

THE CURRENT CHALLENGES IN ENFORCING THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT (ACECA)

Brief history

- Corruption in Kenya has been a challenge since colonial times. Official attempts to fight corruption can be traced back to 1956
- In 1956, the Prevention of Corruption Act, chapter 65 of the Laws of Kenya, was passed by the British colonial authorities in an effort to provide a legal framework for combating public corruption.
- It provided for the punishment of bribery involving holders of public office. However there was little compliance with this law in the post-colonial period.
- The Act was amended in 1991 to provide stiffer penalties for those convicted of corruption.
- In 1993, the Government established the **Police Anti-Corruption Squad** in the police force to spearhead the fight against corruption. This was disbanded in 1995.
- In 1997, the Prevention of Corruption Act was amended to establish the **Kenya Anti-Corruption Authority (KACA)**.

- KACA was disbanded in the year 2000 after it was declared unconstitutional by the High Court. This decision was on the basis, among others, that the powers of KACA to prosecute went against Section 26 of the then Constitution which had then preserved powers of prosecution on the Attorney General.
- After the disbandment of KACA, the **Anti-Corruption Police Unit** was formed as an administrative organ to continue the fight against corruption.
- In December 2002, a new government (NARC) was voted into power, and one of its main pledges was to address the runaway corruption which had existed under the previous regimes.
- Among the initiatives the government put in place was enactment of new laws to establish a legal and institutional anti-corruption framework.
- The key laws enacted under the new regime was the **Anti-Corruption and Economic Crimes Act, 2003** which established the Kenya Anti-Corruption Commission (KACC) as the main legal body with the mandate to fight corruption in Kenya. The Act came into effect in May 2003.

- The speedy enactment of the legislation, the establishment of an anti-corruption department within the government (under the Permanent Secretary/ Presidential Advisor, **Ethics and Governance**) and Kenya being the first country to sign and ratify the United Nations Convention against Corruption (UNCAC) in December 2003, were all cited as evidence of renewed commitment to the fight against corruption.
- Apart from establishing KACC, the **Act provided for the various offences of corruption, the investigation and penalties for such offences**. It also established the special magistrates to preside over corruption cases.
- In August 2010, a new constitution was promulgated in Kenya, which made far reaching changes on governance, leadership, integrity in the anti-corruption regime.
- Article 79 of the Constitution required Parliament to enact legislation to establish **an independent body** to ensure compliance with and enforcement of Chapter Six of the Constitution.

- Pursuant to this Article, Parliament enacted the **Ethics and Anti-Corruption Commission Act, No. 22 of 2011** which came into effect on 5th September 2011.
- The Act amended the **Anti-Corruption and Economic Crimes Act** (ACECA) by repealing the provisions establishing **Kenya Anti-Corruption Commission** and its **Advisory Board**, while retaining all other provisions relating to corruption offences and economic crimes, their investigation and prosecution.
- Being the successor institution to the Kenya Anti-Corruption Commission, the Ethics and Anti-Corruption Commission is mandated to implement the provisions of the Anti-Corruption and Economic Crimes Act.

What the EACC does

1. preventing corruption
2. investigating allegations of corruption and economic crimes
3. asset recovery
4. public education

Prevention of corruption

The EACC is mandated by the ACECA to provide technical and advisory services to both public and private sector organizations on preventing corruption and to educate the public on the damages of corruption and economic crime

Investigations

- Although the Commission is often publicly criticised for the lack of progress on prosecutions, its mandate actually gives it the responsibility for investigating corruption and economic crime.
- Prosecution falls under the DPP's office. Therefore an assessment of KACC's performance should fairly focus on how well it conducts investigations. However, EACC only provides global figures on investigated cases.

Public Education

- The public education function of Anti-Corruption Agencies (ACAs) often comes under criticism. Given the intractability of progress on investigations and prosecutions, the temptation to focus on the easier option of engaging in a multiplicity of outreach activities of unclear impact under the guise of educating the public is high.

- Typically, these will be radio jingles, billboards, signs, etc to sensitize people on the dangers of corruption.

Recovery of Proceeds of Crime

- There have been a number of highly publicised attempts to recover proceeds of economic crime (mainly corruption), mainly targeting locally-held assets including land.
- There have also been efforts to address the repatriation of assets held in foreign countries. The EACC claims that it has filed several civil suits for the recovery of proceeds of corruption, valued at more than Sh15 billion. The Commission declares a large measure of success in the recovery of illegally/irregularly-acquired public land in several parts of the country, including land that belonged to local authorities and other public institutions.
- However, the recovered land is a small proportion of the total identified by the Ndung'u Commission.
- Locally, two high profile inquiries, both based on Commissions of Inquiry, stand out: the **Goldenberg and Ndung'u Commissions of Inquiry** attempted to establish the facts surrounding two of the Kenya's grand corruption problems.

- The former probed the early 1990s financial scandal where up to U\$ 1 billion worth of public resources were stolen while the second probed the irregular allocation of land, largely for political patronage.
- KACC Attempted Recovery of Assets under the Goldenberg Inquiry
Evidence given before the Goldenberg Inquiry identified Yaya Centre, an iconic shopping mall in uptown Nairobi, with proceeds of the Goldenberg scandal.
- Without waiting for the Commission of Inquiry to complete its hearings, the KACC commenced proceedings in the High Court for the recovery of the property on the basis that it was the proceeds of economic crime. The case failed on a legal technicality.

Recovery of Assets under the Ndung'u Inquiry

- In its report, the Ndung'u Inquiry provided a list of illegally-acquired titles and recommended that the government repossesses these .
- Soon after the release of the Ndung'u Report, the KACC issued a notice that those who held illegal titles to land and did not take steps to surrender these would be prosecuted.

National Anti corruption Laws in Kenya

- the Anti-Corruption and Economic Crimes Act, No 3 of 2003(ACECA)
- Public Officer Ethics Act, No 4 of 2003 (POEA).
- Public Procurement and Disposal Act was passed, 2005,
- the Proceeds of Crime and Anti-money Laundering Act in 2009,
- Ethics and Anticorruption Commission Act (EACCA)
- Leadership and Integrity Act after promulgation of the Constitution of Kenya 2010.
- It is amazing the number of legislations in place to curb corruption and yet, corruption still remains arguably the greatest challenge to Kenya's social economic development in Kenya.
- The Anti-Corruption and Economic Crimes Act, was intended to be the substantive anti-corruption legislation and sought to implement the United Nations Convention Against Corruption.
- The anti-corruption legal regime is however shared across several pieces of legislation in significant quantities save for the Ethics and Anti-corruption Commission Act This state of affairs makes the anti-corruption legal environment too complex not only for the public but also for enforcement agencies and legal practitioners.

- Is the Anti-Corruption and Economic Crimes Act therefore, a sufficient substantive anti-corruption law?
- What are its weaknesses and is there need for consolidation of all the substance in the anti-corruption legislations

THE CHALLENGES

1 Meaning of *corruption*

- The Anti-Corruption and Economic Crimes Act explains corruption by setting out what constitutes corruption.
- Section 2 of the Act lays out the general parameters of what constitutes corruption to include:
 - Bribery
 - Abuse of Office
 - Fraud
 - Embezzlement or misappropriation of public funds
 - Breach of trust
 - An offence involving dishonesty- in relation to taxes, or

- under any written law relating to elections of persons to public office.
- The offences under section 39-44, 46 and 47A of the Act are:
 - Bribery involving Agents
 - Secret inducements for advice
 - Deceiving the principal
 - Conflicts of interest
 - Improper benefits to trustees for appointment
 - Bid rigging
 - Dealing with suspect property.
 - Attempts and Conspiracies
- They are considered below in greater detail :

(a) Bribery

- Bribery occurs when a person dishonestly gives or receives a benefit as an inducement or reward for doing or omitting to do what one is already under duty to do or omit to do.

Illustration:

*Mr Askari is a **Traffic Police Officer**. Some of his responsibilities involve keeping general good order on the roads by ensuring that drivers obey traffic rules. Hatari is a matatu driver plying one of the city routes. Hatari's vehicle is in urgent need of repairs. The tyres are worn out, the headlights and indicators do not work and the exhaust pipe produces a lot of smoke amongst other things. The vehicle is not only a danger to Hatari and the passengers he ferries, but to other road users as well.*

Askari, with other police officers, has mounted a road block on the route that Hatari uses. He regularly stops Hatari at the roadblock and makes half-hearted attempts to warn him of grave consequences if Hatari does not remove his vehicle from the road. Hatari's response is usually to hand over his driving license with some money

inside for Askari. Askari then waves the vehicle by and takes no further action.

Askari commits the offence of receiving a bribe while Hatari commits the offence of offering a bribe.

(b) Fraud

- This refers to a situation where a person intentionally makes a false statement or manipulates information in order to confer a benefit to oneself or other person(s) through dishonesty, deceit or trickery.

Illustration:

Atieno and Omari are public officers in one of the government departments. They work as Procurement Officer and Accountant respectively. They have come up with a plan to enrich themselves. Atieno will usually claim to buy certain goods for the department. In actual fact, these goods are never purchased. Omari then approves payment for these goods despite knowing that they were never bought. *He also manipulates the department's accounting books to ensure that*

their plan is not discovered. The money received from the department for these imaginary goods is shared between Atieno and Omari. This plan has been in place for the past two months.

Atieno and Omari commit fraud.

(c) Embezzlement or Misappropriation of Public Funds

Embezzlement refers to the dishonest acquisition and conversion of public funds or resources to one's use. Misappropriation, on the other hand, is the misallocation or wrongful use by a public officer of public funds placed under his/her care.

Illustration:

Ben is a Chief Executive Officer of one of the parastatals in the country. About two months ago, he decided to put up a huge and expensive family home in one of the high-class residential areas in Nairobi. Unable to meet the cost of building the house from his personal funds, Ben decides to use some of the parastatal's money for the project. He feels secure in his job

and hopes to quietly repay this money to the parastatal over the next three years.

Further, in a bid to meet his other urgent financial commitments, Ben has made many trips locally and abroad, supposedly for official business, using public funds meant for media and publicity, but in reality the purpose was for getting large cash advances (imprest). He has been unable to properly account for these imprests.

Ben embezzles public funds when he uses some of the parastatal's money to put up a family home. He misappropriates funds when he uses public funds meant for media and publicity for unjustified trips.

(d) Breach of Trust

The public service is a public trust. Authority assigned to a public officer must be exercised in a manner that promotes integrity and the best interest of the people. Public service must also demonstrate respect for the people and **bring dignity** and **honour** to the public office. Members of the

public expect public officer to render selfless service based solely on the public interest. This demonstrated by honesty in the execution of public duties, accountability to the public in decision making, discipline and commitment in service to the people. Therefore, a public officer should do his or her best to discharge these duties in line with the Constitution. When a public officer does anything that is contrary to these expectations, he or she commits a breach of trust.

Illustration:

Kamau is a senior officer in the Ministry of Lands and Housing. He is involved in a programme where the government is disposing off a number of its houses which it does not need. Part of his duties under the programme is to ensure that all applications made meet the set criteria, one of which is that the applicant must be a civil servant. In the course of performing his duties, Kamau receives an application from Zainabu, who is a senior employee of a local bank. Kamau and Zainabu are close friends. Kamau passes the application and fast tracks it

through the remaining processes, including an erroneous certification that Zainabu has paid the set price for the particular house applied for. In the process, the government loses revenue expected to have accrued from the sale.

Kamau has breached the trust bestowed upon him by virtue of his public office, and therefore commits an offence.

(e) An Offence involving Dishonesty in relation to Taxes

This occurs when a person denies the government revenue by evading or assisting someone to evade payment of any taxes and levies due to the government.

Illustration:

Patel is in the export and import business. He is based in Mombasa. He brings into the country three (3) container loads of motor vehicle spare parts. At the port of entry he declares that the containers have rice in transit to Uganda. Behind the scenes, Patel has "seen" Otoyoy, a Revenue Officer, who is meant to ensure that these goods transit to Uganda through

Malaba. Otoyó assures Patel that for some KSh. 100,000, he will have the documents endorsed that the three containers have transited to Uganda when in fact they do not leave the country and are sold locally. Had the goods been declared for local use, they would have attracted duty of KShs 5 Million.

1. Patel commits the offence of fraudulently failing to pay tax.
2. Otoyó is guilty of the offence of Abuse of Office.
3. Otoyó is also guilty of the offence of Breach of Trust.

(f) An Offence involving Dishonesty under any Written Law relating to Elections of Persons to Public Office.

A person commits this offence when he/she does anything that causes an election not to be free and fair. There are many ways he/she could do so; for example, printing of fake voters' register or ballots, giving false information so as to be registered as a voter, destroying ballot papers or boxes or voters' cards without good reason, preventing a person from voting without good reason or any of the other offences provided for in the Elections Act, 2011.

Illustration:

Andrew has recently been appointed a Polling Clerk for elections of the MCA of Usijali Ward. Among the candidates running for election is Andrew's cousin and very good friend Jimmy. It is clear that Jimmy is unlikely to win, as he is not popular. Jimmy approaches Andrew with a request for assistance in order to win. During the election, which is by secret ballot, Andrew advises unsuspecting voters who he thinks are likely to vote for candidates other than Jimmy to mark their ballots in such a manner that they must be declared "spoilt" votes. As a result, Jimmy is elected as the councillor of Usijali Ward.

Andrew and Jimmy commit the offence of dishonesty relating to elections of persons to public office contrary to the Elections Act, 2011.

2. Elements of unconstitutionality in ACECA

(a) **Section 26** of the Anti-Corruption and Economic Crimes Act, gives the Ethics and Anti-Corruption Commission powers to requires a person suspected of corruption or an economic crime to furnish, within a reasonable time specified in the notice, a written statement of the suspect's property detailing how the same were acquired failure to which the suspect will be guilty of an offence punishable with a fine of Ksh.300, 000 or 3 years in jail or both.

- As if that is not enough the Act under section 30 further confirms that the information obtained in this manner can be used in evidence by the prosecution against the person.
- This is against the principles of natural justice and contrary to the Constitution of Kenya.
- The **right to a fair** hearing is one of the basic principles of **natural justice**. Part of the tenets of fair hearing is for an accused to know the case which is made against him.

- He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them and defend himself.
- Whoever is to adjudicate must not hear evidence or receive representations from **one side** behind the back of the other.
- Under Article 50 of the Constitution of Kenya fair hearing include the right to refuse to give self-incriminating evidence.

(b) Further, **section 26** is inconsistent with the provisions of article 31 of the Constitution which provides for the right to privacy.

It states; ``Every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed''.

(c)The burden and incident of proof

- The Act also provides for recovery of unexplained assets from a person suspected to have been involved in a corrupt conduct.

- **Section 55 (2)** requires that a person to explain the disproportion of his property that may have been identified by the Ethics and Anti-Corruption Commission in the course of its investigation. The burden of proof is always on the person who alleges and the commission should be able to prove that the assets that they label **unexplained** were actually obtained through means that would actually amount to an act of corruption or economic crime. However the section has the effect of shifting the burden of proof to the suspected person which is against the basic principles of law that *'he who alleges must prove'*
- Acquiring the suspect's property under this principle would therefore amount to arbitrarily denying the person his right to own property which would be unconstitutional. This section can and has been abused where individuals have been targeted. The problem is compounded by the modern banked particularly electronic transfers.
- This section obviously goes against the constitutional *presumption of innocence*.
- Section 55 of the Anti-Corruption and Economic Crimes Act is therefore inconsistent with the Constitution and hence can be challenged under the constitution.

- In fact this provision has been taken up to the Court of Appeal in the case of **KACC vs Stanley Mombi Amuti (2011) eKLR** after the High Court (Rawal J) had found as a fact that the section 55 offended Articles 24 and 25 the Constitution.
- Thirdly, the provisions of section 58 of the act are even more draconian. It states that where the accused person is proved to have done that act, the person shall be presumed to have done that act corruptly unless the contrary is proved. This commonly referred to as the *presumption of corruption*.
- The conventional principle of law of presumption of innocence till proved guilty is negated to presumption of guilt, and then the accused person is required to prove otherwise.
- Presumption of innocence is a fundamental element of the right to a fair trial.
- Right to a fair trial is one of the **inalienable** (non derogable) rights under the Constitution of Kenya. These are absolute rights which together with the right to life, freedom from torture, slavery and servitude can never be taken away. Article 25 of the constitution lists

the rights that shall not be limited under whatever circumstance and this includes the right to a fair trial.

- Due to the Presumption of Innocence, a person cannot be compelled to confess guilt or give evidence against himself or herself.
- It is still for the state to produce evidence of guilt, not for the defendant to prove innocence. In general, therefore, a suspect's silence should not be used as evidence of guilt in a court of law. Because of the serious consequences of conviction, the state must prove guilt to a high standard 'beyond reasonable doubt'. If doubt remains, the accused must be given the benefit of the doubt and should be acquitted.

3. Corporate criminal liability

- Unlike in other jurisdictions, the Anti-Corruption and Economic Crimes Act imposed liability only on natural persons and lacked the element of corporate liability that is a vital part of anti-corruption enforcement in other jurisdictions.
- This lack of an effective anti-corruption law regarding corporate criminal liability has created compliance difficulties for both domestic

and international companies operating in Kenya, given the potential for corruption in private and public sector transactions.

- Significantly, the anti-corruption law should establish civil liability of entities for the bribery of public officials. As noted above, under the current law only individuals can be prosecuted for corruption. A new anti-corruption law therefore would therefore impose judicial and administrative sanctions on corporate entities that engage in corruption while doing business in Kenya, and should apply to both Kenyan and non-Kenyan officials.

4. Challenges in the Recovery of Assets

Judicial and Legal Hurdles

- The Judiciary presents significant challenges to the KACC in the discharge of its work, with significant, unwarranted delays, often caused by the defendants' legal teams in cases filed by the KACC, being one of the obvious challenges.
- Regarding rulings, the courts have held that the KACC cannot seek or obtain orders freezing assets suspected to be proceeds of corruption, without first filing a suit in court. This decision has eliminated the element of surprise and urgency, on which freezing powers greatly depend for effectiveness.
- The courts have further stopped investigations into some Anglo Leasing scandal, declaring that to allow such investigation would be a

breach of the contracts between the government and the various Anglo Leasing companies, which also had the approval of the AG.

- Courts have also outlawed attempts by the KACC/EACC to seek mutual legal assistance abroad, declaring that only the Attorney General can seek mutual legal assistance.

5. Challenges in International Cooperation

- A significant drawback in EACC attempts to conduct investigations abroad was lack of cooperation by a large number of the foreign authorities whose help is required.
- While the UN Convention Against Corruption requires signatories lend one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings under the relevant domestic laws, there still appear to be some gaps in achieving this.
- The Commission/competent authority(DPP) experiences significant delays in processing requests for mutual legal assistance by some foreign authorities.
- Some foreign agencies that ought to help have internal constraints of their own including budgetary limitations.

6. Political Challenges

- It was expected that anti-corruption measures particularly the recovery of assets held abroad, would mainly be used in relation to old scandals like Goldenberg, as successive governments have also found themselves entangled in the same web.
- Asset recovery, initially conceived as a necessity for dealing with old scandals, was now the primary means of addressing the Anglo Leasing scandal.

- Further, the controversial court decisions that have had the effect of setting back the anti-corruption drive have been most evident in relation to the Anglo leasing cases.
- Not surprisingly, this has given rise to public suspicion that the courts have come under political pressure to make these inexplicable decisions.

7. OTHER CHALLENGES FACING EACC AND ENFORCEMENT OF ACECA

Lack of universal support

- The Commission (whether KACC or EACC) has never enjoyed universal public support. Initial problems arose from the difficulties experienced when establishing the KACC, with sections of the public failing to support the leadership of the Commission.
- The appointment process of directors became the subject of controversy between Parliament, the President and the leadership of the EACC.
- Further, failure to ensure accountability in the Anglo Leasing scandal has partly been seen as a manifestation of the lack of independence on the part of EACC, further eroding public confidence
- Poor Public Perception and Low Credibility Perceptions are an important part of public credibility in anti-corruption.

Legal Constraints

- In 2007, amendments to ACECA saw the introduction of a new subsection which in effect significantly curtailed the then KACC'S investigative process.

- Through the Miscellaneous Amendment Statute 2007, a new Section (Section 25A) was introduced which became known as the 'Amnesty Clause'.
- The Section gives power to the Minister, AG and KACC Director to determine whether to terminate or continue investigations on cases already instituted.

Judicial Challenges

- Aside from the ***judicial challenges*** presented earlier relating to the recovery of assets of corruption, the ***Judiciary*** presents a profound challenge in the enforcement of anti-corruption laws generally.
- The Commission has found itself on the receiving end of adverse judicial interpretation of its powers.
- The first assault on the Commission was the Judiciary's interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65) with respect to offences committed before the ACECA came into force is still varied and the courts have not settled the law on the matter.
- Although Section 42(k) of Limitations of Actions Act was introduced, it could not help the Commission in cases which were already before the courts before it was enacted.
- The court held in Nairobi High Court Petition No. 199 and 200 of 2007 ***Deepak Kamani vs. AG*** and Another that citizens have freedom of movement and therefore Section 31 of ACECA is null and void as it impeded the citizen's right movement and was therefore inconsistent with Section 81 of the then Constitution of Kenya.

Constitutional References

- KACC has often cited the multiplicity of constitutional references filed by corruption suspects as a hindrance to its work.
- In its view, Constitutional Courts, which should be the courts of last reference, are often misused by corruption suspects to delay and ultimately subvert justice.

Conclusion

- In consideration of the above, there is need to amend the Anti-Corruption and Economic Crimes Act to enable it to conform to the Constitution, include other relevant provisions relating to corporate liability and other best practices.
- The Anti-Corruption and Economic Crimes Act ought to be amended so as to consolidate the Laws relating to the Anti- Corruption agenda. Currently, Anti-corruption laws are scattered in a number of statutes making it difficult to enforce and leading to possible conflict of laws as.

- While the the Ethics and Anti-Corruption Commission simply sets up the institutional framework, it leaves the legal framework to be determined by separate pieces of legislation stated above, such as the Leadership and Integrity Act, the Anti-Corruption and Economic crimes Act as well as the Public Officer Ethics Act just to name but a few. The consolidation here may mean the enactment of a new comprehensive and coordinated legal framework.

THE PROSECUTORS' INTERNATIONAL TOOL KIT

The United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators is part of a larger package of materials intended to provide information and resource materials for countries developing and implementing anti-corruption strategies at all levels, as well as for other elements of civil society with an interest in combating corruption. The package consists of the following major elements.

The United Nations Guide for Anti-Corruption Policies which contains a general outline of the nature and scope of the problem of

corruption and a description of the major elements of anti-corruption policies, suitable for use by political officials and senior policy-makers.

The general United Nations Anti-Corruption Toolkit, which contains a detailed set of specific Tools intended for use by officials called upon to elaborate elements of a national anti-corruption strategy and to assemble these into an overall strategic framework, as well as by officials called upon to develop and implement each specific element. More toolkits are currently being tailor-made for judges, civil society and prosecutors in requesting countries to address their specific needs.

The Compendium of International Legal Instruments on Corruption, in which all the major relevant global and regional international treaties, agreements, resolutions and other instruments are compiled for reference purposes. These include both legally binding obligations and some so-called "soft-law" (or normative) instruments intended to serve as non-binding standards.

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