



TRANSPARENCY  
INTERNATIONAL  
KENYA



# Rubber Meets the Road:

AN ASSESSMENT ON THE IMPACT OF  
ANTI-CORRUPTION LAWS AND INSTITUTIONS  
OF KENYA

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AND INSTITUTIONS OF KENYA**

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

**Author:** Transparency International Kenya.

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## **ABBREVIATIONS/ ACRONYMS**

ACECA - Anti-Corruption and Economic Crimes Act

ARA – Asset Recovery Agency

DCI – Directorate of Criminal Investigations

EACC - Ethics and Anti-Corruption Commission

FATF – Financial Action Task Force

FGDs - Focus Group Discussions

FRC – Financial Reporting Centre

JF – Judiciary Fund

KAM - Kenya Association of Manufacturers

KEPSA – Kenya Private Sector Alliance

KIIs - Key Informant Interviews

NCCK – National Council of Churches of Kenya

NIA – National Integrity Alliance

NYS – National Youth Service

ODPP - Office of the Director of Public Prosecutions

PCA – Prevention of Corruption Act

PFA – Public Finance Act

PLS – Post Legislative Scrutiny

POCAMLA – Proceeds of Crime and Anti-Money Laundering Act

PPADA – Public Procurement and Asset Disposal Act

PPARB – Public Procurement Administrative Review Board

PPRA – Public Procurement Regulatory Authority

TI-Kenya - Transparency International Kenya

UNCAC – United Nations Convention Against Corruption

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## **EXECUTIVE SUMMARY**

This report examines the effectiveness of Kenya's anti-corruption framework, focusing on the impact of key laws—such as the Ethics and Anti-Corruption Act, ACECA, Anti-bribery Act, and the Leadership and Integrity Act—and the capacity of institutions tasked with implementing these laws. The study also explores the influence of ethics and values in combating corruption, with attention to the role of non-state actors, including civil society organizations like Transparency International Kenya in supporting anti-corruption efforts.

The study adopted both quantitative and qualitative research methodologies with the view of estimating the effectiveness of anti-corruption activities. It included relevant statutes and institutional reports, cross-sectional studies, focus group discussions, transection studies, and key informant interviews. A Post-Legislative Scrutiny (PLS) assessed the working and usefulness of anti-corruption laws.

The study highlighted good anti-corruption laws but reported weak enforcement because of loopholes and delays in implementation. Challenges that affect some of the recommended institutions included, inadequate resources, poor cooperation between institutions, similar mandates, and low public confidence in public institutions; however, civil society and faith-based organisations are a major partner in the fight for ethical leadership.

Recommendations included legislative amendments to eliminate legal deficiencies and adherence to international best practices, increased financing and cooperation for critical organizations, embedding of ethical education in training curricula, and collaboration with non-state stakeholders for creation of ethical awareness. In the same regard, an active engagement of citizens through adopting open government principles was also highlighted with a view of enhancing accountability and eradicating corruption.

These recommendations offer a clear and coherent strategy to tackle corruption, a complex phenomenon that policymakers foresee in conjunction with a legal,



institutional and societal change toward the enhancement of transparent governance. Furthermore, through the identification of these areas, this report confirms that corruption in Kenya cannot be fought using a single approach, including and beyond legal reform, institutional strengthening, and the culture of ethics and integrity.

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## CHAPTER 1

### 1.1 Introduction

Transparency International Kenya (TI-Kenya) was formed in 1999 as a not-for-profit organization with the objective of undertaking anti-corruption campaigns, that seek to transform Kenya into a corruption-free Nation. As part of the global Transparency International movement, TI-Kenya works to uphold its vision of a corruption-free world by focusing on three strategic result areas: Citizen Demand and Oversight, Natural Resources and Climate Governance, and Public Finance Management. This research work therefore embodies TI-Kenya's fight against corruption and nurturing of ethical leadership. This mission is further relevant in the current Kenyan society where systematic corruption pervades almost all sectors and undermines economic growth. In addition to combating corruption threats in the country, TI-Kenya aims at developing a sustainable solution targeting changes in culture and legal frameworks in the long run through leadership, improving public awareness of different crucial issues, and promoting necessary reforms.

### 1.2 Background

Corruption has remained endemic in Kenya for many years and has impacted governance, citizens' trust and socio-economic progress. Despite a firm legal framework to address corruption – namely, the Ethics and Anti-Corruption Act, Anti-Corruption and Economic Crimes Act (ACECA), and Anti-Bribery Act among other laws — corruption persists. Some of the challenges include weak enforcement procedures, insufficient financial means for the combating the vice, and social acceptance of corruption. Civil society and faith-based organizations have sought to fill the gap left by government but there is still room for improvement if corruption is to be fought effectively.

This report reviews the narrative of fighting and managing corrupt practices in Kenya through an exploration of the key literature on the subject. Corruption pervades many areas of society and has been identified as one of the most important issues in governance, eradicating confidence in action, and development. The vice has become endemic calling for formation of strong legal systems and structures to address it. This explains the need to draw up a solution to deal not only with legal and institutional issues but also focus on ethos transformation and leadership. Therefore, with the challenges highlighted above, this study seeks to provide practical solutions that suit the Kenyan context.

### **1.3 Statement of the Problem**

Corruption has remained rife in Kenya although there is a well-developed legal framework as well as institutions laid down to address the issue. The lack of strong law enforcement agencies, the poor resourcing of combating institutions, and the deterioration of ethical standards undermine anti-corruption efforts. Complex graft cases, extended trials, acquittal without resolution of corruption cases lead to loss of public confidence in the justice system. Besides, corruption and low civic action due to acceptance of corruption coupled with limited political activism in society compound the problem. The aim of this research is to assess the existing anti-corruption framework in Kenya and determine the areas where there is a need for legal reforms and improving institutional arrangements that strengthen integrity.

Civil society organizations, faith-based groups, and private sector alliances bring unique resources and perspectives to the fight corruption, complementing the government's efforts. Collectively, these actors reinforce Kenya's legislative and institutional frameworks and work to foster an ethical culture that discourages corrupt practices. This collaboration of state and non-state actors is crucial to addressing the complex and pervasive nature of corruption in Kenya.



## 1.4 Purpose and Objectives

This report therefore seeks to evaluate the progress made in Kenya's fight against corruption by examining the adequacy of the legal instruments and institutions. This report aims at establishing an understanding of the current challenges and provides targeted recommendations on the fight against corruption in Kenya.

The specific objectives are:

- **Evaluate the Effectiveness of Anti-Corruption Laws:** Conduct legal research on important pieces of legislation which include the Ethics and Anti-Corruption Act and ACECA to assess their effectiveness to fight corruption and to determine where improvements can be made. This entails the measuring of compliance, regulation, and more critically, the operating experiences of these laws.
- **Assess Institutional Capacity:** Compare and contrast the policy mandate and operationalization, resource management and partnerships among anti-corruption organizations. This objective will help improve the effectiveness of identified institutional strengths and weaknesses.
- **Examine the Role of Ethics and Values:** Find out how Ethics and Moral Leadership shape practices within the public and private domains. This encompasses identifying what civil society, faith-based organizations and private sectors can do in creating ethical culture.
- **Provide Actionable Recommendations:** Provide tangible recommendations as to how to improve the legislative base, encourage institutional development and create a culture of non-corruption in Kenya. Basically, all these recommendations are targeted at establishing change in the system and the institution of ethical practices within all the population stratum.

## 1.5 Scope of Work

This report focuses on three critical aspects essential to understanding Kenya's anti-corruption efforts: Legislative Review, Institutional Framework, Institutional Capacity Assessment, and the role of **Ethics** and Values in the fight against corruption. This scope provides a holistic perspective on the strengths, challenges, and opportunities in combating corruption in Kenya. Some areas focused on within the Legislative Review include the evaluation of the implementation and effectiveness of primary anti-corruption legislation, performance comparison of essential legislation against international trends, and identification of missing or insufficient legislation. The ICA examines the authorities, assets, and cooperate structures of such institutions. Lastly, The Ethics & Values Review looks at the importance of ethical leadership and self and other regulations to change people's thinking and actions towards corrupt practices. These parts constitute what can be described as a packaged system of dealing with corruption in Kenya.

## 1.6 Legislative Review

This report examines Kenya's key anti-corruption laws, including the Ethics and Anti-Corruption Act, Anti-Corruption and Economic Crimes Act (ACECA), Anti-bribery Act, and Leadership and Integrity Act, to assess their effectiveness and impact. While these laws are comprehensive, their practical implementation and enforcement often face significant challenges. The ineffectiveness and impracticality of such laws often impact the public perception, confidence and the institutional capacity of the various agencies and institutions tasked with leading the fighting against corruption.

The legislative review focuses on:

- a) **Implementation and Enforcement:** Evaluating the extent to which these laws are effectively enforced by responsible agencies and their impact in reducing corruption in both public and private sectors.
- b) **Gaps and Overlaps:** Identifying any ambiguities, inconsistencies, or overlaps in the legal framework that may create loopholes or hinder effective enforcement. For example, some laws might not adequately address modern forms of corruption, such as digital fraud and cross-border money laundering.
- c) **Alignment with Global Standards:** Assessing how Kenya's laws compare to international frameworks like the United Nations Convention Against Corruption (UNCAC) and determining areas where harmonization may be required.
- d) **Recommendations:** Where applicable, the report provides various recommendations on possible sections of amendments to ensure effectiveness of enforcement and enhance impact of law enforcement.



## CHAPTER 2

### 2.0 Methodology

#### 2.1 Study Design

The study encompassed a mixed methodology entailing both quantitative and qualitative approaches. This design included both secondary and primary data collection methods. The secondary data collection methods had comprehensive desk reviews while the primary data collection approaches included qualitative and quantitative data collection methods.

#### 2.2 Target Population

Target population comprised of important stakeholders in the fight against corruption in Kenya. Such stakeholders included representatives of public servants, civil society organizations, faith-based organizations and businesspeople. Institutions of interest were the; Ethics and Anti-Corruption Commission (EACC), Judiciary, Office of the Director of Public Prosecutions (ODPP), and civil society organization networks.

#### 2.3 Sampling Technique

Purposive sampling method was adopted in this study so as to capture individuals who have adequate information and experience in the fight against corruption. This approach facilitated the collection of comprehensive data from key stakeholders in and impacted on by anti-corruption practices. Out of all sampling types purposive sampling was adopted to ensure that all the participants under study had first-hand experience in matters concerning the study such as policy makers, enforcement officers and community leaders. Through purposive sampling of participants that include those involved in anti-corruption crusade or otherwise, the study received rich understanding and responses. This approach helped to provide additional quality and richer insights into the topics related to combating corruption measures.

## **2.4 Data Collection Instruments and Procedures**

### **2.4.1 Quantitative Data Collection**

Self-developed structured questionnaires were distributed to a random sample of stakeholders with suitable qualitative and quantitative data regarding views on corruption, anti-corruption laws and the performance of the institutions in question.

### **2.4.2 Qualitative Data Collection**

- i. Focus Group Discussions (FGDs): These five were conducted with members of the communities and participation from CSOs the purpose being to capture their experiences with corruption. Participants shared lived experiences of corruption and its impact, fostering a collaborative environment to exchange insights.
- ii. Key Informant Interviews (KIs): Semi structured interviews were conducted with heads of anti-corruption institutions, leaders of faith-based organizations and private entities to get detailed and local information. These interviews provided detailed, localized information and expert opinions, enriching the study with diverse perspectives on corruption and anti-corruption initiatives. This mixed-methods approach enhanced the study's ability to gather robust and multidimensional data.

### **2.4.3 Desktop Literature Review**

The Consultant conducted a detailed review of the following statutes and documents:

- The Leadership and Integrity Act, No. 19 of 2012.
- The Public Officer Ethics Act, No. 4 of 2003.
- The Anti-Corruption and Economic Crimes Act, No. 3 of 2003.
- The Anti-Bribery Act, No. 47 of 2016
- National Cohesion and Integration Act, No. 12 of 2008.

- Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009
- Sessional Paper No. 2 of 2018 National Ethics and Anti-Corruption Policy.
- The Public Finance Management Act, 2012
- Public Procurement and Asset Disposal Act, 2015
- Public Procurement and Asset Disposal Regulations, 2020
- The Public Audit Act, 2015

In reviewing the laws, a Post Legislative Scrutiny (PLS) approach was adopted, which as defined by Westminster Foundation for Democracy (WFD) is the practice of monitoring the implementation and evaluating the Impact of laws. The aim of this was to be sure that enacted laws benefit the citizens exactly the way originally intended by parliamentarians. This approach enabled the engagement of Parliamentary Committees responsible for the oversight of various laws with a view of effecting the necessary changes to suit the circumstances.

The PLS had two broad dimensions i.e. broad legislative review; the purpose of which was to evaluate whether and to what extent one or more pieces of legislation has achieved its intended purpose, and what is its impact. The other is a narrower evaluation of how a piece of legislation is working in practice. This primarily concerns legal and technical review of legislation under the inquiry. Conceptual definition in summary;

(a) The enactment of the law, whether the legal provisions of the law have been brought into force; focuses for example on: -

- Have all secondary legislation/Regulations/Guidelines been issued?
- Is the law compatible with the constitution, other laws, and international commitments?
- Are there Court rulings or legal proceedings related to the law?
- Has the implementing agency been established, or mandated to implement the law?
- Have relevant target groups been notified of the law?

(b) The impact of legislation; focuses for example on: -

- Have intended policy objectives been met?
- Can implementation and delivery be improved?
- Can lessons be learnt, and best practices identified?

Consequently, the review was largely guided by the two dimensions of PLS as elaborated above.

Other relevant reports and documents to support the review include;

- i. Attorney General's Taskforce Report, 2015
- ii. The Kenya Integrity Plan- 2019 to 2023
- iii. Audit reports for the last 10 years
- iv. Key institution's Strategic Plans and Annual Reports
- v. Controller of Budget reports
- vi. Perception surveys conducted by various organisations over the years on corruption
- vii. Key Court decisions on corruption in Kenya
- viii. Other relevant opinion pieces

## CHAPTER 3

### 3.0 LEGISLATIVE IMPACT ASSESSMENT OF SPECIFIC LAWS

#### 3.1 The Leadership & Integrity Act, 2012

##### **Background: Foundation, Scope and Institutional Framework of the Act**

Kenya has ratified several international instruments to ensure that public officers observe standards of ethical behaviour, accountability, and transparency to foster trust in public service. The Constitution of Kenya (CoK),<sup>1</sup> states that the general rules of international law shall form part of the laws of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya. Consequently, the Leadership and Integrity Act, in Kenya incorporates obligations outlined by international anti-corruption treaties that Kenya is a signatory to, particularly the **African Union Convention on Preventing and Combating Corruption (AUCPCC)** and the **United Nations Convention against Corruption (UNCAC)**. Both treaties set global and regional standards for fighting corruption, promoting integrity, and ensuring accountability in public office.

##### **The Leadership and Integrity Act as a Constitutional mandate.**

Chapter six of the Constitution of Kenya gives general provisions for leadership and integrity in Kenya. The CoK lays down the leadership responsibilities which encompass the authority the state officers have and how to administer that authority.<sup>2</sup> It describes this authority that state officers have, as a public trust that they need to exercise in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honour to the nation and dignity to the office, and promotes public confidence in the integrity

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<sup>1</sup> Article 2(5) & (6), Constitution of Kenya, 2010

<sup>2</sup> Article 73, The Constitution of Kenya, 2010

of the office. It also emphasizes that state officers have the responsibility to serve the people and not the power to rule them.

Additionally, the CoK prescribes the guiding principles for leadership and integrity.<sup>3</sup> Firstly, leaders are to be selected based on personal integrity, competence and suitability, or election in free and fair elections. Secondly, leaders must make decisions impartially and objectively and not in a manner that promotes nepotism, favouritism, other improper motives or corrupt practices. It also stipulates that leaders must offer selfless service based solely on the public interest, demonstrated by honesty in the execution of public duties and the declaration of any personal interest that may conflict with public duties. Finally, leaders must be accountable to the people for their decisions and actions and maintain discipline and commitment in service to the people.

The CoK also mandates state officers to take oaths before assuming office and behave in a manner that avoids any conflict between personal interests and public or official duties. They are also to avoid any behaviour compromising any public or official interest in favour of a personal interest; or demeaning the office the officer holds. This extends to their conduct whether in public and official life, in private life, or in association with other people. In the case of a gift or donation to a state officer, the Constitution stipulates that they belong to the Republic and shall be delivered to the State unless exempted under an Act of Parliament.

The CoK provides further restrictions.<sup>4</sup> This article bars a full-time State officer from participating in any other gainful employment. Further, an appointed State officer must not hold office in a political party. Retired State officers receiving a pension from public funds are also barred from holding more than two concurrent remunerative positions as chairperson, director or employee of a company owned or controlled by the State, or a State Organ. It is provided that they must

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<sup>3</sup> Ibid

<sup>4</sup> Article 77, The Constitution of Kenya, 2010

not receive remuneration from public funds other than the pension they receive from public funds.

Conclusively, the CoK mandates the National Assembly to enact legislation that promotes the administration of Chapter Six of the CoK and the principles of leadership and integrity provided therein.<sup>5</sup> As a result, the Leadership and Integrity Act 2012 was enacted to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution.

Therefore, the main purpose of the Leadership and Integrity Act 2012 is to ensure that State officers respect the values, principles and requirements of the Constitution including:

- The national values and principles provided for under **Article 10** of the CoK.
- The rights and fundamental freedoms provided under **Chapter Four** of the CoK.
- The responsibilities of leadership provided for under **Article 73** of the CoK.
- The principles governing the conduct of State officers as provided for under **Article 75** of the CoK.
- The educational, ethical and moral requirements in accordance with **Articles 99(1)(b) and 193(1)(b)** of the CoK.
- In the case of county governments, the objectives of devolution as provided for under **Article 174** of the CoK.
- The values and principles of Public Service as provided for under **Article 232** of the CoK.

### **Substantive provisions of the Act.**

The Leadership and Integrity Act, 2012, adopts a value-based approach to ensure the realization of the right to leadership and integrity as outlined in Chapter

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<sup>5</sup> Article 80, The Constitution of Kenya, 2010



Six of the Kenyan Constitution.<sup>6</sup> It delineates the obligation of state officers to uphold and embody principles of leadership and integrity in public service, which includes upholding high standards of honesty, transparency, accountability, and respect for public resources. This is to be achieved by establishing and enforcing necessary policies, laws, and mechanisms to promote ethical behaviour in public office, fostering a culture of transparency, and supporting initiatives aimed at preventing corruption and promoting accountability across all levels of government.

Section 5 of the Act sets out the standard for the realization of the right to leadership and integrity by emphasizing the progressive enhancement of integrity, trustworthiness, and ethical conduct among state officers. It mandates public officers to avoid actions that would bring dishonour to their office, such as engaging in corrupt practices, abusing power, or misusing public resources. Additionally, the Act outlines specific ethical expectations for state officers, including avoiding conflicts of interest, refraining from conduct that demeans public office, and making accurate disclosures of personal interests and assets.

The Act further provides for disciplinary measures under Section 7 to ensure that state officers who violate these ethical standards are held accountable. This includes the duty of relevant bodies to investigate breaches of integrity and pursue disciplinary action where appropriate, fostering a preventive and corrective approach to unethical behaviour. Failure to adhere to these standards can lead to removal from office, suspension, or other disciplinary measures, thereby reinforcing the principle of public trust in leadership roles.

Furthermore, the Act emphasizes the need for transparency and accountability through measures that include adherence to fair and transparent procurement processes, and avoidance of nepotism or favouritism in decision-making. It

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<sup>7</sup> Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR Criminal Revision 25 of 2019

recognizes the doctrine of public trust; whereby state officers are stewards of public resources and must act in a manner that promotes the public good rather than personal gain.

In line with international practices, the Leadership and Integrity Act, 2012, also includes provisions for continuous monitoring and assessment of compliance among state officers, thereby contributing to Kenya's commitment to ethical governance and adherence to constitutional standards for leadership.

### **Institutional Framework**

The Act assigns a central enforcement role to the Ethics and Anti-Corruption Commission (EACC) which is mandated to oversee the implementation of the Act and to ensure state officers uphold the integrity standards outlined in Chapter Six of the CoK. The EACC is empowered with a range of functions to enable effective compliance, including the authority to enlist support from other public institutions, mandate compliance, and, if necessary, seek judicial intervention. If a public entity fails to comply, the EACC has recourse to judicial intervention by applying to the High Court for orders compelling compliance. Additionally, the EACC may delegate certain powers and functions to public entities or authorized officers by notice in the Gazette, thus extending its reach and enabling local enforcement within various jurisdictions.

### **Subsidiary legislation**

To effectively implement the Act, the Leadership and Integrity Regulations 2015, the General Leadership and Integrity Code and the various leadership and integrity codes have been developed by public entities.

## **Extent of Implementation: Compliance and Enforcement**

The Leadership and Integrity Act of 2012 implemented the values and principles established in Chapter Six of the Kenyan Constitution as pertains to leadership ethics standards. Public officers face the dual purpose of upholding ethics while becoming accountable and reducing corruption rates through this law. Recent progress under the Act enhances governmental transparency yet the effectiveness of lowering corruption constitutes a multi-faceted evaluation that demands examination.

Through its establishment of transparency and accountability measures the Act successfully promotes corruption reduction. Public officials who must report their wealth and outline their financial conflicts of interest create a system to warn off dishonest conduct. Monitoring functions and restrictions against unexplained wealth accumulation form part of these mechanisms. Through its implementation of a code of conduct the law sets defined ethical boundaries which have decreased official misconduct across government institutions.

Through Act authority, the Ethics and Anti-Corruption Commission (EACC) improved monitoring effectiveness by conducting investigations and initiating disciplinary measures while proposing prosecutions. Due to the law's enforcement strong corruption cases involving prominent public officials have emerged ultimately promoting more accountable governance.

The Act spreads effects beyond direct consequences that create equal importance. The EACC has made important strides in raising public knowledge about how integrity functions as a cornerstone of governance. Through these awareness campaigns, more people have learned to report unethical behaviour which has developed civic interest among residents. Through legal pressure, the Act forces public institutions to restructure their functions according to established ethical benchmarks. Through compliance enforcement, the Act helped establish ethical governance standards throughout multiple sectors.

## Notable Case Law on Implementation

### **a) *Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR*<sup>7</sup>.**

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

Justice Mumbi J. in upholding the decision to bar Governor Lenolkulal from accessing his office stated that, '*Suspension of a public or state officer who has been charged with corruption is not a violation of rights and is in accord with the constitutional provisions in Chapter Six requiring integrity from public and state officers*'.<sup>8</sup>

The effect of the ruling by Justice Mumbi Ngugi in the Lenolkulal case is that: Article 181 of the Constitution can no longer be used as a shield by state and public officers to continue serving in office with pay and accessing their offices while undergoing prosecution for corruption, economic crimes and other charges as this negates the objects and purposes of Chapter 6 of the Constitution of Kenya 2010<sup>9</sup>.

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<sup>7</sup> Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR Criminal Revision 25 of 2019

<sup>8</sup> The Court was of the view that Section 62 of the Anti-Corruption and Economic Crimes Act must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in Chapter 6 of the Constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted, the full benefits are restored. If the person is convicted, then the suspension merges into a penalty.

<sup>9</sup> <https://tikenya.org/wp-content/uploads/2023/05/T.I.K-The-Verdictanalysis-of-interpretation-of-chapter-six-by-kenyan-Courts-21012020-1.pdf>

### **b) Mike Sonko Mbuvi Petition No. 11 (E008) OF 2022 SCORK**

The Petition was an Appeal against the Judgment and Decree of the High Court of Kenya delivered on 24th June 2021 in Constitutional Petition No. E425 of 2020 (As consolidated with Constitutional Petition No. E014 of 2021).

Aggrieved by his impeachment, the appellant challenged the decision to impeach him in the High Court of Kenya at Nairobi on grounds that his rights to a fair trial and fair administrative action had been violated as he had not been given sufficient time to prepare his defence and that new evidence was tabled at the tail end of the proceedings and on grounds that there was lack of public participation in the impeachment process. The High Court dismissed the petition on all grounds leading to the appeal at the Court of Appeal which upheld the position of the High Court and consequently, he appealed to the Supreme Court.

When dismissing the Appeal, the Supreme Court held:

*It bears mentioning in conclusion that Chapter Six of the Constitution was not enacted in vain or for cosmetic reasons. The authority assigned to a State officer is a public trust to be exercised in a manner that demonstrates respect for Petition 11 (E008) of 2022 the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the State officer the responsibility to serve the people, rather than the power to rule them<sup>10</sup>.*

### **c) Mohamed Abdi Olge v Abdullahi Diriye, Ethics and Anti-Corruption Commission, Speaker of the National Assembly & Attorney General of the Republic of Kenya<sup>11</sup>**

The petitioner filed a petition against the first Respondent, a member of the National Assembly, alleging violations of the Leadership and Integrity Act and

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<sup>10</sup> Sonko v Clerk, County Assembly of Nairobi City & 11 others, eKLR

<sup>12</sup> [2021] KEELRC 204 (KLR)

Chapter Six of the Kenyan Constitution. The petitioner claimed that on 27th March 2014, the first Respondent obstructed security officers at Jomo Kenyatta International Airport, insulted them, and trespassed into a restricted area during a routine security check. He was later charged, pleaded guilty, and fined Ksh. 50,000, with the alternative of serving six months in jail for each of two counts.

The petitioner sought orders to declare the first Respondent in violation of Chapter Six of the Constitution, direct the Ethics and Anti-Corruption Commission (second Respondent) to investigate him, and require the National Assembly (third Respondent) to take disciplinary action.

The court held that it had jurisdiction to hear the petition, as the existence of a conviction by a competent court did not preclude its involvement, despite the provisions of the Leadership and Integrity Act and the Ethics and Anti-Corruption Commission's role in investigating such matters. The court found that there was no clear provision ousting its jurisdiction, particularly since the conviction was not under appeal, and the public entity's investigation powers were not applicable. However, the court declined to address whether the first Respondent should vacate his parliamentary seat under Articles 103 and 99 of the Constitution, as the parties had not raised or sought specific orders under those provisions.

The court also held that the first Respondent violated the provisions of Chapter Six of the Constitution, specifically Article 75(1)(c), which requires state officers to avoid conduct that demeans the office they hold. The court found the first Respondent's conviction for obstructing security officers and trespassing at the airport as conclusive evidence of such a violation. The petition was partially allowed, with the court issuing a declaration that the first Respondent violated constitutional and legal integrity provisions. However, the court declined to issue orders for parliamentary disciplinary action or further investigations, as those matters fell outside its jurisdiction or had not been specifically requested. The court also ordered the first and second Respondents to pay the petitioner's costs.

*Ben Murumbi Sihanya & Orange Democratic Movement v Ethics and Anti-Corruption Commission, Registrar of Political Parties & University of Nairobi (Interested Parties)*<sup>12</sup>

The petition involves the 1st petitioner, a professor at the University of Nairobi, who was appointed Chairperson of ODM & Disciplinary Committee. The Ethics and Anti-Corruption Commission (EACC) wrote to him claiming his dual roles as a public officer (professor) and a political party official violated Article 77(2) of the Constitution, which prohibits public officers from holding political party positions, and other relevant laws. The 1st petitioner argued that his position in ODM was non-political, as he was an independent arbiter, and he was not a state officer. He also contended that his constitutional rights to political participation and freedom of association were being violated. The EACC disagreed, stating the 1st petitioner was in breach of the law and gave him 14 days to resign, or the University of Nairobi would be required to act.

The petitioners sought a declaration that the 1st petitioner's appointment did not violate the Constitution, and that the EACC's actions were unjustified. One of the main issues for determination was whether the 1st petitioner violated Article 77(2) and other laws by holding a position in ODM while being a public officer. The petitioners wanted a court declaration that the 1st petitioner's appointment does not contravene the Constitution and that the EACC's demand for resignation was unlawful.

The court found that the 1st petitioner is a professor at the University of Nairobi, a public university, and therefore qualifies as a public officer because his salary is paid from public funds. As a public officer, the 1st petitioner is prohibited from holding office in a political party under the Political Parties Act and the Leadership and Integrity Act. The University of Nairobi is a state corporation under Article

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<sup>12</sup> [2021] KEELRC 204 (KLR)



232(2)(b) of the Constitution, meaning the values of public service apply to the petitioner's role.<sup>13 14</sup>

## **Gaps and inconsistencies in the Legal Framework**

Although commendable strides have been made through the legislation many crucial aspects of its complete realization are hampered by legal streamlining issues. Enforcement mechanisms represent a primary challenge that needs improvement due to their suboptimal performance. The Act contains disciplinary enforcement provisions for cases of integrity breaches yet inconsistent implementation practices combined with prolonged investigation delays erode the law's preventive effectiveness.

The Act faces implementation difficulties because it contains substantial overlaps along with unclear provisions. The legal frameworks of these anti-corruption statutes sometimes overlap leading to conflicting provisions which produce unclear operating boundaries for each legislation. The legal framework faces limitations because critical terms such as "conflict of interest" maintain ambiguity which makes enforcement difficult and weakens the existing framework.

Another problem emerges because of the Act's narrow reach. Most state officials fall under the Act's direct scrutiny but numerous powerful public officials operate free from its coverage boundaries. The Act's regulations offer less protection at the county level because accountability systems in these areas function weaker than national standards to increase corruption likelihood. The public entities who hold power can abuse their position through illegal practices to avoid accountability obligations by manipulating legal exceptions. The matter

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<sup>13</sup> While a public officer can express political opinions, holding an office in a political party (such as the Chairperson of ODM's Disciplinary Committee) is seen as a conflict of interest and compromises the neutrality expected of public officers. The EACC's directive that the 1st petitioner must choose between his role as a university professor and his role in ODM was lawful, fair, and justified as the law prohibits public officers from holding political party positions. Therefore, the petition was dismissed with no order as to costs. The court found the actions of the respondent (EACC) were in accordance with the law.

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demands severe scrutiny because it weakens the operational independence of important institutions including the EACC creating performance limitations.

The response to dangerous or retaliatory actions by whistle-blowers demonstrates why proper legal protections need immediate establishment. The EACC's ability to conduct thorough audits and maintain compliance monitoring is severely restricted because of scant resources and limited personnel capabilities.

### **3.2 The Public Finance Management Act Cap. 412a**

#### **Background: Foundation, Scope and Institutional Framework of the Act**

Parliament enacted the Public Finance Management Act (the “**PFM Act**”) in 2012. The Act sets out its objectives as ensuring that public finances at the national and county levels are managed in accordance with the principles set out in the CoK and that public officers vested with the responsibility of managing public finances are accountable to the public through Parliament and County Assemblies for the management of those public finances.<sup>15</sup>

These objectives are mainly derived from Part I of Chapter 12 of the CoK, which provides for the Principles and Framework of Public Finance. Under Article 201, the CoK lays down the principles guiding all aspects of public finance as openness, accountability and public participation in financial matters; the promotion of an equitable society through the equitable sharing of national revenue, fair sharing of the burden of taxation and the promotion of equitable development in the country with special provision for the marginalised; the equitable sharing of the burden and benefits of the use of resources and public borrowing between present and future generations; the use of public money in a

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<sup>15</sup> Section 3, The Public Finance Management Act, Cap. 412A of the Laws of Kenya

prudent and responsible way; responsible financial management and clear fiscal reporting.<sup>16</sup>

### **Delineation of Powers between the National and County Governments**

The powers of the National Government with respect to the management of public finances are delineated under PART III of the PFM Act. These include the power to enact the national budget in accordance with the procedure under Section 35, draft the Finance Bill setting out the National Government's revenue-raising measures, manage public debt through measures such as the formulation of strategies for the management of public debt and to issue securities for money borrowed by it or for any other purpose in accordance with the PFM Act. The powers of the Government are exercised through the institutions established under this Part including the National Treasury, the Office of the Registrar of National Government securities and the Public Debt Management Office.

On the other hand, the powers of the County Government with respect to the management of public finances are delineated under PART IV of the PFM Act. These functions are to some extent similar to those of the National Government but limited to each specific county government's territorial jurisdiction. The powers include the making of the county budget, formulation of strategies to manage county debt and drafting county finance bills setting out the revenue-raising measures for the county government. These powers are exercised through county government institutions established under this Part including County Treasuries.

While the National and County Governments are allocated separate powers under the PFM Act, the institutions can collaborate on matters of public finance management through the Intergovernmental Budget and Economic Council

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<sup>16</sup> The Constitution of Kenya 2010

whose establishment and purpose are discussed in the institutional framework under the PFM Act.

### **Institutional Framework Under the PFM Act**

The PFM Act establishes several institutions while delineating their functions and scope of authority in matters relating to the management of public finance as follows:

- **The National Treasury;** its established as an entity of the National Government headed by the Cabinet Secretary responsible for finance under<sup>17</sup>. Its main functions include, the formulation, monitoring and implementation of macro-economic policies involving expenditure and revenue, managing the level and composition of public debt, formulating, evaluating and promoting economic and financial policies that facilitate social and economic development in conjunction with other national government entities, mobilizing domestic and external resources for financing national and county government budgetary requirements, promoting transparency, effective management and accountability with regard to public finances in the national government, monitoring the management of the finances of public enterprises and investments by the national government and its entities and monitoring the financial performance of state corporations.<sup>18</sup>
- **The Office of the Registrar of National Government Securities;** the office's main mandate is to establish and maintain the Register of the National Government Securities in which the details of all securities issued by or on behalf of the national government are recorded.
- **The Public Debt Management Office;** The office is established to minimize the cost of public debt management and borrowing over the long-term taking

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<sup>17</sup> Section 11 of the PFM Act.

<sup>18</sup> Ibid. Sec 12.

account of risk, promoting the development of the market institutions for Government debt securities and ensuring the sharing of the benefits and costs of public debt between the current and future generations<sup>19</sup>.

- **County Treasuries;** they comprise of the County Executive Committee member for finance, the Chief Officer and the department or departments of the County Treasury responsible for financial and fiscal matters. The general responsibilities of the County Treasuries include developing and implementing financial and economic policies in the county, preparing the annual budget for the county, coordinating the preparation of estimates of revenue and expenditure of the county government, coordinating the implementation of the budget of the county government and ensuring proper management and control of, and accounting for the finances of the county government and its entities to promote efficient and effective use of the county's budgetary resources.<sup>20</sup> They are also responsible for the enforcement of fiscal responsibility principles in the counties under Section the Act, the preparation of the county fiscal strategy paper, the preparation of the county budget review and outlook paper under, maintenance of a record of county government loans, submission of the county government debt management strategy to the county assembly , providing reports to the county assembly and the preparation and submission of a consolidated report summarizing the extent of county government involvement or investment in, or funding of, all county corporations and county government-linked corporations.
- **The Intergovernmental Budget and Economic Council;** The purpose of the council is to provide a forum for consultation and cooperation between the national government and county governments on the various matters enumerated under Section 187 (2), including the contents of the Budget Policy

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<sup>19</sup> Section. 62 of the PFM Act

<sup>20</sup> Ibid. Sec 104.

Statement, the Budget Review and Outlook Paper, the Medium-Term Debt Management Strategy, matters relating to budgeting, the economy, financial management and integrated development at the national and county level, matters relating to borrowing and the framework for national government loan guarantees, criteria for guarantees and eligibility for guarantees and the proposed regulations under the PFM Act. The council is required to meet at least twice a year at such a time and place as its chairperson shall determine.

- **The Public Sector Accounting Standards Board;** The functions of the Board are provided for under Section 194 of the PFM Act as providing frameworks and setting standards for accounting and financial systems used by all State organs and public entities.
- **The Cabinet Secretary Responsible for Matters of Finance;** the Cabinet Secretary responsible for matters finance has several responsibilities under the Act. These include the administration of the contingencies fund in accordance with Section 20 of the Act, reporting to Parliament on all loans made to the national government under Section 31 of the Act, reporting on all guarantees given by the national government as per Section 32 of the Act, submitting an annual debt management strategy to Parliament under Section 33 of the Act and managing the budget process at the national level as per Section 36 of the Act.

### **Policy and legislative developments developed under the PMF Act<sup>21</sup>**

Under the Act several policy and legislative instruments have been developed which include;

- i. Public Finance (Kenya Millennium Development Fund) Regulations, 2024,

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<sup>21</sup> Public Finance Management Act <<https://new.kenyalaw.org/akn/ke/act/2012/18/eng@2024-04-26>> accessed 14<sup>th</sup> November 2024

- ii. The Public Finance Management (Wildlife Conservation Trust Fund) Regulations, 2023,
- iii. The Public Finance Management (Ulinzi Prime Health Services Fund) Regulations, 2023,
- iv. The Public Finance Management (National Peace Support Operations Fund) Regulations, 2023,
- v. The Public Finance Management (National Peace Support Operations Fund) Regulations,
- vi. The Public Finance Management (Financial Inclusion Fund) Regulations and the Public Finance Management (Senate Monitoring and Evaluation) Regulations, 2016 among others to ensure the prudent use of state funds established under various Acts.

## **Extent of Implementation and Compliance**

The Public Finance Management Act (PFM Act) Cap. 412A received legislative approval in 2012 to establish standardized public resource management which upholds accountability and transparency throughout all financial operations according to Kenya's Constitution. The PFM Act serves three essential goals through its implementation by sustaining fiscal responsibility alongside improvements in financial management perceptions and optimal resource allocation and utilization.<sup>i22</sup>

Throughout Kenya the PFM Act results in reduced corruption levels because of its rigorous financial oversight system. The foundation of its successful implementation relies upon strong mechanisms which support budget preparation and implementation alongside comprehensive reporting processes. The law now requires organizations to disclose their budget plans along with

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<sup>22</sup> S. 27(2)(b) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya



spending reports which enables citizens to examine government financial activities.<sup>23</sup> The establishment of independent audits along with inclusion of oversight institutions comprised of the Controller of Budget and Auditor-General has strongly improved accountability measures. The combination of regulatory measures achieved smarter resource handling and blocked opportunities for financial dishonesty.

Through public involvement in budget creation and approval the Act gives ordinary citizens tools to monitor and enforce accountability from their leaders. Through consistent involvement of stakeholders during every phase of budget development the Act guarantees decisions made within budgets retain public focus and stay shielded from corrupt practices. Fiscal responsibility principles instituted through the Act have successfully reduced reckless financial operations which give rise to corruption risks.

#### **Notable Case Law on Enforcement and Implementation:**

***Senate v Council of County Governors & 6 others (Petition 24 & 27 of 2019 (Consolidated)) [2022] KESC 57 (KLR) (7 October 2022) (Judgment)***<sup>24</sup>

This case revolved around the limits of the powers of the Senate with respect to its parliamentary oversight role on matters of public finance management. On February 8, 2014, the Senate Committee on County Public Accounts and Investments summoned fifteen county governors to appear before it to answer questions on county financial management. Several county governors appeared before the Committee save for four who expressly declined to honour the summons.

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<sup>23</sup> Ibid

<sup>24</sup> [2022] KESC 57 (KLR)

The four governors instead filed a petition before the High Court challenging the summons. On April 16, 2014, the High Court found that the Senate was within its constitutional mandate to issue the summons. Consequently, the Senate issued fresh summons to the governors, requiring them to appear before the Committee on August 26, 2014. However, the four Governors declined to honour the summons despite the court orders, prompting the Senate to pass a resolution, in accordance with **Section 96 of the Public Finance Management Act (PFMA)**, recommending that the Cabinet Secretary Treasury halt the transfer of funds to the concerned county governments and the Controller of Budget withhold the approval of withdrawal of public funds by those county governments.

In its determination the Court held that Senate had powers to summon governors to answer questions on county public finance under **Section 8 of the PFM Act** which mandated the Senate to receive reports, examine the financial statements and documents as submitted to it, and thereafter take appropriate action including making recommendations on the accountable expenditure of public finances from the national revenue allocated to each County. The court reasoned that the Senate could summon governors to gather evidence or provide information in relation to the statements presented to the Senate.

On the issue of the constitutionality of the Senate's declaration, the Courts held that under **Section 96 of the PFM Act**, only the Cabinet Secretary responsible for matters of finance could issue a declaration stopping the flow of funds to a county government entity. The Court further provided that the Senate did not have the authority to direct the Cabinet Secretary to issue such a declaration.

### ***Okoiti & another v National Treasury & 2 others***<sup>25</sup>

In this case, the Petitioners challenged the constitutionality of the National Budget for the financial year 2021/2022 for the reason that the Kenya Shillings 3.6 trillion

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<sup>25</sup> [2023] KEHC 22367 (KLR)

national budget deviated from the Budget Policy Statement ceiling approved by Parliament by Kenya Shillings 608.85 Billion. Accordingly, the Petitioners sought a declaration that the Budget Policy Statement is the estimated limit within which a budget must be set, and anything outside the limit is illegal and void and that the Kenya Shillings 3.6 trillion National Budget was unconstitutional for deviating from the Budget Policy Statement.

In its analysis, the Court found that under **Section 26 of the PFM Act**, the Cabinet Secretary responsible for trade is required to prepare a Budget Policy Statement and table it for approval by parliament. The court also considered the provisions of **Regulation 27 of the Public Finance (National Government) Regulations, 2015**, which provide that the Budget Policy Statement serves as the basis of expenditure ceilings specified in the fiscal framework once adopted by Parliament and that the National Treasury must include a statement explaining any deviations from the Budget Policy Framework in the National Budget.

In the present case, the Respondents adduced evidence that the deviation from the Budget Policy Statement had been explained in accordance with **Regulation 27 (6) of the National Government Regulations** and that the explanation was duly considered and adopted by Parliament. In light of the above circumstances, the court determined that the petitioners had complied with the PMF Act and dismissed the petition.

### **Gaps and inconsistencies in the Legal Framework**

Unfortunately, the PFM Act encounters different problems and uncoordinated aspects that prevent comprehensive implementation. The primary obstacle in financial management arises from the inconsistent coordination of national institutions with county levels.<sup>26</sup> Regions with mismatched capacities and funding distributions face inefficient operations resulting in irregular budget usages most

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<sup>26</sup> S.27(2)(d) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

often appearing in county government allocations. Service delivery suffers from poor performance because the Act does not enforce timely budgetary processes effectively although it sets clear procedural deadlines.

Sanctions for financial misconduct face weak implementation enforcement according to another major problem. Despite the Act specifying penalties there has been inconsistent enforcement because politicians frequently protect those who break the rules. The inability to establish effective fund recovery procedures diminishes the preventive power of the Act.<sup>27</sup> Monitoring and evaluation frameworks contain insufficient oversight that enables shady practices to persist throughout both procurement procedures and project execution thus continuing corruption.

A necessary solution requires building stronger PFM Act execution and enforcement capabilities. The capacity of oversight institutions must be strengthened so they can execute detailed audits and investigation tasks. Training and resource allocation to county governments should reduce capacity shortfalls while enhancing actual resource management practices.<sup>28</sup> The unification of financial management techniques throughout different levels of government will lead to both increased efficiency and improved accountability.

Sanction enforcement procedures for financial misconduct need immediate improvement because current approaches are insufficient. An independent oversight body responsible for recovering misappropriated funds while verifying Act compliance will increase its deterrent value. Bolder consequences for financial misconduct breaches including elevated penalty fines together with extended prison sentences will emphasize to the public that financial accountability is crucial.<sup>29</sup>

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<sup>27</sup> Ibid

<sup>28</sup> S.27(2)(d) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

<sup>29</sup> Ibid

The PFM Act depends on public participation as its essential building block. The implementation of extensive civic education programs for budgetary understanding and citizen oversight responsibilities will enhance public participation in financial oversight. Tangible measures for reporting financial wrongdoings and protection mechanisms for whistle-blowers will increase public involvement in fighting corruption.

The adoption of technological solutions creates huge potential to enhance both transparency rates and operational efficiency. Digital platforms that track budget allocations plus procurement processes and project implementation provide expanded information access to the public and lower corruption risks. Real-time open data policies providing public access to financial records would give citizens and oversight bodies the power to keep public officials accountable.

In conclusion, the PFM Act, Cap. 412A, has laid a strong foundation for prudent financial management in Kenya. However, addressing its gaps and inconsistencies is critical to realizing its full potential. By implementing targeted reforms, Kenya can enhance the Act's effectiveness in combating corruption, promoting transparency, and ensuring the equitable use of public resources.

### **3.3 The Public Officers Ethics Act, Cap. 185b**

#### **Background: Foundation, Scope and Institutional Framework of the Act**

The Public Officer Ethics Act in Kenya is supported by various **Articles in international instruments** that promote anti-corruption, transparency, accountability, and ethical conduct in public service.

The Constitution of Kenya 2010 provides a solid foundation for the Public Officer Ethics Act, ensuring that principles of integrity, transparency, and accountability

guide public service in Kenya. Key constitutional provisions that support the objectives of this Act include Chapter Six, Article 10, Article 232, and Chapter Thirteen.

The Public Officer Ethics Act establishes the standards of conduct for public officers in Kenya, emphasizing integrity, accountability, and transparency in public service. Section 3 of the Act requires public officers to adhere to the principles of public service as outlined in the Constitution, which includes objectivity, professionalism, and impartiality in serving the people of Kenya. The Act mandates all public officers perform their duties with utmost integrity and respect for the rule of law, acting in the public interest rather than for personal gain.

The Act also requires public officers to declare their personal interests where such interests may conflict with their official duties.<sup>30</sup> The objective is to prevent conflicts of interest and ensure that public officers do not engage in activities that would compromise their objectivity in decision-making. The Act mandates the establishment of mechanisms to verify the accuracy of financial declarations to promote transparency and maintain public trust in the system.

The Act provides for the mandatory disclosure of financial information by public officers, including the sources of their income, assets, and liabilities.<sup>31</sup> This measure is meant to discourage corruption and foster a culture of accountability among public servants. By requiring periodic declarations, the Act aims to deter public officers from amassing unexplained wealth and sets the foundation for holding officers accountable for their financial status throughout their service period.

## **Institutional framework**

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<sup>30</sup> Section 4, Public Officers Ethics Act CAP. 185B

<sup>31</sup> Section 5. Ibid

The institutional framework of the Public Officer Ethics Act is structured around several key bodies, primarily various commissions with specific roles, mandates, and responsibilities aimed at implementing the Act's provisions. The term "Commission" under this Act encompasses any commission, committee, or similar body that has functions assigned to it according to section 3 of the Act. These bodies enforce ethical standards and ensure accountability among public officers across different sectors.

The Public Officer Ethics Act also establishes specific commissions, each tasked with oversight and disciplinary roles for designated categories of public officers. These commissions, known as "responsible Commissions," are assigned based on the nature of the public officer's position and the area of disciplinary control. Each commission is responsible for enforcing ethical standards, managing declarations of assets and liabilities, and overseeing the officers' conduct under its purview.

The **Committee of the National Assembly** serves as the responsible Commission for the highest officials, including members of the National Assembly, the President, the Speaker, the Attorney-General, members of the Electoral and Public Service Commissions, the Auditor-General, and key figures within the Kenya Anti-Corruption Commission. Its mandate includes enforcing ethical standards and managing compliance for these top-tier public officials. Similarly, the **Public Service Commission** oversees public officers under its disciplinary control, encompassing employees of state corporations and public bodies as defined by the Constitution. Its role is to ensure these officers meet prescribed ethical standards.

The **Judicial Service Commission** assumes responsibility for judicial officers, overseeing judges, magistrates, and other judiciary officers within its scope of disciplinary control. Its primary focus is on enforcing the Code of Conduct within the judiciary. The **Parliamentary Service Commission** exercises similar oversight for



parliamentary officers, ensuring they comply with conduct standards required for roles within the parliamentary structure.

It also has the authority to delegate its powers and functions under Part IV (declarations of income, assets, and liabilities) and Part V (enforcement of the Code of Conduct) to other individuals or bodies, provided that the delegation is published in the Gazette. This delegated body or individual will then act as the Commission responsible for the specified class of public officers. However, the PSC can only delegate responsibilities for public officers in job groups below job group "M" or its equivalent, limiting this delegation to lower-ranking officers. Meanwhile, the **Electoral Commission** provides ethical oversight for councillors in local governments, holding them accountable to public office standards.

Within the education sector, the **Teachers Service Commission** enforces ethical standards and discipline among registered teachers, as outlined in the Teachers Service Commission Act. The **Defence Council** manages ethical and conduct standards for members of the armed forces, ensuring compliance within defence services, while the **National Intelligence Service Council** assumes this role for officers in the National Intelligence Service. Additionally, the **Witness Protection Advisory Board** upholds ethical standards within the Witness Protection Agency to ensure integrity among those serving in witness protection.

In cases where a public officer is not explicitly covered by these commissions, a responsible body may be designated by regulation. Furthermore, even if a commission delegates its disciplinary powers, it retains overall responsibility for upholding ethical standards and monitoring compliance with the Code of Conduct among officers within its remit. This structured and targeted assignment of responsibilities allows each commission to monitor its sector effectively, promoting accountability and upholding ethical governance across diverse levels of public service.



Each Commission must establish a specific Code of Conduct and Ethics tailored to the public officers under its jurisdiction. This Code must include all elements of the general Code set out in Part III and may introduce additional requirements or clarify how to meet the standards. However, any requirement that would compromise the constitutional or legal independence of a public officer is invalid. Until a Commission enacts its specific Code, the general Code applies by default. Furthermore, each Commission is required to publish its specific Code in the Gazette within ninety days of the Act's commencement or the enactment of relevant regulations.

Every public officer is required to submit a declaration of their income, assets, and liabilities, as well as those of their spouse(s) and dependent children under 18, to the Commission responsible every two years. This declaration must follow the format specified in the Schedule and include all required details. A public officer who has submitted a declaration must promptly provide any written clarifications requested by the Commission within six months of the submission. These requests may include providing omitted information or explaining or correcting any discrepancies or inconsistencies in the declaration.

A declaration or clarification submitted under this Act can be accessed by any person who applies to the Commission responsible, provided they demonstrate a legitimate interest aligned with the Act's objectives. Before approving such access, the Commission must allow the affected party to provide input. However, information obtained this way cannot be published or publicly disclosed without the Commission's prior written authorization. Unauthorized disclosure or dissemination of such information is an offence punishable by up to five years of imprisonment, a fine of up to five hundred thousand shillings, or both.

A Commission is required to retain information collected under this Part about a person for at least five years after they are no longer a public officer.

Each Commission must develop and publish procedures in the Gazette for administering this Part of the Act concerning the public officers it oversees. These procedures must be established within ninety days after the Act's commencement. For Commissions designated later by regulation, this timeline begins from the regulation's start date. Public officers are not required to submit a declaration until these procedures are published.

The Commission responsible can investigate whether a public officer has violated the Code of Conduct and Ethics, either on its own initiative or in response to a complaint. It may refer cases to other appropriate bodies, which must investigate and report back within a reasonable time. Investigations can proceed even if the individual is no longer a public officer. If an investigation reveals that a public officer has breached the Code of Conduct and Ethics, the Commission responsible must take disciplinary action within 30 days or refer the case to an authority with the appropriate power. The Commission must notify the public officer of any action taken or intended within 30 days of the decision. Regulations may further specify appropriate disciplinary actions.

The Commission is required to publicly disclose any disciplinary action taken against a public officer for violating the Code of Conduct and Ethics. This disclosure must include a description of the violation, the circumstances and level of culpability, a summary of the evidence supporting the finding, and details of the disciplinary action imposed. If the matter was referred to another authority, the Commission must also disclose the recommended action and the actual outcome.

If an investigation reveals grounds for civil or criminal proceedings, the Commission must refer the matter to the Attorney-General or the relevant authority for further action.

The Cabinet Secretary may amend the Schedule to the Act by notice in the Gazette, but the amendment can only be made if a draft has been presented to and approved by the National Assembly through a resolution. The Cabinet Secretary also has the authority to create regulations to facilitate the effective implementation of the provisions of the Public Officer Ethics Act.

### **Extent of Implementation: Compliance and Enforcement**

To effectively implement the Act, the following Regulations and guidelines have been developed; Procedures for administration of Part IV of the Public Officers Ethics Act, Procedures for administration of Part IV of the Public Officers Ethics Act, The Witness Protection Agency Procedures for Administration of Part IV of the Public Officers Ethics Act, Procedures for administration of Part IV of the Public Officers Ethics Act, The Public Service Code of Conduct and Ethics, the Public Officer Ethics (Management, Verification and Access to Financial Declarations) Regulations, the Code of Conduct for the Members and Staff of the Ethics and Anti-Corruption Commission, Powers and Privileges Committee Procedures for the Administration of Part IV of the Public Officers Ethics Act and Public Service Commission Delegation of Powers and Functions under Parts IV and V of the Public Officer Ethics Act among others.

### **Notable Case Law on Enforcement and Implementation**

*HAO & CN v George Oduor*<sup>32</sup>

The Petitioners, parents of students at a secondary school in Kisumu County, filed a petition under various articles of the Kenyan Constitution, alleging unethical conduct by the school bursar (Respondent). They claimed that, after sending school fees via M-Pesa to the Respondent's account, the money was not credited to their children's accounts, nor did the Respondent issue receipts. This, they

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<sup>32</sup> [2016] KEHC 2833 (KLR)

argued, violated **Section 11 of the Public Officers Ethics Act** and constitutional principles of integrity, seeking a declaration that the Respondent is unfit for office.

The Respondent, on the other hand, contended that financial irregularities were being investigated by the Ethics and Anti-Corruption Commission and blamed these issues on the school principal, alleging that this petition was a tactic to intimidate him. The Respondent also argued he was not a public officer as per Article 260 of the CoK and asserted that the case should be handled through employment contract mechanisms rather than the courts.

The court held that the Respondent, a bursar at a public school, is considered a public officer under the Public Officers Ethics Act due to his employment by the school's Board of Governors, which manages a public entity that receives government funds. As such, he is subject to the ethical standards and regulations for public officers outlined in the Act and the Constitution.<sup>33</sup>

*Samuel Thinguri Warwathe v Mary N. Mungai, Commissioner for Co-operative, Independent Electoral and Boundaries & Attorney General*<sup>34</sup>

The Petitioner, who was serving as the Chairman of two cooperative societies, challenged a directive requiring cooperative leaders to resign from office if they intended to run for public office. The directive, issued by the Commissioner for Cooperative Development, was based on a circular that classified cooperative leaders as "public officers" and mandated their resignation six months before the 2017 general elections.

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<sup>33</sup> However, the court determined that the Petitioners did not follow the appropriate procedures available for addressing their grievances, such as reporting to the Board of Governors, the Ethics and Anti-Corruption Commission, or the police. Since these avenues were not exhausted, the court declined to grant the requested relief, which would have removed the Respondent from his position without due process, as required by Article 236 of the CoK. The petition was therefore dismissed, with costs awarded to the Respondent.

<sup>34</sup> [2017] KEHC 462 (KLR)

The Petitioner argued that as an official of a cooperative society, he should not be considered a public officer under Article 260 of the CoK, which defines public officers as individuals in national or county government offices funded by public money. He claimed that requiring him to resign violated his constitutional rights, as cooperative leaders do not meet the constitutional definition of public officers. He sought various declarations, including that the directive was unconstitutional and that cooperative society leaders should not be considered public officers.

The 1st Respondent, supported by the Public Officer Ethics Act, argued that cooperative leaders are indeed public officers and are therefore subject to resignation requirements under Section 43(5) of the Elections Act. However, the Independent Electoral and Boundaries Commission (IEBC), the 2nd Respondent, disagreed with this classification, asserting that cooperative leaders do not fall under the constitutional definition of public officers because their remuneration is not drawn from public funds.

The court held that leaders of cooperative societies are not considered public officers under Article 260 of the Constitution<sup>35</sup>.

### **3.4 The Public Audit Act, Cap 412. B**

#### **Background: Foundation, Scope and Institutional Framework of the Act**

The Public Audit Act, 2015(PAA) is a comprehensive legal framework designed to govern the auditing of public finances. It was enacted in 2015 to adhere to

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<sup>35</sup> The Court declared that Section 2 of the Public Officer Ethics Act, which includes cooperative society leaders within the definition of public officers, is inconsistent with the Constitution and therefore null and void to that extent. Consequently, the court ruled that the directive from the Commissioner for Cooperative Development, requiring cooperative society leaders to resign six months before running for office, is unconstitutional.

international obligations by virtue of Articles 2(5) and 2(6) of the Constitution<sup>36</sup> and as a Constitutional mandate.

## **The Act under International Obligations**

### **International Standards of Supreme Audit Institutions (ISSAIs)**

The International Organization of Supreme Audit Institutions (INTOSAI) is a global, non-governmental organization that consists of national and regional audit institutions.<sup>37</sup> These institutions are responsible for auditing government finances and operations, and their role is vital in promoting good governance and accountability. As a member of INTOSAI, Kenya adheres to the International Standards of Supreme Audit Institutions (ISSAIs), which are the guidelines and standards developed by INTOSAI to promote professionalism, transparency, and accountability in public sector auditing. As a result, Kenya enacted the PAA 2015.

These ISSAIs are organized into a series of categories to address different aspects of auditing.<sup>38</sup> These series are divided into several groups, each of which provides guidelines for different areas of public auditing.

### **Constitutional Basis of the Public Audit Act 2015**

The Constitution of Kenya, 2010, particularly in Chapter 12, which deals with public finance management, provides the key provisions that the Public Audit Act 2015 seeks to implement and enforce. These constitutional provisions are designed to ensure transparency, accountability, and the proper management of public resources. Specifically, Article 229 of the CoK establishes the office of the Auditor-General, which is central to the Public Audit Act. The Article provides that the Auditor-General is responsible for auditing and reporting on the accounts of all

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<sup>36</sup> Articles 2(5) and 2(6) of the Constitution of Kenya, 2010, which provide that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

<sup>39</sup> Article 229(4), The Constitution of Kenya, 2010

<sup>39</sup> Article 229(4), The Constitution of Kenya, 2010

government entities, including ministries, departments, and state corporations.<sup>39</sup> The findings of the audits are turned into reports which confirm whether public money has been applied lawfully and in an effective way.<sup>40</sup> It further stipulates that the Auditor-General submits these reports directly to Parliament or the relevant County Assembly to enhance transparency and accountability in public financial management.<sup>41</sup>

Further, Article 201 of the Constitution sets out the guiding principles of public finance management, which include transparency, accountability, and the effective use of public resources. Specifically, it mandates that public funds should be used in a manner that is transparent, accountable, and efficient and that public financial management should be consistent with the principles of good governance.<sup>42</sup>

Article 252 also outlines the mechanisms for oversight of state organs and public offices, including the OAG.<sup>43</sup> The article mandates independent offices to conduct oversight functions, such as audits and investigations, and report their findings to relevant authorities. Moreover, Article 253 guarantees the independence of commissions and independent offices, including the OAG.<sup>44</sup> This independence is vital for ensuring that audits are carried out impartially, without interference from the executive or other government organs. Additionally, Article 232 provides for guiding principles of Public Service which include the efficient and effective use of resources, accountability, transparency and high standards of professional ethics.<sup>45</sup> These values and principles form part of the guiding principles under the Act.<sup>46</sup>

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<sup>39</sup> Article 229(4), The Constitution of Kenya, 2010

<sup>40</sup> Article 229(6), The Constitution of Kenya, 2010

<sup>41</sup> Article 229(7) of The Constitution of Kenya, 2010

<sup>42</sup> Article 201 of The Constitution of Kenya, 2010

<sup>43</sup> The Constitution of Kenya, 2010

<sup>44</sup> The Constitution of Kenya, 2010

<sup>45</sup> The Constitution of Kenya, 2010

<sup>46</sup> s.3 of the Public Audit Act, 2015, CAP.412B, Laws of Kenya



Consequently, the PAA was enacted as the legal framework to establish the OAG and its functions and support and give effect to all these constitutional provisions designed to ensure that public finances are managed in the best interests of the Kenyan people.

### **Delineation of Powers between the County and National Government.**

The PAA provides a clear framework for the delineation of powers between the national and county governments in relation to the auditing of public finances.<sup>47</sup> It ensures that both levels of government are held accountable for the use of public resources while maintaining clear distinctions between their respective roles, responsibilities, and powers regarding audits.<sup>48</sup> Generally, the AG submits audit reports to Parliament and County Assemblies then they publish these reports on their respective official website within seven days.<sup>49</sup> The AG may also submit special reports to Parliament or the relevant County Assembly on any specific matter that comes to its attention.<sup>50</sup> Parliament or the County Assembly are to publicize such reports on their official website and any other public notice and must publish a notice in the Gazette to inform the public of the availability of the reports.<sup>51</sup>

Additionally, the AG submits the final audit reports to Parliament or the relevant county assembly, with copies to the Cabinet Secretary responsible for finance or the relevant County Executive Committee member for finance and the accounting office of the entity that is subject of the audit.<sup>52</sup> Within three months of receiving the audit report, Parliament or the relevant county assembly debates and considers the report and takes appropriate action.<sup>53</sup>

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<sup>47</sup> S.7, S.48 of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

<sup>48</sup> Section 7, S.48 of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

<sup>49</sup> Section 39. Ibid.

<sup>50</sup> Section 49. Ibid.

<sup>51</sup> Section 49(2) Ibid.

<sup>52</sup> Section 50(1). Ibid

<sup>53</sup> Section 50(2). Ibid

Consequently, the accounting officer of a state organ or public entity must then, within three months after the recommendations on the audit report, take the relevant steps to implement the recommendations of parliament or the County Assembly on the report of the AG; or give explanations in writing to the Parliament or the County Assembly on why the report has not been acted upon.<sup>54</sup> The accounting officer is held in contempt of Parliament or the relevant County Assembly if they fail to comply with the recommendations and Parliament or the relevant County Assembly may recommend administrative sanctions such as removal of the Accounting Officer, or reduction in rank among others.<sup>55</sup>

### **Extent of Implementation: Compliance and Enforcement**

The Public Audit Act, 2015 primarily establishes and reinforces the structure and authority of the OAG as an independent constitutional office responsible for auditing public funds and the Audit Advisory Board (AAB) to provide strategic oversight and guidance to the Auditor-General in carrying out the functions related to public audits. The Act also recognizes and interacts with several institutions in the public finance accountability framework. The Act explicitly establishes and operationalizes the OAG whose role is extensively defined throughout the Act.<sup>56</sup> Firstly, the OAG has the mandate to audit public accounts including the accounts of the national government, county governments, public entities, and other bodies funded by public money including loans, grants, and other external financing.<sup>57</sup> This includes auditing the financial statements of ministries, departments, county governments, and state corporations to ensure that public funds are used properly, efficiently, and transparently.

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<sup>54</sup> Section 53(1). Ibid

<sup>55</sup> Section 53(2). Ibid

<sup>56</sup> Section 4. Ibid.

<sup>57</sup> S.7, S.48(1) Ibid

Secondly, the Auditor-General is required to submit audit reports to Parliament, the County Assemblies, and other relevant authorities.<sup>58</sup> These audit reports highlight any financial irregularities, mismanagement, or breaches of public finance laws. The Auditor-General is also responsible for auditing county governments and their entities, then reporting findings to the respective County Assemblies.<sup>59</sup> This Ensures accountability and transparency at the county level, promoting good governance within the devolved system.

Further, the Auditor-General has the mandate to issue audit certificates to public entities confirming whether their financial statements are accurate, complete, and in compliance with accounting standards.<sup>60</sup> These audit certificates are given to entities indicating whether their financial statements have been prepared in accordance with IPSAS to ensure credibility of financial statements. Additionally, the Act authorizes the Auditor-General to conduct performance audits to assess the efficiency, effectiveness, and economy of public resource use.<sup>61</sup>

The Act also establishes the Audit Advisory Board (AAB) under Section 25 to advise the Auditor-General on the exercise of his or her powers and the performance of his or her functions under the Constitution and the Act.<sup>62</sup> This advice extends to the recruitment of senior managers into the Office of the Auditor-General<sup>63</sup>, the development and review of organizational development issues<sup>64</sup>, and the budget estimates and plans of the office of the Auditor-General.<sup>65</sup> The Board also advises the OAG on the remuneration and other terms of appointment of its staff in

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<sup>58</sup> S.39. Ibid

<sup>59</sup> S.32, s.48, s.7. Ibid

<sup>60</sup> S.31. Ibid

<sup>61</sup> S.36. Ibid

<sup>62</sup> S.27(1). Ibid

<sup>63</sup> S.27 (2)(a). Ibid

<sup>64</sup> s.27(2)(b) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

<sup>65</sup> S.27(2)(c) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

consultation with the Salaries and Remuneration Commission<sup>66</sup>, and any other matter that the Auditor-General may refer to the Board from time to time.<sup>67</sup>

The Act further interacts with existing institutions in Kenya's public finance framework to fulfil its objectives and aims. This includes the Ethics and Anti-Corruption Commission (EACC), the Police and the Public Procurement Oversight Authority. The Act provides that the Auditor-General should report any person, supplier or company involved in fraud or corrupt practice to these institutions.<sup>68</sup> Where the matter is referred to the Public Procurement Oversight Authority, the Auditor-General may make a recommendation for debarment from future public procurement and asset disposal proceedings of a state organ or public entity with a copy to the relevant accounting officer.<sup>69</sup>

The Act requires the Cabinet Secretary of Finance to establish any regulations necessary to implement the provisions of the Act. It also mandates the Auditor-General to come up with a code of ethics that aligns with the provisions of the Constitution and the Public Ethics Act, to govern the functions of the OAG. As a result, the Auditor-General Code of Ethics, Legal Notice 134 of 2003, [Revised by 24th Annual Supplement (Legal Notice 221 of 2023) on 31 December 2022] was adopted

### **Notable Case Law on Compliance and Enforcement**

There are several cases that demonstrate the enforcement of the provisions of the Public Audit Act:

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<sup>66</sup> S.27(2)(d) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

<sup>67</sup> S.27(2)(e) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

<sup>68</sup> S.64(1) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

<sup>69</sup> s.64(2) of the Public Audit Act, 2015, CAP.412B, Laws of Kenya

***Okiya Omtatah Okiiti v National Executive of the Republic of Kenya, Selection Panel for the appointment of the Auditor General & Attorney General; Katiba Institute (Interested Party).***<sup>70</sup> This case concerned the recruitment process for the position of Auditor-General in Kenya under the Constitution and the Public Audit Act, 2015. The Petitioner challenged the legality of the Selection Panel's decision to terminate the initial recruitment process and re-advertise the vacancy.

The Petitioner argued that the Selection Panel acted ultra vires by introducing extraneous qualifications, failing to recommend three names to the President, and not submitting a report of the interview proceedings to Parliament as required under **Section 11(5) of the Act**. Additionally, the Petitioner contended that the re-advertisement violated constitutional provisions on transparency, accountability, and the integrity of public service appointments.

The Court declared that the Selection Panel's failure to submit a report to Parliament violated **Section 11(5) of the Public Audit Act** and the constitutional principles of accountability and transparency. It also ruled that the Selection Panel lacked the legal capacity to re-advertise a vacant AG position. Consequently, the Court ordered the Selection Panel and the Attorney General to submit the interview report to Parliament and declared the re-advertised recruitment process invalid.

***Transparency International (TI Kenya) v Attorney General, Auditor General & Africa Centre for Open Governance (AFRICOG)***<sup>71</sup>

The case involved Transparency International Kenya (TI-Kenya) challenging the constitutionality of several provisions in the Public Audit Act, 2015. TI-Kenya filed the petition against the Attorney General, with the Auditor General, AFRICOG, and the National Assembly joining as interested parties. The petitioner argued that

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<sup>70</sup> [2020] KEELRC 1397 (KLR)

<sup>71</sup> [2018] KEHC 8951 (KLR)

the Act violated the constitutional independence of the Auditor General by subjecting the office to undue oversight by the Public Service Commission, limiting its access to certain records, and allowing the Cabinet Secretary for Finance to influence its functions. TI-Kenya also contended that the President overstepped his constitutional role during the legislative process by making significant amendments and suggestions, thus compromising the Act's legality.

The Court addressed two primary issues: **the constitutionality of specific provisions of the Public Audit Act** and whether the President's involvement in noting reservations on the Bill violated Article 115 of the Constitution. The Court emphasized a broad, purposive interpretation of the Constitution, reaffirming that statutes are presumed constitutional unless proven otherwise. The petitioner's challenge against the provisions that restricted the Auditor General's independence was based on concerns that they interfered with its constitutionally mandated autonomy.

The Court invalidated several sections, including those that subjected staffing decisions to the Public Service Commission, those that referred to the Auditor General as a "statutory head," instead of an independent office and those that limited access to vital documents, finding them unconstitutional as they compromised the office's independence<sup>72</sup>.

On the procedural issue of the President's reservations, the Court found that the President acted within his constitutional mandate under Article 115 by referring the Bill back to Parliament with reservations, which could include recommendations or suggested amendments.

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<sup>72</sup> The Court upheld provisions of the Act that were consistent with the Constitution, including those enabling the office's operational functions, like the positions of Senior Deputy Auditor General and other staff. However, provisions like **Section 12 of the Act**, which created the position of Acting Auditor General, were found unconstitutional as they conflicted with the constitutional requirement that only one Auditor General be appointed through a prescribed process. Additionally, the Court found that the Advisory Board's role in **Section 27** of the Act undermined the Auditor General's independence, ruling it unconstitutional

### 3.5 Public Procurement and Asset Disposal Act, 2015

#### Background: Foundation, Scope and Institutional Framework of the Act

The Public Procurement and Asset Disposal Act, 2015 (hereinafter “the PPADA”) was enacted to ensure transparency, accountability and efficiency to public procurement and disposal of assets in Kenya, aligning with the broader national vision of sustainable economic growth under Kenya’s Vision 2030. The Act also adheres to international standards like the UN Convention against Corruption, emphasizing clean, efficient use of public funds.

Constitutionally, the Public Procurement and Asset Disposal Act, 2015 is grounded in Article 227, which requires procurement to be fair, transparent, and cost-effective.<sup>73</sup> It’s further supported by Articles 10 and 201, promoting integrity and accountability in government financial practices. Overall, the Act sets a foundation for a fair public procurement system that strives to be equitable and free from corruption.

#### Delineation of Powers and Mandates

The PPRA has a crucial duty of overseeing the public procurement within the country so as to ensure that laws are as legally complied. In addition, as the main supervisory authority PPRA supervises and checks on compliance to the Public Procurement and Asset Disposal Act (PPADA) and other related regulations. As a regulatory body it has formulated standard for practice in procurement, monitors procuring entities and ensures that compliance is practiced in every aspects of public procurement.<sup>74</sup> In performing its activity in the sphere of the regulation, PPRA plays an important role in protection of the public procurement system’s

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<sup>73</sup> Authority, Public Procurement Regulatory, "Public Procurement and Asset Disposal Act, 2015," 2016.  
2. Authority, Public Procurement Regulatory, " Public Procurement and Asset Disposal Act, 2015," 2015.

<sup>74</sup>Ibid



reputation and its enhancements to involve more accountability and transparency elements.

The Public Procurement Administrative Review Board (PPARB) is an independent appellate jurisdiction that handles the appeals in relation to procurement. This is because PPARB has objectives that help to promote fairness in procurement by addressing any challenge arising from the relationship between contractors and procuring entities. If contractors feel they've been prejudiced in the procurement process, then under PPARB legal recourse may be made against procurement resolutions. This function helps to increase the effectiveness and objectivity of the work of the public procurement legislation, providing contractors with an opportunity to appeal against violations.

### **Extent of Compliance and Enforcement**

The Public Procurement and Asset Disposal Regulations, 2020 bring in specific provisions that enhance inclusivity and address the needs of marginalized groups. For instance, Regulation 50 reserves a portion of procurement opportunities for youth, women, and persons with disabilities, promoting social equity in the procurement process. Regulation 102 outlines conditions under which direct procurement can be utilized, particularly in emergencies, to ensure swift procurement without compromising integrity. Furthermore, Regulation 192 establishes the process for debarment, barring contractors who do not comply with procurement standards from participating in future tenders, thus protecting public interests. Regulation 223 mandates the declaration of conflicts of interest, reinforcing the ethical conduct required in procurement practices.

The general understanding and application of the Public Procurement and Asset Disposal Act (PPADA) has received good progress since implementations have been well guided by the progress registered in the 2020 regulations. These regulations have put a check on the uniformity of procurement processes across

the country; they have provided procedural guidelines as well as reduced opacity. However, there have been challenges in implementing the Act mainly in the following areas; There are challenges especially at the county level since the implementation of Act has been seriously restricted by resource constrain.<sup>75</sup> Despite the fact that national level has received adequate funding to support implementation of the Act, at the county level implementation is faced with a lot of challenges as county government lacks adequate funding for training and monitoring in compliance with the Act thus limiting implementation at the grassroots level.

Another limitation is related to available funding since it hinders adequate procurement capacity, especially in training the officers at the county level, and providing the necessary equipment and materials required for performance of their duties. A shortfall of resources also hampers the extent to which counties can meet compliance with procurement standards, with negative impacts on the fight for transparency and accountability for procurement practices. Nevertheless, the national level has been implemented with more funding available for research, enhanced compliance approach, and strengthened organizational framework at the national level.

Notable cases have shaped the enforcement of procurement law in Kenya. For instance, the case of *Okiya Omtatah Okoiti vs. PPRA* emphasized the importance of fair and transparent reviews in procurement disputes, influencing how appeals are handled. Similarly, the case of *Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728* was a landmark case that highlighted the objectives of the Public Procurement and Asset Disposal Act (PPADA), 2005, and now the PPADA,

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<sup>75</sup> George M. Andaya and Benson Kiiru, "Effects of the Public Procurement and Disposal Act of 2015 on the Financial Management of the State Corporations in Kenya: A Case Study of Agriculture and Food Authority," *The International Journal of Humanities & Social Studies* 8, no. 1 (2020): xx, doi:10.24940/theijhss/2020/v8/i1/hs2001-052.  
2. Andayi and Kiiru, " PPADA," 2015.

2015. These objectives include promoting the integrity and fairness of procurement procedures, as well as increasing transparency and accountability. Fairness, transparency, and accountability are core values of modern societies, such as Kenya, and these cases underscore the importance of upholding these principles.

However, enforcement hurdles remain, particularly due to inadequate civic education. One significant challenge is the lack of awareness about the existence of the Public Procurement Administrative Review Board (PPARB), which is mandated to hear and determine procurement-related disputes. As a result, unsuccessful tenderers involved in bungled and corrupt procurement processes in many counties are often unaware of where to lodge their complaints. Furthermore, there is a lack of knowledge about the Public Procurement Regulatory Authority (PPRA), which is responsible for investigating allegations of corruption in procurement processes. These gaps in understanding hinder the effectiveness of the procurement system and prevent citizens from seeking redress when they experience injustices in the procurement process. Improving civic education and awareness about these bodies would be a crucial step in addressing these enforcement challenges.

### **Gaps and Inconsistencies**

The following is an analysis of existing loopholes in the PPADA that has not let it run to the optimum efficiency: A major concern is poor resource availability to take action against suppliers that have not complied with established procurement laws at the county level. Also, the comprehensiveness of the regulations increases the administrative cost that SMEs and other marginalized organizations have to meet to participate in public procurement. Another is the flaws in direct procurement, though with strict rules, while, in fact, such arrangements are used to bypass competitive tendering. Also lacking civic education, many contractors

have downed their tools without knowledge of their rights and how they could report any irregularities in the implementation of the Act thus weaken the enforcement of the Act.

Generally, the procurement process in Kenya is restrained by rules and regulations, for purposes of avoiding the vice of corrupt practices; however, the process is, most of the time, slow in its operations. While the rigor of the rules, which help to minimize conflict of interest and ensure a level playing field, is admirable and necessary, they do create problems for the implementation of large projects for the public good.<sup>76</sup> These delays happen because each stage of the process is carefully described, while accountability comes for the price of slow decision-making and approval. Therefore, public projects which are governed by time implications may experience delay in delivery thus impacting the efficiency of the procurement system.

Further, the compliance requirements set for primes and subcontractors cause a lot of paperwork, which to the authors appears burdensome particularly to the small contractors. A number of the small business organizations are challenged by the highly rigorous documentation and procedural standards that are necessary to access procurement. Some of these requirements may comprise documentations, certifications, and numerous approvals, which may be daunting to the contractors especially those that may not afford or hire competent personnel to handle the cumbersome paperwork involved. This puts the small contractor at older hand and may even lock him or her out of an opportunity to bid for a public procurement.

Nevertheless, the regulations aim at minimizing corruption and sometimes introduces some complications to the procurement process from time to time it creates some room for maleness' among the unscrupulous individuals. That is how

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<sup>76</sup> Ibid

intricate the rules can get that many a times can be abused through fraudulent tendering or even manipulation of bids. Although the system has been designed under a set of regulatory factors that seek to avoid such risks, such a complexity of the system may inadvertently create room for corruption. Thus, despite the fact that many rules are noble the latter offers opportunities for cheating more and loses its credibility for a regular person. This underlines the necessity to conduct constant critical evaluation of the procurement dealings with a view of developing a better and balanced system of supply that will enhance transparency while at the same time eliminating inefficiencies.

### **3.6 The Anti-Bribery Act, No 47 of 2016**

#### **Foundation, Scope and Institutional Framework of the Act**

*The Anti-Bribery Act, 2016*, was enacted to strengthen Kenya's commitment to transparency and integrity, both in the public and private sectors. The Act aims to curb bribery and corruption by setting a legal standard that supports Kenya's broader vision of accountable governance and economic growth, as outlined in Vision 2030.<sup>77</sup> Internationally, Kenya aligns with frameworks like the UN Convention Against Corruption and the African Union's Anti-Corruption Convention, which call for strong anti-bribery laws.

Constitutionally, the Act is based on key principles in the 2010 Constitution, especially Article 10, which espouses values such as transparency and accountability, and Article 232, which emphasizes ethical behaviour among public officers. Together with Chapter Six on leadership and integrity, the Act

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<sup>77</sup> Laws of Kenya, "THE BRIBERY ACT CHAPTER 79B," National Council for Law Reporting, last modified 2016, <https://kenyalaw.org/8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/B/Bribery%20Act%20-%20No.%2047%20of%202016/docs/BriberyAct47of2016.pdf>  
2. Laws of Kenya, "The Bribery Act, No. 47 OF 2016."

provides the legal backbone to demand that public officials and private entities conduct themselves honestly and responsibly.

## **Enforcement and Extent of Implementation**

The implementation of the Anti-Bribery Act has seen notable progress, particularly in the efforts of the Ethics and Anti-Corruption Commission (EACC) to investigate bribery allegations and ensure that organizations comply with anti-bribery measures. EACC has conducted investigations, prosecuted cases, and ensured that both public and private organizations adhere to the compliance requirements outlined in the Act. This proactive approach has contributed to the Act's success in addressing bribery and promoting ethical conduct within both sectors.

However, the implementation process has not been without its challenges. One significant hurdle has been limited funding, which has occasionally hindered EACC's ability to conduct widespread outreach and investigations. Resource constraints have particularly affected smaller companies and organizations, which may struggle to meet the compliance requirements of the Act. Additionally, political interference has sometimes slowed down investigations, as powerful figures or entities may attempt to derail the legal process. Despite these challenges, the overall implementation has been positive, with EACC taking significant steps to ensure the Act's provisions are enforced.

Public awareness of the Anti-Bribery Act has been improving, but enforcement challenges persist. While many organizations are now more aware of their obligations, inconsistent compliance across sectors remains a concern. Continued efforts to raise awareness and improve resources for EACC are

essential to ensure the Act's effectiveness in curbing bribery and promoting a culture of integrity.<sup>78</sup>

The Anti-Bribery Act has been implemented through various cases which have highlighted the extent of penetration of the Act besides the ability of the EACC in dealing with such cases. Pharmaceuticals case include: Tom Ojienda & EACC (2019) and Kamani v. Ethics and Anti-Corruption Commission (2021) have also supported the Act to fight against corruption. These examples show what Does judiciary and EACC support anti-corruption measures and show the growing capability of EACC to prosecute high level bribery. These are ruling case realities that are significant Since in these cases the act was recognized to serve as a method of ensuring that there is fairness in as well as establishing transparency.

However, there are a number of enforcement challenges that have persisted to act as a disincentive to the efficiency of the Anti-Bribery Act. This is especially because EACC, which is the leading anti-corruption agency in Kenya, has faced a major problem of inadequate finances through which the agency cannot undertake many cases or investigate bribery in a number of sectors. Also, more influential sectors may also exert pressure not to prosecute cases, or may slow down the law process by lobbying against cases. This has inevitably created problems of differential enforcement of the Act and in some cases; the cases may remain open due to these external factors. Yet, as the successes show, these milestones highlight the need to sustain funding for enforcement agencies, and to encourage more commitment to the efficient implementation of the Act across all industry sectors.

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<sup>78</sup> Ibid



## Gaps and inconsistencies of the Anti-Bribery Act

- i. The implementation of the Anti-Bribery Act shows several important structural problems and inconsistencies. The Anti-Bribery Act 's regulations lack substantial integration which creates gaps that weaken efforts to fight procurement-related corruption. When different public entities handle procurement oversight responsibilities their overlapping authority creates difficulties in coordination and waste implies inefficient resource use.
- ii. The insufficient whistle-blower protection systems remain a significant shortcoming of the Act although reporting requirements receive noteworthy focus. Section 9 requires reporting of bribery incidents yet practical safeguards to protect people making reports show significant weaknesses. The Act fails to establish clear guidelines for private sector compliance standards between small and medium businesses leading to implementation differences among enterprises of varying sizes. The current enforcement system shows problems because it awards variable punishment levels in different cases.
- iii. The penalties authorized by the Act include jail time and hefty fines but courts provide different sentencing levels between similar cases making the law's deterrent role much weaker. The various penalties for white collar crimes are not deterrent enough especially noting the presumption of innocent until proven guilty and the fact that criminals have the incentive to commit such crimes and get prosecuted for the same in court noting the lengthy timelines such matters take to be fully heard and determined; until the last appellate avenue.
- iv. The Act shows inadequate development regarding international cooperation norms for cases that span across national borders therefore reducing its capacity to combat global corruption schemes.

### 3.7 Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), No. 9 Of 2009

#### Background: Foundation, Scope and Objectives of the Act

The Act embodies constitutional principles, notably **Article 10**, which emphasizes good governance and accountability, and **Article 79**, which requires the establishment of independent bodies to address corruption and economic crimes. These constitutional directives underscore POCAMLA's importance in promoting transparency and ethical financial practices.

A key objective of POCAMLA is **criminalizing money laundering**, targeting individuals and entities involved in processing illicit funds or concealing their origins. By penalizing such activities, the Act ensures that financial crimes do not go unchecked. Additionally, the Act focuses on **asset recovery**, establishing frameworks for identifying, freezing, and confiscating assets derived from criminal activities.<sup>79</sup> These provisions enhance accountability and disrupt criminal networks by denying them financial rewards

POCAMLA seeks to address money laundering and the recovery of proceeds from crime. Its objectives align with Kenya's commitment to combating financial crimes as outlined in international frameworks like the *UN Convention against Corruption (UNCAC)* and the *Financial Action Task Force (FATF) Recommendations*. Article 79 of the Constitution underpins the creation of mechanisms to prevent misuse of public funds, emphasizing transparency and accountability. The Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) was enacted to strengthen Kenya's ability to combat money laundering, terrorism financing, and organized crime.<sup>80</sup> It addresses the growing

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<sup>79</sup> Ibid

<sup>80</sup> Doug Hopton, "Proceeds of Crime Act 2009 – Other Areas," *Money Laundering*, 2020, xx, doi:10.4324/9781003062226-8.  
2. Hopton, "POCAMLA," 2009.

complexity of financial crimes and aligns with international efforts to uphold the integrity of financial systems.

POCAMLA also ensures **international compliance**, aligning Kenya with global standards, including the Financial Action Task Force (FATF) Recommendations and the Palermo Convention. This alignment not only bolsters Kenya's anti-money laundering measures but also fosters international cooperation in fighting transnational financial crimes.

The Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) divides the responsibilities of fighting financial crimes between specific institutions and aligns them in a system. This structure fosters health collaboration between departments and agencies and ensured that whenever one is tackling money laundering and related offences, it will be able to draw from rich sources of specialized knowledge regarding various aspects of this crime.

ARA has been established to investigate the cases and prosecute criminal proceeds among other roles. Some of its core functions include filing of applications for preservation and forfeiture of property believed to be proceeds of crime. Legal laws of the agency enable the agency to preserve embezzlements, seize and regain such properties so that they can be returned to the state or rightful owners.

The responsibility of executing investigations when fraudulent practices are suspected lies in the Financial Reporting Centre (FRC). Thus, the FRC gives important leads for enforcement by monitoring and investigating anomalous financial transactions. Institution bearing operations that involve financial transactions are obliged to disclose the activities that they consider as suspicious to the FRC so as to have it track, arrest and stop the flow of the illicit funds in the initial stage.

The DCI and the EACC support the framework by focusing on the predicate crimes such as corruption, fraud, and organised crime. These institutions aim at identifying the original crimes that produce proceeds which are later processed under money laundering. Which in turn enhances the total efficiency of the anti-money laundering regime, due to their cooperation with the ARA and FRC.

The Act creates two key institutions created under this framework are the Asset Recovery Agency (ARA) and the Financial Reporting Centre (FRC) with distinct mandates. As the default regulator, the Asset Recovery Agency (ARA) is statutorily required to freeze, protect and recover proceeds of crime. They contain and seeks to execute its mandate in such a way that tools of crime or the proceeds there from get taken out of the black market and channelled back into the legal economy. This enforcement is usually supported by other bodies like the Office of the Director of Public Prosecutions (ODPP) and the FRC. These partnerships help the agency to effectively capture preservation and forfeiture orders preventing and combating financial crimes.

### **Extent of Implementation: Compliance and Enforcement**

The Proceeds of Crime and Anti-Money Laundering Act (POCAML) has catalyzed the development of several regulatory measures aimed at strengthening compliance and curbing financial crimes. These advancements, particularly the introduction of tailored regulations and reporting guidelines, have enhanced the legal and operational framework for financial institutions and enforcement agencies.

The Proceeds of Crime and Anti-Money Laundering Regulations (2013 and 2019) represent a critical milestone in tightening compliance requirements for banks and other financial institutions. These regulations mandate robust customer due diligence processes, obliging institutions to thoroughly verify client identities and monitor transactions for suspicious patterns. Additionally, stringent record-keeping

obligations ensure that financial institutions retain comprehensive transaction data, aiding investigations into illicit activities.

Complementing these regulations are **Guidelines for Reporting**, issued to help entities navigate their obligations under the Act. These guidelines provide clear instructions for identifying and reporting suspicious transactions to the Financial Reporting Centre (FRC). By standardizing reporting procedures, the guidelines reduce ambiguities and encourage consistent compliance, thereby fostering a culture of transparency within the financial sector.

A notable application of the Act is the case of *Asset Recovery Agency v. Abdi Ali Mohamed (2020)*. The High Court preserved over Ksh. 62 million linked to fraudulent transactions, showcasing POCAMLA's effectiveness in addressing financial crimes. The case highlights Kenya's commitment to FATF standards and demonstrates the Act's role in deterring illicit activities.

While POCAMLA has proven effective in several cases, challenges such as limited public awareness and resource constraints among enforcement agencies remain. Addressing these gaps is crucial for ensuring the Act's full potential in combating financial crimes.

The Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) has recorded notable achievements in combating financial crimes and preserving public assets. However, its implementation remains hindered by significant challenges, impacting its full effectiveness. Several success stories highlight the Act's potential. In *Asset Recovery Agency (ARA) v. Margaret Wanja Muthui*, Kshs. 93.5 million suspected to be proceeds of corruption was preserved. This case demonstrated POCAMLA's capacity to secure public funds from misappropriation, underscoring its utility in the fight against corruption. Similarly, the *Joseph Wanjohi Case* was groundbreaking in its use of POCAMLA's provisions to forfeit assets acquired through drug trafficking without requiring direct proof of

criminal intent.<sup>81</sup> This outcome highlighted the Act's innovative approach in targeting illicit gains rather than focusing solely on the criminal conduct behind them.

## **Gaps and Inconsistencies in the Legal Framework**

Despite these successes, implementation challenges remain pervasive. Resource constraints are a major barrier, with both the Asset Recovery Agency (ARA) and the Financial Reporting Centre (FRC) often operating under limited budgets. These financial limitations impede their ability to conduct thorough investigations, enhance inter-agency coordination, and expand public awareness of anti-money laundering measures.

Additionally, judicial bottlenecks pose a significant obstacle. Prolonged litigation frequently delays asset recovery, undermining the Act's deterrent effect and public confidence in its enforcement. Complex cases involving multiple layers of transactions and legal arguments exacerbate these delays, leaving ill-gotten wealth in limbo for years. While POCAMLA has made considerable strides in recovering stolen assets and deterring financial crime, these challenges call for targeted reforms. Enhanced funding for ARA and FRC, coupled with streamlined judicial processes, could address these issues, ensuring the Act achieves its intended impact in securing Kenya's financial systems and combating economic crimes. Lastly, inadequate budgetary allocations to institutions such as the Asset Recovery Agency (ARA) and the Financial Reporting Center limit their ability to successfully oversee the full enforcement of POCALMA.

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<sup>81</sup> Ibid

### 3.8 Anti-Corruption and Economic Crimes Act, No. 3 Of 2003 (ACECA)

#### Background: Foundation, Scope and Objectives of the Act

The **ACECA** aims to combat corruption and economic crimes by establishing clear offenses, penalties, and mechanisms for enforcement. It aligns with Article 10 and Chapter 6 of the Kenyan Constitution, which mandate integrity in public service. The Act operationalizes international commitments such as the United Nations Convention Against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption.<sup>82</sup> The policy focus is to safeguard public resources, ensure ethical conduct in public service, and bolster institutional capacities for anti-corruption efforts. This approach aligns with Kenya's Vision 2030 governance pillar, emphasizing transparency and accountability.

The *Anti-Corruption and Economic Crimes Act (ACECA)* establishes the *Ethics and Anti-Corruption Commission (EACC)* as the central authority in Kenya's fight against corruption. EACC is tasked with a broad range of functions, including investigating corruption offenses, enforcing asset recovery measures, and educating the public on the importance of corruption prevention. This multi-faceted approach is crucial for addressing both the systemic and individual aspects of corruption, which has been a persistent challenge in Kenya.

EACC is empowered to conduct investigations into corrupt activities across both the public and private sectors. Its role includes identifying cases of financial misconduct, such as bribery, fraud, and embezzlement, and initiating investigations into individuals or entities suspected of corrupt practices and to recommend to the DPP their prosecution.<sup>83</sup>

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<sup>82</sup> Ethics & Anti-corruption Commission, "'The Anti-corruption and Economic crimes Act 2003,'" 2003, xx. 2. Ethics & Anti-corruption Commission, "ACECA," 2003.

<sup>83</sup> Ibid



In addition, EACC plays a vital role in educating the public and promoting anti-corruption awareness. Through public awareness campaigns and training programs, EACC works to create a culture of integrity, encouraging citizens and organizations to reject corruption and report unethical practices. This proactive stance is aimed at preventing corruption rather than just addressing its consequences.

The Judiciary, through the *Anti-Corruption and Economic Crimes Division* of the High Court, supports ACECA's enforcement mechanisms. This division is responsible for handling cases related to corruption, ensuring that they are dealt with expeditiously and in accordance with the law.<sup>84</sup> By collaborating with investigative bodies like EACC, the judiciary plays an integral role in ensuring that corrupt individuals are held accountable, and that justice is served in a transparent and timely manner.

### **Extent of Implementation: Compliance and Enforcement**

Since its enactment other regulations and amendments have been passed to support ACECA as it tries to establish stronger enforcement measures as well as to bring the Act into compliance with local and international standards. These policy and legislative changes have greatly boosted Kenyan's endeavour to fight corruption in the country.

Of these, one is worthy of noting namely; the Leadership and Integrity Act (2012) that implements chapter 6 of the Kenyan Constitution. This legislation has stressed the principles of integrity and responsibility among the public official. The Act provides ethical code for politicians, defines specific rules of their behaviour, and guarantees that they will be responsible and republican when functioning as employees of the state. Together with the goals of ACECA, the Leadership and

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<sup>84</sup> Ibid

Integrity Act supports the enforcement of principles of integrity in the public office to curb corruption at its root, within the public sector.

The judiciary has significantly shaped the implementation of the Anti-Corruption and Economic Crimes Act (ACECA), particularly through landmark rulings that interpret its provisions on abuse of office, illicit enrichment, and asset recovery. The first case is **EACC v. Ferdinand Waititu & Others** which revolved around allegations of corruption, abuse of office, and illicit enrichment against Ferdinand Waititu, the former Governor of Kiambu County. The Ethics and Anti-Corruption Commission (EACC) initiated investigations into alleged irregular procurement practices, which led to the misappropriation of public funds amounting to millions of shillings.

Key facts of the case include allegations by the EACC that public tenders were unlawfully awarded to companies linked to the Governor and his associates. Funds from these tenders were funnelled into private accounts and used to acquire property, pointing to illicit enrichment. In its reasoning and decision, the court emphasized that ACECA's provisions allow the EACC to investigate and prosecute high-profile cases involving abuse of public office. It highlighted the role of public officials as trustees of public funds and noted that illicit enrichment constitutes a violation of this trust. By granting orders to freeze assets linked to the case, the court reinforced the principle that public resources must be safeguarded and used for their intended purposes. This decision underscored ACECA's capacity to address large-scale corruption and its role in ensuring accountability among public officials.

The second case is **Assets Recovery Agency v. Charity Wangui Gethi & Another [2021] eKLR**. This case dealt with the forfeiture of assets acquired through proceeds of crime, a critical component of ACECA's asset recovery mandate. Charity Wangui Gethi, the mother of a suspect in the National Youth Service (NYS)

scandal, faced allegations of having received funds fraudulently obtained from NYS and using them to purchase assets.

Key facts revealed that substantial funds were diverted from NYS accounts and transferred to her, which were subsequently used to acquire luxury properties and vehicles. The Assets Recovery Agency (ARA) sought orders under ACECA for the forfeiture of these assets, arguing that they were proceeds of crime. The court held that ACECA allows for the forfeiture of assets even when the owner is not directly charged with corruption, provided there is a demonstrable link between the assets and illicit activities. It emphasized that public funds must not benefit private individuals unlawfully and affirmed that the burden of proving lawful acquisition rests on the respondent once suspicious transactions are established. The court granted the forfeiture orders, reinforcing ACECA's goal of recovering assets tied to corruption. This ruling demonstrated the Act's potency in combating economic crimes and stripping individuals of ill-gotten wealth, thereby deterring corruption.

Institutional strengthening has also been a key achievement under ACECA and related laws, such as the Public Procurement and Asset Disposal Act (PPADA) and the Anti-Bribery Act. Agencies like the Ethics and Anti-Corruption Commission (EACC), the Asset Recovery Agency (ARA), and the Financial Reporting Centre (FRC) have been empowered to detect, investigate, and prosecute corruption more effectively.<sup>85</sup> These institutions have been instrumental in increasing transparency and accountability, particularly through frameworks that mandate public disclosure of procurement processes and the regular auditing of financial transactions.

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<sup>85</sup> Ibid

## Gaps and Inconsistencies (ACECA)

**Judicial Challenges-** the Judiciary has been both a necessary partner and a profound obstacle in the enforcement of anti-corruption laws. One key challenge is inconsistent judicial interpretations, particularly regarding the repeal of the Prevention of Corruption Act (Cap 65) and its implications for offenses committed before the ACECA came into effect. This inconsistency has created legal uncertainties and hindered prosecutions. Section 42(k) of the Limitations of Actions Act was introduced to allow for the pursuit of older corruption cases. However, this provision failed to assist cases already in progress before its enactment. In *Nairobi High Court Petition No. 199 and 200 of 2007 (Deepak Kamani vs. AG and Another)*, the court declared Section 31 of the ACECA unconstitutional. The provision, which restricted the movement of individuals under investigation, was found to violate citizens' constitutional right to freedom of movement. Such rulings have weakened the EACC's ability to implement its mandate effectively.<sup>86</sup>

The enactment of the "Amnesty Clause" (Section 25A) through the Miscellaneous Amendment Statute 2007 introduced significant legal barriers to the EACC's operations.

This clause granted discretionary powers to the Minister, the Attorney General, and the KACC (now EACC) Director to decide whether to terminate or continue investigations. This discretion has been criticized for undermining the independence and impartiality of the investigative process, creating room for political interference.

**Fragmentation of Anti-corruption statutes-** Additionally, the fragmented nature of anti-corruption laws across multiple statutes, including the Leadership and

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<sup>86</sup> Omboto J. Onyango, "Economic Crimes: Factors Responsible For Rampant Fraud And Corruption In Kenya," *Advances in Social Sciences Research Journal* 5, no. 10 (2018): xx, doi:10.14738/assrj.510.5291. 2. Onyango, "ACECA," 2018.

Integrity Act and the Public Officer Ethics Act, complicates enforcement. The lack of a unified framework often leads to conflicts and inconsistencies in interpretation and application.

**Legal Loopholes-** Corruption suspects frequently file constitutional references, exploiting legal loopholes to delay investigations and trials. While Constitutional Courts are intended to provide justice in exceptional circumstances, they have often been misused as a tool to stall proceedings and subvert justice. The excessive reliance on constitutional references has not only delayed cases but also drained the EACC's resources and focus, further limiting its ability to combat corruption effectively.

**Political interference-** Political interference is a serious challenge regarding ACECA's implementation as some suspects use their affiliations to portray investigations as part of a political agenda rather than genuine anti-corruption efforts. Additionally, media amplification of victimization claims sensationalizes these allegations, further weakening public trust in ACECA's enforcement.

## CHAPTER 4

### INSTITUTIONAL CAPACITY ASSESSMENT

#### 4.0 Institutional Capacity of the Ethics and Anti-Corruption Commission in Kenya

##### 4.1 Introduction

Corruption remains one of the most significant challenges to development and governance in Kenya. The fight against corruption is critical for the country's economic growth and democratic integrity. Established under Article 79 of the Constitution of Kenya, 2010 and under part II of the Ethics and Anti-Corruption Commission Act, 2011, the Ethics and EACC plays a crucial role in this ongoing battle. It is mandated to combat and prevent corruption through law enforcement, prevention, public awareness and promotion of standards and practices of ethics and anti-corruption. This report assesses the EACC's capacity to effectively discharge its constitutional and legal mandate in combating corruption and promoting ethical conduct in public service.

In implementing Chapter six of the Constitution, the EACC has developed Leadership and Integrity Codes for State Officers; published specific leadership and integrity codes, secured commitment to the Leadership and Integrity Codes; developed Codes of Conduct and Ethics for Public Officers. It also has a framework for regulating the opening of bank accounts outside Kenya and for providing oversight in the management of Declaration of Income, Assets and Liabilities (DIALs). It has automated processes for compliance with Chapter Six of the Constitution, LIA and POEA. In addition, EACC provides capacity building on implementation of Chapter Six of the Constitution and issues technical advisories on Chapter Six and other related integrity laws.

The mandate of the Commission under Article 79 essentially means that the role of implementation is vested in individual state and public officers and the public

entities they serve under. Unfortunately, it has been assumed that this role is solely that of the Commission, thereby placing a great burden on the Commission which is lacking in adequate financial, human and other resources. Thus, the effectiveness of the Commission is undermined by a role larger than what was envisaged - implementation as opposed to oversight and enforcement.

#### 4.2 Institutional Framework

The EACC was established to provide oversight into issues of ethics, integrity, and accountability within government operations. As stipulated in the Constitution of Kenya 2010 and the subsequent Ethics and Anti-Corruption Commission Act of 2011, the EACC's primary roles include the investigation of corruption and economic crimes, the promotion of ethical governance, and advising public institutions on policy formulation. This framework positions the EACC as a vital entity in upholding the rule of law and fostering a culture of integrity across various public sectors.

It is noteworthy that the EACC recently established the National Integrity Academy as part of its mission to fight corruption, economic crimes, and unethical behaviour. This is based on the EACC Act of 2011, which gives the Commission the authority to tackle these issues and educate the public about the harms of corruption. The Leadership and Integrity Act of 2012 also supports this by calling for long-term training on leadership and integrity for public officials, schools, and citizens. The idea for the Academy came after a nationwide survey in 2016, which showed that both national and county governments needed better training to promote good governance, strengthen integrity, and close gaps that allow corruption to thrive. The Academy now offers specialized training in ethics, leadership, good governance, and anti-corruption for both public and private sectors in Kenya and the region. Its goal is to inspire a cultural change, encouraging people to value integrity and follow the rule of law, ultimately creating a more ethical and responsible society.



The EACC has a two-tier establishment. It has Commissioners who provide oversight over a Secretariat that is headed by a Chief Executive Officer. The CEO is the head of the Secretariat that is structured into departments, with offices in Nairobi and in the counties.

### **4.3 Human Resources**

The effectiveness of the EACC is significantly influenced by its human resources. Currently, there are concerns regarding the adequacy of staffing levels and the qualifications of personnel within the commission. A high turnover rate and a shortage of specialised skills in critical areas such as forensic accounting and legal expertise have hindered the commission's performance. Moreover, continuous training and capacity-building initiatives are required to enhance the skills and efficiency of EACC staff.

EACC has an approved staff establishment of about 1500 officers. The staff complement in place is about 750 officers. This means that the Commission is operating at half its capacity. The focus as per the current strategic plan is on the high impact cases. The statistics indicate incapacity for the EACC to investigate all the cases received at the report centres. Currently the EACC has regional offices in eleven Counties, out of a total of 47 Counties and a presence in over fifty *huduma* centres countrywide.

**Technical Capacity:** EACC has highly specialized officers and equipment necessary to undertake investigation on all types of cases. The only services outsourced are those of the Government Chemist and which are undertaken by officers from the Commission. The EACC has forged highly beneficial partnerships that help it continuously upgrade the technical capacity of its staff. It has received capacity development for its officers from the United Nations Office on Drugs & Crime (UNODC), the National Crime Agency (NCA) and United Kingdom

Serious Fraud Office (SFO), the United States Department of Homeland Security Investigation (HSI), the Federal Bureau of Investigation (FBI) among other partners.

The Commission has an Annual Training Plan which is funded to ensure that all staff get an opportunity to be trained based on the training needs identified in the course of their work and during the performance appraisal. The Commission also supports officers to be in good professional standing with their professional bodies by facilitating their Annual Subscription and Continuous Professional Development (CPD) training. Further staff are trained in career development courses, specialised skills and seminars and workshops.<sup>87</sup>

The Commission seeks to enhance its institutional capacity through recruitment of additional staff and providing continuous training to enhance skills and competencies. It also seeks to expand its investigative infrastructure through acquisition of additional specialised equipment and tools. In the financial year 2021/2022, a revised organogram was implemented. During this period twenty-six (26) new staff were recruited while common and specialised training was undertaken.

#### **4.4 Financial Resources**

The EACC's operational capacity is directly tied to the financial resources it receives. The EACC relies wholly on the budget allocation by the government. The funds allocated to the EACC are inadequate to fully and effectively discharge its mandate. Disbursements are also sometimes delayed and sometimes are not paid at all. With the available resources, prominence is given to the enforcement mandate of the Commission and support services. In recent

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<sup>87</sup> EACC 2019/2020 - employee welfare - page 107

years, budget allocations have fluctuated, which can undermine ongoing investigations and capacity-building efforts<sup>88</sup>.

There have been continuous and incremental disbursements from the exchequer to the EACC each year. The EACC's budget has increased from KES. 2,957,220,000.00 to KES. 3,586,023,199.00 between 2015 and 2022. Budgetary allocations are one of the clear indicators of commitment to a course.

#### *Budgetary Allocation*

Financial Year	Budgetary Allocation (KES)	Budget Deficit (KES)
<b>2023/2024</b>	3,740,883,810.00	61,273,032.00
<b>2022/2023</b>	3,305,886,892.00	181,860,262.00
<b>2021/2022</b>	3,586,023,199.00	61,647,104

The EACC experiences significant deficits in its budgets. This ever-present deficit has been the subject of the Auditor General's concern for a couple of years. The Auditor General in the 2021/22 audited accounts for the commission states: -

***“The persistent under-funding is likely to lead to financial difficulties which might affect the full implementation of the Commission’s planned activities in the future. The existence of the Commission is therefore dependent on Exchequer releases from the National Government.”***

The inadequate funding and the failed Exchequer greatly undermine the capacity of the EACC to attain its assessed staffing levels, ability to train and retain

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<sup>88</sup> For instance, the allocation for the EACC in the National Treasury's budget estimates shows inconsistencies that often limit the commission's ability to fulfil its mandate effectively. Adequate and consistent funding is essential to ensure that the EACC maximises its potential in addressing

staff and the ability to investigate the bulk of the complaints that are received every year and fall within the mandate of the Commission.

In the Auditor general's report for 2019/2020, it is noted that the commission reported a deficit of KES. 116,545,540.00. The previous year, it had recorded a deficit of deficit KES. 20,108,198.00. The cumulative deficit for the two years resulted in the depletion of revenue reserves by KES. 136,653,738 from KES. 712, 225, 241 in the prior year to KES. 167, 480,766.00 as at June 2020. The Commission explained these deficits were due to depreciation and unremitted exchequer. The Auditor General noted the Commission's performance was on a downward trend and if strategies were not put in place to reverse the trend, the Commission was likely to experience financial difficulties in the future.<sup>89</sup>

#### 4.5 Legal Framework

The legal framework governing the EACC includes robust legislation such as the Anti-Corruption and Economic Crimes Act of 2003. While these laws empower the EACC to investigate cases of corruption, challenges remain. Instances of political interference and, at times, reluctance from other agencies to collaborate with the EACC have plagued its operations. Enhancing legal provisions and ensuring better interagency cooperation are necessary for the EACC to function optimally. A review of the POEA to incorporate new agencies and account for technological advancements would strengthen the work of the EACC.

#### 4.6 Effectiveness and Challenges

The effectiveness of the EACC can be measured by the number of cases investigated and successfully prosecuted against the number of complaints received and are marked for investigations. Despite some notable successes, such as high-profile arrests and convictions, public perception remains that

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<sup>89</sup> Ethics and Anti-Corruption Commission, Annual Report 2019/2020, page 111.

corruption remains widespread, indicating a gap between investigations and the deterrence effect of prosecutions and the broader societal impact. Challenges, including political interference, lack of public trust, and resource constraints, continue to hinder the commission.

The mandate of the Commission as established under Article 79 of the Constitution of Kenya is to ensure compliance with and enforce the provisions of Chapter Six of the Constitution. This essentially means that the role of implementation is vested in individual state and public officers and the public entities they are under. Unfortunately, the assumption of many public officials and entities is that this role belongs to the Commission. The result is that the EACC is over-burdened with limited resources. Thus, the Commission has not been very effective in its role because it is now drawn into implementation as opposed to oversight and enforcement.

The commission is required to submit reports on the outcome of investigations to the DPP. Where the EACC has recommended prosecution, administrative action or no further action, the DPP has concurred in on average 88% of the times. Where the DPP has approved prosecution, the conviction rate has averaged 62% between 2014 and 2024.

Reports to ODPP with Recommendations to Prosecute<sup>90</sup>

Year	No. of Reports	Accepted	Not Accepted	Concurrence Rate (%)
2019/20	43	40	3	93
2020/21	70	68	2	97

<sup>90</sup> EACC Report of Activities and Financial Statements for The Year 2023-2024 pg. 94 <https://eacc.go.ke/en/default/wp-content/uploads/2025/01/EACC-REPORT-OF-ACTIVITIES-AND-FINANCIAL-STATEMENTS-FOR-THE-FINANCIAL-YEAR-2023-2024-FINAL-1.pdf>

2021/22	97	80	17	82
2022/23	74	68	6	92
2023/24	104	90	14	87

#### Outcomes of cases finalised in court

Year	No. of cases finalised	Conviction	Acquittal	Discharge	Conviction rate (%)
<b>2014/2015</b>	1	1	-	-	100
<b>2015/2016</b>	14	11	-	3	79
<b>2016/2017</b>	25	18	7	-	72
<b>2017/2018</b>	44	35	9	-	79
<b>2018/2019</b>	78	51	23	4	65
<b>2019/2020</b>	55	23	28	4	42
<b>2020/2021</b>	31	23	5	3	74
<b>2021/2022</b>	60	30	27	3	50
<b>2022/2023</b>	75	27	16	34	36

<b>2023/2024</b>	46	12	9	24	26
<b>Total</b>	<b>429</b>	<b>231</b>	<b>124</b>	<b>75</b>	<b>62.3</b>

## 4.7 Challenges

The EACC has identified several challenges that it faces, among them:

**Slow judicial processes-**slow judicial processes caused by frivolous judicial review applications and appeals filed against the commission. In addition, the legal and policy framework for implementing chapter six of the constitution on areas such as integrity verification for persons seeking appointment or election to public office and inadequate offences and penalty to support implementation of LIA, 2012 is weak.

**Political interference-** Politicisation of the fight against corruption and unethical conduct have been identified as additional challenges.<sup>91</sup>

**High Costs of Investigations-** Investigation costs are often high, especially for high profile cases which often take long to investigate. These cases may sometimes involve multiple layers and most times have an international element that may require coordination with peer institutions in foreign jurisdictions.

**Extradition and mutual Legal Assistance-** There have also been delays occasioned by the complexities in matters involving mutual legal assistance and the bottlenecks associated with extradition. On several occasions, evidence obtained in foreign jurisdictions has been challenged in court. The Commission has very little control in the process of obtaining evidence in other jurisdictions

<sup>91</sup> EACC, Final Annual Report 2019-2020 , <https://eacc.go.ke/en/default/wp-content/uploads/2021/05/Final-Annual-Report-2019-20-18th-MAY.pdf>



once the mutual legal assistance requests have been made. There is however the requirement that the processes be compliant with the Evidence Act.

**Weak and Porous Legal Framework-** The legal framework governing part of the mandate of EACC is weak and porous. The Leadership and Integrity Act, for instance, is too weak to complement Chapter six of the constitution. The EACC and stakeholders have made attempts to amend the law to strengthen it. These attempts have been met with hostility, particularly from the political class. The upshot of this is that the promise under chapter six of the Constitution of Kenya, of a country government by persons of integrity remains unachieved.

**Weak Judiciary-** The Judiciary has also played a negative role in failing to courageously advance jurisprudence that supports the fight against corruption and the enforcement of chapter six of the Constitution. Convictions obtained at the lower courts have been overturned on appeal majorly on technicalities. Considering the nature of corruption cases, the challenge of collecting and collating evidence, it is retrogressive for the court to pay undue regard to technicalities. This remains a significant challenge and will likely persist unless the jurisprudence of the higher courts changes course to deal with merits of the cases based on fact and evidence.

**Conflicting Institutional Mandates-** The laws confer conflicting mandates on different institutions. For instance, both ACECA and POCAMLA confer asset recovery functions on EACC and ARA respectively. Further, nothing stops the DCI from investigating corruption and economic crimes. Sometimes EACC is unable to proceed with an investigation in which the DCI is already involved. – these are mostly high-profile cases. The confusion this brings can be an advantage to perpetrators of corruption.

**Deep Seated Governance Issues-** There are deep-seated systemic governance issues in Kenya that the efforts of the Commission are ineffective in reversing the

trend. The electoral system, campaign financing, public procurement systems and generally societal moral decadence. These, coupled with lack of political good will and politicization of the fight against corruption make it difficult for the EACC to discharge its mandate effectively.

**Weak Enforcement-** On the preventive side, EACC has no power to enforce the system's review recommendations that it is mandated to undertake. The recommendations after a systems audit go unimplemented for the most part. Ministries, Department and Agencies of government choose whether to implement the recommendations or not. In the absence of power to enforce compliance, a potentially impactful tool in the promotion of ethics and the fight against corruption is rendered ineffective.

#### **4.8 Inter- agency coordination**

Section 11 (3) of the EACC Act, 2011 mandates the Commission to cooperate and collaborate with other State organs and agencies in the prevention and investigation of corruption. Further, Section 11 (6) (C) of the Act provides for the Commission to establish and maintain strategic linkages and partnerships with other stakeholders in the rule of law and other governance sectors. In this regard, the Commission has maintained strategic linkages and partnerships with national, regional and international organisations to provide support, enhance coordination of an inclusive framework on the fight against corruption, and optimise on their respective capabilities and strengths. The Commission has partnered with the European Union (EU); the United Nations Office on Drugs and Crime (UNODC); the US Embassy; the British High Commission; the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ); Faith Based Organizations; Media; Civil Society organizations; National Council on the Administration of

Justice (NCAJ); and signed a Memorandum of Understanding with the Salaries and Remuneration Commission.<sup>92</sup>

The EACC has worked in an ecosystem of collaboration with other agencies. It has collaborated with the Office of the Attorney General and other stakeholders through the National Council on the Administration of Justice (NCAJ), Kenya Leadership Integrity Forum (KIF), and the Multi-Agency Team and referral partner's platform. At the NCAJ, EACC chairs the Committee on Anti-Corruption that has been involved in bringing together justice sector actors. These collaborations are informed by the thinking that corruption is a multi-stakeholder problem that can only be resolved through a multi-stakeholder approach.

There are indications that the EACC has benefitted from technical support in various areas from the United Nations Office on Drugs and Crime (UNODC), the National Crime Agency (NCA), the United Kingdom Serious Fraud Office (SFO), the United States department of Homeland Security Investigations (HSI), the Federal Bureau of Investigations (FBI), Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) among others.

The challenge of timely disposal of anti-corruption and economic crime cases is a multi-stakeholder problem that can only be resolved by way of consultations, collaboration and legal reforms, for instance, to provide a cap on the timelines for the determination of corruption cases in court. The judiciary has also administratively played a negative role at times. The Transfer of judicial officers in the course of the trial, for instance, negatively affects the prosecution of corruption cases. This is coupled with the accused person's right to have a matter begin *de-novo* upon take over by a new judicial officer slow down the processes.

Supply of documents from institutions under investigation is hampered by delays. Heads of institutions that are under investigation may sometimes fail to provide

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<sup>92</sup> Ethics and Anti-Corruption Commission, Annual Report 2021/22,

the requested information, delay in supplying the same or supply in piecemeal. On several occasions, senior public officials have engaged in cover-ups by either manufacturing non-existent documents or destroying evidence.

The EACC and the DPP have had a good working relationship over the years. The coordination resulted in the two institutions executing their mandates seamlessly. The relationship however goes through ups and downs with disagreements taking centre stage.

Coordination could be achieved through Consultative meetings and discussions between the heads of the two institutions to ensure seamless flow of processes. Undertake prosecution led investigations from time to time to enhance teamwork amongst technical staff. Joint workshops between the two institutions and capacity building for staff in their various areas of expertise.

#### **4.9 Public Engagement and Awareness**

Public engagement is vital for the success of the EACC's mandate. The commission has initiated several outreach programs aimed at raising awareness about anti-corruption measures and encouraging citizen participation in reporting corruption. However, the level of public trust in the EACC is mixed, as reflected in various surveys. Building stronger relationships with the community and effectively communicating successes can improve public perception and support for the commission.

### **5.0 Assessing the Capacity of the Director of Public Prosecutions (ODPP) in Kenya's Fight against Corruption**

#### **Introduction**

The Office of the Director of Public Prosecutions (ODPP) plays a pivotal role in Kenya's anti-corruption efforts. Its mandate is to prosecute individuals and entities suspected of criminal offenses, including corruption. This section assesses the

capacity of the ODPP to effectively discharge its constitutional and legal mandate in the fight against corruption, drawing on written responses by the ODPP and publicly available information.

## **5.1 ODPP's Mandate and Role in Anti-Corruption**

The ODPP's mandate is derived from Article 157 of the Constitution of Kenya, 2010 and other statutory laws such as the Office of the Director of Public Prosecutions Act. Its primary functions in the fight against corruption include:

### **Investigation:**

The role of the ODPP is to prosecute. However, ancillary to this role are powers to require other agencies such as the Ethics and Anti-Corruption Commission (EACC) and the National Police Service/Directorate of Criminal Investigations (DCI) to investigate corruption cases. In the wake of closer coordination with these investigative agencies and within the multi-agency approach, the ODPP supports prosecution-guided investigations in line with article 157 of the Constitution, section 5 (3) ODPP Act, National Prosecution Policy 2015, and the Decision to Charge Guidelines, 2019. Further, the ODPP has identified and applied various strategies such as team-based prosecutions, following the money approach among others to ensure that only cases with a high chance of conviction are taken to court.

### **Prosecution:**

Prosecution is the preserve of the DPP. In this case, the DPP Institutes and undertakes criminal proceedings against individuals and entities suspected of corruption. The DPP has prosecuted and secured convictions against both natural and juristic persons who have committed various offenses under various laws within Kenya's anti-corruption legal framework. The DPP has also catalysed the expeditious disposal of anti-corruption matters by entering into plea

bargaining agreements with accused persons. This has not only allowed for expeditious disposal of anti-corruption cases, but also allowed for an increase in convictions.

The ODPP has in a concerted effort to ensure the implementation of the overall objective of NEAP, which is to reduce levels and prevalence of corruption and unethical practices in Kenya, do the following:

- a. The ODPP has a specialized department that prosecutes corruption and economic crimes, known as the Economic, Organized, and International Crimes Department. A Deputy Director of public prosecutions heads this department. He has a senior prosecutor heading one of the divisions, which is the Anti-Corruption division, with counsel dedicated to prosecuting anti-corruption and economic crime matters.
- b. The ODPP has been engaging and educating the public through radio and TV shows on the mandate of the Office, the ills of corruption, and how to report the same to the relevant agencies.
- c. The ODPP has been taking part in Anti-Corruption Day which is held on the 9th of December where outreach programs are undertaken to educate the public on matters of anti-corruption.
- d. The ODPP has also in exercising its state mandate of prosecution prosecuted individuals and companies in the fight against corruption and in ensuring the adherence to national values and principles and leadership and integrity, seen an increase of convictions, under the following laws:

### **Legal Advice:**

The DPP has the mandate to provide legal advice and guide investigative agencies and other state organs on matters related to corruption. The

ODPP has continuously proposed amendments to the Law Reform Commission on anti-corruption laws to fill in gaps and ensure the effectiveness of the same, ODPP has given proposals on what laws need to be amended so as to enhance expeditious disposal of cases.

### **Asset Recovery:**

The DPP has been collaborating with relevant agencies, such as the EACC and the Assets Recovery Agency, to recover assets acquired through corruption.

### **Law reform:**

The ODPP is a key cog in the administration of justice and has a mandate to contribute to the advancement of the law through proposals for legislative reform. The ODPP has proposed amendments to the anti-corruption laws in areas where the law has gaps and is not keeping up with evolving corruption practices and offenses.

### **Inter-Agency Coordination:**

The ODPP collaborates with government, inter-government and non-government agencies in the discharge of its mandate. The DPP is championing the establishment of specialised multi-agency, investigative and prosecutorial strategy teams tasked with collaborating, coordinating and cooperating during investigation, analysis and prosecution process. The DPP will also champion appropriate policy that will enable investigators, prosecutors, and the judiciary to synergize efforts in the fight against corruption and which will also strengthen the legal and institutional frameworks, in addition to deepening and broadening the collaboration



with international partners in sharing information that would support to fight corruption.<sup>93</sup>

The ODPP is an active member of the Kenya Leadership Integrity Forum which brings together stakeholders from the public and private sectors, civil society, and religious organizations aiming for an integrated effort to prevent and combat corruption.

<b>Year</b>	<b>Matters Handled</b>	<b>Conviction Rate</b>	<b>Conclusion Rate</b>	<b>Success Rate</b>
<b>2023/2024</b>	477,201	91.92%	51.68 %	61.22%
<b>2022/2023</b>	480,124	92.29%	42.18 %	56.1%

### 5.2 Assessing the ODPP's Capacity

The capacity of the ODPP to effectively discharge its mandate depends on several factors, among them adequate budgetary allocations, the right number and level of staffing with the requisite skills to deal with the complex and ever evolving nature of economic crimes. Since the ODPP operates within a legal ecosystem with many other players, coordination with other agencies involved in the fight against corruption is essential. To assess the ODPP's capacity, several key factors need to be considered:

<sup>93</sup> DPP Renson Ingonga Strategic Agenda, Page 7, <https://odpp.go.ke/wp-content/uploads/2024/08/DPP-RENSON-INGONGA-STRATEGIC-AGENDA.pdf>



## **1. Human Resource Capacity:**

### **Staffing Levels:**

The ODPP requires enough qualified prosecutors to handle the increasing caseload of corruption cases. The number of staff available to the ODPP remain far below the establishment. For instance, the approved establishment was 1867 prosecutors against 707 in post, 72 Research Officers against 38 in post, two analysts with none in post and 194 clerks against 75.<sup>94</sup> Many other cadres of staff fall below 50 % of establishment with some completely left out. This means prosecution services are operating at less than 50% of the required and approved capacity for prosecutors and corporate staff.

In its annual report for 2020/2021, the ODPP notes the challenge of inadequate staff with a total of 1,062 against the approved establishment of 2,276. In addition, the office notes the terms and conditions of service remain less competitive despite significant improvements over the previous years.

### **Training and Development:**

Regular training and capacity building programs are essential to equip prosecutors with the necessary skills and knowledge to handle complex corruption cases. The DPP emphasises this aspect in his Strategic Agenda Paper issued in 2023, with the stated desire that every prosecutor and staff of the ODPP participates in at least one customised needs-based training every year.<sup>95</sup>

### **Staff Retention:**

The ODPP needs to implement strategies to retain experienced prosecutors and attract new talent. As part of this agenda, the DPP promises to actualize an ODPP

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<sup>94</sup> ODPP Strategic Plan 2023-2027, pg. 60.

<sup>95</sup> DPP Renson Ingonga Strategic Agenda, Page 3..<https://odpp.go.ke/wp-content/uploads/2024/08/DPP-RENSON-INGONGA-STRATEGIC-AGENDA.pdf>

staff reward and recognition policy as key to motivating and retaining staff. In addition, the ODPP emphasises the role of the Prosecution Training Institute that was established to assist in developing the capabilities of the staff members of the office.<sup>96</sup> The PTI has a vision to provide continuous training of prosecution Counsel to build capacity and ensure that they keep up with emerging complex corruption practices and economic crime trends. A training curriculum was under development to provide both diploma level certification in prosecution, advanced prosecution courses as well as inter-agency coordination. The ODPP also has established policies and guidelines for better development management and retention of staff.

## **2. Financial Resources:**

### **Budgetary Allocations:**

Adequate funding is crucial for the ODPP to effectively carry out its mandate, including prosecution-guided investigations, prosecutions, and asset recovery. An analysis of the budgetary allocations shows that the ODPP received a budgetary allocation of Kshs. 2,991,000,00.00 in 2018/2019 financial year. This figure marginally increased to Kshs. 3,284,000,000.00 in 2019/2020 and further to Kshs. 3,330,941,454.00 in 2020/2021.

## **3. Infrastructure and Technology:**

### **Modern Facilities:**

The ODPP needs modern office facilities and technology to enhance its efficiency and effectiveness. While office space has been expanding, this expansion has not kept in tandem with the increasing needs of the office.

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<sup>96</sup> DPP Renson Ingonga Strategic Agenda, Page 4, <https://odpp.go.ke/wp-content/uploads/2024/08/DPP-RENSON-INGONGA-STRATEGIC-AGENDA.pdf>

## **Case Management Systems:**

Effective case management systems are essential for tracking and managing the progress of corruption cases. The ODPP established the *Uadilifu* Case Management System which is an end-to-end case management system linked to the Judiciary's e-filing system. It enables the uploading of charge sheets and tracking of cases. This has resulted in efficient storage and quick retrieval of case data and allowing for effective monitoring and evaluation.

## **4. Independence and Impartiality:**

### **Independence:**

The ODPP is established as an independent office in the public service. This means its decisions ought to be seen as devoid of any political and external influence. There has been a perception that some of the decisions of the DPP, particularly around the 2022 political transition, were politically motivated or politically influenced. This was due to the unprecedented number of high-profile corruption cases that were withdrawn from the courts by the DPP. The conclusion of many was that the cases were either politically motivated, as claimed by members of the executive, or were politically influenced as many members of the public thought in the aftermath of the withdrawals.

### **Impartiality:**

A core tenet of a prosecution service is that it should act impartially, without bias, applying the law equally to all, paying fidelity only to the law. The DPP has occasionally struggled with the perception of bias, especially when dealing with politically sensitive cases. The DPP has however acted as a counter-balance against the miss-use of police powers by the National Police Service, especially around the exercise of civil rights by Kenyans.

## 5. Public Perception and Trust:

### ***Public Confidence:***

The ODPP recognizes the centrality of public confidence in its processes. It recognizes its mandate from the Kenyan people and promises to ensure justice, fairness and accountability in the discharge of its mandate. To this end, it has established a people centred prosecution service that focuses primarily on the Kenyan people and the staff of the ODPP.<sup>97</sup> In order to succeed, the ODPP must maintain public trust by demonstrating its commitment to the fight against corruption. A strategic Communications Department is envisaged to be the centrepiece of the DPP's agenda. This unit will deploy traditional and modern communication approaches and tools to keep the internal and external stakeholders informed of the work and service provided by the ODPP. This unit, will play a significant role in keeping the public involved and help maintain public confidence in the public prosecutor.

### ***Transparency and Accountability:***

Transparency in the prosecution process and accountability for decisions made are crucial to build public trust. The ODPP engages in public awareness campaigns to educate the public on the effects of corruption and how to report offenses of corruption. In addition, the ODPP is enhancing public participation and engagement in the war against corruption through the DPP's agenda on People-Centered prosecution which is in line with NEAP's objective of enhancing public participation and engagement in the war against corruption.

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<sup>97</sup> DPP Renson Ingonga Strategic Agenda 22nd September 2023, p. 2 , <https://odpp.go.ke/wp-content/uploads/2024/08/DPP-RENSON-INGONGA-STRATEGIC-AGENDA.pdf>

### 5.3 Challenges Facing the ODPP

The ODPP faces several challenges in its efforts to combat corruption:

#### *a. Complex and Sophisticated Crimes*

Corruption cases often involve complex financial transactions and intricate legal issues. The ODPP notes that the evolving nature of crime introduces complexities in prosecution.<sup>98</sup> The prosecution of complex and emerging crimes often requires special expertise to ensure successful outcomes. Further, due to the complex nature of corruption and economic cases the investigations usually take a long time and this sometimes affects timely prosecution of these crimes and delays in asset recovery and witness availability.

#### *b. Capacity*

In some cases, prosecutors lack the necessary training and skills to handle complex cases involving emerging forms of crime. The ODPP needs the resources to adequately and continuously train its staff to effectively prosecute new and evolving crimes.

#### *c. Complex nature of Mutual Legal Assistance*

Due to the increasing transnational nature of corruption and economic crimes, the tools available for proper investigation and prosecution are complex and slow. Due to differences in legal regimes, the process of obtaining and recovering evidence from different jurisdictions is complex and time-consuming. Prosecution counsels also face admissibility challenges in court when seeking to adduce the evidence obtained through MLA.

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<sup>98</sup> Office of The Director of Public Prosecutions, Annual Report, 2021/22

#### *d. Transnational nature of economic crimes*

With the globalization of crime, prosecutors face challenges in handling cases that involve multiple jurisdictions. Cooperation between countries through Mutual Legal Assistance is crucial in addressing transnational crimes such as cybercrime and money laundering and this usually takes time and is complex.

#### *e. Political Interference*

Political interference can hinder the ODPP's ability to prosecute high-profile corruption cases. Successfully prosecuting the political and economic elite in Kenya can be daunting. The political system makes prosecution of the elite a strenuous affair through interference with the investigation, prosecution and adjudication processes.

#### *f. Resource Constraints*

Limited financial and human resources have impacted the ODPP's capacity to effectively investigate and prosecute corruption cases. The ODPP's budgetary allocation is insufficient leading to limitations on the building of capacity of staff through continuous pieces of training and providing them with the necessary equipment to properly leverage technology in the execution of their duties. This culminates in reduced performance in the prosecution of corruption and complex economic crimes.

#### *g. Witness Intimidation and Bribery*

Witnesses may be intimidated or bribed to discourage them from cooperating with investigations and prosecutions. In some instances, prosecutors are unable to secure witness cooperation and testimony due to interference and intimidation. This results in critical evidence not being adduced in court and ultimately the acquittal of accused persons.



#### *h. Slow Pace of Justice*

The slow pace of justice can undermine public confidence in the ODPP's ability to deliver results. Despite the uptake of technology in the judiciary, there is still the manual handling of court processes which hinders the quick disposal of cases. 'Automated recording of proceedings technology has not been installed in all courts thus requiring judicial officers to record proceedings manually.' This is highly time-consuming as anti-corruption cases often have voluminous documentation. Additionally, as the law has not been amended to allow the admission of uncontested documents before trial, the entire trial process tends to be lengthy which may lead to witness fatigue and eventually miscarriage of justice.

#### *i. Filing of numerous applications by the Accused persons*

To subvert the course of justice, many accused persons make numerous applications in various courts often geared at derailing the trial with the aim of delaying the final determination of the matter. Such applications consequently result in hindering the ODPP from effectively prosecuting the cases to their logical conclusion. Such delays jeopardize the attendance of the witnesses, and the quality of evidence eventually presented in the matter during the hearing.

#### *j. Inadequate legislation*

The law is not adequately keeping up with the ever-evolving nature of corruption and economic crimes resulting in the ineffective prosecution and addressing of these forms of crimes.

#### *k. Weak inter-agency coordination and collaboration*

Despite concerted efforts to strengthen inter-agency collaboration, there exists coordination gaps amongst the agencies in the criminal justice system. This has

resulted in inefficiency and ineffectiveness in the delivery of justice (annual report 2020/2021 at page 68.<sup>99</sup>

#### *l. Legislative gaps in the virtual court process*

There exist gaps in the virtual court processes due to lack of a unified legal framework in plea taking. This leads to cases of mistrials and unnecessary failure in prosecution.

#### *m. Inadequate office infrastructure.*

The ODPP needs to keep pace with the office and infrastructure requirements of an ever expanding, but grossly inadequate number of prosecutors and enabling staff. In addition, technology has become central to the successful management of prosecutions. The ODPP needs resources to accommodate its staff and provide the necessary IT infrastructure to support their work.

#### *n. Overlap of Functions and Mandates*

The mandate of ODPP as relates to asset confiscation and forfeiture in matters arising from criminal offenses overlaps with that of the Asset Recovery Agency's mandate. Since the DPP exercises state powers of prosecution as provided for under Article 157 of the Constitution, asset confiscation and forfeiture being a key aspect of ensuring criminals do not benefit from the proceeds of their crime, this function falls squarely within the ODPP's mandate. Criminal forfeiture under part VII of POCAMLA relates to confiscation after conviction in a criminal matter as provided for under section 61 of POCAMLA. Criminal matters are a preserve of the ODPP.

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<http://parliament.go.ke/sites/default/files/2022-05/Annual%20Report%20of%20the%2021st%20Century%20Prosecution%20Service-%20Office%20of%20the%20Director%20of%20Public%20Prosecutions%20Kenya%20for%20the%20year%202020-2021%281%29.pdf>

## Recommendations

To enhance the ODPP's capacity to combat corruption, the following recommendations are proposed:

- **Increased Funding:** Adequate budgetary allocations to support the ODPP's activities.
- **Strengthening Human Resource Capacity:** Investing in the recruitment, training, and retention of qualified prosecutors.
- **Modernization of Infrastructure and Technology:** Upgrading the ODPP's infrastructure and technology to improve efficiency.
- **Protecting Witnesses and Whistle-blowers:** Implementing robust measures to protect whistle-blowers who report corruption.
- **Strengthening International Cooperation:** Collaborating with international law enforcement agencies to facilitate investigations, prosecutions and asset recovery.
- **Public Awareness and Education:** Raising public awareness about corruption and the importance of reporting it.

### *Law Reform and Legislative development:*

It is proposed that the Evidence Act and the Criminal Procedure Code be amended to firstly, allow for expeditious admission of exhibits such as documents and evidence obtained from foreign jurisdictions through MLA. Secondly, uncontested documents can be produced as exhibits without having to go through the whole process of examination of the witnesses before they are admitted as exhibits. Thirdly, once witness statements are supplied as exhibits the party calling that witness does not have to take him through an in-depth examination in chief, the witness statement can be adopted and the witness is cross-examined. This will allow for expeditious dispensation of cases.

The ACECA is to be amended to ensure that the mandatory fine under section 48 is adhered to as a measure to ensure the benefit gained by an accused person is taken away. The serving of imprisonment in default of paying the mandatory fine defeats the principle of depriving criminals of the proceeds of their crime.

There is a need for constant review of the law so as to ensure that we are adequately keeping up with the ever-evolving nature of corruption and economic crimes.

#### *Public Participation and Engagement:*

There is a need for enhanced engagement of the public in the strengthening of the current legislative framework. Conducting public participation with a view of both educating the public about the various laws and also getting their perspectives and recommendations on the various laws is important. This will allow for a continuous critique of the laws and getting feedback from the public on what is or is not working and what needs to be done to improve on the same in the fight against corruption and economic crimes.

## **6.0 The Anti-Corruption and Economic Crimes Division of the Judiciary in Kenya: A Comprehensive Analysis**

### **Introduction**

The Anti-Corruption and Economic Crimes Division (ACECD) of the High Court of Kenya is a specialized division established within the Judiciary to handle cases of corruption, economic crimes, and related offenses. This is a Division of the High Court established to deal specifically with corruption and economic crimes in an expeditious manner. This section delves into the legal and institutional framework of the ACECD, its human and financial resources, its effectiveness and challenges,

inter-agency coordination, public awareness and engagement, and finally offer recommendations to enhance its capacity and impact.

## **Legal and Institutional Framework**

The ACECD was set up administratively by the Chief Justice to answer to the need for expedited hearing and determination of corruption and economic crimes cases. The Division is not an independent court, but an administrative division of the High Court. It has therefore been hard to get information on staffing, financial resources and other aspects of capacity that relate specifically to the Division. As a result, the information used in this analysis covers the entire High Court and in some cases the entire Judiciary.

The Kenya Judiciary had 137 magistrate court stations in June 2024. There were also 46 High Court stations across 42 counties<sup>100</sup>. Four counties, Nairobi city, Nakuru, Laikipia, and Kiambu have two High Court stations. With High Court sub-registries established in Mandera and Samburu, the High Court has a presence in 46 out of 47 Counties.<sup>101</sup>

While there were no statistics available for the ACECDA, statistics for entire judiciary show that there were a total of 518,121 cases filed in the year 2023/2024. During the same period 509,664 cases were resolved, achieving an overall case clearance rate of 99%. 423,394 cases were filed in all courts across the country in 2022-2023, while 419,262 cases were resolved, representing a clearance rate of 99%. This rate of resolution of cases is commendable and will be key in reducing the backlog that bedevils the judiciary. Case backlog has been on a downward trend for the 2022/2023 and 2023/2024 reporting years.

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<sup>100</sup> SOJAR 2023-2024, page 21, [https://judiciary.go.ke/downloads/#flipbook-df\\_35371/49/](https://judiciary.go.ke/downloads/#flipbook-df_35371/49/)

<sup>101</sup> SOJAR 2023-2024, page 21.

## Human Resources

The performance of courts relies significantly on a committed, motivated and competent workforce that comprises all cadres of staff - judges, judicial officers and judiciary staff. In the SOJAR report for 2022-2023 the Judiciary acknowledges an increase in its personnel capacity against an ever-increasing workload. It is also acknowledged that the judiciary faces challenges in human resources capacity.<sup>102</sup> This challenge cascades to the entire judiciary, including the ACECD. While the division has assigned judges and special magistrates, the number of cases it handles often exceeds its capacity. This has led to delays in disposal and a backlog of cases. Additionally, the division may require more specialized training to effectively handle complex corruption and economic crimes cases.

The Judiciary has an approved establishment of 10,388 employees. In 2023/2024, it had 7,077 translating to 68% of the approved establishment. The number of judges was 207 against an establishment of 388, about 63%. The magistracy was 570 against 1,200 approved establishments 48%. Overall the judiciary is operating at 68% of its optimal staffing levels, calculated across the various cadres. This is an improvement from 64% reported in the 2022-2023 financial year.

The judiciary has put in place policies and measures to improve the human resource capacity. These include appointment of new judges and judicial staff and promotions across the board. The Kenya Judiciary Academy has been established to drive continuous learning for all cadres of the judiciary. In addition, continued efforts have been pursued towards improving the working environment, by providing working tools, equipment, and furniture.

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<sup>102</sup> SJOAR 2022/2023, page xxv <https://judiciary.go.ke/wp-content/uploads/2023/11/SOJAR-2022-2023-1.pdf>

During the 2023/2024 reporting year, 30 judges and 41 judicial officers received training on combating money laundering, corruption and economic crimes. SOJAR 2023/2024 - page 26.

### *Financial Resources*

The ACECD being part of the judiciary and high court relies on the Judiciary's budget to fund its operations. However, the division may require additional funding to support specialized training, technology, and infrastructure. Adequate funding is essential to ensure the division has the resources it needs to effectively discharge its mandate.

The judiciary estimates that the optimal cost per case is Ksh. 125,750.00 against an allocated cost of Ksh. 40,700.00. To dispose of all the 516,121 cases filed in 2023/2024 within a year, the judiciary estimates it would need Ksh. 64 billion against an allocation of Ksh. 21 billion.<sup>103</sup>

The information available mainly through the SOJAR reports indicates a serious funding problem for the judiciary. The judiciary received an allocation of Ksh. 22.42 billion in the financial year 2023/2024. This is an increase from Ksh. 18.56 in 2021/2022 to 21.13 billion in 2022/2023 and further to Ksh. 22.42 in 2023/2024<sup>104</sup>. Historical data shows that the judiciary is funded up to around 50% of its budgetary requirements. The data below, derived from the SOJAR 2022-2023 indicates the funding requirements against the budget allocation for the judiciary in 2023-2024.

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<sup>103</sup> SOJAR 2023/2024 pg. 144. [https://judiciary.go.ke/downloads/#flipbook-df\\_35371/171/](https://judiciary.go.ke/downloads/#flipbook-df_35371/171/)

<sup>104</sup> SOJAR 2023/2024 pg. 143



## Resource Requirements vs Budget Allocation in FY 2023/2024

	<b>Requirements Kshs. Billion</b>	<b>Allocation Kshs. Billions</b>	<b>Funding Gap (Kshs) Billions</b>	<b>Funding Gap (%)</b>
<b>Recurrent</b>	35.81	21.02	14.79	41%
<b>Development</b>	7.36	1.40	5.96	81%
<b>Total</b>	43.17	22.42	20.75	48%

Juxtaposed against other arms of government, the Judiciary has consistently received less than one per cent of the National Government budget for at least the past six years. This falls short of the desired 2.5-3 per cent that is indicated in the July 2010 Report of the Task force on Judicial Reforms which observed that: "To enhance the independence, operational autonomy, efficiency and effectiveness in the governance and management of the Judiciary, it is recommended the annual budgetary allocation to the Judiciary be augmented to a minimum of 2.5 percent of the national budget, provided that this percentage may be increased in future to cater for the Judiciary's needs."

Comparative Budget Allocation Shares of the National Government Budget (Ksh. Billions)

	2019-2020	2020-2021	2021-2022	2022-2023	2023/2024
<b>Executive</b>	1,947.87	1,816.34	1,886.21	2,050.15	2,373.80
<b>Parliament</b>	39.9	37.31	37.88	50.22	41.9
<b>Judiciary</b>	19.2	18	17.92	21.13	22.42
<b>Total</b>	<b>2,006.96</b>	<b>1,871.65</b>	<b>1,942.01</b>	<b>2,121.50</b>	<b>2,437.61</b>

Noting the continued resource gap in the judiciary, the government committed in 2023 to increase the budgetary allocation for the judiciary by Kshs. 3 billion every year over a period of five years. As a result, the judiciary received Kshs. 2.7 billion through a supplementary budget in 2023.

A number of challenges relating to funding and exchequer have been noted. They include inadequate and unpredictable frequency of exchequer issuance, delays in the exchequer requests process and inadequate legal provisions for the implementation of Judiciary Fund. There are proposals made to resolve these challenges.

*Judiciary Fund:*

Expenditure operations under the Judiciary Fund (JF) took effect from July 1, 2022 after all implementation instruments were actualised and an operational framework established. A year after operationalisation of the Fund, the Judiciary continues to strengthen the processes and procedures of the Fund ensuring that the budget is effectively implemented, and the exchequer is aligned with the Judiciary's cash flow plan. Standard Operating Procedures (SOPs) for Judiciary Fund operations and a Monitoring & Evaluation Framework were developed and a Judiciary Fund support desk established to offer technical support on all matters to the Judiciary Fund.

### **Infrastructure and Accessibility**

Case backlog and delays are amongst the major challenges the Judiciary is actively addressing. Case management allows the courts and stakeholders to make the best use of the limited judicial and administrative resources. The Judiciary continues to enhance case management techniques across the courts and tribunals towards the expeditious determination of cases.

The judiciary has embraced technology as a tool to aid the filing, management and monitoring of cases within its systems. For instance, the judiciary established an e-filing portal, partly as a response to the COVID 19 pandemic. This portal has helped Kenyans in filing their cases online. The number of cases registered through the E-Filing portal continue to rise and were reported to have reached 100,295 in 2023. The system has received very high satisfaction levels among court users. The satisfaction index was recorded at 67.5% in 2023. This, coupled with the use of the Case Tracking System and the digitisation of other court records are bound to improve the user experience for court users.

*Access to Justice:*

Article 48 of the Constitution imposes an obligation on the State to ensure access to justice for all. The Judiciary has therefore been deliberate in taking steps to ensure proximity and physical access to courts. This includes demonstrable efforts to remove barriers to access to justice and put measures in place to ensure that courts are within reasonable range and available to all those who seek justice. The judiciary has established more and more court stations, with a view to having a High Court station in all counties and a magistrate's court in all the constituencies. To supplement physical courts, the judiciary operates a mobile court system in remote areas. A shortage of judges and magistrates in remote parts of the country led to the innovation of court circuits which are court-organized hearings meant to accelerate the determination of disputes and bring justice closer to the people.

### **Effectiveness and Challenges**

The ACECD has been central in combating corruption and economic crimes since its inception. More and more cases are being filed and concluded in the court system. A number of challenges are however noticeable. The special anti-corruption magistrates do not handle corruption and economic cases exclusively. The desire for a day to day hearing of corruption cases has therefore not been institutionalised or achieved.

#### *Judicial Backlog:*

The division often faces a backlog of cases, which can delay justice and undermine public confidence in the judiciary. While the case clearance rate has been high and improving from 89.03 per cent in 202/21 to over 99% in 2023, the number of pending cases remains high. 7 in the same period. This is a case resolution rate of 105% which ultimately reduces the number of pending cases.<sup>105</sup> In 2023/2024, the number of cases filed in the High Court grew by 33% from 36,476

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<sup>105</sup> SOJAR, page 145, [https://judiciary.go.ke/downloads/#flipbook-df\\_35371/73/](https://judiciary.go.ke/downloads/#flipbook-df_35371/73/)

in 2022/2023 to 48,392 in 2023/2024. The number of resolved cases increased by 27% from 41,347 to 50,737.

Filed and resolved cases<sup>106</sup>

<b>Year</b>	<b>2018- 2019</b>	<b>2019- 2020</b>	<b>2020- 2021</b>	<b>2021- 2022</b>	<b>2022- 2023</b>	<b>2023/2024</b>
<b>Filed</b>	484,321	337,510	356,997	404,312	423,394	516,121
<b>Resolved</b>	469,359	289,728	294,837	381,317	4219,262	509,664

#### *Lack of Independence:*

Corruption and economic crimes in the Kenyan context involve the political and economic elite. The independence of the judiciary in resolving these cases has come under sharp focus. The Constitution guarantees the independence of the Judiciary, which shall not be subject to the control or direction of any person or authority. To the extent anti-corruption measures remain largely ineffective in their deterrence value, the independence of the judiciary will remain a matter of public interest.

#### *Corruption within the Judiciary:*

Corruption within the judiciary itself can undermine the effectiveness of the ACECD. Allegations of corruption within the judiciary are on the rise. The judiciary is under pressure to reassure Kenyans that its decisions are not vitiated by corruption. In 2021, the Chief Justice invited the EACC to undertake a systems review of the policies, procedures, and practices of the Judiciary with a goal of identifying the avenues and opportunities for unethical and corrupt practices. A

<sup>106</sup> SOJAR 2022-2023, page 112

'judicial hygiene' strategy has been instituted to implement the recommendations.

### *Inter-Agency Coordination*

Effective inter-agency coordination is crucial for the success of the ACECD. The division needs to collaborate with other law enforcement agencies, such as the Ethics and Anti-Corruption Commission (EACC) and Office of the Director of Public Prosecutions to ensure a coordinated approach to combating corruption. The Judiciary is at the apex of the legal and justice system with the Chief Justice chairing the National Council for the Administration of Justice. In this position, legal sector stakeholders can discuss challenges and come up with solutions to the challenges the system faces. There has however been dissatisfaction among the anti-corruption agencies and the executive on the rate of completion of cases by the judiciary.

### ***Public Awareness and Engagement***

Public awareness and engagement are essential to the success of the ACECD. The division needs to engage more with the public to not only ensure its place and role is appreciated by the public but also to communicate and address the challenges of the slow pace of resolution of cases.

### *Adoption of Technology*

While the judiciary has adopted technology to some extent, there is a lot that technology can contribute in the timely resolution of cases. For instance, while there are many AI enabled stenographers in the market, the judiciary has no audio recorded or full transcripts of proceedings, stuck in taking proceedings in long hand. The judiciary should aggressively deploy technology to help manage its workflow.

## CHAPTER 5

### 7.0 Moral and Ethical Values in Building a Culture of Integrity and Combating Corruption in Kenya

#### *Introduction*

Corruption remains one of the greatest challenges undermining Kenya's socio-economic progress and governance. Its pervasive nature erodes public trust, compromises service delivery, and exacerbates inequality. To address this issue, the Constitution of Kenya, 2010, emphasizes the importance of leadership grounded in integrity, accountability, and transparency. Article 10 of the Constitution sets out the national values and principles of governance, which include integrity, transparency, and accountability. These principles provide the foundation for ethical leadership and good governance. Chapter Six of the Constitution, the Leadership and Integrity Act, the Public Officers and Ethics Act and other codes of conduct which seek to operationalize these principles, providing a robust framework for combating corruption through adherence to national ethos and moral values. These values are essential in fostering ethical governance, promoting public accountability, and shaping societal attitudes toward corruption.

The Constitution of Kenya, in its preamble, underscores the aspirations of Kenyans to uphold justice, unity, and dignity. Chapter Six further enshrines the principles of integrity and ethical leadership, mandating that public officers act in a manner that upholds public confidence. The Leadership and Integrity Act and the Public Officers and Ethics Act (POEA) gives effect to these constitutional ideals by providing a code of conduct for public officers, emphasizing impartiality, accountability, and the prevention of conflicts of interest. Together, these frameworks embody the national ethos that corruption is unacceptable, and that public service is a trust to be executed with utmost integrity.



Corruption in Kenya extends far beyond mere legal transgression because it is a social vice that has retarded the growth of the country right from independence. In the 2023 CPI, Kenya was ranked 126th out of 180 countries, with a score of 31 out of 100, indicating a slight decline from its previous score of 32 in 2022. This decline has been attributed to factors such as the limited number of successfully prosecuted corruption cases and attempts to weaken anti-corruption laws. Therefore, while the CPI provides a numerical ranking, it does not offer a qualitative analysis of the ethical challenges affecting Kenyan society across both public and private sectors.<sup>107</sup> The Corruption Perceptions Index (CPI) is primarily a quantitative ranking that reflects perceived levels of public sector corruption. Various forms of embezzlement and unethical practices of the Kenyan people have been traced from the post-colonial period of the nation, once in the form of occasional acts of embezzlement that has grown over the years into a blueprint of a grand corrupt system with its hooks on almost every societal corner in Kenya.

### **7.1 Landmark Corruption Cases: A Historical Perspective**

Among all scandals in recent history, especially the 1990s the Goldenberg scandal orchestrated the massive fraud and corruption that shocked the nation. This was complemented by colossal government subsidies for gold exports, most of which were faked, amounting to over 5.8 billion Kenyan shillings lost.<sup>108</sup> This case turned into a turning point, primarily for explaining the rampant corruption within government procurement and finance systems. The National Youth Service (NYS) corruption scandal, which occurred more recently, was another showcase of how incurable unethical practices were.

In 2018, corruption investigations established that about 2 billion Kenyan shillings had been siphoned off through fraud involving senior government officials,

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<sup>107</sup> Gakuo Mwangi, *Political corruption, party financing and democracy in Kenya* 2008

<sup>108</sup> Hope, *Kenya's corruption problem: Causes and consequences* 2014

indicating systematic corruption in public organizations.<sup>109</sup> The scandal showed how pervasive corruption became, even in the programs aimed at youths' advancement in employment. According to the Transparency International Corruption Perception Index, the corruption index in Kenya has witnessed an upward trajectory.<sup>110</sup> Kenya scored 31 points out of 100 on the 2023 Corruption Perceptions Index reported by Transparency International. The index, which ranks 180 countries by their perceived levels of public sector corruption, showcases this trajectory as shown in Figure 1 below.

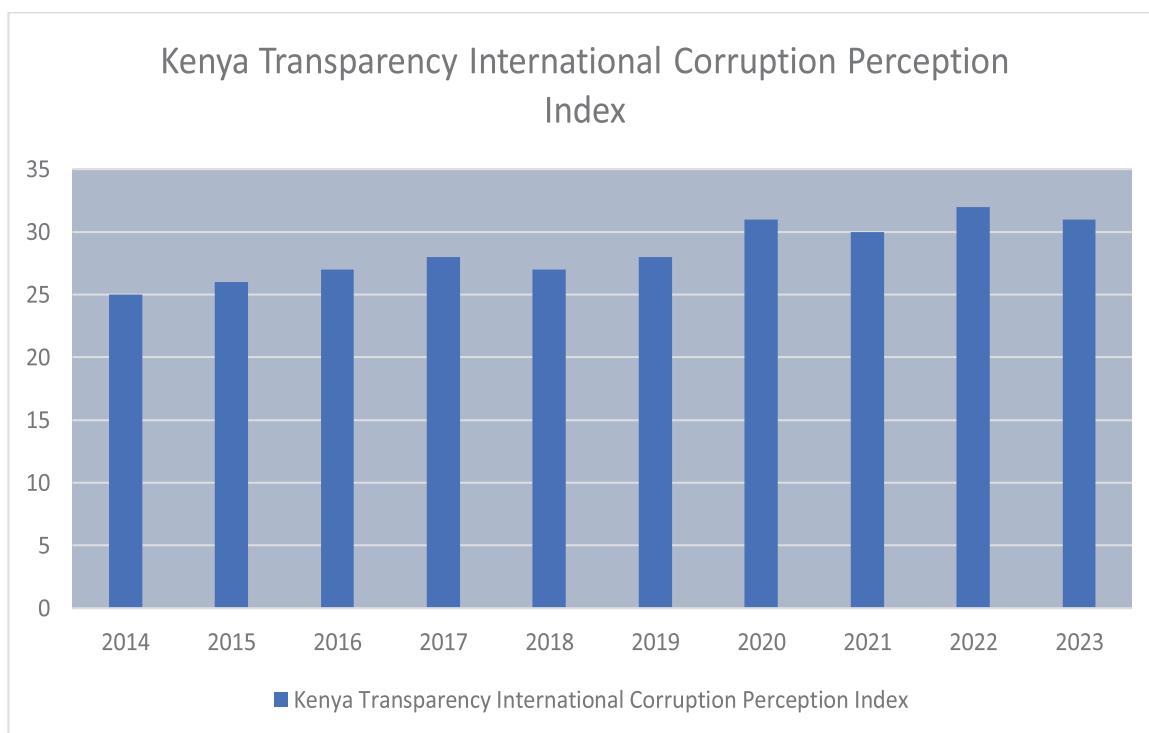


Figure 1: Transparency International Corruption Perception Index

### 7.3 Legal Foundations and Frameworks

#### The Leadership and Integrity Act

The Leadership and Integrity Act operationalizes Chapter Six of the Kenyan Constitution, which promotes ethical leadership. The Act is another comprehensive legal framework of Kenya's anti-corruption strategy. It enforces

<sup>109</sup> Ayodeji, *Assessing the strategies of the defunct Kenya's Anti-corruption commission (KACC): Lessons for the ethics and anti-corruption commission (EACC)* 2015

<sup>110</sup> Ibid

strict rules and standards on leaders and their position to create accountability on the highest level of governance.<sup>111</sup> The Act has addressed the cascading effect of leadership behaviour leading to systemic change through stringent standards on leadership. Unfortunately, legislative frameworks alone cannot curb the far-reaching effects of corruption since this menace is deeply rooted in complex social dynamics like cultural norms, historical patronage systems, and economic pressures.

The Act, enacted in 2012, addresses specific obligations, including:

- i. **Conflict of Interest:** Sections 11 through to 20 of the Leadership and Integrity Act requires public officers to declare and avoid personal interests that could interfere with the discharge of their duties.
- ii. **Wealth Declaration:** The Leadership and Integrity Act obliges public officers must submit declarations of income, assets, and liabilities to promote transparency. The Ethics and Anti-Corruption Commission (EACC) is mandated to ensure compliance of the wealth declaration by public officers.
- iii. **Accountability:** Section 11 of the Officers are obligated to ensure proper management of public resources and report any misappropriation.
- iv. **Disciplinary Measures:** The Leadership and Integrity Act provides mechanisms for investigating and sanctioning individuals who fail to comply with its provisions, including removal from office.

The Act operationalizes these principles through oversight institutions such as the Ethics and Anti-Corruption Commission (EACC), which investigates breaches of Chapter Six and ensures compliance with integrity standards. However,

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<sup>111</sup> Onyango, *Whistleblowing behaviours and anti-corruption approaches in public administration in Kenya* 2020

challenges in enforcing these provisions, including political interference and inadequate funding, often undermine their effectiveness.

## **7.2 The Public Officer Ethics Act**

The legal landscape of Kenya provides a background that addresses the intricate interplay between institutional practices, legislative frameworks, and societal norms. To begin with, the Public Officer Ethics Act stands out as a paramount legislative instrument that establishes legislative frameworks for governing the public behaviour of public officials.<sup>112</sup> This Act extends its mandate to enforce regulatory compliance and accountability within public services. These mandates are enforced through the Act's power to define clear codes of conduct, mandate asset declaration, and address conflicts of interest. Mutonyi affirms the role of this Act in curbing corruption by citing the structural frameworks that minimize the opportunities for corruption practices. However, this Act has been questioned because of the weak enforcement mechanism that shields corrupt public officers from legal consequences. This Act must be reevaluated in its implementation to achieve its intended purpose.

## **7.3 Public Service Code of Conduct and Ethics of 2016**

This Act complements the Public Officer Ethics Act by reinforcing the Public Officer Ethics Act's commitment to ethical governance. The 2016 revision strengthened the code by introducing detailed provisions on issues such as nepotism, bribery, and abuse of office.<sup>113</sup> Through its philosophical approach to ethical governance, the Act emphasizes the role of professionalism, transparency, and responsibility. This document is not only a set of guidelines because it recognizes punitive measures that transform individual mind-sets and organizational culture. The Act obligates private and public entities to implement appropriate anti-bribery procedures. Failing to penalize those who breach the

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<sup>112</sup> Mutonyi, “*Fighting corruption: Is Kenya on the right track?*” 2002

<sup>113</sup> Ibid

code creates an impression of impunity, undermining public confidence in anti-corruption efforts.

#### **7.4 National Code of Ethics/Ethos**

The development of a code of ethics or ethos as the National code could help a lot in eradicating this vice since society, we demand morality and ethic in our behaviours.<sup>114</sup> While using legal efforts that are based merely on punitive actions a code of ethics serves to establish high level of ethical standards, understanding and accountability among individuals in an organization.

The Kenyan environment provides a rich background for understanding why a national code of ethics should be adopted. Let alone the legal vehicles as seen in matters concerning Goldenberg and the National Youth Service corruption case, legal measures have not been proven adequate to curb corrupt practices. Whereas political factors include ethnic bias and influence peddling of the values like *Harambee* which is a Kenyan virtue of everyone pulling together, social factors are the major causes of corruption, although all the factors may interweave to emphasize the theme. Operation of a national ethos could help address these systemic issues by fashioning virtuous people in the population and rise above tribal and self-interest to what is best for the country.

Leaders play a pivotal role in setting the tone for governance and public ethics. When leaders adhere to the values prescribed in Chapter Six and the Leadership and Integrity Act, they inspire public confidence and cultivate a culture of accountability. Ethical leadership demonstrates the practical application of national ethos, ensuring that public resources are managed responsibly and decisions are made transparently. Conversely, leaders who flout these principles not only undermine the legal framework but also perpetuate a culture of impunity, weakening societal commitment to fighting corruption.

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<sup>114</sup> Ayodeji, *Assessing the strategies of the defunct Kenya Anti-corruption commission (KACC): Lessons for the ethics and anti-corruption commission (EACC)* 2015

National ethos and moral values also shape societal expectations and behaviour. A society that prioritizes integrity demands the same from its leaders and institutions. Civic engagement becomes a powerful tool in holding leaders accountable when citizens are guided by the ethos of justice and fairness. Mechanisms such as public participation in governance and the right to petition government actions, as provided under Article 1 of the Constitution, allow citizens to demand accountability and expose corrupt practices. Additionally, whistle-blower protections under the Leadership and Integrity Act encourage individuals to report unethical conduct, reinforcing the fight against corruption.

Education and cultural practices further contribute to embedding moral values that counter corruption. Incorporating anti-corruption principles in school curricula and community awareness programs helps instil a sense of ethical responsibility from an early age. Religious and cultural organizations also play a significant role in emphasizing values such as honesty and stewardship, mobilizing communities to reject corrupt practices. These efforts align with the constitutional principle of promoting social justice and national unity, as corruption is inherently divisive and unjust. Incorporating ethics in to school curriculum, and use of other forums such as religious institutions, youth groups will contribute to moral development from childhood. Moreover, including ethical leadership norms into governance frameworks – with reference to countries that redefine the criterion of integrity on the basis of Rwandan and the Botswana experiences – strengthens the relation of national values to systemic responsibility.<sup>115</sup> So, associating societal values with ethical norms, Kenya could gradually disorient corrupt practices that are a part of its political culture.

## 7.5 Challenges

Despite the generally diverse nature of corruption in Kenya, corruption is widely linked to social relations and ethnically constructed networks. The term

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<sup>115</sup> Ibid

*Harambee*, meaning pulling together, as was once seen as a great sign of togetherness, has been twisted to cover things such as favouritism in the distribution of resources. This cultural complexity gives birth to a rather paradoxical difficulty that cannot be fought only with legal tools. Obligations of family, tribe, or other extended relationships produce mechanisms of self-interest that may interfere with ethical practice.<sup>116</sup> Holding keys to state resources in Kenya is equated to an opportunity to bring the national cake closer home

Even with the robust policy and legislative frameworks, implementation of the values and principles, legal provisions and various codes, streamlining ethics in public service continues face challenges like;

- Inadequate and ineffective mechanisms for integrity vetting for persons seeking elective and appointive positions in the public service; the self-declaration forms are inadequate without the robust engagement of the public in the processes rendering vetting a charade especially when the appointments are presidential in nature.
- Weak mechanisms for the enforcement of the provisions of Chapter Six; the lack of a legal framework that coordinates the various facets from the point vetting to sanctioning remains a weak link especially as observed during vetting for elective posts rendering most chapter 6 vetting agencies recommendations unimplemented and peripheral e.g. EACC submitting a list unfit persons while IEBC claims the mandate to clear aspirants and exercising discretion on who to clear.
- Lack of mechanisms for lifestyle audits; Kenya lacks a policy and legal framework to assess how much public and state officers have acquired over time since joining public leaving a gap which has

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<sup>116</sup> Ibid



been exploited to illicitly enrich corrupt state/public officers from state resources.

- Overlapping institutional framework for enforcement of provisions on declarations of income assets and liabilities by public officers; state and public officers declare and file forms with their respective commissions making it cumbersome for EACC to process and verify the declarations.
- Public indifference to suitability of persons elected or appointed to public office; generally, the public resorts to tribal emotions when one of their own has been appointed or is seeking elective positions and therefore fail to call out leaders who fail to meet the integrity standards while others feel that the corrupt are brave enough to bring the national cake closer home than those who would be considered clean.
- Fragmented legal framework for implementing the Leadership and Integrity Codes.
- Low threshold for enforcement against breach of ethics that impedes the enforcement of Chapter Six and the Leadership and Integrity Act and Codes; apart from the case of the former CJ who was impeached and the bar raised on integrity standards, courts have generally adopted the criminal standards which makes it impossible to declare persons unfit for office especially in cases where the cases are ongoing while at the same time declaring that one needs to have exhausted the judicial system to declared unfit to hold public office.
- Inadequate partnerships with non-state actors in the promotion of ethics and integrity.
- Low awareness by the public on the Leadership and Integrity Act and Codes and on their role in the enforcement thereof.

## 7.6 The Role of Moral and Ethical Values in combating corruption in Kenya

The war on corruption in the Kenyan context needs to transcend simple measures such as punishment for corrupt behaviour to strengthen moral and ethical practices within the society. Fundamentally, corruption prospers where ethical responsibility is poor, not least where there is a demand for moral regeneration. Integrating morality and ethics into Kenya's effort to combat corruption is an admirable move that involves changes in people's behaviour, organizations, and authorities.<sup>117</sup> When education, technology, ethical leadership, inequalities, and more are enhanced, Kenya will set up a society where integrity is valued and corruption is frowned upon. In the long run, this shift will pave the way for realizing this nation's vision of ethical leadership, governance, and sustainable development

At the individual level, curbing or combating corruption calls for fundamental reforms in personal ethics. At the root of personal ethics lies a belief system guided by a robust moral compass that prioritizes collective well-being over personal gain. This belief system demands transparency, commitment to integrity, and professional excellence. Pillay calls for moral education and educational initiatives that lead to this transformation. The author recognizes the tools that come with these initiatives and their role in navigating ethical dilemmas; this approach introduces all individuals to broader social implications of individual choices.<sup>118</sup> Emerging initiatives like the Young Professionals Against Corruption (YPAC) have promoted personal ethics and challenged existing narratives.<sup>119</sup> These youth-led movements leverage. Technology, social media, and communal organizations challenge corrupt practices and promote a culture of integrity. Young Kenyans increasingly view corruption as a barrier to national development, creating a generational shift in attitudes and expectations.

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<sup>117</sup> Gathii, *Kenya's long anti-corruption agenda - 1952-2010: Prospects and challenges of the Ethics and Anti-Corruption Commission under the 2010 constitution* 2010

<sup>118</sup> Pillay, *Corruption in procurement- antecedents, practices, and challenges* 2021

<sup>119</sup> Oindo et al., *An ethical response to corruption in Kenya* 2021

Education is the starting point in developing the relevance of ethical awareness nurturing. Ethics that can be taught right from this an elementary level will help cultivate appropriate standards, responsibility, and value for property. For example, South Africa's "Ethics and Integrity Curriculum" represents a highly developed program that builds the ethical profiles of society through the institutional education procedures at each level of schooling.<sup>120</sup> Kenya could replicate similar frameworks that will fit the culture and history of the country. This approach bears the understanding of Pillay that education has effectively transformed society's values.

The religion and cultures of the people of Kenya are well represented in social relations and are more influential than state authorities. It could promote behaviour change if the governance ethical values are advertised on these platforms. Ministry in Small Christian Communities (SCCs) and other small groups offer avenues through which the subject of ethical corruption can be introduced.<sup>121</sup> Referring to the experiences from El Salvador where the 'See, Judge, Act' method was used at the grassroots level, to encourage residents to fight against corruption, Kenyan institutions can employ religious events for evidence mobilization and for the creation of public awareness about corruption issues.

Another key element of fighting corruption is ethical leadership. By adopting integrity, the leaders help foster the required institutional culture while ensuring people have faith in the institutions. This strategy can be supported by Rwanda's leadership under Paul Kagame as a case study.<sup>122</sup> Ironically, the county's no-tolerance policy towards corruption, accompanied by rigorous ethical standards of the public officials, has enhanced the governance result. Based on the above model, Kenya should strengthen the Leadership and Integrity Act to ensure the leaders' ethical standards

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<sup>120</sup> Ibid

<sup>121</sup> Ibid

<sup>122</sup> Ibid

Although Kenya has a relatively sound legal framework that addresses corruption, there must always be more connection between the law on the books and its application on the ground. Bridging this gap requires a dual approach: boosting existing in-built systems, enforcement and ensuring that moral standards and principles are stamped into society.<sup>123</sup> Transparency awareness currently being carried out by, for instance, the Ethics and Anti-Corruption Commission (EACC) should involve negative deterrence and positive incentives.

Besides, a shift from the compliance-based approach commonly used in organizations is equally important. These institutional transformations create a culture that rewards and values ethical behaviour. A study by Hope cites institutional transformation measures like implementing fair and transparent recruitment practices and creating environments where whistleblowing is supported.<sup>124</sup> The author cites the case of the University of Nairobi's comprehensive ethics training program implemented in 2017. This program serves as a model for institutional transformation because it takes a holistic approach to developing institutional integrity, transparent recruitment processes, focusing on ethical decision-making, and establishing clear consequences for unethical behaviour while simultaneously working to develop a culture of integrity.

## **7.7 Comparative Analysis: Lessons from Nations with Strong Ethical Frameworks**

In viewing the impact of moral and ethical values in the fight against corruption, Rwanda and Singapore are the best-case studies to review. The extensive study of both countries shows that when a company has a healthy ethical environment, it is possible to reduce corruption hundreds of times, with the support of society, contributing to its development.

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<sup>123</sup> Gakuo Mwangi, *Political corruption, party financing and democracy in Kenya* 2008

<sup>124</sup> Hope, *Police corruption and its security challenges in Africa: Kenya as a country case study* 2023

### 7.7.1 The Case of Rwanda: A Zero Tolerance Policy

Rwanda's social-economic development under President Paul Kagame offers a perfect example of how ethical leadership complemented with an aggressive war on corruption can produce dramatic results. It has resulted in a militant type of intolerance that has admission under the cultural banner of a new country that believes in unity and accountability.<sup>125</sup> In some countries, all governmental employees, including ministers and presidents, must be approved systems, and any sign of corruption will be legally and socially dealt with. Other state institutions, such as the Office of the Ombudsman, are guarantors of transparency by allowing people to report violations anonymously.

This can be seen from Rwanda's reverse on the Corruption Perception Index (CPI) following the implementation of these measures. The country has focused on ethical governance to prevent corruption, enhance investors' confidence, invite external investment, and boost public confidence in governance institutions.<sup>126</sup> Kenya can do the same and redouble efforts: the Leadership and Integrity Act needs to be bolstered; anti-corruption agencies, like the EACC, need to be granted more independence from political influence, for instance, has gone from being regionally corrupt into one of the world's cleanest states within the past half-century. This success is due to the appropriate institutions that Singapore has established, including the Corrupt Practices Investigation Bureau (CPIB), and supported by an ethic that ensures that employees with a good work ethic are respected in the country. Singapore's strategy is to first have severe punishments that check corruption and, second, use preventive measures, such as paying competitive salaries to avoid bribery.

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<sup>125</sup> Oyamada, *Combating corruption in Rwanda: Lessons for policy makers* 2017

<sup>126</sup> Ibid

### 7.7.2 Singapore: Institutional Integrity and Cultural Reinforcement

Ethical and moral values are incorporated into Singapore's societal base. Culturally and ethically responsible teachings are incorporated into the academic lesson plans to teach the students moral and ethical acts of responsibility.<sup>127</sup> Moreover, a public awareness campaign focuses on the effects of procedures, thus reminding people that society does not tolerate unethical work. Analysing the cases of Rwanda and Singapore it is obvious that pursuing a firm ethical approach is crucial for fighting corruption. Such nations demonstrate best practices of how legal-institutional and cultural measures need to be combined to build a culture of integrity. It means that if Kenya decides to implement similar measures, it would record considerable improvements in fighting corruption.<sup>128</sup> Through promoting the National spirit associated with the set values and ethical responsibility Kenya can not only increase the confidence of the public but also unleash the country's economic and social potential.

### 7.7.3 Worst Case Scenario- Lessons to Learn

According to the Transparency International's 2023 Corruption Perception Index, Somalia had a score of 11 on a scale from 0 (highly corrupt) to 100 (Not Corrupt). The country is ranked last among the 180 countries that have been listed in the index.<sup>129</sup> Somalia faces corruption challenges that are deeply entrenched in the patronage system which undermines the federal government. The challenge of corruption is further exacerbated by the absence of resources, functional government and administrative capacity.

Since the falling of the Said Barre regime in 1991, the central government has been weak, thus offering those involved involvement in criminal networks such as warlords and militias the opportunistic chance. Corrupt officials embezzle public money for their own benefit and the funds meant to build new roads or bridges,

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<sup>127</sup> S.T. Quah, *Curbing police corruption in Singapore: Lessons for other Asian countries* 2014

<sup>128</sup> S.T. Quah, *Curbing police corruption in Singapore: Lessons for other Asian countries* 2014

<sup>129</sup> Omar, *Effect of anti-corruption strategies on economic development in Somalia* 2018



feed the hungry or provide job opportunities are siphoned.<sup>130</sup> For example, the money provided to the state to feed and treat inhabitants affected by regular droughts in Somalia is usually embezzled.

The normalcy of unethical behaviour is a clear contribution to the general erosion of standards within the society reducing accountability, leading to the unmatched drive for individual self-interest. Somali authorities have been forced by international organizations and donors to work for increased transparency, and while change has been made, there is much more that can be done and the process is very slow due to bureaucratic interests which hinder accountability. As argued already from the case of Somalia, moral and ethical failures at national level are devastating. It stresses the need for change, in the area of governance more specifically, leadership ethics and the reestablishment of social capital.

## Conclusion

While the legal framework provides a solid foundation for promoting ethical behaviour, their effectiveness is limited without a corresponding commitment to moral and ethical values. The Leadership and Integrity Act and Public Officer Ethics Act represent great milestones in legislative provisions of the law against corruption. These elaborate legal regimes prescribe high ethical behaviour codes of conduct for public officials, demanding extensive declaration of assets, laying thin lines on conflict of interest, and providing adequate procedures for investigating and condemning corruption. Despite a robust legal framework, Kenya faces several challenges in embedding moral and ethical values in governance. These challenges include systemic corruption, weak enforcement mechanisms, and cultural norms. However, Kenya needs to learn from successful models and initiatives implemented in other countries to address the gaps in their current framework. For instance, the nation can learn from Rwanda's zero-

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<sup>130</sup> Omar, *Effect of anti-corruption strategies on economic development in Somalia* 2018



tolerance approach and Botswana's emphasis on ethical governance to combat corruption.

Cultural normalization of corrupt practices, such as the acceptance of small bribes as a way of life, undermines the national ethos. Weak enforcement of Chapter Six and the Leadership and Integrity Act further emboldens corrupt individuals, as political interference often compromises institutional independence. Moreover, economic disparities and poverty push some individuals to prioritize survival over moral convictions, complicating the fight against corruption.

### RECOMMENDATIONS

#### Recommendations on Specific Legislations

##### The Leadership and Integrity Act

- i. Strengthening enforcement mechanisms is critical. Secure deterrents in public life require both quick actionable systems for integrity enforcement investigations and criminal proceedings. The process requires independent teams to perform asset verification tasks while they maintain continuous oversight regarding conflict-of-interest compliance.
- ii. Detailed definitions of important terms will create uniform enforcement practices while clearing up ambiguities in the process.
- iii. The Act needs expanded coverage to increase its scope of accountability measures. The scope of public official coverage under this law must include all government personnel while the integrity requirements must retain equal strength for both national and county administrators.
- iv. The EACC requires operational and financial autonomy from influence because this will protect its independence.
- v. The public needs to receive better education and have enhanced participation rights. Educational programs executed through civil society partnerships will build public engagement for oversight of integrity. Selectable and untraceable reporting systems must be developed to help people report corruption incidents.
- vi. Bolstering whistle-blower protections is essential. To safeguard whistle-blowers full protection must include anonymity as well as legal aid and financial benefits. A dedicated independent organization specializing in whistle-blower complaints management can both defend their safety and provide suitable solutions to their complaints.

- vii. The implementation of the Act will benefit from improved systems that monitor and report violations. Enhancements in EACC funding would provide opportunities for extensive audit activities and public entity compliance oversight. Annual reports about compliance requirements should become mandatory for governments so the public can maintain proper oversight of their actions.
- viii. Technology adoption provides substantial opportunities to increase transparency levels. Modernized online platforms that handle public assets reporting together with purchasing and enforcement activities enable greater oversight by cutting out administrative errors. Through open data policies citizens gain access to government resource distributions and actions so they can monitor them properly.
- ix. Potentially excessive punishments for serious violations of compliance policies should be analysed followed by enhanced sanctions to clearly communicate the gravity of compliance responsibilities to the public. Future measures that pawn recovered stolen public funds and administer bans on public office positions harmed offenders would dramatically reinforce the value of governance integrity.

## **The Anti-Bribery Act**

To enhance the effectiveness of the Anti-Bribery Act and address the identified gaps, several key recommendations are proposed:

- EACC and other enforcement agencies need better institutional capacity because public funding and their resources need to be strengthened. The authorization of modern investigative tools coupled with training for personnel needs to become a critical part of the investment plan.

- A centralized database together with regular information-sharing sessions between corruption teams should enhance cooperation between all anti-corruption agencies.
- The development of detailed guidance for private sector compliance should prioritize small and medium-sized enterprises because it promotes standard anti-bribery practices across every sector.
- The protection of whistle-blowers should improve through clearly defined procedures for confidential reporting accompanied by strict legal protections against any form of retribution.
- Independent evaluation systems operated regularly will help assess how well the Act performs and discover where changes should be made.
- Public understanding about the Act's rules and the reporting processes should be increased by permanent educational campaigns.

## Recommendations on Institutional Capacity

To enhance the capacity of the EACC, the following measures are recommended:

- **Recruit more staff for the EACC:** The EACC operates at 50% of its staff establishment. This does not correspond with the trends of corruption in the country which it is established to help fight. Inadequate staff inhibits the Commission from effectively executing its constitutional and statutory mandate.
- **Adequate Funding:** The EACC needs to secure more stable and sufficient budget allocations from the national government commensurate with its important mandate of leading the fight against corruption. Its financial allocation should be enhanced to keep in tandem with the ever-increasing number and challenge of investigating and preventing corruption in Kenya.

- **Capacity Building:** Invest in comprehensive training programs for staff to build specialized skills in investigative techniques. The IT infrastructure needs to be enhanced to keep it in tandem with technological advances as well as the evolution of crime.
- **Legal Reforms:** Advocate for legal reforms to enhance the authority of the EACC and streamline cooperation with other government entities. These reforms should also bring clarity in the legal framework, address mandate overlaps and simplify investigation and enforcement procedures. Specifically
  - the POEA should be amended to provide for an automated system of filing and processing declaration of assets and liabilities.
  - ACECA should be amended to provide for a timeframe within which corruption cases should be concluded in court
  - LIA should be amended to provide for the suspension from office of state officer facing charges of corruption in court, until their innocence is established.
  - The law should be amended to bar potential candidates facing corruption charges in court from being eligible to vie for any electoral office or be appointed in any public office.
- **Public Relations Strategy:** The EACC will need to review its strategic communication plans to improve public engagement and trust. This will also help the challenge of misinformation and inaccurate media reports.

## Recommendations

To enhance the capacity and impact of the Anti-Corruption and Economic Crimes Division (ACECD) of the High Court of Kenya, the following recommendations are proposed:

1. **Increase Human Resource Capacity:** The Anti-Corruption and Economic Crimes Division of the High Court needs to recruit more judges to ensure

expeditious resolution of cases. It has been the desire of stakeholders that cases are resolved within one year.

2. **Provide Adequate Funding:** Funding for the judiciary needs to be significantly enhanced to accord with the constitutional mandate of providing access to the courts and case resolution without delay. The government should allocate sufficient funds to the judiciary and the division to support its operations, including necessary specialised training, technology, and infrastructure. This should include greater exchequer autonomy of the judiciary and the full operationalization of the judiciary fund.
3. **Strengthen Inter-Agency Coordination:** The division should establish strong working relationships with other anti-corruption agencies to ensure mutual learning and a coordinated approach to the resolution of corruption and economic crimes.
4. **Promote Public Awareness and Engagement:** The judiciary and the ACECD should enhance its public awareness engagement strategies to bridge the gap between the judiciary and the courts.
5. **Enhance Judicial Independence:** The public and justice stakeholders should take steps to protect the independence of the judiciary, including the ACECD, from political and other undue influences.
6. **Implement Anti-Corruption Reforms:** The government should implement comprehensive anti-corruption reforms to address systemic corruption and create a conducive environment for the ACECD to operate effectively.
7. **Embrace technology:** The Judiciary is left behind in embracing technology. Technology, including AI-powered technology should be deployed to develop court transcripts and generate a verbatim record of proceedings. Technology should also be used to manage better judicial work processes.

## Recommendations on Enhancing Moral and Ethical Values in the Fight against Corruption

In order to strengthen and enhance moral and ethical values in Kenya, it is proposed to:

- Ensure strict enforcement mechanisms for Chapter Six and the Leadership and Integrity Act by amending LIA to clarify the roles of the various Chapter 6 institutions, creating a Chapter 6 Working Group and clear grey areas especially on the finality of the reports from the vetting institutions and foster a coordinated approach towards vetting.
- Strengthen the framework and mechanisms of public participation and for conducting civic education on leadership and integrity.
- Develop a legal framework for conducting lifestyle audits and ensuring the audits are applied consistently to all public and state officers.
- There is a need to integrate ethics education at an early age to inculcate values of accountability and integrity from an early age. This initiative shapes individual behaviour and leads to an ethically conscious society. Collectively, public awareness campaigns build a culture of accountability and encourage citizens to demand transparency from their leaders.
- There is a need to integrate social activism into the Small Christian Communities (SCCs), Men Associations' gatherings and exercises, and Women's Associations. Through this initiative, the public will be introduced to a profound investigation of their local area's political and social influences in influences thereby enhancing a greater call for transparency and accountability on matters of governance.
- There is a need to engage the public more on anti-corruption initiatives e.g. reporting by developing a robust whistle-blower protection and reward mechanism and enabling citizens to recover looted public resources by public and state officers.



- Independent anti-corruption institutions such as the Ethics and Anti-Corruption Commission should be adequately resourced and shielded from political influence. Ethical leadership must be prioritized, with stringent vetting processes for public

**Other Recommendations:**

1. The Criminal Asset Recovery Fund should be fully operationalised and managed autonomously.
2. The overlap in the asset recovery mandate between different agencies should be streamlined to enhance efficiency.
3. A policy on re-use of recovered assets should be developed to safeguard recovered assets from further loss and direct resources to anti-corruption work and social sectors.

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## ADDENDUM 1: LEGISLATIVE MATRIX

Below is an expanded and detailed matrix for each legislation:

Law	Gaps/Inconsistencies	Recommendations (Expanded)
Public Procurement and Asset Disposal Act (PPADA), 2015	<p>- <b>Resource constraints</b> at county levels hinder implementation, particularly for training, monitoring, and compliance. - <b>Complicated procedures</b> and compliance costs limit SME and marginalized group participation. - <b>Lack of civic education</b> means stakeholders are unaware of their rights and reporting mechanisms. - <b>Abuse of direct procurement provisions</b>, allowing manipulation to bypass competitive tendering.</p>	<p>- <b>Establish sustainable funding mechanisms:</b> Allocate annual budgets for county governments to support PPRA and PPARB capacity-building initiatives, with periodic resource audits to ensure sufficiency. - <b>Simplify procurement regulations:</b> Review and revise documentation requirements to eliminate unnecessary bureaucracy for SMEs and marginalized groups. Develop user-friendly guides and digital tools for application processes. - <b>Conduct quarterly civic education campaigns:</b> Partner with civil society organizations and the media to educate stakeholders on procurement</p>

		<p>rights, responsibilities, and reporting fraudulent practices.</p> <p>Include workshops, public forums, and simplified materials in local languages. - <b>Audit direct procurement processes regularly:</b> Conduct third-party evaluations and set up automated monitoring systems to identify anomalies in direct procurement cases, ensuring compliance with transparency and urgency criteria.</p>
<p>The Anti-bribery Act, No. 47 of 2016</p>	<p>- <b>Limited funding</b> for enforcement agencies like the EACC hinders investigations and outreach programs. - <b>Inconsistent compliance</b> by public and private organizations in adopting anti-bribery measures. - <b>Political interference</b> undermines the impartiality and independence of investigations.</p>	<p>- <b>Increase funding for the EACC:</b> Establish a ring-fenced budget for anti-bribery initiatives to ensure consistent funding.</p> <p>Introduce performance-based grants to support regional offices. - <b>Improve public awareness:</b> Launch nationwide campaigns targeting businesses and individuals to educate them on Section 9 (reporting bribery) and</p>



		<p>Section 18 (anti-bribery policies).</p> <p>Develop sector-specific training for industries prone to bribery risks, such as construction and procurement. - <b>Ensure independence of investigative agencies:</b> Amend legislation to limit political oversight and influence over the EACC's operations. Introduce public reporting of progress on high-profile bribery cases to reinforce transparency.</p>
<p>Proceeds of Crime and Anti-Money Laundering Act (POCAML), 2009</p>	<p>- <b>Judicial delays</b> in asset recovery prolong the process and allow dissipation of illicit assets. - <b>Limited public awareness</b> of reporting obligations and financial crime prevention measures. - <b>Ambiguities in institutional roles</b> lead to overlaps and inefficiencies among agencies like ARA, FRC, and DCI.</p>	<p>- <b>Streamline judicial processes:</b> Establish specialized anti-money laundering courts to fast-track cases. Introduce statutory timelines for hearings and asset recovery decisions to prevent undue delays. Train judges and prosecutors on complex financial crime cases. - <b>Enhance public education campaigns:</b> Develop targeted</p>

		<p>outreach programs for financial institutions, businesses, and the general public. Include workshops, media campaigns, and practical guides on recognizing and reporting suspicious financial transactions. - <b>Clearly define institutional roles:</b> Draft a memorandum of understanding (MoU) between ARA, FRC, DCI, and other agencies to clarify responsibilities and improve coordination. Set up inter-agency task forces to manage high-profile cases and share intelligence.</p>
<p>Anti-Corruption and Economic Crimes Act (ACECA), 2003</p>	<p>- <b>Judicial bottlenecks</b> delay prosecutions, allowing suspects to dissipate assets. - <b>Overlapping mandates</b> among anti-corruption agencies result in inefficiencies and jurisdictional conflicts. - <b>Negative public perception</b> of enforcement efforts due to perceived selective</p>	<p>- <b>Establish specialized anti-corruption courts:</b> Set up courts dedicated to corruption cases with trained judges and prosecutors to handle complex financial evidence. Use technology to track case progress and enforce statutory timelines. - <b>Create a centralized</b></p>

	<p>prosecution and political interference.</p>	<p><b>coordination mechanism:</b> Form an Anti-Corruption Coordination Council (ACCC) to streamline investigations and prosecutions. Ensure regular inter-agency meetings and data-sharing protocols to eliminate redundancies. - <b>Launch transparency campaigns:</b> Develop a public-facing dashboard to provide updates on corruption cases, asset recoveries, and enforcement actions. Highlight success stories and address public concerns to rebuild trust. Engage independent auditors to review high-profile cases for impartiality.</p>
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