

**THE ADMINISTRATIVE FACTORS HINDERING THE EFFICIENT
ACCOUNTABILITY OF PUBLIC OFFICERS IN FULFILLING PUBLIC
FUNCTIONS**

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Declaration

I, JAMES OCHONG AHERE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as
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12. Stephen Mwai Gachiengo & another v Republic [2000] eKLR.

ABBREVIATIONS

KACA-Kenya Anti-Corruption Authority

KACC-Kenya Anticorruption Commission

EACC-Ethics and Anti-Corruption Commission

DPP-Director of Public Prosecution

AG-Attorney General

PPOA-Public Procurement Oversight Authority

NARC- National Rainbow Coalition

KANU-Kenya Africa National Union

ACECA-Anti Corruption and Economic Crimes Act

ARA-Assets and Recovery agency

WPA-Witness Protection Agency

NPS-National Police Service

ABSTRACT

This dissertation focuses on the regulation and holding to account of public officers with regard to fulfilling public functions, which can be understood as the responsibility taken up by the state to provide public services to its citizens. There has been an exponential increase in cases reported of public officers mismanaging and embezzling public funds in Kenya, leading to inefficient provision of services to the public and a reduction in the socio economic welfare of the citizens due to mismanagement of tax payer's money. This research paper outlines the administrative measures stipulated by law with respect to policies made and the institutions established in regulating, monitoring, investigating and prosecuting actors. Moreover, the dissertation seeks to assert the real issues that have inhibited the efficient regulation and holding to account of public officers by providing a historical account of the role of regulatory bodies mandated with the role of investigating corrupt public officers in public office. The research paper further highlights the National Youth Service corruption scandal as its case study, providing the facts of the case and thereafter providing new reforms/approaches that can be implemented in the ongoing probing of the public officers accused of the corruption offences. Inherently, this research paper seeks to outline the statutory loopholes in the law with respect to regulation of public officers. It also outlines general institutional measures, internal and external, necessary to maintain efficiently provided public functions guided by the principles set out in the constitution with respect to leadership, integrity and the rule of law.

1. CHAPTER ONE-Introduction to Research Paper

1.1. Background of the problem

According to statistics provided by Transparency international as of year ended 2016, Kenya was ranked number 145 in the corruption perception index.¹ Corruption weakens the ethical fabric of the civil service and prevents the emergence of well-performing governments capable of developing and implementing public policies that promote social welfare.²

On 26th June 2015, the clerk of the National assembly requested the Auditor-General to conduct a special audit report of the accounts of the National Youth Service (NYS), in the state department of planning under the Ministry of Devolution and Planning.³ The special audit noted weaknesses in implementing control activities i.e approval, authorization, arithmetic accuracy and documentation, that were meant to deter and/or prevent misappropriation and abuse of public resources.⁴ The special audit noted fraudulent practices that led to the losses of kshs.1,863,512,255.66 under various circumstances.⁵ This led to investigations by the Office of the auditor General which conclusively submitted their report to the Public Accounts Committee of the National Assembly.

¹Transparency international, Corruption Perception index 2016, http://www.transparency.org/news/feature/corruption_perceptions_index_2016

²The World bank group, Helping countries combat corruption: The role of the world bank. <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>

³ Office of the Auditor General , Special report on the State department of planning, Ministry of Devolution and Planning; National Youth Service,2016,p.1.

⁴ Office of the Auditor General , Special report on the State department of planning, p.1.2.19.

⁵ Office of the Auditor General , Special report on the State department of planning, p.1.4

Thus the case study becomes relevant for the public officers in charge of the Institution were inefficient in establishing controls that could prevent the misappropriation and abuse of public resources.

Integrity is essential for building strong institutions resistant to corruption.⁶ Thus it is important to address this issues in order to formulate viable solutions that will improve accountability of public officers through proper internal and external controls i.e. from an internal perspective, this can be done through the maintenance of high standards of competency, integrity and professionalism by Government officials, and from an external perspective through the regulation, supervision, monitoring and holding to account of the Government officials in fulfilling public functions.

1.2.Statement of the problem

The main issue that this dissertation tries to address is the fact that the implementation and enforcement of public functions has not met the standard enshrined in the Constitution of Kenya. This is clearly exhibited by the exponential increase in the way State officers disregard the sanctity of their offices as a public trust held for the benefit of the citizens of Kenya. These compromise public/official interests in favour of their own personal interest.

This raises the question of accountability. Is it a matter of law that the government is not properly supervised and held accountable for its actions in fulfilling public functions?

The purpose of the dissertation is to critically assess the role of the law in the formulation of policies and establishment of institutions involved in the regulation of actors undertaking public functions. The main goal of this paper is to unearth the reasons why public officials are not being held accountable for lack of competency and integrity in fulfilling public functions. Once

⁶ Organization for Economic Co-operation and Development; Fighting corruption in the public sector. <http://www.oecd.org/corruption/ethics/>

this is defined, viable solutions are provided based on arguments by scholar Migai Aketch, on the implementation of strongly instituted Administrative law frameworks.⁷

1.3. Research Questions

- What is a public function and what does the law stipulate about it?
- What is the role of government in carrying out public functions?
- Which institutions are involved in the regulation, supervision and monitoring of the government in carrying out public functions?
- What are the main issues that have hindered regulatory institutions in holding to account government officials involved in corruption?
- What measures have been taken to handle these issues?
- What reforms/proposals can be introduced to improve the mode of implementing and enforcing public functions?

1.4. Rational of the research paper

This Research paper begins with the premise that regulatory institutions have become complacent in their role of supervising and holding to account government bodies/individuals in fulfilling public functions .The paper therefore provides a comprehensive history of regulatory bodies in Kenya that have not been successful in their mandate. It also addresses, the main issues prohibiting efficient regulation and provides viable solutions. In doing this the paper aims to create confidence among foreign investors to participate in trade and development projects within the state, in addition it aims to increase the public's confidence on the state's ability to carry out its mandate.

1.5. Definition of terms

Public function; Functions of a public nature i.e. the state has assumed responsibility for the function, and directly or indirectly, regulates, supervises or inspects the performance of the

⁷ A Migai, Privatization and Democracy in East Africa: The Promise of an Administrative Law, Nairobi: East African Educational Publishers Ltd,2009,11

function in question in the public's interest and is guided by statutory powers and duties stipulated in law.⁸

Corruption; is a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.⁹

Public Officer;

- Any State officer¹⁰, meaning anyone holding a state office¹¹
- More so, any person other than a state officer who holds a public office (an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament).¹²

Regulation;

A rule of order having the force of law, prescribed by a superior or competent authority, relating to the actions of those under the authority's control.¹³

⁸ Human Rights Act 1998 (Meaning of Public Function) Bill, Published by Authority of the House of Commons London, The Stationary Office Limited.

⁹Black's Law Dictionary Free Online Legal Dictionary 2nd Ed, <http://thelawdictionary.org/corruption/>

¹⁰ Article.260, Constitution of Kenya (2010)

¹¹ Article.260, Constitution of Kenya (2010)

¹² Article.260, Constitution of Kenya (2010)

¹³ <http://legal-dictionary.thefreedictionary.com/regulation>

1.6. OUTLINE OF THE PAPER

In Chapter one, the dissertation provided a background of the research problem and the purpose of the study. In addition the, research questions were outlined.

Chapter two outlines the conceptual framework of the study based on; administrative law, democracy and history.

Chapter three proceeds to make the central case, that is corruption of public officers and a description of its context within Kenya. The chapter provides a definition of laws and institutions involved in the regulation, monitoring, investigation and prosecution of public officers involved in corruption and embezzlement of public funds. It also provides an illustrative case study of the National Youth Service.

Finally it gives a historical account of the investigative body mandated with the investigation of corrupt public officers from Kenya Anti-corruption Authority, to Kenya Anti-corruption Commission to the present Ethics and Anti-corruption commission.

Chapter four then outlines the main issues that have been identified as, hindering the efficient regulation and holding to account of public officers.

Chapter five concludes the paper by providing suggested reforms and approaches that can be implemented in the ongoing probe of the National Youth Service. It also makes general recommendations on how to improve regulation, investigation and holding to account of public officers.

2. CHAPTER 2- A CONCEPTUALISATION OF ADMINISTRATIVE LAW, DEMOCRACY AND HISTORY

This paper conceptual framework is built on an interdisciplinary approach of Administrative law; Democracy; and History. The chapter outlines the main tenets upon which the paper is assessed.

2.1 Administrative law

Administrative law plays the important role of ensuring that public agencies and public officers do not abuse the discretionary power given to them by the Constitution of Kenya, 2010 and by Acts of Parliament. Administrative law is a branch of law that establishes democratic principles and procedures that regulate the exercise of power; such as transparency and procedural fairness.¹⁴ One author who uses an Administrative law perspective is Migai Akech. He is of the contention that through the establishment of strongly institutionalized Administrative law frameworks, state and/or public officers are held accountable for their actions in their official capacities.¹⁵ In addition to this, Migai attributes corruption to the predominance of arbitrary power especially in the statutory as opposed to constitutional order. The statutory order grants executive, legislative and judicial actors broad powers without establishing effective procedural mechanisms to circumscribe their existence. More so he asserts that the statutory order must be aligned with the values and principles of the Constitution of Kenya 2010, if abuse of power and corruption are to be curbed.¹⁶

¹⁴ Akech M, Privatization and Democracy in East Africa: The Promise of an Administrative Law, Nairobi: East African Educational Publishers Ltd,2009,1

¹⁵ Akech M, Privatization and Democracy in East Africa: The Promise of an Administrative Law, Nairobi: East African Educational Publishers Ltd,2009,11.

¹⁶Akech M, Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?, Indiana University Press, Indiana Journal of Global Legal Studies , Vol. 18, No. 1 , 2011), pp. 341-394

In this paper the perspective of Administrative law is implemented through the assessment of Administrative institutions empowered with an oversight role over public officers and their success rate in holding public officers accountable.

2.2 Democracy

In political science democracy is defined as the rule of the people.¹⁷ The key role of citizens in a democracy is to participate in public life. The Bill of rights an integral part of Kenya's democratic state is the framework for social, economic and cultural policies. It stipulates the rights and freedoms a citizen enjoys in the state with regard to preserving their dignity and promoting social justice.¹⁸ Citizens have an obligation to become informed about public issues; to watch carefully how their political leaders and representatives use their powers, and to express their own opinions and interests.¹⁹ Every citizen has the right of access to information held by the state.²⁰ The rule of law protects the rights of citizens, maintains order, and limits the power of government. Therefore the citizen has the right to be actively involved in the administration of the law through the recognition of one's civic duty. This is so for all Sovereign power belongs to the people, and this power may be exercised either directly or indirectly through their democratically elected representatives.²¹

In this paper the perspective of democracy focuses on the inclusivity of the public in the holding to account of public officers with respect to access to information and involvement in decision making. This consequentially leads to public confidence in the systems of regulation and oversight.

¹⁷Nitisha, Democracy; Definition and explanation, Political science Notes. <http://www.politicalsciencenotes.com/democracy/democracy-definition-and-explanation/831>

¹⁸ Article 19. (2) , Constitution of Kenya (2010).

¹⁹ Lecture at Hilla University for Humanistic Studies January 21, 2004, What is Democracy? <https://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm>

²⁰ Article 35. (1).a, Constitution of Kenya (2010).

²¹ Article 1. (1) and (2), Constitution of Kenya (2010).

2.3 History

History is a branch of the social sciences that is inescapable. To a whole school of writers among whom we find some of the great historians of our time, history is the study of politics, that is, as provided by Aristotle, “all that concerns the activity of the state itself.”²² Therefore the topic earns relevance in this paper for the subject provides an account of measures taken by the state in the past in addressing political matters.

With regard to the paper historical accounts of steps taken by the Kenyan government in holding public officers to account for acts derogatory to their mandate will be outlined.

The efforts to curb corrupt public sector go back to 1956 when the British colonial government passed the Prevention of Corruption Act .²³ The Act provided a framework to fight the vice more effectively after the attainment of independence in 1963. After independence, the implementation of the Act was hampered by two competing goals;²⁴

- a) Nation building and speeding up of economic growth and Development
- b) Provide public services at lower cost, ensure equity of access, generate revenues, and provide employment.

These aspirations were sort out through the establishment of income-generating agencies, known as ‘parastatals’, The immediate goal of such was to provide citizens with essential services like electricity, rail and air transport, water, telephone, and postal services. This approach empowered the government to intervene in the market place by setting up interest rates and the prices of basic commodities. The unintended consequence of such intervention

²² Frederick Jackson Turner, The significance of History. <http://teachingamericanhistory.org/library/document/the-significance-of-history/>

²³ Kenya Anti-Corruption Commission. (2009). ‘Kenya Anti-Corruption Commission 2007-2008 Annual Report.’ Nairobi, Kenya

²⁴ Okoth S H, Prosecute and Punish; Kenya’s attempt to curb Political and Administrative Corruption, 4. <http://www.ameppa.org/upload/Prosecute%20.pdf>

was the creation of a platform of which corrupt practices took root in post-independent Kenya.²⁵

A practice in which favors were extended to selected citizens through employment in return for their loyalty and political support became the norm of the day. Moreover, with the weak public accountability, state censorship of the media, and the absence of organized civil society during the first three decades of independence, Kenya's senior government officials began to loot revenues through the state-agencies.²⁶ Thus this research paper begins from the procedural steps that orchestrated the creation of regulatory institutions that would hold state/public officers accountable for acts of corruption in public office.

3. CHAPTER 3-THE LEGAL FRAMEWORK ON CORRUPTION IN KENYA

This chapter seeks to introduce the central focus of the research paper which is the regulation and holding to account of government officials in carrying out public functions. Public function is defined as, an assumed role by the government to undertake functions which are of a public nature and within the public domain, that are worth the public's interest and are guided by statutory powers and duties stipulated in law.²⁷

The chapter first discusses corruption and then looks at the legal and regulatory framework set up to curb it. Finally it outlines the historical steps implemented by the government in the fight against corruption by public officers.

²⁵ Okoth, Prosecute and Punish; Kenya's attempt to curb Political and Administrative Corruption, 4. <http://www.ameppa.org/upload/Prosecute%20.pdf>

²⁶ Okoth, Prosecute and Punish; Kenya's attempt to curb Political and Administrative Corruption, 3. <http://www.ameppa.org/upload/Prosecute%20.pdf>

²⁷ Human Rights Act (Meaning of Public Function) Bill, Published by the Authority of the House of Commons London, The Stationery Offices Limited, 1998.

3.1 CORRUPTION

The Legal definition provided for corruption is, a vicious and fraudulent intention to evade the prohibitions of the law. More so, the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.²⁸ According to the Anti-corruption and Economic Crimes Act, the definition of corruption includes the embezzlement or misappropriation of public funds.²⁹

According to International Law

In recognition of what is stipulated in Article 2 of the Constitution of Kenya 2010, the general rules of International Law form part of Kenyan Law.³⁰ Kenya ratified the United Nations Convention Against Corruption on 9th December 2003 and therefore is bound to adopt such legislative and other measures as may be necessary to establish the specified acts as a criminal offence.³¹

The United Nations Convention against Corruption provides the following definitions;

- Abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity³²

²⁸Black's Law Dictionary Free Online Legal Dictionary 2nd Ed, <http://thelawdictionary.org/corruption/>

²⁹ National Council for Law Reporting, Sec.2 , Anti-Corruption and Economic Crimes Act, CAP 65, Revised Edition (2014)

³⁰ Article.2.(5)and(6), Constitution of Kenya (2010)

³¹United Nations Convention against Corruption Signature and Ratification Status as of 12 December 2016, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

³²Article.19, United Nations Convention Against Corruption, 31 October 2003, A/58/422.

- Illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.³³

3.1.1 Corruption of public officials in Kenya

Corruption within the country is a publicly sanctioned activity both in the private and public sectors. This research paper is focused on outlining the measures stipulated by law both as a form of policy and institutionally in curbing the vice and holding actors to account, to be specific public officials.

In light of what is stipulated in Article 10 of the Constitution, the State seeks to enforce principles of governance that are binding upon all state and public officers, this principles include the rule of law, democracy, participation of the people, good governance, integrity, transparency and accountability.³⁴These are the main proponents upon which this research paper is based upon.

Chapter six of the constitution further asserts that the office of a state officer is a public trust that is to be exercised in a manner that brings honour and dignity to the office, and promotes public confidence in the integrity of the office. Other provisions stipulated in chapter six include;³⁵

- The selection of leaders on the basis of personal integrity, competence and suitability
- Selfless service based on the public's interest and not one's conflicting personal interest
- Accountability to the public for decisions and actions made.

³³Article.20,United Nations Convention Against Corruption, 31 October 2003, A/58/422,

³⁴ Art.10.(2), Constitution of Kenya, (2010)

³⁵ Art.73.(1).a, Constitution of Kenya,(2010)

3.1.2 Laws regulating corrupt public officers.

In recognition of what the constitution asserts with regard to leadership and integrity, legislative steps have been taken through the enactment of acts of parliament both as a matter of policy and institutionally in curbing the vice. These laws include;

Public Officer Ethics Act;

The Act advances the ethics of public officers by providing a code of conduct and ethics, which imposes on public officers a duty of professionalism and prohibits activities such as improper enrichment, conflicts of interest, acting for foreigners, political partisanship, nepotism, and sexual harassment.³⁶

Anti-Corruption and Economic Crimes Act;

An Act of Parliament that provides for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith.³⁷

Public Procurement and Disposal Act;

An Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.³⁸

Leadership and Integrity Act;

The Act asserts that a State officer shall maintain high standards of performance and professionalism and shall not use the office to unlawfully or wrongfully enrich himself or herself or any other person.³⁹ In addition to this, a State officer or a public officer shall declare a

³⁶ Sec.5 and 6, The Public Officer Ethics Act, Cap. 183 , Revised Edition 2009(2003)

³⁷ Preamble, Anti-Corruption and Economic Crimes Act ,Cap.65,Revised Edition 2014(2012).

³⁸ Preamble, Public Procurement and Disposal Act No. 33 of 2015.

³⁹ Section. 11 and 12,Leadership and Integrity Act ,Cap 182,Revised 2015(2014).

personal interest to the public entity where he or she is employed.⁴⁰ More so the act posits the role of The Ethics and Anticorruption Commission as institution responsible for overseeing and enforcing the implementation of the Act.

3.2 REGULATORY INSTITUTIONS

In the absence of fear of penalty or sanctions there is nothing to deter those who wield power from fraudulently enriching themselves and violating the law.⁴¹ Oversight is therefore an important activity that ensures accountability.

At the center of the concept of accountability is the checking and balancing of potential abuse of power by public officials with the objective of limiting the potential for corruption of public officers.⁴²

With reference to the constitution accountability can be viewed from two perspectives. If the holder of a public office directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good that use.⁴³

With reference to the central focus of this research paper (the provision of public function), when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, and transparent⁴⁴

⁴⁰ Rule 10, Leadership and Integrity Regulations, Cap 182, Revised 2015, Subsidiary Legislation.

⁴¹ Egbue N.G, Africa: Cultural Dimensions of Corruption and Possibilities for change, Nnamdi Azikiwe University, P.M.B 5025, Awka, Anambra-State, Nigeria, 84.

⁴² Abuodha J.O, Integrating accountability mechanisms in local government: Case Study Of Kenya's Specialized Intellectual Property Rights Court Regime, 2011. <http://kenyalaw.org/kl/index.php?id=1898>

⁴³ Article.226.(5), Constitution of Kenya,(2010)

⁴⁴ Article. 227.(1), Constitution of Kenya (2010)

The various bodies that carry out an oversight role over the appropriation of public funds based on the following perspectives;

3.2.1 Regulation, Supervision and Monitoring

Office of the Auditor General

The Office of the Auditor- General is established as an Independent Office under Article 248(3) of the Constitution of the Republic of Kenya. By virtue of the supreme law of the land, The Auditor General shall audit and report the accounts of every commission and independent office established by the constitution.⁴⁵ More over The Auditor-General may audit and report on the accounts of any entity that is funded from public funds and the audit report shall confirm whether or not public money has been applied lawfully and in an effective way.⁴⁶

With regard to the case study the Office of the Auditor general fulfilled its mandate in carrying out a credible audit over the Ministry of Devolution and Planning and reporting to the Public Accounts Committee.

Civil Oversight

Civilian oversight refers to measures that allow citizens to engage and supervise operations of government and public institutions.⁴⁷It provides for access to information, public participation as well as reporting violations, lobbying and citizen advocacy.

Article 1 of the Constitution of Kenya on the sovereignty of the people provides that all sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution; and that the people may exercise their sovereign power either directly or through their democratically elected representatives.⁴⁸ Therefore the citizens can monitor law enforcement agencies for transparency and accountability.

⁴⁵Article. 229.(4).d, Constitution of Kenya,(2010)

⁴⁶Article.229.(5) and (6), Constitution of Kenya,(2010)

⁴⁷ <http://www.tikenya.org/index.php/blog/371-an-overview-of-civilian-oversight-in-kenya>

⁴⁸ Article.1.(2),Constitution of Kenya(2010)

The principles of public finance under Article 201 of the constitution have been incorporated in the Public Finance and Management Act No.18 of 2012 to ensure transparency and accountability in finance, brought about by the Citizens ability to effectively participate in the financial matters which include the budget making and tracking process through civilian oversight.

In this respect the public was not effectively involved in the monitoring of the National Youth service transactions thus the lack of transparency in the procurement of goods and services within the institution.

Ethics and Anti-Corruption Commission

The commission is established by article 79 of the constitution of Kenya whereby it shall have the powers and status of a commission for purposes of ensuring compliance with and enforcement of chapter six of the constitution (leadership and integrity).⁴⁹The Commission shall have the power to conduct investigations on its own initiative or on a complaint made by any person⁵⁰In addition to this, the commission shall recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under relevant Acts or any other law enacted pursuant to Chapter Six of the Constitution, and recommending appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct.⁵¹

In this respect the Commission has fulfilled its mandate in the ongoing investigations on the NYS and has duly forwarded the matter to the office of the Director of public prosecutions.

⁴⁹ Art.79,Constitution of Kenya(2010)

⁵⁰ Section.13(2).c, Ethics and Anti-Corruption Commission Act, No.22 of 2011

⁵¹ Section. 35, Anti-Corruption and Economic Crimes Act ,Cap.65,Revised Edition 2014(2012)

Public Procurement Oversight Authority

Public Procurement Oversight Authority (PPOA) was established pursuant to the provisions of Section 8 of the Public Procurement and Disposal Act, 2005. The constitutional basis of oversight over public procurement and disposal of goods and services in the Public Sector is set out under Article 227 of the Constitution of Kenya, which provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective⁵²

With respect to the NYS scandal the procurement authority did not effectively scrutinize the procurement process at the NYS thus leaving loopholes in the procurement process occasioning the overpricing of goods

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Public Accounts Committee

With respect to holding the executive accountable on a daily basis, the work of the legislature revolves around departmental committees, which investigate the activities and administration of the government ministries, departments, and agencies assigned to them.⁵³

- The Public Accounts Committee mandate is to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments.⁵⁴

With respect to the NYS scandal the committee disregarded the report made by the EACC after the commission absolved the former devolution minister Anne Waiguru of misappropriation of public funds, and thus conducted fresh investigations. However the probing process is clouded with matters of politics as claims have been made that the process turned into a “witch hunt” in

⁵² Article.227,Constitution of Kenya,(2010)

⁵³ Section.198(3), Republic of Kenya National Assembly, Standing Orders, (2008)

⁵⁴ <http://www.parliament.go.ke/the-national-assembly/committees/mandate-and-classification/departmental-committees>

which members of the committee are focusing on pinning blame on the former cabinet secretary instead of unearthing the facts in issue.⁵⁵

3.2.2 Prosecution perspective

Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions is established under Article 157 of the Constitution of Kenya, 2010, and operationalized through the Office of the Director of Public Prosecution Act, 2013.⁵⁶

Pursuant to the provisions of Article 157 of the Constitution, 2010 and Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 the Office of the Director of Public Prosecutions has the mandate to prosecute criminal cases including all corruption and economic crime matters investigated by EACC.⁵⁷

The Director of Public Prosecutions (DPP) is required, under Section 37 of Anti-Corruption Economic Crimes Act, to prepare and submit to the National Assembly, an annual report (1st January to 31st December) on action taken and the status of the prosecution of cases investigated and submitted by EACC⁵⁸

3.2.3 Asset recovery perspective

The Asset Recovery Agency is established under Section 54 of the Proceeds of Crime and Anti-Money Laundering Act as a body corporate and as a semi-autonomous body under the Office of

⁵⁵ Kelvin Odunga, MP Gumbo-led Public Accounts Committee owes Kenyans an apology, 23rd March 2017 <https://www.standardmedia.co.ke/ureport/article/2001233702/mp-gumbo-led-public-accounts-committee-owes-kenyans-an-apology>

⁵⁶ Article.157, Constitution of Kenya, (2010)

⁵⁷ Section.35, Anti-Corruption and Economic Crimes Act, Cap.65, Revised Edition 2014(2012)

⁵⁸ Section.37, Anti-Corruption and Economic Crimes Act, Cap.65, Revised Edition 2014(2012)

the Attorney-General.⁵⁹ The key function of the Agency is to trace, freeze and confiscate proceeds of all crime, as per the provisions of Proceeds of Crime and Anti-Money Laundering Act.

3.3 Case Study-National Youth Service Corruption Saga

Subject to the National Youth Service Act CAP 208 of Kenya, the research paper seeks to focus on the National Youth Service of Kenya as a case study. The National Youth Service provides training to the youth as a national development program that does away with youth unemployment and promotes national cohesion in the country.⁶⁰

Thus the case study is relevant, because the institution's main mandate is to train the nation's youth to become more productive citizens of the state (public function), and more so the matter is within the public's interest. However this research paper dives deeper into the main issue which is misappropriation and embezzlement of public funds within the NYS. Thus the meeting point between the Devolution and Planning Ministry and the National Youth Service, in that, through the Executive Order no. 2 of May 2013, the Directorate of Youth Affairs was placed under the Ministry of Devolution and Planning making the ministry responsible for the integration of youth issues into national planning and development.⁶¹

From the beginning of 2015 there have been recurrent media reports and political rhetoric on the investigation of public officials involved in the public embezzlement of funds at the National Youth Service. Presently, investigations are being carried out by the Ethics and Anti-Corruption commission after reports were made through the office of the Auditor General claiming that more than 791 million Kenya shillings was embezzled at the National Youth Service.

The following accounts included in the research paper are currently ongoing and may change in due time. It would be an act of prejudice to comment on the present matter for investigations are not yet conclusive. This paper however seeks to provide a basic understanding of what has been

⁵⁹Section.54 Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009

⁶⁰ <http://nys.go.ke/public/index.php>

⁶¹ <http://www.devolutionplanning.go.ke/wp-content/uploads/2015/04/Strategic%20Plan.pdf>

officially uncovered in order to provide a comprehensive understanding of the corruption scheme.

The first fraudulent scheme discovered by the Auditor General was at the pay-point of the youth groups daily allowances. There were instances where cohorts shared the same identification cards used to make multiple payments to different individuals, At least 19.4 million during the program period. Payment of another 18 million was also fraudulently made to beneficiaries using identical mobile numbers.⁶²

The second scheme was altering of contracts. An altered supplies branch contract was used to facilitate fraudulent payments of ksh.222 million to various suppliers without proof of the goods being delivered or services being rendered. The audit revealed that the payments were in two components

- 1) Was a total payment of Kshs 66,964,619.00 identified as recurrent however no documentation was availed to support the payment an
- 2) A payment of 155,158,300.00 and three documents supporting the payment when verified, highlighted that the payment for the supply of 945 sleeping bags 945 camp beds, 45 manigold and 137 uni-huts for dam construction. An inspection at the NYS Headquarters confirmed that these items had neither been received nor taken on charge in any of the NYS records.⁶³

The special audit noted an amount of Kshs.791,385,000 was fraudulently paid to three suppliers namely; **Form Home builders, Reinforced Concrete Technologies and Roof and All Trading**, all associated with Josephine Kabua. **Form Home Builders** received all its irregular payments of 218 million at least five months before it was registered by the Registrar of companies. On the other part **Reinforced Concrete Technologies**, and **Roof and All Trading's** started receiving their payments 2 months after they were registered.⁶⁴

⁶²Office of the Auditor General , Special report on the State department of planning, Ministry of Devolution and Planning; National Youth Service, 2016 Appendix 2,

⁶³ Office of the Auditor General , Special report on the State department of planning .Appendix 3

⁶⁴ Office of the Auditor General , Special report on the State department of planning. Appendix 1

According to records at the Registrar, the suppliers were just recognized as business names but not companies and thus were not bound by the Companies Act CAP 286. This highlighted a case of fundamental disregard to internal controls and an indication that proper due diligence was not done for these suppliers before starting any business with the NYS.

The information presented above acknowledges the contribution made by the office of the Auditor General in providing the facts of the case study upon referral to the special audit of the accounts of the National Youth Service (NYS), in the state Department of Planning under the Ministry of Devolution and Planning.

Based on the central focus of the paper that is the accountability of public officers. It can be argued that the NYS affiliated public officers accused of misappropriation of public funds should be held to account for failure to fulfill their public functions with regard to upholding high standards of integrity and professionalism in carrying out their mandate.

3.4 Historical issues that have hindered regulatory institutions in holding to account government officials involved in corruption.

History

The period between the year of '1990' and '2000' witnessed the formation of anti-corruption measures and initiatives. Some of the initiatives introduced were the amendment of the Prevention of Corruption Act (Cap 65) to provide for the establishment of the Kenya Anti-Corruption Authority (KACA - 1998) whose Executive Director was Harun Mwau.⁶⁵ Unfortunately, after a brief span of life, the agency's power to prosecute was challenged under Section 26 of the country's Independence constitution that empowers only the Attorney General to do so.⁶⁶

⁶⁵ Gathii J, Kenya's Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution, 4 L. & Dev. Rev. 182 (2011)

⁶⁶ Okoth .S, Prosecute and Punish: Kenya's attempt to curb political and administrative corruption.4. <http://www.ameppa.org/upload/Prosecute%20.pdf>

Not only did the Kenyan Executive branch remove the KACA's cases from the docket, it also went on to remove its leader as well. The President, Daniel arap Moi, appointed a tribunal to evaluate the competence of Director Mwau not long after he and his agency brought some judicial officers and high level ministers to court on corruption charges.⁶⁷

The NARC party victory in the general elections in 2002 raised popular expectation of an end to corruption. The President, Mwai Kibaki launched a National Anti-Corruption Campaign in which a strong anti-corruption agenda was born. The Government, through the newly created Ministry of Justice and Constitutional Affairs, took measures to enact the anti-corruption legislation that had failed to become a reality during the KANU era.⁶⁸

The biggest anti-corruption initiative taken by President Kibaki and his NARC party at the outset of his Presidency was the passing of the Anti-Corruption and Economic Crimes Act as well as the Public Officer Ethics Act in May 2003. The Anti-Corruption and Economic Crimes Act established the Kenya Anti-Corruption Commission. The KACC would have to face the same obstacles imposed on the KACA by the Constitutional Court's conclusion in *Gachiengo case*.⁶⁹

*Case; Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic of Kenya*⁷⁰

The question tackled during proceedings was whether it was contrary to the separation of powers for High Court Judge Ringera to also serve as director of the Kenya Anti-Corruption Authority.

The Court held that it was an unconstitutional breach of separation of powers to have Justice Ringera be a member of both the Executive and the Judiciary. As such he had to choose to either remain a High Court Judge or retire from the High Court and continue to direct the KACA.

⁶⁷ Gathii J, Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya, 14 CONN. J. INT'L L. 407, 428 (1999).

⁶⁸ Tordoff, W, Government and Politics in Africa (4thed.). Bloomington, IN: Indiana University Press, (2002).

⁶⁹ Gathii J, Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya.

⁷⁰ Stephen Mwai Gachiengo & another v Republic [2000] eKLR.

The Court asserted that the judiciary should not be “subject to the dictates of either the executive or the legislature” and when Judge Ringera took his oath to head the KACA he became a part of the Executive branch also and was no longer bound by the judicial oath.⁷¹

One of the adverse consequences brought about by the Gachiengo decision is the effect it had on all the pending cases that KACA had initiated against corrupt officials. Once KACA was stripped of its legal authority for prosecuting corruption, all the cases it was investigating and planning to prosecute were handed over to the Attorney General and Anti-Corruption Police Unit. However, none of these cases resulted in a conviction and all were either not prosecuted by the AG or if they were prosecuted they were dismissed by the courts.⁷²

Therein after, The Anti-Corruption and Economic Crimes Act (herein after ACECA) filled the void left by the KACA’s demise following the Court’s Gachiengo decision. The ACECA established the Kenya Anti-Corruption Commission (hereinafter “KACC”) as the newest corruption fighting body in Kenya.

With the promulgation of the New Constitution of Kenya, 2010 the Ethics and Anti-corruption Commission was established under article 79 of the constitution of Kenya whereby its prescribed purpose was to ensure the compliance with and enforcement of chapter six of the constitution (leadership and integrity).

4 CHAPTER 4- THE ADMINSTRATIVE ISSUES INHIBITING THE REGULATION OF PUBLIC OFFICERS

This chapter discusses the administrative issues that frustrate the effective regulation of public officers from a perspective of controls. Controls are systematic measures such as reviews, checks and balances, methods and procedures instituted by an organization to conduct its business in an orderly and efficient manner.⁷³

⁷¹ Stephen Mwai Gachiengo & another v Republic [2000] eKLR.

⁷² Anti-Corruption Police Unit Annual Report 2002, Nairobi, 2003, 11.

⁷³ Business dictionary. <http://www.businessdictionary.com/definition/internal-control.html>.

4.1 Internal Controls

4.1.1 Autocracy or the Politics of Patron-clientilism

An autocratic system is characterized by the patron - client relation political process. This is a political process in which the political leader (in this case, the president) recruits his/her close confidants and place them into key political, administrative and judicial positions. Since the close confidants owe their appointments into the key positions to the leader, their loyalties are also direct to the leader.⁷⁴ The establishment and consolidation of an autocratic regime in Kenya began in earnest in December 1964. It involved the abandonment of multiparty system of government, and the systematic amendment of the constitution to concentrate more powers in the presidency.⁷⁵ The autocratic state that Jomo Kenyatta established and consolidated, and Moi sustained resulted in the creation of a category of public servants that were overwhelmingly impervious to good ethical standards. It was this category of public servants that benefited from the Africanisation of the economy by dishing to themselves the former white owned farms, purchasing controlling shares in the national commercial firms, and unfairly advancing themselves easy loans from government controlled financial institutions.⁷⁶

4.1.2 Procurement challenges;

There is a general lack of understanding of procurement law by actors, including: procuring entities; service provider; investigative agencies; and the courts. Moreover unstructured coordination amongst anti-corruption and enforcement agencies, Poor records management, documentation and filing systems, and a lack of proper procurement planning and irregular

⁷⁴ Odhiambo C.Mbai, Public Service Accountability and Governance in Kenya Since Independence, African e-Journals, (2003), Vol 8 No.129.

⁷⁵ Odhiambo C.Mbai, Public Service Accountability and Governance in Kenya Since Independence,130.

⁷⁶ Odhiambo C.Mbai, Public Service Accountability and Governance in Kenya Since Independence,130.

implementation of procurement plans by public entities lead to loopholes in the system leading to opportunistic and unscrupulous embezzlement of funds.⁷⁷

Procurement challenges can be observed in the NYS case study whereby the Public Procurement Oversight authority was inefficient in its supervision of procuring entities. Transactions were carried out without due regard to policy regulations contained in the Public Procurement and Disposal act and thus unscrupulous actors took advantage of the loopholes in the systems and occasioned the misappropriation of funds.

4.2 External Controls

4.2.1 Asset recovery/repatriation;

From a report made by the Ethics and Anti-Corruption Commission in the year ended June 2015, The anti-graft agency seized assets worth Sh140.2 million fraudulently amassed by individuals out of a total of Sh3.86 billion put under probe in the provided year, translating to a dismal recovery rate of 3.6 per cent.⁷⁸

“A total of 27 asset-tracing investigations of illegally acquired assets estimated at Sh3.861 billion were undertaken and assets valued at approximately Sh140.2 million were recovered,” said EACC chief executive Halakhe Waqo in the agency’s annual report for the fiscal year ended June 2015. Mr Waqo said the public assets were recovered through court rulings and out-of-court deals. The agency has blamed the low recovery rates of looted assets on lengthy court processes, human resource constraints, inadequate policy and legal framework, and an entrenched unethical culture among Kenyans. In addition to this, he added that, “Slow adjudication of cases characterized by frequent adjournments, numerous judicial review applications and constitutional references affected execution of the commission’s mandate on asset recovery,” said Mr Waqo.

⁷⁷<http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf>

⁷⁸<http://www.businessdailyafrica.com/EACC-records-worst-assets-recovery-in-four-years/539546-3073064-13et452z/index.html>.

With reference to the NYS case, through the collaboration of the office of the Auditor General, the EACC, The PAC and the courts in which the corruption cases are being tried will credible and conclusive retrieval of funds be enforced.

4.2.2 Whistle blower and Witness Protection ;

An article dated 22 August 2007 in The East African Standard reported that KACC “had admitted that it was toothless in reining in those who threatened witnesses.” According to KACC, The Witness Protection Act “was not enough to protect witnesses in graft cases.” KACC said "although the Witness protection Act prohibits harassment and intimidation of a person who testifies in a corruption case, it provides no penalties for those who violate the law, adding that KACC had no powers to arrest and prosecute the offenders.” KACC “believes that unless the current laws are repealed, whistleblowers would be in danger from those they would have reported on”⁷⁹

4.2.3 Regulators involvement in corruption;

In general, the conduct of legislators outside the debating chamber or the precincts of the legislature is not regulated. In particular, the absence of proper regulation has meant that legislators can serve on committees “even though their membership would entail a conflict of interest either because they face allegations of corruption, are allegedly allied to corruption cartels, or have commercial interests that are overseen by these committees”⁸⁰

⁷⁹ Kareithi A. 2007, ‘Kenya: KACC Stands Up for Whistleblowers’, The East African Standard, 22 August, allAfrica.com website <http://allafrica.com/>

⁸⁰ World Bank, Understanding the Evolving Role of the Kenya National Assembly in Economic Governance in Kenya: An Assessment of Opportunities for Building Capacity of the Tenth Parliament and Beyond, Report No. 45924-KE (May 2008)

There are widespread and credible allegations that the legislature and the judiciary are also abusing their powers and engaging in, or facilitating, corruption. These allegations have led to questions about the ability and legitimacy of these branches to hold the executive to account.⁸¹

The legislature's ability to function as a watchdog is compromised because some of its key committees are headed by legislators who have been implicated in corruption scandals. There are also concerns that legislators are influenced by special interests and may not be credible guardians of the public interest⁸². The judiciary is equally culpable. Due to allegations of abuse of power and corruption, significant segments of the citizenry perceive the judiciary as having lost its legitimacy as a dispute resolution forum.⁸³

4.2.3 Historical Constraints to Regulatory Commissions Mandate

1) Deprivation of Prosecutorial Powers

The deprivation of prosecuting powers to the Kenya Anti-Corruption Commission (KACC) which is now the Ethics Anticorruption Commission(EACC) which was left as prerogative of the attorney general led to counter accusations between the Attorney General and KACC, where KACC accused the Attorney General(AG) of frustrating their efforts in the fight against corruption. Under the old constitutional dispensation, while the separation of power was ideally an appropriate check against concentration and abuse of power by KACC, civil societies and other stakeholders felt that the mandate of KACC, was being undermined where the AG was not obliged to charge identified corruption cases.⁸⁴ Corruption is fought not by investigation but by successful prosecution.

⁸¹Njeri Rugene, Bribery in Kenya's Parliament, DAILY NATION (Nairobi), May 16, 2009, available at <http://www.nation.co.ke/News/-/1056/599016/-/u6adu9/-/index.html> .

⁸² Akech M, Abuse of Power and Corruption in Kenya: 341-394.

⁸³ Akech M, Abuse of Power and Corruption in Kenya: 341-394.

⁸⁴Wanjiku K, Situational analysis of corruption in Kenya since 1963. <http://documentslide.com/documents/situation-analysis-of-corruption-in-kenya.html>

2) The replacement of the agency's leadership team with politically-correct individuals

Initially, when prosecutions began to implicate leaders, the powers of that body, as well as its leadership, were quashed. Often the political leaders would employ their powers to diffuse such charges. For example, attempts would be made to change the Anti-Corruption agency's leadership, including overhauling its mandate. This was the case with the Kenya Anti-corruption Authority whereby Harun Mwau, not long after he and his agency brought some judicial officers and high level ministers to court on corruption charges, the agency's power to prosecute was challenged under Section 26 of the country's Independence constitution that empowers only the Attorney General to do so, consequentially leading to the Directors competency being challenged by the president and a tribunal was formed to probe his capacity and competence.⁸⁵ These actions led to the foreseeable delay of the prosecution of corrupt public officers and most of the cases were withdrawn due to lack of evidence due to inconsistency in investigations.

Another example would be in the case of KACC's director Patrick Lumumba and his team, whereby they were ejected out of the agency's leadership in September 2011 after a brief stay in office. The ejection of the team followed the declaration by the Director that there were "five to ten 'high voltage files'" that were soon to be recommended for prosecution.⁸⁶ The referenced files involved four Cabinet ministers and 45 heads of parastatals. To the legislators, the director's declaration would have undermined their public image and status in society. Consequently the legislators demanded that the entire KACC team be removed under the pretext of the need to restructure the organization in order to comply with the provisions of the new constitution approved in 2010.⁸⁷

⁸⁵ 15. Gathii J., Kenya's Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution, 4 L. & Dev. Rev. 182 (2011),19

⁸⁶ Kwayera J. (2012, April 8). "Anti-graft veto sparks anxiety." East African Standard. Retrieved from <http://www.eastandardmedia.co.ke/ke/print.php?id=2000055799&cid=4; 4/8/2012>

⁸⁷Wanjiku K., Situational analysis of corruption in Kenya since 1963. <http://documentslide.com/documents/situation-analysis-of-corruption-in-kenya.html>

4.3 Prosecution of offenders

A Report made by the Task Force on the Review of the Legal Policy and Institutional Framework for Fighting Corruption in Kenya noted that prosecution of corruption faced a number of challenges which include;⁸⁸

- a) Delay in the conclusion of cases prosecuted (due to a variety of reasons such as: preliminary objections by the Defense in the form of judicial review applications and constitutional petitions; hostile, uncooperative and unavailable witnesses; shortage of Special Magistrates/anti-corruption courts, frequent transfers of magistrates, high turnover of investigators.
- b) Limited capacity to prosecute complex cases;

In recognition of this challenges it is evident that in the administration of justice the process of adjudication of corruption cases is frustrated by procedural technicalities and ,the incapacity of courts to handle complex cases. It is therefore prudent to promote the expeditious adjudication of this cases through institutional capacity building,i.e special courts that can handle complex corruption cases and the judicial will to conclude cases for justice delayed is justice denied.

⁸⁸<http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf>

5 CHAPTER 5-MEASURES THAT CAN BE TAKEN IN RECOGNITION OF MAIN ISSUES HINDERING ACCOUNTABILITY

This chapter seeks to outline new measures that can be considered in the ongoing probing of the NYS corruption scandal. Recognizing that the matter is ongoing, this paper shall consider the issues outlined in chapter 4 which include a holistic view of the main issues inhibiting proper and efficient regulation of public officers involved in corruption and embezzlement of public funds.

5.1 Impartiality of Public Officers

Public servants should not, in the pretext of preserving their impartiality, be prevented from exposing cases where the government is involved in illegal acts or corruption. In such cases, public servants have a duty to question or even “decline to follow instructions which are motivated by improper partisan interests”⁸⁹

This resolution can lead to revolutionary changes in the way that operations within state departments are handled. Employees in state offices fear the wrath of superiors due to a breach in confidence when they expose procedural improprieties occasioned at the institution. This can be handled through establishing proper administrative frameworks that encourage the reporting of such heinous acts. In addition there should be an appreciation and recognition of the rule of law by which high levels of integrity, accountability and professionalism can be maintained within state/public offices.

In line with this, such internal controls can be implemented in the administrative framework of the NYS. This would discourage and deter malicious actors who seek to fulfill their own personal interests and engage in misappropriation and embezzlement of public funds.

⁸⁹ Sossin L , Defining Boundaries; The constitutional argument for Bureaucratic independence and its implication for the accountability of the public service 25, 30 (2006).
http://www.cbc.ca/news2/background/groupaction/v2fullreport/CISPAA_Vol2_2.pdf

5.2 Asset Recovery and Repatriation

Article 31. to the United Nations Convention against Corruption stipulates that each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of proceeds of crime derived from offences established in accordance with the convention as discussed in chapter 3.1.

In addition to this as stipulated under the Anti-Corruption and Economic Crimes Act of 2003, the legislature in Kenya provides a mechanism for the (KACC) now (EACC), to seek to recover assets and property that belong to the people of Kenya and which were acquired in pursuit of or as a result of acts of corruption. Whereas criminalization of corruption and the prosecution of the corrupt are necessary, it is equally important to complement the criminal law processes with efforts to reduce the financial gain that emanates from acts of corruption.⁹⁰

The lack of a recovery agency has for far too long allowed the corrupt to flaunt their ill-gotten wealth and afforded them enough time to hide and launder it, effectively undermining any legal processes against them. The Asset Recovery Agency (ARA), established under The Proceeds of Crime and Anti-Money Laundering Act, must now move with similar tenacity to track and recover the billions of shillings in public funds lost in past corruption.

According to the task force on the Review of the Legal Policy and Institutional Framework for Fighting Corruption in Kenya of 2015, the asset recovery laws should be harmonized to create only one competent authority to deal with assets recovered from criminal activities including corruption. The task force asserts that the EACC should undertake asset recovery arising from corruptly-acquired assets while ARA should undertake asset recovery arising from the proceeds of other crimes. The Government should establish systems to ensure transparency and accountability in the management of repatriated funds and recovered assets. This could be facilitated through the establishment of a special fund for purposes of ensuring that the proceeds

⁹⁰Owino K., Transparency International Kenya, Asset Recovery in Kenya: Outstanding questions, 2008. <http://tikenya.org/phocadownload/adili103.pdf>

of the recovered assets are utilized towards the realization of the obligations of the State over economic and social rights under Article 43(3) of the Constitution.⁹¹

An additional reason for the lack of public reporting of assets recovered from the proceeds of crime are the complex transactions used in order to hide the sources. Sometimes these transactions are completely taken away from the direct jurisdiction of institutions like the EACC through transfer to foreign nations.

Thus in recognition of Article 2 (6) of the new Constitution, by which the United Nations Convention against Corruption (UNCAC) was ratified and became part of Kenyan law, Article 54 of the convention should be implemented for each State Party, with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention. Therefore in line with this stipulation foreign nations should;⁹²

a) Take such measures as may be necessary to permit their competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law.

b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation.

Thus with regard to the NYS scandal, the NYS leadership in conjunction with the EACC and the ARA should work together in the retrieval of the amounts lost through misappropriation and embezzlement in order to make the probing process conclusive.

⁹¹ <http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf>

⁹² Article 54, United Nations Convention Against Corruption, 31 October 2003, A/58/422

5.3 Protection of Whistle Blowers

According to the UNCAC , each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.⁹³

Effective whistleblower legislation requires, above all, an independent body to receive process, investigate, and adjudicate requests for protection.⁹⁴

The Witness Protection Agency (WPA) which was established in August 2011 in accordance with the provisions of the Witness Protection Act, 2006 and then amended by the Witness Protection (Amendment) Act, 2010 has the mandate to provide a framework and procedures for giving special protection to threatened and intimidated witnesses.⁹⁵

The task force on the Review of the Legal Policy and Institutional Framework for Fighting Corruption posited, enhancing inter-agency coordination between EACC, WPA and National Police Service (NPS) to ensure the safety of threatened witnesses and whistleblowers engaged in cases of grand corruption shall lead to a more efficient provision of adequate financial resources and human resource capacity to enable the Witness Protection Agency to effectively implement its statutory mandate.⁹⁶ In the case of the NYS this will consequentially encourage the submission of information by whistleblowers and witnesses because of the incentives with respect to security and safety provided to them.

⁹³ Article 33, United Nations Convention Against Corruption, 31 October 2003, A/58/422

⁹⁴ Mass, G, 'Whistleblower Protection Legislation: A Torch of Courage Illuminating a Sea of Darkness', ADILI 81, August, Transparency International Kenya website,2006,5 <http://www.tikenya.org/documents/adili81.pdf>

⁹⁵ Report of the Task force on the review of the institutional framework for fighting corruption in Kenya.<http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf>

⁹⁶ Report of the Task force on the review of the institutional framework for fighting corruption in Kenya.<http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf>

5.4 Office of the Auditor General and Controller of Budgets

The objective of the independent offices is to protect the sovereignty of the people and secure the observance by all state organs of democratic values and principles set out in the constitution.⁹⁷

In the Independence constitution of Kenya, the Controller and Auditor General was part of the executive by virtue of it being an office of the public service.⁹⁸ Duties of monitoring and reporting on the budget implementation in a financial year were not being performed regularly resulting in the misuse of budgeted resources. Consequently there was no report for Parliament to properly exercise its mandate of budget oversight during the implementation phase correct the misuse of resources in good time.⁹⁹ The introduction of the Office of Controller of Budget has therefore transferred some of the key public finance management responsibilities from the executive to other oversight institutions introducing better financial control, transparency and accountability mechanisms.

Presently, the country is witnessing the implementation of the independent offices mandate through the reports made in Parliament and submitted to the Public Accounts Committee .With regard to the NYS, the separation of the independent offices from the executive should enhance better checks and balances, and will increase the public's confidence on audits made on Public institutions tasked with fulfilling public functions.

⁹⁷ Article.252,Constitution of Kenya,(2010)

⁹⁸ Article.128.(1), The Kenya Independence Order in Council 1963. No. 1968

⁹⁹Office of the Controller of Budget, About the office of the Controller of Budget. <http://cob.go.ke/about-us/office-of-the-controller-of-budget/>

5.5 Prosecution

Quite often a Minister would be implicated in a corruption scandal which would become complicated by the fact that the AG by law was meant to prosecute the matter,¹⁰⁰ yet he/she was meant to protect the interests of the executive.

This explains why the prosecutorial function was transferred from the AG in the COK 2010. Before that the AG was not seen as functionally-independent since he was a member of the Cabinet. Article 157(10) of the COK, 2010, now secures the independence of the DPP thus: “The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

Nonetheless, the Task Force on the Review of the Legal Policy and Institutional Framework for Fighting Corruption indicated that the DPP should enhance its mechanisms for accountability, including setting out within the public domain the criteria by which each case is prosecuted or rejected. It was agreed that the DPP would be required to file quarterly reports on the action taken over matters referred to it by EACC for prosecution. Currently, only EACC is required to file such quarterly reports under Anti-corruption and Economic Crimes Act (ACECA). The DPP agreed to this procedural proposal.¹⁰¹ The Anti-Corruption and Economic Crimes Act, 2003 should be amended to reflect that position.

With regard to the ongoing probe on the NYS scandal there is need for clear procedures on the appropriate disciplinary action, prosecution and removal proceedings for elected leaders over the contravention of Chapter 6 of the Constitution of Kenya, 2010. This will make the process more transparent and efficient in holding corrupt actors to account.

¹⁰⁰ Gathii J, Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya, 14 CONN. J. INT’L L. 407, 428 (1999).

¹⁰¹ Report of the Task force on the review of the institutional framework for fighting corruption in Kenya. <http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf>

5.6 Procurement

The Public Procurement Oversight Authority has been established under section 8 of the Public Procurement and Disposal Act 2005. Its functions include; promoting corporate decision making and greater accountability and transparency on procurement.¹⁰² The law introduces an institutional framework in public entities to ensure that decisions on procurement are made in a corporate fashion i.e. no individual is responsible for all procurement decisions. This enhances checks and balances and promotes greater accountability by public officials. The law also clarifies who is accountable for which decisions and makes mandatory the publication of information on procurement including on contract awards.¹⁰³

The task force on the Review of the Legal Policy and Institutional Framework for Fighting Corruption prescribes the Incorporation of a provision requiring the signing of an integrity code of conduct for business entities trading with public sector agencies as a precondition for eligibility to tender.¹⁰⁴ Moreover, a list of directors and beneficial owners of business entities trading in the public sector has to be provided. Applying this in respect to the NYS case, would establish proper internal checks that would affirm that organisation's seeking tenders meet high standards of capacity, competency and professionalism. This would deter instances where a public office issues tenders to organisation's which are not registered corporate associations within Kenya, or organisation's which have a negative historical past in fulfilling legal and financial obligations with respect to procurement.

Finally, in the current probe of the NYS, adoption and enforcement of deterrent sentences against suppliers or public officers convicted of procurement offences should be implemented.

¹⁰² Section.8, Public Procurement and Disposal Act, No. 33 of 2015

¹⁰³ <http://tikenya.org/phocadownload/adili103.pdf>.

¹⁰⁴ <http://www.statelaw.go.ke/wp-content/uploads/2016/08/Republic-of-Kenya-Report-of-the-Task-Force-on-the-Review-of-the-Legal-Policy-and-Institutional-Framework-for-Fighting-Corruption-in-Kenya-2015.pdf>.

5.7 Conclusion

It matters not how comprehensive a network of laws a country puts in place, there has to be political will to confront corruption, to understand its causes and to take vigorous measures to overcome it. If corruption is to be aggressively pursued government must ensure that those they appoint to perform this are not left isolated and unsupported. They must not allow the anticorruption battle to itself become politicized. Rather they must show that even if one of their own is under suspicion, whether he's an influential politician he is not above the law.¹⁰⁵

¹⁰⁵ The UN Convention against corruption Implementation & Enforcement: Meeting the Challenges, Anti-Corruption Conference, CHATHAM HOUSE · LONDON · 24 TO 25 APRIL 2006, Common Wealth Secretariat & Chatham House.

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