

**THE VERDICT:  
AN ANALYSIS OF THE  
INTERPRETATION OF CHAPTER SIX  
BY KENYAN COURTS**



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Transparency International Kenya (TI-Kenya) is a not-for-profit organization founded in 1999 in Kenya with the aim of developing a transparent and corruption-free society through good governance and social justice initiatives. TI-Kenya is one of the autonomous chapters of the global Transparency International movement that are all bound by a common vision of a corruption-free world. The vision of TI-Kenya is that of a transparent, accountable and corruption-free Kenya and the mission is to transform the society and institutions by supporting the development of high integrity leadership in all sectors and at all levels.

Author: Transparency International Kenya.

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## Acronyms and Abbreviations

- ACECA – Anti Corruption and Economic Crimes Act
- AFC – Agricultural Finance Corporation
- CAJ – Commission on Administrative Justice
- CIC – Commission for the Implementation of the Constitution
- CJ – Chief Justice
- CVC - Central Vigilance Commissioner
- DCI – Directorate of Criminal Investigations
- EACC – Ethics and Anti-Corruption Commission
- GAC - Comptroller and Auditor General
- GCB - General Council of the Bar
- ICAC – Independent Commission Against Corruption
- ICC – International Criminal Court
- ICPC - International Centre for Policy and Conflict
- IEBC – Independent Electoral and Boundaries Commission
- JCF - Jamaican Constabulary Force
- JSC – Judicial Service Commission
- KACC – Kenya Anti-Corruption Commission
- NCIC – National Cohesion and Integration Commission
- NDPP – National Director of Public Prosecutions
- NLC – National Land Commission
- OAG - Office of the Auditor General
- ODPP – Office of the Director of Public Prosecutions
- PIL – Public Interest Litigation
- PSC – Public Service Commission
- TI-Kenya – Transparency International Kenya

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## 1. Executive Summary

This paper is an analysis of the interpretation of Chapter Six (6) of the Constitution on Leadership and Integrity by Kenyan courts. Chapter 6 deals with matters of leadership and integrity and the paper begins by tracing the history of grand corruption at government level and the laws surrounding it which culminated in the Committee of Experts on the Constitutional Review and the people of Kenya including this Chapter in the Constitution. This should be read along with the national values of good governance, integrity, transparency and accountability as listed in Article 10 of the Constitution on National Values and Principles of Governance that arose for the same reasons and several other jurisdictions from which these were borrowed. The paper then looks at the jurisprudence that has developed around Chapter 6 through key selected cases.

Within the last few months, there have been two progressive rulings that have given life to this Chapter. The first of these is the Lenolkulal<sup>1</sup> case, where the Governor of Samburu after being charged with corruption was barred from accessing his office and seen to be in a state of moral ill health. This was an important precedent because it set the stage for violations of Chapter 6 being used to bar entry to office whereas before officials had been protected by Article 181 of the Constitution which sets out the established Grounds for Removal of a County Governor. The precedent set here was used in the case of Kiambu County Governor Ferdinand Waititu wherein he was charged with conflict of interest and was barred from accessing office quoting the Lenolkulal case as well as the values of Chapter 6. There have been other findings such as in the case of Mohamed Abdi Olge, Wajir South MP where it was determined that he violated Chapter 6 – however this was not on corruption grounds and was related to elections. At this time it appears that the standard for Chapter 6 is a case of perception rather than proof of wrong doing.

Earlier cases have set various standards of jurisprudence that contrast with the above cited cases. It has been determined that a fact based enquiry is required to apply Chapter 6 provisions and that

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<sup>1</sup> Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR Criminal Revision 25 of 2019



the standard of proof is between reasonable doubt and balance of probability. The case challenging the eligibility of Uhuru Kenyatta and William Ruto to run for the presidency in the 2013 presidential elections set a precedent early on that the presumption of innocence was paramount.

This report explores several other jurisdictions such as the Solomon Islands and Jamaica as well as key case laws from South Africa and India. These jurisdictions include leadership codes, restrictions on personal dealings, leadership committees and enforcement bodies. Case law from India displays an activist judiciary ruling on public interest above providing proof or wrongdoing and South African jurisprudence involving a sitting president's appointee who was found unfit to hold public office.

The report concludes with a recommendation that the judiciary should interpret the Constitution in a purposive manner and take advantage of the most recent rulings (Lenolkulal & Waititu Cases) to enforce Chapter 6 to combat corruption and impunity in Kenya, among other key recommendations.

## Summary Methodology

This process began with an inception meeting with Transparency International Kenya staff where clear ideas and scope for this research were agreed upon. Data collection was conducted through literature review which included an assessment of comparative best practices, the Kenyan legal framework and selected local cases concerning Chapter 6. The data from this review guided the development of interview guides which were used to carry out in-depth interviews with key informants including lawyers involved in some of these cases, members of civil society, government and select experts as the second key source of data. An analysis of this data was used to develop a draft report which was then discussed by a small focus group of select experts, feedback was incorporated followed by two validation workshop with key stakeholders before finalising the document.

## 2. Background

The provisions of Chapter 6 of the Constitution of Kenya on leadership and integrity are informed by a history of bad governance in post-independence Africa characterized by corruption, repression and human rights abuses. In Kenya a history of misappropriation of public finances through grand corruption, nepotism, negative ethnicity, abuse of power and impunity informed the writers of the Constitution to develop a specific chapter on leadership and integrity in the supreme law as part of a new political charter geared towards enhancing accountability and dealing with runaway corruption.<sup>2</sup>

Corruption in Kenya has been perceived as problematic since the enactment of the Prevention of Corruption Act in colonial Kenya in 1956<sup>3</sup>. This Act remained largely unchanged until 1991, but no prosecutions were made after these amendments, which is a result of the various factors of Kenya's political and economic history.<sup>4</sup> A raft of legislation was introduced as part of efforts to tackle rampant corruption. This included the Anti-Corruption and Economic Crimes Act, No 3 of 2003, which repealed the colonial era Prevention of Corruption Act. This legislation established the Kenya Anti-Corruption Commission (KACC), currently known as the Kenya Anti-Corruption Commission (KACC) following the adoption of the 2010 Constitution. This was accompanied in 2003 by the enactment of the Public Officers Ethics Act, Chapter 183 of the Laws of Kenya, to govern the conduct of persons holding public office in a bid to stem corruption.

Despite these elaborate legal provisions, Kenya continued to be plagued by corruption scandals. Abuse of public office for private gain became the norm even during the NARC administration, which came to power on a platform of 'zero tolerance for corruption'. This history informed the Committee of Experts on the Constitutional Review in coming up with a specific Chapter in the supreme law dealing with matters of ethics and integrity in public affairs.

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2 Lumumba and Franchesci, *The Constitution of Kenya 2010: An Introductory Commentary*

3 Kenya Anti-Corruption Commission. (2009). 'Kenya Anti-Corruption Commission 2007-2008 Annual Report.' Nairobi, Kenya.

4 Political Economy Analysis of Kenya: Prepared by Geir Sundet, Scanteam, and Eli Moen, Norad 2009, pg 6

Following the promulgation of the Constitution of Kenya 2010, the Commission on the Implementation of the Constitution (CIC) and other actors embarked on establishing legal and policy frameworks for the implementation of the new Constitution. The Leadership and Integrity Act of 2012 was enacted by Parliament as part of the implementation of Chapter 6 of the Constitution on Leadership and Integrity. An understanding of Chapter 6 on Leadership and Integrity is enhanced when read together with Article 10 of the Constitution of Kenya 2010, which sets out the National Values and Principles of Governance, which emphasizes good governance, integrity, transparency and accountability. The other chapter that must be read together with Chapter 6 to gain a holistic meaning is Chapter Thirteen (13) of the Constitution on the public service, which sets out the Values and Principles of Public Service which stresses high standards of professional ethics in public service.

The other important consideration is the theory of interpretation of the Constitution. Former Chief Justice Willy Mutunga articulated this while ascribing to Articles 10, 259 (1) and (3) in his dissenting opinion in *The Matter of the Principle of Gender Representation in the National Assembly and Senate*<sup>5</sup> where he stated, in reference to Articles 10, 259 (1) and (3) that: ‘The Constitution is complete with its mode of interpretation and its various articles are meant to achieve this collective purpose.’ According to the Chief Justice Emeritus:

*“Article 259 captures this clear permutation of methodology and constitutional interpretation, a new direction sanctioned by the Constitution in a departure from well-known canons of interpretation in settled precedents that our courts have long been accustomed to”.*<sup>6</sup>

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<sup>5</sup> In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR

<sup>6</sup> Miyawa Maxwell, *the Genesis of Mainstreaming the Theory of Interpreting the Constitution of Kenya, 2010: An Analysis*. The Platform 15th February 2016

### 3. Origins of the Leadership and Integrity Provisions in Chapter Six

The standards for leadership and integrity in the Constitution of Kenya 2010 were derived from Hong Kong, which was, early in its history, a highly corrupt state especially the police force. In 1974, Governor Sir Murray MacLehose in an effort to curb runaway corruption, upon observing that the situation had become untenable that action was needed, established the Independent Commission against Corruption (ICAC). ICAC had what amounted to a separate police force, a model that was replicated in Queensland. This approach became well known and was considered in the crafting of the Kenyan constitution, apart from the element of the police service.

The Constitution of Papua New Guinea adopted in 1975 had a leadership code, leadership tribunal 'responsibilities of office' spoke about integrity, and respect for the office during tenure – with the idea that this was to be expanded into organic law. This formed part of the best practices adopted by the Committee of Experts in coming up with the provisions of Chapter 6.

The provisions of Chapter 6 of the Constitution of Kenya 2010 also drew inspiration from the Seven Principles of Public Life in the United Kingdom<sup>7</sup>, also known as the Nolan Principles.

The Seven 7 principles of public life apply to anyone who works as a public office-holder. This includes people who are elected or appointed to public office, nationally and locally, and all people appointed to work in:

- The civil service
- Local government
- The police
- Courts and probation services
- Non-departmental public bodies
- Health, education, social and care services

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<sup>7</sup> Committee on Standards in Public Life - The 7 principles of public life Available at <https://www.gov.uk/government/publications/the-7-principles-of-public-life>

The principles also apply to all those in other sectors that deliver public services.

Lord Nolan who chaired the Committee on Standards in Public Life in 1995<sup>8</sup> first set them out and they are included in the Ministerial Code. The seven Principles include:

**a) Selflessness**

Holders of public office should act solely in terms of the public interest.

**b) Integrity**

Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.

**c) Objectivity**

Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

**d) Accountability**

Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

**e) Openness**

Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

**f) Honesty**

Holders of public office should be truthful.

**g) Leadership**

Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

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<sup>8</sup> Government of the United Kingdom, Committee on Standards in Public Life Available at <https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life>

## 4. Jurisprudence on Chapter 6 from the Kenyan Courts

Given the broad based consultative nature of constitution making in Kenya, civil society organisations and individual citizens have sought to catalyse the implementation of various aspects the Constitution of Kenya 2010 in order to breathe life into the supreme law. Various forums were used by these actors including but not limited to civic education and litigation before the Courts. As such, a vast body of jurisprudence on various aspects of the Constitution including Chapter 6 on Leadership and Integrity has developed over time. The objective of this study is to provide a detailed analysis of case law from the Courts detailing their interpretation of Chapter 6 of the Constitution.

In 2019, the High Court emerged with jurisprudence, which sets a high bar with regard to the interpretation of Chapter 6 of the Constitution of Kenya. The most recent jurisprudence from the High Court, which is viewed as progressive for purposes of giving life to Chapter 6 of the Constitution of Kenya 2010 include decisions in the following cases:

- Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR (Criminal Revision No 25 Of 2019)<sup>9</sup> and
- Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR<sup>10</sup>

### [a\) Moses Kasaine Lenolkulal v Director of Public Prosecutions \[2019\] eKLR.](#)<sup>11</sup>

In the Lenolkulal case, the Governor of Samburu was charged with conspiracy to commit an act of corruption, abuse of office, conflict of interest and unlawful acquisition of public property. All these offences contravened the Anti-Corruption and Economic Crimes Act. Upon being charged, Hon Justice Murugi barred Governor Lenolkulal from accessing the Samburu County Government Offices without prior written authorization from the investigative agency, specifically the CEO of the Ethics and Anti-Corruption Commission.

<sup>9</sup> Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR Criminal Revision 25 of 2019

<sup>10</sup> Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR

<sup>11</sup> *Supra* note 9

Governor Lenolkul challenged the order barring him from accessing his office. Governor Lenolkul contended that the order was illegal and unconstitutional as it amounted to the removal or suspension of the Governor from office in a manner contrary to the express provisions of Article 181 (1) of the Constitution. Article 181 (1) of the Constitution of Kenya 2010 sets out the established Grounds for Removal of a Governor. Lenolkul argued that Section 62 (6) of the Anti-Corruption and Economic Crimes Act, which governs suspension of Public Officers, charged with corruption, does not apply to an office, such as the office of the Governor, where the Constitution sets limits or provides ground of removal from office. Further, he states that the Constitution and the law do not envisage a situation where a sitting Governor would be supervised by another body (in this case the EACC) with regard to attending his office.

Justice Mumbi Ngugi upheld the decision to bar Governor Lenolkul from accessing his office stating that:

*'Suspension of a public or state officer who has been charged with corruption is not a violation of rights and is in accord with the constitutional provisions in Chapter Six requiring integrity from public and state officers'.<sup>12</sup>*

Justice Ngugi was of the view that Section 62 of the Anti-Corruption and Economic Crimes Act must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted, the full benefits are restored. If the person is convicted, then the suspension merges into a penalty.<sup>13</sup>

Relying on the decision of Justice Achode in *David Kinusu Sifuna v Ethics and Anti-Corruption Commission & 3 others* [2017] eKLR<sup>14</sup>, Justice Mumbi Ngugi held that:

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<sup>12</sup> *Supra* note 9

<sup>13</sup> *Supra* note 9

<sup>14</sup> *Miscellaneous Civil Application 44 of 2017 David Kinusu Sifuna v Ethics and Anti-Corruption Commission & 3 others* [2017] eKLR

*“Where a public or state officer is charged with an offence of corruption, then the officer is required by law to be suspended with half pay, under the terms of section 62(1), until the conclusion of the case. If the prosecution results in an acquittal, then the public or state officer is restored to his position and paid all the monies that may have been withheld in the period of his suspension.”<sup>15</sup>*

On the import of Chapter 6 regarding the charges faced by Governor Lenolkulal, Justice Mumbi Ngugi adopted a purposive interpretation of the Leadership and Integrity chapter of the Constitution stating that the people of Kenya, having promulgated the Constitution of Kenya 2010 containing Article 10 on the National Values and Principles of Governance could NOT have intended to:

*“Pass legislation (in the form of the Anti-Corruption and Economic Crimes Act) that allowed state officers for whom grounds for removal from office are provided in the Constitution, to ride roughshod over the integrity required of leaders, face prosecution in court over their alleged corrupt dealings, and still continue to enjoy the trappings of office as they face corruption charges alleged to have been committed while in office and committed within the said offices”.<sup>16</sup>*

Justice Ngugi decried the continued use of the provisions of the Anti-Corruption and Economic Crimes Act by state officers to escape sanctions and remain in office while having been charged with economic crimes due to the special regime for their removal in the Constitution. She posed the question:

*“Could the people of Kenya have wished to have their legislative authority, which they have delegated, under Article 1, to the legislature, to be exercised in such a way as to pass legislative provisions such as section 62(6) of ACECA that allow state officers whose removal is provided for in the Constitution to remain in the same offices that they are alleged to have abused and used to their personal enrichment to the detriment of the public they are supposed to serve while undergoing prosecution for such offences”.<sup>17</sup>*

<sup>15</sup> *Ibid*

<sup>16</sup> Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR

<sup>17</sup> Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR Criminal Revision 25 of 2019



Further:

*“In the matter before me, the Governor of a County, to whom Article 10 and Chapter Six apply, is charged with the offence of abuse of office. He is charged with basically enriching himself at the expense of the people of Samburu County who elected him and whom he is expected to serve.”<sup>18</sup>*

Justice Mumbi Ngugi also posed the following questions in arriving at her decision:

- Would it serve the public interest for him to go back to office and preside over the finances of the County that he has been charged with embezzling from?<sup>19</sup>
- What message does it send to the citizens if their leaders are charged with serious corruption offences, and are in office the following day, overseeing the affairs of the institution?<sup>20</sup>
- How effective will prosecution of such state officers be, when their subordinates, who are likely to be witnesses, are under the direct control of the indicted officer?<sup>21</sup>

Upon consideration of these questions, Justice Mumbi Ngugi upheld the decision that Governor Lenolkulal should continue to be barred from accessing his office concluding that Governor Lenolkulal is charged with a criminal offence; he has been accused of being in ‘moral ill-health’, if one may term it so. He is alleged to have exhibited moral turpitude that requires that, until his prosecution is complete, his access to the County government offices should be limited as directed by the trial court.<sup>22</sup>

The effect of the ruling by Justice Mumbi Ngugi in the Lenolkulal case is that: Article 181 of the Constitution can no longer be used as a shield by state and public officers to continue serving in office with pay and accessing their offices while undergoing prosecution for corruption, economic crimes and other charges as this negates the objects and purposes of Chapter 6 of the Constitution of Kenya 2010.

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18 *Ibid*

19 *Ibid*

20 *Ibid*

21 *Ibid*

22 *Ibid*

## b) Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR

This is another recent case where a Judge of the High Court adopted a purposive approach to reading the Anti-Corruption and Economic Crimes Act in the context of the broader intentions of the drafters of Chapter 6 of the Constitution of Kenya 2010.

In this case, Governor Waititu was charged with conflict of interest contrary to Section 42 (3) of the Anti-Corruption and Economic Crimes Act<sup>23</sup> dealing in suspect property. The most contested issue in this application regards the imposition of stringent bail conditions against the Governor of the County Government of Kiambu and further barring him from setting foot into the County offices pending the hearing and determination of the trial.

Governor Waititu argued that: it was an error for the trial magistrate to be informed by the decision in *Moses Kasaine Lenolkul v. Director of Public Prosecution* [2019] Eklr in holding that the first Applicant should not set foot in his office until the case is determined. Governor Waititu urged the Court to rely on the decision in *Muhammed Abdalla Swazuri & 16 others v. Republic* [2018] eKLR. In the Swazuri case, Justice Ong'undi held that:

*“Removal or suspension from office of constitutional office holders would only occur under the constitutionally mandated terms. Thus there would be a big conflict of interest if the Secretary/CEO of EACC which was the investigating agency could be seen to be controlling the affairs at the National Land Commission (NLC) yet both EACC and NLC were independent commissions”.*<sup>24</sup>

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<sup>23</sup> An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence.

<sup>24</sup> *Ferdinand Ndungu Waititu Babayao & 12 others v Republic* [2019] eKLR

Justice Ngenye, like Mumbi Ngugi before her, departed from the reasoning in the Swazuri case stating:

*“It seems to me that the provisions of section 62(6) of the Anti-Corruption and Economic Crimes Act25, apart from obfuscating, ..., are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land.”<sup>26</sup>*

Justice Ngenye stated that if section 62(6) of the ACECA, which in her view violates the letter and spirit of the Constitution, particularly Chapter Six on Leadership and Integrity, is to be given an interpretation that protects the Governor Waititu’s access to his office, then conditions must be imposed that protect the public interest. Relying on the decision by Justice Mumbi Ngugi in the Lenolkulal case, Justice Ngenye was of the view that:

*“In this case, the applicant is charged with a criminal offence; he has been accused of being in ‘moral ill-health’, if one may term it so. He is alleged to have exhibited moral turpitude that requires that, until his prosecution is complete, his access to the County government offices should be limited.”<sup>27</sup>*

Justice Ngenye made the following points in her ruling on the Waititu Case:

- In as much as State Officers are exempt from suspension from office because the Constitution provides for a mechanism for their removal, that statement in the legislation is against the spirit and letter of Chapter 6 of the Constitution.<sup>28</sup>
- In as much as the accused persons remain innocent until otherwise proven, it would make a mockery, not only to the

<sup>25</sup> Section 62 (6) of the ACECA: This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

<sup>26</sup> Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR

<sup>27</sup> *Ibid*

<sup>28</sup> *Ibid*

people of the County of Kiambu but to the letter and spirit of the Constitution that persons charged with such weighty offences can be allowed to go back to the office to continue with dealings that they are alleged to have committed against the law.<sup>29</sup>

- It is clear that the drafters of the Constitution intended to ensure that corruption did not infiltrate public offices; and in there lies an indication that accountability is a key tenet of leadership and integrity. Governor Waititu has been charged in court because of the doubt the public has in his integrity. Until such a time that he is vindicated or convicted, he is yet to fulfil his duty to account for the alleged breach of the public trust entrusted in him under Article 73 of the Constitution. Absurdity would reign in if the court allowed him to go back to the office to continue executing his duties.<sup>30</sup>
- Chapter 6 of the Constitution at Article 73(1) and (2)<sup>31</sup> of the Constitution clearly lay out the responsibilities of leadership and the guiding principles of leadership and integrity, which apply, to the first Applicant as a State Officer.<sup>32</sup>
- It is clear then that the Governor Waititu was required to act selflessly in the conduct of his public duty demonstrating objectivity and impartiality in his decision making by ensuring that he is not influenced by nepotism, favouritism, other

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<sup>29</sup> *Ibid*

<sup>30</sup> *a Ibid*

<sup>31</sup> 73.(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and

(b) Vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—(i) honesty in the execution of public duties; and (ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) Discipline and commitment in service to the people.

<sup>32</sup> Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR

improper motives or corrupt practices. He was also expected to exercise his authority while paying special cognizance to the fact that he was entrusted with the public trust and he was therefore to demonstrate respect for the people, bring honour to the Nation and dignity to the office while ensuring that the public's confidence in the integrity of the office endured or was promoted.<sup>33</sup>

- Whilst once again bearing in mind the principle of presumption of innocence until proven guilty, it is clear that the charges currently facing the 1st Applicant (Governor Waititu) are antithetical to the letter and the spirit of the Constitution.<sup>34</sup>

In conclusion, Justice Ngenye held:

“I would concur with the observation of my senior sister Mumbi, J. in the Lenokulal case that the 1<sup>st</sup> Applicant (Governor Waititu) ought to be considered in “moral ill health”.<sup>35</sup>

It should be noted that at the time of this report's publication, Kiambu MCAs were seeking to move this matter to the Supreme Court to seek an advisory opinion on whether terms of bail can be imposed that are tantamount to suspending a governor from office by way of denying access to the office. The outcomes and process of this matter should be monitored closely for precedents it sets on Chapter 6.

### c) *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR Court of Appeal

A candidate for Chairperson of the Ethics and Anti-Corruption Commission (EACC), Mumo Matemu's past record at the Agricultural Finance Corporation (AFC) was according to the Trusted Society Alliance, plagued by integrity questions including approval of loans without proper security. The allegations also involved fraudulent payment of loans to unknown bank accounts and overall failure to prevent loss of public funds entrusted to the AFC.

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*

At the High Court, the petitioner (Trusted Society Alliance) argued that in approving Mumo Matemu's appointment, Parliament failed to consider whether Mumo Matemu met the leadership and integrity test set out in Chapter Six (6) of the Constitution of Kenya 2010. The High Court agreed with the Petitioner and annulled the appointment of Mr. Matemu stating that:

*"All the organs involved in the appointment of the Chairperson of the Commission had the obligation to consider whether the applicants met the qualifications in the Constitution and in the Act. They were required to investigate the background of the applicants and to conclusively consider any information, which went to their qualifications. From the record presented to the Court, it is evident that the appointing authorities gave lip service or no consideration at all to the question of integrity or suitability to hold the office. They failed to ascertain for themselves whether the Interested Party met the integrity or suitability threshold."<sup>36</sup>*

The High Court ruled that Parliament and other vetting/ appointing authorities failed to give due attention to all information that was available, and which touched on Mumo Matemu's integrity or suitability.

Mumo Matemu challenged the High Court annulment of his appointment to Chair the EACC at the Court of Appeal. He argued that the Trusted Society Alliance had no locus standi<sup>37</sup> to file the petition seeking his removal before the High Court. On the issue of locus, the Court of Appeal disagreed with Mumo Matemu stating that in the absence of a showing of bad faith on the part of the Trusted Society Alliance as claimed by Mumo Matemu, the Trusted Society had the locus stand to file the petition. On the specific issue of locus standi, the Court of Appeal agreed with the decision of the High Court to uphold article 258 of the Constitution of Kenya 2010, which provides:

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<sup>36</sup> Civil Appeal 290 of 2012- Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR

<sup>37</sup> A place to stand – meaning the right to bring an action against a decision or challenge a decision.

*“Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”<sup>38</sup>*

The Court then moved onto the issue of evidence relating to the improprieties alleged to have been committed by Mumo Matemu, stating that the determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence. The Court of Appeal was of the view that such challenges invoking Chapter 6 based on prior impropriety in public office required “an intensely fact-based enquiry” of the accusations of impropriety. On this basis, the Court of Appeal found that the Trusted Society Alliance did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011 by Mumo Matemu in his prior engagements as a public servant.

This heightened the standard of proof required for Chapter 6 cases in the eyes of the Court of Appeal. The Court stated that:

*“The determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence. When presented as a constitutional challenge, the evidentiary standard is on a balance of probabilities. This standard is heightened, given its implications on due process, fairness and equal protection.”<sup>39</sup>*

The Court of Appeal reversed the decision of the High Court stating that:

*“The petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011.”<sup>40</sup>*

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38 Civil Appeal 290 of 2012- Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR

39 *Ibid*

40 *Ibid*

To buttress the need for an intensely fact based inquiry supported by a strict evaluation of material evidence as part of due process, the Court of Appeal stated, with regard to the importance due process in with regard to petitions based on Chapter 6:

*“The courts may have the highest intentions to hasten this process (implementation of Chapter 6), but we must remember that the Constitution also protects us from our best intentions: by providing safeguards for due process, justice and fairness. That, extravagant as it appears, is the price of constitutional maintenance.”<sup>41</sup>*

#### d) Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR.

When the legislation to implement Chapter 6 of the Constitution of Kenya 2010 was passed by Parliament, the Commission on the Implementation of the Constitution (CIC) felt that the legislation was weak and did not give full effect to the intentions of the drafters of the Constitution in relation to chapter 6. Further, the CIC contended that the Leadership and Integrity Act failed to provide procedures and mechanisms for the effective administration of Chapter 6 of the Constitution of Kenya 2010.

The CIC’s grievance is that the Leadership and Integrity Act lacks the constitutional muster because while it appears to clearly set out ethical and moral requirements similar to those set out in Articles 73 and 74 which fall under Chapter 6, it fails to provide mechanisms and procedures for the effective administration of Chapter Six.

The CIC asserted that Parliament diluted and watered down the Bill prepared by the CIC in consultation with stakeholders during the enactment process because of which the final product failed to meet the constitutional threshold as contemplated by Article 80. The CIC argued that the Act is an attempt by Parliament to subvert the stringent moral and ethical requirements of Chapter Six (6).

The EACC, in Court as an interested party, adopted the CIC’s stance that while the Act set out strict ethical and moral requirements, it failed to provide for the consequences of failure to comply with the

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<sup>41</sup> *Ibid*



said requirements and fails to provide procedures and mechanisms which would enable it to enforce compliance with the Chapter Six and in this respect it fell short of the constitutional standard set out under Article 79.

EACC relied on the case of *Trusted Society of Human Rights Alliance v Attorney General and Others* to support the proposition that Kenyans intended that the provisions on integrity and suitability of public offices should not be mere aspirations but have substantive bite. EACC urged the court to uphold the letter and spirit of the Constitution by granting such orders and directions as to enable the Act meet the constitutional threshold contemplated under Article 80.

The CIC emphasized the need for Kenya's leaders to comply with the strict requirements of Chapter Six. According to CIC, the Constitution envisaged that:

*"One of the mechanisms of ensuring compliance with the Chapter Six was to ensure that leaders who do not comply with its provisions either barred from holding public office, or if already holding public office, are removed from such office and therefore the Act as enacted has failed to recognize such enforcement mechanisms."<sup>42</sup>*

The CIC also took issue with what it describes as the Act's failure to establish procedures and mechanisms, which would enable the Ethics and Anti-Corruption Commission ("the EACC") to enforce compliance with Chapter Six as, envisaged under Article 79.

CIC argued that the Leadership and Integrity Act, No. 19 of 2012 failed to provide the following:

- a) Way for the comprehensive administering of the Chapter 6 as required by Article 80(a).
- b) Disciplinary mechanisms and penalties as required by Article 75 and Article 80(b).
- c) A mechanism that would allow the EACC to prosecute cases of breach of Chapter Six where the Director of Public Prosecutions refuses to prosecute without good cause as expected by Article 79.

<sup>42</sup> Petition 454 of 2012 Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR

## Transparency International Kenya- Submissions (Second Amicus Curiae)

- In its written submissions, TI-Kenya concurred that the Act in its current form would not be able to meet the constitutional standard of an ‘effective administration’ and ‘enforcement’ as required of it under Article 80(a) and (d). TI-Kenya urged the court to make a decisive finding that the Act contravened the provisions of Article 80(a) and (d).<sup>43</sup>
- Mr. Norwojee, S.C., counsel for Transparency International Kenya, contended that weak legislation does not enhance integrity but creates a cynical ethos of corruption that weakens constitutional values. Counsel submitted that Parliament, in enacting the legislation, had acted as if the word ‘effective’ were absent in the Constitution. Referring to the Trusted Society of Human Rights Alliance v Attorney General and Others counsel further submitted that the ‘enforcement’ mechanism provided under the Act did not meet the degree required.<sup>44</sup>

TI-Kenya’s Amicus Brief relied on the Trusted Society case, particularly the following paragraphs:

- *“We are persuaded that this is the only approach to the interpretation of Article 73 of the Constitution which maintains fealty to the Constitution and its spirit, values and objects. Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution.”<sup>45</sup>*
- *“They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution.”<sup>46</sup>*

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43 *Ibid*

44 *Ibid*

45 *Ibid*

46 *Ibid*

- *“The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers would be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice.”<sup>47</sup>*

#### Decision of the Court – Justice Majanja:

- Although the Act was condemned on the basis of lack of public participation, the parties who impugned the Act on the basis did not demonstrate to the Court how the National Assembly had failed to achieve public participation within the constitutional parameters taking into account the process from the time the bill was initiated by the CIC up to its enactment.<sup>48</sup> The parties did not address me on the standard to apply in order to assess the level of public participation in the legislative process.<sup>49</sup>
- I am therefore unable to find and hold that the Act is unconstitutional for want of public participation.<sup>50</sup>
- I have come to the finding that the Leadership and Integrity Act is not to the extent suggested by the petitioner unconstitutional. I therefore dismiss the petition.
- I wish to commend the tenacity exhibited by the Petitioner, the Interested Parties and indeed the two amicus in their spirited fight in defending the constitutional spirit to the petitioner and supporters: remain vigilant and keep the State and the Legislature on its toes, keep your missiles to their launch pads until the spirit and letter of the Constitution and ultimately the fruit of the Constitution is realized and enjoyed by all. It is for this reason I shall not award costs.

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<sup>47</sup> *Ibid*

<sup>48</sup> A High Evidentiary Burden on the Petitioner alike to the decision of the Court of Appeal in the Mumo Matemu Case requiring ***an intensely fact-based enquiry***.

<sup>49</sup> Petition 454 of 2012 Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR

<sup>50</sup> *Ibid*

## e) Report and Recommendation into the conduct of The Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR.

Following the recommendation by the Judicial Service Commission (JSC), a tribunal looking into the conduct of Lady Justice Nancy Baraza, set out the appropriate standard of proof to be applied with regard to the interpretation of Chapter 6 of the Constitution of Kenya in the context of the conduct and integrity of public and state officers.

The tribunal established that the standard of proof is neither that of the criminal law, that is beyond reasonable doubt nor that in civil cases, which is on a balance of probability.

The standard of proof for Chapter 6 cases is somewhere between beyond reasonable doubt and a balance of probability.

There was a precedent for the establishment of a standard of proof from the Tribunal to Investigate the Conduct of the Hon. Mr. Justice Daniel K.S. Aganyaya in Matter No. 3 of 2003

This conduct in question involved an allegation that on 31st December 2011, at the Village Market, a shopping complex along Limuru Road, in Nairobi, the Deputy Chief Justice of the Republic of Kenya and Vice-President of the Supreme Court, threatened to shoot Mrs. Rebecca Kerubo Ogweche with a pistol. The DCJ had entered the Village Market refusing to be searched by Mrs Kerubo Ongweche who was a security guard at the shopping complex.

The Tribunal was satisfied that the conduct of the DCJ breached the provisions of Article 168 (1) (e) read together with Article 75 (1) (c) of the Constitution, 2010 and of the Judicial Code of Conduct, and was of such a serious nature to amount to gross misconduct and misbehaviour.

Article 75 (1) (c) of the Constitution, 2010 falls under Chapter 6 on leadership and Integrity and deals with the conduct of state officers which requires that:

1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoid.

(a) Any conflict between personal interests and public or official duties;

(b) Compromising any public or official interest in favour of a personal interest; or

(c) Demeaning the office the officer holds.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)—

(a) Shall be subject to the applicable disciplinary procedure for the relevant office; and

(b) May, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.

(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions mentioned in clause (2) is disqualified from holding any other State office.

The tribunal adopted a straightforward application of the constitutional requirements under Chapter 6 on Leadership and Integrity as well as the Judicial Code of Conduct and adopted a standard of proof Somewhere between beyond reasonable doubt and a balance of probability.

This is unlike other cases on Chapter 6 which have placed a high premium on presumption of innocence close to what would be applied in criminal proceedings (beyond reasonable doubt) and other cases which have placed the burden of proof at a balance of probability as applied in civil cases. The threshold established in this case was informed by the expected conduct of state officers on a prima facie

examination of the conduct in question and its' potential to put the office in question, in this case the office of the DCJ and Judiciary in general, in jeopardy and bereft of public confidence.

The tribunal further considered Chapter 6 and the circumstances of the DCJ's conduct in light of the National Values and Principles of Governance set out at article 10 of the Constitution of Kenya, which some scholars including former Chief Justice Willy Mutunga considered as part of the theory for the interpretation of the Constitution of Kenya 2010. Former Chief Justice Mutunga expounded on the value of Article 10 read together with Article 259 (1) of the Constitution as providing an authoritative approach to the interpretation of the Constitution in his dissenting opinion in the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR where he stated that the Constitution:

*"Article 10 on national values and principles of governance as the foremost beacons to guide a judicial officer whenever any of them 'applies or interprets' the Constitution, 'enacts, applies or interprets any law', makes or implements public policy decisions".<sup>51</sup>*

Article 10 of the Constitution sets out the National Values and Principles of Governance, which provide that:

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
  - (a) Applies or interprets this Constitution;
  - (b) Enacts, applies or interprets any law; or
  - (c) Makes or implements public policy decisions.
- (2) The national values and principles of governance include—
  - (a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

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<sup>51</sup> The Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012]eKLR Dissenting Opinion of CJ Willy Mutunga

- (b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) Good governance, integrity, transparency and accountability; and
- (d) Sustainable development.

As such, any interpretation of the Constitution including Chapter 6 ought to give meaning to these National Values and Principles. With respect of judicial interpretation of Chapter 6, it should be consistent with and give effect to the principles of good governance, integrity, transparency and accountability. The Courts should apply chapter 6 in a way that gives life to these principles clearly set out in the Constitution. Another provision, which should guide the Courts in interpreting Chapter 6, is Article 159 (1) of the Constitution, which stipulates that:

This Constitution shall be interpreted in a manner that:-

- Promotes its purposes, values and principles;
- Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- Permits the development of the law; and
- Contributes to good governance

If the judiciary proceeds with this unique textual approach towards the interpretation of the Constitution of Kenya 2010, then cases including those calling for an interpretation of Chapter Six should be guided by Articles 10 and 259 (1) of the Constitution which provides the basis for constitutional interpretation.

## f) Mohamed Abdi Olge v Abdullahi Diriye & 3 others [2017] eKLR.

Abdullahi Diriye, a state officer and Member of Parliament for Wajir South Constituency caused a security scare, when he attempted to impede security officers, who in their ordinary course of duty, had requested that he and a person in his company identify themselves. Diriye refused and instead engaged them in an altercation, insulted them and trespassed into a restricted area in an attempt to bypass the requisite security check. Because of this conduct, he was subsequently charged in court and convicted on his own plea of guilty.

## g) Decision of the Court – Mativo J

The facts of this case are clear. There is a conviction by a court of competent jurisdiction. The petitioner has demonstrated that the conduct by the first Respondent, which led to the conviction, is a violation of article 75 (1) (c) of the Constitution.<sup>52</sup>

The Petitioner had asked the Court to order the EACC to commence investigations into the conduct of the Wajir South Member of Parliament and that a directive be issued towards the Speaker of the National Assembly directing the relevant House Committee of the National Assembly to institute disciplinary action against the Wajir South Member of Parliament.

On this, Justice Mativo ruled that:

*“The alleged conduct took place outside Parliament, hence, I do not think it would be appropriate to invoke Parliamentary rules to punish the first Respondent for conduct outside Parliament and even if the conduct in question took place in Parliament, I do not think it would be appropriate for this court to direct the Speaker on what to do in matters happening within the precincts of Parliament on account of the doctrine of separation of powers and the independence of Parliament.”<sup>53</sup>*

<sup>52</sup> (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(c) Demeaning the office the officer holds.

<sup>53</sup> Constitutional Petition 484 of 2015 Mohamed Abdi Olge v Abdullahi Diriye & 3 others [2017] eKLR



A declaration was therefore issued that the first Respondents violated the provisions of Chapter 6 of the constitution of the Republic of Kenya and the provisions of the Leadership and Integrity Act.<sup>54</sup>

### h) Kenya Youth Parliament & 2 others v Attorney General & 2 others [2012] eKLR.

The Petitioners sought an interpretation from the court as to whether the appointment of Mr. Keriako Tobiko to the Office of the Director of Public Prosecutions in the light of allegations of corruption, incompetence, conflict of interest and lack of reform credentials would be inconsistent with the Constitution and the Public Officers Ethics Act.

They also sought declaratory orders that the appointment in light of the said allegations unless thoroughly investigated and cleared would fail the integrity test set out for leadership.

The court was asked to give an interpretation as to what constitutes competence, integrity, honesty and suitability for Public Office.

It was contended that the nomination panel did not encourage public participation in a meaningful and purposeful manner. One of the interested parties argued that Professor Yash Pal Ghai raised the issue of Mr. Tobiko's suitability and that the relevant organs did not interrogate the very serious allegations presented to them.

The court dismissed the petition citing lack of merit. The court held that there was insufficient evidence that not all the organs responsible for the process of his appointment considered all the allegations, complaints and all other matters complained of as against Mr. Tobiko.<sup>55</sup>

Further, the Court found that it had no power to undertake a merit review of Mr. Tobiko. This was the duty of the nominating and appointing bodies. It further held that anyone having a reason to have the Director of Public Prosecutions removed from office (even

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<sup>54</sup> *Ibid*

<sup>55</sup> Constitutional Petition 101 of 2011 Kenya Youth Parliament & 2 others v Attorney General & 2 others [2012] eKLR

from matters arising out of Chapter 6 on integrity), must comply with the requirements of Article 158(4). This article of the Constitution provides the prescribed process for the removal of the DPP from office and includes a petition to the Public Service Commission (PSC) and the formation of a tribunal by the President upon the recommendation of the PSC.<sup>56</sup>

### i) International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR.

The petitioners sought a declaration that Uhuru Kenyatta and William Ruto, having been indicted by the International Criminal Court (ICC) for crimes against humanity which formed part of Kenyan law under the International Crimes Act, should not be eligible to run for the positions of President and Deputy President given that the circumstances of their indictment, dealt a blow to their integrity as espoused in Chapter 6 of the Constitution of Kenya 2010.

The petitioners contended that the candidature of Uhuru Kenyatta and William Ruto ran contrary to the tenure, ideals and spirit of the Constitution of Kenya especially Chapter Six and were thus prohibited from running (even being considered for nomination) for President and Deputy President, respectively.

The Court found that any question relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya could only be determined by the Supreme Court. This includes the determination of the question whether such a person meets the test of integrity under Chapter Six (6) of the Constitution in relation to Presidential elections.<sup>57</sup>

The Court shifted the burden of deciding upon eligibility to the IEBC. The Court stated that even if Uhuru Kenyatta and William Ruto did not meet the integrity and leadership qualification as spelt out

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<sup>56</sup> *Ibid*

<sup>57</sup> Constitutional Petition 101 of 2011 - International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR

under Article 99 (2) (h) and Chapter Six of the Constitution, then the institution with the Constitutional and statutory recognition would be the IEBC under Article 88 (4) (e) of the Constitution and Section 74 (1) of the Elections Act and Section 4(e) of the IEBC Act. This then divests the court of its original jurisdiction and places an exclusive mandate on IEBC.<sup>58</sup>

The court found that the petitioners or any other person for that matter presented their grievances regarding the nomination of Uhuru Kenyatta and William Ruto to the IEBC. The Court exercised restraint. It stated as follows:

*“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution.”*

The Court added that where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.

The requirement for the IEBC to receive the self-declaration forms is part of its mandate to check compliance with the Elections Act and the Elections (General) Regulations, 2012, which set out a vetting mechanism for all political parties regarding nomination of candidates vying for positions. The court has power to review decisions made by IEBC pursuant to these laws, except in cases relating to the election of a President or Deputy President by virtue of the fact that original jurisdiction on matters related to the election of the President and Deputy President resided in the Supreme Court.

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<sup>58</sup> *Ibid*

The Court agreed that it should adopt a purposive approach to reading the Constitution of Kenya 2010.

## Presumption of Innocence

The Court held that the Presumption of Innocence protected under the Bill of Rights is a critical consideration and that Uhuru Kenyatta and William Ruto could not be condemned unheard. It held as follows:

- Article 50 (2) (a) provides that an accused person is presumed innocent until proved guilty. It underpins the principle of a fair hearing. Article 24 provides instances when these rights can be limited while Article 25 sets out the rights cannot be limited. All these rights are undergirded by the supremacy of the Constitution set out in Article 2.<sup>59</sup>
- The Court found that a limitation of the political rights of Uhuru Kenyatta and William Ruto would, in these circumstances be unreasonable.<sup>60</sup>
- It has neither been alleged, nor has any evidence been placed before us that the 3rd and 4th Respondents have been subjected to any trial by any local court or indeed the ICC that has led to imprisonment for more than 6 months. The confirmation of charges at the ICC may have formed the basis for commencement of the trial against the 3rd and 4th Respondents. The result, however, cannot be presumed neither is there sufficient evidence that at the end of it all, a conviction may be arrived at.<sup>61</sup>
- We have already placed on record the rights of the citizens of this country to make political choices, and indeed the rights of the 3rd and 4th Respondents to seek public office. Article one (1) of the Constitution of Kenya places all sovereign power on the people of Kenya, which shall be exercised only in accordance with the Constitution. It shall not be, and can never be the role of this court to exercise that power on behalf of the people of Kenya. That right must remain their best possession in a democratic society and is inalienable.<sup>62</sup>

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<sup>59</sup> *Ibid*

<sup>60</sup> *Ibid*

<sup>61</sup> Constitutional Petition 101 of 2011 - International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR

<sup>62</sup> *Ibid*

- Where there exist sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted. We found that the Petitioners did not exhaust the mandate of IEBC and other statutory bodies in dealing with the issues of eligibility and integrity before invoking the jurisdiction of this Court.<sup>63</sup>
- Article 1 of the Constitution of Kenya places all sovereign power on the people of Kenya, which shall be exercised only in accordance with the Constitution. Limiting the Interested Party's political rights under Article 38 would be inimical to the exercise of democratic rights and freedoms of its members.<sup>64</sup>

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<sup>63</sup> *Ibid*

<sup>64</sup> *Ibid*

## 5. Comparative case law from other jurisdictions

### a) Democratic Alliance v The President of the RSA & others (263/11) [2011] ZASCA 241 (1 December 2011).

This case was centred on whether the fourth respondent, Mr. Menzi Simelane, was properly appointed as the National Director of Public Prosecutions (NDPP) by the first respondent, Mr. Jacob Zuma, the President of the Republic of South Africa (the President). Put simply, the question for decision is whether the President, in appointing Mr. Simelane on 25 November 2009, complied with the prescripts of the Constitution and s 9(1)(b) of the National Prosecuting Authority Act 32 of 1998 (the Act).

The High Court was approached on an urgent basis for an order declaring that the President's decision, purportedly taken in terms of s 179 of the Constitution read with section 9 and 10 of the Act, was inconsistent with the Constitution and invalid.

The primary challenge to the appointment of Mr. Simelane is that he was appointed contrary to the requirement of s 9(1) of the Act, which provides:

- (1) Any person to be appointed as National Director, Deputy National Director or Director must-
  - (a) Possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and
  - (b) Be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.'

The DA's case is that Mr. Simelane is not a fit and proper person within the meaning of that expression in s 9(1) (b) of the Act, alternatively, when the President made the appointment he did not, as he was required to, properly interrogate Mr. Simelane's fitness for office in the manner contemplated in the subsection.

The North Gauteng High Court (Van der Byl AJ) held that there was no basis on which to interfere with President Zuma's decision to appoint Mr. Simelane as NDPP. It dismissed the DA's application and made no order as to costs.

*"The appeal is before us with the leave of that court. The material findings and conclusions of the court below are dealt with extensively later in this judgment. Although the criticism levelled at Mr. Simelane in this regard may to a certain extent be justified, I also find myself here unable, even if it is considered in context with the foregoing criticism, to hold him to be a person that is unfit to hold the position of NDPP."*<sup>65</sup>

The DA pointed out that if the President had properly scrutinised Mr. Simelane in considering his worthiness for appointment as NDPP he would have discovered that in each of the financial years of Mr. Simelane's tenure as DG, the Department of Justice had received a qualified audit from the Auditor-General. It listed the details of the deficiencies in the financial management within the Department.

The General Council of the Bar (GCB) had launched a probe into Mr. Simelane's fitness as an advocate and appointed three senior counsel to investigate the complaint.

Mr. Simelane had made a deliberately misleading affidavit in proceedings before the Constitutional Court in the matter of *Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC)*, in relation to his knowledge about whether the cabinet had made a decision to dissolve a special investigative unit, the Scorpions.

According to the DA during the hearing in the Constitutional Court, Mr. Simelane was rebuked by Justices O'Regan and Yacoob for not complying with the Government's obligation to respond fully, frankly and openly.

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<sup>65</sup> *Democratic Alliance v The President of the RSA & others (263/11) [2011] ZASCA 241 (1 December 2011)*

## (i) Court of Appeal Finding

Section 195(1) (f) of the Constitution provides that public administration must be accountable.

The PSC, referred to earlier in this judgment, is established by s 196 of the Constitution. It is required to be independent and impartial and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.

Chapter 8: Institutions of state, integral to the well-being of a functioning democracy have to be above reproach, have to be independent and have to serve the people without fear, favour or prejudice

The Presiding judge of the Court of Appeal in his Interpretation of Section 9 (1) (b) in relation to Presidential appointments including that of NDPP in this stated:

*"I disagree with the view that in applying s 9(1) (b) of the Act the President is entitled to bring his subjective view to bear. First, the section does not use the expression 'in the President's view' or some other similar expression. Second, it is couched in imperative terms. The appointee 'must' be a fit and proper person. Third, I fail to see how qualities like 'integrity' are not to be objectively assessed. An objective assessment of one's personal and professional life ought to reveal whether one has integrity."*<sup>66</sup>

- In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.'<sup>67</sup>

<sup>66</sup> Democratic Alliance v The President of the RSA & others (263/11) [2011] ZASCA 241 (1 December 2011)

<sup>67</sup> *Ibid*



- Collins' Thesaurus (2003) provides the following as words related to the word 'integrity': 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, and reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.'<sup>68</sup>

It is clear that the President did not undertake a proper enquiry of whether the objective requirements of s 9(1) (b) were satisfied. On the available evidence, the President could in any event not have reached a conclusion favourable to Mr. Simelane, as there were too many unresolved questions concerning his integrity and experience.

The Court of Appeal declared that Mr. Simelane's appointment, as NDPP was inconsistent with the Constitution and invalid. His appointment is reviewed and set aside. [Justice M. S Navsa, Judge of Appeal]

## b) The Centre for PIL and Another vs The Union of India Writ Petition (C) NO. 348 of 2010.

This case concerned the legality of the appointment of Shri P.J. Thomas (respondent No. 2 in W.P. (C) No. 348 of 2010) as Central Vigilance Commissioner under Section 4(1) of the Central Vigilance Commission Act, 2003.

Shri P.J. Thomas was appointed to the Indian Administrative Service (Kerala Cadre) 1973 batch where he served in different capacities with the State Government including as Secretary, Department of Food and Civil Supplies, State of Kerala in the year 1991. During that period itself, the State of Kerala decided to import 30,000 MT of palmolein.

The Comptroller and Auditor General ('CAG'), in its report dated 2nd February 1994 for the year ended 31st March 1993 took exception to the procedure adopted for import of Palmolein by the State Government. While mentioning some alleged irregularities, the CAG observed, "therefore, the agreement entered into did not contain adequate safeguards to ensure that imported product would satisfy all the standards laid down in Prevention of Food Adulteration Rules, 1956

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<sup>68</sup> *Ibid*

On 23<sup>rd</sup> January 2009, Shri P.J. Thomas was appointed as Secretary, Parliamentary Affairs to the Government of India.

Vigilance is an integral part of all government institutions. Anti-corruption measures are the responsibility of the Central Government. Towards this end, the Government set up, among other institutions, the Central Vigilance Commission (CVC).<sup>69</sup>

CVC as the Government of India set up an integrity institution in 1964 vide Government Resolution pursuant to the recommendations of Santhanam Committee. The sole purpose behind setting up of the CVC was to improve the vigilance administration of the country. Under at 1999 Ordinance the role of the CVC was enhanced to inquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations, Government companies, societies and local authorities owned or controlled by the Central Government. The CVC is an integrity institution.<sup>70</sup>

The Court seized with the issue of whether Shri P.H Thomas passed the integrity threshold to be a Commissioner of the Central Vigilance Commission found as follows:

- When institutional integrity is in question, the touchstone should be “public interest” which has to be taken into consideration by the HPC and in such cases, the HPC may not insist upon proof.<sup>71</sup>
- Personal integrity has a correlation with institutional integrity<sup>72</sup>

For these reasons the Court declared that the decision of the High Powered Committee (HPC) to recommend the name of Shri P.H Thomas as Central Vigilance Commissioner void and quashed his appointment as Central Vigilance Commissioner.<sup>73</sup>

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<sup>69</sup> The Centre for PIL and Another vs The Union of India Writ Petition (C) NO. 348 of 2010

<sup>70</sup> *Ibid*

<sup>71</sup> *Ibid*

<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*

### c) **R. Ravichandran vs The Additional Commissioner of Police** accessed at Indian Kanoon (High Court of India in Madras).

This case concerned the suspension of a police officer charged under the Prevention of Corruption Act, 1988 of India. The police officer was suspended for allegedly receiving a bribe while on duty in the traffic department. He was charged for the offence under the Prevention of Corruption Act 1988 (India). The suspended officer challenged the suspension contending that it was unlawful and should be revoked and the officer allowed resuming his duties.

The Court held as follows:

- When a public servant was found guilty of corruption after a judicial when an adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court. The mere fact that an appellate Court or revision forum has decided to entertain his challenge and to go into the issues and findings made against such public servants once again should not even temporarily absolve him from such findings. If such a public servant becomes entitled to hold public office and to continue to do official acts until he is judicially absolved from such findings by reason of suspension of the order of conviction it is public interest which suffers and sometimes even irreparably.<sup>74</sup>
- When a public servant who is convicted of corruption is allowed to continue to hold public office it would impair the morale of the other persons manning such office, and consequently that would erode the already shrunk confidence of the people in such public institutions besides demoralising the other honest public servants who would either be the colleagues or subordinates of the convicted person.<sup>75</sup>

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<sup>74</sup> Ravichandran vs The Additional Commissioner of Police accessed at Indian Kanoon (High Court of India in Madras)

<sup>75</sup> *Ibid*

- If honest public servants were compelled to take orders from proclaimed corrupt officers because of the suspension of the conviction the fall out would be one of shaking the system itself. Hence, it is necessary that the court should not aid the public servant who stands convicted for corruption charges to hold only public office until he is exonerated after conducting a judicial adjudication at the appellate or revisional level.<sup>76</sup>
- For the purpose of suspension, it is sufficient that the competent authority has arrived at a prima facie conclusion that the Government servant has committed a serious misconduct, which entails major penalties, like dismissal, removal or compulsory retirement<sup>77</sup>. Such misconduct includes<sup>78</sup>:
  - \* Offence or conduct involving moral turpitude
  - \* Corruption, embezzlement or misappropriation of Government money
  - \* Possession of disproportionate assets
  - \* Misuse of official powers for personal gain
  - \* Serious negligence or dereliction of duty

## 6. Comparative Analysis: Approach by Kenyan Courts and Foreign Courts (India and South Africa) on Integrity Matters relating to Public Officials

These cases from India and South Africa challenge the rationale that the Kenyan Courts have applied in cases such as *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR* where the Court reasoned that the presumption of innocence prevents the alleged perpetrators from being barred from holding office because they had not been convicted.

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<sup>76</sup> *Ibid*

<sup>77</sup> *Ravichandran vs The Additional Commissioner of Police* accessed at Indian Kanoon (High Court of India in Madras)

<sup>78</sup> *Ibid*

They also go against the reasoning in the decision regarding *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR Court of Appeal in which the Court found that integrity challenges must be backed by strong evidence based on an intensely fact based inquiry supported by a strict evaluation of material evidence as part of due process.

The Kenyan Courts have imposed a very high evidence based threshold on matters related to integrity of public officials charged with corruption related offences, whereas the standard set out in the Indian jurisprudence is the extent to which those accusations and/or charges impairs the public interest.

Jurisprudence from the Indian sub-continent focuses on public perception of integrity of the public office bearer charged with corruption. Suspension is therefore a standard in enhancing public confidence and once the case is determined, if the accused is absolved of the charges, he or she can return to office and be paid outstanding dues resulting from the reduced pay accruing from their suspension.

Kenyan Courts have also approached cases related to integrity challenges, mostly based on accusations of corruption or abuse of office from the perspective that the due process requirements should be applied to the standard required in criminal law. This is a high evidentiary threshold, which implies that a person whose integrity is called into question in the discharge of public office must be proven guilty beyond reasonable doubt before the person can be removed from office or prevented from getting into public office.

This approach from the Kenyan Courts is too stringent and limits the objectives and purposes of leadership and integrity provisions whose purpose is to safeguard confidence in public office. International best practices have shown that once such public confidence is called into question upon being charged with corruption or other forms of abuse of office, the measure should be one of perception and safeguarding the public interest.

Therefore, Courts should not insist on strict proof as established in *The Centre for PIL and Another vs The Union of India Writ Petition (C) NO. 348 of 2010*. As such, the most relevant consideration is the question that Justice Mumbi Ngugi posed in the *Lenolkulal Case*:

*“What message does it send to the citizen if their leaders are charged with serious corruption offences, and are in office the following day, overseeing the affairs of the institution?”<sup>79</sup>*

The Courts in Kenya have also exhibited a high level of judicial restraint in their interpretation of Chapter 6 of the Constitution of Kenya 2010 on Leadership and Integrity. By ruling that Courts cannot review the process of appointment of public officials as illustrated by the decision in *Kenya Youth Parliament & 2 others v Attorney General & 2 others* [2012] eKLR where the court held that it had no power to undertake a merit review of the appointment of Mr. Keriako Tobiko as Director of Public Prosecutions (DPP). This was despite concerns about his integrity being tabled about his suitability to hold public office based on previous transgressions.

The ruling in this case is in stark contest to a similar case involving the appointment of a Public Prosecutor in South Africa whose integrity was challenged before the Courts after his appointment. The Court in *Democratic Alliance v The President of the RSA & others* (263/11) [2011] ZASCA 241 found that the President could in any event not have reached a conclusion favourable to Mr. Menzi’s Simelane as National Director of Public Prosecutions (NDPP), as there were too many unresolved questions concerning his past integrity and experience.

## **7. Comparative and International Statutes, Policy & Best Practices**

### **a) Papua New Guinea**

Papua New Guinea has a Leadership Code entrenched in its National Constitution and Leadership Tribunal from which the Committee of Experts drew some inspiration in crafting the contents of Chapter 6 of the Constitution of Kenya 2010.

Under the national Constitution, the Leadership Code requires that leaders in the country should not use their positions for personal gain and should avoid conflict between their personal interests and their public duties. They are expected to act with honesty and integrity at all times. Leaders covered by the code include parliamentarians, secretaries of departments, directors of statutory authorities, senior members of the defence force and police, senior diplomats, and the executive officers of political parties.<sup>80</sup>

<sup>79</sup> *Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR

<sup>80</sup> Leadership Code in Papua New Guinea available at <http://www.paclii.org/pg/CPCReport/CPC3.DOC>

Between the introduction of the Code in 1975 and 1990, a number of breaches of the Code were detected and the cases brought before the Ombudsman Commission. Those whom the Ombudsman found guilty were referred to a Leadership Tribunal. If found guilty by the Tribunal, they were dismissed from office. The enforcement of the Leadership Code, aside from the Leadership Tribunal rests with the Ombudsman Commission.<sup>81</sup>

The Leadership Code of Papua New Guinea provides as follows:

- In his public office, a leader's first responsibility is to the people he (or she) represents or on whose behalf he is working. This responsibility must override self-interest. A leader's first loyalty must be to his office, not to himself. Such priority of loyalties might in fact mean some personal loss of opportunity or benefit, but this personal and official responsibility of a leader is assumed when he takes office, and it continues throughout his entire tenure of office.<sup>82</sup>
- A leader's loyalty to his office must spring from his genuine concern for his country. It is always expected of a patriot that he will put his country's interests before his own. In the event of any conflict of interests, the interests of the people he serves must prevail over his own personal interest. The higher the office held in the state, the more serious the office-holder's responsibility.
- The greater the power, the greater the obligations of the person holding the powerful position. The power he holds is not meant to be for his own honour and fame; much less is it for his own material aggrandisement. The power he holds is for the betterment of the citizens of Papua New Guinea.<sup>83</sup>
- If the leader were to use his power for purposes other than the betterment of the citizens, he would be abusing it, and he would thereby be demonstrating his unworthiness of his high office. In short, his high office and all that it legitimately brings with it is never meant for the office-holder's material enrichment; it is meant to be used in the service of the citizens of the state and for their betterment.<sup>84</sup>

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<sup>81</sup> *Ibid*

<sup>82</sup> *Ibid*

<sup>83</sup> Leadership Code in Papua New Guinea available at <http://www.paclii.org/pg/CPCReport/CPC3.DOC>

<sup>84</sup> *Ibid*

- The members of the National Parliament are the elected representatives of all people of Papua New Guinea. They have been given their high position to represent the interests of their people, and not for their own special interests. The same applies to persons holding ministerial office.<sup>85</sup>
- The Leadership Code Leadership gives strong emphasis to firmly restricting leaders in their dealings with foreign controlled enterprises. We believe that experience both here and in other countries shows that involvement of leaders with foreign controlled corporations including the giant multi-national corporations, can lead to much corruption.<sup>86</sup>
- Foreign companies and other enterprises are in a position to offer tempting gifts and other favours, apparently with no strings attached, but in reality with the object of compromising the leader's own position, so that when negotiations or other dealings between the enterprise and the level of government at which the particular leader is working, take place, that leader will not be able to take an objective stand on behalf of his people. A similar danger exists if the leader has shares or some other beneficial interest in the foreign enterprise.<sup>87</sup>

Papua New Guinea also has an Organic Law on the Integrity of Political Parties and Candidates<sup>88</sup>, which demands that candidates intending to run on a political party ticket must first meet the integrity threshold in the organic law. Political parties are required to ensure that their candidates are of sound integrity, failure to which the political party itself may be sanctioned.

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<sup>85</sup> *Ibid*

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*

<sup>88</sup> Papua New Guinea Organic Law on the Integrity of Political Parties and Candidates Available at [http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/05\\_04wp\\_Sepoe\\_0.pdf](http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/05_04wp_Sepoe_0.pdf)



## b) Jamaica

In 1973, Jamaica passed a new law concerning members of parliament along very similar lines to our own Parliamentary Integrity Ordinance<sup>89</sup>. In Jamaica, the Parliament (Integrity of Members) Act requires Parliamentarians to furnish statutory declarations of their assets, liabilities and incomes on an annual basis to the Integrity Commission. It further imposes penalties for non-compliance. In addition to legislation, there are specific anti-corruption initiatives, which are implemented in various Government Ministries, Departments, Agencies and other arms of the executive.

In this regard, in 2011, the Jamaica Constabulary Force (JCF) Anti-Corruption Strategy (2012-2015)<sup>90</sup> was launched. In order to ensure transparency and combat corruption, Government recruitment is also regulated by the Judicial Service Regulations, the Public Service Regulations and the Police Service Regulations. The Staff Orders for the Public Service of 2004<sup>91</sup> also regulate appointments. The document addresses matters such as how appointments are made, the authority to make appointments, eligibility, and entry into service, probation and confirmation of appointments.

## c) Tanzania

Tanzania introduced a stringent leadership code covering parliamentarians and a large number of officials at all levels, in 1967, and recently passed a new law to establish a Leadership Committee to enforce the Code more effectively than had previously been possible. The Constitution of the United Republic of Tanzania was amended in 1995 by introducing Article No 132 which directed for the enactment of the Public Leadership Code of Ethics Act No. 13 of 1995.<sup>92</sup>

The Act establishes a statutory basis for the development of standards of ethics for the public leaders. The standards aim at strengthening ethics, accountability, and transparency of specified bureaucrats

89 Parliament (Integrity of Members) Act, Available at <https://moj.gov.jm/laws/parliament-integrity-members-act>

90 Jamaica Anti- Corruption Strategy, Available at <https://moca.gov.jm/jcf-anti-corruption-strategy-2012-2015/>

91 Government of Jamaica: Staff Orders for the Public Service, Available at <http://www.osc.gov.jm/Legislation/Staff%20Order.pdf>

92 Tanzania, Public Leadership Code of Ethics Available at <https://www.ethicssecretariat.go.tz/>

and politicians defined as public leaders including those from the executive, legislature and judiciary. On the other hand, Article 132 established the Ethics Secretariat, which is an extra ministerial department of government under the Office of the President.<sup>93</sup>The Ethics Secretariat supervises the implementation of the Act and its main functions are (URT, 1995) as follows;

- To receive Declarations, which are required to be made by public leaders in accordance with the Constitution or any other law.
- To receive allegations and notifications of breach of the code by members of the public;
- To inquire into any alleged or suspected breach of the Code by all public leaders who are subject to the Act;
- To carry out awareness creation of the Public Code of Ethics to stakeholders and members of the public.

The basic principle underlying the Act is that public leaders should be of incontestable integrity, honest, untarnished, impartial, and open.<sup>94</sup>

#### d) Zambia

Zambia adopted a similar code after establishing a special enforcement body called the Leadership Committee in its 1973 Constitution. The Code delineates broad principles of basic values and behavioural standards that call for a high level of ethical conduct by Public Service employees designed to enhance public confidence in the Public Service. The Code is expected to enable Public Service employees to execute their duties with efficiency and effectiveness, whilst exhibiting high moral values through exemplary conduct both on and off duty.

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<sup>93</sup> Tanzania, Public Leadership Code of Ethics Available at <https://www.ethicssecretariat.go.tz/>

<sup>94</sup> *Ibid*

## e) Trinidad & Tobago

Trinidad and Tobago enacted the Integrity in Public Life Act<sup>95</sup>. The Act acknowledges that Parliamentarians, Senior Public Servants, Members of Local Government Authorities and Member of Statutory Bodies and State Enterprises are all in a position to influence the granting of benefits to, or the exercise of administrative discretion in favour of individuals, organisations and firms. These include the letting of contracts, the administration of government programmes and employment decisions such as appointments and promotions.

The Act requires that absolute impartiality, fairness, openness, and accountability is exercised in such processes. This requires that a balance is struck between the genuine value of established, continuing business-partner type relationships with particular firms or suppliers and the need, for reasons of probity, public confidence, and conspicuous even-handedness, to test existing arrangements by periodic tender and re-negotiation processes.<sup>96</sup>

The Act further requires that a balance is struck between the genuine value of established, continuing business-partner type relationships with particular firms or suppliers and the need, for reasons of probity, public confidence, and conspicuous even-handedness, to test existing arrangements by periodic tender and re-negotiation processes.

## f) Solomon Islands

The Solomon Islands enacted a leadership code in 1999. It vested the Leadership Commission with powers for investigation and enforcement of the code. The code prohibits the use of public office for private gain:

*“Any leader who directly or indirectly asks or accepts, on behalf of himself or any associate of his, any benefit in relation to any action in the course of his official duties (whether such action has already been taken, is continuing or is to be taken in the future) or by reason of his official position, is guilty of misconduct in office.”<sup>97</sup>*

<sup>95</sup> Trinidad and Tobago, The Integrity In Public Life Act 2000, Available at <http://www.ttparliament.org/legislations/a2000-83.pdf>

<sup>96</sup> *Ibid*

<sup>97</sup> Section11(1) of the Leadership Code (Further Provisions) Act 1999 Solomon Islands

Engagement in other forms of paid employment while occupying public office is prohibited. The Code prohibits holders of public office from holding shares in a company either directly or through a family member if that shareholding could reasonably be expected to place him in a position in which he could be faced with a conflict of interest or might be compromised when discharging his public or official duties. In the same vein, the code prohibits public officials and their spouses or children from holding a beneficial interest in any contract concluded with the Government of Solomon Islands.

## 8. Conclusion and Recommendations

This analysis of Kenyan cases has shown a set of different precedents and interpretations of what the courts consider to be the provisions of Chapter 6. The positive recent rulings on these matters should be used as a launching point to cement these gains and as a basis for advocacy including Public Interest Litigation (PIL) moving forward.

This paper identified two key themes emerging from the jurisprudence, these are:

- Standard of Proof and
- Threshold of Evidence

### Standard of Proof

Here the contention is what constitutes an acceptable standard by which an individual or state officer may be judged to have violated the provisions of Chapter 6. It is important to note that Kenyan courts have provided different interpretations of this as shown above and this has varied between the provisions of a strict evaluation of material evidence to determine a balance of probabilities and has further used the presumption of innocence to prevent actions being taken.

However, international best practices and recent jurisprudence have taken into account that the provisions on leadership and integrity in public office are questions of perception and thus should not be held to the same standards as that of a criminal trial. Precedents have

been set that determine that public interest is paramount and that public opinion on whether or not a state officer is guilty of corruption is to be held in high regard as this affects confidence in their offices. This notion of public perception overrides the question of guilt or innocence when it comes to matters of temporary removal from office.

## Threshold

The question of the evidentiary threshold in cases concerning leadership and integrity should not rise to the same as that of a criminal case as the question here is not one of guilt or innocence. The question is one of perception – is the individual seen to be one who is able to uphold the integrity of the office. It must be borne in mind that this is a public office while considering the history of corruption perpetrated through state offices in the Kenyan context. Therefore, the evidentiary threshold provided in the CIC case and the Mumo Matemu case of an Intensely Fact- Based Enquiry and Evaluation of Material evidence is too high as this will;

- (i) Take a considerable amount of time to be settled by the court often being settled after terms of officers have ended, and
- (ii) While this air of suspicion is associated with this office it is likely that public confidence in this office will be lost.

It should therefore be the case that public interest and by extension public perception holds sway in matters of Chapter 6 and public servants. As stated in other sections of this report, it is important to remember the context in which these laws were formed and the current public perception of the fight against corruption. Providing clear examples in instances where allegedly corrupt individuals are found unfit to hold public office would be a significant step towards restoring public confidence in government.

Judicial activism around Chapter 6 has provided more purposive and progressive interpretations such as the Lenolkulal & Waititu Cases (High Court), Tribunal - Nancy Makokha Baraza that uphold standards to which public officers should be held. These standards should be higher than those that ordinary citizens are held to by the nature of their offices.

The Building Bridges Report released in November 2019, makes specific reference to enforcement mechanisms for Chapter 6 noting that this has lacked teeth and further focussed primarily on financial impropriety. The inclusion of other aspects that contradict national values in this report provides fertile ground for the development of further jurisprudence should these measures come to pass. The question of the constitutional legality of Section 62(6) of the ACECA, which allow states officers whose removal is provided for in the Constitution to remain in the same offices they have allegedly abused, remains contentious and should be a subject of advocacy to enforce the provisions of the constitution on leadership and integrity.

## Recommendations

Several key recommendations emerge from this research that can be used to more progressively implement the provisions of Chapter 6. The nature of the subject means that the majority of these are directed towards the court and civil society and this is reflected in the recommendations provided:

### A. To the Courts

- (i) Kenyan courts should be more purposive and proactive in interpreting Chapter 6 of the Constitution of Kenya. They should do so in a manner that gives meaning to the transformative nature of the Constitution of Kenya 2010. A purposive approach to the interpretation of Chapter 6 by the Courts is required because this part of the Constitution was crafted to save the country from impunity and corruption [Impunity provides oxygen to corruption].
  - The purposive approach sometimes referred to as purposive construction, purposive interpretation, or the “modern principle in construction” is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (that is, a statute, a part of a statute, or a clause of a constitution) in light of the purpose for which it was enacted.<sup>98</sup>

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<sup>98</sup> Agarwal, Rajat, Interpretation of Statutes - The Purposive Approach published in Legal Services India ISBN No: 978-81-928510-1-3

- As stated in the Trusted Society Alliance Case [Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] KLR]:

*The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers would be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice.<sup>99</sup>*

- (ii) Kenyan courts should interpret chapter 6 of the Constitution in a manner that gives meaning to the National Values and Principles of Governance set out in Article 10 [including good governance, integrity, transparency and accountability –Article 10] – Harmonisation Principle in Constitutional Interpretation
- (iii) Kenyan courts should work in coordination with other agencies including the Ethics and Anti-Corruption Commission (EACC), Independent Electoral and Boundaries Commission (IEBC), Office of the Auditor General (OAG), National Cohesion and Integration Commission (NCIC), Commission on Administrative Justice (CAJ)/ Ombudsman and other constitutional bodies on matters related to Chapter 6 violations especially in the context of elections.
- (iv) Kenyan courts should be emboldened by the fact that judicial authority is derived from the people and thus should not shy away from a purposive approach in interpreting Chapter 6. As such, the courts should not be unduly restrained when it comes to enforcing Chapter 6 in election related cases and challenges to the appointment of persons of doubtful integrity, even if those persons have already been appointed with the approval of Parliament.

<sup>99</sup> Petition 229 of 2012 High Court of Kenya

- (v) Kenyan courts should lessen the threshold or standard of proof and evidentiary burden. The standard of proof is neither that of the criminal law, that is beyond reasonable doubt (or conviction) nor that in civil cases, which is on a balance of probability.
- The threshold should be informed by the expected conduct of state officers on a prima facie examination of the conduct in question and its potential to put the office in question. This was established in the Report and Recommendation into the Conduct of The Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR<sup>100</sup>
  - The Courts should not insist on an intensely fact-based enquiry and a strict evaluation of material evidence as part of due process as occurred in the Mumo Matemu Case
- (vi) The standard of proof in petitions involving Chapter 6 over the conduct of a state or public officer should be one of the existence of credible investigations and existence of clear documentary proof of the breach of Chapter 6. It should be enough to show reasonable grounds that a person has been involved in corruption.
- (vii) Kenyan courts should consider disobedience of court orders by state and public officers as a serious breach of Chapter 6. The conduct of public officers who disobey court orders is in breach of the standards set out in Chapter 6 and should apply in the cases of:
- Miguna v Fred Matiangi, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR
  - Republic v Karanja Kibicho - Principal Secretary of Ministry of Interior and Coordination of National Government Ex-Parte Evanson Gidraph Kamau [2017] eKLR

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<sup>100</sup> Report and Recommendation Into The Conduct of The Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR



*This case resulted in Justice George Odung'a ordering that Interior Permanent Secretary Karanja Kibicho to be jailed for three (3) months for disobeying a Court order to appear before him in a case in which the state had failed to pay compensation to a victim of torture despite a court ruling demanding that the victim be compensated.*

## B. Civil Society

- A clear direction on Chapter 6 should emerge from the jurisprudence and be maintained as such. CSOs should seek an advisory opinion on the standards of proof required for Chapter 6 cases from the Supreme Court. This will serve to provide clarity on the issues and this should be based upon the precedents set by the Waititu and Lenolkulal cases.
- Advocacy should be carried out on amendments made to the ACECA by the EACC. These need to be interrogated and their possible implications understood. This can be targeted at the media, the office of the Attorney General and select champions who may include elected officials and/or members of the judiciary. The purpose of this will be to build an advocacy campaign to push for the passage of these amendments.
- Attempts to amend the ACECA should further be pursued through parliamentary measures. Proposed amendments particularly to Section 62(6), ACECA which allows state officers whose removal is provided for in the Constitution to remain in the offices they have been accused of abusing, should be drafted and a Bill introduced to effect this amendment. In this the support of the EACC and the ODPP will be crucial as key stakeholders in the prosecution of violators of this rule. Within this effort, parliamentary champions will need to be identified to lobby for the introduction and passage of these amendments.

- Public Interest Litigation (PIL) can be carried out on select cases to test the courts emerging jurisprudence around Chapter 6 with suggested actions around Governors and members of parliament that have been charged in court with cases touching on Chapter 6.
- Civic education is needed for citizens to understand the purpose of Chapter 6 and how it has been applied. This will combat rhetoric from politicians, and public perceptions that these prosecutions are influenced by tribal and political considerations, and help develop an understanding of how these provisions serve to uphold the integrity of public office.
- PIL can be used to provide an interpretation from the court of what constitutes public interest and in doing so Kenya can draw from other jurisdictions and these include the Siracusa Principles on the limitation of rights under the ICPCR. When working with the presumption of innocence these principles provide guidelines on how to derogate from this. These can be the subject of CSO advocacy campaigns.
- Advocacy can be carried out to ensure accountability in the cases where the court has passed on responsibility to other organs such as the IEBC and legal action may be considered in these cases.

## C. Legislature

- The legislature should consider and pass amendments to ACECA particularly on the question of the Section 6(2)
- The legislature should consider provisions to develop stronger enforcement mechanisms for Chapter 6. Enacting such legislation would mean that this jurisprudence set by the Samburu and Kiambu cases would stand and not be overturned by subsequent rulings – further having these in law would make enforcement more effective.
- Develop clear criteria for vetting those seeking elective positions before the next general elections and include strict enforcement mechanisms for these.

## **D. ODPP**

- The ODPP should utilise the precedents set particularly in the Lenolkulal and Waititu cases in their arguments as these can set further precedents to reinforce those already set.

## **E. EACC**

- The EACC should continue to lobby for the passage of the suggested amendments made to the ACECA.
- Once again in conjunction with CSOs and other stakeholders develop and advocate for a list of individuals who should be barred from running for office before the next election based on questions related to their integrity.

## **F. IEBC**

- It falls upon the IEBC to approve candidates for nomination to vie for elective seats. Clear procedures and reasoning should be provided to explain why certain candidates were cleared to run despite allegations of corruption. The precedents set by the Lenolkulal and Waititu cases can form the basis of these arguments.

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### **ALAC ELDORET**

P.O BOX 842 - 30100  
NCCK Offices, West Market, Kidiwa  
Mobile: 0704899887  
Email: alaceldoret@tikenya.org

### **ALAC WESTERN**

P.O BOX 3560-40100  
Riat- Kisumu, along Kisumu- Kakamega Road  
Mobile: 0716900227  
Email: alacwestern@tikenya.org

### **ALAC NAIROBI**

P.O Box 198 - 00100, Nairobi  
Kindaruma Road, Off Ring Road, Kilimani Gate No. 713; Suite No. 4  
TEL: +254 20  
Mobile: 0701471575  
Email: alacnairobi@tikenya.org

### **ALAC MOMBASA**

2nd floor, KNCHR offices Panal Freighters Lane  
Off Haile Selassie Avenue Behind Pride inn Hotel Mombasa CBD  
Mobile: 0728418822  
Email: alacmombasa@tikenya.org

### **HEAD OFFICE**

Kindaruma Road, Off Ring Road, Kilimani | Gate No. 713; Suite No. 4  
P.O Box 198 - 00200, City Square, Nairobi | Tel: +254 (0) 20 2730324/5,  
2727763/5 Mobile: +254 (0) 722 296 589/ +254 (0) 733 834 659 |  
Email:transparency@tikenya.org

