When citizens, state officers and government agencies act outside the law; or disregard the commands of the law; or disobey lawful court orders; they not only corrode their legal, political and institutional capabilities, but they also undermine their very own existence, as they themselves are creatures of the law. Once we oust the rule of law as part of our national ethos and political culture, we have effectively overthrown the Constitution.

As such, the rule of law is necessary both for sustainable economic development and social stability as well as for the protection of individual rights and fundamental freedoms which are dear to all citizens. As is now universally acknowledged, the procedural legitimacy of the rule of law in a given

country is only realized when, as John Locke long ago said, the society is governed by known laws interpreted by an impartial and independent Judiciary. This must mean, to quote Friedrich Hayek, that all persons – including the government and its agents – are bound in all their actions by rules fixed and announced beforehand – "*rules which make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances and to plan for one's individual affairs on the basis of this knowledge*."

Your Excellency, Ladies and Gentlemen:

What this old-age account of the rule of law means, in its essence, is that in a constitutional democracy, there should be no room for impunity. The notion of equality before the law applies to both individuals and

institutions. It is therefore no mistake that the Constitution identifies the rule of law as one if its key pillars.

Your Excellency, Ladies and Gentlemen:

As I conclude, I wish to state that the Report which we launch today is not an intellectual exercise in charitably channeling our reality through rose-tinted glasses. It is an honest assessment of our triumphs and challenges; institutional realities and realistic goals. It also objectively helps define the needs of the Judiciary in the appropriate context.

I understand and appreciate the public frustration with case backlog. However, the public quest for a quick reduction in the case

backlog should also be seen within the context of our own realities.

We Kenyans must accept that we are a very litigious society. We file cases on literally every dispute. According to the Report, an average of **400,000** cases are filed annually while our courts are currently able to dispose of about **300,000** cases a year. Currently the Judiciary caseload stands at **569,859**.

Currently, we have a total of **656** judicial officers (Judges, Magistrates and Kadhis) serving a population of **48 million** Kenyans. If we were to share this caseload equally, each judicial officer will have an average of **869** cases to hear and determine. The question is

how long would that take? Let us do some simple arithmetic.

A year has 365 days. If you net off 104 days that fall over the weekend, and at least another 10 public holidays, and another 30 days leave that we are all entitled to, that leaves us with a working time of 221 days. If you divide this by the case load of each judicial officer you will realise that it will take us about **4 years** to clear this backlog - assuming there are no new cases filed and that there is no Judge that has to be off the bench even for a single day to attend to any personal or family emergency.

It is this reality, and our interest to address this public frustration with backlog, that informs our need to recruit more Judges and

Magistrates, and also investing in technology to improve our work methods.

Your Excellency I know you are personally keen on expeditious disposal particularly of corruption cases and you have often expressed your concern, which is the concern of many Kenyans, about the speed at which were are handling them. Whereas I agree that we have at times allowed unnecessary adjournments, please be patient with us. We are required and have sworn to follow and uphold due process. Sometimes because of the sheer number of accused persons, one major witness in some of the cases takes up to 30 or even more days. Some cases have up to 50 witnesses. Of course that is not the position in all cases but you get the idea of how long it takes to conclude the hearing of

these cases. I want to assure you your Excellency that we are, however, making very good progress.

Your Excellency, I also know that you are keen on Kenya moving up in the World Bank' Ease of Doing Business Index to less than position 20 by the year 2030. In the year **2014**, Kenya was in position **136.** With the cooperation of the Ministry of Trade and the Judiciary each playing its part, we moved up and are now in position **56**. As regards the Judiciary, the two main factors considered in this rating are automation and digitization of court proceedings as well as reducing the period of enforcing contracts from **465** to **200** days. To maintain this upward mobility in the index, we will have to urgently and deliberately address the Judiciary's financial

and human resources needs as well as the question of compliance with court orders, which is a relevant consideration in evaluating enforcement of contracts and other obligations.

In a nutshell your Excellency, what we are saying is the Judiciary requires proper facilitation to be able to discharge its mandate.

With over 400,000 cases being filed every year and the Judiciary, with the current manpower being able to dispose of about 300,000 case, backlog will continue rising causing more frustration to our people. Even though the Judiciary is an Arm of Government, it is not demanding much. Out

of a budget of about 3 Trillion, give us just 2.5% and we will dispose cases within 2 years of their filing. Give us a development vote of about Kes. 5 billion a year and we will construct courts all over the country in 10 years.

Once again your Excellency and all our guests, I wish to thank you for finding time from your very tight schedule to be with us this morning. God bless you.

HON. JUSTICE DAVID K. MARAGA, EGH
CHIEF JUSTICE & PRESIDENT OF THE
SUPREME COURT OF KENYA