KIBAKI LEGACY:

TAMING OR STOKING CORRUPTION?

TRANSPARENCY
INTERNATIONAL
KENYA

Publisher:
Transparency International Kenya
Kindaruma Road, Off Ring Road, Kilimani
Next to Commodore Office Suites
Gate No. 713; Suite No. 4
PO BOX 198 – 00200, City Square,
Email: transparency@tikenya.org

KIBAKI LEGACY:

TAMING OR STOKING CORRUPTION?

ACKNOWLEDGEMENTS

TI-Kenya acknowledges staff members -- Caroline Gaita, Mwangi Kibathi, Harriet Wachira, Sheila Masinde and Samuel Kimeu -- who were actively involved in the production of this publication.

Our heartfelt thanks to our expert contributors:
Dr. Arbogast K. Akidiva, James Gondi, Dr. Linda Musumba, Michael Macharia Nderitu and Dr. Alfred N. Ongera.

Contents

About the contributors

James Gondi is a human rights lawyer and consultant with an interest in constitutionalism, international law, governance and access to justice. His specialisations include: transitional justice and transnational organized crime, including human trafficking, and countering violent extremism. Mr. Gondi previously worked as a Programme Advisor for the Africa Centre for Open Governance (AfriCOG); headed the International Centre for Transitional Justice (ICTJ)'s Kenya programme; and served as a legal officer at the Kenya Secion of the International Commission of Jurists (ICJ).

Mr. Gondi has a Master of Laws (LLM) in International and Comparative Law from Vrije Universiteit Brussel, Belgium; and an LLB from Keele University, UK.

Dr. Alfred Ndemo Ongera is a seasonal lecturer and researcher on governance issues, conflict resolution and ethics. He has several years of experience in international development, disaster management, anti-corruption, and public policy. His research specialisations include: governance and public sector reform; disaster management; and conflict resolution. Dr. Ongera previously worked with the Government of Kenya for over ten years before joining academia. He has also worked as a consultant for the World Bank, DFID, USAID, GiZ and Transparency International.

Dr. Ongera has a PhD in Public Administration from the University of Birmingham, a Master's degree in Governance and Development from the same university, and an undergraduate degree in Public Administration from Moi University.

Michael Macharia Nderitu is lawyer and legal consultant. He previously worked as a Parliamentary Liaison Officer, and then as a Programme Officer with the Kenya Section of the International Commission of Jurists (ICJ).

Mr. Nderitu has a Master of Laws LLM in International Trade and Investments Law from the University of Nairobi, and an undergarduate law (LLB) degree, also from University of Nairobi.

Dr. Linda Musumba is the founding dean of the Kenyatta University School of Law (KUSOL), and holds the postion of Senior Lecturer in the university's Department of Public Law. She also runs her own legal practice and serves on the boards of the Katiba Institute, Kituo Cha Sheria and Transparency International Kenya.

Dr. Musumba obtained her PhD in Law from the University of Birmingham, UK, in the area of Constitutional Law. She has a Master of Laws (LLM) from the University of Warwick, UK, and an undergraduate Law Degree (LL.B) from the University of Nairobi.

Dr. Arbogast Kemoli Akidiva is an educationist and governance specialist with over 30 years' experience in public service. He worked with the Ethics and Anti-Corruption Commission (EACC) and its predecessor the Kenya Anti-Corruption Commission (KACC) from 2005

to 2013 variously as the Coordinator of the Preventive Services Directorate; Principal Education Officer; Acting Assistant Director in the Preventive Services Directorate; and Officer-in-Charge of the Mombasa Regional Office. During his tenure there, he authored numerous educational programmes and materials, including a scripture-based anti-corruption study guide entitled *Integrity: A weapon against corruption*.

Dr. Akidiva has a PhD in Education from the University of Alberta, Canada; M. Ed. from Kenyatta University; B.Ed. from the University of Nairobi, and a Post Graduate Certificate in Corruption Studies from the University of Hong Kong.

Executive Summary

This publication delves into the Kibaki presidency and how it performed in the war against corruption in Kenya.

TI-Kenya commissioned expert evaluations of the successes and failures of the Kibaki regime in different aspects of its attempts to rein in corruption. The expert reviews were conducted along the following themes:

i. Legislative action: Policies and anti-corruption laws adopted under the NARC regime, and their effectiveness.

ii. Executive action against corruption: Tracing various executive actions including investigations, commissions of inquiry, radical surgery of the Judiciary, signing and domestication of international conventions among others and their effectiveness.

iii. Anti-corruption bodies instituted in the NARC regime and an examination of their mandate and effectiveness.

iv. Tracing corruption in key institutions in Kenya under the NARC regime.

v. A comparative analysis of anti-corruption efforts in the East African region.

Analysis of the key areas indicates that, the expanded political space that followed the advent of multiparty politics in the early 1990s brought to the fore the demand for improved public financial management. Corruption became a core topic in political discourse. By the end of

the decade, demand for improved financial stewardship was a driving force for renewed leadership. The National Rainbow Coalition (NARC) rode on this popular demand and won the 2002 general elections.

As part of its commitments, the new government adopted a 'zero tolerance to corruption' policy. In its first year, the NARC government passed key anti-corruption legislation - the Anti-Corruption and Economic Crimes Act (ACECA) and the Public Officers' Ethics Act (POEA). In the same year, Kenya became the first country to sign and ratify the United Nations Convention Against Corruption (UNCAC). At the institutional level, the government created a position of Permanent Secretary in charge of governance and ethics. The Kenya Anti-Corruption Commission as provided for under the ACECA was instituted. A commission to investigate the Goldenberg scandal was constituted. The first attempt to reform the judiciary, popularly referred to as 'radical surgery', was also rolled out.

Despite these anti-corruption efforts, doubts about the commitment of the government to the much publicised 'zero tolerance to corruption' policy emerged. Claims of backpedaling on anti-graft commitments dominated public discourse after the Anglo-Leasing scandal came to light in 2004.

During the 2007 elections, corruption was once again a major campaign platform. The electoral dispute and the consequent coalition arrangement impacted the anti-corruption agenda of the new government. Cases of gross malfeasance that rocked the grand coalition government included: the Free Primary Education, maize and Triton Oil scandals, as well as irregular sale of the Grand Regency Hotel among others.

The expert analysis indicate that failure by the Kibaki regime to confer prosecutorial powers on the anti-corruption agencies undermined the efforts to make the anti-corruption bodies effective. Such that despite the many institutions created to root out corruption, their success was minimal to say the least. For instance, major corruption cases, such as Anglo Leasing and Goldenberg have continued to drag courts, with only very few of the culprits having been prosecuted.

Hence the need to seal the loopholes within the current legislation especially the Public Procurement and Disposal Act (2005), Ethics and Anti-Corruption Commission Act (2011), Leadership and Integrity Act (2012). Enforcement of Chapter Six of the Constitution, which deals with Leadership and Integrity, is also recommended to ensure that only persons of integrity manage public resources.

Only once the country is firmly under the rule of leaders who are devoid of integrity issues, it will be possible to deal with corruption.

Retracing corruption under the Kibaki regime

James Gondi

"At the heart of grand corruption in Kenya is a series of financial arrangements that together make up a system of security-related procurement, procurement of commercial debt, and financing of the political system"[1]

In the run up to the 2002 general election, the country's opposition was resolute in its promises to shift the political paradigm away from corruption and impunity, towards a new Kenya. The coalition government's manifesto was seen as ground breaking by the public in its attempts to right the wrongs of the previous government in every sector of the society, which was necessary as, according to George Saitoti, "Kenya has entered the 21st Century in a very bad economic state." The National Rainbow Coalition (NARC) perceived corruption as one of the key stumbling blocks to a prosperous nation and its manifesto stated that:

> Poor management, excessive discretion in government, appointment of people of dubious

> character, lack of respect for professionalism and political interference are the key factors that continue to favour the prevalence of corruption.[2]

During the Moi regime, it is estimated that a total of over US$1 billion was misappropriated from government coffers.[3]This was at a time when the vast majority of Kenyans were living in poverty with the average income of Kenyans never rising above US$450 during Moi's presidency.[4] The NARC regime promised to change the status quo and revitalise the country's faith in the political class.

During his inauguration speech on December 30th 2002, then President Mwai Kibaki said that his government would be characterised by a policy of zero tolerance to corruption and was committed to the complete eradication of corruption.

> Corruption will now cease to be a way of life in Kenya and I call upon all those members of my government and public officers accustomed to corrupt practice to know and clearly understand that there will be no sacred cows under my government.[5]

President Kibaki's references to sacred cows can be closely linked to the concept of impunity, which can be defined as:

> "The impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations

> to their victims[6]."

Impunity is intrinsically linked with the fight against corruption as it creates an environment in which corrupt acts go unpunished. It can therefore create a sense of invulnerability in the perpetrators of such crimes.

BRIEF HISTORY OF THE POLITICAL ECONOMY OF CORRUPTION IN KENYA

Corruption in Kenya has been perceived as problematic since the enactment of the Prevention of Corruption Act in colonial Kenya in 1956.[7] This Act remained largely unchanged until 1991, but no prosecutions were made after these amendments, as a result of the various factors of Kenya's political and economic history.[8]

The transition from colonialism to independence has been viewed as one of the main contributing factors to Kenya's corrupt political atmosphere, as the country had:

> "...a centralised state with a powerful executive, political conflict around the issue of inequality, particularly with reference to land, and a tradition of violent confrontation between the state and popular movements in opposition."[9]

Centralisation specifically can foster corruption as it can encourage rent-seeking behaviour.[10] This was further exacerbated by the government during the transition to independence by allowing two opposing forces to exist in the country's economy: Kenya attained independence during the cold war and as such, could have chosen a socialist or capitalist system to allow for the development of its economy. Kenya chose a capitalist system, but as a mitigating measure against the high start-up cost and

low near term profitability of essential services such as water and sewerage, transport and electricity, allowed for a statist approach[11] where the government would retain ownership of the parastatals providing these services.

This formed a situation where the government effectively controlled the "invisible hand" of the economy by its ability to set prices, interest rates and so on, and within the context of corruption, allowed for the creation of so called patron-client or patronage networks. [12] In these networks, contracts from these parastatals as well as land and other forms of preferential treatment were awarded to those loyal to the government, specifically those loyal to then President, Jomo Kenyatta. These individuals then became Kenya's new elite. President Kenyatta shifted Kenya into an era of near absolute executive power by merging his ruling party KANU with the country's only opposition party KADU and ended the debate on federalism in the country, making Kenya a de-facto one party state.

Federalism could possibly address some of the inequalities that faced Kenya, as some of the factors favouring a federal structure are the presence of strong ethnic minorities and national identities; the existence of considerable regional inequalities and the strengthening of local democratic institutions, all of which Kenya was experiencing in the years immediately following independence. In the 1970's the state became an agent of specific group development interests, the remnants of which are still in power. These groups were ethnic in nature and this translated into the politics of the day. These ethnic cleavages continue to dominate Kenyan politics today. Corruption both informal and formal became the conduit for ethnic patronage– essentially corruption while in office was the reward of obtaining and maintaining power.

President Kenyatta's regime gave way to the Moi era, which

saw what has been described as an "imperial presidency." It was a time of more repression and greater consolidation of executive powers. This placed President Moi in a position where for his power to be consolidated he needed to break down the existing patronage structures and establish his own.[13] This resulted in Moi's regime repressing the ruling Kikuyu elite of Kenyatta's era and entrenching the privileges of those loyal to him into the state machinery which "was important because controlling the state was the means to entrench an ethnically defined class and to ensure its enrichment."[14]

This worsened the already existing elite capture, as Moi used his significant powers to further centralise the state by weakening the country's systems for checks and balances, such as the Judiciary and auditor general. At the same time he took on extra powers, through practices such as eroding the powers of the Local Authorities and transferring their powers to the provincial authorities that were directly under the control of the President. Following the failed coup attempt in 1982, Moi made a constitutional amendment that turned Kenya into a de-jure one party state which lasted 10 years before the repeal of section 2(a) of the Constitution introducing multi-party politics in 1991. The continued patronage based system is able to exist because of (i) Weak institutions and (ii) Underdevelopment/poverty. These allow elite patronage to continue unabated and achieve a level of acceptance in society. The political establishment worked:

> "To maintain their favoured positions, they eventually transformed vital national institutions such as the civil service, judiciary, legislature, police and others into an alternative or parallel power structure, tentacles extended to all economic, political and social sectors, and whose main purpose was to maintain them in power

beyond the reach of the law"[15]

There have been however promising signs particularly from the 2002 general election that an election cannot simply be bought as in the past although it is possible to manipulate legislative decisions using corrupt measures.[16] These institutions are undergoing reforms as a greater culture of accountability has emerged since the 2002 elections despite the failure of the government to combat corruption. In the first few months in power the Kibaki administration set up various commissions including the Kenya Anti–Corruption Commission (KACC) and relevant laws to combat corruption although this drive was undone by the emergence of divisions within the governing NARC coalition. These divisions resulted in a shift towards the politics of old, a simple option considering the same players were present and the elevation of ethnic interests for example through the emergence of the 'Mt Kenya mafia'. Indeed it may be argued that Anglo Leasing and the maize scandals were attempts by the respective sides to secure funds for patronage.

This environment created the necessary conditions for a series of corruption scandals that shall be further examined and analysed.

CORRUPTION SCANDALS DURING THE KIBAKI PRESIDENCY

Goldenberg

The Goldenberg scandal though not occurring under the Kibaki regime was still a defining moment in the new political dispensation's handling of corruption. In February

of 2003, President Kibaki appointed a commission of inquiry into the scandal to assess the economic impact it had on the country and any potential culpability by government officials in Moi's regime. The commission was chaired by Justice Samuel Bosire and the report was released (publically) in February 2006 and called for further investigations into the involvement of any public officials in the Goldenberg proceedings.

The origins of the scandal require a deeper understanding of Kenya's economic situation in the early 90's and the preceding decade of political turmoil. In the years following the 1982 coup attempt, in which members of Kenya's Air force attempted to overthrow President Daniel arap Moi, he become increasingly autocratic in his policies. This resulted in souring of relations with donors that strained Kenya's already strained foreign reserves. Continued pressure from the IMF and World Bank to open up and liberalize the Kenyan economy was heightened by a suspension of aid from the Bretton Wood institutions in 1991. Any further aid was pegged on the improved governance of the country politically (mainly through democratisation) and economically, with trade incentives playing a key part in the liberalisation of the economy. One key restriction Kenya had in place was in the form of the Exchange Control Act, wherein all individuals requiring foreign exchange had to apply for foreign exchange via a foreign exchange allocation license. It further states:

> (3) For the purposes of subsection (2), the authorised dealer shall sell the specified currency to the Central Bank of Kenya immediately after collection thereof but in any case within a period not exceeding forty-eight hours thereafter.[17]

The Central Bank of Kenya thus controlled all foreign currency in the country, as anyone in possession of the

currency had to sell it back to the Central Bank. Therefore, all exports have to be certified by the Department of Customs and Excise. After the sale of any exports, the exporter could not keep the proceeds in foreign currency, but had to convert them to Kenya shillings by selling them to the Central Bank. As a result of a corrupt and inefficient system of management, this process could often take months at a time to complete a single transaction.[18]

With mounting pressure to ease aids to trade, and more importantly gain valuable foreign currency, the government enacted the Export Compensation Act. This act allows for all exporters of non-traditional goods to receive compensation in the form of cash that is a percentage of the value of their exports. The act further states that:

> (1A) Notwithstanding subsection (1), no compensatory payment shall be made in respect of gold (non-monetary) and articles thereof, other precious and semi-precious metals or stones and their articles in semi-manufactured or fully manufactured form, before they are presented to the proper officer of customs for physical examination and certification prior to exportation[19]

This meant that as long as an exporter can provide the customs certification required and make the necessary deposits with the Central Bank, they can receive export compensation. This act also stipulates that only goods originating from Kenya are eligible for compensation. This caused Goldenberg International to apply to the Ministry of Finance for the sole right to export Kenya's gold and diamond deposits, despite there never having been proven diamond deposits in Kenya, and minimal gold deposits. They applied to then Finance Minister Professor George Saitoti and requested a 35% export compensation

as well as the ability to start their own finance company. This figure was almost two times above the prevailing rate of compensation (20%), but was nevertheless acceded to by Professor Saitoti. This decision was in violation of both the Local Manufactures (Export Compensation) Act, which states that and the Restrictive Practices Monopolies and Price Control Act of 1989, as Professor Saitoti had effectively granted Goldenberg International the monopoly right to trade Kenya's diamonds and gold.

The workings of the fraud involved Goldenberg International getting fraudulent certification from the Customs and Excise Department and making foreign currency deposits in local banks using various foreign currency obtained from the black market. This was in an attempt to satisfy the Central Bank requirement for the compensation of the Exchange Control Act of Kenya that all foreign currencies be returned to the Bank. Eventually, Goldenberg International Limited was granted the authority by the Central Bank to handle the trade of foreign exchange reserves, which was in further violation of the Exchange Control Act of Kenya.

The Goldenberg saga was estimated to have cost the Kenyan taxpayer a minimum of Kshs. 27,079,578,684. The commission of inquiry into its activities was therefore of extreme interest to ordinary Kenyans. It was thought to mark an end to the level of impunity evident in Kenyan society. The report by the commission called for further investigations into the following individuals:

- Former President Daniel arap Moi
- Former Permanent Secretary, Ministry of Finance, Mr. Joseph Magari
- Former presidential aide Mr. Joshua Kulei

The report had called for the prosecution of 14 individuals

including Kamlesh Mansukhlal Pattni, Prof. George Saitoti, Wilfred Karuga Koinange and Jams Kanyotu.

The former Minister of Finance George Saitoti was named after the two year inquiry as one of the principal perpetrators of the 'Goldenberg Scandal', but not only did he not face trial, his name was expunged from the list of those accused of involvement in the scandal.[20]

In April of 2013, the charges against Kamlesh Pattni were finally dropped. The Goldenberg Scandal provided the new Kibaki government with an anti-corruption platform during the 2002 election campaigns, and in the subsequent months after his election, the Anti-Corruption and Economic Crimes Act, 2003 (which established the Kenya Anti-Corruption Commission) was enacted. Kenya signed and ratified the United Nations Convention against Corruption (UNCAC) in December 2003. In addition, President Kibaki appointed John Githongo, to the new position of Permanent Secretary of Governance and Ethics in the President's Office. However, despite all this, the aftermath of the scandal, specifically the lack of convictions, furthered the notion of political impunity in the country.

The lack of prosecutions particularly the dropping of the case against the man widely considered to be the chief Goldenberg architect Kamlesh Pattni further deteriorated public faith in the anti-corruption agenda. The final Goldenberg report recommendations remain unimplemented.

Anglo Leasing Scandal

The Anglo Leasing Scandal was yet another corruption case with origins in the Moi era. The saga is different from

the Goldenberg scandal in that the contracts were actually actively pursued during the Kibaki government.

> The roots of the procurement woes can be traced to a 1997 when former Criminal Investigation Department Director Francis Sang wrote a memo proposing and justifying the creation of a forensic science laboratory in Kenya, considering that Kenya had to outsource its forensic needs to South Africa and Egypt.[21]

On November 10th 2000, Mr. Sang in a letter to then Internal Security Permanent Secretary Zakayo Cheruiyot, further suggested that the project use single sourcing and recommended Forensic Laboratories, UK.[22]It was decided that the government did not have the necessary finances to meet the potential costs and would consider a leasing option as an extract from "The Priority Security Projects for the Police Force:"

i. Use of Lease Financing as the appropriate mode of funding for the high priority security projects of housing, transport and forensic laboratory, and,

ii. Use of Suppliers' Credit for essential security equipment and supplies.[23]

The contract for the financing of the construction of a CID laboratory was eventually signed between the government of Kenya and Anglo Leasing and Finance Ltd and forensic Laboratories in August of 2001 with a total value of US $54.6 million and a US $4.7 million instalment was paid in two instalments on the agreed dates.[24]

The Anglo Leasing scandal also involved the Department of Immigration (DOI) which in its search for greater efficiency in its systems and procedures recommended

that an Immigration Information Management System be designed.

In the case of the DOI's tendering process, it was decided that there should be an open tendering system in 2001 and AIT International was awarded the contract at Kshs. 622 million shillings, however, there were no funds available and the contract was formally cancelled on the 5th of August 2001.[25] The process had a number of problems during the second tendering process as the original systems requirements were expanded to include the following components, and was henceforth referred to as an Immigration Security and Document Control System (ISDCS):

- High security new generation passports
- Secure passport issuing system
- High security new generation visas
- High security visa issuing system, and
- Computerisation of machine-readable immigration records[26]

Anglo Leasing handed in an unsolicited tender of 31.9 million euros on August 1st 2003, despite the absence of clear Terms of Reference for the Project. This was done within President Kibaki's first term and was to be sub-contracted to François-Charles Oberthur Fiduciaire of Paris as opposed to being directly handled by Anglo Leasing. The company had requested for a facility for the funds to be paid in quarterly instalments after the projects commencement for 62 months at a 4% annual interest rate.

The proposal could however not be completed without the technical approval of the Treasury, a legal opinion by the Attorney General or the Ministry of Finance's approval

and a viability assessment. The contract had the signature of the Permanent Secretary for Treasury, and the Vice President and the Minister for Home Affairs Hon Moody Awori on behalf of the Kenyan government.

This was despite John Githongo (then PS, Governance and Ethics) informing the Head of Civil Service Francis Muthaura on 3rd June 2003 that the then British High Comissioner had informed him in a letter dated the 3rd of June 2004 that the companies Anglo Leasing and Forensic Laboratories did not exist.[27] This further confirmed by Mr Githongo in April 2004 when he travelled to the United Kingdom with former Justice and Constitutional Affairs Minister Kiraitu Murungi to carry out a search for Anglo Leasing Finance Company and found that no company of UK origin had in the past or currently existed by that name.[28]

The scandal finally broke on May 14th 2004[29] and three days later, Joseph Magari the then Permanent Secretary of Treasury, Sylvester Mwaliko, Permanent Secretary for Home Affairs, Dr. Wilson Sitonik of the Government Information Technology Services (GITS) and Dorcas Achapa an official from the AG's chambers were suspended. In the resulting investigations by Mr. Githongo, he received (from a source) an unferenced letter from the then Central Bank of Kenya governor Joseph Oyula that sought confirmation from the minister of finance regarding payment of the following credits:[30]

Payee	Purpose	Amount (millions)	Signatories	Date signed
Anglo Leasing	Forensic Lab CID	USD 54.56	PS Treasury PS-Internal Security OP	16-08-01
Silverson Establishment	Security vehicles	USD90	PS Treasury PS-Internal Security OP	16-08-01

Apex Finance (addendum 2)	Police security	USD30	PS Treasury PS-Internal Security OP	9-02-02
LBA Systems	Security-met	USD35	PS Treasury	07-06-02
Apex Finance (addendum 3)	Police security	USD 31.8	PS Treasury PS-Internal Security OP	14-06-02
Universal Satspace	Satellite services	USD 28.11	PS-Treasury PS-Transport	11-07-02
First Mercantile	Police security	USD 11.8	PS-Treasury PS-Transport	11-07-02
Apex Finance Corp	Police security	USD 12.8	PS-Treasury PS-Internal Security OP	12-07-02
LBA Systems	Prisons security	USD 29.7	PS-Treasury	19-11-02
Nedemar	security	USD 36.9	PS-Treasury PS-Transport	19-11-02
Midland bank	Police security	USD 49.65	PS-Treasury	29-05-03
Navigia Capital	Oceanographic vessel	EUR 26.6	PS-Treasury	15-07-03
Empressa	Oceanographic vessel	EUR 15	PS-Treasury	15-07-03
Euromarine	Oceanographic vessel	EUR 10.4	PS-Treasury	15-07-03
Infotalent	Police security	EUR 59.7	PS-Treasury PS-Internal Security OP	19-11-03
Apex Finance Corp	Police security	EUR 40	PS-Treasury PS-Internal Security OP	17-12-03
Ciara Systems Inc	Design, maintain satellite for NSIS	USD 44.56	PS-Treasury Director NSIS	20-01-04

It should be noted that this table corresponds to the 18 projects and their subsequent contracts that were investigated in the Special Report of the Controller and Auditor General on Financing, Procurement and Implementation of Security Projects.

In the ensuing days, matters quickly unfolded when attorney Fred Ojiambo was arrested for refusing to divulge with the authorities the identity of Anglo Leasing who were his clients. It was at this time that Anglo Leasing paid back money owed for the Forensic Laboratories Project. This is despite the previously stated budgetory allocation of over

Kshs. 200 million for the next year, 2005. Mr. Githongo then testified before the Public Accounts Committeeand remained at the forefront of the public eye. This lead to his eventual exile from Kenya to the United Kingdom as he feared for his life.

The company (Anglo Leasing) has been linked to Kenyan businessman Deepak Kamani[31] a man who was notorious in Kenya for his company's supply of highly ineffectual Mahindra Jeeps to the Kenya Police force[32]and with numerous links being made to him and several Anglo Leasing type contracts. In the path towards reparations, "Anglo Leasing refunded US $ 4.7 million on the forensic laboratories project; Anglo Leasing refubnded Euros 956,700 on the Immigration Security Project and Infotalent Ltd refunded Euros 5,287,164 on the E-Cops Security project."[33]

Former Finance PS Joseph Magari, David Lumumba and Wilson Sitonik, were eventually acquitted in March of 2012., while Former Home Affairs Permanent Secretary Sylvester Mwaliko was convicted later in the year for corruption charges and was jailed for three years with the option of a Sh3 million fine, which he paid.[34] The Anglo Leasing Scandal has several underlying problems that were responsible for creating the political, social and economic situation necessary for the scandal to occur. The Scandal is within the realm of public procurement which, according to a study commissioned by the Government of Kenya and the World Bank lacked transparency and fair competition.[35] The study revealed several institutional weaknesses in the procurement system of the country, namely:

- A lack of training, skills or professionalism for public procurement staff in Kenya.
- A lack of a professional body that oversees and

instils discipline among procurement officers also made them vulnerable to corruption.

- A lack of a uniform procurement system for the public sector
- A lack of records of procurement transactions in many cases were found to be inaccurate or incomplete while in some cases they were absent altogether.[36]

The weaknesses in the tendering system were largely addressed by the creation of bodies such as the Public Procurement Oversight Authority (PPOA) and the Public Procurement Complaints, Review and Appeals Board (PPCRAB), and the enactment of the Public Procurement and Disposal Act (PPDA) of 2005.

The scandal was also influenced heavily by the elite capture of the Kenyan economy. The economy had been largely controlled by a few elites in the country who were used to receiving rewards for their political patronage, a system which had been established under Kenyatta,[37] and was continued under Moi and passed onto the Kibaki regime by the same ruling class that had been present in the previous government. The government further failed to act on the recommendations of the former PS John Githongo which resulted in his eventual exile, and who stated that the Kibaki administration:

> Tried to consolidate power in the hands of a smaller clique of people, who would hold onto their power using a mixture of some real reforms, public relations, and dubiously financed political patronage.[38]

Anglo Leasing became the symbol of the Kibaki government's lack of commitment to the fight against

corruption, a clear sign that a break with the past had not been achieved.

Triton scandal

In late 2008 Kenya experienced an acute oil shortage and high fuel costs despite a sharp drop in prices from an all-time NYMEX high of US $ 140 in June of 2008 to under US $ 80 by the end of the year.[39]

The cause and circumstances of the oil shortage were audited by PriceWaterhouseCoopers (PwC) on behalf of the Kenya Pipeline Corporation (KPC). The audit revealed staggering irregularities in the oil importation and distribution system in the country.

Let us first examine how Kenya imports and distributes its petroleum. Oil marketers such as Shell, Total and Oil Libya and so on will bid for the right to import petroleum

individually for the entire industry. The companies will need to obtain financing from banks to acquire large quantities of petroleum (both crude and refined) at a cheaper price than they would if each marketer bought it individually. The petroleum marketers will then use their stocks of oil at Kipevu Oil Storage Facility in the coast as security for their financing and are not allowed to receive their stocks of oil without the express and written consent of the financers.

Triton Kenya used a malfunction of the newly installed stock checking system to withdraw large quantities of oil without the consent of its financiers and had falsified letters guaranteeing said financiers that the stock in question remained untouched. This total fraud was initially estimated to involve 124.6 million litres of petrol worth Kshs 7.6 billion shillings (using a base rate of Kshs. 60 per litre).[40]

Due to these irregularities, Triton was placed under receivership towards the end of December 2008 while still owing money to its financiers Kenya Commercial Bank (KCB), Emirates National Oil Company, Fortis of France and Glencore, although in September 2011, KCB received Kshs. 1.5 Billion of Kshs. 1.85 Billion shillings it was owed[41] by runaway tycoon and former head of Triton Yagnesh Devani. Mr. Devani, though facing prosecution alongside Julius Kilonzo, Collins Otieno, Mahendar Pathak and Benedict Mutua, he fled the country soon after he was to face court prosecution. However, he was arrested in the United Kingdom in May 2011,[42] and is awaiting extradition to Kenya. It is believed that the extradition process of both Chris Okemo and Samuel Gichuru for corruption and money laundering charges in the United Kingdom coincided with Devani's extradition to Kenya.[43] The extradition case against Okemo and Gichuru was approved in February 2013.

Triton Oil had had a history of alleged underhand dealings with the Moi regime and was linked to the corrupt dealings of Charterhouse bank by auditors PWC, when it was noted that substantial transfers were made to the personal account of Mr Devani's wife, Sonal Devani, in Charterhouse from the Triton account in the bank. It is estimated that Ksh 218 million was transferred in October 2005 and January 2006, in this manner.[44]

The Triton Oil Scandal was the culmination of institutional weaknesses and elite capture. The Triton Oil company was granted an unfair advantage as a result of its ability to usurp the procurement system and individuals in the Kenya Pipeline Company (KPC). This was further aided by the tendency to create an uncompetitive oligarchy in the petroleum industry that could allow for arbitrary price hikes and shortages. The Ministry of Energy was also reported to have given instructions to KPC to release fuel to preferred oil companies such as Triton,[45] suggesting the collusion between ministry officials and the oil companies.

The KPC should be thoroughly audited for all on going and future projects to ensure that all sourcing and procurement activities are in line with the Public Procurement and Disposal Act (PPDA) of 2005, and the government should make public all reports on the fuel shortage to allow for greater transparency.

The political connections evident in this scandal indicate it is certainly possible that high level government officials were involved. This case demonstrated that the nexus between business and politics remains a key driver of corruption.

The maize scandal

Maize is Kenya's main staple crop. In 2008, Kenya had experienced a severe harvest shortage largely attributed to the country's post-election violence which caused a destruction of 3.5 million bags of maize, and was exacerbated by the countries fuel shortage at that same period.[46]

As a result, the government of Kenya envisioned a subsidised maize scheme which:

- Would allow for the sale of maize to millers through the National Cereals and Produce Board (NCPB) at a fixed subsidised price in order to avoid exploitation by middlemen leader to cheaper maize;
- Would introduce a direct maize meal subsidy scheme with two different prices set for the same bag of maize flour, with the cheaper one for lower income earners.[47]

On top of these measures, the government not only allowed millers with large capacity access to maize at subsidised prices, they were also given a direct subsidy fee to partially cover the cost of milling.[48]

The genesis of the scandal was when the maize, instead of being given to millers was given to corporations and individuals with no capacity for milling, who instead sold the maize to millers. This resulted in maize prices not reducing in the country.[49]

The management of the NCPB, including its Managing Director Prof. Gideon Misosi were implicated in the scandal, and he was named as culpable by Parliament's Departmental Committee on Agriculture, Livestock and

Cooperatives.[50] The then Agriculture Minister, William Ruto, was accused of disregarding the Public Officers Ethics Act by allowing a company he was associated with to supply the NPCB with gunny bags.[51]

In the Maize scandal, the culture of impunity prevailed, as there were no prosecutions carried out by the government. This is despite clearly documented evidence detailing the involvement of individuals, including public officers who made improper use of their office to enrich themselves or others, in contravention of the Public Officers Ethics Act and did not disclose a potential conflict of interest.

Several members of the then Parliament were alleged to have asked NCPB for allocations.[52] No prosecutions have been conducted with regard to this case.

Factors Contributing to the Scandals and Reactions

There have been various scandals that cast a shadow over President Mwai Kibaki's achievements yet he presided over the largest economic growth the country has experienced for over two decades.

During his presidency, Kenya launched its Vision 2030 programme, which "aims to transform Kenya into a newly industrializing, middle income country providing a high quality of life to all its citizens by the year 2030."[53]This plan was met with critics who were eager to point out that Kenya has had long term strategies since independence, but rarely were they ever realized.[54] It has however brought about very tangible results, such as the Thika Super Highway, despite its failings in areas such as job creation, and economic growth.[55]

One must ask oneself what factors exist to have created a

situation where a president, while achieving a degree of economic success, has left a legacy of corruption and poor implementation of anti-corruption measures, which were the platform upon which he launched his regime.

There are several factors that allowed for the corrupt practices to be passed onto the Kibaki regime, namely patronage, elite capture and institutional weaknesses. There is an element of each of these factors that can be observed in each scandal under the general influence of impunity in the country.

Culture of Impunity

Kenya has long been believed to have a culture of impunity. For culture of impunity to thrive, by the definition given in the introduction, it would mean that there is a consistent failure on the part of the government to bring violators of criminal and in this context corrupt actions to account. Kenya has a trend of establishing various commissions and panels to debate and provide reports on corruption scandals, but there is little to no implementation of these reports. The culture of impunity contributes to the lack of political will in a country to prosecute corrupt individuals.

Institutional Weaknesses

Kenya's Law enforcement agencies are ideally in the front line in the fight against corruption. The Police, Department of Public Prosecutions, the Judiciary and agencies such as the Kenya Anti-Corruption Commission are the key Kenyan institutions responsible for the arrest and prosecution of corrupt individuals. However, the general culture of impunity can often lead to a situation where law enforcement agents are unwilling to prosecute

corruption suspects, for fear of potential retaliation.

> In the end, law enforcement agents begin to operate under fear, and fear leads to conscious omission of performing duties that will lead to apprehending criminals engaged in corruption or complicit in such acts.[56]

This is not to say that these organisations do not have their own intrinsic short comings. The weakness of the KACC and the Judiciary are key to the continued impunity for perpetrators of grand corruption. The KACC was constrained by political challenges most particularly the presence of officials implicated in Anglo Leasing still being in power contrary to the perception of most politicians that it would primarily be handling Moi era scandals – a large factor in its political support. This in tandem with the fallout from the previous self-imposed exile of John Githongo and a failure to prosecute any 'big fish' led to a tangible lack of public support. Additionally, many members of the public do not fully appreciate the magnitude of the task ahead of the commission as they must effectively take on the political establishment to root out grand corruption.

The KACC has also been restricted in its work by the Judiciary. The involvement of the Judiciary "presents a profound challenge in the enforcement of anti- corruption laws generally."[57]

The Judiciary has been undergoing reforms and has gained a large degree of legitimacy as a result. However, the backlog of cases makes it difficult to ensure timely prosecutions and there remain political appointees within the Judiciary. The KACC was restricted in its power to freeze assets and investigate Anglo Leasing. The KACC would first have to file suit in court before obtaining orders

that would allow for assets suspected of being ill- gotten to be frozen. The removal of the element of surprise can eliminate the effectiveness of such actions and may also allow for the possible relocation of such assets to foreign countries. The Mutual Assistance Act of 2011 was enacted to ensure that legal enforcement bodies would have redress to seek assistance from foreign countries should they require mutual legal assistance.

The commission has been further hampered by the Judiciary in its investigation into the Anglo Leasing scandal after it declared that it would be in breach of contract between the government and various companies involved in the scandal, which was approved by the Attorney General.

Thus the prospects for effective prosecution and investigations into corruption are hampered by institutional weaknesses and the lack of 'background institution's' a term used to describe "the plethora of laws, governmental regulations, customs, unions, consumer and environmental groups, and popular pressures, demands and expectations' as constituting background institutions against which and within which business operates"[58]

Recommendations

The Kenyan situation is exacerbated by the use of patronage politics to secure power and personal wealth for various ethnic groupings. The nature of politics is thus conducive to grand corruption.

The opening of the democratic space has made the greatest contribution towards the fight against corruption as it has yielded a call for greater accountability and better governance. Within the debate and push for greater

democratic space, it is critical to ensure that the anti-corruption agenda is advanced.
Institutional reforms and transparency in procedures of procurement and related processes are critical as they make it more difficult for grand corruption to take place. The EACC and the Judiciary are the most important institutions in this area encompassing the ability to investigate and prosecute respectively.

Prosecutions and reparations by those involved in corruption scandals are essential to end the culture of impunity. Moreover, it is important for the Kenyan society to develop a culture that recognises corruption for the abhorrent practice that it is, and not revere, or revel in the wealth of corrupt individuals.

A society needs to develop a political culture that discourages corrupt practice, or makes it difficult for the corrupt to parade the proceeds of corruption as signs of success or social status.[59]

The nature of Kenyan politics needs to change ultimately if grand corruption is to be countered. Initiatives against ethnic based patronage politics should be supported and the connection between such politics and the existence of corruption must be highlighted. One main way through which this has been sought is through the full implementation of the Constitution.

The Constitution has called for the devolution, or decentralisation, of power, outside of the country's capital and the Executive, by establishing 47 new counties and providing the local governments with increased autonomy and powers. This devolution aims to:

Provide the legal framework and courses of action to confront the challenges of corruption, ethnic

divisions, and ill-defined property rights[60]

Decentralisation has several benefits towards the fight against corruption, as it gives citizens more power in political or public decision making, and brings the centres of power closer to the people, allowing them to address issues directly affecting their particular circumstances. Furthermore, decentralisation will foster a greater level of accountability to local electorate, and will develop a local civic culture through fostering democratisation, and include greater local involvement of other local stake-holders in the decision making process, such as CSO's.[61]

The devolution programme seeks to end ethnically centred patronage by allowing for the provision of services to citizens to be sourced by local governments, and by promoting greater equitable land access through the National Land Commission, which will prevent an unequal distribution of resources through reducing strong concentrations of ethnic groups.

The fight against corruption is inextricably linked to the politics. Therefore, moving away from ethnic patronage based politics make grand corruption less likely to occur. The general push for reforms that began with the enactment of multi-party politics in the 1990's should be cognisant that such reforms make corruption far less likely. Kenya has in the past witnessed a fundamental lack of political will to arrest, detain and prosecute corruption suspects. The full implementation of the provisions of chapter six of the Constitution on leadership and integrity will help in deterring the occupancy of the helm of key government agencies by persons of questionable integrity as has been the case in the past.

Proponents of measures such as lustration, argue that it is necessary so as to consolidate the trust of citizens in

democratic reforms and institutions,[62] in order to deter officials from a former regime to re-define or re-brand themselves and return to power. Lustration seems like an almost ideal form of transitional justice in this regard. It does however have its own challenges, namely, that it has often been implemented in a sub-par fashion by entangling the innocent.[63]

Kenya has attempted each of these policies with varying degrees of fervour believing each one to be the panacea to solve the problem of corruption in the country. However, based on the systemic and institutional failures of the countries justice mechanism, there has been little to or no prosecution for corrupt individuals. This suggests that a complete paradigm shift is required to allow for the transition to justice and truth in Kenya. In conjunction with vetting, lustration might pose an appropriate solution for a system whose inter-connectedness can only be matched by its corruptness. This lustration would have to go hand in hand with vetting, because the strength of the institutions Kenya is attempting to create and improve can only be maintained in the presence of a committed and competent civil service.

The continued presence of the 'same elite' in power and their associated business interests and the continued politics of patronage mean that anti- corruption efforts will continue to be frustrated. However, with the enactment of the Constitution, and the strengthening of institutions to combat corruption, there is hope for a more just and equitable Kenya.

Tracing corruption in key sectors during the NARC years

Dr. Alfred N. Ongera

The Transparency International movement through the National Integrity Systems[64] tool works on the premise that good governance is dependent on the soundness of key pillars in a country's governance system. These pillars include the Legislative branch of government; the Executive arm of government; the Judiciary; the public sector; law enforcement; electoral management body; ombudsman; audit institution; anti-corruption agencies; political parties; media; civil society; business.

Unless these pillars have minimised corruption risks, efforts by sectors or departments to enhance good governance individually, however well-crafted their frameworks are, will generally achieve very little. This is because; no department or agency can operate in isolation in matters of governance.

Kenya's roadmap to good governance over the years has

been hindered by unethical practices within various ministries and other state agencies. Such practices include bribery, abuse of office, nepotism and favouritism among others. All these are manifestations of corruption, which stands out as a major problem affecting the public sector. In fact, according the 2013 Global Corruption Barometer, a majority of Kenyans surveyed (61%) stated that they believe that corruption is a very serious problem in the public sector Kenya[65]. It has in most instances led to the rise of the cost of providing public services and economic stagnation (ibid).

In the Kenyan context, corruption commonly manifests through bribery, abuse of office, bid rigging in public procurement, fraud, conflict of interest and embezzlement. Evidence available indicates that corruption within government occurs through illegal acquisition of funds meant for government activities, fraud, misrepresentation and bribery[66]. These omissions occur despite the fact that there are rules, policies and laws, which comprehensively define what is right and wrong. Motivations behind unethical practices in government are always contextual, rooted in a country's policies, bureaucratic traditions, political development, and social history. Still, corruption tends to flourish when institutions are weak and government policies generate rents[67].

Against this background one can argue that there is an urgent need to review and re-invigorate the anti-corruption strategy in Kenya. To achieve this, it is vital that one assesses the various forms of corruption in the recent past and examine the successes and failures of the various attempts to combat the vice, and suggest possible policy options that will probably help in managing the problem. This evaluation presents a critical analysis of corruption in the water, health and education sectors as well as Parliament and the Judiciary in the last ten years.

HEALTH SECTOR

The Kenya government underscores the importance of quality yet affordable healthcare in attaining her social goals. It is on this basis that the Government of Kenya has over a long time tried to improve the health of its people through its development agenda. In its 2003-2007 Economic Recovery strategy for Wealth and Employment Creation (ERSWEC) and vision 2030, the government is planning to attain equitable and affordable healthcare at the best affordable standard to Kenyans. Despite this vision, corruption within this sector has hindered faster positive progress in this area.

Failure to adhere to the basic principles of governance is a clear indication that plans to institute good governance go without notice. This failure implies that targets in high priority areas in the health sector will not be achieved and or the relevant institutions will not function because resources are pilfered or misapplied. Poor procurement policies and procedures coupled with corruption and extortion greatly undermine the provision of health care services. Corruption in the sector mainly manifests in the following ways: corrupt healthcare professionals, distribution of drugs and services, procurement of drugs, medical equipment and budget allocation among others (CMI, 2008)[68]. In 2010, the Kenya Anti-Corruption Commission singled out corruption within the sector as wanting and warned thus:

> In recent years public sector allocations for financing health have significantly increased; however, corruption stands out as a key impediment to impact on well-intentioned spending on health. Without addressing this issue, the commitment to meet goals articulated in the MDGs are unlikely[69]

In a Global Report dubbed 'Where is the money for HIV and AIDS' (2010)?[70], a scandal involving senior ministry officials is detailed. In the report, it was revealed that the then head of the National AIDS Control Council (NACC) Margaret Gachara fraudulently obtained an excessive salary seven times more than what she was supposed to be earning. A subsequent audit by a team from the Efficiency Monitoring Unit (EMU) established that in the same sector, NACC staff used their positions on several occasions to extract personal rents totaling to over USD$490,000 in salaries, fake projects and through misrepresentation of projects. These are huge sums of money diverted for personal gain instead of being utilised as designed for service delivery.

Elsewhere, it has been established by Jansen (2009)[71] and KACC (2010)[72] that there is corruption in virtually all sectors of government in Kenya; the only difference is the way the vice manifests itself. In the health sector, malpractices experienced by patients as they seek healthcare services range from rendering unofficial payments to absenteeism of medical staff[73]. That notwithstanding, misappropriation of financial resources has been the most controversial issue at the heart of corruption scandals in this sector.

Many of these corruption scandals were motivated by either the desire to source for funds for either the 2007 or the 2013 general elections, or the greed for power[74]. On the other hand, the manner in which corruption occurs and where it occurs partly depends on the health of financial systems. As a routine, budgetary allocation within the ministry follows a chain of procedures which are slow and riddled with red tape.

The procedure of channeling money through various layers of national and local government contributes to the continuing dilapidation of health facilities as the process is unnecessarily too long. The fear here is

is that, the red tape within government contributes greatly to the sorry state of public health facilities and therefore raises the question of accountability of money that the government allocates for improvement of health facilities, which reaches the facilities either too late or does not reach them at all. In a report, dubbed 'Kenya Health System Assessment' (2010)[75], it was observed that such bureaucratic procedures lead to delays or a lack of opportunity to access healthcare services by Kenyans.

With these bureaucratic problems comes the question of accountability; which is a major concern within the ministry of health[76]. Like other ministries, there has been a continuous trend of accountability problems of funds meant for improvement of healthcare facilities, wanton embezzlement of funds and improper management of finances.

An example of a scandal at the National Hospital Insurance Fund (NHIF) scandal would be appropriate here. The NHIF saga involved payments made to some non-existent branches of Clinix Healthcare Services. In his commentary in a local daily, Francis Mureithi claimed that Clinix Healthcare Services and Meridian Services which were at the centre of the National Hospital Insurance Fund were said to have received huge sums of money for the provision of insurance services for civil servants[77]. The allegations indicated that Clinix Healthcare Services and Meridian Services contracted clinics to offer the healthcare services while in effect those clinics were nonexistent, and the manner in which they were procured was questionable.

Although the NHIF scandal took a political dimension, it is important to note that attempts by the Parliamentary Accounts Committee (PAC) to hold the then Minister of Medical Services to account on how these services were procured and how money was paid to Clinix failed.

The then minister argued that he could not micromanage tendering procedures since that was the role of Kenya Medical Supplies Agency (KEMSA). According to Mureithi (Jan. 2013), the Efficiency Monitoring Unit (EMU) cleared Clinix Healthcare Services arguing that problems arose from the manner in which the services were procured[78]and that it would be proper for NHIF to consider handling the matter through arbitration rather than cancellation of the contract.

That this matter took a political dimension is not in doubt; as it is clear that, the overall regulator of service provision in the health sector in Kenya is the Ministry of Health (MOH), and the then minister could not purport to be completely in the dark, yet he was the overall leader in that ministry. At the same time, it is important to note that the Ministry plays a leading role in overseeing the activities of all institutions whose functions fall under the health docket. It was therefore not convincing for the minister to have provided such a response based on the institutional framework where he was the head of the Ministry. Hence the minister's response to the NHIF saga was deemed inadequate and merely an admission of failure on his part to take responsibility.

Another area of concern in this sector is the problem of weak legislation. Weak legislation and poor policy formulation has given room for the entry of counterfeit medicines (drugs) and the associated problems that come with it. A survey by Wanjau and Muthiani (2012)[79], established that weak legislation contributed to the influx of these drugs into the Kenyan market since the law allowed for equity of medicines. The study also revealed that unless the brand quality of drugs was protected, counterfeit drugs would flood the market and eventually affect the prices and usage of genuine drugs.

The case for counterfeit drugs is complicated because according to the WHO IMPACT (2006)[80], counterfeit medicines are deliberately and fraudulently mislabeled to disguise their identity, it is therefore difficult to distinguish between genuine and counterfeit drugs unless one is a medical practitioner.The effect of this is that many Kenyans are duped into buying low quality drugs whose effects are unpredictable and contain wrong amounts of active ingredients. The problems associated with these drugs are common across government and private health institutions. The drugs are available at a cheaper cost hence people of lower economic strata opt for them.

It is on this basis that CMI (2008) advised that unregulated medicines which are of sub-therapeutic value can contribute to the development of drug resistant organisms, increase the threat of pandemic disease, and severely damage patients' health as they have the wrong and inactive ingredients and eventually undermine public trust in important medicines. Despite this advise, the government and respective institutions have failed to act. Presently, counterfeit drugs continue to exist in the market and with the potential to severely compromise treatment.

Another area of concern in matters of governance in this sector, is the healthcare profession. Chaudhury et al (2003) observe that health workers have a duty to provide care to their patients, and therefore any misdemeanor is a breach of their dutiful role. Theft of drugs and equipment in stores, failure to administer genuine drugs to their patients, selling of drugs, and absconding duty are some of the problems associated with professionals in this sector. As a response, healthcare workers have adopted 'survival' strategies such as subjecting patients to meet certain costs by either charging illegal fees on drugs and meals, or subjecting them to some form of 'referral' to their clinics where they get some returns. Although one can argue that demoralisation as

a justification for such behaviour, it is immoral and a crime to deliberately fail to save the lives of patients under one's care.

It is important to mention here that the state of the public healthcare infrastructure is in a dilapidated state and is characterised by poor management. This has paved way for deliberate theft from hospital stores, misuse of public facilities, collusion of doctors with private practitioners etc. On the other hand, the government has failed over many years to develop strict mechanisms that would offer the right oversight functions in this sector. As argued by Lakin and Magero (2012), whenever there is an economic constraint on the part of the health workers, the effects are directly passed on to the patients[81].

The above scenario, has created the impression that there is booming business for doctors and nurses who engage in private consultancies contrary to the provisions of their code of practice. Whether by design or by default, medical consultants have found themselves engaging in private services to earn extra income due to weak or no oversight at all. The net effect of this is that doctors steal valuable time and resources from the government that would have been used to save lives through health service delivery in the public sector.

The situation in Kenya's health facilities can be described as wanting with mismanagement incidents such as the mysterious disappearance of essential drugs across the country, acute shortage of funds, poorly maintained stock records, poor monitoring and accounting systems, disappearance of huge stocks of government stores and assets, flawed procurement systems and many unethical practices within government health facilities[82]

Policy recomendations and interventions

According to an integrity study on the health sector in Kenya conducted by Transparency International Kenya in (2011)[83], there was a general shortage of healthcare providers contrary to the requirements of World Health Organisation (WHO). According to the Joint Learning Initiative (JLI), the assumption was that countries with less than 2.5 health workers per 1000 population would easily fail to achieve their objective of enabling citizens access health care.[84]

Some departments in the health facilities had as few as one qualified staff while in other situations none at all. The situation was even worse for technical staff particularly in provincial hospitals where their services were based on the available technology for referral services. It is therefore recommended that mechanisms for the hiring of more healthcare workers be put in place so that Kenya can meet the WHO stipulated standards if the vision 2030 is to be achieved.

In order to improve healthcare services, it is imperative that they are fully devolved and operationalised. It is through devolution that health care services will be streamlined in line with the requirements of specific counties. This is in line with the decentralisation policy intended to enable greater decision making at the decentralised units. With the creation of counties in line with the devolved system of government; and the planned devolution of health services, it is crucial that activities of the Ministry of Health and its affiliate organs such as KEMSA be devolved and part of government as well as donor funds be channeled to these devolved units. It is through decentralisation of healthcare services that the public can participate in enhancing governance in areas of procurement and in the distribution of medical equipment.

Although it is important that the Kenya Medical Supplies Agency (KEMSA) is devolved, a few in house issues must

be addressed. These include strenghthening KEMSA as an institution by building on its capacities particularly the human resource element and financial independence. Currently, KEMSA operates within no independent budget and relies heavily on donor funding and supplements from the Ministry of Health. Strenthening KEMSA will give it the autonomy necessary to function.

On the other hand, in order to improve the quality of service delivery, it is important that government monopoly in the provision of healthcare be abolished and instead encourage more private service providers. This however does not mean totally abolishing government monopoly, but opening up the sector to encourage competition among those who supply medical equipment to health facilities. Privatisation of bodies that offer procurement services for the government on behalf of the Ministry of Health (MoH) such as KEMSA can be helpful in reducing unprecedented loses of medical equipment and thereby contribute in granting quality services. For instance, if a private supplier is identified and made responsible for the supply of health equipment, cases of mysterious loses or delivery of substandard materials might be minimised since the institution is at liberty to reject the delivered materials if they do not meet the required specifications.

Even though the Public Procurement and Disposal Act (2005) has a clear intention of reducing corruption, it is worth observing that procurement in Kenya has had various weaknesses. Procurement systems in Kenya rely on these control mechanisms and interested stakeholders to conduct social audit and implement effective ethics and anti-corruption measures; some of these conditions are missing. There is therefore need to serve the public with information regarding procurement, to enable them carry out the oversight role. The lack of adequate flow of information and the lack of a completely

open tendering process are two factors among many responsible for corruption incidents in the MoH.

Similarly, the current Public Procurement and Disposal Act (2005), needs to be amended. Quite a number of issues have emerged with the Act in regard to it being open and transparent. Effecting changes to allow for transparent mechanisms in procurement procesesess will encourage private entities to jump on board and effectively offer better options in case KEMSA and the government fail to offer the services effectively.

The question of counterfeit drugs is a major problem. However, it is possible that it can be managed through legislation. The government should initiate legislation which regulates the sourcing and use of medical drugs in Kenya. There should be a policy which outlines and strengthens institutions such as the Pharmacy and Poisons Board (PPD) and National Quality Control Laboratory (LQCL), which are essentailly required by law to check on drugs. Such institutions should be strengthened and be mandated to monitor procurement and usage of drugs in Kenya.

WATER SECTOR

Reforms in the water sector date back to 2002 when the government introduced legislative changes which define the various roles of key water institutions. It is important to mention that these legislation provided for huge spending, public participation in the sector and gave guidelines on privatisation and commercialisation of the sector. Despite all these attempts, there have been challenging governance issues within the sector, key among them being corruption.

It is significant to emphasise that although the Water Act 2002 broadly set out a legal implementation framework, it

fell short of setting out a clear, elaborate and comprehensive government policy on privatisation that would improve governance in the sector[85]. It is against this background that a study by European Centre for Development Policy Management (ECDPM) observed that the failure on government to develop a comprehensive policy led to over-institutionalisation, overlap of roles and poor coordination of activities, necessary to boost the reforms in the water sector[86].

The then Minister for Water, Charity Ngilu admitted in Parliament that cartels were threatening to bring down the ministry and that unless that was checked, millions of taxpayers' shillings would be lost[87]. Ngilu admitted that there were claims of non-existent costs, involvement of officers within the ministry and tribalism among others. According to Ngilu, governance problems in the Ministry were occasioned by a 'weak' Water Act 2002, violent water cartels, illegal water tapping and mismanagement'[88].

In their survey Rampa et al (2011) observed that in the water sector, a failure by stakeholders to be accountable for their actions is a cause of concern. They argue that:

> Vested interests, blurred stakeholders' role and relatively small circles of those making decisions combine to become strong disincentives for real transparency and independence. The extreme personalisation of roles, still unclear governance functions and the need to survive in a highly competitive environment generates a feeling of guilt, the sense of ultimately sharing the responsibility for the problems of the sector[89]

The events that followed the 2002 and 2007 elections were pre-occupied with the desire of the political elite to make money for elections and had nothing to do with enhancing good governance. In particular, during the

post-grand coalition period after 2008, many individuals seized the opportunity to source for funds in readiness for the next elections. According to a report by ECDPM (ibid), the years that preceded the 2007 elections, agents of the coalition government and other stakeholders embarked on a 'looting spree' to ready themselves for the 2012 elections[90].

Similarly, although Charity Ngilu publicly admitted in Parliament of the existence of rampant corruption in her ministry, she was also accused of corruption at the same ministry. This is because as far back as 2010, a major corruption scandal was revealed which involved her and her cronies. According to the African Centre for Open Governance (Africog), Charity Ngilu (the then Water Minister) was said to have violated the Public Procurement and Disposal Act (PPDA 2005) and the Public Officer's Ethics and Act (POEA 2003) by sneaking in her relatives in procuring tenders irregularly in her ministry[91].

The nature of procurement-related corruption involves the manipulation of tendering systems and payment processes. The ministry has largely been regarded as a culprit of procurement-related corruption related to the purchase and supply of water related services. Several incidents reveal that the supplied materials were of different specifications (low quality), while the indicated prices were of high quality materials[92]. According to Heinrich (2004)[93], purchase of different commodities, was done through single sourcing, nepotism, tribalism and favouritism. It was also established by KACC that in tendering systems, tenders were given to individuals who had special relationship with senior officers[94].

The controversy which surrounded procurement processes during the tenure of Hon. Ngilu is a case in point that might prove high levels of nepotism. The tendering process was marred with allegations of nepotism as the minister was accused of giving her relatives the tender[95]. According to

a commentary in the Daily Nation (25th October 2009), entitled '*Kenya: Water Ministry has lost Millions*'; despite these wild allegations, the nature of investigation which took place was so superficial because the matter ended with no meaningful prosecution as the real culprits escaped prosecution due to insufficient evidence.

Also, it was revealed that the level of corruption was worsened further due to conflict of interest[96] in the manner in which the hiring officers was done. On the other hand, according to the Africog governance report (ibid), the period before 2007 general elections saw excessive fraudulent payments of unaccounted for goods and services running to over Ksh. 10 billion, money meant for constructing water storage dams.

According to the National Corruption Perception Survey conducted by KACC in 2010, although the Ministry of Water does not appear among the top five most corrupt ministries in Kenya, the level of corruption within the ministry has remained extremely high. In the Ministry, several incidents of corruption, ranging from individual participation to grand corruption, have been reported. This is consistent with the findings of a sectoral analysis of the Ministry by KACC (2011), where the commission sought to establish the level of corruption in the various institutions in the ministry.

According to KACC[97], the Ministry of Water and Irrigation recorded the highest cases of corruption with 89 cases being reported. Nairobi Water and Sewerage Company came a distant second with only 40 cases being reported. This study demonstrated that the ministry had reported very high levels of corruption.

Policy interventions and recommendations

Just like the health sector, the water sector has also considered privatisation as a means towards achieving greater transparency and accountability. The failure of the Ministry of Water to provide better services has prompted the need to consider privatising water service boards with the proponents of privatisation insisting that this could be a means of curbing graft because it will lead to efficient delivery of services[98].

Privatisation as a way of curbing graft in public institutions should however be considered with care lest it results into uncontrollable corruption. Ong'endi and Ong'oa, (2009) fault the proponents of privatisation especially in the water sector. They argue that the supporters of private service providers never took into consideration the fact that the socio-economic status of a majority of the people in Kenya does not favour privatisation since only those with the economic muscle will have their way in buying the companies.

However, this has to be handled with caution: complete privatisation may disadvantage the poor at the expense of consumers with purchasing power. Based on these reservations, it could be argued that privatisation without provisions for public participation poses the danger of plunging the water sector into even more corruption. The ability of private service providers to deliver better than government can only be justified if government is so deficient and unwilling to fight corruption that private individuals get considered as the better option.

As argued by the National Taxpayers Associoation of Kenya (NTA), problems associated with corruption through procurement and tendering can effectively be minimised by the participation of all stakeholders during the implementation stage of the projects[99]. The critical role of the public in ending graft in the water sector is emphasised

by Ong'endi and Ong'oa (2009)[100] who stress the important role played by the public. This approach to governance in the water ministry gave control of water resources to the local communities with very minimal input or control from the government in all stages of the project cycle thus during initiation stage, implementation and management. It is imperative then that today, public participation is more necessary than it was ten or so years ago. This will be in line with the intentions and requirements of the Public Procurement and Disposal Act (2005)[101] which outlines a very representative composition of the Public Procurement Oversight Authority (PPOA) board.

The overal intention of PPDA Act 2005 was to streamline procurement procedures by making procurement proceses more open and fair to those participating. It was also meant to reduce cases of corruption through open tendering. The importance attached to the tendering process and the emphasis on stakeholder participation in the process is a clear indication that openness is key in the fight against corruption. Accordingly, accountability supposes that public policies, practices and expenditure are open to the public and legislative scrutiny and that civil society is involved at all stages of budget formulation. Involvement of the public and other stakeholders must be upheld in making competitive award of tenders thereby minimising cases where ministry officials award tenders to their relatives and acquaintances at costs which are not known to the public.

Problems associated with corruption through procurement and tendering can effectively be minimised by the partcipation of all stakeholders right at the implementation stage of any project[102]. For instance, Ong'endi and Ong'oa (2009)[103] argue that Kenya's water policy at independence placed a lot of emphasis on the participation of all stakeholders e.g.the Department of Water, the private

sector, Non-Governmental Organisations (NGOs), and the ordinary citizens. The policy gave control of the water resources to the local communities with very minimal input or control from the government during initiation stage, implementation and management. Today, it is imperative that those involved in all processes be brought on board as articulated in the PPDA[104] which outlines a very representative composition of the Public Procurement Oversight Authority board.

Even though the PPDA has a clear intention of reducing corrupt activities as a result of a flawed procurement processes in public institutions, it is worth observing that procurement in Kenya has had various weaknesses. An assesment of the procurement system in Kenya carried out by the PPOA in 2007[105], established that the integrity and transparency of a public procurement system heavily relied on a number of control mechanisms. These include an effective control and audit system, appeals mechanism, a comprehensive information sharing system enabling civil society and interested stakeholders to conduct social audits and effective ethics and anti-corruption measures.

It is worth mentioning that some of these conditions, as provided for by the assessment have not yet been implemented. For instance, the comprehensive information sharing system has not been adequately achieved. In recognition of the fact that the lack of access to procurement information has been exploited by people to engage in corruption, the PPOA has established a website with the intention of publishing a broad range of information about the procurement system, including legal and policy documents, procurement statistics, and procurement plans, notices and contract awards (PPOA, 2007)[106]. Although these measures have been taken, there is still need to serve the public with more information regarding procurement in the water sector. Lack of this

information and adequate open tendering processes have largely been responsible for corruption in this sector.

EDUCATION SECTOR

Corruption in the education sector is a big concern to both the government of Kenya and development partners. It has been argued that due to corruption in the sector, learners have come to believe that hard work does not pay as success is only attained through favouritism, bribery and manipulation[107].

Although this is a sector that has not been largely associated with major corruption scandals, it emerges as one where individuals have in the recent past embezzled large sums of money under unclear circumstances. Some of the scenarios that have been a subject of corruption in the education sector are detailed below.

Free Primary Education and Kenya Education Sector Support Programme (KSSP)

The Free Primary Education Programme (FPE) was launched by the National Rainbow Coalition (NARC) government in 2003, soon after the 2002 general elections. It had been estimated that Kenya would have achieved the Millennium Development Goals target of free universal primary education by the year 2015. According to Muthwii et al (2004), the implementation of FPE in 2003 attracted a 22.3% enrollment rate which was very impressive[108]. The programme attracted several pupils into primary schools and several donors such as UNESCO were motivated to offer support. The programme was later diluted by Ministry of Education officers who saw donor funding as an avenue of satisfying their individual needs

rather than an opportunity to improve service delivery in the education sector. According to Bold et al (2012)[109], misappropriation of FPE funds was at the centre of a major corruption scandal which emerged in 2009 in which actual funds disbursed to school bank accounts fell short of the allocated amount by huge sums per pupil in 2005 and by smaller but significant amounts in subsequent years. Bold et al (2012) further argue that in line with the sentiments of Teyie and Wanyama (2010), press reports estimated that anywhere between $68 million and $590 million of the FPE budget had been misdirected between 2004 and 2008[110].

This incident prompted the suspension of top officials at the Ministry, but the Minister and the Permanent Secretary who were accountable for the money at the ministry were retained. The intrigues that followed this saga within the then Grand Coalition Government, was a clear indication as to what was of priority to the two principals - politics of survival. This is because, even though the Prime Minister suspended the then Minister for Education, the President overturned his decision as the Minister belonged to his side of the coalition. Foreign donors who included the Department for International Development (DFID) and United States Agency for International Development (USAID) decided to freeze support to the programme in December 2009 (Bold et al, 2012).

As a consequence of this embezzlement and misappropriation, this programme was halted. In its annual governance report, AfriCOG argues that development partners were displeased with the misuse of the funds and subsequently demanded for a refund of their money. The fact that donors were refunded their money by the Kenyan government and that the matter was not conclusively handled suggest a possible involvement of senior government officials. Those who were arraigned in court were junior officers who were working on instructions

from "above".

Just like the Free Primary Education (FPE) Program, corruption had weakened the effectiveness of the Kenya Secondary Schools Programme (KSSP). A case in mind is where an audit of the KSSP revealed that in several cases, the ministry spent excessive public funds on training and workshops; while in reality, such events cost less or never took place. This audit exposed many financial flaws and high financial fraud conducted by the ministry officials. The ministry has also been implicated in dubious dealings and transactions, where forged documents were used. Using forged receipts and other documents, ministry officials, claimed huge sums of money for non-existent services, excessive disbursement of funds to specific places and implementation of new programmes. This audit exposure led to dismissals of officials in the ministry[111].

Malpractices in staff recruitment, ghost teachers and staff absenteeism

There is a tendency by ministry officials to neglect their mainstream duties in favour of private business such as private tutoring and holiday tuition which compromise service delivery in the sector[112]. Fraudulent practice is another form of malpractice. The manifestation of this is through the use of public facilities for private interest, exerting pressure on parents to pay for private tuition, teaching or coaching the curriculum in a distorted way and punishing pupils for attending private tuition including deliberately failing them.

Although in the Kenyan case attempts at curbing this vice have been in place, very little has been achieved. A study by Choti (2009)[113], reveals that Kenyan teachers are not committed to teaching as they miss classes and therefore the syllabus is not adequately covered. Elsewhere, Thuranira

(2010)[114] established from his research on 'Perspectives on the Teaching Profession in Kenya' that the fact that Kenyan teachers engage in private tuition elsewhere, has greatly affected the standards and quality of education yet the authorities shy away from facing it. He argues that there is evidence to the effect that teachers own and run private schools - a clear case of conflict of interest.

In 2012, the then Education Minister the late Mutula Kilonzo sought to prohibit holiday tutoring in all schools, but little has been done to control the vice. Comparatively, this move was similar to that in Canada and Japan where the people simply decided to ignore private tuitions. However, in the Kenyan case, although the Minister's move was well intentioned, it failed to attract national support owing to lack of appropriate legislation which define the extent to which holiday tutoring could go and which spell out the penalties levelled against those found engaging in it.

The Ministry of Education has recorded cases of corruption in recruitment and promotions. According to an investigation team by the Daily Nation in 2009[115], 'College admission scam under probe' the team established that education staff were trading in admission letters; a research that prompted the ministry to launch a ministerial investigation following public outcry.

In 2012, *The Standard Newspaper*[116] reported that short-listing and recruitment of teachers in the sector were marred with irregularities, which were attributed to corrupt practices. It was reported for instance that during the recruitment of 2,074 low cadre staff in the ministry, the recruitment procedures failed the integrity test since those who got the jobs did not apply for the jobs nor were they shortlisted. It observed that:

> The recruitment failed the integrity tests as an audit

> revealed that those who got the jobs did not apply neither were they shortlisted. On the flip side some of those who qualified were never given the jobs. The then minister in his defence admitted saying: This was a mistake -- the recruitment is something difficult to defend -- during my watch this would not happen. I was waiting for this Committee to conduct a hearing so that I can go back and start a better process[117].

It is a fact that out of all the total applicants, 436 were shortlisted but did not apply for the jobs; 344 individuals were appointed yet they were not among those shortlisted while 239 who were successful at the interviews were not appointed. This indiscretions in appointment procedures raised concerns. The same practice was also experienced in promotions, where those who did not deserve promotions were promoted; yet these are the people who determine the general performance of their respective schools. In his study on 'Perspectives on the Teaching Profession', Thuranira (2010) captures this sad state of affairs and observed that:

> Although the head teacher has the overall responsibility for the administration of the school... in most cases their expectations are not always met, as many fall short of them. Owing to corruption and ethnicity, some of the head teachers are promoted irregularly to these positions when they are not qualified... Many teachers feel that they are just equals and to make it worse, some of the teachers serving under them earn more than their bosses and might even be better or more qualified than their superiors[118].

The education sector has been affected by issues of staff

qualification with schools having a number of teachers that are hired by parents and schools' Boards of Governors (BOGs). According to Bold et al (ibid), schools informally contract local teachers known as Parent-Teacher Association (PTA) teachers to supplement the work done by permanent teachers. Teacher shortage has however been partly caused by corruption scandals that have emerged from teacher recruitments as earlier demonstrated[119]. Government in co-operation with stakeholders should put in place policies that govern the process of hiring qualified personel in the public service in order to ensure the provision of quality services to Kenyan citizens.

As earlier observed, the involvement of junior education officials in corruption has been motivated by poor remuneration of teachers (ibid). Poor remuneration of teachers has caused the numerous strikes that teachers in Kenya have been engaged in since 1997. In order to motivate teachers and improve their job satisfaction, government ought to improve the remuneration of teachers through a thorough a review of their salaries.

In relation to private tuition against free government sponsored tuition; it would be better if the government initiated a policy to spell out the nature of tuition that is most likely suitable than a wholesome ban of private tuition. It would be prudent too if the state initiates a policy where private entities partner with interested schools to offer private tuition in a Public Private Partnership (PPP) arrangement. In so doing, the state just becomes a facilitator in the process and only plays an oversight role. This will help in eliminating unnecessary confrontation between teachers, parents and private providers while at the same time not affecting the standards of education offered. This will in addition offer opportunities for private groups to compete with state sponsored schools. Kenya should consider best practices on private tuition

from different parts of the world. For instance we can learn from Mauritius and Hong Kong which have recorded better success due to laws and regulations that define holiday tutoring. The two countries have also provided budgetary allocations for monitoring and policing of private tutoring and established self regulated associations.

LEGISLATURE

Kenya's Parliament, which has grown over time to develop its own formal authority is regarded as the most advanced in Africa.[120]Kenya's Parliament has developed from a controlled legislature in 1997 to a powerful independent house free of the Executive under the Constitution of Kenya, 2010. Over time, Kenya's Parliament has been deeply engaged in policy formulation, revision and drafting of new legislation, effective public representation and oversight functions. Other areas of engagement have been in public budgeting and constitution making[121]. It is for this reason that public opinion placed it highly with 67% of those interviewed approving its role in governance[122]. Underscoring the role of Parliament in Kenya over the last decade, the Institute of Economic Affairs (IEA) writes:

> The destiny of any nation rests squarely on the conduct, integrity and performance of Parliamentarians in their individual and collective capacity as peoples' representatives in the exercise of their functions-legislation including passing of the budget, oversight and representation[123]. the conduct, integrity and performance of Parliamentarians in their individual and collective capacity as peoples' representatives in the exercise of their functions-legislation including passing of the budget, oversight and representation[124].

The implication of these responsibilities is that Parliament is positioned to play a pivotal role in curbing corruption in Kenya. Although there have been plenty of successes in Parliament, there have been some failures too. The Kenyan Parliament has over time had its own technical hiccups which, have to a large extent affected its effectiveness.

When one assesses the achievements of the 9th and the 10th Parliaments (2003-2007 and 2008-2013 respectively), it is obvious that their performance has been dismal[125]. While commenting on the performance of the 9th Parliament, Mars Group[126] described it as the most wasteful Parliament, which chose to concentrate on its own selfish interests instead of focusing on formulating effective laws to curb corruption and facilitate economic recovery.[127].

This is because in some instances, Parliament becomes part of the problem when it is supposed to offer solutions. This was the case in situations of policy and legal formulations and acting decisively upon all those implicated in corruption. Even in situations where Parliament has succeeded in initiating censure motions against those implicated in corrupt practice, some members have been compromised and have betrayed fellow Parliamentarians hence failing to embrace the spirit of collective responsibility[128]

One area in which corruption manifested in Parliament during the life of the 9th Parliament is abuse of office. MPs resolved to unlawfully award themselves salaries and allowances through misrepresentation and fraud, contrary to the expectations of many Kenyans. According to a report by the Mars Group, the 9th Parliament became mischievous right from the beginning. For instance, they passed legislation that awarded them salaries and allowances, and which was backdated to eight days before they were sworn in, and became eligible for allowances and salaries.

The same MPs through an amendment Act No. 2 of 2003 awarded themselves huge amounts of money in form of extraneous, entertainment and attendance allowances. As custodians of public funds, it was illogical for the MPs to have awarded themselves such huge perks- a clear manifestation of abuse of office[129]

Constitutionally, legislators are obliged by law to monitor and oversee the proper collection, custody and expenditure of public finances and ensure that all the tax collected is spent for the overall public good. However, it is during the 9th and 10th Parliaments that Kenya lost billions of shillings as legislators watched. The failure to push for legislation in good time to enforce prosecution is a failure on the part of the two regimes[130]. In its argument, Mars Group[131] has observed thus:

> During the 2003-2007 Parliament revelations of grand corruption and misappropriation of public funds continued unabated, and Parliament took no action to prevent illegal charges on the Consolidated Fund. The epitome of this state of affairs was the Anglo Leasing scandal in which the Controller and Auditor General informed the 9th Parliament that close to 40 billion shillings was paid out by the Treasury on 18 bogus security related contracts without Parliamentary approval. Although those mentioned were later arraigned in court, the evidence in question had been tampered with and hence they were absolved from blame. [Italics my comment]

Although in its assessment, the World Bank[132] credits Parliament for its later role in this scandal, it must be noted that the 9th Parliament failed to act early enough before the culprits in government interfered with the evidence. In its report: 'The Role of Parliament in Curbing Corruption',

the World Bank observes by reviving the investigations in this matter, Parliament was trying to show its relevance in fighting graft; but the move came much too late. It can however safely be argued that this was a notable achievement because it is through the Anglo Leasing scandal that Kenya's opposition in Parliament tried to exert their role by attempting to hold accountable those implicated in the scandal. Although there was little success, in holding those responsible to account, it sent strong signals that somehow, Parliament was actively keeping the government on its toes. These views are also shared by Matiangi et al (2013)[133].

Although The Goldenberg Scandal falls far much behind the scope of this study, its ghost still haunts the Kenyan nation. Even though many cases involving the Goldenberg scandal came to an end recently, it had far reaching effects.

The Grand Regency scandal involved the sale of the then Grand Regency Hotel to a Libyan company at a throw away price. The proprietor of the hotel decided to sell the hotel after several court battles where the government wanted to take away the hotel from him; he opted to sell the hotel and invited the government as a third party. As a result of this, the government became an interested party going for an out of court settlement. It is argued that the Grand Regency Hotel became government property after government wooed the proprietor in return for amnesty on all charges related to the infamous Goldenberg being dropped[134]. The concern here is that it is alleged that the hotel was sold three times cheaper than the market value, to the Libyan government[135].

It is these revelations that prompted the then Chairman of the Public Accounts Committee to lead a spirited campaign in Parliament to have the then Minister for Finance resign for being party to the sale of the hotel and for flouting the procurement procedures[136]. The Minister stepped aside to pave way for investigations. Although this intervention was timely on one hand, it can be argued that the events that

followed this were choreographed.

It can also be argued that the role and involvement of Parliament in this saga could be termed as a case of double standards because at one point it performed well[137]. However, Parliament acquitted key suspects in the same saga for which they had earlier on compelled a Minister to resign[138]. This raises the question of whether PAC was really motivated by the fight against corruption, or there were other motivations in leading a campaign to have the then Finance Minister resign.

Another area where Parliament has failed in the fight against corruption is in campaign financing. During campaigns, parliamentary aspirants spend a lot of money. The Kenyan Parliament has for a long time failed to legislate and regulate campaign finance. By the time they enter parliamentary service, they are already broke. Although Matiangi et al (2010), attribute this problem to respective political parties, MPs use their parliamentary privilege to defraud the public of millions of shillings to recover the money spent in financing their campaigns.

The situation has not been any different in the 11th Parliament (sworn in 2013). As a result of the promulgation of the Constitution of Kenya in August 2010, the law changed and contrary to the previous parliaments, Members of the National Assembly have no powers to determine their pay packages. Determining MPs salaries is now vested in the Salaries and Remuneration Commission (SRC). After elections, Members of the National Assembly began to arm-twist the SRC to increase their salaries to a point of even attempting to disband the SRC and to frustrate bills presented by government in Parliament if their pay demands were not met.

According to Maurice Odhiambo[139], Members of the

National Assembly overwhelmingly passed legislation to increase their remuneration than stipulated in law. What is more shocking is the fact that in one of the local dailies, Herbling David (Business Daily, June 12 2013) alleged that the Executive and Members of the National Assembly secretly entered an agreement to earn more than what the Salaries and Remuneration Commission (SRC) had initially provided[140]. In this case, the Executive and Members of the National Assembly would have hatched a plot to fraudulently obtain money illegally from the taxpayer.

It is important to mention that this action by MPs is an act of abuse of office, a manifestation of corruption, which has been perpetuated over the years, partly due to precedence set by the 9th and 10th Parliaments and because Members of the National Assembly have immense powers on issues that affect them. Although this demonstrates to Kenyans that their legislators cannot be trusted in regulating matters touching on their (legislators) welfare, it is important to mention that Kenyans too bear responsibility for electing people who have demonstrated lack of integrity while in public service.

Although according to Matiangi et al (2013), this action by MPs can be justified, as the manner in which it was done was mischievous and without proper consultations. In his opinion, Matiangi et al uses the words of Squire (1972) who argues that:

> Not surprisingly, the Kenyan civil society blasted the most recent raises while MPs defend them as necessary if they are to do their work. The truth lies somewhere in between. Without adequate salaries, MPs are vulnerable to Presidential patronage that has crippled legislatures across the continent. Indeed, one can argue that the combination of

adequate salaries and the enforcement of term limits is responsible for the emergence of the Kenyan National Assembly since 2002 as an independent institution that matters. Stated simply, MPs can no longer be bought in the manner that they were a decade ago.

Against this background, one may ask: why Parliament as the institution charged with the duty of legislation cannot initiate laws to provide for other agencies to exercise prosecutorial powers? According to Wamuti Ndegwa[141], the failure of Parliament to enact such legislation is proof that they are not committed to the war on corruption. He argues that private interest takes centre stage and becomes priority arguing that where sufficient evidence has been established, those responsible should be charged. Failure to do so would cause the public to lose confidence in the institutions responsible[142]. According to Transparency International Kenya, this is one of the reasons why Kenyans would not report corruption incidents to the law enforcement agencies[143]. The action of Parliament in failing to initiate the process of holding the Executive and related institutions to account, was an omission of the law; that of obstructing the course of justice.

Perhaps, the 2010 Constitution and the subsequent amendments in Parliament is something that can be said to give Kenyans hope - but with caution, as they empowered the 10th and the 11th Parliament(s) to vet those proposed for appointment to public office. This is a departure from previous practice. Although this approach can be said to have put strict checks on excessive powers of the President in appointment, to some extent the current Parliament has not lived to the people's expectations[144]. According to an opinion by Kwendo Opanga[145], parliamentary vetting committees that conducted vetting of appointees after the 2013 elections were a waste of taxpayers' money as they

never achieved the objectives of the vetting process. He argues that although the vetting process was meant to cushion Kenyans, the way the MPs conducted it sounded like it was nothing new – it was business as usual. Arguing that:

> True, the MPs had at their disposal memoranda and petitions forwarded to Parliament against the nominees by dissenting members of the public. But they did not carry out any research of their own; you vet from a position of strength, which is brought about by knowledge, in turn, brought about by research and inquiry. MPs cannot possibly have weeded the undesirable elements out of the Cabinet if they did not have fool proof evidence of wrong-doing on the part of the nominees. Similarly, they cannot possibly have cleared the nominees of the accusations levelled against them if they did not benefit from investigations into the same[146]

It can therefore be argued that despite the Kenyans' optimism, Parliament demonstrated inefficiency by carrying out a lacklustre vetting process. For instance, the vetting committees and Parliament endorsed people with questionable integrity and incompetent to be appointed into government. According to an opinion by Victor Raballa of the People Daily:

> The vetting of cabinet secretaries, who have since been sworn into office, and the manner in which the pending list of principal secretary nominees was selected have been shrouded in controversy with critics saying they fell short of the benchmarks set in the Constitution. Seven of the 16 cabinet secretary nominees faced integrity questions and although the parliamentary committee on appointments

> the parliamentary committee on appointments cleared them, it was with a rider that the Ethics and Anti-Corruption Commission (EACC) was unable to provide a report on their status within the short period their vetting was supposed to take place (People Daily, 19th May 2013).

In this manner, Parliament demonstrated that it is not the oversight institution as envisaged in the constitution, but is an institution that operates in a partisan manner and in fulfilment of partisan political interests.

The desire to fulfil political and personal interests and the failure to amend the execution of prosecutorial powers to various agencies of government; coupled with an overbearing Executive have been the main setbacks to Parliament in its fight against corruption (See Githongo Article 2007)[147]. This implies that the independence of Parliament is crucial if its role in fighting graft is to be achieved. However, despite various attempts and suggestions on how the Kenyan Parliament can participate in fighting corruption, partisan political interest still remain the biggest obstacle[148].

Policy Interventions and recommendations

The success of Parliament in the fight against corruption largely depends upon strengthening Parliamentary oversight committees i.e. the Public Investments Committee (PIC) and the Public Accounts Committee (PAC). This view is supported by the claims in The Point (2000)[149] which highlights that in Kenya, the Parliamentary audit committees - PIC and PAC, have historically done a splendid post-mortem job on corruption. The importance of PIC and PAC have however been frustrated by the unwillingness of the State Law Office and the Office of the

Director of Public Prosecutions to initiate investigations and prosecution of people that Parliament has earmarked following allegations of involvement in corrupt practices. In view of these circumstances, Parliament must be more assertive not just through its various committees such as the PIC and PAC, but also through a progressive and proactive legislative agenda; key among these legislations should be the one that paves way for Parliament to have the powers to ensure that investigation and prosecution of recommended cases are carried out and necessary sanctions are undertaken if need be.

Public participation is crucial in beefing up support to the oversight role played by Parliamentary Oversight Committees[150]. It is imperative that Parliament fully recognises the role that the public plays in governance and involve them in the process of enhancing good governance. Though this is a provision recognised in the current constitution of Kenya, it has not been fully implemented since in the past some issues raised by members of the public and which appeared to challenge the suitability of certain nominees to the cabinet were seemingly not taken into consideration. Instead, the nominees were endorsed by Parliament without fully considering the allegations. For instance, the then acting chairperson of the Ethics and Anti-Corruption commission Irene Keino confirmed that there were pending allegations related to corruption against some nominees hence their integrity had not been cleared while there were integrity queries raised by members of the public against specific nominees such as Phylis Kandie, Charity Ngilu, Fred Matiangi and Francis Kimemia among others[151]. In recognition of the need for public participation in the activities of Parliamentary committees, Parliament has the obligation of availing as much information as possible to the public to facilitate the participation of members of the public and it ought to include the general principles of openness in its standing

orders.

JUDICIARY

Sustainable judicial reform is a process and not an event. Lasting and effective solutions to the problems which have plagued the legal system depends on an accurate assessment of the root causes. Examinations of the requisites of an effective judicial system must be undertaken. We need to identify aspects of judicial reforms that will assist in restoring the state of our judiciary to glory that used to be its hallmark. A favourable attitude towards reform is an important variable if the reforms are to be effective (ICJ, 2005)[152].

For long, Kenya's Judiciary was characterised as inept, corrupt, unethical and opaque in the manner in which it transacts its business[153]. The history of reform within the Judiciary dates back to 1963, and still continues to date[154]. Although the struggle for reform in the Judiciary has been on for a long time, this review will be limited to the reform process in the last ten years. What is saddening is the fact that some of the reforms were not implemented, partly because of interference from the Executive and partly due to corruption (see Githongo arguments ibid)[155]. The failure to implement reforms within this sector led to three things: loss of confidence and the integrity of the Judiciary, collapse of the independence of the Judiciary and justice system, and high levels of corruption (ibid).

According to a Report on the Integrity and Anti-Corruption Committee of the Judiciary in Kenya (2003)[156]; actual corruption in the Judiciary has taken two forms: the petty corruption practised by the lowly paid employees to supplement their emoluments and the grand corruption practised by the well paid employees in an endeavour to satisfy greed. These two dimensions of unethical practices have manifested themselves in various ways.

According to the Report of the Fourth Meeting of the Judicial Integrity Group (2005) corruption was prevalent in the Judiciary with 5 of 9 Judges of the Court of Appeal, 18 of 36 High Court Judges, 82 of 254 Magistrates, and 43 of the 2,910 paralegal staff being implicated[157]. The Final Report of the Task Force on Judicial Reforms (2010) however ranked bribery as the most common form of corruption in the Kenyan Judiciary alongside fraud, abuse of office and receiving of favours. At the same time, the Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (2003) indicates that different forms of graft have been associated with the Kenyan Judiciary over a long time.

As a result of these revelations, the then Chief Justice recommended to the President to relieve implicated Judges of their duties. It was out of these recommendations that the Report of the Fourth Meeting of the Judicial Integrity Group (2005) indicated that although 16 of the 23 court judges who had been implicated opted to retire from the Judiciary, they did not lose their benefits. The report further affirms that those who were under investigation continued to enjoy their salary, allowances and other benefits in spite of the allegations of corruption. The reforms that followed then were a response to these revelations.

According to the International Legal Assistance Consortium (ILAC)[158], by 2010, the Kenyan population had lost confidence in the Judiciary, the institution had lost its independence, and there were rampant unethical practices and high level corruption. In addition, inefficiency and delays in courts had made many Kenyans to believe that justice was only a preserve of a few individuals. It was the realisation of the above scenario that a Judicial Task Force was formed to address these problems within the Judiciary[159].

All matters of development and democracy in a country largely depend upon a Judiciary that is functional; that is effective in upholding integrity in all spheres of life. According to a Judiciary Perception Survey commissioned by the International Commission of Jurists (ICJ) and conducted by Infotrack Research and Consulting (2012) in Kenya, the Judiciary plays a significant role in the socio-economic and political development of any democracy.

On the other hand, the importance of an effective Judiciary is further echoed in the Progress Report on the Transformation of the Judiciary (2011). In the report, Chief Justice Dr. Willy Mutunga acknowledged that a Judiciary that upholds the rule of law, dispenses justice fairly and efficiently, validates and protects human rights is not just good for stability but also for economic development[160].

It is therefore important to emphasize the pivotal role that the judiciary plays in upholding social integrity. This means that if the Judiciary is infested with corrupt practices, all aspects of development in political, social and economic spheres will be compromised.

Despite the known importance of the Judiciary in upholding integrity in the public sphere, the Kenyan Judiciary has been accused of corruption on many fronts. In his first 120 days in office, the current Justice Willy Mutunga, described the way things were when he assumed office:

> We found an institution so frail in its structures, so thin on resources, so low on its confidence, so deficient in its integrity, so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a Judiciary that was designed to fail. The institutional structure was such that the Office of the Chief Justice operated

> as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralized. Accountability mechanisms were weak and reporting requirements absent[161].

In echoing the sentiments of the CJ, the International Commission of Jurists (ICJ) Kenya Chapter, in its Judiciary Perception Survey (2012), confirms that the Kenyan public had lost confidence in the Judiciary way before CJ Mutunga took over and prior to the promulgation of the new Constitution in 2010; arguing that the efficiency, independence, integrity and public confidence in the Judiciary was at its lowest ebb. The Final Report of the Task force on Judicial Reforms (2010) indicated that the Kenyan Judiciary was characterized by unabated corruption, interference from politicians, tribalism and nepotism and it is these factors that contributed to the low public trust and the waning confidence in the Judiciary.

Corruption has for the last decade continued unabated in the Judiciary partly because of conflict of interest (see comments attributed to Kiraitu Murungi, 2005)[162]. For instance, The Report of the Fourth Meeting of the Judicial Integrity Group (2005) highlighted the reservations that the Chief Justice had in instituting disciplinary procedures against the judicial officers who had been accused of involvement in corruption in 2003 because some of them were his colleagues and old friends. Africog (2011) too in its Kenya Governance Report (2011) blamed conflict of interest for the acquittal of the current Deputy President, William Ruto and others who faced charges of fraudulently obtaining Ksh 96 million from Kenya Pipeline Corporation (KPC) by claiming that they were in a position to sell 1.745 hectares of land belonging to the Ministry of Natural Resources at Ngong Forest. Africog reports that the case was dismissed in April 2011 because the magistrate said the prosecution failed to call its main witness, who allegedly

released the money to the accused.

The question one asks is: How did this form of corruption thrive in an institution like the Judiciary? There must have been some legal or policy weaknesses which have been exploited by individuals to enable them execute their acts of corruption. One point to note is that corruption in the Judiciary in the period prior to the promulgation of the new constitution partly emanated from the phenomenon of Judiciary's dependence on the Executive.

According to Transparency International's Global Corruption Report (2007)[163], the Constitution of Kenya then, vested the power to appoint Judges on the President. Even though the President was required to consult the Judicial Service Commission in making the appointments, the same commission comprised of Presidential appointees who included the Chief Justice, Attorney General, a Court of Appeal Judge and the chair of the Public Service Commission (PSC); a situation which gave room for Executive interference.

In the Kenyan case, the fact the Judges and the Commissioners were both Presidential appointees reduced their motivation to spearhead the fight against corruption in the Judiciary. This was because the mandate of ordering any legal proceedings against any Judge accused of involvement in corruption was squarely on the President as the sole authority with the mandate to hire and fire. This loophole encouraged laxity among judicial officials who decided to take a low profile even when corruption was rife in the institution.

The Global Corruption Report by TI (2007) further highlights political context as a factor that has motivated corruption in the Judiciary. According to the report, tribunals appointed by either the Executive or the Law Society of Kenya (LSK) to investigate corruption have

always failed to deliver on their mandate because of political interests. According to ICJ (2005), some magistrates failed to act on corrupt practices committed by the high ranking politicians in the country due to the fear that appeals that might follow their convictions might be used against them. The following narrative extracted from the TI report (2007) proves how political contexts had frustrated the Judiciary's fight against corruption.

> In October 2003, the LSK appointed a committee to investigate judicial corruption and submitted to the Chief Justice a report containing the names of judges who faced further investigation. In a move to address concerns on corruption, the Chief Justice in 2005, appointed a special committee on ethics and governance, headed by Appellate Judge Walter Onyango Otieno, to inter alia investigate cases of alleged corruption in the judiciary. The committee completed its work in September 2005, but has yet to make its findings public. After four years, it has completed only one case, which resulted in exonerating the judge concerned. Political support has evaporated and no individual in government seems responsible for the tribunals' existence. Although conceived as vehicles to determine quickly the removal of judges, they have dragged on for years without finishing their work. Some tribunal members are serving judges and initially they gave their full attention to the task. They have since been re-deployed to ordinary duties. This sends the message that there is no longer any commitment to the tribunal's process.

The determination of salaries and remuneration of Judges was also another weakness that was exploited by judicial officers to perpetuate corruption. ICJ (2005) argued that unlike in Canada where salaries of judicial officers

were safeguarded by the Judicial Act (financial security), remuneration of Judges in Kenya was not safeguarded by law and indeed they were not highly paid civil servants (ICJ, 2005). With this public acknowledgement of meagre earnings within the ranks of the magistracy, there was a potential framework of compromise of the justice system by the corrupt, but powerful, individuals through financial manipulation. Furthermore, the poor pay compromised the Judiciary's independence and acted as a justification for judicial officers to engage in corrupt practices. This has drastically changed over the years following the reforms within the Judiciary - however a lot needs to be done to safeguard the general staff especially the rank and file.

The society has also been blamed for corruption that has been experienced in the Judiciary. According to the Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (2003)[164], judicial officials have at times exploited the existence of a culture of corruption in the Kenyan society in order to carry out and justify corrupt dealings. The Anti-Corruption Committee report (2003) observed that in Kenya, corruption is viewed as normal because corrupt individuals are not shunned while at the same time corruptly obtained wealth is not stigmatised. Consequently, advocates conspired with judicial officers and induced them to be corrupt while prosecutors colluded with magistrates such that at times they were enticed to withhold crucial evidence that could lead to a just expedition of a case (Anti-Corruption Committee of the Judiciary of Kenya, 2003).

Policy interventions and recommendations

According to Abdullahi (2011)[165] one of the policy interventions which the Judicial Service Commission has undertaken to reduce corrupt malpractices in the judiciary

is by ensuring that during the recruitment for judicial officers, the integrity of the candidates is of paramount consideration. Where there is credible evidence or even reasonable suspicion, the JSC is bound by the policy not to recommend individuals with baggage for appointment as Judges (Abdullahi, 2011, Ibid). The enforcement of this policy to the letter by the JSC will reduce corruption since unqualified people as well as individuals with integrity issues will not be admitted as judges in the first place.

ICJ (2002) observes that in an ideal democracy, the Judiciary must be independent and allowed to decide matters before them without any restrictions, improper influences, pressures, threats or interference, direct or indirect, from any quarter or for any reason. However, Kenya's Judiciary has been held in captivity over the years by the Executive and people with vested political interests, to the extent that the institution has at times failed to deliver an objective judgment even when it is clear what kind of judgment ought to be given. This scenario justifies the need for an independent Judiciary that is free from influence from any quarters. Judicial independence will ensure the freedom of the judicial officers to seek justice that is in line with the common good and not partisan interests.

However, it is of crucial importance to observe that judicial reforms call for a system of remuneration that guarantees proper pay to Judicial Officers. As earlier stated, ICJ (2005) observed that the remuneration of judges in Kenya was not safeguarded by law unlike in Canada where salaries of judicial officers are safeguarded by the Judicial Act (financial security). Although the Constitution of Kenya 2010 has established a Commission to set the salary of all State Officers, the government needs to establish a good pay package for Judicial Officers so that they overcome the urge to extort money from justice seekers. The assumption then is that the establishment of a policy that enhances

better remuneration for public servants will help in reducing corruption. The action taken by CJ Mutunga will suffice here[166].

The government has attempted to address the problem of corruption in the Judiciary in various ways. According to TI's Global Corruption Report (2007), the National Rainbow Coalition (NARC), led by President Mwai Kibaki, came to power in 2002 when the Judiciary was 'crowded' with corruption and Executive interference. As a response to this situation, the NARC government introduced an anti-corruption plan famously known as 'radical surgery' in the Judiciary. Through the radical surgery, the government recommended the vetting of all Judges with the aim of ridding the Judiciary of those who were found to have engaged in some form of malpractice. This 'radical surgery' saw the removal of former Chief Justice Bernard Chunga, and the suspension of 23 judges and 82 magistrates on grounds of corruption (Transparency International, 2007).

Nevertheless, the radical surgery did not take into account measures to put in place an institutional and legal framework that could address the excesses of some judicial officers. The insufficiency of the anti-corruption initiative by the NARC government in 2003 prompted the establishment of more detailed reforms to the Judiciary through the Constitution of Kenya 2010.

According to ICJ (2012), there are notable examples of Judicial reforms which have been undertaken in Kenya since the promulgation of the Constitution of Kenya 2010, and which are regarded as the basis of a success story in the Judiciary. Of these, the greatest achievement of all is perhaps the fact that Kenyans voted for a Constitution of Kenya which created the Supreme Court, set the retirement age of judicial officers, created a rigorous process in the recruitment of judicial officers and recommended vetting of sitting judicial officers. Unlike the previous efforts, these

reforms were based on a legal framework that sought to guarantee judicial officials, the long desired independence from the Executive. These reforms undertaken by the Judiciary have since revived the confidence of Kenyans in the Judiciary[167].

CONCLUSION

The debate on corruption has largely revolved around blaming government officials who engage in these practices or who allow such practices to thrive. Several management solutions have been suggested as possible strategies to reduce the vice. Prudent management of public resources however does not only depend upon the presence of proper management systems but also public participation especially in putting in place a government with individuals that can show interest in fighting the vice. This means that the fight against graft largely depends on good governance and putting in place the checks and balances.

The greatest challenge in Kenya, in managing corruption, is dealing with political impunity which has spread across the country. There has been no political will to spearhead the war on corruption; what has for sure been seen in the Kenyan case is a hasty approach in fighting corruption[168]. If we have to win the war on corruption, there ought to be some commitment from the political divide that clearly shows firm commitment from the government. With devolution, it is important that Kenyans devise mechanisms of dealing with the question of emerging corruption networks at the county level.

It is important to acknowledge that since 2003, Kenya has made substantial efforts in laying a firm foundation in fighting corruption. Many institutions to strengthen these

efforts and legislation have been initiated, but results have been minimal to say the least. For instance, major cases like the Anglo Leasing and Goldenberg scandals have been dragging for long in court, with few culprits prosecuted.

In order to meaningfully address corruption, the loopholes within the current legislation especially the Public Procurement and Disposal Act (2005), Ethics and Anti-Corruption Commission Act (2011), Leadership and Integrity Act (2012) etc, must be addressed to strengthen the anti-corruption legal framework. On the other hand, there should be clear provisions in the law, on how the public should be involved in public projects for civic ownership and accountability.

Chapter Six of the Constitution, which deals with Leadership and Integrity, should be fully enforced to ensure people of integrity manage public resources. Once we have a leadership devoid of integrity issues, it will be possible to deal with corruption.

Anti-corruption bodies established in Kenya in the Kibaki era: An assessment of their mandate, overlaps and effectiveness

Michael Macharia Nderitu

INTRODUCTION

Good governance has been defined as 'the use of political authority and exercise of control over society and its management of resources for social and economic development'.[169] Public sector corruption is a symptom of

development'.[170] Public sector corruption is a symptom of failed governance systems.[171] Corruption is defined as 'the abuse of public office for private gain'.[172] Public office is abused for private gain when an official accepts, solicits or extorts a bribe. It is also abused when private agents secretly offer bribes to circumvent public policies and processes for competitive advantage and profit. Patronage and nepotism, theft of state assets and diversion of state revenues are also other ways through which public office can be abused for private gain. [173]. Governance has been defined as the traditions and institutions by which authority is exercised including the process by which governments are selected, monitored and replaced, the capacity of the government to effectively formulate and implement sound policies, and the respect of citizens and the state for the institutions that govern economic and social interactions[174].

In Kenya, corruption has been a key governance challenge since 1963. The pervasive and distortionary nature of corruption is acknowledged [175]. Corruption undermines the rule of law, hampers performance of public institutions and delivery of public service, promotes market inefficiency and misallocation of resources, undermines optimal resource allocation and challenges the authority of states[176]. Corruption can summarily be categorised into three subsets. Petty, administrative or bureaucratic corruption comprises isolated transactions by individual public officers. Grand corruption is theft or misuse of vast amounts of public resources by state officials. The last type of corruption is state capture and influence peddling, where the functioning of the state is fundamentally compromised by the corrupt[177].

Corruption is rampant in countries where the legitimacy of the state and its capacity to protect public interest is contested; the rule of law is weakly embedded; institutions of accountability are highly ineffective; commitment of

national leaders to combat corruption is weak or non–existent; and where there is information asymmetry between state officials and the public[178]. Corruption thrives in countries where there is lack of service orientation in the public sector; weak democratic institutions; economic isolation and a closed economy; internal bureaucratic controls and centralised decision making[179]. The key ingredients that are necessary to combat corruption effectively in Kenya are judicial reform to restore the rule of law; enactment of a freedom of information law to implement and operationalise the access to information provision under Article 35 of the Constitution[180]; sustained public demand for transparency and accountability in the government; and the establishment of appropriate institutions for investigating and prosecuting corruption.

Official corruption was reluctantly acknowledged in government circles after a sustained public campaign demanding accountability and the consequent suspension of development funding by the World Bank and the International Monetary Fund (IMF) to Kenya due to widespread corruption. At the time, high level grand corruption was permeating government operations. The main scandal was a fraudulent gold and diamonds export compensation scheme popularly known as the Goldenberg Scheme that was executed in the early 1990s. This scandal remains unresolved to date, despite concerted effort to investigate and prosecute suspects[181].

The first effort to legislate a comprehensive framework to combat corruption in a systematic and organised manner was through an amendment to the Prevention of Corruption Act[182]. The amendment established the Kenya Anti-Corruption Authority (KACA). The National Alliance Rainbow Coalition (NARC)[183] government came to power in 2003 and formulated the Economic Recovery Strategy for Wealth Creation. The strategy aimed to improve

governance by ensuring efficiency and effectiveness of public service delivery[184]. Since then, an appropriate legal framework anchored in the Constitution has been established to fight corruption. This chapter analyses the institutions that the government has established to combat corruption over the years and an assessment of their success and failures in carrying out their duties.

a) Kenya Anti-Corruption Authority

Parliament amended and implemented the anti-corruption law that had been in existence since 1956[185] to prove its commitment to fighting corruption. The amendment created the Kenya Anti-Corruption Authority (KACA) in 1997 with a mandate to investigate and prosecute corruption. This was the first attempt to establish and institutionalise anti-corruption agencies into law. The Act secured the independence of the Authority by creating the Kenya Anti-Corruption Advisory Board that would recommend persons to be appointed as the Director of KACA to the President. The Board comprised of seven Members appointed by the President[186]. The Board also advised KACA in the discharge of its functions. The Director enjoyed security of tenure and could only be removed on the recommendation of a tribunal appointed by the President. KACA was mandated to take necessary measures for the prevention of corruption in the public, parastatal and private sectors[187]. KACA could however not commence the prosecution for an offence under the Act without the written consent of the Attorney-General[188].

The first director of KACA was John Harun Mwau, a former police officer and a politician. He was removed from office shortly afterwards after attempting to arrest senior civil servants at the Ministry of Finance. During his tenure, KACA did not demonstrate a clear methodology

and strategy in its approach to fighting corruption[189]. His removal was recommended by a tribunal appointed to investigate his conduct and ability to hold the office. He was replaced by Justice Aaron Ringera, who was a Judge of the High Court and had previously served as the Solicitor General in the Office of the Attorney General.

There was little political will to support the independent functioning of KACA. The opposition resulted from its robust efforts to investigate and prosecute corruption cases. Two Applicants, who were being prosecuted for corruption by KACA moved to court to seek a declaratory order that KACA was operating unconstitutionally by virtue of exercising prosecutorial powers under the Act when the Constitution of Kenya vested such powers exclusively in the Attorney General[190]. Further, the Applicants alleged that the holding of the office of Director of KACA by a Judge of the High Court was a violation of the principle of separation of powers. The High Court, after hearing the parties, held that KACA was acting in contravention of the Constitution and declared KACA unconstitutional thus effectively rendered it non-operational.

The court stated that:

> 'Whether or not the Authority purports to act under the direction of the Attorney General in relation to prosecution, the exercise of powers under section 11B of the Prevention of Corruption Act offends the Constitution. By alienating powers conferred upon him by the Constitution, the Attorney General was being escapist and is a mark of abdication of responsibilities bestowed upon him by the Constitution. The existence of the Authority undermines the powers and authority of the Attorney General and the Commissioner of Police as conferred by the Constitution. The court further

stated that it is unconstitutional and contrary to the principle of separation of powers for the Authority to be headed by a High Court Judge. The sanction of the Attorney General to prosecute is not valid under the Constitution[191]'.

The decision in Gachiengo & Another vs. AG[192] was rendered per incuriam. Section 26 of the former Constitution presupposed the existence of other prosecuting agencies besides the Attorney General. Indeed, most prosecutors were police officers who were designated as prosecutors by the Attorney General. Further, some agencies had their officers designated as prosecutors by the AG, for example local authorities. The prosecution of the KACA cases was under the control and with the sanction of the office of AG, as the prosecutors were appointed by the AG. The functions and role of the Commissioner of Police were not set out in the Constitution but in an Act of Parliament, namely the Police Act[193]. It was not un constitutional to confer another body powers to investigate crime. The doctrine of separation of powers is a theoretical principle to ensure good governance but not a straight-jacket principle that could inhibit inter-agency collaboration. The court failed to consider the overriding public interest and need to eradicate corruption as an important policy for the government that was essential in improving the lot of Kenyans.

With KACA barred from executing its investigatory and prosecutorial mandates, the prosecution files were transferred to the Attorney General while the investigation files were referred to the Kenya Police. The challenges that KACA faced in fighting corruption can be attributed to the fact that the Government was not keen to establish an anti-corruption agency. KACA resulted from persistent calls by the donors, including the IMF and the World Bank and their conditions that resumption of budgetary aid would

be reconsidered if the Government demonstrated that its willingness to set up appropriate structures to combat corruption. The opposition political parties had similarly called for the establishment of an anti-corruption agency. There was no political will, independent of the demand by the donors and the opposition, to establish the agency.

KACA was a pioneer in the fight against corruption and can be rated as successful before it was declared unconstitutional. The agency was working in a difficult and unsupportive political environment and yet it managed to arraign a number of high profile suspects of corruption in court. The courts were also hostile to the cases instituted by KACA due to the political implications of their decisions and the lack of independence of some of the judicial officers. Whereas KACA was clothed with statutory mandate to investigate and prosecute corruption, it was established without an amendment to the Constitution to insulate it from collateral attacks by persons suspected of corruption. Lack of insulation undermined its effectiveness, resulting in its eventual collapse. The lessons learnt from KACA's experience were: -

a. There was need for constitutional and legal clarity in regards to the roles of the courts, the AG and the police vis-à-vis the anti-corruption agency to ensure appropriate inter-agency co-ordination.

b. To insulate an anti-corruption agency from collateral attacks, it must be anchored in the constitution.

c. Political will is necessary to ensure success of the fight against corruption.

d. An independent and competent anti-corruption agency can successfully prosecute high profile corruption cases.

b) The Anti-Corruption Police Unit

The Anti-Corruption Police Unit was established administratively by the Commissioner of Police in September 2001, to investigate corruption and corruption related cases after the disbandment of KACA. This was in spite of the police being consistently ranked the most corrupt institution in Kenya[194]. The unit would investigate on its own initiative or as directed by the Attorney General or the Commissioner of Police. The unit took over all matters that were previously under investigation by KACA. The Attorney General established an anti-corruption prosecution unit under the Director of Public Prosecutions (DPP) which was hosted at the unit offices but was operationally independent. The AG seconded three former KACA prosecutors to the unit.

The unit was expected to perform dismally due to political interference and the central role of the Commissioner of Police, who was a political appointee, in its operational framework. Despite these misgivings, the unit performed rather well and received a large number of complaints. It was also able to use its easy access to the police intelligence network and operational set up optimally. However, the unit lacked independence since it was essentially a police outfit that was subject to the directions of the Commissioner of Police. Officers attached to the unit were subject to the police discipline and transfer mechanisms[195]. The unit was therefore perceived as a stop gap measure since the Kenya Anti-Corruption Commission was later established after enactment of the necessary law.

The unit faced structural limitations in the fight against corruption. The overall operational directives of the unit were subject to the authorisation by the Commissioner of Police. However, very many cases were referred to the unit as complaints but most were never investigated. The

unit was not anchored in any law that could protect it from unwarranted interference since it was a stop gap measure before an appropriate agency was established.

c) Ministry of Justice and Constitutional Affairs

The Ministry of Justice and Constitutional Affairs was established in 2003 after NARC won the elections. Previously, the ministry had been established and assigned to the Late Hon Tom Mboya at the dawn of independence. The ministry was later abolished but was re-established in early 1980s and the former Attorney General, Hon Charles Njonjo, was appointed as the Minister after he was elected to Parliament. The ministry formulated policies and strategies relating in to corruption and oversaw their implementation. It coordinated and facilitated the fight against corruption[196]. The ministry sponsored the laws that have been enacted in the attempt to combat corruption. In the Grand Coalition government set up in 2008, the ministry was known as the Ministry of Justice, National Cohesion and Constitutional Affairs. Hon. Martha Karua resigned as a Minister of Justice in 2010 citing lack of support by the government in the fight against corruption. Under the Jubilee Government, it was placed under the State Law Office as the Department of Justice.

d) Office of Permanent Secretary in the Office of the President on Governance and Ethics

To demonstrate his commitment to the zero tolerance to corruption policy, President Kibaki, upon election into office in 2002, appointed a Permanent Secretary in his office in charge of Governance and Ethics. John Githongo, who was previously the Executive Director of Transparency International Kenya, was appointed as the first holder of

the office. The role of the office was to advise the President on appropriate programmes to promote ethical behaviour in government and to act as the liaison between the various anti-corruption agencies and the office of the President. Due to mounting evidence that key government Ministers and senior civil servants were involved in corruption, there was an attempt to transfer John Githongo to the Ministry of Justice[197]. The transfer was later revoked. Eventually, he resigned from the office in January 2005 and went into exile in the United Kingdom. The vacancy was never filled and it was eventually abolished.

President Kibaki had good intentions in appointing the adviser on matters of ethics and anti-corruption. Previously, there was no attempt to demonstrate political commitment at the highest level to fight corruption and this was a demonstration that the President would take a lead role in fighting corruption. It was necessary to ensure that the President benefited from relevant expertise in the fight against corruption. However, once it was unravelled that some officers suspected of corruption worked in close proximity with the President, the office of the Permanent Secretary could no longer succeed. The office lacked institutional and legal independence since it was established administratively and its success was dependent on continued good will of the President to implement the advice offered by the office. The office played a mere advisory role without a mandate to implement recommendations.

The office duplicated the statutory roles of KACC and the Ministry of Justice and Constitutional Affairs in the fight against corruption leading to institutional conflict. The structure of the Executive under the repealed Constitution stipulated that the Permanent Secretary served under the pleasure of the President[198] and did not have a security of tenure. This means that whereas the President could take the advice of the Permanent Secretary, there was no

obligation to implement it. There was potential conflict between the actions of the office with established agencies to fight corruption

The failure of the office to deliver on its advisory mandate proved that the Government should strengthen, protect and work with constitutionally established organs to ensure effectiveness and a clear constitutional mandate to investigate and implement. An ad hoc measure would result in institutional conflict and act as a distraction in the fight against corruption.

e) Kenya Anti-Corruption Commission

The Kenya Anti-Corruption Commission (KACC) was established as a body corporate by the Anti-Corruption and Economic Crimes Act[199]. The Anti-Corruption and Economic Crimes Act provides for the prevention, investigation, punishment of corruption, economic crimes and related offences. The Act defines corruption to include bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust or offences involving dishonesty in connection with any tax, rate or impost levied under any Act or relating to elections of persons to public office. Economic crime is defined as any offence involving dishonesty under any written law providing for the maintaining and protection of public revenue[200]. The prosecutorial powers were reposed in the Attorney General. The initial proposal was to amend the Constitution and establish a Commission with investigatory and prosecution powers. This proposal was rejected by Parliament.

Following an investigation, KACC would report to the AG on the results of the investigation[201]. KACC's report would include any recommendation that a person be prosecuted

for corruption or economic crime[202]. KACC would prepare quarterly reports setting out the number of reports made to the AG and other statistical information that it considers appropriate[203]. The quarterly report indicates if a recommendation to prosecute a person for corruption or economic crime was accepted or rejected[204]. KACC submitted the quarterly report to the AG[205]. The AG was required to lay a copy of the quarterly report before the National Assembly[206]. Each quarterly report was published in the Kenya Gazette[207].

The AG was mandated to prepare an annual report with respect to prosecutions carried out for corruption or economic crime during the calendar year ending 31st December annually[208]. The report included a summary of steps taken during the year in each prosecution and the status of each prosecution at the end of the year[209]. The report indicated if a recommendation by KACC to prosecute was rejected and set out succinctly the grounds for not accepting the recommendation[210]. The report did not include status of a prosecution that has finally been concluded in the previous year if that status was included in a previous report[211]. The report was laid by the AG before the National Assembly within the first ten days following the end of the year to which the report related[212].

Section 65 of the Act protects whistleblowers. It states that no action or proceeding including a disciplinary action, may be instituted or maintained against a person in respect of assistance given by the person to KACC or an investigator or a disclosure of information made by the person to KACC or an investigator[213]. The protection does not apply to a person who made a statement that he or she did not believe to be true[214]. In prosecution for corruption or economic crime or proceedings under the Act, no witness shall be required to identify or provide information that might lead to the identification of a person who assisted

or disclosed information to KACC or an investigator[215]. The court shall ensure any information that might lead to the identification of a person who assisted or disclosed information to KACC or an investigator is removed from any documents to be produced or inspected in connection with the proceeding[216]. This limitation will apply only to the extent determined by the court as necessary to ensure that the ends of justice are met. [217] A person is deemed to be in possession of any record, property, information or other thing if its possession is under his control[218].

The Public Officers Ethics Act (POEA) advances the ethical standards of public officers by providing a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers. A public officer shall carry out his or her duties in accordance with the law[219]. A public officer shall not violate the rights and freedoms of any person while carrying out his or her duties[220]. A public officer shall not knowingly give false or misleading information to members of the public or to any other public officer[221].

Every public officer shall once every two years submit to the responsible Commission for the public officer, a declaration of income, assets and liabilities of himself, his spouse and dependent children under the age of 18 years as prescribed[222]. The declaration shall be in the prescribed form[223]. A Commission shall keep the information collected confidential[224]. No person shall disclose, allow access to or require information collected and held by a Commission[225]. No person shall disclose information that was disclosed or acquired in contravention of the Act if the person knows or has reasonable grounds to believe that the information was disclosed or acquired in contravention of the Act[226]. Information collected and held by the Commission may be disclosed to and accessed or acquired by authorised staff of the Commission, the police or any other law enforcement

agency, a person authorised by an order of a judge of the High Court or the person who provided the information or his representative[227]. If a different Commission becomes the responsible Commission for a public officer, the Commission that was the responsible Commission may give any information collected to the Commission that has become the responsible Commission[228]. A person who discloses any information collected under the Act is guilty of an offence and is liable on conviction to a fine not exceeding Kshs two million or to imprisonment for a term of 2 years or to both[229]. The Act addresses questions of conflict of interest and formulates codes of conduct for all public officers.

The secrecy of the declaration undermined the reasons why they were required in the first place as members of the public were unable to countercheck the contents of the declaration vis-à-vis the available knowledge on the assets of the public officers. This provision violates the citizen's right to information that is guaranteed in the Constitution.

The Commission shall keep information collected concerning a person for 30 years after the person has ceased to be a public officer[230]. Each Commission shall establish procedures for collection and storage of information with respect to public officers for which it is the responsible Commission[231]. The procedures shall be established and gazetted within 90 days from the commencement of the Act[232]. The responsible Commission for a public officer may investigate to determine whether the public officer has contravened the Code of Ethics[233]. Such investigations may be made on the Commission's own initiative or pursuant to a complaint by any person[234]. The Commission may take appropriate disciplinary action or refer the matter to another person or body that has the power to take disciplinary action[235]. Any action taken shall be made public including the name and description of the public officer, summary of

evidence and description of the disciplinary action taken[236]. Political and judicial opposition to the work of KACC remained strong and hindered efforts to investigate and prosecute corruption[237]. KACC's work was also hindered by the fact it was established under a statute without clear constitutional anchoring and that the powers to prosecute were still vested in the Attorney General, who served as the chief government legal adviser. The decisions by the AG, whether to prosecute a particular case or not, seemed to be influenced by the political implications of the particular case. KACC was arm-strung and unable to investigate major corruption scandals like the Goldenberg and Anglo Leasing scandals. The Anglo Leasing scandal was a fraudulent scheme which commenced during the last year of the KANU regime and continued operating seamlessly during the new NARC regime[238].

The structure of KACC was a four pronged approach, based on investigation; public education; advisory; and civil recovery and restitution. The key responsibilities were: -

a. Investigative function. KACC was empowered to swiftly, thoroughly and impartially investigate corruption, corruption related cases and economic crime. Further, KACC could investigate any conduct which is liable to allow, encourage or cause conduct constituting corruption or economic crime and the conduct of any person that is conducive to corruption and economic crime. KACC was required to assist any law enforcement agency in investigation of corruption and economic crime[239].

b. Advisory function. KACC was mandated to advise any person or public body on ways in which that person or public body would eliminate corrupt practices[240]. In that regard, KACC could examine the practices and

procedures of public bodies in order to facilitate the discovery of corrupt practices and secure the revision of methods of work that were conducive to corrupt practices[241]. KACC examined a number of public bodies including the Ministry of Lands, the Department of Civil Registration, the National Registration Bureau, the Traffic Department of the Kenya Police, Department of Immigration, and City Council of Nairobi among others[242]. However, the advisory mandate of KACC was not very effective since the law did not provide for an enforcement mechanism or a method for follow up between the examined department and KACC.

c. Educative function. KACC would educate the public on the dangers of corruption and economic crimes to enlist their support in combating corruption[243]. KACC would design programmes to deliver proactive well targeted public education to stimulate change[244].

d. Restitutionary function. KACC had powers to investigate the extent of liability for the loss or damage to any public property and to institute civil proceedings against any person for the recovery of such property or for compensation; and to restore such property to the public even where such property was outside Kenya.[245] Restitution was through legal proceedings to recover stolen assets[246].

The KACC Director was the chief executive officer and was responsible for its direction and management. KACC would appoint up to four Assistant Directors. The Director and Assistant Directors were persons recommended by the Advisory Board and approved by the National Assembly. KACC hired high skilled staff and engaged consultants to ensure proper performance of its mandate and maintained a rigorous capacity building programme for staff[247]. In the performance of their duties, KACC and the Director were

not subject to the control and direction of any other person or authority, but were accountable only to Parliament[248]. KACC was authorised to co-operate with any other persons or bodies as it deemed appropriate including the Controller and Auditor General and the Director of the Criminal Investigations Department[249]. The Director was required to publish an annual report[250]. KACC was structured into four directorates of Investigation and Asset Tracking; Legal Services and Assets Recovery; Research, Education, Policy and Preventative Services and Finance and Administration. KACC received oral and written complaints from members of the public.

In terms of composition, The Kenya Anti-Corruption Advisory Board comprised of representatives of the Law Society of Kenya, Institute of Certified Public Accountants of Kenya, Federation of Women Lawyers – Kenya Chapter, Kenya Association of Manufacturers, Federation of Kenya Employers, Kenya Bankers Association, Central Organisation of Trade Unions, Association of Professional Societies of East Africa, Architectural Association of Kenya, Institute of Engineers of Kenya, Kenya Medical Association and joint forum of religious organisations[251]. The function of the Board was to advice KACC on the exercise of its powers and performance of its functions. The Board was accountable only to Parliament. Investigations of the Commission were conducted by the Director or persons authorised by the Director[252].

The first director of KACC was recommended by the Board and appointed by the President. The Board also recommended names of four Assistant Directors of KACC to the President. All the names were approved by Parliament as required[253]. The elaborate process of appointment and removal of the officers of KACC is meant to shield the process of fighting corruption from the Executive and other quarters whose actions are dictated upon by the exigencies

of the moment and political expediency. The officers could not be removed from office on flimsy grounds unrelated to their competence to hold office[254]. The appointees served for a term of 5 years. Whereas KACC investigated many cases relating to corruption, it was dependent on the AG for prosecutorial services. Only a handful of cases were successfully prosecuted.

Limitations faced by KACC

KACC faced a number of limitations in executing its statutory mandate. The Anti-Corruption and Economic Crimes Act, 2003 was a sufficiently comprehensive law that protected the mandate and function of KACC. However, just like KACA before it, KACC was not protected by the Constitution. This means that its functions and powers were not insulated from challenges in court on the basis of lack of constitutionality.

KACC was limited by institutional and political factors. The political will of government to fight corruption was not sustained. Whereas the government was initially committed to fighting corruption that commitment waned once its own senior officials were implicated in corruption. The Judiciary and the office of the AG faced capacity constraints. This coupled with a determination by accused persons to ensure that trials were delayed proved a veritable challenge to the functioning of KACC[255]. The constitutional powers and functions of KACC were challenged in court in many cases. For example in Mercantile Financial Services Corporation vs. KACC, the High Court held that the Commission lacked the mandate to directly request for assistance from any foreign government or law enforcement agency by way of mutual legal assistance in international investigations[256].

The trial by special magistrates on a day-to-day basis is not practicable as the magistrates are required to perform other judicial functions and hear other criminal matters. This was further affected by the limited geographical jurisdiction of the magistrates and their frequent transfers leading to delays in hearing of cases and witness fatigue[257].

KACC lacked the mandate to prosecute. KACC had the capacity to investigate and was equipped with forensic expertise. The inability to prosecute weakened its overall efforts to fight corruption. KACC has argued in its reports that disarticulation of the functions of KACC to investigation and the role of the AG to prosecute was the weak link in the fight against corruption. The decision of whether the case should be prosecuted was dependent on the AG. However, an analysis of the annual reports from 2006 to 2010 show that out of 514 cases that KACC recommended prosecution, the AG approved prosecution in 433 files. This means that the approval rate was more than 84%. On the converse, out of 36, 374 complaints referred to KACC during the period, only 514 cases were recommended for prosecution, a mere 1.8% and 8, 989 cases were taken up for action by KACC, constituting 24.5% of the total complaints[258]. The high number of cases referred to KACC that did not relate to corruption shows that the public was not properly sensitised on the role of KACC. This means that the few cases of corruption prosecuted is not as a result of incompetence or failure by the AG to cooperate. The AG routinely referred files back to KACC for further investigations. Courts stopped KACC from carrying out its investigative work[259].

The Judiciary was not committed to the fight against corruption or protecting the public interest at the time and did not cooperate with KACC. In some cases, the courts granted orders prohibiting KACC from investigating certain cases or seeking the cooperation of other states to

gather adequate evidence for prosecution. The removal of some judges and magistrates in 2003 after the Ringera Report did not result in comprehensive reform of the Judiciary. However, the judicial reforms implemented after the promulgation of the Constitution in 2010 have restored public faith in the Judiciary. However, it must be noted that the Judiciary has a duty to uphold public interest and convict the guilty in corruption cases and in equal measure protect the rights of persons accused of corruption.

The Commission was unable to perform lifestyle audits on suspects of corruption. In the case of Christopher Murungaru vs. Kenya Anti-Corruption Commission and Another[260], the Commission issued a notice to the Appellant to furnish it with a statement of his property pursuant to section 26 of the Anti-Corruption and Economic Crimes Act. The Appellant moved to court and stated that issuance of such notice violated his right to protection against non-discrimination and presumption of innocence. The court held that whereas the Commission and the AG could not be stopped from carrying out investigations into allegations of corruption and economic crimes against the Applicant, the question whether the Applicant is bound to supply them with the information they require from him ought to await the resolution of the question whether sections 26, 27 and 28 of the Act are constitutional. This meant that the Commission could not demand information from a suspect as mandated in the Act and had to resort to its own investigations to prosecute. The Commission was unable to recover illegally acquired assets or facilitate restitution. Whereas some of the cases were settled out of court, especially cases on illegally acquired public land, most cases were vigorously challenged in court and were protracted.

KACC did not execute its reporting mandate as required by the law. KACC was required by law to publish quarterly

and annual reports of its activities. The reports had no mechanism of updating previous reports; contained scanty details that could not be subjected to independent verification; and there was no information on the outcome of cases filed in court.[261] The reports listed the number of cases that had been recommended for prosecution and the cases that the AG had approved. However, there was no indication of the outcome of the cases, including the cases filed by KACC for restitution. The outcome of the cases would have been an indicator of the success of KACC in investigating corruption cases and would have bolstered public confidence in its work and overall, the fight against corruption.

Very few suspects of corruption investigated by KACC were convicted after trial. This led to decreased public confidence in KACC and weakened its bargaining position against politicians and other groups opposed to its work. KACC struggled with political interests in carrying out its mandate.

Parliament proved that it could undermine the independence of the Commission to protect the interest of some of its members. In 2003, Parliament failed to enact a constitutional amendment to insulate KACC from challenges on its constitutionality as proposed. MPs also politicised on-going investigations by KACC, for example the investigations into the Anglo Leasing scandal which were supposedly characterised as targeting particular communities. Parliament reversed the reappointment of Justice Aaron Ringera by the President in 2009, stating it was illegal as it had not been approved by the legislature.
Overall, KACC functioned well to fight corruption in a hostile political environment. There was high public expectation that KACC would deliver on its mandate. However, the expectation waned when very few high level corruption cases resulted in convictions.

The experience of KACC shows that an anti-corruption agency must secure its independence under the Constitution. This has been accomplished in the current Constitution. An independent prosecutorial office, devoid of political influence, is pivotal. The office of the DPP will be essential in ensuring professional evaluation and prosecution of corruption cases. The Ethics and Anti-Corruption Commission works closely with the office of the DPP to ensure that the cases that filed in court are prosecuted professionally and efficiently. Extensive public education programmes must be carried out to enable the public make appropriate and relevant complaints to the agency. The reports of the agency must include the outcome of cases that referred to court. EACC must ensure that it has sufficient personnel to evaluate and investigate complaints filed with it.

f) Commissions of Inquiry

Goldenberg Commission

The President established the Commission of Inquiry on the Goldenberg Affair in 2003. The objective of the Commission was to establish the root cause and the impact on the economy of the Goldenberg affair. The scandal involved a fraudulent export compensation scheme for gold and diamonds perpetrated in late 1980s and early 1990s.

The commission's report would form a basis of restitution of funds pilfered from the state through the scandal. The Commission was chaired by Court of Appeal Judge, Justice Samuel Bosire. The proceedings of the Commission were extensively covered by the media; it conducted proceedings for two years. It submitted its report in 2005[262]. Pursuant to its recommendations, seven suspects were charged in

court for offences related to the scandal. Unfortunately, none of the suspects were convicted and a number of the suspects died before the full hearing of their cases. The prime suspect of the scandal, Kamlesh Pattni, surrendered the Grand Regency Hotel to the Central Bank of Kenya in an effort to have charges against him dropped.

With the court dropping criminal charges against Pattni and civil claims earlier dropped, the main suspect was free of any Goldenberg related claims. The Office of the DPP however promised to appeal the court decision. The key recommendations of the Commission were the prosecution of persons implicated in the scandal; enactment of the Proceeds of Crime Bill and the Witness Protection Bill; the prompt and regular filing of the outcomes of income tax cases and appeals; and that the Central Bank of Kenya should be subject to regular audit by the Controller and Auditor General[263].

Commission of Inquiry on Illegal and Irregular Land Allocations

The government also established the Commission of Inquiry on Illegal and Irregular Land Allocations. The Commission was chaired by Paul Ndungu and was a follow up to the Njonjo Commission on Land that had been established in 2000 and had submitted its report in 2002. The Commission was mandated to identify all government land that had been irregularly and illegally allocated. The Commission identified such land and made recommendations on how the land could be repossessed. The Commission recommended the setting up of a Land Titles Tribunal to vet all such titles and render a verdict; the establishment of a National Land Commission as an advisory task force on land matters; redress of past wrongs over illegal or irregular allocation of public land; recovery

of public land illegally or irregularly acquired; and the development of a National Land Policy. However, the tribunal was never established due to likely conflict with the provisions of the repealed Constitution. The National Land Policy was however developed through a consultative process and adopted by Parliament[264]. The Constitution of Kenya, 2010 has established the National Land Commission that will, among other functions, initiate investigations into present or historical land injustices, and recommend appropriate redress[265]. The Commission of Inquiry Report can inform the conduct of such investigations.

The Commissions of inquiry have not been effective instruments in the fight against corruption since their reports are not made public and most recommendations of the Commissions are not implemented. Their reports are released many years after submission to the government and their recommendation are hardly used as a basis for further investigations and prosecution. It appears that the Commissions are formed to distract the public from seeking answers on corruption scandals. The overall success of the Commissions has been dismal.

The enabling law, the Commissions of Inquiry Act[266], provides that the Commissions are answerable and report to the appointing authority who is the President. There is no access to information requirement that their reports must be published. However, some commissions, like the Commission of Inquiry on the Goldenberg Affair have conducted their hearings in public. The Act should be amended to require that the reports of the Commission should be published within a prescribed period and that the recommendations of the Commission should be implemented and reasons given where the government rejects the recommendations. The Act should secure the independence of the Commissions and grant it clear powers to compel the attendance of witnesses. In the past,

persons suspected of wrongdoing have failed to appear before the Commissions when they are summoned.

g) National Anti-Corruption Campaign Steering Committee

The Committee was established under the Ministry of Justice and Constitutional Affairs with the mandate of carrying out a public awareness campaign on corruption[267]. The Ministry developed the National Anti-Corruption Campaign to bring fundamental change in the attitudes and culture of Kenyans towards corruption and thereby assist in the fight against corruption. The campaign was grounded on the quest for a corruption-free and prosperous nation. National development was grounded on integrity, equity and commitment to justice. The Ministry aimed to promote a multi-sectoral approach to fighting corruption that would avoid concentration of roles in one institution leading to overwhelming complaints, high demand for service and an opportunity for sabotage. Decentralisation of the fight against corruption was intended to reduce the risk of isolation and shut-down of the anti-corruption commission and reduce risk of capture of the institution by the corrupt. The members of the Committee were drawn from religious groups, the private sector, women organisations, the Ministry of Justice and Constitutional Affairs, the office of the Attorney General, Permanent Secretary in charge of Ethics and Governance, Secretary of the Teachers Service Commission, a representative of the University of Nairobi, and the Managing Director of the Kenya Broadcasting Corporation. The establishment of the Committee, when the education and awareness mandate was vested by law in KACC, typifies the cluttered institutional environment characteristic of the fight against corruption in Kenya[268]. Efforts to streamline the campaign within EACC's public education mandate should be

undertaken to consolidate anti-corruption initiatives and resources.

h) Auditor General

The Constitution of Kenya 2010 provides for the office of the Auditor General under section 229. The role of the office is to audit all bodies and institutions that run fully or partially on public funds and report to Parliament and county assemblies.

In the past, the submission of the audit reports of the Controller and Auditor General to the National Assembly was routinely delayed by four or five years. In 2003, Parliament enacted the Public Audit Act to reorganise the office. Under the Act, the Treasury shall prepare accounts showing the financial position of the government at the end of the year and submit the report to the Controller and Auditor General[269]. The Controller and Auditor General and his staff were named the Kenya National Audit Office (KENAO)[270].

KENAO prepares a report on the audit and submits the report to the Minister responsible for finance[271]. The report expresses an opinion on the accounts based on the results of each audit stating whether all information and explanations considered necessary for the audit were received, whether proper records were maintained for all transactions, whether the accounts are in agreement with the records and whether the accounts reflected fairly the financial position of the audited entity[272]. The report shall contain such other information that the Controller and Auditor General may consider appropriate including on efficiency in usage of resources. The report shall indicate whether the information and explanations that were required to perform the examination and audit were

received and whether the accounts have been properly maintained.[273]

The government is obliged to ensure that the Kenya National Audit Office is adequately and properly staffed to carry out its functions[274].

The Controller and Auditor General submits the report to the Minister within 6 months after the end of the financial year or such other period to which the accounts audited relate[275]. The Minister lays the report before the National Assembly not later than 7 days after the National Assembly first meets after receipt of the report[276]. If the Minister fails to lay the report before the National Assembly as required the Controller and Auditor General shall submit a copy of the report to the Speaker of the National Assembly who shall present it to the National Assembly[277].

If in the course of examination and audit, a matter comes to the attention of the Controller and Auditor General that he or she feels should be brought to the attention of the National Assembly immediately, he shall submit a special report to the Minister responsible for finance[278]. The Minister shall lay the special report in the National Assembly not later than 7 days after the National Assembly first meets after receipt of the report[279].

The staff of KENAO assist the Controller and Auditor General to carry out the audit of the government and other public bodies in a timely and professional manner. The chairpersons of the Public Accounts and Public Investments Committees are members of the Kenya National Audit Commission (KNAC)[280]. KNAC serves as the oversight board of KENAO.

Since the enactment of the Public Audit Act in 2004, the audit process has been streamlined to ensure timely audit reports. Before then, the delayed reports were of little

significance as they related to historical use of public resources. The reports related to the Goldenberg Scandal were available to Parliament in 1994, about 5 years after the scandal had commenced. Further payments were made while the inquiry by the Public Accounts Committee was going on.

Parliamentary committees have based their scrutiny of the use of public funds on the audit reports. The Anglo Leasing scandal was revealed after an audit by KENAO on use of public funds. KACC has based some of its investigations on the reports by the Kenya National Audit Office[281] and Public Accounts Committee. Clear inter-agency relations should be established between Parliament, KENAO and EACC.

Where the use of government resources has been queried, the Executive has been keen to take corrective measures and ensure that the systemic problems that led to the losses are corrected. The capacity at KENAO has been increased to cope with its expanded mandate and ensure efficiency owing to on-going reforms.

i) Parliament

Chapter eight of the Constitution establishes the Legislature. Article 93 of the Constitution states that "There is established a Parliament of Kenya," (Parliament) "which shall consist of the National Assembly and the Senate." The two Houses of Parliament perform their respective functions in accordance with the Constitution as stated in Article 93 (2) of the Constitution.

Article 95 of the Constitution articulates the roles of the National Assembly as follows:

1. Represent the people of the constituencies and special interests

2. Deliberate on and resolve issues of concern to the people

3. Enact legislation

4. Determine the allocation of national revenue between the levels of government, as provided in Chapter Twelve on Public Finance; Appropriate funds for expenditure by the national government and other national state organs; and exercise oversight over national revenue and its expenditure

5. To review the conduct in office of the President, the Deputy President and other state officers and initiate the process of removing them from office; and exercise oversight of state organs.

6. To approve declarations of war and extensions of states of emergency.

Article 96 of the Constitution states that the following shall be the roles of the Senate:

1. Represent the counties, and protect the interests of the counties and their governments

2. Participate in the law-making function of Parliament by considering, debating and approving bills concerning counties

3. Determine the allocation of national revenue among counties and exercise oversight over national revenue allocated to the county governments; and

4. Participate in the oversight of state officers by considering and determining any resolution to remove the President or Deputy President from office

in accordance with Article 145 of the Constitution on removal of the President by impeachment.

The Standing Orders of the National Assembly establish the Public Accounts Committee and Public Investment Committee. The two committees are popularly referred to as watchdog committees since their main role is to monitor expenditure by the government. Prior to 2002, the Public Accounts Committee was chaired by the Leader of the Opposition. However, the Standing Orders were later amended to provide that any MP who is not a member of the ruling coalition could chair the Committee. The principal materials used by the Committee in auditing the government are the reports of the Controller and Auditor General. The Committee therefore is dependent on the competence and efficiency of KENAO. The Chairperson of the Committee is a Member of the Kenya National Audit Commission. The improved operations of the KENAO have streamlined the work of the Committee.

PAC and PIC analyse the reports of the Controller and Auditor General for debate in the National Assembly. The timely submission of reports by KENAO to the PAC and PIC has improved the reporting by the Parliamentary Committees. In the past, the analysis by the PAC or PIC was of historical relevance, was not capable of solving the queries or useful for legal and political purposes due to the delayed submission. The delay defeated the purpose of the audit process and eroded the capacity of PAC and PIC to fight corruption[282]. The Public Audit Act strengthened the operations of the office of the Controller and Auditor General and has ensured timely submission of audit reports.

Parliament has increasingly sought an expanded mandate in the budget making process in pursuit of its watchdog role. In 2008, Parliament established the Budget

Committee that liaises with the Ministry of Finance in the budget making process[283]. The role of Parliament in the budget process has been amplified in the Constitution. The Executive is required to submit budgetary estimates to Parliament on or before 30th April of every year to enable Parliament scrutinise the estimates through the departmental committees before the final budget is prepared and presented. The involvement of Parliament in the budget process ensures budget transparency and creates an opportunity for public engagement in the process. In the past, the role of the budget committee was not clear in the Constitution. However, this has been clarified and the budget committee will play a central role in a transparent, budget making process going forward.

In 1999, Parliament enacted a constitutional amendment securing the financial independence of Parliament from the executive and establishing the Parliamentary Service Commission. The Commission would set the remuneration and benefits for Parliament and could recruit staff to assist MPs and the Committees to execute their functions. The Commission had the mandate to prepare the budget for Parliament.

The Commission subsequently approved increases in the monthly pay for MPs. The public has characterised MPs as an insensitive lot who are concerned about their welfare at the expense of the tax paying public. MPs further exempted their pay from taxation. In many instances, some MPs have been accused of lack of integrity by fellow MPs by accepting rewards to vote for particular bills or motions in Parliament. For example, MPs approved a motion calling for the reopening of the Charterhouse Bank which had been closed by the Central Bank of Kenya on allegations of money laundering and tax evasion. Parliament also rejected a report implicating some MPs in a maize import scandal that had occasioned losses in public funds. A number of

MPs have been accused of mismanaging the Constituency Development Fund leading to loss of funds[284]. The litany of failures and complicity by Parliament has led to apparent loss of public faith in Parliament as the ultimate protector of public interest. In the Constitution, the Salaries and Remuneration Commission was established as a measure of checking this unbridled greed by MPs. The Commission has recommended a lower salary for MPs and stated that all remuneration paid to MPs should be subject to taxation[285]. This is in furtherance to Article 210(3) of the Constitution that prohibits legislative action aimed at exempting any state officer of taxation.

In some instances, Parliament has approved motions intended to protect public interest. For example, Parliament passed the report on the sale of Grand Regency Hotel, whereby the then Minister for Finance was required to step aside pending further investigations.

j) Office of the Ombudsman and the Commission on Administrative Justice

The Permanent Secretary for Governance and Ethics in the office of the President established the Office of the Ombudsman in June 2003. The unit was expected to receive complaints and allegations of corruption on a confidential basis from the public and determine whether such complaints or allegations constituted corrupt practice or abuse of office. It was observed at the time that most complaints that were filed at KACC related to maladministration and not corruption. The unit would liaise with the relevant government offices to which the allegations or complaints were addressed and provide advice on the appropriate mode of investigation and redress. Later, the government established the Public Complaints Standing Committee with the mandate of investigating

and resolving complaints of maladministration in the government. The Committee was established by the President through a Gazette Notice[286]. The Committee has been replaced with the Commission on Administration of Justice (CAJ)[287] in the Constitution of Kenya, 2010.

The functions of CAJ shall be to report to the National Assembly twice every year on the complaints investigated and remedial action taken, and to publish periodic reports on the status of administrative justice in Kenya[288]. CAJ shall have power to request for information, and documents and reports[289]. The hearings of CAJ shall be public[290]. CAJ on conclusion of an investigation or inquiry shall submit its report to the complainant and to the State organ, public office or organisation whose affairs are under inquiry or investigation[291]. CAJ may report any evidence of misconduct to the appropriate authority[292]. CAJ shall submit an annual report to the National Assembly[293]. The responsible Cabinet Secretary shall submit a report on the progress in implementing CAJ's recommendations to the National Assembly[294]. The office has assisted in resolution of administrative malpractices that have not escalated to the level of corruption. The office should also publicise its mandate so that matters that properly belong to it are not referred to EACC. The office can also assist in advising government departments on effective service delivery to reduce complaints on their administrative practices.

k) Kenya Police

The Kenya Police still retains the primary role in investigating all types of crimes, including corruption and corruption related cases. The police has consistently been rated the most corrupt institution in Kenya[295]. The public has lost faith in the capacity of the police to execute its constitutional role. With the reorganisation of

the police under the 2010 Constitution, there is hope that the leadership in collaboration with the National Police Service Commission and the Independent Police Oversight Authority will be able to effectuate reforms in the police force. Reforms will ensure that the police have the capacity to independently and competently investigate corruption, and police officers observe high standards of integrity in their work. Any positive role by the Kenya Police will be realised after the implementation of comprehensive police reforms that will include vetting of all the officers.

l) Judiciary

Judicial reform is at the centre of a rule of law state. An independent judiciary is an absolute requirement for any effective and legitimate anti-corruption strategy[296]. The Judiciary has in the past been used as an instrument for obstructing accountability for corruption related offences. As noted above, KACA was declared unconstitutional by the High Court in 2000. So far, KACA was the agency that had the most impact in investigating and prosecuting corrupt public officers. The Judiciary was at the time subservient to the Executive. Many judges and magistrates were suspected to be corrupt. The fact that judicial officers were suspect of corruption at the time meant that the Judiciary could not be a trusted partner in the fight against corruption.

In 2003, the Chief Justice established the Committee for Reforms and Development. He further appointed High Court Judge, Justice Aaron Ringera to chair an ad hoc Judiciary Integrity Committee that investigated suspected corruption and incompetence among judicial officers. The committee in its report presented on 30th September 2003, recommended the removal of seven Court of Appeal Judges, 17 High Court judges and 82 Magistrates. The

report led to the resignation of five Court of Appeal judges, 11 High Court judges and the retirement in the public interest of 75 magistrates[297].

The committee report was criticised on the ground that long term judicial reforms must result through institutional change and not just change in personnel. The Chief Justice must spearhead the reforms and ensure they are formulated and implemented in a systematic manner. Judicial reforms have been realised after the promulgation of the Constitution which reconstituted the Judicial Service Commission by including representatives of the Law Society of Kenya and elected representatives of the Kenya Magistrates and Judges Association. Such representatives are to be elected in a transparent manner.

The recruitment to the offices of Chief Justice and Judges of the High Court, Court of Appeal and Supreme Court was conducted in an open and transparent manner as demanded by the Constitution. Further, the Constitution requires that all judges and magistrates who were serving as at the date of promulgation be vetted[298]. Judges of the High Court and Court of Appeal have been vetted while the vetting for the magistrates has been partially concluded. The Anti-Corruption and Economic Crimes Act provides for the appointment of Special Magistrates to hear and determine corruption cases. The Judicial Service Commission is empowered by the Act to appoint special magistrates through a notification in the Kenya Gazette[299]. Such magistrates try offences under the Act or any conspiracy to commit or attempt to commit or abet the offences under the Act. The appointment is made from persons who have served as Chief or Principal Magistrates or have been qualified as advocates for more than 10 years[300]. Offences under the Act are tried by the special magistrates only[301]. The magistrates hold the trial on a day-to-day basis to prioritise completion[302]. The magistrate can

pardon a person who is involved directly or indirectly in an offence under the Act on condition that such person makes a full and true disclosure of the whole circumstance within his knowledge relating to the offence[303].
The Chief Justice, as the Chairperson of JSC, has designated special magistrates for the purposes of the Act. There is no justification for the appointment of special magistrates to try anti-corruption cases. Perhaps the intention was to expedite the hearing and determination of corruption cases by eliminating unnecessary adjournments and entrenching the impartiality of the court. Further, most of the magistrates have been appointed to sit in courts in Nairobi whereas corruption is a widespread crime in Kenya.

The special magistrates may be influenced to lean backwards to advance the interests of fighting corruption and thereby compromise the demands of due process. The procedures of such courts may be construed as validating the concerns of the political establishment rather than exercising a statutory mandate[304]. Such approach will undermine the rule of law and constitutional independence of the Judiciary[305]. It should be noted that the performance of the Judiciary in the fight against corruption depends on the smooth functioning of other institutions, especially the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission. Its performance cannot be assessed in isolation[306]. Selective prosecution of corruption cases results in diminished confidence in the judicial process and undermines the legitimacy of any conviction resulting from such prosecution and the principle of equal application of the law[307].

m) The Attorney General and the Director of Public Prosecution

In the repealed Constitution, the role of directing prosecution was vested in the Attorney General. The AG's office was not been very supportive of the investigation work of the anti-corruption agencies. In most cases, the AG requested the agencies to carry out further investigations before prosecution could be carried out. Prosecution of corruption cases has been the weak link in anti-corruption in Kenya.

The 2010 Constitution established the office of the Director of Public Prosecution, to which all prosecutorial powers are reposed. The office is a constitutional off shoot of the Office of the Attorney General. The DPP was appointed through an open, transparent and competitive process, which included vetting by Parliament. Article 157 (9) of the Constitution provides that the powers of the DPP may be exercised in person or by subordinate officers acting in accordance with special or general instructions. Further, article 157 (12) of the Constitution confers Parliament with the power to enact legislation conferring powers of prosecution on authorities other than the DPP. These provisions seek to cure the mischief in the Gachiengo & Another vs. AG[308] case in which KACA was declared unconstitutional.

The failure to exercise the power to prosecute is a major hurdle in the fight against corruption. The office of the AG was subject to political control which undermined the independence of the anti-corruption agency. The results of investigations cannot yield any fruit if the cases that are ripe for trial are not prosecuted. This was demonstrated during the term of the KACC where only less than 10% of the cases were authorised for prosecution[309]. With the increased transparency demanded by the Constitution, it is hoped that the relationship between the DPP and the Ethics and Anti-Corruption Commission (EACC) will be streamlined to enable EACC to lead the fight against

corruption on all fronts. Public prosecutors should be trained to enhance their capacity in cases relating to corruption. The prosecutors need better skills due to the scope and complexity of the cases.

n) Ethics and Anti-Corruption Commission

After the adoption of a new Constitution in August 2010, Parliament was required to enact the necessary legislation within one year to establish and operationalise the Ethics and Anti-Corruption Commission (EACC). EACC succeeded the KACC. It is entrenchment in the Constitution granted the necessary autonomy and mandate to collaborate with other investigatory and prosecutorial agencies established under the Constitution. The Constitution established high ethical standards that all state and public officers were required to comply with. Pursuant to the Constitution[310], Parliament enacted the Leadership and Integrity Act[311] to stipulate the standards of conduct for state and public officers. It also enacted the Ethics and Anti-Corruption Commission Act, which defines the Commission as the Independent Ethics and Anti-Corruption Commission established under Section 3 of the Act pursuant to Article 79 of the Constitution. The provision effectively terminates the existence of KACC, hitherto established under the Anti-Corruption and Economic Crimes Act[312].

The Constitution provides that Parliament shall enact legislation to establish an independent ethics and anti-corruption commission for the purposes of compliance with and enforcement of Chapter 6 of the Constitution. The legislation shall provide for procedures and mechanisms for effective administration of Chapter 6, prescribing penalties that may be imposed for contravention; providing for application of Chapter 6 to public officers; and making any other provision necessary for ensuring the promotion of the principles of leadership and integrity.

EACC is intended to vet public and state officers to ensure compliance with Chapter 6 of the Constitution on ethics and integrity.

EACC shall comprise of a Chairperson and 2 Commissioners[313], who shall be appointed for a single term of 7 years[314] and shall serve on a full time basis[315]. The functions of EACC are to develop and promote standards and best practices in integrity and corruption, and a code of ethics for state officers; receive complaints on breach of the code of ethics by public officers; investigate and recommend the prosecution of acts of corruption or violation of code of ethics to the DPP; recommend action that should be taken against a state or public officer alleged to have engaged in unethical conduct; public awareness; advisory services; and institute recovery proceedings for purposes of recovery and protection of public property[316]. EACC shall carry out investigation on its own initiative or upon a complaint and undertake preventive measures against unethical or corrupt practices[317].

The functions of EACC include raising public awareness on ethical issues and educating the public on dangers of corruption, and enlisting and fostering public support in combating corruption. EACC shall have due regard to the requirements of Anti-Corruption and Economic Crimes Act regarding confidentiality[318]. EACC shall cause an annual report to be prepared at the end of each financial year[319]. The report will be submitted to the President and to the National Assembly within three months after the end of the year to which it relates[320]. The financial statements, description of the activities, statistical information that it may consider appropriate relating to the Commissions functions, recommendations to state departments or any other persons and the action taken, the impact of the exercise of its mandate or functions, and any legal or constitutional or other impediment that inhibited the

achievement of its functions, will be set out in the report[321]. The Commission shall cause the report to be publicised and published in such manner as it may determine[322].

EACC shall publish and publicise important information within its mandate affecting the nation[323]. A request for information by a citizen shall be addressed to the Secretary or other designated person[324]. The request may be subject to payment of a reasonable fee and confidentiality requirements of EACC. Subject to Article 35 of the Constitution, EACC may decline to give information on the basis that the request is unreasonable in the circumstances, the information is at the deliberative stages, for failure to pay the prescribed fee or for failure of the applicant to satisfy the confidentiality requirements[325]. The right to access to information provided for under Article 35 of the Constitution is limited to the nature and extent specified[326]. Every member and employee shall sign a confidentiality agreement[327]. EACC shall publish a notice for public information specifying the location of its principal office and its addresses, telephone numbers and other means of communication or contact details [328].

The Act preserves the past activities of KACC, which will be completed by EACC. Any notices or orders made or issued by the KACC shall be deemed to have been made or issued under the Act[329]. Any function, transaction, investigation or prosecution; civil proceedings or any other legal or other process in respect of any matter carried out under the Anti-Corruption and Economic Crimes Act or any other law before the commencement of the Act shall be deemed to have been carried out under the Act[330]. Any undertaking or responsibility falling on Kenya Anti-Corruption Commission Advisory Board shall be assumed by EACC[331].

Parliament has enacted a weak legislative framework for enforcing integrity and ethics demanded by the Constitution. This has watered down the enforcement of these provisions to state officers, including candidates who vied during the March 2013 General Elections. EACC should ensure that it cultivates institutional integrity to ensure that the public has the confidence to report incidents of corruption to the agency and expect results in the form of prosecution and convictions.

EACC must establish links with other vital government organs that are essential in the fight against corruption, including the office of the DPP, the Kenya Police and the Judiciary. The analysis of the KACC reports shows that 84% of the cases recommended for prosecution by the Commission resulted in prosecution by the AG. Successful prosecution is dependent on co-operation between the investigator and the prosecutor. The agency must ensure that its leadership is above reproach and able to inspire public confidence and lead the fight against corruption from the front. Political will in the fight against corruption will be necessary to ensure effective delivery. Such political will is primarily generated by public perception on the ability of the institution to deliver and the demand that the Government supports the institution.

The operations of EACC have been hampered by:-

a. The Act did not grant EACC sufficient powers to investigate and prosecute corruption and corruption related offences. The lack of clear prosecutorial powers will hamstring the operations of EACC. EACC also needs powers to conduct lifestyle audits to unearth corruption by public officers.

b. The Act has watered down the high ideals on leadership and integrity established by the Constitution. Elected

state officers are required to submit a self-declaration form. There is no verification mechanism for the contents of the form.

ANALYSIS

The agencies established to combat corruption in Kenya have overlapping mandates and conflicting roles. KACC shared the education and public information mandate with the National Anti-Corruption Campaign Steering Committee while the prosecution function was vested in the AG. The overlapping roles lead to overprotection of information and institutional rivalry. The fight against corruption should be vested in an independent agency with appropriate structural and operational autonomy. The law must protect such an institution from attack and secure its independence. The lack of clarity and overlaps between functions of the institutions comprising the anti-corruption architecture leads to duplication of efforts which reduces the overall effectiveness of the system.

Evidence shows that the level of centralisation or decentralisation of anti-corruption agencies may not be the primary determinant of their effectiveness. Factors such as institutional independence, specialisation, integrity, capacity and political interference will influence their effectiveness to a greater extent[332]. Other facilitative actors include a supportive legal and institutional framework that supports effective investigation and prosecution of corruption related offences. Most of the anti-corruption agencies worldwide have had little impact.[333]

The advantages of centralised anti-corruption agencies include an enhanced public profile; concentration and accumulation of expertise and experience in investigating and prosecution of corruption; and reduced uncertainty

over jurisdiction through avoidance of duplication of powers. The disadvantages of centralised agencies include marginalisation of anti-corruption activities and targeted attacks on the agency and inability to create a broad based strategy to combat corruption[334].

The United Convention against Corruption (UNCAC) provides that states parties shall establish an independent body to prevent corruption and provide adequate training, material resources and specialised staff to ensure that it can fulfil its mandate effectively[335]. The types of agencies that have been set up can be categorised as: -

a. Multipurpose agencies. These bodies have multiple competencies that include preventative or suppressive powers and are responsible for education, prevention, communicative and awareness raising activities besides criminal investigation. EACC is a multipurpose anti-corruption agency. The multipurpose agencies are established in countries where corruption is widespread and the police are so corrupt that offences of bribery are no longer investigated.[336] Without political will and without a prosecution mandate, KACC was not effective in fighting corruption in Kenya. The decision to prosecute is decidedly political and was vested in a pseudo-political office of the AG.

b. Law enforcement agencies. These comprise specialised units or departments within the police force or prosecutor's office that focus on investigating and prosecuting corruption. They are centralised investigation commissions. The defunct Anti-Corruption Police Unit was a law enforcement body.

c. Preventive bodies. Such bodies exercise exclusive preventive functions. The National Anti-Corruption Campaign Steering Committee is a preventive body.

The myriad institutions involved in the fight against corruption in Kenya have led to an oversupply of agencies with conflicting or overlapping mandates. This has created institutional confusion; weak or non-existent co-ordination; duplication of roles, redundancy and waste of resources, and inter-agency competition for resources and leadership. The EACC should be strengthened through institutional and legal reform to enable it take leadership in ensuring corruption is eliminated. Already, EACC is constitutionally entrenched and there are elaborate provisions in the Constitution to enforce ethical behaviour among public and state officers.

The co-ordination between the different anti-corruption agencies has been conflicted and inefficient. There is no clear delimitation of the public awareness roles of EACC and the National Anti-Corruption Steering Committee. There is no clarity on the exact role of DPP in consenting to or carrying out prosecution. Seamless inter-agency coordination is crucial for an effective and efficient outcome in prosecuting corruption cases. The anti-corruption plans, strategies and policies should be harmonised to avoid contradictions and inconsistencies. The agencies should not engage in unnecessary and uncoordinated attempts to reinvent the wheel. The formation of numerous agencies with conflicting or competing mandates affects the quality of results in the fight against corruption. This is further fortified by the opaque method used to appoint officials of the agencies, fuelling suspicion of political patronage and cronyism as a criterion in the place of ability and competence[337]. Lack of co-ordination among the agencies can impede mutual legal assistance and asset recovery[338]. A unified strategy should aim to resolve the jurisdictional issues that reduce effectiveness in the fight against corruption in Kenya.

The fight against corruption was forced upon the

government in the 1990s as a condition precedent to access development assistance from the IMF and World Bank. Political will is dependent on knowledge, appropriate policy tools and willingness to make use of the policy tools.

There is evidence of political interference in operations of the agencies. For example, in 2009 the President attempted to renew the term of Justice Ringera without involvement and approval of the Kenya Anti-Corruption Commission Advisory Board and without submission of his name to Parliament for approval. The attempted appointment was declared illegal and rejected by Parliament, forcing the President to rescind the decision. Prof. P.L.O. Lumumba was later appointed the director of the Commission through an open, transparent and competitive process. Parliament has not been supportive in the fight against corruption. This is especially where the suspected corrupt officer is a Member of Parliament. However, in some instances, ministers were forced to step aside from office pending resolution of allegations of misconduct. In 2004, the Ministers of Finance, Energy and Education at the time were forced to step aside from office when they were mentioned adversely in regards to the Anglo Leasing and Goldenberg scandals. All the three Ministers were later cleared and reappointed to the Cabinet[339].

The fight against corruption requires an appropriate access to information law and whistle blower protection. By limiting the right to access information, the government demonstrates its unwillingness to be scrutinised. In such a scenario, corruption thrives. An anti-corruption agency can be effective if it's made fully independent of the Executive and if there is a strong Judiciary[340].

The government has failed to promote an open and transparent society. Parliament is yet to enact an appropriate access to information law to create the

facilitative framework for the operation of Article 35 of the Constitution. However, courts have been very proactive in permitting access to official information by individuals. However access is still obstructed by the requirement that this right is only available to citizens[341]. The law does not require anti-corruption agencies to proactively disclose important information. Access to courts for the purposes of accessing information is expensive and restrictive to most Kenyans. Information asymmetry has been identified as a driver to corruption and the government should endeavour to promote an open and democratic society through a culture of openness.

The media plays a vital role in investigating and reporting corruption. It is responsible for informing and generating support of the civil society and the public on strategies to combat corruption. The law should secure the right to information, freedom of the press and freedom of expression[342]. Suits for defamation by suspects of corruption may expose the media to high civil liabilities and render it vulnerable. The media in Kenya lacks the capacity to carry out effective investigative journalism which affects the quality of reporting corruption[343]. Corruption is sophisticated and trans-boundary in nature. The laws should be strengthened to ensure adequate protection for journalists and provide a legal environment that facilitates access to information, protects whistleblowers and confidential sources of information. The media is central in building a culture of transparency and accountability to ensure public and state officers are held to account[344].

Poor terms and conditions of work for public officers have been identified as a driver of corruption. Some anti-corruption agencies have been allocated inadequate resources. This may be partly attributed to competition for resources between the agencies.

The government has promoted and passed a weak and ineffective legislative framework for enforcing leadership and integrity under the Constitution. For example, the Leadership and Integrity Act has diluted the high standards set out in Chapter Six of the Constitution by failing to provide sanctions for breach and in failing to create an effective enforcement mechanism.

The Government has instituted other measures in an effort to control corruption. The Privatisation Act was enacted in 2005 with the aim of enhancing transparency in the privatisation of state owned enterprises thereby strengthening accountability and to ultimately scale down the public sector[345].

The challenges that have been identified in the fight against corruption in Kenya include[346]:-

a. Weak and ineffective co-ordination among the anti-corruption agencies, including in educational and awareness campaigns. The National Anti-Corruption Plan was never implemented to ensure a systematic way of implementing the initiatives by and the harmonisation of the activities of the anti-corruption agencies

b. Weakness in processes, systems and procedures within public entities resulting in rent-seeking opportunities and corruption facilitative activities. The law did not provide for the implementation of KACC audit reports.

c. Capacity constraints in the anti-corruption agencies due to limited skilled manpower, under developed technological capacity to tackle modern and sophisticated corruption and economic crimes. Due to the intractability of the process of investigation and prosecution, the temptation was high on the part of the anti-corruption agencies to engage

in a multiplicity of outreach activities of unclear impact under the guise of educating the public[347]

d. Inadequate empowerment and appreciation of the citizenry to enable active participation in the fight against corruption.

e. High and unrealistic public expectation.

f. Inadequate legal framework to facilitate cross border investigation and restitution of corruptly acquired assets, restitution of corruptly acquired assets, constitutional challenges to appoint receivers by the Commission and to investigate unexplained assets, challenges to the power to investigate offences in the Penal Code. Court orders for freezing assets cannot be obtained ex parte thereby eliminating the elements of surprise that the freezing power depends on for effectiveness[348].

g. Delays in court processes by suspects and their lawyers through challenges of KACC in court and indefinite delays in prosecution of cases where suspects seek stay of proceedings through recourse to constitutional references. The rules for filing constitutional references formulated by Chief Justice Bernard Chunga in 1999 provided for an automatic stay or proceedings once the reference was filed.

h. Politicisation and ethnic realignment in the fight against corruption, and the portrayal of anti-corruption efforts as a 'witch hunt' by political adversaries.

Conclusion

Anti-corruption initiatives are dependent on establishment of institutions that adhere to the rule of law. The institutions

include an impartial, independent and competent judiciary that ensures constitutional that guarantees for fair trial are observed and investigatory and prosecutorial agencies are free from political or other interference[349]. An effective anti-corruption strategy must incorporate an appropriate anti-corruption legal framework; mechanisms and will to enforce the laws; administrative reforms including public service reforms and procurement safeguards; dedicated anti-corruption agencies and public audit authorities; access to information law; and an active media and civil society to shape public opinion and perception[350].

The failure of the anti-corruption campaign can be attributed to poor design of oversight and monitoring institutions; weak political commitment in the fight against corruption; lack of the will to enforce the anti-corruption law by the agencies; lack of an access to information law; and non-protection of whistle blowers and confidential sources of information.

Political will is very essential in a successful anti-corruption campaign[351]. It is a primary requirement for effective corruption control . Political support is necessary to secure the independence of the agency and minimise arbitrary interference. The agencies should adopt a top down approach to fighting corruption[352]. If senior public officials are investigated for corruption, arraigned in court and convicted, the public confidence of the agencies may increase. The public will be ready and willing to collaborate with the agencies in the campaign.

The lack of significant progress in eradicating corruption is attributed to the fact that many programmes are simply folk remedies or 'one-size-fits-all' approaches and offer little chance of success. Each programme should identify the type of corruption they are targeting and tackle the underlying country specific causes or 'drivers'

of dysfunctional governance. The research on types of corruption in Kenya may inform the strategies adopted by the agencies to fight corruption successfully[353].

Failure to confer prosecutorial powers to the anti-corruption agencies has undermined efforts to make the anti-corruption agencies effective. Initially, the AG's office was perceived to be a 'gate keeper' for political interests and would not demonstrate the will to robustly prosecute cases relating to corruption or economic crimes. Similarly, EACC has no prosecutorial powers. This means that the DPP as established in the current Constitution will be required to prosecute cases that have been investigated by EACC. Although the office of the DPP has the independence to initiate prosecution, it is not yet clear whether the office will make the right call at the right time on matters relating to corruption in a professional manner and devoid of political interference.

Tracing legislative and judicial action in the fight against corruption in Kenya: Smokescreen of the century?

Dr Linda Musumba

THE ROLE OF THE LEGISLATURE IN FIGHTING CORRUPTION BETWEEN 2003 AND 2007

In this chapter, the fight against corruption between the years 2003 to 2007, following the exit of the KANU regime, will be reviewed. The NARC government had come to power on the platform of reforms and the fight against corruption. There was a lot of expectation from the public

for the government to deliver on the promise to fight corruption tenaciously.

Before discussing the Legislature's input in the fight against corruption during this period, it is important to explain why there was such huge expectation on the NARC government to deliver on the fight against corruption. This demonstrates how the orientation of the government of the day on any issue can go a long way in influencing the orientation of the Legislature with respect to an issue, and thus the kind of laws it makes.

a) The influence of the executive in the successful implementation of government policies

Whilst the three arms of government are independent, the executive arm wields great influence on the success of a government initiative. It is the branch that ensures implementation of laws and policies. As such, the orientation of the executive arm on any issue is vital in determining whether the other branches will succeed in the same initiative. For instance, the period before 2002 as assessed, indicates the many failures by the Legislature and Judiciary in their fight against corruption. One may reasonably conclude that the KANU Government condoned corruption since most of the corruption cases involved government officials. This being the case, the type of government in power and the personalities within that government clearly has a great influence on the success of any initiatives to eradicate corruption. For this reason, the fact that Mwai Kibaki, gunning for presidency on a NARC ticket, had expressed his intention to fight corruption vociferously saw the expectations of the public soar to even greater heights that this time corruption would be effectively addressed after the 2002 elections. Essentially, Mwai Kibaki rode onto victory on a strong anti-corruption

platform with renewed hopes that his government would deliver.[354]

At his swearing in ceremony, the newly-elected President Mwai Kibaki categorically reiterated his government's commitment to fighting corruption.[355] Corruption and the people's desire for a government dedicated to its eradication had played a large part in determining the results of the election. In fact, one of the main pillars of President Kibaki's candidacy was his denouncement of Moi's KANU party as corrupt and subsequent promises to the people to fight and end corruption as a way of life. To many, his election in 2002 signalled a time of hope in which government reforms would bring about a new way of life in Kenya.[356] President Kibaki carried this anti-corruption momentum into office with him and quickly began pushing through measures to fight corruption in many different ways.

One of the President's first steps was to sack all state procurement executives due to evidence of widespread abuse of office among these officials.[357] President Kibaki then created a new Ministry of Justice and Constitutional Affairs.[358] The purpose of this position was to coordinate the anti-corruption efforts to make them more effective and consistent.[359] The seriousness of the President to fight corruption could be seen from his appointment of Kiraitu Murungi as the Minister in charge of this Ministry. Mr Murungi exhibited the same vigour and demonstrated it at an International Conference by terming corruption, 'A Crime Against Humanity'.[360] President Kibaki also created the position of Permanent Secretary in the Office of the President for Governance and Ethics. He appointed John Githongo, the former Executive Director of Transparency International Kenya to this post.[361]

While all these developments were initiatives of the Executive of the newly elected government, they went a

long way in showing the government's orientation on the issue of corruption. These early signs of a government committed to the fight against corruption provided a good environment for the Legislature and Judiciary to play their roles in the fight against corruption.[362] Therefore, although the foregoing developments were mainly associated with the new government and in particular the Executive, an assessment is made hereafter of the specific role of the Legislature and Judiciary in the fight against corruption.

In this regard, the period shortly after the December 2002 elections is remarkable for the massive legislative reforms that took place with respect to fighting corruption in Kenya. However, the most significant anti-corruption initiative undertaken by that Parliament was the passing of the Anti-Corruption and Economic Crimes Act as well as the Public Officer Ethics Act in May 2003.

b) The enactment of the Anti-Corruption and Economic Crimes Act and its framework

The Anti-Corruption and Economic Crimes Act (ACECA) filled the gap left by the demise of Kenya Anti-Corruption Authority (KACA) following the decision of the High court, sitting as a constitutional court, in the Gachiengo Case[363] which will be comprehensively examined in the following section on judicial action in the fight against corruption. The ACECA established the Kenya Anti-Corruption Commission (KACC) as the official body to fight corruption in Kenya.[364]However, KACC still faced the same obstacles imposed on the defunct KACA by the constitutional Court's decision in the Gachiengo Case; that anti-corruption bodies established through Acts of Parliament did not have the explicit power to prosecute anti-corruption crimes under the Constitution of Kenya. ACECA did not also empower KACC with prosecutorial

powers[365] although it gave KACC very broad powers of investigation. The new law also sought to make the Attorney General accountable for his decisions on whether or not to prosecute suspects reported to him by KACC.

Under the Act, KACC had extensive investigatory powers including the ability "to investigate any matter that in the Commission's opinion, raised suspicion that; conduct constituting corruption or economic crime; conduct liable to allow, encourage or cause conduct constituting corruption or economic crime,"[366] had occurred. ACECA also gave KACC the power to investigate the conduct of any person,[367] branch of the government,[368] corporations, and local authority, among others. Besides these powers, KACC was also given all the powers necessary or expedient for the performance of its functions.[369] It also had privileges and immunities for police officers to enable it carry out investigations.[370] KACC also had the power to demand, upon reasonable suspicion, a declaration of the suspected person's property.[371] This was meant to ensure that if a person was found in possession of wealth far beyond what one would expect to have, given his/her job or upbringing; this may raise suspicion of corruption. However, although KACC had been given wide powers, which would have enabled it to perform its work effectively, many of them were perceived to be in conflict with the fundamental legal principle that requires that all accused persons are accorded the presumption of innocence until proven guilty.[372]

Notably, as a major departure from previous anti-corruption legislations, ACECA provided for the appointment of special magistrates to hear corruption cases.[373] These magistrates are responsible for the trying of "any offense punishable under the Act"[374] as well as any conspiracy to commit these activities labelled a crime under the ACECA.[375] Since then an anti-corruption court has been established.[376]

c) The Enactment of the Public Officer Ethics Act, 2003

The above law was the first to introduce an ethical dimension in the fight against corruption in Kenya. Its purpose was to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers.[377] Up until this point, anti-corruption legislation had taken the form of merely defining corrupt behaviour and determining how severely to punish each type of behaviour defined as corrupt. By bringing in an ethical dimension, the Legislature demonstrated its seriousness in the fight against corruption and strengthened the notion that for the fight against corruption to be successful, a government would have to do more than create an all-encompassing definition of corruption.

While defining and investigating corruption are both integral parts of the fight against corruption, when they are supplemented by other reform efforts, a much greater effect is possible. This is where the Public Officer Ethics Act, 2003 came into play. The Legislature sought to promote professionalism and integrity in the public service through a code of conduct and model standards rather than by threat of punishment, hence the need for the Public Officer Ethics Act in order to curb corruption in a different way.

The Public Officer Ethics Act, (POEA), created a general Code of Conduct and Ethics. This code of conduct set out a number of provisions for the members of the public service to follow. The Act required a public officer to carry out his/her duties and ensure efficiency and honesty in service provision.[378] The Act also provided a vast array of standards and responsibilities that public officials are expected to comply with.[379]

A more interesting dimension in the Act was the requirement for all public officers to declare their wealth and that of their families. This requirement led to quite a

number of individuals publicly declaring their wealth.[380]

d) Loopholes in the Public Officers Ethics Act 2003

This Act required that every public officer to whom it applied submit a declaration of the income, assets and liabilities of himself, his spouse and dependent children under the age of 18 annually.[381] The Act further provided, however, that declarations received from public officials were to be held in confidence and could not be disclosed to the public.[382] Information contained in the register of declarations could only be disclosed to law enforcement agents or for purposes of judicial proceedings.[383] These requirements that excluded the public from accessing the information contained in the register of declarations severely undermined the purposes of this law. Essentially, the lack of public involvement undermined the success of this legislation. Wealth declarations do little good if no one can access them, and accountability in government spending is not possible if no one knows how much was available and allocated to a given project in the first place. The law ought to have allowed the public to scrutinise the full information on wealth declaration by public officials. It is only then that these declarations will have served the objectives for which the provisions were put in place.

Despite these shortcomings, the enactment of the Public Officer Ethics Act was laudable as it sought to create an environment that will discourage and deter corruption amongst public servants in Kenya and generally improve the fight against corruption in the country.

Other keys laws enacted by the Legislature during this period include:

1. The Public Procurement and Disposal Act 2005_-

This law sought to make procurement of goods and services by public bodies transparent, accountable and effective. This legislation was supported by the Public Procurement Regulations of 2006.

2. The Privatisation Act, 2005 - This was enacted to ensure transparent and accountable transfer of public assets.

3. The Government Financial Management Act, 2004 - This was enacted to consolidate, improve and streamline key governmental processes previously scattered under separate codes.

4. The Public Audit Act 2003 - This law was set up by the National Audit Commission, the National Audit Office and generally streamlined the national audit of all public organisations.

5. The Witness Protection Act 2006 - The thrust of this Act was to ensure that no disciplinary action was taken against any private or public employee who assists an investigation, or discloses information for such an investigation. Courts are required to conceal or remove any information that may disclose the identity of the informer, and to provide relocation and identity change if required.

6. The Proceeds of Crime and Anti-Money Laundering Act – The Act criminalises money laundering activities and provides mechanisms for freezing, seizing and confiscating proceeds of crime. The Act also establishes various organs necessary to combat money laundering.

Besides its legislative role, the Legislature could also be credited for the role it played in ensuring adoption and domestication of various international legal instruments concerning corruption. These instruments include; The

United Nations Convention against Corruption,[384] the UN Convention against Transnational Organised Crime and the African Union Convention on Preventing and Combating Corruption. By signing these instruments, the country's fight against corruption could not be questioned. Going by the avalanche of laws enacted during the period from when the NARC Government took over, it can be reasonably concluded that this Parliament, which succeeded that of KANU, was determined to break away from the corruption-ridden past. The successes in passing anti-corruption laws could perhaps be explained by the fact that NARC had won the majority of seats in Parliament, having campaigned on the platform of fighting corruption in the country.

The strange and unabated continuation of corruption during this period however raises significant questions in the face of the increased number of laws enacted. The Anglo Leasing scandal that occurred in 2004 is proof of this. The question begs whether the laws already outlined were suitable or effective in fighting corruption. In other words, in the approach to the December 2007 elections, the NARC Government's first term was coming to an end with a dismal scorecard on the question of corruption. In light of this, it will be interesting to review in the following section the impact of the Coalition Government, which included President Mwai Kibaki and Prime Minister Raila Odinga as the two principals, on the fight against corruption. The two individuals had been the leading luminaries in the formation of the NARC Government and had now turned adversaries. However, both these principals had campaigned on a platform of fighting corruption.

THE ROLE OF THE LEGISLATURE IN FIGHTING CORRUPTION BETWEEN 2008 AND 2012 UNDER THE GRAND COALITION

In the enquiry at hand, the general outlook of the government and how its nature might have aided or stifled the fight against corruption in the country will be investigated. The period in question has been divided into two distinct portions that reflect the important changes that had occured at the time. The Legislature's performance will be analysed in two periods i.e. between 2008 and 2010, and between 2010 and 2012. The former period refers to the analysis of the Legislature's performance immediately after the Coalition Government was formed and commenced its rule, and the latter period focuses on the Legislature's performance following the promulgation of the Constitution of Kenya in 2010.

a) The performance of the Legislature from 2008 to 2010

As already mentioned, the Government in question was a coalition between the political parties of Mwai Kibaki and Raila Odinga i.e The Party of National Unity and The Orange Democratic Movement. The coming together of these two parties swallowed up the majority of Members of Parliament in the House under the coalition arrangement thus leaving few out of it. There was therefore no identifiable opposition party in Parliament except the few MPs who were not co-opted into the government.[385] This sort of arrangement had significant implications on the Legislature's effectiveness in providing checks to the government.[386] Despite President Kibaki's first term in office showing a dismal display in the fight against corruption, his campaign did not shy away from reiterating his commitment to fighting corruption.[387] His main opposition, Orange Democratic Party (ODM), also campaigned strongly on this platform. As such, it was expected that fighting corruption would be a priority of the Coalition Government, both parties having made strong

promises on the same.

Oddly, very little effort was witnessed towards fighting corruption in the period between 2008 and 2010. Parliament failed to enact any laws that could have fortified the fight against corruption. The Kenya Anti-Corruption Commission (KACC) continued to exist under the Anti-Corruption and Economic Crimes Act. The only major contribution by the Legislature in the fight against corruption was the approval of the appointment of Professor Patrick Lumumba as the Director of KACC.[388] Notwithstanding this, major corruption scandals that are outlined imminently continued to emerge within the Coalition Government. These include the controversial sale of the Grand Regency Hotel, the maize scandal,[389] the Triton Oil,[390] the acquisition of the Nairobi cemetery land, and the Free Primary Education programme scandals.

The Legislature's orientation on corruption in this period can be discerned from its reaction and handling of these scandals. As was the norm, Parliamentary Committees only stepped in after the fact. For this reason, they failed to play any meaningful oversight role to prevent these scandals from happening. While the Parliamentary Select Committees have been effective in carrying out investigations and making recommendations, including calling for the prosecution of the culprits, this practice on its own seems to have failed to bear much fruit in the fight against corruption.

In particular, the suitability and effectiveness of Parliamentary Committees in fighting corruption was put into serious question following their conduct in the scandals that rocked the Grand Coalition Government. On the maize scandal, an investigative report by Parliament's Departmental Committee on Agriculture, Lands and Natural Resources questioned how the tendering for the

imports was carried out and implicated the Chair of the Cabinet ad-hoc Committee on Food Security, Prime Minister Raila Odinga, and some members of his family in the irregular award of a tender.[391] The Committee made its findings, some of which touched on the Prime Minister. These findings spurred political parties to make counter-allegations. The findings against the Prime Minister, his staff and family were later expunged.[392] Furthermore, Parliament rejected the Report on the grounds that it was "politically engineered" and "absolutely clumsy". It instead implied that the National Cereals and Produce Board (NCPB), the lead government agency for managing all aspects of grain importations into the Country, was responsible. The manner in which this Committee conducted its business sums up how political party patronage that reigns supreme in Parliament has hampered any serious fight against corruption.

With regard to the cemetery land scandal, the Local Authorities Committee took a positive step in recommending the prosecution of the Local Government Permanent Secretary, Mr Sammy Kirui and Nairobi Mayor, Mr Geoffrey Majiwa. However, the Committee's consensus on exonerating the Minister for Local Government, Musalia Mudavadi from blame is questionable.[393] However, the workings of this Committee too were compromised by political party allegiance, and its objectivity was clearly clouded.[394]

On the other hand, whilst the Parliamentary Committee on Finance, Planning, and Trade asserted itself in the fight against corruption by investigating the controversial sale of the Grand Regency Hotel, and recommending severe punishment for the then Minister for Finance, Amos Kimunya for breaching the National Powers and Privileges Act,[395] it exposed the inadequacies that exist in these Committees. Indeed these inadequacies have rendered

them ineffective since the Committee in this case was unable to take any other step to ensure prosecution of the Minister or prevent his reinstatement by the appointing authority.

From the foregoing, it is clear that the various Parliamentary Committees have been unable to provide effective checks on the Executive and act as serious agents in fighting corruption. The last Parliament, as stated elsewhere herein, lacked an organised opposition due to the formation of a Grand Coalition Government. This may as well have contributed to the absence of any serious oversight on the Executive, and specifically, the fight against corruption.

The above discussion indicates what had been the norm in the fight against corruption for a long time. In 2010, a new Constitution was promulgated. This Constitution raised the hopes of many Kenyans that it was going to resuscitate the fight against corruption in the country. The following section looks at how the new Constitution impacted on the fight against corruption in Kenya.

b) An analysis of the period following the promulgation of the Constitution of Kenya, 2010

On August 27, 2010 Kenya got a new Constitution.[396] By ratifying it, the Constitution did not only give Kenyans hope for a future free of looting of public resources, but it also fortified the fight against corruption in the country. This Constitution is founded on principles of "good governance, integrity, transparency, and accountability".[397] To realise the letter and spirit of the Constitution, a raft of laws were to be enacted to give effect to the provisions of the Constitution. These laws, and specifically those that relate to the fight against corruption, form the platform on which to judge the performance of the Legislature in the

fight against corruption in this new era.

The Ethics and Anti-Corruption Commission (EACC) Act [398]

The EACC Act was enacted pursuant to Article 79 of the Constitution to ensure compliance with and enforcement of the provisions of Chapter Six of the Constitution on Leadership and Integrity. This legislation established the Ethics and Anti-Corruption Commission (EACC) to implement chapter six of the Constitution and any other additional functions under the Act.[399] The Ethics and Anti-Corruption Commission (EACC) replaced KACC as the anti-corruption body in Kenya. This was a huge step forward in the fight against corruption. This legislation did not however, bring substantial changes in the substantive law on corruption. The Act only repealed Section 2 and Part III of the Anti-Corruption and Economic Crimes Act.[400]

Due to the difficulties that had faced the preceding KACC i.e. lack of prosecutorial powers, it was expected that Parliament would remedy that defect through this new law. However, this was not to be. Through an act that seemed deliberate, Parliament denied this vital body prosecutorial powers. Under the previous Constitution, the argument raised against an anti-corruption body with prosecutorial powers was that the Attorney General had exclusive powers to prosecute and that any law that purported to give such a body these powers was unconstitutional.[401] This argument was however not plausible and misrepresented the correct position of the law.[402] Article 157 of the Constitution creates the office of the Director of Public Prosecutions (DPP) and gives it the power to prosecute.[403] This power is however not exclusive to the DPP. Article 157(6) (b) provides that,

> 'The Director of Public Prosecutions shall exercise State powers of prosecution and may take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority...'

Sub-article 12 further provides that, 'Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.' This means that anybody else or authority may bring prosecutions against a person with the authority of the Constitution. Anybody or any authority referred to in this provision includes the EACC. Thus it was easy for Parliament to invoke part 12 of this Article to delegate to the EACC the power to prosecute corruption offences rather than having to report to the DPP.[404] In the same vein, the powers of the Ethics and Anti-Corruption Commission are set as "able to perform any functions and exercise any powers prescribed by legislation, in addition to the powers and functions conferred by the Constitution."[405] The reasonable expectation therefore was for Parliament to confer prosecutorial powers to the EACC expressly. While blame could be placed on the drafters of the Constitution for leaving it to Parliament to take the necessary progressive steps when well aware of Parliament's history in the fight against corruption in Kenya, Parliament could nonetheless have done better.

The trend of poor quality legislation from Parliament is perhaps explained by the fact that some MPs were under investigation, with some having been prosecuted for corruption, and would therefore do anything to ensure that they manipulate the process of law making.[406]

The Leadership and Integrity Act, 2012

The enactment of the Constitution affected the scope of the Public Officer Ethics Act. However, the principles of this Act were included in Chapter Six of the Constitution, where they were cemented thus elevating their profile. The essence of giving the fight against corruption an ethical dimension cannot be over emphasised. Chapter Six of the Constitution sought to establish high ethical, moral and integrity standards, not only for public servants, but also other state officers including holders of political offices.[407] As will become evident, the Legislature's hand in shaping the law that would breathe life into this Chapter of the Constitution did nothing short of extinguishing the hopes and morale of Kenyans finally slaying the dragon of corruption.

Article 80 of the Constitution requires Parliament to enact legislation for the procedures and mechanisms for the administration of Chapter Six. The Sixth Schedule to the Constitution makes it mandatory for Parliament to enact the legislation on leadership within two years from the date of promulgation. Pursuant to this, Parliament enacted

the Leadership and Integrity Act, 2012 to establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution, to promote ethics, integrity and servant leadership among state officers. Through this law, Parliament was expected to make any other provisions necessary for ensuring the promotion of the principles of leadership and integrity mentioned in Chapter Six, and its enforcement.[408] This legislation prescribes penalties, in addition to the penalties referred to in Article 75 of the Constitution, which may be imposed for the contravention of the provisions of this Chapter. Article 80 of the Constitution gives Parliament the power to make legislation to bring this Chapter into effect with

any necessary modifications for its application to public officers.[409] The latitude of discretionary power given to Parliament proved too wide however because it presented Parliament with room for mischief. This it did when it watered down the Leadership and Integrity Act, which was the final product of the otherwise very important constitutional provisions in Chapter Six.[410]

The Leadership and Integrity Act as was originally drafted in Bill form and was supposed to remove the ambiguity on the constitutional test for integrity and eligibility for public office.[411] The draft Bill was meant to introduce a new mechanism or forum through which those seeking public offices are vetted for integrity, with provision for the views of the public to be taken and considered, and the candidate being interviewed issued with certificates of clearance to run.[412] Since the Constitution was promulgated and Chapter Six came into operation, uncertainty had arisen over how to implement Chapter Six practically. Thus the new Leadership and Integrity Bill sought to address this uncertainty.[413]

More specifically, the Leadership and Integrity Bill sought to define explicitly what several clauses of Chapter Six mean, and what is expected of those holding or aspiring to hold public office.[414] It was supposed to give teeth to Chapter Six of the Constitution as well as according the Ethics and Anti-Corruption Commission the power to declare a state officer who refuses to co-operate with it unfit to hold public office.[415] The Bill gave the power to determine who has contravened the relevant codes of conduct to the Ethics and Anti-Corruption Commission coupled with the power to bar people from standing for or to be elected or appointed to public office.[416] It also outlined tough measures to enforce integrity including forcing state officers to declare and close foreign accounts,[417] in addition to barring them from engaging in politics or part time jobs

while in public service.[418] The Bill further sought to put in place mechanisms to identify what is good leadership. Certainly, those barred by professional organisations would not be eligible to vie for elective posts or seek appointments.[419]

The Bill also sought to make it a mandatory requirement that before any state officer assumes public office; they had to undergo a mandatory training on leadership and integrity for six months.[420] This was meant to be a training program on inter alia; the Constitution of Kenya; history of Kenya; principles of democracy; devolution; principles of servant leadership; leadership, ethics and integrity; national values and principles of governance; public service principles, values and roles; national diversity, cohesion and integration; good governance and anti-corruption; human rights; national policies and goals; economic growth, planning, and development; financial and human resource management, and any other subject relevant to the above.[421] To avoid duplication of laws, this Bill sought to amend the POEA so as to exclude all State officers under Article 260 of the Constitution and the designated State officers under the Bill from the application of the Act (Public Officers Ethics Act).[422] If this law, with all these important provisions, had come into being, it would have been a very strong tool in promoting good governance and consequently a big step in the fight against graft in this country. It could have speeded up the war on graft and enforced transparency among public officials.

Unfortunately, the final product of this Bill did not contain all these important provisions especially some of the very vital ones. For example the requirement that persons who breach this Chapter be subject to disciplinary procedures, specifically that where such persons are dismissed from office; they are barred from holding state offices again.[423]

It would have been expected that this provision would be amended to specifically provide that those who had been accused of breaching the codes of conduct established under this Act should not be eligible to run for any public office. This is because only persons who had been convicted of a felony or adversely mentioned in a commission of enquiry report adopted by Parliament would not have been eligible for assuming any state office.[424] This would have resolved once and for all, the long standing debates on whether the MPs and other state officers who are still facing corruption related charges, and those facing trials at The Hague can still run for political office or occupy a state office.[425] It is worth noting that Articles 99(1)(b), 103(1)(c), 193(1)(b) and 194(1)(c) of the Constitution anticipated that the legislation under Article 80 would provide for the circumstances under which both elected and appointed state and public officers would assume and/or vacate office in accordance with this Chapter. Unfortunately, the Act enacted under Article 80 (The Leadership and Integrity Act) does not address all these issues as envisaged by the Constitution.

Besides the two main laws on corruption reviewed above, Chapter 13 of the Constitution also emphasises the values and principles of Public Service. These include:

> "high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making, accountability for administrative acts; and transparency and provisions to the public of timely, accurate information." [426]

It is hoped that by cementing these 'high standards of professional ethics'[427] in the Constitution will make them fundamental pillars to public officers in the performance

of their jobs and help eradicate corruption or unethical behaviour in government before it even begins.[428]

In addition, the government now has a constitutionally mandated requirement to be more transparent. This imperative of transparency in the execution of the government's mandate is bolstered by Article 35(1), on access to information with the requirement that it publishes certain information affecting the nation.[429] Many have since called for the publication of the reports of commissions of enquiry that have been held in the past and their findings withheld. Those pertaining to corruption include the Cockar Report regarding the inquiry into the sale of the Grand Regency Hotel and the report by the Ndung'u Commission on the illegal and irregular allocation of public land.

In concluding this Chapter, one can boldly state that the Legislature failed to assert itself in establishing high levels of morals and integrity that could have played a role in fighting corruption in Kenya. Even though the importance of Chapter Six in energising the fight against corruption in Kenya is inarguable, it is important that it be understood within the context of Kenya's history as far as fighting corruption is concerned. It must be understood that the enactment of the new Constitution is not in itself a panacea to several challenges plaguing the public service. The conduct of the Legislature with regard to the Leadership and Integrity law reminded us that it was too early to celebrate the decision in the Matemu Case which is discussed in the following Chapter. On current trends where the Legislature's appreciation of the importance of having a moral and ethical society is still suspect, it is difficult to tell what the future holds. It would seem that almost every move made to combat corruption in Kenya has suffered a setback because either the Judiciary was unsympathetic to the broader anti-corruption agenda or

Parliament or the Executive always found ways to cover-up corrupt behaviour. Clearly, the conduct of the Legislature and particularly its watering down of the integrity laws indicated its reluctance to fully commit to the fight against corruption in Kenya. Indeed this was demonstrated throughout the history of the Legislature dating back to the Kenyatta Government all the way to the Coalition Government.

JUDICIAL ACTION AGAINST CORRUPTION

The Judiciary occupies a unique position in the governance of a state. It is neither involved in making laws or policies nor enforcing them, but is mandated to interpret the law to determine whether an offence has been committed and levy an appropriate punishment. In so doing, it may have recourse to policies that have been created by the Executive. In other words, it only interprets and enforces that which the Legislature passes whilst the decisions of the Executive are subject to judicial review. Through the decisions it makes, the Judiciary obviously contributes to and influences the law making and policy making processes by the Legislature and Executive. In fact, in most cases, the successes of a particular legislation are measured by how well the Judiciary interprets it to give effect to Parliament's intention. Therefore, courts' decisions have a huge bearing on the fight against certain vices in the society such as corruption. Where courts take cases of corruption lightly, this affords the vice room to thrive and the reverse is true.

This section discusses some of the decisions that courts have delivered in corruption cases and their implications for the fight against corruption.

The Judiciary during the tenure of the NARC government (2003 – 2007)

To better appreciate the role played by the Judiciary at the time, it is essential to outline the internal state of the Judiciary during that period. Corruption under the KANU regime, was rampant. It did not escape the Judiciary which was in fact exposed through the renowned 'Radical Surgery' of 2003.[430] Although the successes or failures of this process are arguable and contentious, it was a reminder that corruption could not be tolerated within the Judiciary internally.

An evaluation of the Bosire Commission on the Goldenberg scandal is necessary to examine how the judicial officers in the Commission handled the inquiry and the recommendations they made.

a) The Bosire Commission of Inquiry into the Goldenberg Affair (2003)

This was the first major test of the Judiciary in the fight against corruption during the Kibaki administration. While the establishment of the Commission is thought to have been a political manoeuvre, it is analysed in this Chapter as part of the Judiciary's input in fighting corruption because it was chaired by Justice Samuel Bosire, a Judge of the Court of Appeal. The other members were a Judge of the High Court, Justice Daniel K. Aganyanya and a Senior Counsel, Peter Le Pelley. It is also important to state that this correlation is made on the assumption that Justice Bosire and his team were sitting in the Commission with a 'judicial mind' as opposed to political, even though the rules of engagement during the enquiry were clearly based on judicial principles.

The Commission was established to investigate a major incident of financial fraud involving Goldenberg International Limited and the Central Bank of Kenya

in which the Central Bank and the banking sector had made significant financial losses. Indeed the Inquiry established the extent of the loss suffered and apportioned responsibility. The Commission presented its report to the President in February 2006.

A notable contribution by this Commission in the fight against corruption was the naming and recommendation of certain persons for further investigations and prosecution. This was a huge positive step in fighting grand corruption in Kenya. However, any hopes that had been raised from the recommendations of the Commission were later dashed in July 2006. This is because the High Court terminated the prosecution of the culprits of the Goldenberg scandal in the Saitoti case which will be discussed subsequently.[431] Once again, the fight against corruption had suffered a big blow at a time when the public's confidence in the political will of the NARC Government to fight corruption was appreciating.

To establish the trend, if any, of the Judiciary with respect to corruption cases, two other key cases are briefly reviewed here below with the aim of analysing the decisions made therein for their impact on the fight against corruption. In other words, to determine whether the termination of the Saitoti Case emanating from the Bosire Commission of Inquiry into the Goldenberg affair was a one off, or a sign of things to come.

b) Two crippling decisions by the judiciary in cases of corruption during this period tied to the Anglo Leasing Scandal

During this period, and against public expectation, the Judiciary continued to render anti-corruption authorities powerless in the fight against corruption. For instance, in

the case of Nedemar Technologies BV Ltd V The Kenya Anti-Corruption Commission & Another,[432] KACC was prohibited from investigating Nedemar Technologies BV, one of the companies that received an 'Anglo Leasing' contract on the basis that KACC was not in existence at the time the Attorney General entered into the contract.[433]This decision was made despite the fact that KACC, as an anti-corruption authority, had the power to investigate cases of corruption regardless of whether it was in existence as an Authority at the time, or even when the corrupt act was committed or became known.

In yet another case, KACC's investigations into Globetel Incorporated and First Mercantile Securities Corporation were hindered. The court in that case ruled that KACC could not use any information received from the mutual legal assistance of a foreign jurisdiction.[434] This is a decision that was made either in disregard or ignorance of the global concern in fighting corruption and the legality of mutual legal assistance mechanisms in criminal justice systems all over the world. Once again, the court had failed to prioritise the need to fight corruption by blocking the use of relevant evidence.[435]

The mere fact that the court blocked KACC from investigating and using certain evidence which had been acquired legally to prosecute corruption cases, demonstrated the Judiciary's reluctance in prosecuting high profile cases. This reluctance was laid bare in 2006 in the Saitoti case, which effectively killed hopes of any successful prosecution of the Goldenberg scandal cases.

c) The Saitoti Case; another step backward?

This was a landmark case that demonstrated the unwillingness of courts in fighting corruption during this

period. In the case of Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others exparte George Saitoti,[436] the High Court set a bad precedent regarding whether government ministers could use Parliament to protect themselves from criminal prosecution for crimes committed whilst in office. The thrust of this decision was to prohibit prosecution based on the resolution that had been made by Parliament in 1995. The Public Accounts Committee report of 1995 had stated that, "After evaluating all the evidence available to the committee, it was noted that the Government followed normal procedures of approval in granting the request by Goldenberg International Limited."

Based on the above report, the Court found that:

1. Since Parliament had considered this matter, the courts could not reconsider it without breaching the doctrine of separation of powers.

2. To subject Professor Saitoti to another trial, after he had been grilled by Parliament, would amount to double jeopardy.

3. Since Parliament had sanctioned Professor Saitoti's decision, he now enjoyed immunity for his actions under the National Assembly (Powers and Privileges) Act.

All these findings were erroneous in law.[437] The court concluded that the Bosire Commission's findings against Saitoti were unconstitutional, oppressive and in violation of the principle of double jeopardy.[438] Not only did this decision end any hope of successful prosecution of the Goldenberg culprits, but it also created an obstacle to any significant fight against grand corruption in Kenya. The Court in this matter failed to appreciate the public interest in fighting grand corruption and instead confined itself to

procedural issues thus allowing a person who had been implicated in the Goldenberg scandal go scot free. Indeed, by quashing the Report of the inquiry, the Court had taken the fight against corruption several steps backwards.

From the foregoing, it is clear that the internal judicial reforms under the 'Radical Surgery' process of 2003 did little to make the Judiciary a pillar in the fight against corruption. As an institution that is mandated to adjudicate disputes, the Judiciary has a duty to develop jurisprudence that is intolerant to corruption. However, from the cases looked at during this period, the courts failed to make decisions that could deter corruption. The approach of the courts during this period, which focused on procedural issues, saw many corruption cases collapse. Perhaps this explains why in 2006, only fourteen convictions had been given all over the country. This low number of convictions in corruption cases was an indicator that the fight against corruption in Kenya was not as effective, a fact that is vindicated by the Transparency International's Corruption Perception Index (CPI) of 2007 where Kenya was ranked 150 out of 180 countries.

Indeed the low ranking of Kenya at the end of this period raises significant doubt on the effectiveness of the 'Radical Surgery' process of 2003 and the NARC Government's overall commitment to fighting corruption. The two Anglo Leasing cases and the Saitoti case discussed above form a plausible basis for casting doubt. As this period came to an end in 2007, the NARC Government's first term had realised insignificant gains in reforms and the fight against corruption.

The Judiciary after the promulgation of the Constitution in 2010

Although the Coalition Government was formed in 2008,

the inquiry in this section is limited to the period following the promulgation of the Constitution of Kenya in 2010 because there was no significant shift in judicial trends in the handling of corruption cases from 2008 to 2010. The Coalition Government was formed as a result of a dispute to the results of the December 2007 general elections. It was a compromise bringing together the disputants of this election namely Raila Odinga of the Orange Democratic Movement, who was challenging the declaration of Mwai Kibaki of the Party of National Unity as president during these elections.

In this section therefore, some of the quick scores of the Constitution of Kenya, 2010 with respect to empowering the fight against corruption will be noted. The decisions in select cases are discussed to discern whether courts had appreciated the changes within the Constitution of Kenya, 2010. Undoubtedly, the Judiciary was one of the major beneficiaries of the reforms introduced under the Constitution. These reforms saw the establishment of a Supreme Court, public vetting of judicial officers and the appointment of more judicial officers. These reforms were not only aimed at enhancing the administrative governance of the Judiciary, but also its independence. With a Judiciary that had not enjoyed the confidence of the public for a long time because of corruption and a backlog of cases, the expectations of Kenyans were high following the constitutional reforms.

a) Lessons from the Tobiko and Matemu cases concerning integrity and corruption

The Kenya Youth Parliament & 2 others v. Attorney General & Another[439] or the Tobiko Case, as it is better known, was the first major ruling that brought to test the constitutional provisions on leadership and integrity.[440] Briefly, the case

against Tobiko was that he did not have the qualifications of integrity and morality for the post of the Director of Public Prosecutions as specified in the Constitution. Several accusations were set out in detail by the petitioners to the appointing authorities with considerable evidence produced against him on the allegations of corruption, deceit, intimidation, and unprofessional conduct.[441]

The High Court ignored the petitioners' main case against Tobiko, i.e. that of eligibility, and instead began to examine the process of his appointment. The Judges maintained that all the steps had been followed correctly; therefore the appointment was valid. In order to prove that the procedure was correct, the Judges decided to place the responsibility to prove that it was not correct on the petitioners. The Judges then ruled that all the allegations had been thoroughly investigated by the Nominating Panel, Principals and Parliament![442]

From the foregoing, it can be bravely asserted that the Court failed to interpret the Articles on integrity saying that they were self-evident and required no deduction yet the entire case depended on their interpretation. The Court then said that the petitioners failed to show which Articles of the Constitution were allegedly violated. The Court in this case avoided the substantive issues and concerned itself with the technical defects in the petitioners' request for remedies. The Court found that the failure of the petitioners to ask explicitly for the removal of the DPP was not a procedural technicality which the Court could ignore. This finding was made despite the Constitution providing that procedural technicalities should not be used to defeat justice.[443] The ruling in the Tobiko Case failed to capture the letter and the spirit of the Constitution in the fight against corruption in Kenya. The Court gave a narrow construction to the provisions of the Constitution. This was clearly a discouraging first step in the early days

of the new constitutional dispensation.

As if the above case had not done enough to erode the confidence of Kenyans in the Judiciary's ability to fight corruption, having been buoyed by the enabling provisions of the new Constitution, then along came the case of Trusted Society of Human Rights Alliance v Attorney General & 2 Others[444] (Matemu Case). This case captures the second major ruling on the provisions of leadership and integrity under the Constitution.[445] The gist of the petitioner's case was that Mr Matemu did not meet the constitutional threshold required for appointment to the office of the Chairperson of the now constitutionally entrenched Ethics and Anti-Corruption Commission. It was argued that Parliament and the Executive abdicated their constitutional duty in ensuring the selection of a candidate who met the constitutional threshold. This was because of the information that had come to light during the vetting process regarding Mr Matemu's alleged actions when he had held several senior positions at the Agricultural Finance Corporation (AFC). More specifically, Mr Matemu's integrity was brought into question with the allegation that he swore an affidavit with false information on the amount of money that a company known as Rift Valley Agricultural Contractors Limited (RVAC) owed AFC. In addition, that as the Legal Officer at AFC, he approved certain loans which had not been properly secured, and whose proceeds were paid out in fraudulent and unclear circumstances.

The High Court faulted all the organs involved in the appointment of Mr Mumo Matemu as the director of the Ethics and Anti-Corruption Commission for failing to pay due attention to the information that was available which touched on his integrity or suitability. In nullifying the appointment, which seemed a radical step from the inertia witnessed from the courts in dealing with such cases

before, the High Court stated that although the evidence available was yet to be tested in judicial proceedings, the allegations were substantial enough and it was not possible to make a determination without the aid of an inquiry to resolve the question of whether Mr Matemu had passed the integrity test.

In the Matemu Case, the Court discussed at length the objectives of the Constitution in emphasising integrity and how it responds to the concerns about pervasive corruption in Kenya. The Court also considered the rules of interpretation, which emphasised the promotion of national values.[446] By doing this, the Court established the constitutional and political context of the case and had to consider whether a person could be appointed to the post if he or she did not satisfy the integrity and other constitutional provisions. The decision in the Matemu Case went ahead to expound the ingredients of the procedure for appointments. In particular, a clear distinction was made between the formal procedural steps and the eligibility for the post. On this issue, the Court was unequivocal that if the requirement of eligibility was not satisfied, the appointment was invalid. This was an assertion by the Court of its power and duty to determine whether a particular applicant is constitutionally qualified to fill the vacant office.

The Matemu Case further gave a detailed interpretation of the integrity provisions. The Court engaged in an extremely helpful discussion, laying the foundations of an approach towards adjudging integrity, including not only that of the appointee but also the integrity of the institution to which the appointment is made. On this, the Court discussed at length the allegations made against Mr Matemu and showed how they would affect the responsibilities of the anti-corruption body if its director was indeed guilty as alleged. The Court in the end decided that the appointment was

not valid as none of the authorities had made any serious investigations into the allegations. This decision had laid a formidable ground for discussing issues around leadership and integrity and one would have thought that it provided a perfect platform for fighting corruption based on moral and ethical issues.

However, the celebrations with respect to the progressive decision in the Matemu Case were cut short by the High Court's decision in the Uhuru and Ruto case questioning their eligibility to vie for presidency.[447] While the petition was filed to challenge the integrity of the two based on the charges of crimes against humanity facing them at the International Criminal Court (ICC), the High Court rushed to rule that it had no jurisdiction to deal with disputes regarding the nomination and election of presidential candidates.[448] However, this Court had jurisdiction to interpret the provisions relating to integrity. The basis of this petition was the eligibility of the two and not on the actual election of a president. [449] Justice Msagha Mbogholi said that the ICC cases against the two could not be a reason to stop them from vying in elections since no local or international trial had convicted them to imprisonment for more than six months.[450]

This decision was a controversial departure from that in the Matemu Case where in nullifying the appointment, the Court had stated that although the evidence available against Mr Matemu was yet to be tested in judicial proceedings, the allegations were substantial enough to make it impossible to make a determination without the aid of an inquiry to resolve whether Mr Matemu had passed the integrity test. As such, the decision in the Uhuru and Ruto Case evidently lowered the integrity test in Kenya.

b) The famous 'Small Fish' versus 'Big Fish' argument in corruption cases

The fight against corruption in Kenya has always been characterised by the concentrated discussion of the 'small fish' bearing the brunt of corruption related arrests and prosecution unlike the 'big fish' in utter disregard of the rule of law. It has been easy and convenient to target the perpetrators of 'small' corruption, most of whom are police officers and junior civil servants who are quickly arrested, prosecuted, convicted, fined and jailed. However, the 'big fish', the powerful civil servants and politicians go scot free. If anything, they are at most arrested and granted bail but never to return to court. As such, the fight against senior corrupt officials still remains difficult in this country. This can be seen from various annual reports by the anti-corruption authorities over the years.[451] Besides, a look at all the major scandals that have bedecked the various government administrations in Kenya reveals that, in none of them has a minister in office been charged, prosecuted and convicted.

Clearly, any campaign against corruption must be credible and credibility can only be achieved if corruption is punished indiscriminately. While the few minor prosecutions roping in 'small fish' are key and definitely justified, the frying of the 'big fish' must be undertaken in similar vein because it is perhaps even more important in dismantling the culture of corruption. In fact, where the corrupt 'big fish' are publicly named, shamed and punished, it is hoped that the message will reverberate at all levels horizontally and vertically. This practice has recently been adopted in Kenya in the recent past.

The prospects of the new Constitution in the fight against corruption with respect to the 'big fish' were seen shortly after its promulgation when the Government begun prosecuting high-level corruption cases more actively. In 2010, the then Higher Education Minister William Ruto was charged with fraud in the amount of KES.

96 Million.[452] He had allegedly received the money in exchange for transferring parcels of land belonging to the Ministry of Natural Resources irregularly to the Kenya Pipeline Company.[453] While this case did not end up in a conviction, it was a positive step in prosecuting high profile government officials.

In yet another incident in 2010, the then Foreign Affairs Minister Moses Wetang'ula and his Permanent Secretary, Thuita Mwangi, were questioned before Parliament for their role in procuring properties for Kenya's Missions in multiple countries abroad. These ventures resulted in the loss of millions of shillings. Interestingly, these purchases were made without the proper input of other departments which would have been able to make a proper evaluation of the value of the property.[454] Whilst the Parliamentary Committee exonerated the Minister, Mr Mwangi was subsequently arrested.[455] At the time of this publication, the trial was still ongoing. It is worth noting that arresting a senior government official for corruption sends a strong message of the government's commitment to fighting corruption and its respect for the rule of law. However, depending on how this case is dealt with, it may restore the faith of Kenyans in the potential successes that can be harvested through the courts in the fight against corruption. In the alternative, it may engender the stereotype of 'small fish' being the prime targets in the fight against corruption.

The Nabutola Case

The most notable conviction of what could be called the 'big fish' is the case of Republic V Rebecca Nabutola & Others.[456]In this case, the three accused persons were convicted of various offences jointly and severally ranging from conspiracy to defraud (contrary to Section 317) of the Penal code, and a variety of offences under the Anti-

Corruption and Economic Crimes Act, including abuse of office contrary to Section 46 (as read with Section 48), wilful failure to comply with the law relating to procurement contrary to Section 45 (2) (b) (as read with Section 48), fraudulently making payments from public revenue for services not rendered contrary to Sections 45 (2) (a) (iii) (as read with Section 48), conflict of interest contrary to Sections 42 (3) (as read with 48 and fraudulent acquisition of public property contrary to section 45 (1) (a) (as read with Section 48 (1) and (2)) of the Act. Although the prosecution of this case began before the Constitution of Kenya 2010 came into effect, the decision was made under the reign of the new Constitution. The Nabutola Case reinforced the idea that under the new constitutional regime, the 'Big Fish' would also be prosecuted. However, as is already evident from the many false starts and backpedalling in the fight against corruption, both by the Legislature and Judiciary, one can only be guardedly optimistic.

In concluding this Chapter, it would be ambitious to state that there have been any real successes in the fight against corruption through the Judiciary so far. There has undoubtedly been inconsistency in the decisions by the courts, just like has been apparent with the laws made by the Legislature.

CONCLUSIONS AND RECOMMENDATIONS

This chapter has extensively discussed the role that has been played in the fight against corruption by the two arms of Government in Kenya; that is the Legislature and Judiciary. In so doing, there has been a lengthy exposition of the methods and interventions that have been employed by the two arms of Government to fight corruption. The

chapter has reviewed the legislative role of Parliament and its contribution to the fight against corruption through the enactment of various pieces of legislation. This has been achieved by critically analysing all the anti-corruption laws enacted since Independence. The oversight role of the Legislature has been explored too with a view of investigating how it has been employed as an anti-corruption device. This has been achieved by looking at the Parliamentary Committees as veto organs within the House, and in their role as investigative units in corruption scandals that have occurred.

This chapter has also reviewed judicial institutions such as courts and commissions of inquiry that have been used in the fight against corruption. Court decisions on corruption matters have been analysed and critiqued. An elucidation of how those decisions have either aided or obstructed the fight against corruption has also been given.

While auditing the performance of the Judiciary over the last decade, this chapter examined the various ways in which the courts have contributed to the fight against corruption. As is expected, courts have made their contribution through decisions in various cases, some of which served to advance the vice rather than deter it. The Gachiengo case comes first on the list. In this case, the court failed to take into consideration the public interest in fighting corruption by disbanding KACA. Similarly, the Saitoti case showed how courts have served as the stumbling blocks in the fight against corruption, through spurious interpretations of the law. However, it is noted that whilst there appeared to have been a 'change of wind' in some isolated cases like the Matemu and Nabutola cases, the Tobiko and Uhuru and Ruto integrity cases proved otherwise. The demonstrated commitment of the courts in punishing corruption and establishing a moral and ethical society in the former cases was negated by the latter cases. This sums up the

inconsistencies that witnessed from the Judiciary in the fight against corruption. It is therefore argued that this corpus of information provides fertile ground for making sensible conclusions and recommendations.

Whilst the effect of corruption in the state and on its citizens has been well appreciated, five key conclusions have emerged based on the studies that have been undertaken.

Firstly, that the Legislature and Judiciary are key sites for fighting corruption in the state. In fact, their potential can't be ignored. This is evidenced by the fact that in the case of the Legislature, it is able to make rules and regulations to give guidance and direction with respect to conduct that is acceptable or otherwise with regard to corruption. As for the Judiciary, it has the lawful mandate to determine whether any behaviour is in breach and prescribe suitable sanctions that ought to punish offenders and deter would be offenders. In a nutshell, the two institutions have the capability to take lawful actions to proscribe and punish corruption.

Secondly, that for the institutions of the Legislature and Judiciary to be effective in fighting corruption, it is utterly important that they are internally free of corruption in order for them to be objective. As was witnessed, Parliamentarians and Judges made and unmade various anti-corruption laws and institutions, thus reducing the momentum in fighting corruption. In other words, the internal corruption of an institution is a definite limitation to the institution's capability to fight corruption on the outside.

Thirdly, the orientation of the Executive with respect to corruption is extremely important to the success or otherwise of the other two arms of Government. This was evident from the experience of the KANU Government

that was clearly reluctant to fight corruption thus neutering the capability of the Legislature and Judiciary to do so. Also, during the early days of the NARC Government when its resolute intention to fight corruption received such high profile, this translated into robust activity from the Legislature and Judiciary on the same. In addition, both the Legislature and Judiciary do not have the power to implement their resolutions and sentences and require the utmost co-operation of the Executive to do this. Indeed if the Executive carries out sloppy investigations or conducts lame prosecutions, the Judiciary may have no option but to rule against cases of corruption that come before it, or even find an avenue of avoiding to rule against the 'big fish'. Certainly, where the Legislature and Judiciary are not supported by a working implementation and administrative framework from the Executive, their role in fighting corruption is minimised.

The fourth conclusion drawn is that where the institutions of the Legislature and Judiciary fail to establish the fight against corruption as an enterprise roping in the 'big and small fish', the seriousness and urgency to fight corruption is diminished. Where the so called 'big fish' roam the streets without a care in the world despite accusations of serious high level corruption, there is certainly no incentive for Kenyans who are indigent to bother to be corruption-free. It goes without saying therefore, that for the fight against corruption to gain momentum, equal treatment of the 'big and small fish' alike at the altar of justice must apply.
Lastly, that during the elections season in Kenya, the issue of corruption receives an unusually high profile given that it constitutes a significant campaign agenda. However, as has been realised, the seriousness of fighting corruption is confined only within the elections and immediate post-elections period. Paradoxically, citizens repeatedly elect legislators whose record is tainted with corruption and who then act as stumbling blocks in combating corruption,

whether in the Legislature or Judiciary. With the threshold of integrity for presidential candidates having been lowered by the decision in the Uhuru and Ruto case, one can only surmise what the future portends. Improving the ability of the Legislature and Judiciary to effectively fight corruption requires the concomitant strengthening of vetting institutions and processes. It also requires an enlightened public that is alive to the true cost of corruption brought about by decision-makers of low or no integrity.

The following recommendations are made with a view to strengthening the institutions of the Legislature and Judiciary to fight corruption in Kenya.

The Legislature

1. The Legislature and Judiciary should be evaluated for any incidents of internal corruption that should be dealt with administratively or through the judicial process.

2. The Ethics and Anti-Corruption Commission Act should be amended to give express prosecutorial powers to EACC. This will remove the requirement for permission to be sought from the DPP in order to prosecute cases of corruption. Permission by its very definition implies discretion which could set back the fight against corruption if exercised in favour of maintaining the status quo

3. The Leadership and Integrity Act, 2013 should be repealed and in its place, a law that reflects the true spirit of Chapter Six of the Constitution be enacted. This could involve the reinstatement of the Leadership and Integrity Bill, 2011. Such action should be aimed at enhancing the threshold of integrity for elective office

for the individuals concerned and the offices aspired for.

4. Parliamentary committees dealing with any issue on corruption should be open to the public. A mechanism should be devised to provide for civil society organisations to monitor the deliberations. This way, corruption by committee members who are often alleged to have been compromised by the subjects under investigation can be reduced. In addition, any committee established to investigate corruption by Parliament should not consist of any member who has been implicated in corruption in the past, or has been charged and/ or been convicted of any criminal offence. Members of a committee should be selected based on moral integrity rather than party affiliation.

The Judiciary

1. The Judges and Magistrates' Vetting Board, which has been carrying out vetting of Judges and Magistrates in line with the requirements of the Constitution 2010 should be supported by the legal fraternity, politicians, and the public at large to weed out corrupt judicial officers. Furthermore, the vetting of judicial officers should be a periodic exercise to ensure that they remain committed to the ideals of integrity and intolerant to corruption.
2. Judicial officers should undergo continuous special training in handling corruption cases to develop consistent jurisprudence that can aid in the fight against corruption.

3. Special rules for prosecuting corruption cases should be designed to minimise adjournments and other unnecessary delays to corruption cases to ensure their

timely disposal. This may also cure the problem that has been witnessed in longstanding cases where the accused persons and witnesses die before the case is completed, considering the inordinate amount of time it takes to prosecute these cases.

4. Anti-corruption courts should be set up at every court station to give this issue the due attention it requires.

Anti-corruption initiatives in Eastern Africa: Re-energising the war against graft in the region

Dr. Arbogast K. Akidiva

INTERNATIONAL AND REGIONAL POLICY, LEGAL AND INSTITUTIONAL INITIATIVES

Efforts to prevent and combat corruption and unethical conduct have given rise to a proliferation of anti-corruption, anti-fraud and integrity initiatives at the global, regional and national levels in the last two decades. The initiatives consist of policy, legal and institutional frameworks put in place to address bad governance, corruption, fraud and unethical conduct by public, private, and civil sector

practitioners. Latitia Lawson (2009) in a comparative analysis of the Nigerian and Kenyan anti-corruption agencies (ACAs) identifies (i) awareness on incidence and impact of corruption, (ii) formation of the legal and institutional frameworks and (iii) focused implementation of the anti-corruption agenda as three characteristics of the development of ACAs. The author concludes that in a neo-patrimonial context, instrumentalisation of and leadership style of the ACA, among other factors; contribute to the success or failure of the ACA. Notable initiatives include:

United Nations Convention Against Corruption

The United Nations Office on Drugs and Crime (UNODC) is the specialised UN agency established to implement the United Nations Convention Against Corruption (UNCAC), a comprehensive Convention adopted in 2003 and that came into force in 2005. The UNCAC, which is the first global instrument on corruption, provides for general provisions; corruption prevention; criminalisation and law enforcement; international cooperation; asset recovery; and implementation mechanisms. The Convention is monitored through a voluntary review mechanism. UNODC has developed many resources, such as, the UNCAC Toolkit, United Nations Anti-Corruption Guide on Anti-Corruption Policies, United Nations Anti-Corruption Handbook for Investigators and Prosecutors to implement the Convention. The East African Association of Anti-Corruption Authorities member countries have signed and ratified the UNCAC. Kenya was not only the first country to sign and ratify the UNCAC but also among the first to conduct the UNCAC GAP Analysis in 2009. Kenya embarked on the second UNCAC GAP Analysis in 2013. The East African countries participate in the implementation of the Convention through a number of programmes and activities which include attendance of the

UNCAC States Parties Conferences and the International Association of Anti-Corruption Authorities to evaluate the implementation of the UNCAC.

African Union Commission Initiatives

African countries, in the last decade have undertaken comprehensive policy, legal and institutional anti-corruption programming by ratifying and domesticating both the United Nations Convention against Corruption (UNCAC: 2003) and the African Union Convention on Preventing and Combating Corruption (AUCPCC: 2003) and other international and regional legal instruments. The African Union Convention on Preventing and Combating (AUCPCC) was adopted in 2003 and came into force in 2006. Its scope is just as comprehensive as the UNCAC and it provides for corruption prevention, criminalisation, asset recovery, and regional collaboration. The AUCPCC requires member states to establish independent national anti-corruption agencies. The Continent's efforts to advance its governance and developmental agenda, over time, have led to the creation of policy positions and institutional arrangements that are coordinated through the African Union Commission.

Notable among these initiatives are: the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM): Pan-African Meeting of National Anti-Corruption Bodies; African Union Anti-Corruption Advisory Board; the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption; the Southern African Development Community (SADC) Protocol against Corruption (2005) which provide for both preventive, enforcement and anti-money laundering strategies; the draft East African Community Protocol against Corruption; Economic

Community of West African States (ECOWAS) Protocol Against Corruption; East African Community (EAC) draft Protocol on Preventing and Combating Corruption and the African Development Bank Anti-Corruption Programming. These initiatives arise from continental efforts in implementing the UNCAC and AUCPCC.

It should be noted that some countries on the continent are enacting and amending relevant anti-corruption legislation in line with the UNCAC and AUCPCC provisions and putting in place complementary policies, standards, regulations and sanctions in addition to establishing corresponding institutional frameworks consisting of enforcement and watchdog institutions.

The African Union Commission's governance agenda is spear headed through NEPAD and the African Peer Review Mechanism (APRM, 2003) which were formulated to mainstream democratic principles; good governance; regional integration and enhance sustainable development on the African Continent. These arrangements have developed principles, standards, mechanisms and tools for use by State parties on a voluntary basis. The APRM evaluates four focal points namely: (i) Democracy and Good Political Governance, (ii) Economic Governance and Management, (iii) Corporate Governance, and (iv) Socio-Economic Development. By 2011, 30 countries had joined the APRM with only 14 countries having been peer reviewed. It is apparent from these statistics that African countries are not serious in implementing their commitments. The African Continent should be responsible and courageous enough to account to its people. NEPAD and the APRM have come of age and there is need for a comprehensive critique of the performance of these mechanisms within the East African Community countries in the past ten years.

Implementing anti-corruption and integrity frameworks within the East African Association of the Anti-Corruption Authorities (EAAACA)

Although all the East African Countries have put in place legal, institutional, administrative and policy frameworks to tame corruption, corruption continues to thrive. It is, therefore, clear that the existence of many pieces of anti-corruption legislation and institutions does not guarantee good governance in a society where impunity is the norm. While the anti-corruption agencies are declared by the statutes to be independent and not subject to the direction or control of any authority or person, this does not happen in reality. The main reason for this state of affairs is poor leadership and citizen apathy.

The introduction of Commissions and Independent Offices is a constitutional safeguard for these oversight institutions from undue interference by the traditional three arms of Government. A notable feature of these efforts has been what could be described as a confluence of mandates which could be seen as an expression of the anxiety these countries have in dealing with perennial bad governance, fraud and corruption challenges.

The East African Community countries have adopted Hong Kong's Independent Commission Against Corruption's three-pronged anti-corruption model of law enforcement, prevention and public education. Critical evaluation of the anti-corruption agencies in the East African region indicates that law enforcement efforts have not borne meaningful results since the establishment of these institutions due to a number of reasons among them lack of prosecutorial powers. In most instances, these powers are vested in the Ministry of Justice, Attorney General or Director of

Public Prosecutions. This limitation is worsened by the existence of corrupt and inefficient judicial systems that are subservient to both the Executive and Legislature. The war against corruption in the EAC also suffers adverse judicial decisions. Lack of political will at most leadership levels within the Public Service characterised by gross impunity with regard to the rule of law compounds this debilitating situation.

The EAC member countries' efforts to combat both national and transnational corruption are further hampered by lack of cooperation and outright frustration by international legal and jurisprudential conditionalities. In the case of Kenya, the challenge had manifested itself through weak anti-corruption legal regime and the recent laws such as the Proceeds of Crime and Anti-Money Laundering Act and Mutual Legal Assistance Act have not yielded any meaningful results. Cases in point include the Goldenberg and Anglo Leasing cases which remain in limbo decades later. To compound matters further, developed countries resist investigations into the recovery of stolen assets by citing incompatibility of jurisdictional regimes.

In addition, they demand that developing countries prove that indeed the outward cash flows have their origins in criminal activity. The recovery of illicit cash outflows is a very expensive undertaking these countries can hardly afford. It is instructive that recent judgments in the United States of America have begun to yield positive results from the secretive Swiss banking system yet efforts by African countries have gone unheeded.

The transnational nature of corruption necessitates cooperation within and outside states. The Anti-Corruption Agencies within the East African Community have formed an association to bolster the war against corruption. The

EAAACA was established in 2007 in Uganda bringing together the Special Brigade of Anti-Corruption of Burundi, Kenya Anti-Corruption Commission (Now Ethics and Anti-Corruption Commission), Office of the Ombudsman of Rwanda, Prevention and Combating Bureau of Tanzania and the Inspector General of Government of Uganda with full membership. Anti-Corruption agencies of Djibouti, Ethiopia and Southern Sudan have observer status. The EAAACA is a consultative forum through which member countries "share information, best practices, offer each other mutual legal and technical assistance among others, in preventing and combating corruption." The EAAACA has a Constitution and Manuals on Regulations, Corruption Prevention and Investigations. Respective member countries have ratified the UNCAC and AUCPCC and variously developed relevant policy, legal and institutional frameworks informing their anti-corruption agenda.

The EAAACA has held six annual general meetings where agencies present standard reports on their mandates, programmes, achievements, challenges and a call for enhanced cooperation among members. These reports capture in-country statistics in relation to the education, prevention, and enforcement mandates. It is instructive that none of the country reports gives causal/relational analyses of their operations. There is urgent need for correlational analyses to gauge whether there is significant return on investment on the Anti-Corruption Authorities (ACAs) in the region. The reports do not address pertinent issues and concerns relating to the political economies in the respective countries and in the region. Similarly, the submissions are very weak on cross-country collaborative efforts. A review of the performance reports by some of the ACAs reveals that they are largely formulaic narrative accounts devoid of comprehensive comparative casual analyses. Following are synopses on initiatives in some of these countries.

Ethics and Anti-Corruption Commission (EACC) - Kenya

The Ethics and Anti-Corruption Commission formerly the Kenya Anti-Corruption Commission (KACC) has four directorates: Investigation and Asset Tracing, Legal Services and Asset Recovery, Preventive Services, and Finance and Administration and five Regional Offices in discharging its mandate. The EACC has a staff complement of about 350. Additionally, Kenya has the following law enforcement and supply side accountability institutions: Office of the Director of Public Prosecutions, Efficiency Monitoring Unit, Parliamentary Oversight Committees, National Anti-Corruption Campaign Steering Committee, Public Procurement Oversight Authority, the National Police Service, Commission on Administrative Justice (Office of the Ombudsman) and the Office of the Attorney General and Department of Justice (Formerly Ministry of Justice, National Cohesion and Constitutional Affairs). In spite of this broad based institutional framework, corruption and unethical conduct has continued to persist over the years. The perennial problem is gross impunity in the management of public affairs and extremely feeble political will by both mainstream government and the institutions set up to ensure rule of law and good governance in Kenya.

Office of the Ombudsman of Rwanda

Rwanda's anti-corruption framework consists of the Supreme Court, Ministry of Justice, Ministry of Local Government and National Security Services, Ombudsman's Office, National Police and National Public Prosecution Authority which collectively form the National Anti-Corruption Advisory Council which guides the Office of the Ombudsman. The Ombudsman is mandated to spearhead the anti-corruption war. The Ombudsman was established in 2003 under Article 182 of the Constitution

of the Republic of Rwanda and operationalised through Organic Law of 2003 amended in 2005. Its mandate is to enforce good governance, investigate and prevent corruption and conduct public education on the ills of corruption in addition to enforcing the Leadership Code of Conduct. The Office of the Ombudsman has jurisdiction over the public and private sectors. Like the Kenyan case, the Ombudsman does not exercise prosecutorial powers. Over the years, Rwanda has enacted a number of laws to facilitate the war against injustice and corruption. Notable among them are Law No. 25/2003 establishing Office of the Ombudsman; Law No. 23/2003 on Corruption Prevention; Law No. 17/2008 on Money Laundering and Financial Terrorism; Law No. 61 on the Leadership Code of Conduct.

The Ombudsman has four units namely:

(i). Prevention Unit responsible for prevention of injustice, corruption and other offences
(ii). Declaration responsible for wealth declaration.
(iii). Finance and Administration and
(iv). Fighting Corruption.

The Rwandese anti-corruption framework combines the justice and anti-corruption functions and brings together a broad collection of institutions to guide the Office of the Ombudsman.

Special Anti-Corruption Brigade - Burundi

In her efforts to mainstream good governance, combat and prevent corruption, the Government of Burundi formulated a good governance and anti-corruption institutional framework consisting of the Ministry of Good Governance and Privatisation in the Presidency,

The General Inspectorate of the Government, the Attorney General and Anti-Corruption Courts and the Special Anti-Corruption Brigade established in 2007 but operationalised in 2007. The Brigade has two directorates (i) Legal Affairs and Administration, and (ii) Logistics and Financial Affairs and nine regional offices established in 2006. It had a staff complement of 39 officers drawn from law enforcement agencies and professionals. The Brigade's anti-corruption mandate covers investigation, prevention and public education functions. Between 2007 and 2011, the Brigade forwarded to the Attorney General 562 cases for prosecution. The Special Anti-Corruption Brigade is not adequately resourced in terms of financial streams and human capacity. There is urgent need to strengthen the legal framework and nurture a robust jurisprudence.

Inspectorate of Government in Uganda

Office of the Inspectorate of Government was established under Chapters 13 and 14, Articles 223 and 225 of the Constitution of Uganda of 1995 and has a broad mandate covering anti-corruption, ombudsman, and leadership code implementation functions. It became operational through the Anti-Corruption Act (2009), the Inspectorate of Government Act (2002), and Leadership Code Act (2002). The Inspectorate of Government consists of five directorates: Directorate of Operations, Directorate of Regional Offices and Follow-up (15 regional offices), Directorate of Leadership Code, Directorate of Legal Affairs, Directorate of Ombudsman Affairs, Directorate of Education and Prevention of Corruption. Finance and Administration is a department and a staff complement of 350.

In enforcing the Leadership Code, the Constitution of Uganda requires Public Officers to account for their

income, assets and liabilities every two years. The Inspectorate of Government has broad Special Powers under Article 234 which include prosecution, arrest and search, inspection and freezing of bank accounts, imposing injunctions on and confiscating leaders' property. The Inspectorate of Government has an elaborate Leadership Code implementation mechanism. In the 2008/2009 financial year, the Inspectorate of Government reported a 91% compliance rate with regard to the Leadership Code.

The Inspectorate has published many education manuals such as the *Participants' Handbook and Facilitator's Guide of the Inspectorate of Government Training Manual for the Sensitisation of the Public on the Leadership Code Act, 2002*. Since 1998, the Inspectorate of Government has conducted three National Integrity Surveys to monitor and evaluate progress in the war on corruption. The Inspectorate of Government of Uganda has witnessed success in the number of prosecuted cases in part due to having prosecutorial powers and a relatively responsive justice system. The Inspectorate of Government's success could be attributed to ably running its Data Tracking Mechanism (DTM) which collects data from the entire justice, law and order sector tracking corruption and unethical practices. The Data Tracking Mechanism has 71 indicators against which the performance of the anti-corruption institutions is measured. Kenya does not have a centralised tracking and monitoring centre rendering the activities of the anti-corruption and supreme audit agencies uncoordinated and lacking in a national focus.

Wealth Declaration Returns in the EAAACA Member Countries

East African countries are plagued by corruption arising

from illegally acquired and unexplained assets and illicit foreign outflows. The East African Community countries have passed legislation to counter these two economic crimes. The war against corruption demands a rigorous enforcement of the income, assets and liabilities regime. In Kenya, the Public Officer Ethics Act (POEA, 2003) and the Leadership and Integrity Act (2012) require all State and Public officers to declare their wealth. The Kenyan experience is that the wealth declaration returns under POEA have remained sealed since 2003 and never been subjected to analysis because of the high threshold for disclosure coupled with the high penalty for any 'illegal' disclosure and proliferation of bodies handling wealth declaration. The Leadership and Integrity Act is yet to be fully implemented due to lack of statutory regulations to give effect to the law.

Uganda, Rwanda and Burundi have Wealth Declaration regimes implemented under their Leadership Codes legislation which grants the respective implementing agencies authority to analyse wealth declaration returns by public officials and take appropriate action. Rwanda instituted the declaration of income, assets, and liabilities in 2004 when 2,770 officers made their declaration. In 2011, the figure rose to 6,742 officers who made their returns online. The Ombudsman verifies the returns. However, over the years, the work of the Ombudsman has been hampered by limited financial and human resources allocations and deployment. It has also encountered resistance with regard to the implementation of its recommendations and apathy from the general public in reporting incidents of corruption. In spite of these limitations, the Rwandese Office of the Ombudsman has had reasonable success in performing its mandate.

It is inconceivable that Kenya has the POEA which requires public officers to declare their wealth, assets and

liabilities, yet the country disables the implementation of the Act by insisting that the wealth declarations can only be opened through a court order. Another impediment is that the wealth declarations are deposited with multiple responsible commissions for institutions within the public service. This deliberate architectural arrangement makes it impossible for coherent and cohesive analyses of the returns since each responsible commission does not have clear guidelines or regulations on how to conduct such analyses. Kenya is best advised to follow the Ugandan and Rwandese examples in opening up the analysis of the wealth declaration returns by State and Public Officers.

CHALLENGES FACING THE WAR AGAINST CORRUPTION IN EASTERN AFRICA

Body politic and state capture

The EAAACA reports capture varied forms of political corruption in their respective jurisdictions. This form of corruption is perpetuated by the political and economic elite. Political parties to a large extent are funded through nefarious relationship between the political parties and the economic and professional elite in these countries. This state of affairs has, to a large extent, rendered the anti-corruption and watchdog institutions ineffective in discharging their mandates and asserting their independence.

Corruption investigation by the EAAACA member states needs to shift its focus to preventing and combating state capture. The Anti-Corruption agencies must vigorously interrogate the relationships between the political, economic and bureaucratic elites and the impact on the economy. There is an emerging trend of manipulating policy formulation and implementation in addition to enacting

legislation to benefit vested interests. A case in point is the persistent manipulation of the legal and institutional frameworks of the anti-corruption agencies by both the Executive and Legislature in the East African Community region for political ends. The East African ACAs suffer from frequent leadership changes and perennial under resourcing in terms of financial and human resources. The Kenya Anti-Corruption Authority (KACA) was established in 1997 and disbanded in 2000 through a ruling by the High Court that the KACA was unconstitutional. The 10th Parliament in Kenya terminated the tenure of the PLO Lumumba led Ethics and Anti-Corruption Commission in 2012 through an Act of Parliament.

East African Community countries are struggling with how best to counteract both local and international corruption.

Transnational Organised Crime

The global community has instituted initiatives to counteract mega private sector corruption. The UNCAC, AUCPCC, the FCPA and the OECD criminalise corrupt business practices and spell out the obligations of States Parties in fighting transnational criminal activities. Some of these initiatives include the UN Global Compact and the World Bank and Development Partners' undertakings in tackling corrupt business practices. As the world registers phenomenal growth in technological advancement, the crime of corruption has also grown in complexity. Corruption forms part and parcel of other organised and serious crimes consisting of smuggling, trading in counterfeits, tax evasion and avoidance, drugs and human trafficking. Within the era of "globalisation" and the "knowledge-based economy," organised crime cartels around the world plan and execute a wide range of illicit activities and complex criminal transactions. In

view of these hi-tech challenges and internationalised corrupt cartels, the East African Anti-Corruption Agencies encounter massive problems in tackling and enforcing laws against cross-border crimes because they do not have relevant trained personnel and ICT infrastructure to prevent and combat transnational cyber-crime. In addition, the justice chain institutions have very weak jurisprudential expertise.

Business integrity and illicit financial flows

In efforts to mitigate against the negative effects of transnational crime in business transactions, the EAAACA member countries participating in the United Nations Office on Drugs and Crime/World Bank programme entitled Stolen Assets Recovery (StAR Initiative), commissioned a study in 2012 conducted by Jack Titsworth for the StAR/ World Bank Institute. Kenya was used as the pilot case. The study reveals that Africa is a "net creditor" as shown by the following tables :

Estimates of illicit financial flows from East Africa over the last four decades in US Dollars (Kar & Cartwright 2010)

Country	Total illicit financial flows in US Dollars (Deductive Methods of Calculation)
Burundi	1.2 billion
Rwanda	1.9 billion
Kenya	5.6 billion
Uganda	6.2 billion
Tanzania	7.4 billion
Southern Sudan	No figures
TOTAL	22.2 billion **
**Enough to pay off Collective External Debts	

Within the Eastern African region, Tanzania, Uganda and

Kenya have recorded the highest Illicit Outflows of US$ 7.4, 6.2 and 5.6 billion respectively in the last 40 years.

Africa in General – A "Net Creditor"

	1970-96	1970-2004		1970-2008	
Capital Flight (Assets)	285.1	372.2	604.2	717.7	944.2
Debt Liabilities	178.6	233.1	192.8	216.1	176.9
Net Assets	106.5	139.1	447.4	501.6	767.7
Cumulative ODA		382.8		555.1	684.1
Capital Flight ODA		-10.6		162.6	260.1
# of Countries	25 LICs	33 SSA		33 SSA	

Cumulative Capital Flight exceeds Cumulative Debt and Cumulative ODA (Leonce Ndikumana – 2011)

The table above indicates an upward trend of capital flight (asset) from Africa for the period 1970-1996 from 285.1 to 372.2; 1970-2004 from 604.2 to 717.7 and 1970-2008 at 944.2. These figures are higher than the net inflows to the continent.

BANK FOR INTERNATIONAL SETTLEMENTS

Country DATA FOR EAAACA COUNTRIES, SEPTEMBER 2012

	Banking Sector			Non-Banking Sectors		Total
	Deposits	Loans	Total	Deposits		
Loans Total	Banking + Non-Banking					
Burundi	217.0	25	242.0	137	11	148
390.0						
Kenya	9,526.0	2024	11,550.0	4408	1477	5885
17,435.0						
Rwanda	513.0	26	539.0	191	26	217
756.0						
S. Sudan	0.0	0	0.0	0	0	0
0.0						
Tanzania	2,089.0	813	2,902.0	874	742	1616
4,518.0						
Uganda	1,802.0	602	2,404.0	410	400	810

3,214.0
Total 14,147.0 3,490.0 12,637.0 6,020.0 2,656.0 8,676.0 26,313.0

At the country level, Kenya records the highest Banking and Non-Banking Sectors deposits and loans at 17,435 out of the cumulative figure of 26,313 (66.3%); Tanzania has 4,518 out of 26,313 (17.2%). The StAR Initiative aims at tracing and recovering stolen assets. The implications of this are monumental with regard to developing appropriate Anti-Money Laundering and Proceeds of Crime legislation and Mutual Legal Assistance protocols among these countries. More importantly, EAAACA member states have to deliberately develop a robust jurisprudence and enhance their collaboration and partnerships regionally and internationally in their efforts at repatriating the stolen assets. Time has come for the East African Community member states to enact anti-foreign officials' bribery legislation before requiring development partners to courageously apply their legislation prohibiting such corrupt and unethical business practices to include the robust examination of the operations of "safe havens" in foreign jurisdictions.

AfDB and OECD Business Integrity Initiative

The Organisation for Economic Cooperation and Development's (OECD) Anti-Bribery Convention was adopted in 1997 and it came into force in 1999. 34 OECD member countries have ratified the Convention. This Convention addresses supply side corruption through the development of complementary regulations and other tools to assist in the implementation of the Convention. The OECD and the African Development Bank (AfDB) in a joint initiative to enhance business integrity in Africa cite a World Bank Report that states, "Over $1 trillion is paid

in bribes every year and that the proceeds of corruption stolen from developing countries alone range from USD 20 billion to USD 40 billion a year." The Joint AfDB/OECD Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa aims to enhance efforts to deter, prevent and combat corruption; promote business integrity; and mainstream democratic governance and sustainable development.

The implementation of this declaration led to the project focusing on business integrity entitled, Stocktaking of Business Integrity and Anti-Bribery Legislation, Policies and Practices in Twenty African Countries . It documents African countries', "efforts to strengthen anti-bribery frameworks and practices, and promote business integrity to provide an attractive environment for investment and sustained growth in the African region." The report reveals that forfeiture, seizure, confiscation, debarment, blacklisting, plea bargaining mechanisms are in place with respect to proceeds of corruption and illicit enrichment in Ethiopia, Kenya, Malawi, Mali, Mauritania, Mozambique, Nigeria, Rwanda, Sierra Leone, South Africa, Tanzania and Zambia.

This initiative is informed by the United Nations Convention Against Corruption, the African Union Convention on Prevention and Combating Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The report identifies gaps relating to definitions of a public official, legal liability of a public official, wealth declaration, witness and whistle blower protection in the anti-corruption laws in 20 African countries among others. Participation in regional and international programmes is one strategy that would compel these countries to move forward their anti-corruption agenda. Such participation makes available financial and technical resources.

FUTURE DIRECTIONS

Fighting corruption requires multifaceted and multidisciplinary approaches and strategies which target its political, economic, legal, administrative, social and moral aspects. This calls for coherent, consistent and broad based approaches with a long term perspective. E. Campos & B. Bhargava (2007) argue that fighting corruption is fundamentally about addressing poor governance rather than catching the perpetrators of the crime. Bad governance and political corruption are the causes of the above cited illicit financial outflows from developing and transition countries. The global community is implementing strategic intervention programmes in response to this menace.

United Nations Economic Commission for Africa and the African Union Advisory Board on Corruption Interventions

In attempts to find workable strategies in preventing and combating corruption in Africa, the United Nations Economic Commission for Africa (UNECA) and the African Union Advisory Board on Corruption have developed a futuristic blueprint entitled, Combating Corruption in Africa: Regional Anti-Corruption Programme for Africa (2011-2016) . They cite the 2005 African Governance Report (AGR I) which identifies corruption, poverty and unemployment as the greatest dangers to national development in Africa and the 2009 African Governance Report (AGR II) in which the executive, legislature and judiciary were perceived to be the most corrupt institutions on the continent. More poignantly they state:

'The socio-economic and political cost of corruption is myriad in Africa. It was estimated in 2004 that corruption costs the continent over US $ 148 billion per annum.

Moreover, 50 % of tax revenue, 25% of the continent's GDP and US $ 30 billion dollars in aid for Africa was eaten up by corruption. In addition, illicit financial flows especially by Multinational Corporations (MNCs) mostly through corrupt practices continue to deny African countries the needed financial resources for development."

This strategic document enjoins Anti-Corruption Agencies, Non-State Actors, Private Sector and the Media to proactively advocate for the anti-corruption and governance agenda on the continent through the implementation of the AUCPCC and UNCAC policy and political frameworks. It states, inter alia:

Illicit financial outflows through several channels increasingly constitute hidden resources for development in African countries, which require strategic policy and institutional response to address. Global Financial Integrity, a US based think tank, estimates that illicit outflows increased from $1.06 trillion in 2006 to approximately $1.26 trillion in 2008, with average annual illicit outflows from developing countries averaging $725 billion to $810 billion, per year, over the period 2000-2008. The real growth of illicit financial flows from Africa was 21.9% over the period 2000-2008. The EAC countries are best advised to implement these key international and regional initiatives by undertaking some of the following recommendations:

a) Enhancing political accountability

Lack of political accountability and transparency is primarily responsible for corruption and impunity in EAC. Political accountability and transparency puts an obligation on all duty bearers to explain their management of public

affairs publicly. The EAC countries should implement their Political Parties Acts, Leadership Codes and other relevant pieces of legislation demanding probity of all public and private sector duty bearers. Political corruption is the abuse of entrusted power by political leaders for private gain, with the objective of maintaining or acquiring power or wealth. Robin observes:

> Political corruption involves a wide range of crimes and illicit acts committed by political leaders before, during or after leaving office. It is distinct from petty or bureaucratic corruption in so far as it is perpetrated by political leaders or elected officials who have been vested with public authority and who bear the responsibility of representing public interest. There is also a supply side to political corruption – bribes paid to politicians.

Recent studies have shown a direct relationship between the management of politics especially funding and the level of corruption. Transparency International's Global Corruption Barometer 2010 found that political parties were viewed as one of the most corrupt sectors. Given the role and place of political parties in the democratisation process, there is need to initiate reforms to streamline political parties' operations to ensure that they embrace good governance practices at the party level. Meritocratic appointments and 'servant leadership would engender the generation and implementation of policies, strategies and programmes promoting good governance and the common/public good and preventing patronage and influence peddling.

b) Lifestyle audits

Despite the anti-corruption initiatives put in place to

address corruption, political corruption continues to thrive. The wealth declaration system provided for in some EA countries' laws is ineffective and has failed to address corruption. The anti-corruption agencies in the EAC must be vested with responsibilities to conduct life style audits of public officers - all members of parliament, all party leaders, and public servants so as to name and shame the corrupt, expose corruption to the public and boost public confidence in the fight against corruption. Lifestyle auditing is one of the most effective social accountability mechanisms. It mainly seeks to proactively monitor an individual's or his family's lifestyle. Any indication of incongruity between one's income and lifestyle would be a most revealing indicator on a person's integrity.

c) Promoting ethical leadership

Ethical leadership refers to demonstration by leaders of appropriate conduct through personal actions and relationships and institutional mainstreaming of good governance and ethical practice. Unethical leadership remains one of the biggest governance challenges in the Eastern African countries leading to dismal economic and social performance. Bad leadership breeds corruption and impunity resulting in poor relationships between the leadership, the and development partners. At the national level, this state of affairs leads to dignity deficit and identity crisis.

High standards of ethics are required of all duty bearers of leadership positions because they must constantly decide among competing interests. The moral tone and ethics of the modern public service are influenced by the leadership function, which dictates the organisational culture. The EAC countries have enacted Leadership codes and established institutions to implement them. The challenge

facing the political leadership is to provide for effective and efficient procedures, mechanisms and adequate resource envelopes to fund the ACAs' operations.

d) Access to information

Open access to information provides a basis for government accountability and transparency by providing accurate and detailed information on a company's and board performance, set targets and capital application. Private companies and payments made to elected representatives, public servants, political parties and government departments must be made public. In the US an amendment to the Dodd-Frank Act, compels oil, gas and mining companies listed on an American stock exchange to disclose details of payments to governments. Therefore all governments must put in place freedom of information legislation to ensure that citizens have access to information about official business and on corruption affecting the society. The citizens must therefore demand compliance to prescribed standards and laws relating to leadership and service delivery by state institutions. However, this cannot succeed without access to information. The UN Charter, Article 19 of the Universal Declaration of Human Rights, the UNCAC, AUCPCC and EAC country constitutions enjoin States Parties to provide for and fulfil access to information requirements. The challenge is for civil society and citizens' coalitions in these countries to insist that their governments honour their commitments to this provision.

CONCLUSION

Good governance delivered through democratic institutions may provide fundamental long term solutions to the scourge of corruption, fraud and unethical

behaviour in transition and developing economies. The East African Community member countries have put in place a constitutional regime from which they derive legislative, institutional and administrative frameworks used to implement their constitutions. Even under their old constitutions, these countries had numerous statutes meant to strengthen the rule of law and good governance. In addition, they had corresponding regulatory institutions whose primary function was to ensure probity by the implementing institutions.

Citizen Empowerment and Participation

The people of Eastern Africa must continue with the struggle to correct bad governance that characterises their political economy. Empowerment entails activating voice and agency among the people to enable them determine issues that affect their lives. Citizens must expand their authority and control over resources and decisions that affect them. Empowerment and participation arises from building community knowledge bases and skills for more effective participation and organisational capacity. The Leadership Codes in the EAC region will only be realised when these countries make deliberate efforts in nurturing cultural capital - a capital that inspirits national values and virtues against which to measure the conduct and behaviour of all citizens. The values system would affirm desirable behaviour and name and shame misconduct in the public sphere.

The new Constitutional Dispensation in the East African Community countries has created a framework to promote participatory governance. In order to realise the letter and spirit of the constitutions in these countries, it is imperative to enhance citizen participation in governance by nurturing social accountability mechanisms such as

civic education, participatory budget making and analysis, participatory public expenditure tracking, citizens advisory and oversight boards, social audits, community scorecards, citizens' charters and lifestyle audits.

Duty of Civil Society

Alexis De Tocqueville attributed the strength of democracy in the United States to the proliferation and advocacy of many citizen oriented associations in that country. A study on the relationship between civic participation and governance found high public conscientiousness and compliance with the rule of law by the governors in societies with active civic participation. Civil society resolve is informed by Woodrow Wilsons, a former US President's statement that it is citizens and not governments who can remove shackles to the realisation of individual and collective liberties. Civil society has had profound impact on countries' political, social and economic development the world over. In modern society, civil society not only delivers development assistance, but also provides an alternative voice on various issues that affect human and sustainable development. Indeed, civil society has developed 'soft law' through formulations of guidelines and recommendations, which in some cases have crystallised into hard law thus influencing domestic and international legal regimes and practice. TI's work on Codes of Conduct and Integrity Pacts is exemplary.

In order for civil societies in the East African Community to accomplish their goal, they need to be vigilant and proactively engage with the governors and the governed, and formulate new approaches to promoting good governance. Civil society should champion the implementation of regional and global pro-people initiatives like the Global Compact Collective Action Against Corruption, the

African Union Anti-Corruption Advisory Board, African Development Bank, OECD and World Bank initiatives.

Endnotes

1 John Githongo (2007) Kenya's fight against corruption – An uneven path to Political Accountability CATO institute Development Policy Briefing Paper March 15 2007 No 2 p4

2 The face of corruption in Kenya and the possible power of international civil society interference, Jurgen Schroder, pg 26

3 The looting of Kenya, The Guardian online: http://www.guardian.co.uk/world/2007/aug/31/kenya.topstories3

4 Kenya GDP per capita http://www.tradingeconomics.com/kenya/gdp-per-capita

5 http://www.statehousekenya.go.ke/speeches/kibaki/2002301201.htm President Kibaki's
Speech to the nation on his inauguration as Kenya's 3rd president, 30 December 2002

6 http://derechos.org/nizkor/impu/principles.html Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, 8 February 2005

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

8 Five years on: How effective is the KACC in Kenya's fight against corruption? Africog 2009

9 Political Economy Analysis of Kenya: Prepared by GeirSundet, Scanteam, and Eli Moen, Norad 2009, pg

10 Federalism, decentralisation and corruption, Sebastian Freille_ M Haque Richard Kneller May 2008

11 Prosecute and Punish: Kenya's attempt to curb political and administrative corruption, Simon H. Okoth

12 Kenya: Overview of corruption and anti-corruption, Anti-

Corruption Resource Centre, U4 Expert Answer, pg. 2

13 Throup, D. "The Construction and Destruction of the Kenyatta State." In The Political Economy of Kenya, edited by Michael Schatzberg. New York: Praeger, 33

14 The Political Economy of Kenya's Crisis, Susanne D. Mueller Journal of Eastern African Studies, Vo. 2 No. 2, July 2008 pg. 188

15 Dr Nicholas Kimani (2006) Understanding Corruption in Kenya – A Discussion Paper.

16 John Githongo (2007) Kenya's fight against corruption – An uneven path to Political Accountability CATO institute Development Policy Briefing Paper March 15 2007 No 2

17 Exchange Control Act of Kenya Section 25A(3)

18 The Goldenberg conspiracy The game of paper gold, money and power Peter Warutere Occasional Paper 117, September 2005

19 Local Manufactures (Export Compensation) Act, [Act No.9 of 1974] 3 1(A)

20 Civil Application No. 102 of 2006 Republic vs. The Judicial Commission of Inquiry into the Goldenberg Affair & Others ex parte Hon. Professor George Saitoti

21 Kenya National Assembly Ninth Parliament 5th Session Public Accounts Committee Report on the Special Audit on Procurement of Passport Issuing Equipment, pg. 36

22 http://www.marsgroupkenya.org/publications/pubs/stories/Origin%20Of%20Anglo%20Leasing%20Project.htm

23 Anglo Leasing Cabinet Minute Number 91/01

24 Kenya National Assembly Ninth Parliament 5th Session Public Accounts Committee Report on the Special Audit on Procurement of Passport Issuing Equipment, pg. 37

25 Ibid.

26 Ibid. pg. 38

27 John Githongo (Nov. 2005) Report on my Findings of Graft in the Government of Kenya, submitted to President Mwai Kibaki, pg. 6

28 Ibid. pg. 2

29 David Pallister, Scandals cast shadow over Kenya's Government, http://www.theguardian.com/world/2004/jul/06/kenya.davidpallister

30 John Githongo (Nov. 2005) Report on my Findings of Graft in the Government of Kenya, submitted to President Mwai Kibaki, pg. 7

31 John Githongo (Nov. 2005) Report on my Findings of Graft in the Government of Kenya, submitted to President Mwai Kibaki, pg. 14

32 http://www.marsgroupkenya.org/publications/pubs/stories/Mahindra,%20The%20Ugly%20Side%20Of%20Secret%20Tenders%20In%20Security.htm

33 John Githongo (Nov. 2005) Report on my Findings of Graft in the Government of Kenya, submitted to President Mwai Kibaki, p 11

34 Former PS's conviction no closure to Anglo Leasinghttp://www.businessdailyafrica.com/Opinion-and-Analysis/Former-PS-conviction-no-closure-to-Anglo Leasing/-/539548/1498392/-/1s2qp/-/index.html

35 The influence of political patronage on the organization of public procurement law in Kenya, Njuguna Humphrey Kimani pg. 1604

36 Ibid pg. 1604

37 Political economy analysis of Kenya: Prepared by Geir Sundet, Scanteam, and Eli Moen, Norad 2009, pg. 6

38 Kenya's fight against corruption An Uneven Path to Political Accountability, John Githongo, Centre for Global Liberty and Prosperity, March 15, 2007

39 http://www.nasdaq.com/markets/crude-oil.aspx?timeframe=6y

40 Analysis of the Triton oil scandal, AfriCog, July 2009

41 http://allafrica.com/stories/201109210049.html

42 http://uk.reuters.com/article/2011/05/26/UK-Kenya-corruption-idUKTRE74P4BE20110526

43 http://www.capitalfm.co.ke/news/2013/02/Court-gives-Okemo-Gichuru-extradition-proceedings-a-nod/

44 Analysis of the Triton oil scandal, AfriCog, July 2009

45 Analysis of the Triton oil scandal, AfriCog, July 2009

46 The maize scandal, A Report Prepared by the African Centre for Open Governance, December 2009, pg. 1

47 NationTeam, 2009. Government to release 200,000 bags of

maize Daily Nation [internet] 14th January. Available at: http://www.nation.co.ke/News/-/1056/514898/-/u19rko/-/index.html [Accessed on 17th December 2009]

48 David Okwembah, 2009. Mystery of 100,000 missing bags of maize. Daily Nation [internet] 3rd January. Available at: http://www.nation.co.ke/News/-/1056/510274/-/u16ujd/-/index.html [Accessed on 17th December 2009] Eight millers contracted by the Government were; Pembe Millers, Mombasa Millers, Chania Millers, Capwell Industries, Unga Group of Companies, Uzuri Foods Ltd., Kabansora Milllers and Nairobi Flour Millers.

49 The Maize scandal, A Report Prepared by the African Centre for Open Governance, December 2009, pg. 1

50 Maize scandal, A Report Prepared by the African Centre for Open Governance, December 2009,pg 3

51 Ibid pg. 6

52 AFRICOG (2009) The maize scandal Dec 2009

53 Kenya Vision 2030, the popular version, Government of the Republic of Kenya 2007, 1st Edition, pg. 1

54 Lessons in success from Vision 2030 grand plans http://www.businessdailyafrica.com/Lessons-in-success-from-Vision-2030-grand-plans/-/539444/1691396/-/9teb82z/-/index.html

55 Second Annual Progress report on the Implementation of the First Medium Term Plan, (2008 – 2012) of Kenya Vision 2030

56 The political economy of corruption in Kenya, Prof. Anyang' Nyong'o, African Research and Resource Forum, Public Debate Series 2006, pg8

57 Five years on, how effective is the KACC in Kenya's fight against corruption, AfriCog 2009, pg. 13

58 Dr Nicholas Kimani (2006) Understanding Corruption in Kenya – A Discussion Paper.

59 The Political Economy of Corruption in Kenya, Prof. Anyang' Nyong'o, African Research and Resource Forum, Public Debate Series 2006, pg. 15

60

61 Federalism, decentralisation and corruption, Sebastian Freille_ M Haque Richard Kneller May 2008, pg7

62 Lustration in Libya: Ruling Congress Passes "Political

Isolation Law"http://justiceinconflict.org/2012/12/28/Lustration-in-Libya-ruling-congress-passes-political-isolation-law/

63 Stanley Cohen 1995. "State crimes of previous regimes: knowledge, accountability, and the policing of the past." Law & social inquiry 20 (1): 7-50.

64 http://www.transparency.org/whatwedo/nis/

65 http://www.transparency.org/gcb2013/country/?country=kenya

66 Mulinge, Munyae M., and Gwen N. Lesetedi. "Corruption in Sub-Saharan Africa: Towards a more holistic approach." African Journal of Political Science 7.1 (2002): 51-77

67 http://www.iadb.org/regions/re2/consultative_group/groups/transparency_workshop6.htm

68 CMI (2008), 'Corruption in the Health Sector,' U4 Issue no. 10

69 KACC (2010): Sectoral Perspective in Kenya: the Case of the Public Health Care Delivery, Nairobi, Kenya.

70 This report was prepared by the 'Where is the money for HIV and AIDs campaign', a consortium of regional and international organisations in raising awareness of inadequate funding, corruption and waste of money and resources in the AIDS response.

71 Jansen, Eirik G. "Does aid work? Reflections on a natural resources programme in Tanzania." U4 Issue 2009. 2 (2009).

72 Kenya Anticorruption Commission (2010): Sectoral Perspecives on Corruption in Kenya, The Case of the Public Health Care Delivery, Research and Policy Department, Directorate of Preventive Services.

73 KACC (2010), ibid.

74 Elections in the Republic of Kenya: The Difference between 2002 and 2007 (2013, April 18) Retrieved July 21, 2013, from http://www.academon.com/comparison-essay/elections-in-the-republic-of-kenya-the-difference-between-2002-and-2007-152690/

75 Republic of Kenya (2010): Kenya Health Systems Assessment 2010

76 Transparency International-Kenya (2011): The Kenya Health Sector Integrity Study Report

77 The Star Newspaper (18th January 2013)

78 Onyango, G. (2012). Administrative and political grassroots corruption in rural Kenya: It takes two to tango.
79 Kenneth Wanjau Muli Muthiani (2012): Factors influencing the influx of counterfeit medicines in Kenya: A survey of pharmaceutical importing small and medium enterprises within Nairobi, International Journal of Business and Public Management.
80 WHO IMPACT (2006): International Medical Products Anti-Counterfeiting Taskforce (IMPACT).
81 Jason Lakin, Vivian Magero (2012): Healthy Ambitions? Kenya's National Hospital Insurance Fund (NHIF) Must Become More Transparent if it is to Anchor Universal Health Coverage

82 Republic of Kenya, Ministry of Health (2007): Pharmacy & Poisons Board and Division of Malaria Control. Antimalarial Medicines in Kenya: A vailability, Quality and Registration Status-A Baseline Study Undertaken Prior to Nationwide Distribution of Artemether-Lumefantine (AL) in Kenya 83 Transparency International, Kenya (2011), The Kenya Health Sector Integrity Study Report
84 Dal Poz MR, Kinfu Y, Dräger S, Kunjumen T, Diallo K. Counting health workers:definitions, data, methods and global results. Geneva, World Health Organization, 2006
(background paper for The world health report 2006; available at: http://www.who.int/hrh/documents/en/).
85 Sammy Wambua (2004): Water Privatization in Kenya, Global Issues Papers, No.8, March 2004
86 European Centre for Development Policy Management (2011): Analyzing governance in the Water Sector in Kenya, No. 124, October 2011- ECDPM works to improve relations between Europe and its partners in Africa, the Caribbean and the Pacific.
87 http://www.standardmedia.co.ke/?id=2000019293&cid=37&articleID=2000019293
88 David Ochami, Peter Opiyo and Alex Ndegwa: Kenya: Minister admits corruption is rampant in public water institutions, Wednesday, September 29th 2010: http://www.source.irc.nl/page/55322
89 ECDPM. Ibid pp. v
90 Apparently, all decisions and allocation of funds, public and

parastatal jobs, private and state-owned projects, follow interests related to the main political parties and ethnic groups, to secure electoral gains for the next round of parliamentary and presidential elections.

91 African Center for Open Governance (2011): "Kenya Governance Report"

92 On the Frontline against Corruption Ethics and Anti-Corruption Commission Annual Report 2011-2012

93 Global Issue Papers, No. 8: 'Water Privatization in Kenya' (Heinrich Boll, 2004).

94 Kenya Anti-Corruption Commission (2012): Sectoral Perspectives on Corruption in Kenya: The Case of Water and Sanitation Sector in Kenya.

95 UN (2011): Fighting Corruption in the water Sector: Methods, tools and good Practices

96 The Departmental Committee on Lands and Natural Resources (2011), 'Report on Alleged Corruption in the Ministry of Water & Irrigation and its Agents'.

97 Kenya Anti-Corruption Commission 2012; Sectoral Perspectives on Corruption in Kenya: The Case of Water and Sanitation Sector in Kenya. Pg. 21

98 http://www.undp.org.tt/news/UNODC/Anticorruption%20Methods%20and%20Tools%20in%20Water%20Lo%20Res.pdf

99 http://www.nta.or.ke/reports/special/NTA_COUNTY_BUDGET_PARTICIPATION_GUIDE.pdf

100 Ong'endi, G.M., Ong'oa I.M. (2009), "Water Policy, Accessibility and Water Ethics in Kenya" in the Santa Clara Journal of International Law, Vol. 7, Issue , pp 117-196

101 Republic of Kenya, (2005), Public Procurement and Disposal Act

102 http://www.nta.or.ke/reports/special/NTA_COUNTY_BUDGET_PARTICIPATION_GUIDE.pdf

103 Ong'endi, G.M., Ong'oa I.M. (2009), "Water Policy, Accessibility and Water Ethics in Kenya" in the Santa Clara Journal of International Law, Vol. 7, Issue , pp 117-196

104 Republic of Kenya, (2005), Public Procurement and Disposal Act

105 Kenya Medical Supply Agency (KEMSA) (2007): Procurement

Review- 1 January- 31 December 2007

106 Public Procurement Oversight Authority, (2007), Assesment of the Procurement System in Kenya

107 Perspectives on the Teaching Profession in Kenya, Taaliu Simon Thuranira, Dissertation submitted to the Faculty of the Graduate School of the University of Maryland, College Park, in partial fulfillment of the requirements for the degree of Doctor of Philosophy, 2010.

108 http://www.create-rpc.org/pdf_documents/PTA10.pdf

109 Bold et al (2012): Interventions & Institutions, Experimental Evidence on Scaling up Education Reforms in Kenya.

110 Teyie, Andrew and Henry Wanyama. 2010. "Losses in FPE rise to Sh5.5 billion." The Star, 8 January. Available online at http://allafrica.com.

111 Teyie and Wanyama 2010: ibid.

112 http://unesdoc.unesco.org/images/0018/001851/185106e.pdf

113 Choti, T.M, (2009). University in Context: A case of the Gusii students of South Western Kenya. A doctoral dissertation, Retrieved June 14th, 2013, from Digital Dissertation Database: University of Maryland-College Park: (pp, 20-112)

114 Thuranira, Ibid.

115 Investigations launched after allegations that some Ministry of Education officials were selling letters for admission to teacher training colleges in Kenya. One parent, who spoke to the Daily Nation, claimed he had been promised admission for his daughter if he paid Ksh 30,000. The admission process started in July and those who qualified reported to the colleges on September 8th (Daily Nation, 11/12/2009).

116 http://www.standardmedia.co.ke/?articleID=2000067081&story_title=education-ministry-in-staff-recruitment-scandal&pageNo=2

117 Peter Opiyo (2012): Education ministry in staff recruitment scandal, Thursday, September 27th 2012

118 Perspectives on the Teaching Profession on Kenya: Taaliu Simon Thuranira (2010:69) ibid.

119 Thuranira (2010:60): Perspectives on the Teaching Profession

in Kenya, University of Maryland also available at: http://drum.lib.umd.edu/bitstream/1903/11241/1/Taaliu_umd_0117E_11808.pdf

120 http://www.africanlegislaturesproject.org/sites/africanlegislaturesproject.org/files/Kenya%20Country%20Report.pdf

121 Joel D. Barkan and Fred Matiangi (2010): Kenya's Totturous Path to Successful Legislative Development.

122 In survey conducted by the Gallup organization in June 2008, 67 percent of Kenyans approved of the operations of the House (Gallup 2008).

123 Institute of Economic Affairs (2009): the Parliamentary Budget Oversight in Kenya- Analysis of the Framework and Practices since 1963 to Date: IEA Research Paper, Series No.19.

124 Institute of Economic Affairs (2009): the Parliamentary Budget Oversight in Kenya- Analysis of the Framework and Practices since 1963 to Date: IEA Research Paper, Series No.19.

125 Centre for Multi-Party Democracy-Kenya: Audit of the 9th and 10th Parliaments (2003-2009): High Profile Corruption Cases in the Post-KANU Era (2003-2009).

126 The Case Against Members of Parliament available at: www.marsgroupkenya.org

127 The 9th Parliament has acted dishonourably on many accounts, and indeed our assessment results in a negative finding. Considering its legislative record, the 9th Parliament disappointed many especially as it became the most expensive Parliament in Kenya's history – its annual budget now stands at around Ksh 4 billion (USD 57.14 million)

128 Joe Khamisi (2011): The Politics of Betrayal: Diary of a Kenyan Legislator, Trafford Publisher Ltd.

129 Mars Group ibid:pp.7

130 Centre for Multi-Party Democracy-Kenya: Audit of the 9th and 10th Parliaments (2003-2009): High Profile Corruption Cases in the Post KANU Era (2003-2009)

131 Ibid:pp.8

132 World Bank, The Role of Parliament in Curbing Corruption, Washington, 2006

133 According to Matiangi et al (2013:32), the Anglo Leasing

saga and the actions and reactions by the Parliamentary Accounts Committee can be said to be a great achievement on the part of Parliament in executing its oversight role.

134 http://nairobichronicle.wordpress.com/2008/06/30/grand-regency-saga-displays-rot-in-kenyas-elite/

135 Centre for Multi-Party Democracy-Kenya: Audit of the 9th and 10th Parliaments (2003-2009): High Profile Corruption Cases in the Post KANU Era (2003-2009).

136 http://nairobichronicle.wordpress.com/2008/06/30/grand-regency-saga-displays-rot-in-kenyas-elite/

137 http://www.breakingnewskenya.com/2008/07/02/vote-of-confidence-in-kimunya/

138 Mwenda Njoka Saturday May 5th 2012: Kimunya, This Is New Kenya With New Standards For Appointments –at: http://www.the-star.co.ke/news/article-19728/kimunya-new-kenya-new-standards-appointments#sthash.ngkPWfwC.dpuf

139 The current president of the lobby group, the National Civil Society Congress http://www.capitalfm.co.ke/news/2013/06/civil-society-to-stage-another-protest-over-mps-pay/

140 http://www.businessdailyafrica.com/MPs-win-Sh1m-monthly-pay-in-backdoor-deal/-/539546/1881004/-/item/1/-/xahccxz/-/index.html

141 Wamuti Ndegwa (2008): Open ended prosecutorial discretion in the fight against corruption in 3rd world Kenya case study.

142 Ahmednasir Abdullahi (2011): Restoring Public Confidence in Kenya's discredited, corrupt, inefficient and over burdened Judiciary: the Judicial Service Commission's agenda for reform.

143 http://www.transparency.org/files/content/publication/Annual_Report_2012.pdf

144 Elsewhere, in a commentary carried by the Business Daily Africa, the speaker of the National Assembly is accused of outright arrogance when he accuses the public of being ignorant of the law in relation to the vetting procedures. The editor argues that the vetting teams handled the process so casually without due diligence as required by law to the extent that one would argue that the committees were compromised, since the questions and testing criteria did not focus on how the nominees would discharge their respective functions in office

and very little attention was paid to the integrity of the nominees; where they arose, they were regarded as non-issues. In contrast the editor argues that in developed countries, such a process is conducted so comprehensively to ensure that anybody appointed met the necessary legal and constitutional threshold. The editor poses a rhetoric question: why were the MPs paid allowances yet they did nothing to justify the pay, why did they disregard public petitions and why did they handle the exercise casually?

145 http://www.nation.co.ke/oped/Opinion/Vetting-of-Cabinet-nominees-was-a-sham-exercise/-/440808/1856408/-/rkq8rxz/-/index.html?relative=true&title=Vetting%20of%20Cabinet%20nominees%20was%20a%20sham%20exercise

146 Kwendo Opanga, Commentary in Daily Nation, 18th May 2013: Vetting of Cabinet nominees was a sham exercise

147 http://www.cato.org/sites/cato.org/files/pubs/pdf/dbp2.pdf

148 http://www.standardmedia.co.ke/m/story.php?articleID=2000082512&story_title=Politics-intrigues-in-cabinet-vetting

149 Institute of Economic Affairs, The Point, Corruption in Kenya, A Call to Action. Issue No. 37,

150 http://www.nta.or.ke/reports/special/NTA_COUNTY_BUDGET_PARTICIPATION_GUIDE.pdf

151 http://www.thepeople.co.ke/863/vetting-of-state-officers-comes-under-scrutiny/

152 Strengthening Judicial Reforms in Kenya, Administrative Reforms ,Vol. x- Kenyan Section of the International Commission of Jurists, 2005,

153 http://www.kenyalaw.org/Forum/?p=227

154 UNDP Kenya; "Judicial Integrity and the Vetting Process in Kenya." Amani Papers , Volume I No. 6, September 2010

155 http://www.cato.org/sites/cato.org/files/pubs/pdf/dbp2.pdf

156 http://www.marsgroupkenya.org/Reports/Government/Ringera_Report.pdf

157 Chief Justice Evans Gicheru outlined the initiatives that had been taken to combat the widespread problem of corruption in the Kenyan Judiciary since 1998, but more particularly since his appointment as Chief Justice in March 2003. A judicial committee on

the administration of justice appointed in 1998 had found both "petty" and "grand" corruption to exist in the Judiciary. When he assumed office as Chief Justice he found that corruption in the Judiciary had assumed pandemic proportions. The maxim "why pay a lawyer when you can buy a judge" had achieved notoriety, and the majority of Kenyan judges had become "the best judges that money could buy"

158 A Report of the International Legal Assistance Consortium and International Bar Association Human Rights Institute

159 Restoring Integrity: An assessment of the needs of the justice system in the Republic of Kenya February 2010

160 http://www.kenyalaw.org/Forum/?p=227

161 Dr. Willy Mutunga, Progress Report on the Transformation of the Judiciary - The First Hundred and Twenty Days, http://www.kenyalaw.org/kenyaLawBlog/?p=227 (October 2011)

162 http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/1495984/Kenya-losing-battle-against-corruption.html

163 Transparency International (2007): Global Corruption Report, Corruption in Judicial systems, Cambridge: Cambridge University Press

164 The Integrity and Anti-Corruption Committee also referred to as 'the Ringera Committee', was appointed on 18 March 2003 and presented its report on 30 September 2003. The report noted that judicial corruption was rampant. It cited credible evidence of corruption on the part of five out of nine Court of Appeal judges (56 per cent), 18 out of 36 High Court judges (50 per cent) and82 out of 254 magistrates (32 per cent).134 Prior to informing the accused of the allegations against them, however, a 'List of Shame' was published in the media, naming the judges and magistrates implicated in the report.

165 Abdullahi, Ahmednassir, (2011). Restoring Public Confidence in Kenya's discredited, corrupt, inefficient and over burdened Judiciary: the Judicial Service Commission's agenda for reform

166 Corruption in the Judiciary will, however, not be eliminated if we do not change the environment that incentivises it. Four months ago, when we took office, we found a Judiciary in which junior officers

entrusted with paperwork in matters concerning billions of shillings lived lives that exposed them to influence-peddling and bribery. Many of the clerical staff, who ensure that the courts system works – or does not work – and who are very critical in the administration of justice, earned an average of Ksh 20,000 only. Staff morale was slow and career stagnation rampant. Many officers had been in one position for over 10 years. The disparities in pay between judges and magistrates, on one hand, and judicial officers and administrative staff, on the other, were acute. - See more at: http://www.kenyalaw.org/kenyaLawBlog/?p=227#sthash.491JRp4z.dpuf

167 According to the ICJ's Judiciary Perception Survey (2012), 84% of surveyed respondents trust the Kenyan Courts

168 Mongoljingoo et al (2013): Institutional Failure in Kenya and a Way Forward: Journal of Political Inquiry at New York University, Spring Issue (20).

169 Doig, Alan & Riley, Stephen, Corruption and Anti-Corruption Strategies: Issue and Case Studies for Developing Countries, Page 2.

170 Doig, Alan & Riley, Stephen, Corruption and Anti-Corruption Strategies: Issue and Case Studies for Developing Countries, Page 2.

171 Anwar Shah et al, Combating Corruption: Look before You Leap, Page 2.

172 World Bank. Helping Counties to Combat Corruption: The Role of the World Bank.

173 Ibid, Page 1.

174 Ibid, Page 2.

175 Institute of Economic Affairs, Corruption in Kenya: A Call to Action, The Point, Issue Number 37, August 2000.

176 Jeremy Pope, The Role of National Integrity System in Fighting Corruption, www.worldbank.org.

177 Page 3.

178 Cited above at 2, Page 3.

179 T. Gurgur & Anwar Shah, Localization and Corruption: Panacea or Pandoras Box? World Bank, WP 3486, January 2005, Page 2.

180 Article 35 of the Constitution. The campaign for a freedom

of information law has been going on in Kenya for the last decade, spearheaded by the civil society. However, the law is yet to be enacted. Further, the law was not prioritised for enactment in the current Constitution.

181 The Kenya Police has been investigating the scandal since 1995 but are yet to successfully prosecute any suspect. In 2003, the Government established a Commission of Inquiry on the scandal. The activities of the Commission are analysed in later sections of this report.

182 The Prevention of Corruption Act, Chapter 65 of the Laws of Kenya (Now repealed).

183 National Rainbow Coalition elected in 2003

184 Government of Kenya, Economic Recovery Strategy for Wealth Creation

185 Ibid.

186 Section 11B (11) of the Act. The appointments comprised individuals knowledgeable or experienced in law, monetary and financial matters, accountancy and fraud investigation.

187 Section 11B(3) of the Act.

188 Section 12 of the Act.

189 For instance, the Authority published public notices seeking members of the public to volunteer information on corrupt public officials. This was a strategy to avoid investigating high level corruption cases that were reported in the media at the time.

190 Stephen Mwai Gachiengo & Another vs. the Republic, High Court Misc. Application Number 302 of 2000 (Unreported)

191 As per the Judgment of Mbogholi, Mitey & Mulwa, JJ.

192 Cited above at 84.

193 Chapter 84 of the Laws of Kenya.

194 According to the Transparency International Surveys.

195 Ludeki Chweya, et al, Control of Corruption in Kenya: Legal- Political Dimensions, 2001-2004, Clarispress, 2005, in J.K. Tuta, Evolution of Anti-Corruption Policy and Institutional Framework, Page 80.

196 Ibid, Page 81.

197 This was announced in a public statement issued by the Permanent Secretary in the Office of the President and the Head of

Civil Service on 30th June 2004. Due to the frustrations he faced, John Githongo resigned from office while on a trip to London on 24th January 2005.

198 See Sections 23 and 24 of the repealed Constitution of Kenya.
199 Section 6 of the ACECA.
200 Section 2 of the Act.
201 Section 35(1) of the Act.
202 Section 35(2) of the Act.
203 Section 36(1) of the Act.
204 Section 36(2) of the Act.
205 Section 36(3) of the Act.
206 Section 36 (4) of the Act.
207 Section 36 (5) of the Act.
208 Section 37 (1) of the Act.
209 Section 37(3) of the Act.
210 Section 37(4) of the Act.
211 Section 37(5) of the Act.
212 Section 37(6) of the Act.
213 Section 65(1) of the Act.
214 Section 65(2) of the Act.
215 Section 65(3) of the Act.
216 Section 65(4) of the Act.
217 Section 65(5) of the Act.
218 Section 2(2) of the Act.
219 Section 10(1) of the Act.
220 Section 10(2) of the Act.
221 Section 19 of the Act.
222 Section 26(1) of the Act.
223 Section 26(2) of the Act.
224 Section 30(1) of the Act.
225 Section 30(2) of the Act.
226 Section 30(3) of the Act.
227 Section 30(40 of the Act.
228 Section 30(5) of the Act.
229 Section 30(6) of the Act.
230 Section 31 of the Act.
231 Section 33(1) of the Act.

232 Section 33(2) of the Act.
233 Section 35 (1) of the Act.
234 Section 35(2) of the Act.
235 Section 36(1) of the Act.
236 Section 37(1) of the Act.
237 P.G. Perreira et al, South Africa Anti-Corruption Architecture, South African Anti-Corruption Architecture. International Centre for Asset Recovery, Basel Institute of Governance, (2012), Page 66.
238 Ibid, Page 67
239 Section 7(1) (a), (b) and (c) of the ACECA.
240 Section 7(1) (d) of the ACECA.
241 Section 7(1) (e) of the ACECA.
242 See KACC Annual Reports for 2006/7, 2007/8, 2008/9 and 2009/10.
243 Section 7(1) (g) of the ACECA.
244 Cited Above at 23, Page 150.
245 Cited Above at 65, Page 68, Section 7 (1) (h) of ACECA.
246 Cited Above at 23, Page 150.
247 KACC, Annual Report, 2010.
248 Section 10 of the ACECA.
249 Section 12 (1) and (2) of ACECA.
250 Section 15 of the Act.
251 Section 16 (2) of the Act.
252 Section 23 (1) of the Act.
253 The scrutiny was carried by the Parliamentary Committee on Administration of Justice and Legal Affairs.
254 P. Kichana, The Search for Effective Instrument for Upholding the Rule of law In Corruption Control Initiatives, Judiciary Watch Report, Judicial Reforms in Kenya, 2003-4, ICJ Kenya, Page 21.
255 Justice A. Ringera, KACC Annual Report, 2006-2007, Page xiii.
256 Nairobi High Court Petition Number 695 of 2007.
257 KACC, Annual Report, 2007-2008, Page 79.
258 KACC Annual Reports 2006/7, 2007/8. 2008/ 9, 2009/ 10.
259 See the analysis of Court of Appeal, Civil Application Number 54 of 2006 (Unreported) below.
260 Ibid.

261 AfriCOG, Five Years On: How Effective is KACC in the Fight against Corruption; December 2009, Page 13.

262 Government of Kenya, Judicial Commission of Inquiry on the Goldenberg Affairs, 2005.

263 Government of Kenya, Governance Strategy for Building a Prosperous Kenya, November 2006.

264 The Government of Kenya, National Land Policy, Session Paper Number 3 of 2009.

265 Article 67 (1) (e) of the Constitution.

266 Chapter 102 of the Laws of Kenya.

267 Established vide Gazette Notice Number 4124 of 28th May 2004.

268 Cited above at 84, Page 12.

269 Section 3(1) of the Act.

270 Section 34 of the Act.

271 Section 9 (1) of the Act.

272 Section 8 of the Act.

273 Section 9(2) of the Act.

274 Section 35 of the Act. The Act establishes the Kenya National Audit Commission which shall comprise the Controller and Auditor General, the Chairpersons of the Pubic Accounts and Public Investments Committees; a member of the Institute of Certified Public Accountants of Kenya, co-opted by others Members, the Chairperson of the Public Service Commission; and the AG or his representative. The Commission shall consider and approve the budget of the Kenya National Audit Office and determine the remuneration and other terms of employment of the staff. The Commission shall be chaired by the Controller and Auditor General (see sections 49, 50 and 51 of the Act).

275 Section 9(4) of the Act.

276 Section 10(10 of the Act.

277 Section 10(2) of the Act.

278 Section 11(1) of the Act.

279 Section 11(2) of the Act.

280 Section 48 of the Act.

281 For example the investigation in the scandals in the water sector in 2011 and the hiring of machinery for the Tana Delta Irrigation

Project in 2010-2011 (KACC Annual Reports, 2010/ 11 and 2011/12).

282 As stated above, the delays by the Controller and Auditor General were for 4 to 5 years before submitting the audit reports.

283 Pursuant to the Fiscal Management Act.

284 Two MPs, Hon Peris Siman and Hon. Dr James Gesami were arraigned in court between 2010 and 2012 for cases relating to misuse of Constituency Development Funds. Many other MPs were being investigated for similar offences.

285 The monthly salary for MPs has been capped at Ksh 532, 500 per month. The salary of MPs in the previous Parliament was Ksh 851, 000, with only Ksh 200, 000 being subject to taxation.

286 Gazette Notice Number 5826 of 29th June 2007.

287 Established under the Commission for Administrative Justice Act, 2012.

288 Section 8(c) and (i) of the Act.

289 Section 26 of the Act.

290 Section 38 of the Act.

291 Section 42 and 43 of the Act.

292 Section 44 of the Act.

293 Section 53 of the Act.

294 Section 54 of the Act.

295 Transparency International- Kenya, Bribery Index 2002-3, Kenya Police was ranked as Number 1 institution out of the 38 institutions listed as most bribery-prone.

296 Cited Above at 65, Page ….

297 D. Deya, The Ringera Report on Judicial Corruption in Kenya: Which Way Forward for Judicial Reform? Judiciary Watch Report: Analysis of Judicial Reform in Kenya 1998-2003, ICJ Kenya, Nairobi, 2004.

298 A vetting mechanism, the Judges and Magistrates Vetting Board was established pursuant to section 23 of the 6th Schedule of the Constitution and the Judges and Magistrates Vetting Board Act, 2011.

299 Section 3(1) of the Act.

300 Section 3(2) of the Act.

301 Section 4(1) of the Act.

302 Section 4(4) of the Act.

303 Section 5(1) of the Act.

304 Cited Above at 81, Page 19.

305 Cited Above at 23, Page 121.

306 D. Majanja, The Roles of the Judiciary, Kenya Anti-Corruption Commission and the Attorney General in the Fight Against Corruption: How Effective have they been? Judiciary Watch Report: Judicial Reform in Kenya, 1/ 2005, Page 89.

307 Cited Above at 81, Page 25.

308 Nairobi High Court of Kenya Miscellaneous Criminal Application Number 302 of 2000.

309 KACC, Annual Reports.

310 Article 79 of the Constitution.

311 Act Number 19 of 2012. The EACC has the mandate of overseeing and enforcing the implementation of the Act. (Section 4(2).

312 Section 36 of the Act.

313 Section 4 of the Act.

314 Section 7(1) of the Act.

315 Section 7(2) of the Act.

316 Section 11 of the Act.

317 Section 13 of the Act.

318 Section 11(i) of the Act.

319 Section 27(1) of the Act.

320 Section 27(2) of the Act.

321 Section 27(3) of the Act.

322 Section 27(4) of the Act.

323 Section 29(1) of the Act.

324 Section 29(2) of the Act.

325 Section 29(3) of the Act.

326 Section 29(4) of the Act.

327 Section 29(5) of the Act.

328 Section 30 of the Act.

329 Section 33(a) of the Act.

330 Section 33 (b) of the Act.

331 Section 33(c) of the Act.

332 Maria Chene, Centralised versus decentralised anti-corruption institutions, available at www.u4.no, 16th March 2013, Number 323, accessed on 3rd April 2013.

333 UNDP, Practitioners Guide on Capacity Assessment of Anti-

Corruption Agencies.

334 Cited above at 158, Page 5.

335 Article 6 of the Convention.

336 Cited above at 6, Page 20.

337 Op. Cit. at 141, Page 27.

338 Cited Above at 6, Page 18.

339 One of the Ministers, Prof George Saitoti, was cleared by the High Court in the case of R. vs. the Judicial Commission of Inquiry into the Goldenberg Affair & Another, Ex Parte Hon George Saitoti, [2006] eKLR, where the court held that the Report by the Commission contained glaring errors that resulted in the recommendation that the Ex Parte applicant should be investigated and the finding of the omission was thus quashed to the extent that it mentioned the Ex Parte Applicant adversely. The AG promised to appeal against the ruling but the appeal was never filed.

340 Cited Above at 6, Page 12.

341 Famy Case.

342 SAHRIT, Media Report: Reporting Corruption in Southern Africa, 2003, Harare, Zimbabwe, Pages 9-11. The Constitution of Kenya provides for the freedoms of media, expression and information in Articles 33, 34 and 35.

343 The media invested in investigative reporting in Kenya resulting in the unraveling of a number of corruption scandals. The Goldenberg Scandal was first reported and investigated by the media.

344 Ibid, Page 113.

345 The Government of Kenya, Governance Strategy for Building a Prosperous Kenya, November 2005.

346 Cited Above at 23, Page 165.

347 Cited above at 84, Page 7.

348 Cited above At 84, Page 9.

349 Cited above at 81, Page 13.

350 Stefan Ittner, Fighting Corruption in Africa; a Comparative Study of Uganda and Botswana, Dissertation for PhD.

351 Ibid, Page 27.

352 Cited above at 81, Page 137.

353 Cited above at 177.

354 John Githongo (2004). Kenya's Fight against Corruption:

An Uneven Path to Political Accountability. First published by CATO Institute as Development Policy Briefing Paper No. 2, March 15, 2007. http://www.africanexecutive.com/modules/magazine/article_print.php?article=2191 [22.02.2013].

355 "Corruption will now cease to be a way of life in Kenya and I call upon all those members of my government and public officers accustomed to corrupt practice to know and clearly understand that there will be no sacred cows under my government." Mwai Kibaki 30 Dec 2002. http://www.marsgroupkenya.org/pages/stories/Anglo_Leasing/ [23.02.2013].

356 Gladwell Otieno, The NARC's Anti-Corruption Drive in Kenya: Somewhere over the Rainbow?, Vol. 14, No. 4 African Security Review (2005) available at http://www.iss.co.za/pubs/ASR/14No4/EOtieno.htm [22.02.2013].

357 Refer to footnote No. 44.

358 Today the branch is called the Ministry of Justice, National Cohesion, and Constitutional Affairs. http://www.justice.go.ke/index.php?option=com_frontpage&Itemid=1

359 Honourable Kiraitu Murungi was appointed the first Minister in Charge of this Ministry.

360 The content of the speech is contained in Annexure 1.

361 Githongo was widely viewed as a well-regarded, trustworthy person to head this important position and he came into the office determined to wage war against the corruption that has plagued the country for so long.

362 Fighting Corruption and Impunity 2003 – 2008 – An excerpt from Kenya: A History since Independence (1963-2011) By Charles Hornsby.

363 The case of Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic of Kenya (Gachiengo Case) exposed the weaknesses of the existent anti-corruption laws. The High Court, sitting as a constitutional court, held that KACA's existence was a violation of the separation of powers as stipulated by the Constitution and consequently found that it was unconstitutional.

364 Anti-Corruption and Economic Crimes Act, (2003) Cap. 65 Section 6(1).

365 The ACECA even defined the KACC as a "body corporate"

which is the exact term used by the Constitutional Court in its Gachiengo decision to strike down the Prosecutorial Power of the KACA because it was a separate entity and not one subservient to the Attorney General. Compare, S 6(1) of the ACECA ("The Kenya Anti-Corruption Commission is hereby established as a body corporate") with Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic from the Republic of Kenya in the High Court of Kenya at Nairobi, High Court Miscellaneous Application No. 302 of 2000 ("KACA is not a department in the Office of the Attorney General. It is a body corporate . . . . The existence of KACA undermines the power and authority of both the Attorney General and the Commissioner of Police as conferred on them by the Constitution).

366 Anti-Corruption and Economic Crimes Act, (2003) Cap. 65 Section 7(1) (a).

367 Refer to the Anti-Corruption and Economic Crimes Act, (2003) Section 7(1) (b).

368 Refer to footnote 58 Section 7(1) (e).

369 Refer to footnote 58 Section 6 (2).

370 Refer to footnote 58 Section 23(3).

371 Anti-Corruption and Economic Crimes Act, (2003) Cap. 65 Section 26(1).

372 The arguments made here are that KACC has the power to significantly infringe on a person's right and freedoms through a unilateral decision that the person is a corruption suspect.

373 Section 3 of the Act in footnote 58.

374 Section 3 (a) of the Act in footnote 58.

375 Section 3 (b) of the Act in footnote 58.

376 "The Anti-Corruption Court specifically handles matters dealing with graft in public and private office. Anti-Corruption Courts are located across the country in areas such as Nairobi, Kiambu, Nyeri, and Kisumu. The Republic of Kenya, Judiciary, Court Structure, http://www.Judiciary.go.ke/Judiciary/index.php?option=com_content&view=article&id=289&Itemid=407 [23.02.2013]

377 Preamble of Public Officer Ethics Act, (2003) Cap. 183. Furthermore, the bill was stated as being intended to "define the basic values, principles and set boundaries of acceptable behaviour by public officials in this country (Kenya). We also hope to provide a

legal framework for restoring public confidence in our Civil Service." Kenya, The National Assembly, Debates on the Public Officer Ethics Bill, March 13, 2003, col. 446 (statement by Mr Murungi, Minister for Justice and Constitutional Affairs).

378 Public Officer Ethics Act, (2003) Section 8.

379 The full listing was contained in Sections 8 – 31 of the Act.

380 Marc Lacey, Kenya President Declares his Wealth, N.Y. TIMES, Sept. 30, 2003, available at http://www.nytimes.com/2003/09/30/world/world-briefing-africa-kenya-president-declares-his-wealth.html [23.02.2013]

381 Refer to Section 6, Public Officer Ethics Act, (2003)

382 Public Officer Ethics Act, (2003), Section 30(1)

383 Public Officer Ethics Act, (2003), Section 30(4)

384 Kenya was the first Country to ratify this Convention in 2006.

385 See the National Accord and Reconciliation Act, 2008. Under the Agreement, Kibaki retained the Presidency while Raila became the Prime Minister. The two principles shared government appointments on 50-50 basis, between ODM and PNU side. As a result, this killed any effective opposition in Parliament.

386 See the Global Corruption Report 2009. This report discusses how this arrangement inadvertently culminated in the absence of an effective opposition, severely compromising parliament's oversight role over the executive.

387 Government to intensify anti-corruption crusade, Mbeere, December 13 2007.
http://www.statehousekenya.go.ke/news/dec07/2007131201.htm [24.02.2013].

388 Can Lumumba team make a difference in KACC's anti-corruption crusade? Standard Digital, Tuesday 27, July 2010.

389 PWC Report on Maize Scandal 2008.
http://www.marsgroupkenya.org/documents/index.php?option=com_docman&task=cat_view&gid=37&Itemid=2 [23.02.2013].

390 PWC Report Into Triton Oil Scandal - 6th April 2009
http://www.marsgroupkenya.org/documents/index.php?option=com_docman&task=cat_view&Item [24.02.2013]

391 Njeri Rugene and Alphonce Shiundu, 2009. Raila cleared as house rejects report on KES 3 Billion Maize scandal. Daily Nation[internet].http://www.bunge.go.ke/parliament/downloads/tenth_third_sess/ hansard/14.05.09.pdf.[23.02.2013].

392 http://www.bunge.go.ke/parliament/downloads/tenth_third_sess/hansard/14.05.09.pdf [24.03.2013].

393 This Committee was established under the under Standing Order No. 198 (1); its mandate was; a) to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; b) to study the programme and policy objectives of the Ministries (and Local Authorities) and departments and the effectiveness for implementation; c) to study and review all legislation referred to it; d) to study, assess and analyse the relative success of Ministries and departments as measured by the results obtained as compared with its stated objective; e) to investigate and inquire into all matters relating to all assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House or a Minister and; f) to make reports and recommendations to the House as often as possible, including recommendation of proposed legislation. Members of the Committee were Hon. Ahmed Shakeel Shabbir, M.P - Chairman, Hon. Mwalimu Mwahima, M.P., Hon. Joshua Kutuny, M.P. Hon. Stanley Githunguri, M.P., Hon. Fahim Twaha, M.P., Hon. Gideon Konchella, M.P., Hon. Mohammed H. Gabow, M.P., Hon. David Ngugi, M.P and Hon. Maitha Gideon Mungaro, M.P. See the report on the procurement of cemetery land by the City Council of Nairobi, January 2010.

394 Martin Mutua, MPs meet over Mudavadi fate, Standard Digital, Tuesday November 2, 2010.http://www.standardmedia.co.ke/?id=2000021488&cid=4&/trackback/=&articleID=2000021488 [23.03.213]

395 Committee Chairman Chris Okemo formally laid the report before the House after months of uncertainty. Kimunya stepped aside in June to allow investigations into the sale of the hotel after Parliament passed a vote of no confidence in him. The report concluded: "... the appointing authority be advised that the conduct of Kimunya is not compatible with that of a Cabinet minister." Standard Digital,

Wednesday, October 2008.

396 Kenya President Ratifies New Constitution, BBC News, August 27, 2010. Available at, http://www.bbc.co.uk/news/world-africa-11106558.

397 Article 10 of the Constitution.

398 Act No. 22 of 2011.

399 Article 79 of the Constitution and Section 11 of the EACC Act.

400 Act No. 3 of 2003.

401 Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic in the High Court of Kenya at Nairobi, High Court Miscellaneous Application No. 302 of 2000. In this case, the constitutional court proscribed KACA, the body charged with the mandate to fight corruption on the basis that it was unconstitutional. This was part of the reasoning of the court in making the verdict to disband KACA.

402 Section 26 of the then Constitution allowed private prosecutions.

403 This provision is almost an exact replica of Section 26 of the former Constitution to the extent that it vested the prosecutorial powers in the Attorney General's office just like the current Constitution does the same in the office of the DPP.

404 Paragraph 12 gives the Parliament authority to enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

405 Section 13 of the Ethics and Anti-Corruption Act.

406 For further understanding read James Thuo Gathii, Defining the Relationship between Human Rights and Corruption, 31 U. PA. J. INT'L L. 125, 182-183 (2009). He says that, "Because it has not been expressly conferred, any prosecution power at this point may be limited by a narrow reading of the Constitution. A court that has in the past relied on technicalities to defeat corruption may continue this legacy because the Constitution does not affirmatively confer to the Commission the right to prosecute. This possibility alone is a criticism of the new Kenyan Constitution. Given all the troubles the anti-corruption commissions have had in the past trying to punish corruption through the legal system, it would have been prudent for the drafters to affirmatively confer the prosecutorial power to the

EACC in the Constitution rather than making a conferral of this type merely permissible".

407 Articles 73, 75, 76 and 77 of the Constitution.

408 See the Preamble of the Act, No.9 of 2012.

409 Article 80 (c) of the Constitution.

410 This Act as a draft Bill contained very important provisions with far reaching implications in the governance process in Kenya. The draft Bill made the process of assuming state office a thin tunnel that would ensure that only suitable people succeed in assuming such positions. Unfortunately as it now stands, only those assuming appointive positions will go through such rigorous process. The parliamentarians did away with the mandatory vetting process for those seeking elective posts like themselves. See also Article 80(d).

411 The Leadership and Integrity Bill 2012.

412 Section 52(3) of the Leadership and Integrity Bill 2012.

413 'New Roadblock for Uhuru Ruto' The Standard 13th March 2012.

414 Part II and III establish Leadership and Integrity codes of conduct for public officers.

415 Section 12(5), The Leadership and Integrity Bill 2012.

416 Section 52(2), The Leadership and Integrity Bill 2012.

417 Section 19, The Leadership and Integrity Bill 2012.

418 Section 26, The Leadership and Integrity Bill 2012.

419 Section 13(2), The Leadership and Integrity Bill 2012.

420 Section 47 (1), The Leadership and Integrity Bill 2012.

421 Section 47 (1) of the Leadership and Integrity Act.

422 Section 80, the Leadership and Integrity Act.

423 Section 35 of the draft Leadership and Integrity Bill states: "A person seeking to be appointed or elected as a State officer may not be eligible for appointment or to stand for election to such office if that person has, as a State officer, contravened the Leadership and Integrity Code under this Act or while serving as a public officer, has contravened a Code of Ethics and Integrity applicable to that officer." The Bill gives EACC the power to determine who has 'contravened' the Code and to bar people from standing for elected or appointed office.

424 Section 12(3) provides that: A person who has contravened the Code or has been convicted of a felony or has been adversely named

in a Parliamentary Committee Report or a Commission of Inquiry Report adopted by Parliament shall not qualify for appointment or election to State office if the matter for which he or she has been named remains unresolved.

425 The individuals facing charges of Crimes against Humanity at The Hague are Uhuru Muigai Kenyatta and William Ruto, who have since been elected as President and Deputy President of Kenya respectively.

426 Chapter 13 of The Constitution, 2010.

427 The Constitution, Article 232

428 In the past, there were several cases that challenged the constitutionality of the Public Officers Ethics Act as it was not embedded in the Constitution.

429 Article 35(1) of The Constitution.

430 The Radical Surgery of the Judiciary was led by Justice Aaron Ringera and Kiraitu Murungi.

431 Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others exparte George Saitoti [2006] eKLR.

432 [2006]eKLR

433 David Okwembah, Is this the End of the Anglo Leasing Investigations? Daily Nation, July 8, 2009.

434 David Okwembah, Is this the End of the Anglo Leasing Investigations? Daily Nation, July 8, 2009.

435 Justice Ringera laid the blame squarely on AG Amos Wako and the Judiciary, whom he accused of blocking every route KACC, has taken to deal with the key players. 'The decisions from some of the courts have questioned the Commission's powers in exercise of its investigatory mandate and stopped the Commission in its tracks from continuing investigations into mega-scandals like the Anglo Leasing contracts.'" David Okwembah, Is this the End of Anglo-Leasing Investigations?, Daily Nation, July 8, 2009; see also, KACC Accuses Attorney General of Frustrating Graft War, The Standard (stating the opinion of many within the KACC that it is a lame dog without prosecutorial powers)

436 [2006] eKLR, Misc Civil Application 102 of 2006.

437 Saitoti was a former Vice President and Minister for Finance and the most prominent political figure found culpable in the

Goldenberg affair.

438 Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others exparte George Saitoti [2006] eKLR.

439 [2012] eKLR The Judges that decided this case were justices J.W. Mwera, Hon. M. Warsame, Hon. P.M. Mwilu.

440 This ruling was made on 25 May 2012.

441 Yash, Gahi, 'Tobiko versus Matemu: Protecting Integrity in Public Life', 27 October, 2012.

442 See Ghai on Tobiko and Matemu case, "The parliamentary Constitutional Implementation Oversight Committee had recommended that the appointment should not be confirmed unless Tobiko was cleared after a thorough investigation —a course of action rejected by Parliament, which then proceeded to confirm him."

443 Article 159 (2) d of the Constitution.

444 [2012] eKLR www.kenyalaw.org [23.03.2013]

445 This ruling was made on 20th September 2012.

446 Article 10 of the Constitution.

447 Wahome Thuku, Court Clears Uhuru, Ruto to vie, The Standard Digital, 15 February, 2013.

448 Chapter Six of the Constitution.

449 The five judges are Mbogholi Msagha, Luka Kimaru, Hellen Omondi, Pauline Nyamweya and George Kimondo.

450 "It has neither been alleged nor has any evidence been placed before us (that) the respondents have been subjected to any trial in any local court or indeed the ICC that has led to imprisonment for more than six months."

451 These reports can be found online at: http://www.google.co.ke/search?q=EACC&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a [03.03.2013]

452 Judy Ogutu, Ruto to Face Sh96 Million Fraud Charge, The Standard, Oct. 15, 2010. MP Ruto allegedly received Ksh 96 Million in the fraudulent transactions, but the total amount that the government and people were defrauded is estimated to be Ksh 272 Million. Anthony Kariuki, Kenya Minister Suspended over Fraud Charge, Daily Nation, Oct. 19, 2010.

453 Judy Ogutu, Ruto to Face KES. 96 Million Fraud Charge, The Standard, Oct. 15, 2010

454 Refer to footnote 160.

455 Foreign Ministry PS Arrested. Standard Digital, Thursday, February 28 2013. http://www.standardmedia.co.ke/?articleID=2000078268&story_title=Kenya-Foreign-ministry-PS-arrested [4.03.2013].

456 (2012) eKLR.

CONTACTS

HEAD OFFICE

Kindaruma Road, Off Ring Road, Kilimani Gate No. 713; Suite No. 4
P.O Box 198 - 00200, City Square, Nairobi | Tel: 2727763/5 / +254 (0) 722 209 589
Mobile: +254 (0) 722 296 589 | **Email:** transparency@tikenya.org

REGIONAL OFFICES & ADVOCACY AND LEGAL ADVICE CENTRES

ALAC ELDORET

P.O BOX 842 - 30100
NCCK offices: West Market - Kidiwa
TEL: +254 53 2033100
Mobile: 0704899887
Email: alaceldoret@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

ALAC WESTERN

Nyalenda Railways Estate-along
Nairobi Road Opposite YMCA
Building block 9/220
Mobile: 0716900227
Email: alacwestern@tikenya.org

ALAC NAIROBI

Kindaruma Road, Off Ring Road, Kilimani
Gate No. 713; Suite No. 4
P.O Box 198 - 00100, Nairobi
TEL: +254 20 3864230, 0701471575
Email: alacnairobi@tikenya.org

CALL OUR FREE ANTI-CORRUPTION

HELPLINE 0800-720-721 or SMS 40019

To get assistance on corruption related cases