



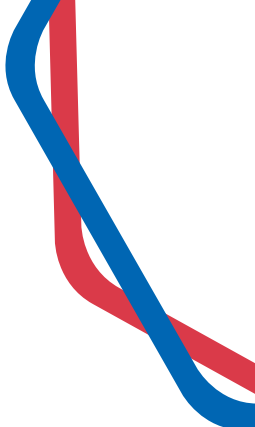
TRANSPARENCY  
INTERNATIONAL  
KENYA

# TRACKING COVID-19:

A REPORT ON TRANSPARENCY  
AND ACCOUNTABILITY IN  
GOVERNMENT'S RESPONSE TO THE  
COVID-19 PANDEMIC







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## LIST OF ABBREVIATIONS

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<b>ASSL</b>	Audit Service Sierra Leone
<b>CAJ</b>	Commission on Administrative Justice
<b>CSO</b>	Civil Society Organisation
<b>DCI</b>	Directorate of Criminal Investigations
<b>EACC</b>	Ethics and Anti-Corruption Commission
<b>IFMIS</b>	Integrated Financial Management System
<b>KEMSA</b>	Kenya Medical Supplies Authority
<b>KMPDU</b>	Kenya Medical Practitioners, Pharmacists and Dentists Union
<b>NCPB</b>	National Cereals and Produce Board
<b>OAG</b>	Office of the Auditor-General
<b>PFMA</b>	Public Finance Management Act
<b>PPADA</b>	Public Procurement and Disposal Act
<b>PPRA</b>	Public Procurement Regulatory Authority
<b>SAI</b>	Supreme Audit Institutions
<b>TI-Kenya</b>	Transparency International Kenya
<b>UHC</b>	Universal Health Coverage
<b>UNDP</b>	United Nations Development Programme
<b>WHO</b>	World Health Organisation

# EXECUTIVE SUMMARY

This report examines transparency and accountability issues in government response to the COVID-19 pandemic. The COVID-19 pandemic began in Wuhan, China where multiple cases of respiratory illness were observed. Eventually, the virus started to spread around China and established footholds in other parts of the world at the start of 2020, prompting the World Health Organisation (WHO) to declare it a pandemic. At this stage, the consensus was that most, if not all, countries would eventually be impacted by the virus. The first case in Kenya was reported in mid-March.

In response, the government took several measures to respond to the crisis including restrictions on movement, mandatory quarantine for travellers arriving from abroad, curfews, and the mass procurement and distribution of various medical supplies around the country. Questions around Transparency and Accountability arose over the rationale behind these policies and their implementation. With time, further questions arose on the use of resources set aside for response to the pandemic.

The following are the key findings of the report:

Transparency and Accountability Issues	Extent achieved
<b>Preparedness</b>	
<ul style="list-style-type: none"> <li><b>Transparency</b> -COVID-19 preventive measures in place before the first case was recorded in Kenya</li> </ul>	<ul style="list-style-type: none"> <li>Measures not disclosed to the public and not available on request by the Senate</li> </ul>
<ul style="list-style-type: none"> <li><b>Accountability</b> – pressure from media, civil society, and the public and oversight institutions for government to take action in preventing the spread of COVID-19 from countries most ravaged by the virus.</li> </ul>	<ul style="list-style-type: none"> <li>The government was initially casual about preventing the spread of the virus by allowing flights from hotspot countries. The High Court later issued orders stopping flights from China coming into the country.</li> </ul>
<b>Quarantine</b>	
<ul style="list-style-type: none"> <li><b>Transparency:</b> Policy documents on quarantine were released but in practice, there was poor implementation of the policies.</li> </ul>	<ul style="list-style-type: none"> <li>Challenges within quarantine facilities were uncovered by media, civil society, and the public, not by government oversight institutions.</li> </ul>
<ul style="list-style-type: none"> <li><b>Accountability:</b> Rationale and strategy behind the application of certain measures such as forced quarantine and failure to observe health guidelines while at quarantine centres.</li> </ul>	<ul style="list-style-type: none"> <li>No accountability for the violations of health guidelines and detention of citizens in these conditions.</li> </ul>
<b>Cessation of Movement, Curfew, and Mask Mandate</b>	
<ul style="list-style-type: none"> <li><b>Transparency:</b> The government provided clear directives on cessation of movement, curfews, and proper hygiene measures.</li> </ul>	<ul style="list-style-type: none"> <li>The government failed to provide information on the implementation strategy for smooth operations, including the legal punitive measures in case one flouted those directives.</li> </ul>
<ul style="list-style-type: none"> <li><b>Accountability:</b> By implementing institutions including the police and Ministry of Health officials</li> </ul>	<ul style="list-style-type: none"> <li>The government did not take significant action to stem police brutality or hold the law enforcement officers to account for mishandling citizens who disobeyed the directives.</li> <li>Cases of police bribery were reported by citizens caught on the wrong side of the law.</li> </ul>



Personal Protective Equipment(PPE) and Medical Equipment	
<ul style="list-style-type: none"> <li>Transparency: COVID-19 preventive measures in place before the first case was recorded in Kenya..</li> </ul>	<ul style="list-style-type: none"> <li>The government failed to satisfactorily explain how procurement of medical equipment was undertaken and the distribution to where it was required.</li> </ul>
<ul style="list-style-type: none"> <li>Accountability: on the use of public funds in purchasing medical equipment.</li> </ul>	<ul style="list-style-type: none"> <li>Vertical accountability through citizens and the media led to the intervention of oversight authorities like the Senate, OCOB and OAG, but no culpability has been apportioned.</li> </ul>
Kenya Medical Supplies Authority (KEMSA) Audit	
<ul style="list-style-type: none"> <li>Transparency: It was made known that procurement of Medical Equipment was being carried out but details were lacking.</li> </ul>	<ul style="list-style-type: none"> <li>Transparency lacking initially but some information was later provided by the media expose' (COVID-19 Millionaires) and the OAG.</li> </ul>
<ul style="list-style-type: none"> <li>Accountability: Pressure from the media, civil society, and the public.</li> </ul>	<ul style="list-style-type: none"> <li>The 'COVID-19 Millionaires' documentary triggered public pressure and opinion in support of accountability, leading to the audit and investigations, but so far without any prosecution.</li> </ul>
Controller of Budget Report on Counties	
<ul style="list-style-type: none"> <li>Transparency: Information provided by counties on public funds spending.</li> </ul>	<ul style="list-style-type: none"> <li>According to the Controller of Budgets, the information provided by counties and MoH indicated a lack of budgeting for emergencies.</li> </ul>

Table 1: Transparency and Accountability

The lack of transparency and accountability in government response to COVID – 19 Pandemic has had several deleterious effects notably:

1. Loss of faith by the donor community in the government thus jeopardising the medical supplies available for combating not only the virus but other diseases during and after the pandemic. It is important to note that the health sector is heavily dependent on external support.
2. The counties have not developed sufficient bed capacity and preparedness to deal with the impact of the pandemic.
3. Health workers lacking essential medical supplies and equipment, most notably PPEs, which has led to infections and even deaths among the medics.
4. Lack of trust among the general public of the government's response to the pandemic contributed to a reduction in the observation of social distancing and other measures.

Best Practices identified include:

- Use of stringent accountability measures in emergency financing to safeguard loss of public funds. Though the government was able to secure funding in good time, it did not put the required accountability measures in place.
- Using an open data contracting system. While Kenya has this system ([tenders.go.ke](https://tenders.go.ke)) and has published information on tenders awarded, best practices call for further details to be provided on the award process.
- The use of proactive audits is key to ensuring that resources are used properly. While Kenya has undertaken an audit of KEMSA operations after a request by the Senate, further audits are required as well as real-time auditing processes to be used in emergencies.
- Transparency on the part of donors is key. Donors and the government should reveal details of money given, audits, evaluations, and other reports of past and ongoing work as well as the details of current agreements including performance. This has not been done in Kenya.

- Regular consultation and communication is key to understanding and having citizens work with the government. The government has failed to regularly provide accurate and timely information and respond to requests for access to information on certain matters.

The report makes five key recommendations:

- 1) Ensure that information is proactively disclosed to the public to ensure Transparency and Accountability in the COVID-19 response. Key factors such as KEMSA, MOH, KMPDU, Donors, and the International Community should provide relevant information relating to their respective roles in the fight against the pandemic.
- 2) Ensure that the counties are not side-lined in fighting the pandemic since health is a devolved function, as stated under the Fourth Schedule of the 2010 constitution.
- 3) Develop a criterion for accountability in times of emergency for procurement purposes and attendant procedures. The emergency nature of the pandemic resulted in the flouting of procurement regulations developed by PPRA, OAG, and KEMSA.
- 4) The Office of the Auditor-General (OAG) should expedite all audits on COVID-19 expenditure and make these publicly available.
- 5) EACC and ODPP should undertake investigations and prosecutions concerning alleged corruption identified already and other violations of the law during the Pandemic.

# 1 INTRODUCTION

This report seeks to understand the response of the Kenyan government to the COVID-19 pandemic through Transparency and Accountability lenses. It examines (i) laws, (ii) policies, and (iii) institutional frameworks around the state's response to the COVID-19 pandemic for Transparency and Accountability. The report also focuses on public procurement by exploring where resources have gone and what legal and policy frameworks are in place to guide this, especially concerning access to information. The report also identifies best practices in other states for the COVID-19 response and other emergencies and makes recommendations to improve these practices.

To do this, the report begins by providing a background and contextual analysis of the health sector and the history of Transparency and Accountability in Kenya. This is important because it demonstrates a culture of corruption and a lack of accountability and, indeed, impunity around the use of government resources in the country. Furthermore, it shows why despite damning findings such as those of an audit of Kenya Medical Supplies Authority (KEMSA) operations undertaken by the Office of the Auditor-General (OAG), sustained efforts and advocacy must be undertaken to ensure that action is taken and those responsible for the mismanagement of funds are held to account.

The paper then provides an overview of the institutions and policies that are in place to ensure Transparency and Accountability such as the Public Finance Management Regulations (PFMR), the Public Finance Management Act (PFMA), the Public Procurement and Disposal Act (PPADA), among others. This sets the stage for the pandemic response that unfolded after the first case was reported in mid-March 2020 until the time this report was published.

## Scope, Limitations, And Methodology

The scope of this report is the government response to the COVID-19 pandemic through the lenses of Transparency and Accountability. It seeks to understand questions around how resources were raised, how they were used, and crucially the information that has been made available on these. The principles of Transparency and Accountability are about proactively seeking to show that this is what we have done, and in what manner.

Due to temporal constraints, this paper has largely depended on secondary desk research with select interviews conducted where possible. It should be noted that due to the vast nature of the response across the entire country and the continually evolving nature of the pandemic and the response, the analysis contained therein may be outdated at the time of publication. Moreover, while this report would have benefitted from a public perception survey on various issues and in-depth interviews with key stakeholders, financial and temporal constraints prevented this from happening. This study is therefore limited by taking place during the events it seeks to analyse.

## Transparency and Accountability

Transparency is seen as a key feature of good governance as it allows for and indeed is a pre-requisite for accountability. Put simply, revealing your actions is the first step towards being accountable for those actions.<sup>1</sup> Transparency is the principle that there is a 'duty to act visibly, predictably, understandably, and to promote participation and accountability. However, Transparency does not necessarily enhance accountability as this touches on the question of responsibility and culpability.

<sup>1</sup>Transparency and Accountability Initiative (2010) *Review of Impact and Effectiveness of Transparency and Accountability Institute of Development Studies*

Accountability goes beyond the mere responsibility of delivery of a task or service. It also means answerability if a service is not delivered in a timely and efficient manner such that it becomes a burden. It is the citizens' right but also their duty to demand it. This can be applied either vertically, horizontally or diagonally by various parties as illustrated in the table below <sup>2</sup>:

Type of Accountability	Means of applying accountability
<b>Vertically</b>	Free press, elections, civil society, active citizens
<b>Horizontally</b>	Oversight by other agencies such as courts and audit institutions
<b>Diagonally</b>	Citizens use government institutions for oversight through engagement in policymaking, budgeting, and other processes

<sup>2</sup>Transparency International (2009) *The Anti-Corruption Plain Language Guide* Berlin Transparency International

The history of Transparency and Accountability in Kenya is deeply linked to the endemic corruption within the state which has been characterized by a high level of government involvement in both petty and grand corruption. A slew of subsequent investigations, commissions of inquiry, and the like following public outrage elicit little accountability. Certainly, the response to the COVID-19 pandemic follows a similar pattern.

#### Key Points

- Kenya has a history of graft and corruption around government contracts
- There is a culture of impunity entrenched in the system
- It is through audits that many instances of corruption have been unearthed
- Various investigations, commissions of inquiry, and other actions have not resulted in convictions and are used merely as delaying tactics
- The war on graft has been perceived as selective and has largely failed to yield results leading to erosion of public trust

#### a) Previous Scandals

The following table details some of the scandals involving the health sector since 2010<sup>3</sup>:

Corruption Incidence	Action Taken	Estimated Amounts Embezzled
Theft of KShs8.1 million donated by the Global Fund for TB programmes	The audit report notes that it was agreed to impose disciplinary measures and recover funds from Holders A and B, However, no information is available on the actions taken by the government against the two account holders (A & B). The Ministry of Health has not responded to letters seeking access to information.	<b>KShs8.1 million</b>
Embezzlement of Kshs160 million donated by GAVI for essential vaccines to children	The Ministry of Health paid back to GAVI Kshs. 160 million from taxpayer's pockets. No reported action was taken against the perpetrators.	<b>KShs160 million</b>
Managed Equipment Services	No reported arrests, prosecutions, or recovery of the stolen funds.	<b>Approximately Kshs7 billion</b>
Project: Procurement of CT scanners		

<sup>3</sup>Adapted from KELIN (2020) *Matrix of Reported Corruption in Kenya's Health Sector since 2010 September 2020*

Managed Equipment Services Project Scandal (AfyaGate)	It was recommended by the Senate that: 1. That EACC and DCI investigate the circumstances surrounding the awarding and implementation of the MES contracts; 2. That all public officers found culpable be prosecuted 3. That all private entities and persons found culpable of participating in the irregular and illegal acts of the liable public officers adversely mentioned in this report be investigated by the relevant investigatory authorities; 4. The Office of the Auditor-General to expeditiously undertake a comprehensive forensic audit of the Managed Equipment Service Project	<b>KShs3.8 million in 2015, KShs4.5 billion in 2016, KShs6.1 billion in 2017 and KShs9.4 billion in 2018</b>
Manipulation of the Integrated Financial Management System (IFMIS) (Mafyahouse scandal)	No reported action against the perpetrators with a Principal Secretary adversely mentioned in the scandal transferred to the Ministry of Lands	<b>Approximately KShs5 billion</b>
Looting of over Kshs.10 Billion from the National Hospital Insurance Fund (NHIF)	No actions taken	<b>Approximately KShs10 billion</b>

Public procurement has been the theatre of numerous scandals hence the emergence of the term, *tenderpreneurs*. Analysts have said that public procurement is, “Subject to rampant corruption and bribery,” and that, “Tendering fraud is the fastest growing economic crime in Kenya.”<sup>4</sup>

It is also important to note that since devolution took place under the 2010 Constitution, counties have been required to provide information on their budgeting process online, a requirement which they have broadly failed to meet. The lack of access to information means that it is difficult to assess the county-level response to the pandemic and this access is a basic starting point to achieve Transparency and Accountability. According to the International Budget Partnership in the year 2019, only 32% of the documents expected to be published online were available and certain older documents had been pulled down.<sup>5</sup>

## b) Ebola Preparedness

The readiness of the country for the Ebola virus that was present in neighbouring countries stands in contrast to aspects of the COVID-19 approach. Kenya took proactive measures including surveillance measures at border points and contact tracing although the application was not always consistent in nature.<sup>6</sup> In 2014, despite not having a single confirmed case, training was undertaken in all 47 counties including on the use of PPEs, screening was carried out and funds were provided to prevent the disease from crossing the border and dealing with it, should that happen. An isolation wing was

<sup>4</sup>Gain integrity (2020) Kenya Corruption Report Risk and Compliance Portal August 2020 Available at <https://www.ganintegrity.com/portal/country-profiles/kenya/>

<sup>5</sup>International Budget Partnership Kenya (2019) Are Kenya Counties Making Budget Documents Available to the Public? A Review of County Websites March 2019 Available at <https://www.internationalbudget.org/wp-content/uploads/kenya-county-budget-transparency-review-march-2019.pdf>

<sup>6</sup>Ziraba A (2019) Kenya responded fast to Ebola scare but cross border risk remains high The Conversation Available at <https://theconversation.com/kenya-responded-fast-to-ebola-scare-but-cross-border-risk-remains-high-119173>

also established at Kenyatta National Hospital.<sup>7</sup>Flights from high-risk areas in West Africa (Guinea, Liberia, and Sierra Leone) were suspended, a National Ebola Preparedness and Response Contingency Plan was developed and a National Task Force created. <sup>8</sup>Similar steps were taken in the wake of the 2019 Ebola outbreak in neighbouring countries including the provision of PPEs.<sup>9</sup>

It is difficult to address questions of Transparency and Accountability for this response because the disease did not enter Kenyan borders and the bulk of the response was limited to just this preparedness. On the question of transparency, however, information was provided to the public readily and the plans to deal with the Ebola virus were communicated to the public. This is in contrast to COVID-19 situation in which steps taken were announced and possibly formulated following the emergence of the first case in the country despite the existence of an ad hoc government bodies dedicated to the COVID-19 fight.

### c) Legal Provisions On Transparency

Article 35 on Access to Information states that every citizen has the right to:

\* 'Information held by the State' – 35(1)

\* 'The State shall publish and publicise any important information affecting the nation' – 35 (3)

This is further codified in the County Government Act under Section 96 and the Access to Information Act 2016. The County Government Act 2012 states in Section 96 (1): "Every Kenyan citizen shall on request have access to information," under Article 35 of the Constitution." It continues in 96(2) that "Every County Government and its agencies shall designate an office for ensuring access to information as required by subsection (1)"

The Access to Information Act gives effect to Article 35 of the Constitution above. This further, 'confers on the Commission on Administrative Justice (CAJ) the oversight and enforcement functions and powers for connected purposes.'

The Access to Information Act further states in Section on 5(e) that when entering into an agreement the Government should:

Publish on its website or through other suitable media, the following particulars in respect of the contract entered into:

- (i) The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service, and terms of reference.
- (ii) The contract sum.
- (iii) The name of the service provider, contractor, or individual to whom the contract has been granted: and
- (iv) The periods within which the contract shall be completed.

This was augmented by Executive Order No 2 of 2018 calling for the publication of all information online related to procurement. The Circular states in unequivocal terms that: "All public procuring entities are required to maintain and continuously update and publicize (through the websites of the Public Procuring Entity, e-Citizen, Public Procurement Regulatory Authority Platforms, Public Notice Boards and/or official government publications the information required and detailed in the Executive Order."

<sup>7</sup>WHO (2014) Kenya steps up its EBOLA Contingency Plan with the training of trainers 26th September 2014 WHO AFRICA Available at <https://www.afro.who.int/news/kenya-steps-its-ebola-contingency-plan-training-trainers>

<sup>8</sup>ibid

<sup>9</sup>MoH (2019) Press Release on Ebola prevention and response measures in the country <https://www.health.go.ke/press-release-on-ebola-prevention-and-response-measures-in-the-country/>

It continues: “Accounting Officers across Government are further directed to ensure that the contents of both the Executive Order as well as this Circular are brought to the attention of all institutions under their State Departments and/ or Supervision; as well as ensure full implementation and compliance with the same.”<sup>10</sup>

#### d) Legal And Institutional Framework On Accountability

On 31<sup>st</sup> of March 2020, the Senate established the ad hoc committee on the COVID-19 situation whose mandate is to oversee actions and measures taken by the national and county governments in addressing the spread and effects of COVID-19 in Kenya<sup>11</sup>. The government also set up a Cabinet Ad Hoc Committee on Health and the Inter-Ministerial Technical Committee on Government Response to the Coronavirus outbreak which were then subsumed by the National Emergency Response Committee (NERC) established by an Executive Order. This National Emergency Response Committee was set up at the end of February and given a broad mandate and functions inter alia:

- “Coordinate, Kenya’s preparedness, prevention and response to the threat of Coronavirus disease,
- Enhance surveillance at all ports/points of entry into Kenya
- Coordinate the preparation of national, county, and private isolation and treatment
- Coordinate the supply of testing kits, critical medical products/supplies, pharmaceuticals, masks and other protective gear within the Republic”<sup>12</sup>

The NERC is chaired by the Cabinet Secretary for Health and consists primarily of Cabinet Secretaries, Principal Secretaries, and Directors of various government organs. Based on the mandate outlined above, it is the cornerstone of the government response to COVID-19

The Constitution of Kenya under Article 228 establishes the office of the Controller of Budget whose function is to “oversee the implementation of the budgets of the national and county governments by authorising withdrawals from public funds...(and) shall not approve any withdrawal from a public fund unless satisfied that the withdrawal is authorized by law”<sup>13</sup>

The Controller of Budget therefore performs an oversight and controlling role over the use and release of funds. The Controller is further tasked with the preparation of quarterly, annual, and special reports to the Legislature and Executive on budget implementation matters of the national and county governments as provided by law according to (Article 228 (6) of) the Constitution.<sup>14</sup> The Controller of Budget has further advisory roles to Parliament, an investigative role following complaints made, and finally a public sensitization role under Section 39(8) of the Public Finance Management Act.

<sup>10</sup>The Presidency, Executive Office of the President, Head of the Public Service (2018), Executive Order No.2 of 2018 – Procurement of Public good, works, and services by public entities, Transmittal Letter 28th June 2018

<sup>11</sup>The Senate, Republic of Kenya (2020), Ad hoc committee on the COVID-19 situation in Kenya 3rd progress report Thematic Area 1: Health Issues, 28th April 2020, Clerks Chambers

<sup>12</sup>Executive Office of the President, State House, Executive Order 2 of 2020 National Emergency Response Committee on Coronavirus 28th February 2020

<sup>13</sup>Constitution of Kenya 2010



This section will examine three key instances of lack of accountability and transparency.

- Firstly, the audit report on the KEMSA dealings involving COVID-19 funds,
- Secondly, the findings of the media expose headlined as ‘COVID-19 millionaires’, and
- Thirdly, the lack of accountability in its actions taken directly to curb the pandemic such as the use of quarantine and enforcement of the curfew.

### a) The Government Response

In the early stage of the pandemic there were clear questions about the government response and a lack of clarity around the policy that was being deployed. This naturally resulted in a lack of transparency and accountability regarding the government’s actions. The most egregious cases of this lack of transparency and accountability were unearthed by journalists.

As the pandemic broke worldwide, questions were raised in Parliament on issues of preparedness for its eventual arrival. Senator Sylvia Kasanga, a member of the Senate Ad Hoc Committee on COVID-19 on 19th of February, 2020 sought a statement from the Government on its level of preparedness. Specifically, she asked for an explanation on the following:

1. Measures to improve surveillance at the points of entry
2. Plans the National Government had put in place to train medical personnel on the virus following the release of WHO guidelines
3. Measures in place to insulate medics and citizens from the spread of the virus to the counties
4. Explain how small-scale businesses would acquire goods and services from China <sup>15</sup>

Answers to these questions were not forthcoming and the Senator believes that this is because the government did not have a pandemic plan in place at the time. Request by the Senate for access to information on the contingency plans elicited no response from the State. The answers to these questions would have outlined how the government, and more specifically the Ministry of Health, had prepared to deal with the Pandemic.

### b) Public Health Measures

#### i. Quarantine procedures

In the early stages of the pandemic, the government initiated quarantine procedures that were not accompanied by clear guidelines on how this was to be carried out without violations of basic rights of Kenyans. Kenyans were being forcefully contained in overcrowded facilities without beddings, running water, and handled by staff who didn’t adhere to safety protocols <sup>16</sup>.

<sup>15</sup>NTV (2020), *COVID Millionaires*, Air Date Aug 16th, 2020, Nation Television Network

<sup>16</sup>Human Rights Watch (2020) *Kenya: Quarantine Conditions undermine rights* May 28, 2020, available at <https://www.hrw.org/news/2020/05/28/kenya-quarantine-conditions-undermine-rights>

Those who arrived in Kenya from foreign countries were sent to these centres at their own expense. The centres were not transparent with results of the tests they conducted, with the stay unilaterally extended should a resident display symptoms. This made citizens shun COVID-19 tests in order to avoid quarantine. In one instance, dozens of citizens made a daring escape from one of the isolation centres.<sup>17</sup> On their part, the Kenyan police forcibly detained and placed in quarantine, citizens found outside their homes after curfew hours.

The government later published a guide on quarantine protocols in Kenya. This was released on the 27th of March, 2020 although the directives had been in place since the 22nd of March, 2020.<sup>18</sup> Investigations by CSOs found that the facilities had failed to meet the conditions laid out in this guide including being well ventilated, ensuring social distancing, regular cleaning, and disinfection of laundry, dedicated linen and utensils for each person, and provision of regular detergents for cleaning.<sup>19</sup> In response to this and several other unanswered requests for information, several CSOs including Transparency International Kenya, filed Petition 81 of 2020 which challenged

“the failure of various State and public entities to provide timely and accurate information during the COVID-19 health pandemic.”<sup>20</sup>

The letters to the government sought inter alia to obtain information about:

- The implementation of mandatory quarantine
- The rationale for extending the quarantine beyond the initial 14-day period
- The rationale for mandatory quarantine as punishment for those who allegedly commit curfew offenses<sup>21</sup>

Following a rise in COVID-19 cases, the government instituted home quarantine measures and put in place regulations governing how this would be done and preconditions for the same. From a Transparency and Accountability perspective, the government response was wanting. Indeed, the impetus for Transparency came from external actors notably the civil society, the public, and the media. The government failed to explain the rationale and strategy behind the quarantine procedures and the failures in implementation. No action has been taken about this.

## ii. Cessation Of Movement, Curfew, And Mask Mandate

To stem the spread of the virus and prevent large gatherings, the government instituted a mandatory mask mandate, a curfew, and cessation of movement in and out of Nairobi and Mombasa and hotspot areas within these cities.

However, investigative reports in the media exposed how corruption was allowing citizens to bypass these movement restrictions by paying off police at crossing points.<sup>22</sup> The government further announced that it would be initiating cash transfers and allocated funds and received donations from various sectors to fight the pandemic. There have been reports that the mechanism for distributing this cash was biased and the government should give clarity on how this has been done.<sup>23</sup>

<sup>17</sup>Basillio Muthai (2020) *Coronavirus: The fear of being sentenced to a Kenyan quarantine center 19 April 2020 BBC News Available at <https://www.bbc.com/news/world-africa-52326316>*

<sup>18</sup>Ministry of Health (2020) *COVID-19 Quarantine Protocols March 27th, 2020 Ministry of Health*

<sup>19</sup>KHRC (2020) *Kenya Quarantine Conditions Undermine Rights Press Releases 28 May 2020 KHRC Available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/715-kenya-quarantine-conditions-undermine-rights.html>*

<sup>20</sup>Transparency International Kenya (2020) *Petition 218 Of 2020 On The Right Of Access To Information Media Advisory Transparency International Kenya*

<sup>21</sup>Petition No 81 of 2020

<sup>22</sup>Citizen TV (2020) *Virus Safaris- How Passengers are beating the restriction of movement out of Nairobi June 21, 2020, Available on [https://www.youtube.com/watch?v=ynPPU7577xl&ab\\_channel=KenyaCitizenTV](https://www.youtube.com/watch?v=ynPPU7577xl&ab_channel=KenyaCitizenTV)*

<sup>23</sup>Victor Rateng (2020) *Improving Kenyans' Access to Cash Transfers for COVID-19 Response August 2020 MitGov Available at <https://mitgovlab.org/updates/improving-kenyans-access-to-cash-transfers-for-COVID-19-response/>*

The imposition of curfew and enforcement of other related regulations in various cities across the country was characterised by police brutality. On the first day of the curfew,

there were reports of police brutality in enforcing this curfew, illustratively, in Mombasa County, where police used tear gas and brutalised ferry users well before the curfew time.”<sup>24</sup>

As the curfew began, there were multiple instances of police brutality as they arrested and detained citizens who failed to observe curfew hours and public health regulations. The use of tear gas and batons on hapless and helpless citizens were common.<sup>25</sup> Up to 15 people were killed by the police who were enforcing the curfew, prompting CSOs to file a suit seeking inter alia to “ensure that there is one particular department or a Cabinet Secretary who will be tasked with implementing legislation that relates to the protection of the citizenry from excessive force”<sup>26</sup>

Police officers have been charged over killings by the Independent Police Oversight Authority (IPOA), in cases that received significant social and traditional media attention.<sup>27</sup> The police were also found by the media and social media to have used brutality in the enforcement of the mandatory mask mandate. While the government released guidelines on how to wear masks and the standards that were expected, questions were raised over affordability of the masks. The government has rolled out mask distribution but the strategy and full audited details of this programme have not been shared with the public.

### iii. PPEs and medical equipment

These would be in the form of supplies and funds that were to be used to equip the country with various items such as Personal Protective Equipment (PPE)s, masks, and other medical supplies. The government allocated funds to purchase these and even began local production of PPEs.

In August, a media expose was aired detailing corruption in the health sector related to the money that was coming in for the fight against the virus. Some of these findings were vindicated by an audit of KEMSA conducted in September. This was in the wake of questions around the use of resources for the pandemic with Health Cabinet Secretary Mutahi Kagwe saying that he was fighting against cartels in the ministry and that theft of donor money had reached record-breaking levels<sup>28</sup>. EACC has conducted investigations into the theft of COVID-19 resources by KEMSA and recommended prosecution to the ODPP. But the latter has returned the file to the EACC for further investigations and to address gaps in the evidence.<sup>29</sup>

The documentary noted that while medical officers were lacking PPEs in hospitals, KEMSA had undertaken a massive procurement of these items and stolen some donations of equipment in collusion with high ranking political figures, including some within the Senate.<sup>30</sup> As early as April, the Senate Ad-Hoc Committee on COVID-19 identified the lack of PPEs

<sup>24</sup>KELIN Kenya (2020) Advisory Note on ensuring a rights-based response to curb the spread of COVID-19 Available at <https://www.kelinkkenya.org/wp-content/uploads/2020/03/letter2.pdf>

<sup>25</sup>Al Jazeera (2020) Kenya Police under fire over excessive force as curfew begins Al Jazeera Available at <https://www.aljazeera.com/news/2020/3/28/kenya-police-under-fire-over-excessive-force-as-curfew-begins>

<sup>26</sup>VOA News (2020) Kenya government sued over alleged killings, human rights violations September 24, 2020, Available at <https://www.voanews.com/africa/kenya-government-sued-over-alleged-killings-human-rights-violations>

<sup>27</sup>VOA (2020) Kenya charges police officer with murder for Coronavirus curfew death June 12, 2020, Available at <https://www.voanews.com/africa/kenya-charges-police-officer-murder-coronavirus-curfew-death>

<sup>28</sup>Paul Wafula and Angela Oketch (2020) Senior Executives at KEMSA on the radar in EACC probe September 29, 2020, Daily Nation Available at <https://nation.africa/kenya/news/senior-executives-at-kemsa-on-eacc-radar-in-graft-probe-1807596>

<sup>29</sup>Citizen TV (2020) DPP returns KEMSA investigation file to EACC for further probe October 2, 2020, Available at <https://citizentv.co.ke/news/dpp-returns-kemsa-investigation-file-back-to-eacc-for-further-probe-346698/>

<sup>30</sup>NTV (2020) COVID Millionaires Air Date Aug 16th, 2020 Nation Television Network

among health workers, low fulfilment rates by KEMSA, and allegations of the high cost of goods at KEMSA.<sup>31</sup> Philanthropist Jack Ma of Alibaba had donated testing kits and face masks as did other countries. These were received by the Ministry of Health and were supposed to be deployed immediately. There were reports of these supplies being stolen from the airport. The DCI is still investigating this matter.<sup>32</sup>

The documentary alleged that three-quarters of these donations were taken to be stored in a warehouse in Tanzania while the rest were sold out to suppliers of KEMSA who would then sell it back to KEMSA when the agency was undertaking procurement. The companies and individuals involved are said to enjoy State protection.<sup>33</sup> As billions of shillings poured into the COVID-19 fund, these suppliers took advantage of the situation to collude with KEMSA officials. According to Corruption Tracker, these donations total KShs. 253,033,548,450.

The exposes speak of suppliers who were invited to submit bids and requested to supply immediately – but although they won the tenders, they received letters terminating the same. Preferred companies then received these tenders, a fact that was flagged by the Ad Hoc Committee on COVID-19. This meant that double payments could be issued in the system. Details of suppliers kept in the system were accessed and used to open similar accounts to allow for the receipt of funds to shadow accounts.<sup>34</sup> Some of these companies did not meet the requirements for supplying, a fact confirmed by the OAG special audit.

On camera, doctors demonstrated the sub-standard nature of PPEs they were forced to use while medics in counties often lacked sufficient equipment despite massive procurement by KEMSA. Doctors have gone on strike citing lack of PPEs, delayed payments, lack of medical cover, and being forced to pay for COVID 19 treatment from their own pockets should they contract the virus despite the government saying that it had distributed sufficient PPEs.<sup>35</sup> Civil society organisations including Transparency International - Kenya have petitioned the Cabinet Secretary in the Ministry of National Treasury and Planning on these issues. The petition states: “We have noted with great concern, gaps in transparency, and accountability by government agencies charged with managing COVID-19 resources. These loopholes have led to the overpricing of commodities, purchase of substandard Personal Protective Equipment (PPEs), embezzlement of commodities including donated PPEs, failure to take the PPEs to those who need them the most such as healthcare workers on the frontline fighting COVID-19, and misappropriation of public funds meant to procure protective gear”<sup>36</sup>

The government failed to provide sufficient medical equipment and explain why the distribution failed to take place. Through the medical fraternity and the media, the citizens brought these issues to light and this caused oversight authorities to intervene. As a result of this, the Ad Hoc Committee on Health took action and ordered an audit of KEMSA by the OAG.

<sup>31</sup>The Senate Republic of Kenya (2020) Ad hoc committee on the COVID-19 situation in Kenya 3rd progress report Thematic Area 1: Health Issues 28th April 2020 Clerks Chambers

<sup>32</sup>East African (2020) Scanty information on Jack Ma's COVID-19 donations to Kenya June 20, 2020, East African Available at <https://www.theeastafrican.co.ke/tea/news/east-africa/scanty-information-on-jack-ma-s-COVID-19-donations-to-kenya-1443560>

<sup>33</sup>NTV (2020) COVID Millionaires Air Date Aug 16th, 2020 Nation Television Network

<sup>34</sup>ibid

<sup>35</sup>US News Dozens of Kenyan Doctors strike over lack of PPE, delayed pay Aug 18, 2020, Available at <https://www.usnews.com/news/world/articles/2020-08-18/dozens-of-kenyan-doctors-strike-over-lack-of-ppe-delayed-pay>

<sup>36</sup>Transparency International (2020) Petition on measures to institute Transparency and Accountability in COVID-19 procurement 10 Sep 2020

### c) KEMSA Audit

Following the revelations of the COVID-19 Millionaires' documentary and other questions in the media about corruption, the Office of the Auditor-General undertook a special audit of the utilization of COVID-19 funds by KEMSA for the period 13 March – 31 July 2020. It released its report in September 2020.

KEMSA is a state corporation under the Ministry of Health established under the KEMSA Act 2013 whose mandate is:

- “Procure, warehouse and distribute drugs and medical supplies for prescribed public health programmes, the national strategic stock reserve, prescribed essential health packages, and national referral hospitals
- Establish a network of storage, packaging, and distribution facilities for the provision of drugs and medical supplies to health institutions.
- Enter into partnership with or establish frameworks with County Governments for purposes of providing services in procurement, warehousing, distribution of drugs, and medical supplies.
- Collect information and provide regular reports to the national and county governments on the status and cost-effectiveness of procurement, the distribution and value of prescribed essential medical supplies delivered to health facilities, stock status, and any other aspects of supply system status and performance which may be required by stakeholders.
- Support County Governments to establish and maintain appropriate supply chain systems for drugs and medical supplies”<sup>37</sup>

Worth noting is the inclusion of Transparency and Accountability measures in its mandate such as the provision of reports and cost-effectiveness and its mandate to supply the counties with the required items.

This audit was in response to requests from oversight bodies to perform an audit of the utilization of COVID-19 funds given the questions that had arisen over procurement.

The OAG was required to report whether or not:

- a) “KEMSA adhered to the Public Procurement and Asset Disposal Act, 2015 (PPADA, 2015) in the procurement of medical supplies for combating the COVID-19 pandemic;
- b) KEMSA adhered to the Public Finance Management Act, 2012 (PFMA, 2012) in the procurement of medical supplies; and
- c) There was value for money in the procurement of medical supplies through KEMSA, for purposes of combating the pandemic.”<sup>38</sup>

<sup>37</sup>KEMSA (2020) About KEMSA Available at <https://www.kemsa.co.ke/about-us/>

<sup>38</sup>Ibid pg 6

As illustrated in the table below KEMSA failed on all these three counts, demonstrating that there was a lack of transparency in the way the procurement was carried out in the early months of the pandemic. <sup>39</sup>

	Statutory Requirement	Summary of findings
1	Adherence to the Public Procurement and Disposal Act, 2015 (PPADA, 2015)	Management of KEMSA violated provisions of the PPADA, 2015 in all material aspects
2	Adherence to the Public Finance Management Act, 2012 (PFMA, 2012)	The budgetary process for capital budgets did not comply with PFMA, 2012
3	Value for money	Given the inefficiencies in the procurement process and the fact that 97% of supplies procured were still in KEMSA warehouses at the time of the audit, there was no value for money realised.

**(i) The report found that KEMSA requested the use of Universal Health Coverage (UHC) funds** in June from the Cabinet Secretary for Health, Mr Mutahi Kagwe, who declined this permission but later wrote to the Principal Secretary in August, 2020 that they had used UHC funds for COVID-19 procurement. KEMSA also used its capital budget which the audit found was in contravention of the PFMA 2012 that requires Accounting Officers to ‘ensure resources are used in a lawful, effective, efficient, economical and transparent manner’

**(ii) The audit investigated the source of funds for COVID-19 procurement.** There was conflicting information around this on the amounts disbursed by the National Treasury and what was received by KEMSA and MoH. This will be the subject of a forthcoming special audit.

**(iii) The special audit established that there was irregular use of the Retrospective Direct Procurement Method.** Direct procurement was used for emergency goods as the COVID-19 was detected in the country and that “Commitment letters were issued to suppliers and then the procurement process was to follow after deliveries were made.” <sup>40</sup>

According to the Public Procurement and Asset Disposal Act of 2015 under Section 103 and 104 (c), this is allowed:

- Under circumstances of urgency,
- Provided that the acquisition price is fair and compares well with known prices. No market index was undertaken in this case
- The purpose is not to avoid competition
- Appropriate approvals are sought <sup>41</sup>

The audit report found that where approval was sought, this was done afterwards and that the procurement on 18th March was done without putting into place necessary systems and procedures. The examination of samples was carried out before delivery but this was not governed by controls or procedures to guarantee that there was a budget available for this. It emerges later in the report that some of these budgets were lacking.

<sup>39</sup>Ibid pg8

<sup>40</sup>Ibid pg 34

<sup>41</sup>Ibid pg13

By the time requisite guidelines were in place on the 24th of April, KEMSA had commitment letters of Kshs3,966,636,560 which had therefore been irregularly issued and existing guidelines not followed.

Based on the actions explained above, the audit found that Kshs 8,388,872,706 was irregularly allocated.<sup>42</sup>

**(iv) The audit found that COVID-19 procurement was started without the requisite budgets.** This was a violation of the PPADA which requires that funds be available to meet these obligations and PFMR to ensure that funds are used only for the purpose which they are allocated. (As explained earlier, UHC funds and other allocations were diverted to the COVID-19 fight without authorization). As the audit report notes, “There is a risk that KEMSA may not be in a position to efficiently and effectively implement the UHC programme given that some of the funds have been irregularly utilized in the procurement of COVID-19 items.”<sup>43</sup>

**(v) KEMSA failed to integrate COVID-19 related procurement plans into the budget process.** KEMSA approved a procurement plan worth Kshs 5,096,027,600 which was higher than the available capital budget. This violated the PPADA Section 53(5) which requires that ‘procurement and asset to be based on indicative or approved budgets which shall be integrated with the applicable budget process’

**(vi) There were inefficient stock management procedures at KEMSA.** The PFMR Section 139(2) requires the assurance that there is effective, efficient, economical, and transparent use of government assets. The assets were procured based on an emergency yet, out of stock of a value of Kshs 7,632,068,588 the quantity still in the warehouse was worth Kshs 6,279,531,019. Further, KEMSA lacks the funds to pay Kshs 2,919, 198,672. As the audit report clearly states:

“This is an indication that there was no justification for procuring the items based on urgency”

On 20th August 2020, KEMSA wrote to the Cabinet Secretary for Health saying that should KEMSA sell off excess stock at market price, which would be lower than the purchase price, it would result in a loss of 2,338,261,175. The audit also questions the ease of selling these items given their declining demand. The audit undertook an age analysis and found that 97% of COVID-19 items had been at the warehouses for over 3 months. The audit concluded that,

“KEMSA over procured COVID-19 related stock without an objective assessment and forecasting of the existing demand for the products.”<sup>44</sup>

**(vii) There were red flags indicative of procurement fraud.** Some companies had been in existence for less than one year and hence could not have met the necessary qualifications and experience but were nonetheless awarded significant contracts. These totalled a contract value of Kshs. 1,258,860,000.

The audit notes that there was no need for an assessment done to determine the amounts required as evidenced by the stock in the warehouse. On this subject, the report concludes that: “The procurements were therefore not conducted in the best interest of KEMSA and the public but could have been influenced by suppliers and management of KEMSA. There is a need for further investigations on all companies engaged by KEMSA to establish acts of procurement frauds and collusion”<sup>45</sup>

These findings tie in with what was revealed in the ‘COVID-19 Millionaires’ expose.

<sup>42</sup>Ibid

<sup>43</sup>Ibid pg 38

<sup>44</sup>Ibid Pg 17

<sup>45</sup>Ibid Pg 19

**(viii) There were cases of overpricing by suppliers.** In one illustrative case, surgical masks were offered at a price of Kshs 4,750 for a 50 pack which was then revised down by the supplier to KShs3,813 per pack of 50. However, the evaluation committee noted the price was negotiated down from Kshs 4,750 to KShs4,500 a pack. Based on these and other inconsistencies, it is estimated that in this case involving surgical masks, up to Kshs39,510, 000 could have been lost.

**(ix) Finally,** the special audit identified numerous violations of the PPADA including:

- Failure to conduct a market survey for items being procured
- Failure by quality and assurance department to test samples before issuance of a commitment letter.
- Irregular extension of delivery timelines
- Delivery of products past agreed timelines without approval
- Engagement in business for which the supplier was not incorporated for
- The supplier being financially incapable to execute the contract
- Director (s) technically incapable and inexperienced to supply medical commodities
- The supplier having inadequate experience in the market/industry
- Engagement of suppliers who were not prequalified
- Pre-qualifying suppliers without evaluation and approval

Based on these findings the special audit identifies specific irregularities, the laws violated, the amount at risk, and those who bear responsibility. In all instances the Chief Executive Officer and Management of KEMSA were identified as responsible. Its recommendations are as follows:

- “Investigations should be conducted by the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC) to establish criminality in the procurement process for COVID-19 related items and possible collusion between the management and the companies that supplied the items;
- The management of KEMSA should withhold any further processing of COVID-19 related claims until an independent audit is done to confirm the legitimacy of the claims. This should include a reconciliation of the procurements made under Capital and UHC budgets to establish the legitimacy of the claims;
- The KEMSA board should consider overhauling the agency’s business model which has failed to ensure a robust supply chain management system that is efficient, effective, economical, and transparent (Note that these are the same recommendations made by the donor audit)
- Appropriate action should be taken on those found culpable, or responsible for actions as indicated in this special audit report<sup>46</sup>

In response to this, KEMSA CEO Jonah Manjari was suspended in August 2020 alongside the Commercial Director and Procurement Director to allow for investigations into the findings of the OAG report on COVID-19 procurement. The CEO was also summoned to answer questions before the Senate on these matters. The EACC has launched its investigations into the matter. Its officers visited the KEMSA offices and seized computers, files, and other relevant evidence. The EACC recommended prosecution of the KEMSA officers to the ODPP. However, the file was returned to the EACC for further investigations and to address gaps in the evidence.<sup>47</sup> This begins to address the question of accountability measures although to date this remains unresolved.

<sup>46</sup>Ibid pg 26

<sup>47</sup>Citizen TV (2020) DPP returns KEMSA investigation file to EACC for further probe October 2, 2020, Available at <https://citizentv.co.ke/news/dpp-returns-kemsa-investigation-file-back-to-eacc-for-further-probe-346698/>



In sum then, there was no transparency at the time of procurement nor in its immediate aftermath. This was however provided later through the work of oversight institutions including the Senate, the OAG through its audit report, and the EACC and ODPP for their roles in the investigation and yet to be realized prosecutions. It is important to note that on the question of accountability particularly responsibility this follows the same path as many previous scandals highlighted in the contextual background –lack of prosecutions resulting in impunity. On a positive note, citizens, media, and public engagements with these issues did lead to action by the government to enhance transparency by undertaking the audit and investigations and beginning the process towards accountability through suspension of officers, investigations, and possible prosecution.

#### **d) Controller of Budget**

At the start of the pandemic, the Controller of Budget and National Treasury in recognition of the resources that would be needed, suspended all payments that were due to suppliers both individuals and entities and in announcement made at the end of March, declared that only salaries would be processed in an announcement made at the end of March. The office further noted that since COVID-19 was not foreseen in budgets, reorganization and re-prioritization of these budgets and development of new ones would need to take place for purposes of dealing with the pandemic.<sup>48</sup>

At the request of the Senate Committee on Health, and following reports from the MoH that county governments had not prepared themselves adequately for the pandemic, as well as allegations of the counties misappropriating funds, the Controller of Budget produced a Special Budget Review Implementation Report on the Utilisation of Funds by the County Governments Towards COVID-19 for the period 13th March to 31st July 2020.<sup>49</sup>

The report found that out of KShs13.1 billion shillings allocated to the counties between March and July, 2020 only 33 percent has been spent by the counties. The Controller of Budget noted that there were no clear guidelines from the National Government on the role that counties should play in the COVID-19 response at the outset. Further Nairobi and Mombasa which were then and still remain epicenters of the outbreak did not provide information on their expenditure towards COVID-19.<sup>50</sup>

These figures are based on self-reporting so this is not an audit of county spending which has not been done months into the pandemic. This included KShs5 billion for quarantine and isolation facilities and KShs2.36 billion for allowances for healthcare workers. The report does not cover donations received by individual counties.<sup>51</sup>

The report identifies the following issues:

- **Failure by County Governments to Budget for COVID-19:** The timing of the funds shared was too close to the end of the Financial Year 2019/20 and budgets had not been prepared for these. Therefore, at the end of the Financial Year these funds could not be withdrawn.
- **Lack of adequate support from the National Government** – No clear guidelines on preparedness for the pandemic in the counties was provided until the end of May

<sup>48</sup>Daily Nation (2020) Treasury suspends all due payments over COVID-19 May 13, 2020, Available at <https://nation.africa/kenya/news/treasury-suspends-all-due-payments-over-COVID-19-284106>

<sup>49</sup>The Star (2020) Budget Report: Irony of COVID-19 Billions lying idle in counties 28th August 2020 The Star <https://www.the-star.co.ke/news/2020-08-28-budget-report-irony-of-COVID-19-billions-lying-idle-in-counties/>

<sup>50</sup>ibid

<sup>51</sup>OCOB (2020) Special Budget Review Implementation Report on the Utilisation of Funds by the County Governments Towards COVID-19 for the period 13th March to 31st July 2020

From the foregoing, the following recommendations were made:

- That county governments factor in COVID-19 funds into the current fiscal year budget to facilitate withdrawal of funds
- The national government should provide support to implement the budgets and ensure that required standards are met
- The counties and the national government should conduct audits for these funds as is required.<sup>52</sup>

In sum, from a transparency perspective, counties self-reported for the report but were unable to provide large amounts of information required. This report was in part prompted by the MoH expressing concerns that counties were not prepared despite receiving funding. From an accountability perspective, it is positive that this report was generated by an oversight institution at the request of the Senate and, in some part, due to public pressure. However, in terms of responsibility as a facet of accountability, this has not yet been assigned although an audit has been recommended.

### e) Review of Transparency and Accountability

The extent to which these responses demonstrated Transparency and Accountability is summarised in the matrix below. Overall, it demonstrates that Transparency and Accountability have stemmed from oversight authorities, the public, media, or civil society and that the responsibility aspect of accountability has been lacking.

Transparency and Accountability principles	Extent achieved
<b>Preparedness</b>	
<ul style="list-style-type: none"> <li>• Transparency -Measures in place before the first case</li> <li>• Transparency -Measures taken to prevent the virus at the point of entry</li> </ul>	<ul style="list-style-type: none"> <li>• Not disclosed to the public and not available on request by the Senate</li> <li>• Flight from China came into the country without proactive government information on measures taken</li> </ul>
<ul style="list-style-type: none"> <li>• Accountability – Pressure from media, civil society, and the public</li> <li>• Accountability from oversight institutions</li> </ul>	<ul style="list-style-type: none"> <li>• Little or no accountability for the lack of preparations taken beforehand. Revelations of the Chinese flight that came into the country came from the public and resulted in pressure for accountability from the public and the media</li> <li>• The High Court barred flights from China from landing in the country</li> </ul>
<b>Quarantine</b>	
<ul style="list-style-type: none"> <li>• Transparency: Policy documents released on quarantine but in practice there was poor implementation</li> </ul>	<ul style="list-style-type: none"> <li>• Challenges within quarantine facilities were uncovered by media, civil society, and the public, not by government oversight</li> </ul>
<ul style="list-style-type: none"> <li>• Accountability: Rationale and strategy behind the application of certain quarantine measures and poor conditions</li> </ul>	<ul style="list-style-type: none"> <li>• No accountability for the violations of health guidelines and detention of citizens in these conditions</li> </ul>

<sup>52</sup>ibid

## Cessation of movement, curfew, and mask mandate

<ul style="list-style-type: none"> <li>• Transparency: The government provided clear directives for these measures but didn't explain the strategy for implementation</li> </ul>	<ul style="list-style-type: none"> <li>• The government failed to provide information on its mask distribution programme and explain measures taken to stem police brutality in curfew enforcement</li> </ul>
<ul style="list-style-type: none"> <li>• Accountability: Horizontal accountability from oversight agencies lacking</li> </ul>	<ul style="list-style-type: none"> <li>• The government has not taken significant action to stem police brutality or hold the law enforcement officers to account</li> <li>• Lack of accountability for the violations of curfews and cessation of movement</li> </ul>

## PPEs and medical equipment

<ul style="list-style-type: none"> <li>• Transparency : Government undertook procurement for required medical supplies</li> </ul>	<ul style="list-style-type: none"> <li>• The government neither explained how the supply of medical equipment was undertaken nor the distribution pattern.</li> </ul>
<ul style="list-style-type: none"> <li>• Accountability : The media and medical officers revealed that this procurement did not culminate in adequate medical supplies being distributed</li> </ul>	<ul style="list-style-type: none"> <li>• Culpability for the failure to provide adequate medical supplies is lacking and medical officers still lack equipment</li> </ul>

## KEMSA AUDIT

<ul style="list-style-type: none"> <li>• Transparency: It was made known that procurement was being carried out but details were lacking</li> </ul>	<ul style="list-style-type: none"> <li>• Transparency was not evident at the time of the procurement nor was it present soon afterward.</li> <li>• Transparency was present through the media documentary (COVID millionaires) not from the government but was followed by an audit from the OAG</li> </ul>
<ul style="list-style-type: none"> <li>• Accountability: Pressure from the media, civil society, and the public</li> <li>• Accountability: Use of audit institutions</li> <li>• Accountability: Question of responsibility</li> </ul>	<ul style="list-style-type: none"> <li>• The 'COVID millionaires' documentary created public pressure and public opinion in support of accountability</li> <li>• The Senate and other organs questioned KEMSA and MoH officials and requested an audit which was carried out by the OAG</li> <li>• The EACC has carried out investigations, KEMSA officials have been suspended but the ODPP has returned the file for further investigations. Therefore, no prosecutions have taken place.</li> </ul>

## Controller of Budget Report on Counties

<ul style="list-style-type: none"> <li>• Transparency: Information provided by counties on spending</li> </ul>	<ul style="list-style-type: none"> <li>• Counties self-reported for the Controller of Budget Report</li> <li>• MoH identified that counties were not prepared despite receiving funding</li> <li>• Very few counties were able to provide adequate information when self-reporting indicating poor Transparency</li> </ul>
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<ul style="list-style-type: none"><li>• Accountability: Use of audit institutions</li><li>• Accountability: Question of responsibility</li><li>• Accountability: Public and media pressure</li></ul>	<ul style="list-style-type: none"><li>• A report carried out by an audit institution at the request of the Senate and oversight institution</li><li>• Recommendations for an audit made but this has not been carried out and there have been no investigations</li><li>• Public and media pressure on the lack of facilities in the counties helped to prompt action</li></ul>
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This section examines some of the best practices in Transparency and Accountability including procurement, auditing processes, and access to information by the general public. During a crisis such as this, these measures would enhance public trust which is paramount to a successful approach in combating the virus. Put simply, the public is more likely to follow government health regulations if they understand them and the authorities make conscious efforts to explore this. As is often the case in Kenya, requisite laws and policies are already in place but have not been followed.

Key best practices identified and the actions which the government has taken to apply them are summarised in the table below.

Best Practices	Kenya Actions
Emergency Financing Provisions	<ul style="list-style-type: none"> <li>The COVID -19 Emergency Response Fund was established and financing was made available for the response</li> </ul>
<b>Safeguards for emergency procurement</b> <ul style="list-style-type: none"> <li>A procurement process should be auditable</li> <li>Daily updates provided in Togo on payments made in a Social Transfer Programme</li> </ul>	<ul style="list-style-type: none"> <li>Public Finance Management (COVID-19 Emergency Response Fund Regulations) 2020 put in place but these only refer to existing applicable regulations.</li> <li>Safeguards then were largely not put in place.</li> <li>Detailed information on Government support such as cash transfers has not been provided.</li> </ul>
<b>Open data contracting system</b> <ul style="list-style-type: none"> <li>Colombia publishes tender data and technical comments</li> <li>Sierra Leone and Togo have published online information on procurement</li> </ul>	<ul style="list-style-type: none"> <li>The government-published summary of KEMSA awards from 2019 to 2020 containing details of contract description, date, amount, the reason for award and list of owners/shareholders/owners.</li> <li>Further details could be provided including technical comments. Most responses related to the reason for award of emergency direct procurement or evaluated bidder response.</li> </ul>
<b>Audits</b> <ul style="list-style-type: none"> <li>European Union targets audit to those areas most likely to be at risk</li> <li>Honduras seeks to correct irregularities as soon as they occur</li> <li>Use of real-time audits</li> <li>Independent audits conducted (Liberia and Sierra Leone)</li> </ul>	<ul style="list-style-type: none"> <li>A special audit of KEMSA procurement for COVID-19 was undertaken following requests from the Senate.</li> <li>Further audits are required on other aspects of the emergency response.</li> </ul>

<p><b>Transparency from donors</b></p> <ul style="list-style-type: none"> <li>• Publication of contracts</li> <li>• Auditing by independent monitors</li> </ul>	<ul style="list-style-type: none"> <li>• Neither donors nor the government has published audit reports, done evaluations or revealed details of contracts and/or agreements that are in place for the COVID-19 response. Where these reports have been published for other health initiatives, efforts should be made to make them easily accessible to a Kenyan audience through government websites.</li> </ul>
<p><b>Publication of contracts</b></p> <ul style="list-style-type: none"> <li>•Ukraine had all emergency contracts published including payment delivery and value</li> </ul>	<ul style="list-style-type: none"> <li>• The government has not published emergency contracts and further details such as delivery.</li> </ul>
<p><b>Regular consultation and communication</b></p> <ul style="list-style-type: none"> <li>• Right to information should be honoured</li> <li>• Regular communication to the public and other stakeholders</li> </ul>	<ul style="list-style-type: none"> <li>• The government has been taken to court over the failure to provide timely and accurate information on the response to the pandemic.</li> <li>• Government officials have regularly appeared on local media, however, daily briefings have more often than not become press releases rather than press conferences as was the case at the start of the pandemic.</li> </ul>

Further details on these approaches are provided below.

## I) Emergency Financing Provisions

During an emergency, Public Finance Management expert Wangari Mukia highlights that an effective system should have emergency financing provisions which the GoK achieved, simplify procedures, and accelerate spending. The downside of such an approach is the lack of safeguards and the dilution of accountability mechanisms a problem which has been heightened by COVID-19.<sup>53</sup>

### ii) Safeguards For Public Procurement

Countries such as Sierra Leone and Togo have published online information on procurement or used interim audits, while Honduras carries out ‘concurrent controls’ helping to address irregularities as soon as they occur.<sup>54</sup>

The government has put in place emergency financing provisions and funding was made available and received from several donors regularly. Emergency Response regulations such as Public Finance Management (COVID-19 Emergency Response Fund Regulations) 2020 were put in place but these did not provide for emergency procurement. As per these regulations,

“The Fund shall be governed per the financial and procurement laws and regulations as applicable”<sup>55</sup>

### iii) Open data contracting system

The use of Open Contracting is about being able to publicly trace the flow of money through the system including planning, how tenders are awarded, the reasons for the awards, delivery, and implementation. Kenya has a Public Procurement Portal as mentioned earlier and the principle is enshrined in the law. In 2020, a mapping was taken on the Kenyan Open Data Contracting System which found that there was no gender-disaggregated data and that disclosed data was mostly historical.<sup>56</sup>

<sup>53</sup>IREX International (2020) Accountability in Resourcing Kenya’s COVID-19 Response Webinar October 22, 2020, [https://www.youtube.com/watch?v=NzAjinoQPew&feature=youtu.be&ab\\_channel=IREXdc](https://www.youtube.com/watch?v=NzAjinoQPew&feature=youtu.be&ab_channel=IREXdc)

<sup>54</sup>IMF (2020) COVID-19 Funds in Response to the Pandemic Fiscal Affairs August 26, 2020

<sup>55</sup>Public Finance Management (COVID-19 Emergency Response Fund Regulations) 2020 Article 13

<sup>56</sup>ICJ-K (2020) Factsheet – Second OCDS Mapping Report ICJ

Colombia which uses the Open Data Contracting system as a standard, has an e-procurement platform which it uses during COVID-19. Colombia's National Health Institute discloses not only tender data and information but all the technical comments received from potential suppliers.<sup>57</sup>

In Ukraine, anti-corruption reforms oblige all emergency contracts to be published in full, shared as open data, including terms of payment and delivery, and value. Civil society has developed a business intelligence tool to monitor COVID-19 related medical procurement and emergency spending and includes information such as the name of items, the price per item, terms and supplier.<sup>58</sup>

#### iv) Audits

An analysis of the European Union case notes that, in light of the massive spending on COVID-19 and the fact that auditors do not have unlimited resources and that audits should be undertaken based on risk assessment, those targeted should have a history of corruption, and in those areas where the risk of failure to procure is greatest to the detriment of the public good.<sup>59</sup> In Italy for example, due to rushed procurement companies that would have been disqualified from supplying the government received contracts which were later blocked after the media broke the story.<sup>60</sup>

Research into corruption during disasters and emergencies have shown that speed doesn't have to mean a lack of accountability. Measures that can be taken during the pandemic include:

- Public procurement mechanisms should be relaxed only when a clearly defined urgency test is met and documented, and only to the extent necessary.
- Regardless of how expedited the process is, procurements should be auditable
- All public contracts under emergency procedures should be promptly published
- Similar principles and approaches should apply to government distribution of emergency economic stimulus packages and support programs for business and households
- Institutions designed to provide oversight and accountability of public actors should be protected and reinforced
- The right to information should be honored to the most practicable extent and supported through proactive government publication of information
- Finally, a free and independent media should be protected<sup>61</sup>

<sup>57</sup>UNDP (2020) *Promoting Transparency and Accountability during COVID-19* June 9, 2020, Available at <https://www.undp.org/content/undp/en/home/blog/2020/promoting-accountability-and-transparency-during-COVID-19.html>

<sup>58</sup>*ibid*

<sup>59</sup>EIPA (2020) *Procurement audit – helping to ensure public money is well spent in the crisis* June 2020 EIPA Briefing Available at <https://www.eipa.eu/procurement-audit-helping-to-ensure-public-money-is-well-spent-in-the-crisis/>

<sup>60</sup>Ben Hallman (2020) *Investigating the coronavirus: Who is cashing in?* ICIJ March 24, 2020, Available at <https://www.icij.org/inside-icij/2020/03/investigating-the-coronavirus-who-is-cashing-in/>

<sup>61</sup>World Justice Project (2020) *Corruption and the COVID-19 pandemic* World Justice Project Pg 6 Available at <https://worldjusticeproject.org/sites/default/files/documents/Corruption%20Design%20File%20V4.pdf>

Supreme Audit Institutions (SAI)s play a big role during a crisis. In Sierra Leone, the funds raised from various sources to handle the Ebola crisis totalled 20,792,588 USD approximately KSh2.3 billion all of which were audited through a real-time audit by the Audit Service Sierra Leone (ASSL), a constitutionally mandated organization. <sup>62</sup>

Audits undertaken in Liberia and Sierra Leone as they faced Ebola identified the following key lessons:

- There should be clarity on the role of oversight or Supreme Audit Institutions (SAI)s from donors and government and,
- The need for clear emergency procedures for procurement <sup>63</sup>

The audits of the Ebola response by ICRC and other emergencies identified best practices as:

- A national emergency plan that can be used to guide the response
- A central co-ordination body
- Regular communication to the public and other stakeholders
- Quick action should be taken particularly in the purchase and distribution of supplies. <sup>64</sup>

Drawing from these responses and applying them to COVID-19, SAIs, or oversight institutions can aid the current response by:

- “Being a ‘critical friend’ and reminding key actors about basic rules and regulations that must be adhered to even during an emergency
- Maintain dialogue with stakeholders in and outside of government on the potential role of the SAI
- Clarify its role and mandate as needed
- Embark on audits that can add value as the crisis unfolds
- Report on time, taking the situation into account
- Protect staff and adopt innovative ways of working <sup>65</sup>

## v) Transparency By Donors

The role of donors is critical. Consequently, Transparency International Kenya (TI-Kenya) has called upon donors to release ‘all audit reports they have undertaken...make it a requirement for government entities to proactively disclose to the public all information on health interventions they have supported/funded/advanced loans’ <sup>66</sup> Speaking about the IMF and the response to COVID-19 Transparency International identified four measures that can be taken to increase transparency and accountability without compromising on the flexibility required in a time of crisis, these are:

<sup>62</sup>Tamba Monh (2020) Auditing during an Emergency - SAI Sierra Leone's Ebola Audit Experience. Available at <https://www.contraloria.gob.ec/WFDescarga.aspx?id=13&tipo=pesdoc>

<sup>63</sup>IDI (2020) Accountability in a time of crisis – How Supreme Audit Institutions and development partners can learn from previous crises and ensure effective responses to COVID-19 in developing countries April 2020 IDI

<sup>64</sup>ibid

<sup>65</sup>ibid pg 4

<sup>66</sup>Transparency International Kenya (2020) Press Release – Corruption in the health sector is negatively affecting the realization of the right to health 26 September 2020



- IMF Transparency
- Transparency and Accountability in Public Procurement
- Auditing by government and independent monitors
- Implementing and strengthening existing anti-corruption and anti-money laundering frameworks<sup>67</sup>

Despite donor concerns illustrated earlier through audit processes, they can be more proactive in releasing the findings of these audits in full and ensuring accountability of their funds.

Best practices and examples from around the world demonstrate therefore that an emergency is not a reason to abandon transparency and accountability. This can be achieved retrospectively, through real-time audits, and an effort by all stakeholders. Kenya has made positive initial steps with regards to audits and the publishing of a summary of KEMSA awards. Beyond this, the government needs to provide more in depth information on these and take proactive efforts to communicate with the public and show transparency in all aspects of its response.

<sup>67</sup>Transparency (2020) IMF: Make COVID-19 Funds Transparent, Accountable

Preventing Corruption Key To Helping Hardest Hit April 8, 2020, Available at <https://www.transparency.org/en/press/imf-make-COVID-19-funds-transparent-accountable#>

“Collusion among those who control supply chains has led to outrageous costs of much-needed goods, skewing the market and denying many people life-saving treatment. We must work together to stop such thievery and exploitation by clamping down on illicit financial flows and tax havens; tackling the vested interests that benefit from secrecy and corruption, and exercising utmost vigilance over how resources are spent nationally. Together, we must create more robust systems for accountability, transparency, and integrity without delay.”

UN Secretary-General António Guterres <sup>68</sup>

The research presented in this paper has demonstrated that there has been a lack of transparency in the government response and when this has been prompted by the media or oversight institutions, accountability has not materialised so far. There is also a lack of accountability in the diagonal sense with a lack of citizen participation in policy-making processes. While would have been difficult in the initial stages of the pandemic, several months down the line strategies to address this should be considered. From the best practices and nature of Kenyan institutions, some clear recommendations can be made to ensure greater accountability. Five key recommendations have been identified with action points within these that can be taken by various actors. These are:

1. Ensure that information is proactively disclosed to the public to ensure Transparency and Accountability (KEMSA, MOH, KMPDU, EACC, ODPP, CAJ, Donors, and the International Community) Each of these actors can provide specific information
2. There should be clear separation of both national and county governments’ functions as stipulated in the 2010 constitution, (Ministry of Health, KEMSA, and Various County Governments)
3. Develop criteria for an urgent need in times of emergency for procurement purposes and attendant procedures. The emergency nature of the pandemic resulted in the flouting of procurement regulations. (PPRA, OAG, and KEMSA)
4. The Office of the Auditor-General should expedite all audits on COVID-19 expenditure and make these public.
5. Undertake investigations and prosecutions into the cases of alleged corruption identified already and other violations of the law (EACC and ODPP)

<sup>68</sup>United Nations (2020) Corruption is the ultimate betrayal of public trust Available at <https://www.un.org/en/coronavirus/statement-corruption-context-COVID-19>

Further details and action points are summarised in the table below:

Recommendation	Primary Responsibility	Action points
Ensure that information is proactively disclosed to the public to ensure Transparency and Accountability	Ministry of Health, KEMSA, KMPDU, NERC	<ul style="list-style-type: none"> <li>• Publish through a live portal all expenditures related to COVID-19 including cash transfers</li> <li>• Use the daily Coronavirus briefings with the media to disclose information on Transparency and Accountability around the COVID-19 response, in addition to the focus on the disease burden</li> <li>• Provide regular updates on the numbers of ICU beds, PPEs, Oxygen, and other relevant medical supplies to the various counties and proactively use social media to provide these updates</li> <li>• Continue to disclose the directors, beneficial owners, names of companies, and other details to the Public Procurement Portal as has been done recently due to a presidential order</li> <li>• Engage civil society, the public, and other stakeholders in the decision-making process around COVID-19 under the principle of public participation enshrined in the Constitution particularly within the NERC. Open dialogue will help restore public trust and generate a more effective response to the pandemic</li> </ul>
	EACC and ODPP, CAJ	<ul style="list-style-type: none"> <li>• Provide details on anti-corruption cases being undertaken concerning COVID-19 and status updates on COVID-19 related cases including the status of all prosecutions of persons involved in health sector scandals through an online portal</li> </ul>

	Donors and the International Community	<ul style="list-style-type: none"> <li>• Provide the public with records of all agreements entered into with the government including obligations to be met and how funds should be utilised</li> <li>• Insist that when resources are provided, they should be accompanied by obligations to publicly disclose information on health interventions that they have supported.</li> </ul>
		<ul style="list-style-type: none"> <li>• Make publicly available, the results of various evaluations and audits undertaken, the measures or recommendations made therein, and the follow up on these by the affected parties</li> <li>• Initiate real-time audits on the use of COVID-19 resources</li> <li>• Financial reporting arrangements should link to outputs and outcomes: The government must commit to publishing how the money from donors is spent. It will be appropriate to establish mechanisms for reporting the amounts co-financed through the emergency fund at each spending agency level. The total expenditure on COVID-19 from both the regular government budget and the emergency fund needs to be reported along with output and outcomes.<sup>69</sup></li> </ul>

<sup>69</sup>ADB (2020) Make COVID funds transparent and accountable May 27, 2020, <https://www.forum-adb.org/post/make-COVID-funds-transparent-and-accountable>

	Treasury	<ul style="list-style-type: none"> <li>• Disclose information on amounts received from various donors, their purpose, and status of disbursement</li> <li>• Provide information on funds released for key functions of the COVID-19 response such as funds for medical officer remuneration, funds to the counties for procurement of medical supplies, and others as deemed relevant</li> <li>• Issue a policy directive that allows the PPRA to recommend sanctions against entities that fail to comply with the Presidential directive contained in Executive Order No 2 of 2018</li> </ul>
	Public, Media and Civil Society	<ul style="list-style-type: none"> <li>• Undertake advocacy on the right to information about the COVID-19 response</li> <li>• Advocate for financial disclosures about the use of COVID-19 funds</li> <li>• Advocate for justice for those whose human rights have been violated by the state in the course of enforcing health regulations</li> <li>• Use the media to call for transparency and accountability to the COVID-19 response.</li> <li>• Educate the public on the use of COVID-19 resources and the situation across the country with a focus on the counties and the availability of medical supplies</li> <li>• CSOs working with the government can provide a central information portal on all matters COVID-19 including government reports, parliamentary hearings, outcomes of meetings, policies, gaps in information, and any other relevant information</li> </ul>

<p>Ensure that functions to be performed by the counties are carried out</p>	<p>Ministry of Health, KEMSA and Various County Governments</p>	<ul style="list-style-type: none"> <li>• Provide adequate PPEs and other related COVID-19 equipment to medical officers in all counties</li> <li>• Ensure that counties can account for the funds that they have been allocated and have the capacity to absorb the same</li> <li>• Enforce the minimum requirements for preparedness in all counties</li> <li>• Examine the use of Empirical Diagnostic Tools to prevent corruption such as the World Bank's Good Governance for Medicine Programme</li> <li>• Provide information on stock levels, ICU beds, PPEs, and any other resources available</li> <li>• Proactively seek citizen involvement in county matters related to COVID-19</li> </ul>
<p>Develop criteria for an urgent need in times of emergency for procurement purposes</p>	<p>Office of the Auditor-General, PPRA, and KEMSA</p>	<ul style="list-style-type: none"> <li>• A criterion for urgent need as defined in the procurement process needs to be developed detailing when this starts and ends and how this affects the rules and procedures to be followed for procurement. This will help prevent aspects of the challenges witnessed with PPE procurement by KEMSA as highlighted in the Auditor General's Report. The details of these protocols need to be communicated clearly.</li> <li>• Introduce real-time audits of the use of emergency resources rather than waiting for the conclusion of a financial year</li> <li>• Publish a market price index for key items that will serve as a guide for procurement</li> <li>• Ensure that data provided on Open Contracting is up to date and indicate any technical comments on suppliers</li> </ul>

<p>The Office of the Auditor-General should expedite all audits on COVID-19 expenditure and make these publicly available</p>	<p>Office of the Auditor General</p>	<ul style="list-style-type: none"> <li>• Proactively seek to ensure that the recommendations of these audits for oversight agencies such as the EACC and ODPP are made public and shared with the relevant agencies</li> <li>• Carry out a risk- assessment of the areas where misappropriation of resources is most likely to have taken place and focus efforts there</li> </ul>
<p>Undertake investigations and prosecutions into the cases of alleged corruption identified already and other violations of the law</p>	<p>EACC and ODPP</p>	<ul style="list-style-type: none"> <li>• Hold to account those public figures who have been seen breaking health protocols regardless of their station. This will enhance public trust.</li> <li>• Proactively seek to prosecute members of the security sector who have committed human rights abuses in the course of enforcing COVID-19 regulations</li> </ul>

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