



KENYA

Governance
Report **2012**

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Abbreviations and Acronyms

AfriCOG	Africa Center for Open Governance
AFC	Agricultural Finance Corporation
AG	Attorney General
BVR	Biometric Voter Registration
CDF	Constituency Development Fund
CIC	Commission for Implementation of the Constitution
CMA	Capital Markets Authority
CMC	Cooper Motor Corporation
DCJ	Deputy Chief Justice
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
FATF	Financial Action Taskforce
FRC	Financial Reporting Centre
GoK	Government of Kenya
ICC	International Criminal Court
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
JSC	Judicial Service Commission
KAA	Kenya Airports Authority
KACC	Kenya Anti-Corruption Commission
KDF	Kenya Defence Forces
KNBS	Kenya National Bureau of Statistics
KPRL	Kenya Petroleum Refineries Limited

KRA	Kenya Revenue Authority
KTB	Kenya Tourist Board
LSK	Law Society of Kenya
NCLR	National Council for Law Reporting
NHIF	National Hospital Insurance Fund
NSIS	National Security Intelligence Service
NOCK	National Oil Corporation of Kenya
NSSF	National Social Security Fund
OLN	Operation Linda Nchi
PAC	Parliamentary Accounts Committee
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority

Foreword

The Kenya Governance Report 2012 is the second in a new series by the Africa Centre for Open Governance. Every year, AfriCOG will review the events of the past year as they relate to critical issues and developments in governance reform and efforts against corruption, analyse their implications and make recommendations for the future. We aim to do this in an accessible manner, for wider consumption.

It is hoped that the Kenya Governance Reports will over time develop into a key resource on matters of governance and anti-corruption for our partners in civil society, the public sector, the international community and the general public. This report was finalised in early 2013 and covers the period from January to December 2012.

AfriCOG would like to thank its Board of Directors, Stella Chege, John Githongo, Maina Kiai and Funmi Olonisakin for their support to our work.

Gladwell Otieno
Executive Director

1. The Governance Year in Brief

Like a frog climbing out of a well, progress in governance reforms during 2012 took two steps forward and one step back. The judiciary made bold steps in the cause of fighting impunity: judicial officers with records that did not meet constitutional standards on leadership and integrity were shown the door, while the appointments of some officers were successfully blocked on account of their dubious pasts. In addition, the year saw the first ever conviction on the Anglo Leasing scandal.

The year also witnessed some major setbacks in the war against corruption. Parliamentarians failed to enact laws that could end graft, and deliberately amended them to weaken the legislative framework and give themselves more power. The excesses of the Kanu era returned to haunt the country and there were attempts to swindle the public out of huge amounts of money in high value procurement deals.

2. Governance Reforms in 2012

There are some things in which the 10th Parliament can take pride over its predecessors. One is the record number of bills that it passed, particularly in its final year. While only 81 bills were passed in the four years from 2008 to 2011, by 3 January 2013, more than 88 bills had been passed during 2012 alone.¹

Unfortunately, the numbers are as far as the credit goes. In a rush to beat constitutional deadlines, Parliament not only ignored the spirit of public participation enshrined in the constitution, but also compromised the quality of the laws passed. On some occasions, self-interest trumped public good as MPs passed laws that served their own ends.

2.1. The Leadership and Integrity Bill

Perhaps the most disappointing failure of Parliament to reform governance relates to the actions of both the cabinet and Parliament to water down the Leadership and Integrity Bill. While the initial Bill proposed by the Commission on the Implementation of the Constitution (CIC) represented the aspirations of Kenyans as expressed in the Constitution of Kenya 2010, the cabinet deleted several key provisions, making it possible for persons of questionable integrity to hold public office.

In the opinion of the CIC, the leadership and integrity law that was eventually enacted is not only ineffective in implementing Chapter 6 of the constitution, but also contains clauses that are unconstitutional. The main grounds on which CIC faulted the Bill are:²

- It did not reflect proposals and memoranda received from the public on what should be contained in a leadership and integrity law.
- It failed to establish transparent procedures and mechanisms for the effective administration of chapter six of the constitution.
- It failed to establish a vetting process for persons seeking election to public office.
- It does not provide for public input and participation in the vetting process for persons seeking election or appointment to state office.
- It watered down key provisions of Article 77 dealing with gainful employment and Article 73 on responsibilities of leadership.
- It failed to provide for a mechanism that would allow the Ethics and Anti-Corruption Commission (EACC) to prosecute cases that breach Chapter 6 where the Director of Public Prosecutions (DPP) refuses to prosecute without good cause.

The Leadership and Integrity Law is meant to give effect to Chapter 6 of the constitution, but the current, watered-down version of the Law is unlikely to be effective in improving the quality of future leaders. Indeed, as it now stands, there are no provisions for the vetting of political aspirants. Moreover, there are insufficient barriers to the ascendancy of politicians who have broken the law. Not only can those with pending criminal cases still legally run for office, they are not required to make information related to those cases publicly accessible. Overall, the Leadership and Integrity Law does little to advance transparency and upset the status quo.

1 Kenya National Assembly. Directorate of Legislative and Procedural Services.

2 Commission on the Implementation of the Constitution. 7 Aug 2012. *Opinion of CIC on published leadership and integrity bill 2012.*

An opportunity still remains to strengthen the current Leadership and Integrity Law by way of amendments. However, until this is done, Kenyans should be vigilant and monitor how matters of ethics and integrity are dealt with by Parliament, the Judiciary and other institutions.

2.2. The Political Parties Act and the Elections Act

In a similar quest for self preservation, parliamentarians made cynical amendments to the Political Parties Act and the Elections Act to remove the time constraints that would have limited incidents of party-hopping (moving from one party to another). They amended Section 34 of the Elections Act, removing the requirement to be a member of a political party for at least three months before being nominated for an elective position.

MPs also suspended parts of the Elections Act requiring them to meet certain integrity and academic qualifications to be eligible for contesting elective office in the March 2013 polls. Under the Miscellaneous Amendment Act of 2012, Section 22 (1) (b) of the Elections Act that requires any candidate to hold a post-secondary school qualification, was suspended until the next general election. The requirement to hold a degree certificate from universities recognized by Kenya now only applies to the presidential and gubernatorial positions, together with their respective running mates in the 2013 elections.

Limits on party hopping seek to increase the institutional strength and discipline of parties by mandating that members espouse a certain degree of loyalty – ideologically or otherwise - to the party. A by-product of institutionalised political parties is institutionalised politicians, who are active in the political arena for substantive reasons that go beyond wealth accumulation and personal ambition. Such limits are also meant to ease the logistical challenges of the nomination process, which can be complicated by last-minute changes.

While it is true that requiring political aspirants to have achieved a relatively high level of education potentially locks out some otherwise well-qualified candidates, such educational standards go a long way in ensuring that those entrusted with passing legislation understand the process and impact of their work. Now, as Parliament enjoys new powers to introduce laws, it is likely that the standard for debates and discussions around new laws will be lower. This will result in defeating one of the main purposes of the reform, which was to improve the standard of laws.

What is perhaps most important, however, is the fact that the amendments described above were not the result of open and inclusive discussions. While the original reforms were authorized by the public at large, the changes to those reforms were not agreed upon by the Kenyan people. As such, these amendments may be unconstitutional, not only because they do not comply with the constitution but also because they are the result of MPs acting in breach of their mandate.

2.3. The Election Campaign Financing Bill 2012

The 10th Parliament will also be remembered for squandering opportunities in terms of critical bills that it did not pass. The Election Campaign Financing Bill 2012 is a pertinent example.

The aim of the Bill was to provide for the regulation, management, expenditure and accountability of election campaign funds, which, in view of the close correlation between grand corruption and campaign financing, would have been a game changer in the 2013, and future, elections.

The Bill gave sweeping powers to the Independent Electoral and Boundaries Commission (IEBC) to regulate campaign financing. Had it been passed, it would have empowered IEBC to:

- Supervise candidates and political parties in relation to campaign expenses
- Set spending limits and enforce compliance with such limits
- Verify sources of contributions to a candidate, a political party or a referendum committee
- Monitor and regulate campaign expenses
- Receive expenditure reports from candidates, political parties and referendum committees
- Require a candidate or a political party to disclose the amount and source of contributions received for campaign, nomination or election.³

The Bill also sought to bar collection of campaign funds from organisations, foreigners, foreign States and anonymous or illegal sources, in addition to expressly prohibiting the use of state resources by those seeking office. Sadly, by the time Parliament wound up its business, the Bill was still awaiting debate.

The Campaign Financing Bill sought to address the long-standing problems related to the influence of wealth on political campaigns and political office, especially as expensive conventional and social media become increasingly critical to successful campaigns. The Bill would have ensured that campaign funds only come from legitimate sources and that the flow of money is open to public scrutiny. Contribution and expenditure caps would also have started to equalize the playing field, making it more difficult for well-endowed sources to “buy” influence and more difficult for well-connected politicians to simply drown out qualified but less wealthy competitors.

Without campaign finance regulations in place, the status quo will remain and aspirants will be free to fund their campaigns through less than transparent sources, who will similarly be able to silently make their voices heard after elections are over.

In the future, advocacy efforts will have to be directed towards the enactment of the Bill.

2.4. The Freedom of Information Bill 2012

The other major disappointment was the very slow progress made towards the enactment of a Freedom of Information Bill. The Bill if enacted, would have given effect to Article 35 of the constitution, which guarantees every citizen the right to access information held by the State or by any another person, that is required for the exercise or protection of any right or fundamental freedom. Such access to information legislation is widely viewed as a very potent weapon in the fight against corruption and impunity.

As the year came to a close, the Freedom of Information Bill, 2012 was still undergoing internal review and stakeholder consultations by the CIC.⁴

The Freedom of Information Bill is important, because it activates the constitutional provisions guaranteeing the public access to information gathered by the government and thereby promotes transparency. Without such a law, the Kenyan public is restricted in its ability to investigate issues of interest and maintain a public check on government activities. In order to continue to promote transparency and accountability, civil society must advocate for urgent action to pass the Bill.

3 The Government Printer, Nairobi. *The Election Campaign Financing Bill 2012*.

4 CIC. 19 November 2012. *CIC Holds Round Table Meeting In Finalization Of The Freedom Of Information And Data Protection Bills*. <http://www.cickenya.org/index.php/newsroom/item/251-cic-holds-round-table-meeting-in-finalization-of-the-freedom-of-information-and-data-protection-bills#.UWF5eVK4jIU>

2.5. The “House of Greed”

MPs will also be remembered for the laws they tried to enact to line their own pockets. In October 2012 they attempted to push through a Ksh2.1 billion send-off package, which would have seen each of them take home Ksh9.6 million at the end of their term. They blackmailed the Executive by threatening to scuttle the Finance Bill if they did not get their way. In complete disregard of the constitution and the mandate of the Salaries and Remuneration Commission they sought to be judges of their own cause, thereby severely compromising the principles of transparency and accountability. The country was only saved from these unconstitutional actions by the President’s refusal to assent to the Finance Bill.

The failure to enact the Election Campaign Financing Bill 2012, the changes and amendments made to the Leadership and Integrity Bill, the Political Parties Act and the Elections Act constituted a major setback to governance reform. They effectively maintained the status quo, or what John Githongo (a vocal advocate against corruption in Kenya over the years) describes as:

“(The) Big Man model of leadership... the picture of a leader in a big car or making a grand arrival in a helicopter that flattens maize fields when it lands; who dishes out cash as if he prints it at home; who speaks much and listens little; for whom theft is capitalism in disguise, for whom wananchi are voters, not citizens.”⁵

2.6. Security Sector Reforms

The much awaited reforms in the police service were painstakingly slow in coming. By the middle of the year only 18 recommendations made by the National Task Force on Police Reforms, from a total of 207, had been implemented significantly.⁶ The implementation of most of the recommendations had stalled due to political, policy and administrative issues.

There was much fuss from stakeholders following the enactment of the National Police Service Act, 2011 and the National Police Service Commission Act, 2011, when the enactments were followed by a delay in the appointment of commission members, the Inspector General, two deputies and the director of criminal investigations. These appointments were deemed critical as the country prepared for elections in 2013.

In the second half of the year however, considerable progress was made. In June 2012 Chief Justice Dr Willy Mutunga swore in the Chair and members of the Independent Police Oversight Authority Board. The establishment of the board was a significant first step in addressing impunity in the police force, as its mandate is to investigate complaints by civilians relating to disciplinary or criminal offences committed by police officers.

In early October, members of the National Police Service Commission were sworn in and they proceeded with the task of conducting public interviews for the country’s top police jobs. In late December 2012, David Mwole Kimaiyo was sworn in as the country’s first Inspector General, having been nominated by the President and Prime Minister and further vetted and approved by Parliament.

5 John Githongo (Undated). *Gender Democracy against the Backdrop of the Leadership and Integrity Bill, 2012.*

6 Usalama Forum. June 2012. *Preparedness of the Police to Combat Insecurity and Crime. Police Reform Monitoring Project.*



While the appointment of the Inspector General and his deputies is an important step, the success of such reforms is intimately linked to reforms in other political institutions, including the Judiciary and the National Security Intelligence Service. A trustworthy and efficient police force, for example, is critical for citizens pursuing or involved in criminal cases in court. It remains to be seen how thorough the vetting process for the rest of the security forces will be, but a sound process could bring more accountability to the security sector. It is imperative that civil society continue its advocacy around security sector reform and help the public engage in such discussions.

Inspector General David Kimaiyo

http://www.the-star.co.ke/sites/default/files/styles/node_article/public/images/articles/2013/02/16/107814/5.png

3. The Long Arm of the Law

The high bar on integrity set by Kenya's 2010 constitution continued to haunt persons of questionable integrity as the careers of some long-serving public and judicial officers came crashing down.

3.1. Tourism Officials Charged

In May 2009, following recommendations by the then Kenya Anti-Corruption Commission, former Ministry of Tourism Permanent Secretary (PS), Rebecca Nabutola and ex-Kenya Tourist Board (KTB) Managing Director, Achieng Ong'ong'a were charged with conspiracy to defraud the Ministry of Tourism of Ksh8.9 million. They were charged together with an alleged accomplice - a tour operator and former KTB board member, Duncan Muriuki Kuguru.

The case involved investigations into the illegal payments of money to a tour company that coordinated a visit to the Maasai Mara by President Mwai Kibaki and other top government officials. It was alleged that procurement procedures were flouted in awarding the tender to the tour firm. According to the prosecution, Nabutola thought up the idea, Achieng sanctioned it and the businessman was paid Ksh8.925 million for the trip.⁷ Nabutola was later charged with the offence of 'abuse of office' contrary to Section 46 of the Anti-Corruption and Economic Crimes Act 2003 and 'willful failure to comply with the law' relating to procurement, contrary to Section 45(2) (b) of the Anti-Corruption and Economic Crimes Act 2003. The former PS was further accused of abuse of office by appointing Kuguru's firm, Maniago Safaris, to coordinate transport to the game reserve and instructing the Catering and Tourism Development Levy trustees to foot the bill.



Businessman Duncan Muriuki, former Kenya Tourism Board boss Ong'ong'a Achieng' and ex-Tourism PS Rebecca Nabutola in a Nairobi court, 2012. Photo by PAUL WAWERU / NATION MEDIA GROUP

<http://www.nation.co.ke/image/view/-/1634002/medRes/432264/-/maxw/600/-/ssevbs/-/Officials+Dock+px.jpg>

⁷ The Star. 11 September 2012. *Nabutola, ex-KTB boss jailed for corruption* by Sam Kiplagat. <http://www.the-star.co.ke/news/article-2700/nabutola-ex-ktb-boss-jailed-corruption>

Ong'ong'a faced a similar abuse of office charge for acting contrary to Section 46 of the Anti-Corruption and Economic Crimes Act 2003, in addition to fraudulently making a payment from public revenues for services not rendered, contrary to Section 45(2)(a)iii of the same Act.

In September 2012, the trio was found guilty of defrauding the Ministry of Tourism of Ksh8.9 million. Nabutola was jailed for four years with a fine of Ksh1 million, or in default, to serve a further two years. Ong'ong'a was sentenced to three years in prison, while Kuguru was sent to prison for seven years without the option of a fine. He was further required to pay Ksh17.8 million in fines or serve three years in default and to refund Ksh1.3 million to the Republic of Kenya, or serve one more year in prison.⁸

Kenya has a strong anti-corruption framework with its domestic laws. The problem is and has always been implementation. While the case of the Tourism Ministry is a successful story of the prosecution and punishment of corrupt state officials, Kenya still has a long way to go in the fight against corruption. In order for effective prosecution to continue, the courts must have the capacity and resources to adjudicate such cases. Judicial reforms such as those mentioned above are a harbinger of hope in this regard. Transparency in court processes is also important. The National Council for Law Reporting (NCLR) is one effective mechanism, for it publishes judgments and makes them publicly accessible for scrutiny and analysis. One area that still requires attention is the Judiciary's case management system, which is severely lagging behind. A better organized system could go a long way in helping to address problems such as the alleged loss/altering/hiding of records; bribery; and the loss or destruction of evidence.

3.2. Vetting of Judges and Magistrates

The constitution that was promulgated in 2010 requires judges and magistrates to be vetted to establish their suitability to continue serving in the Judiciary.



The High Court buildings

http://upload.wikimedia.org/wikipedia/commons/4/43/Kenya_High_Court.JPG

8 Ibid.

Consequently, Parliament enacted the Vetting of Judges and Magistrates Act to provide the legal framework under which the vetting process would be conducted. The Act also established the Judges and Magistrates Vetting Board, which commenced work in 2011 and continued in 2012 with noticeable effect.

The vetting process was meant to address corruption, lack of independence and incompetence within the judiciary. While the process could have been more inclusive, it did result in creating a group of judges who, it is hoped, can be trusted to effectively handle cases before them in a fair and timely manner. Overall, public confidence in the Judiciary increased after the vetting procedures.

In its first determination during the year, the Board found four Court of Appeal judges unfit to continue to hold office. The following is a summary of their findings.⁹

Honourable Justice Riaga Omolo

The Board found Justice Riaga Omolo to be lacking in “independence and impartiality”¹⁰ in a series of decisions he had given in some highly publicised political matters. It found the judge to have bent the law in favour of the incumbent president at a time of stark political repression. Further, the Board found the judge to have played an “active role in frustrating rather than enhancing judicial scrutiny of alleged electoral irregularities, and that he had not held back from using his judicial authority to manipulate the law in order to achieve a result that favoured impunity, limited democratic expression and curtailed freedom.”¹¹

Honourable Justice Samuel Bosire

Justice Bosire was indicted for decisions he made when he chaired the Judicial Commission of Inquiry into the Goldenberg affair. He ignored an order by the High Court that required the Commission to summon as witnesses ten prominent persons, including the former President Daniel arap Moi, the late George Saitoti, Musalia Mudavadi and Nicholas Biwott, stating that the “only power he had had was to give notice to the affected persons, and not to compel their attendance.”¹² In addition, as Chair of the Commission, Bosire chose “not to comply with an explicit and precise High Court order made against him as second respondent in an ex parte matter. He did not seek to challenge the order on appeal. He simply treated it as if it was not binding on him and ignored it.”¹³

Honourable Justice Emmanuel Okelo O’Kubasu

Judge O’Kubasu was dismissed over allegations of lack of integrity and fairness¹⁴ in decisions on cases that he was hosted in a London hotel by a man whose brother had a case before him, and that he presided over the case filed by a businessman who was close to him. The Board also found the judge to have displayed a “disconcerting lack of candour”¹⁵ when he denied knowing the businessman, given that he (the businessman) is a very well known public figure.

9 Judges and Magistrates Vetting Board. *Determinations Concerning the Judges of the Court of Appeal*. 25 April 2012.

10 Judges and Magistrates Vetting Board. *Determinations Concerning the Judges of the Court of Appeal* 25 April 2012, <http://www.jm vb.or.ke/images/documents/determinations.pdf>, page 14.

11 Ibid, page 17.

12 Ibid, page 20.

13 Ibid.

14 Ibid, page 27.

15 Judges and Magistrates Vetting Board. *Determinations Concerning the Judges of the Court of Appeal*, <http://www.jm vb.or.ke/images/documents/determinations.pdf>, 25 April 2012, page 25.

The London hotel issue made for some interesting reading. A witness ran a butchery patronised by the judge. The witness sought advice from the judge after falling out with his landlord and facing eviction. On the judge's advice, the witness engaged a lawyer. The matter later came before the judge and he granted a stay of eviction. Later, the witness learned that the judge was visiting London and invited him to stay as a guest at a London hotel owned by the witness's brother. The judge apparently took up the offer. What might appear to be a minor indiscretion may have tipped the balance against the judge.

Honourable Justice Joseph Nyamu

Justice Nyamu earned his marching orders for a number of startling decisions he made in cases relating to the Goldenberg and Anglo Leasing scandals. According to the Board, he made a series of rulings that frustrated attempts by prosecuting authorities to hold prominent businessmen and political figures to account. All the rulings appeared to bend the law to protect impunity.¹⁶

He was part of the bench of three whose ruling permanently ended the then impending trial of the late internal security minister, George Saitoti, over the Goldenberg scandal. The bench issued orders striking out all portions of the Commission report touching on Saitoti, arguing that he would not get a fair trial owing to the long delay in determining the case. The board observed that by faulting the findings of a commission that had ceased to exist, the bench issued orders not against the commissioners, but against a document.

Justice Nyamu's decision on the 2008 *Kotut* case also effectively immunised the then Governor of the Central Bank of Kenya, Eric Kotut, against prosecution for allegedly permitting the fraudulent movement of Ksh3.5 billion out of the country.

To compound matters, on various Anglo Leasing cases that came before him, the judge:

- Issued orders that stopped investigations of, and returned passports to persons whom the KACC (the former anti-corruption authority, now replaced by the EACC) sought to have investigated for alleged economic crime. In addition, the judge ordered that no information be published concerning their being suspected of economic crimes and that they should not be arrested or charged in the 2006 *Nedermar* case.
- Struck down measures aimed at preventing the flight of persons suspected of corruption and serious economic crimes in *Khamani* (2007)
- Gave an initial stay of prosecution in the *First Mercantile Security* case, another Anglo Leasing matter.

Justice Jeanne Wanjiku Gacheche

In August 2012, the Board found High Court judge, Justice Gacheche not fit to continue holding office owing to her rulings in three insurance matters that profoundly dented public confidence in the Judiciary. The Board expressed concern over her failure to comprehend and respond to the needs and experiences of ordinary people; it found that she used her judicial powers in an inappropriate manner that had an extensive negative impact on thousands of people.¹⁷

¹⁶ Ibid, pages 34-35.

¹⁷ Judges and Magistrates Vetting Board. *Determinations Concerning the Judges of the Court of Appeal*. 3 August 2012.

In December 2012, a further five judges of the High Court were found not fit to continue serving as High Court judges. They were judges Leonard Njagi, Nicholas Ombija, Joseph Sergon, Mary Ang'awa, and Murigi Mugo.¹⁸

Justice Leonard Njagi - his tenure was terminated following claims by the EACC that he “illegally caused the transfer of LR. No 209/6238 IR No. 74856 belonging to Kenya School of Law to Rockville Limited, a company in which he was a director”¹⁹ while he was Principal of the Kenya School of Law.

Justice Nicholas Ombija – in addition to allegations of “sexual harassment of an advocate,” the judge also faced accusations of failure to “disqualify himself” in a case involving a client he had acted for while in private practice.²⁰

Justice Joseph Sergon - was accused severally of “receiving a bribe” and taking money from clients and “conning” them when he was in private practice as a litigant.²¹

The following judges were axed on issues not directly touching on integrity:

Justice Mary Ang'awa - found unfit due to her “rigid conduct” towards lawyers and litigants; being “disrespectful to parties appearing before the courts.”

Justice Murugi Mugo also paid for being disrespectful to parties in court and lacking “remorse or capacity for introspection.”²²

Judges Mohamed Ibrahim and **Roselyn Naliaka Nambuye**²³ were found unfit to continue holding office largely on account of unacceptable delays in delivering judgments. **Justice Joyce Nuku Khaminwa** was dismissed on account of delayed judgments and rulings occasioned by her illness.

3.3. First Conviction on Anglo Leasing

In September 2012, former Ministry of Home Affairs Permanent Secretary, Sylvester Mwaliko was found guilty of abuse of office and fined Ksh3 million or three years imprisonment in default.

18 Business Daily. 21 December 2012. *Vetting board rules on fate of judges*.

19 Judges And Magistrates Vetting Board Fifth Announcement, *Determinations On Suitability*, 21 December 2012, http://www.jmb.or.ke/images/documents/Fifth_Determination.pdf, page 26

20 Ibid, page 31.

21 Ibid, pages 42 and 43.

22 Ibid, pages 16 and 24.

23 Judge Mohamed Ibrahim applied for a review of the decision and was re-instated with caveats including that his pending judgments be delivered within a specific time and that rules are set regarding timely delivery of judgments - Judges And Magistrates Vetting Board Sixth Announcement 15 January 2013, http://www.Jmb.Or.Ke/Images/Documents/Sixth_Determination.pdf, pages 9 and 12.

This was significant, being the first conviction relating to the Anglo Leasing corruption scandal in which billions of shillings of public funds were paid to ghost companies. In her ruling, Nairobi Chief Magistrate Lucy Nyambura found the prosecution to have proved beyond reasonable doubt that Mwaliko signed the contract for the tender of new generation passports awarded to Anglo Leasing without the knowledge of the immigration department, or verification of the status of the company before agreeing to enter into any contract.²⁴

While Mwaliko's conviction was an important step in the fight against corruption, it pales in comparison to the apparent impunity enjoyed by much more senior officials who were involved in the scandal. The failure to pursue cases against such officials sets a dangerous precedent and sends the message that power will protect criminals from being brought to justice.

3.4. Appointment of the Chair of the EACC

In May 2012, President Mwai Kibaki, in consultation with Prime Minister Raila Odinga, appointed Mumo Matemu as Chair of the Ethics and Anti-Corruption Commission (EACC). Earlier, the Clerk of the National Assembly, Patrick Gichohi had signed the certificate confirming that Mumo Matemu, Professor Jane Onsongo and Irene Keino had been approved by Parliament to lead the EACC, the former as Chair and the latter two as members of the commission, and sent the names to the President.

Four months later, Matemu's appointment was nullified by the High Court. The nullification followed a challenge of the appointment by a civil society organisation, Trusted Society of Human Rights Alliance. Kenyans for Peace with Truth and Justice was enjoined in this suit as *Amicus Curiae* (a friend of the court) and delivered an amicus brief on the integrity provisions in the constitution regarding the Matemu case. Some MPs had also opposed Matemu's appointment following allegations that centred on his tenure at the Agricultural Finance Corporation (AFC) where he served as legal officer, acting company secretary and deputy chief legal officer. It was alleged that he was involved in deals that resulted in AFC losing millions of shillings worth of taxpayers' money. MP, Gitobu Imanyara for example, was quoted as having told his colleagues in the House that Matemu was at the heart of a clique within AFC that colluded with dubious businessmen.

*"Businessmen of Asian descent would apply for loans of between Ksh18 million and Ksh24 million from AFC, and then, all these loans would be written off ... these loans amounted to over Ksh5 billion," Imanyara claimed.*²⁵

Mr Matemu was also accused of deliberately failing to collect Ksh2.4 billion in tax arrears from a Nairobi based company, Kingsway Motors, during his tenure at the Kenya Revenue Authority (AfriCOG 2011 report, "Smouldering Evidence" mentions the company's alleged role in money laundering).

In September 2012 a three-judge bench of Justices Joel Ngugi, Mumbi Ngugi and George Odunga ruled that Parliament and the Executive had overlooked issues raised about Matemu's integrity and thus nullified his appointment as the Chair of the EACC. They affirmed the determination of the High Court to protect and uphold the constitution, which calls for high integrity from

²⁴ Reuters. 5 Sep 2012. *Kenya makes first conviction in Anglo Leasing graft scam.*

²⁵ The Standard. 21 September 2012. *Why court nullified Matemu's appointment* by Isaiah Lucheli. At <http://www.standardmedia.co.ke/?articleID=2000066625>

public officers. The ruling sent a strong message to those seeking public office and asserted the role of the courts in reviewing appointments made by the Executive and Parliament. It was a welcome breath of fresh air in view of the disappointment that followed the watering down of the Leadership and Integrity Act 2012.

3.5. The Downfall of Nancy Baraza

Then there was Nancy Baraza. The former Deputy Chief Justice (DCJ) left office in disgrace after a tribunal investigating her recommended her removal for gross misconduct. The tribunal was set up following accusations that Nancy Baraza had assaulted and brandished a gun at Rebecca Kerubo Morara, a guard at an upmarket shopping mall. Various media accounts of the incident described how Morara, in performance of her duties, insisted on frisking the DCJ as she entered the shopping mall. Baraza resisted, pinched Morara's nose and told her to "know people" before walking past her to a pharmacy in the mall. Morara further claimed that on her way back, the DCJ warned that she could order her bodyguard to shoot her, proceeded to her car and came back brandishing a pistol. Morara claimed she had to go on her knees to plead for her life.

Having displayed such arrogance, Baraza's removal was something of a 'Kodak moment' for those fighting impunity, in that a little known security guard brought down the DCJ and Deputy president of the Supreme Court of Kenya.



Nancy Baraza

<http://1.bp.blogspot.com/-ODMNvwctyCI/UIB3rtwu4OI/AAAAAAAAHlw/MHqETr9ePq0/s1600/baraza.jpg>

3.6 Establishing an International Crimes Division of the High Court

In May 2012, the Judicial Service Commission mandated research into the viability of the development of an International Crimes Division of the High Court. The sub-committee of the Judicial Service Commission developed a report recommending the establishment of such a division.²⁶

The Chief Justice announced the establishment of the special division of the High Court to try cases stemming from the 2007-08 post election violence, as well as other crimes under international law, saying that the process of setting it up had already started and was effectively advancing. Once set up, the special division would apply Kenya's Penal Code and the International Crimes Act, 2008.²⁷

According to Attorney General Githu Muigai, it will take two years to get the court up and running.²⁸



Attorney General Githu Muigai

http://www.the-star.co.ke/sites/default/files/styles/node_article/public/images/articles/2012/10/17/91359/aggithumuigai.png

26 The Star. 26 November 2012. *JSC to set up new division to deal with poll violence* by Nzau Musau.

27 *Kenyan Chief Justice Announces Special Court*, 10th December 2012 at <http://iwpr.net/report-news/kenyan-chief-justice-announces-special-court>.

28 *Kenya's Special Court Faces Uphill Task*, 10 January 2013 at <http://iwpr.net/report-news/kenyas-special-court-faces-uphill-task>

Despite the ongoing political rhetoric about justice for the victims of the post-election violence (PEV), little has been done in the local context. It was recently announced that a special division of the High Court will be established to address transnational crimes, but that division is still in its inception. Given the alleged involvement of sitting senior State Officials in the perpetration of the PEV, true independence of the special division will be critical to its success. In the same vein, the State must demonstrate a commitment to witness protection so that those involved feel free to speak about their experiences. Of course, lawyers, court staff and police officers involved in the proceedings of this division will require specialized training, and the government will have to allocate resources for this purpose.

It is also worth noting that the establishment of this special division will mark an important occasion in Kenya. If successful, Kenya will finally be able to domestically address transnational crimes such as terrorism, money laundering and wildlife poaching, all of which have plagued the country for a long time.

4. Setbacks in the War against Corruption

For a year preceding an election, when one might expect scandals arising from campaign financing, surfacing incidents of the loss of public funds in 2012 were surprisingly few. However, the year had its fair share of drama, as the following examples illustrate.

4.1. The National Hospital Insurance Fund

The National Hospital Insurance Fund (NHIF), mandated to facilitate affordable, high-quality healthcare for all Kenyans, is the main provider of health coverage in the country. Given the centrality of the NHIF to the health sector, it is important that Kenyans are aware of how the system functions.

Early in the year the National Hospital Insurance Fund (NHIF) rolled out a medical scheme for civil servants worth an estimated Ksh4.2 billion. Under a system called capitation, selected health facilities such as clinics, were to be paid in advance to provide health services to civil servants on the basis of the clients they have recruited.

Allegations of corruption and bribery plagued the scheme from the start, as it turned out that payments may have been made to ghost clinics with assigned, rather than actual recruited patients. During the first quarter of the year, the NHIF was reported to have paid Ksh634.7 million to public and private hospitals that had been identified to offer services. Of that amount, Ksh121 million was paid out to public health centres, Ksh69 million to mission hospitals, and the remaining Ksh447 million to private hospitals. Two facilities - Clinix and Meridian Medical Centres allegedly received more than 45 per cent of the amount paid to private hospitals, at Ksh116 million and Ksh202 million respectively.²⁹

It was alleged that at the time this money was paid out, more than half of all clinics under these two institutions did not exist. It was also revealed that the biggest referral hospital - Kenyatta National Hospital - with 26 departments handling thousands of patients daily, received only Ksh1 million, while Meridian Medical Centre in Kisumu, which, on a busy day handles an average of 20 patients, received nearly Ksh5 million.

Eyebrows were raised over the ownership of Clinix Healthcare Ltd, the firm that received the largest share of the money, following revelations that it is 99 per cent owned by Pharma Investment Holdings, a foreign company registered in the British Virgin Islands, an off-shore jurisdiction sometimes associated with money laundering. Suspicions were heightened when a man, who allegedly did not give his real name, represented the firm before a parliamentary committee, as the CEO: the Clinix Healthcare CEO, Zac Madana, appeared before the Parliamentary Departmental Committee on Health, wearing a large white turban and a pair of spectacles, which media reports suggested were a disguise, after identifying him as a disgraced former spy.³⁰

29 Daily Nation. 25 November, 2012. *Lobbies want graft reports released* by Peter Ng'etich.

30 The Sunday Standard. 6 May 2012. *How ex-spy fooled MPs over NHIF cash scam* by Ben Agina and Alex Ndegwa.

The Committee accused Meridian Medical Centre of receiving millions of shillings when it did not have hospitals in some parts of the country it had listed. It found that Meridian was paid Ksh116 million between January and March 2012, for 19 outlets, Ksh30 million of which may have been for “ghost facilities.”³¹

When the issues came to light, several senior government officials got involved, issuing contradictory orders that spoke volumes about how disjointed the government was. The following events are examples:

Sackings and Counter Sackings at the NHIF

- Thursday 3 May 2012 - Prof Richard Muga (Chair, NHIF Board) sacked the CEO Mr Richard Kerich and suspended four top managers.
- Thursday 3 May 2012 - Prof Anyang Nyong'o (Minister for medical services) reinstated the CEO minutes later, revoked the orders and instead suspended Prof Muga.
- Saturday 5 May 2012 - Francis Kimemia (acting head of Public Service) sent home the entire NHIF board as well as the Chief Executive, to pave the way for investigations.
- Sunday 6 May 2012 - Minister Anyang' Nyong'o reinstated the NHIF board and its Chief Executive, and stated that Mr Kimemia had no powers to “micro-manage” his ministry.
- Monday 7 May 2012 - Prime Minister Raila Odinga announced the suspension of the Board along with the CEO, ordered a forensic audit and appointed a caretaker committee. He also appointed a deputy secretary in the Ministry of Medical Services, Mr A. A. Adan, to act as the CEO during the period of the investigations.

The caretaker committee appears not to have performed any better. By the end of the year the Efficiency Monitoring Unit, a government audit agency under the Prime Minister's office, was reported to have recommended that action be taken against A. A. Adan for illegally accrediting 77 health facilities. The facilities in question were not accredited, licensed nor registered by the Medical Practitioners and Dentist Board; Adan's actions were therefore contrary to section 30 (1) of the NHIF Act.

The NHIF scandal revealed just how little Kenyans' healthcare was prioritized by those purporting to provide it. A partial picture of the story was provided by the Parliamentary Committee on Health. Such parliamentary action committees are useful, and they can provide important oversight capabilities. It is worth considering how such committees can be strengthened and supported in the future.

4.2. Tender Wars over BVR Kits

At the IEBC there was controversy over the tender to supply 9,750 biometric voter registration (BVR) kits for use in computerising the electoral process. The tender worth Ksh3.9 billion attracted cut throat competition among local and international bidders, with allegations of corruption and influence-peddling flying left, right and centre.

Three cabinet ministers, three foreign diplomats, and three politically connected powerbrokers were reportedly among the many local and foreign players jostling for the lucrative contract. The three top Western diplomats in Kenya allegedly visited the IEBC's offices separately to warn that their governments would withdraw from a pool offering funding to IEBC if the tender was not awarded to applicants from their countries.³²

31 The Standard. 3 May 2012. *MPs unearth NHIF pay scandal* by Ally Jamah.

32 The Standard. 28 April 2012. *Tender wars risk elections* by Isaac Ongiri.



BVR Kit

<http://elections.nation.co.ke/image/view/-/1711550/highRes/472127/-/maxw/600/-/1551q4c/-/DN+KAJIADO+VOTING+0403Y+px.jpg>

Intrigue surrounded the companies that appeared in pole position to win the tender. These were:

- African Symphony, a local company which quoted Ksh3.85 billion
- 4G Identity Solutions from India, which quoted Ksh3.72 billion
- Face Technologies from South Africa, which quoted Ksh4.78 billion
- On Track from Israel, which quoted Ksh8.31 billion.

Questions were raised about African Symphony, which had been shortlisted despite the fact that its ownership is shared with Computer Applications Ltd, a company blacklisted by Parliament in the mid 1990s, from doing any business with the Kenyan government. In addition, it was rated poorly for lack of experience, capacity and competence in carrying out biometric voter registration.

Initial reports indicated that 4G Identity Solutions had been recommended for the award by the IEBC's evaluation committee, being the lowest evaluated bidder. However, reports emerged that 4G had been blacklisted in India. The Ministry of Foreign Affairs also advised the IEBC not to engage in any business with the Indian firm. The Kenyan head of the directorate of Asia and Australasia reportedly advised the IEBC on behalf of the foreign affairs Permanent Secretary thus:

*"We write to inform you that Kenya Mission in New Delhi has conducted preliminary due diligence. . . . The Mission has requested us to convey their strong advice that their findings indicate the above mentioned entity should not be allowed to enter into any business transaction with any government institution in Kenya."*³³

Despite the allegations, the tender committee rejected the recommendation of the evaluation committee and a due diligence visit was organized to visit 4G Identity's headquarters in India.

³³ The Star. 18 June 2012. *IEBC to award Sh3.4 billion voters' roll contract* by Walter Menya and Mosoku Geoffrey.

The team comprised eight members, five of whom were from the IEBC. Curiously, two of the team members were reportedly from UNDP, while one was from the International Foundation for Electoral Systems (IFES).³⁴ The team appeared to have given the company a clean bill of health. It later turned out that the process could have been infiltrated by partisan interests, and even extortionists from the Ministry of Foreign Affairs: there were unverified claims that officials from the Ministry falsely reported that 4G had been blacklisted in India after its management declined to pay a Ksh30 million bribe for a clean report.³⁵

A re-evaluation team was then constituted (which again, curiously, included experts from development partners) and a new report prepared, which appears to have maintained the position that the award should be given to 4G. Against this recommendation of the evaluation team, the tender committee recommended awarding the tender to Face Technologies, which had been ranked third. This was highly irregular and the CEO of the IEBC, not satisfied with the decision, wrote to the Public Procurement Oversight Authority for direction, on the grounds that Face Technologies had been ranked third and had quoted a price well above the IEBC budget. According to section 26 (3) of the Procurement and Public Disposal Act of 2005: *"All Public Procurement shall be within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan."*

The CEO also correctly pointed out that the tender committee usurped the role of the evaluation committee. Under the procurement law, tender committees cannot make awards against the recommendation of the evaluation committee. They can only refer the matter back to the evaluation committee. The tender committee's argument in rejecting the evaluation committee's report, that there was no synergy between the financial and technical scores, sounded rather lame considering rankings are based on a combination of both.

Eventually, the Commission dropped the tender and would have resorted to a manual system had the government not stepped in to acquire the kits in a government to government deal that cost more than double the quoted amount.

4.3. KANU Era Scandals Resurface

Pattni's claims over duty free shops

Kamlesh Pattni, of Goldenberg infamy was once more in the limelight, this time regarding the control of duty free shops in the new terminal at Jomo Kenyatta International Airport. He had gone to court to restrain Kenya Airports Authority (KAA) from awarding a tender for the development, management or operation of three shops at the airport's new unit. He claimed exclusive rights to all the shops, including those to be constructed in the future, on the basis of a 1991 agreement with the government that granted his World Duty Free Company an indefinite lease for shops built by KAA in all airports.

34 Curious because the award of tenders in public entities is normally an internal affair. The public procurement and disposal regulations do provide room for the tender committee to invite observers or independent advisers or members of the procurement unit to explain submissions or provide technical advice, where required. It is not however immediately apparent what role UNDP was to play, particularly in light of reported attempts to influence the award.

35 The Standard. 26 July 2012. *Unease over Biometric Voter Registration* by Martin Mutua and Vitalis Kimutai.



Kamlesh Pattni

<http://www.mwakilishi.com/sites/default/files/kamlesh-pattni.jpg>

In 2008, Justice Mutava had granted an injunction restraining KAA from awarding the tenders. In November 2012 he held the KAA's principal officers in contempt of court for ignoring those orders. In effect, the judge, for the second time, controversially ruled in favour of upholding Pattni's claim to hold the said rights in perpetuity. Subsequently Justice Mutava reportedly came under investigation by the Judicial Service Commission over allegations of partiality in his rulings on companies associated with Mr Pattni.³⁶

NSSF KANU Era Contracts

The National Social Security Fund (NSSF) reportedly paid Sololo Outlets, a company associated with former Lugari MP Cyrus Jirongo and Mugoya Construction Company over Ksh830 million as an out of court settlement in a dispute relating to housing projects undertaken during the Kanu years.

The settlement concerning Jirongo and Sololo Outlets related to an agreement made with the NSSF in September 1992 for the development of a housing project at a cost of Ksh1.2 billion, but which was terminated a year later. Consequently the developer instituted a court case against the Fund claiming over Ksh4.25 billion as damages arising from the termination.

It did not escape the attention of keen observers that the payments were made at a time when the NSSF was undergoing major changes in senior management - the managing trustee had been sacked and the tenure of the other trustees had expired.³⁷

4.4. Underhand Deals to Print Money

For the second time in his stint as a minister, Amos Muhinga Kimunya faced suspension from the cabinet following allegations of financial impropriety by a parliamentary committee. He, together with Central Bank of Kenya Governor Professor Njuguna Ndung'u, was indicted by the Parliamentary Accounts Committee (PAC) and declared unfit to hold public office. This followed investigations into corruption allegations that the country lost over US\$21.4 million in underhand deals involving the Ministry of Finance, Central Bank and British currency maker De La Rue. The duo allegedly cancelled a long-term tender worth US\$45.2 million, for the printing of 1.71 billion notes, in favour of a short term one worth US\$67 million, to print 1.49 billion notes.

³⁶ Daily Nation. 24 November 2012. *Pattni returns to haunt Kenyans with dirty Kanu era rip-off schemes* by Mugumo Munene.

³⁷ Daily Nation. 22 March 2012. *NSSF pays millions for Kanu era deals* by Patrick Mayoyo and Jaindi Kisero.



Amos Kimunya

<http://starfm.co.ke/wp-content/uploads/2012/03/mumunya.jpg>

However, the committee's report was rejected by the House amid allegations that some MPs were given bribes of between Ksh20, 000 to Ksh30, 000 to water it down. The PAC chair and Ikolomani MP, Boni Khalwale, was reported to have claimed that he was offered a fee of Ksh10 million by a cabinet minister to go easy on Kimunya.³⁸

4.5. Corruption in the Kenya Railways Staff Retirement Benefits Scheme

A conflict of interest and a severe breach of trust by the trustees of the Kenya Railways staff retirement benefits scheme were revealed following an audit carried out by an inspection team from the Retirement Benefits Authority.

One of the findings of the audit was that there were irregularities in the disposal of properties owned by the scheme. One such property, L.R Nairobi/Blocks 31/219, valued at Ksh525 million, but which had attracted an offer of Ksh625 million, was sold for Ksh540 million by private treaty without following due process. The trustees also allegedly accepted Ksh650 million in respect of L.R 209/8760, which was Ksh50 million less than its valuation of Ksh700 million. Additionally, a company had offered Ksh680 million but was unsuccessful in its bid.

The scheme trustees were also accused of abuse of office and disregard of internal controls and procedures. The audit found that Beryl Odinga, the Chair, was irregularly appointed, as no minutes existed to confirm her appointment. Further, in spite of her non-executive status, she drew a monthly pay of Ksh40, 000, had an office, a driver, a personal assistant and two secretaries. She was found to have been questionably advanced Ksh1.2 million for local and international travel, in addition to having the scheme pay Ksh320, 000 to hire a car for her, over and above fuel costs for her personal vehicle. She allegedly sat in every committee meeting, thus exerting undue influence.

38 The Standard. 7 September 2012. *Shock over bribery of Kenyan MPs* by Peter Opiyo.

The other trustees – Dr. Mtana Lewa, Nduva Muli, Ken Wathome, Silas Gitari, Lazarus Keizi, Moses Njeka, Priscilla Mukuria and Daniel Obop - drew sitting allowances of Ksh10, 000 and Ksh5, 000 for out of town trips. The audit found the trustees to have held too many meetings over and above the quarterly requirement, in addition to awarding themselves bonuses of Ksh50, 000 each in 2010.³⁹

4.6. No payment for Kenya Petroleum Refineries Shares

It emerged that the country may have lost Ksh7.4 billion in a transaction involving the transfer of Kenya Petroleum Refineries Limited (KPRL) shares to Essar Energy Overseas Limited. The government reportedly agreed to waive its rights to buy the shares as three multinational companies (Chevron, BP and Shell), divested from KPRL in March 2008. The shares were offered to Essar Energy Overseas Limited and in return the government was to receive US\$11 million as goodwill. In 2011 the Auditor General queried how the amount had been reduced to US\$2 million, while also pointing out that there was no evidence that the Treasury had received any money from the transaction.⁴⁰ When the matter came before the Public Accounts Committee in March 2012, Financial Secretary Mutua Kilaka and acting Director of Investment Beatrice Gathirwa were unable to satisfactorily explain both the reduction in amount due and whether the company had been competitively sourced.⁴¹

As evidenced by all the procurement issues that presented themselves during the year, it is clear that public procurement remains the avenue through which much, if not most of the corruption in Kenya is perpetrated. The Public Procurement Oversight Authority seems unable to effectively perform its mandate.

This can largely be attributed to the secrecy and underhand dealings that surround public procurement, especially when contracts are worth large amounts of money. Openness in government and contracting, particularly leveraging technology, would go a long way to addressing corruption in the public sector.

4.7. Mismanagement of the Constituency Development Fund

A social audit by the National Taxpayers Association, covering 38 constituencies, uncovered considerable rot in the management of the Constituency Development Fund (CDF). It found that Ksh363 million meant for the fund in various constituencies could either have been misappropriated or could not be accounted for. The worst performing constituency was Marakwet East, which used only half of the Ksh31 million allocated to it, followed by Malava, Kibwezi, Naivasha and Kitui Central.⁴²

39 The Star. 5 March 2012. Kenya: *Raila's Sister Kicked Out of Pensions Scheme* <http://allafrica.com/stories/201203051647.html>

40 Business Daily. 3 August 2011. Kenya: *Auditor Queries Sale of Oil Refinery Shares to Essar* by Muna Wahome.

41 Daily Nation. 22 March 2012. *Sh7bn feared lost in oil refinery scandal* by Edwin Mutai.

42 NTA releases CDF report, <http://www.citizennews.co.ke/news/2012/local/item/1503-nta-releases-cdf-report>, 9 May 2012

A significant concern with regard to devolution is the opportunity for “devolved corruption,” especially in the allocation of money from the CDF. In fact, the lack of public participation in the choice and implementation of projects is one significant reason for the corruption that has already taken root in this sector. In the future, it is critical that public participation be a core component of the management of local funds. Local governments should establish regular and timely public consultation sessions in which those who will be impacted by projects have a chance to voice their opinions and questions on the same. Local governments should also ensure that they are accountable to the public by explaining their responses to the public opinions expressed in these sessions.

4.8. Corruption at City Hall

Investigations by the Nairobi Law Monthly exposed a conspiracy by City Hall senior staff to allocate Nairobi’s only working fire station to a private developer. They also revealed that over the years, six public spaces set aside for fire stations in the city and worth an estimated Ksh3 billion had been irregularly allocated to individuals. One such plot in Westlands, initially LR1870/111/284, was reportedly subdivided and allocated to Gideon Moi (son of the former President) with a new title deed, LR No 209/13263.⁴³

4.9. Lining Pockets at the Ministry of Defence

The Nairobi Law Monthly also alleged that unnamed politicians and senior officials at the Department of Defence were enriching themselves from the Ksh14.7 billion allocated for Operation Linda Nchi and were in fact prolonging the Kenya Defence Force’s stay in Somalia so as to keep lining their own pockets.⁴⁴

Demanding complete transparency from the defense sector can be difficult, because disclosure of certain information could endanger national security. There are mechanisms, however, for dealing with this, at least partly, which have been tried in other countries. For instance disclosure could be made to members of the responsible parliamentary committee that are sworn to secrecy; scrutiny could also focus on progress in achieving the stated objectives of the deployment. At the same time, however, problems such as the one described above prove that public scrutiny can be helpful. And that secrecy must be limited to the absolutely necessary aspects. In the case of Somalia, there would seem to be little need for the KDF to still be present. Advocacy efforts should lobby for an exit strategy for Kenyan troops from the country, which might stem the type of corruption mentioned above.

4.10. Ethics and Anti-Corruption Commission Cases under Investigation

During the year there were a number of cases that the Ethics and Anti-Corruption Commission was reportedly following up, but which it did not completely unravel. These include:

Konza Technology City

The EACC announced in April 2012 that it was instituting investigations regarding allegations that Ministry of Information and Technology permanent secretary, Bitange Ndemo, together with the chief procurement officer of the Ministry, flouted the Public Procurement and Disposal Act, 2005

43 The Nairobi Law Monthly. 02 May 2012. *The Sh3bn City Hall Conspiracy* by Michael Rigby.

44 The Nairobi Law Monthly. 08 Sep 2012. *Eyebrows Raised Over KDF Spending In Somalia War* by Michael Rigby.



Artistic impression of Konza Techno City

<http://www.transforming-kenya.com/cms/media/events/211.jpg>

by acquiring 5,000 acres of land at Ksh1 billion for the ICT project at the proposed Konza City through single sourcing, as opposed to an open tender. The EACC later forwarded the file to the DPP, having recommended that the Permanent Secretary and the chief procurement officer be charged with the offence of 'careless failure to comply with the law relating to procurement of goods'.

Kenya National Bureau of Statistics (KNBS)

The Director General of the Kenya National Bureau of Statistics (KNBS), Anthony Kilele and the procurement manager, Fred Ayiera, were arrested and charged with failure to use an open tender method in accordance with the Public Procurement and Disposal Act, 2005, in the procurement of storage space for census material. Kilele was further charged with abuse of office for using his office to improperly confer benefits amounting to Ksh7.39 million on one Samuel Ogot Baker through a ghost company that purported to have provided the warehouse services. Mr. Baker was also charged with fraudulently acquiring the money.⁴⁵

National Oil Corporation

The EACC also recommended the prosecution of the Managing Director of the National Oil Corporation of Kenya (NOCK) Ms. Sumayya Hassan-Athman and the supply manager, Maimuna Kassim, for abuse of office after it was found that they did not follow the law in contracting a firm to supply automotive gas oil. NOCK allegedly single sourced and paid Russian Oil and Gas Manufacturers and Exporters Association (Ruogmea) over Ksh10 million for the purchase of 132,000 metric tonnes of automotive oil gas, which were never delivered to NOCK.⁴⁶

⁴⁵ EACC Press Release, <http://www.eacc.go.ke/archives/pressreleases/KNBS%20OFFICIALS%20ARRESTED%20AND%20TO%20BE%20TAKEN%20TO%20COURT.pdf>, 10 July 2012

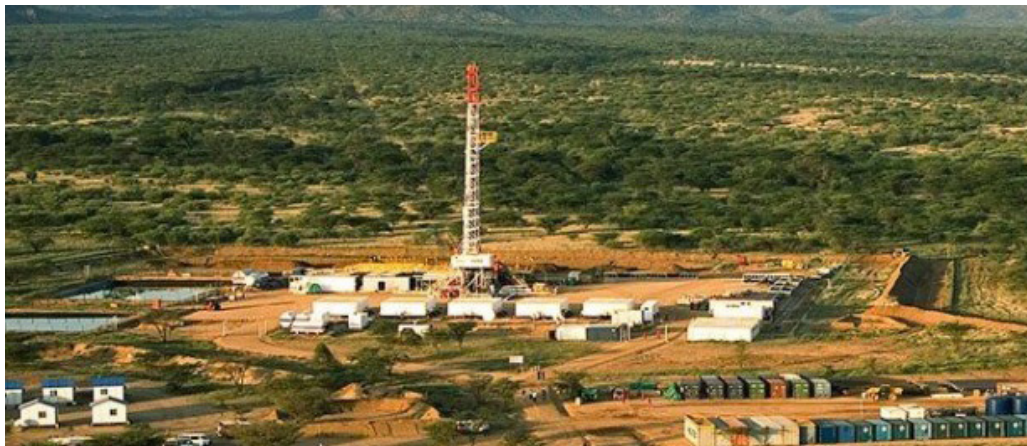
⁴⁶ EACC Press Release, <http://www.eacc.go.ke/PRESSRELEASES.ASP?ID=402>, 5 August 2012

4.11. Murky goings-on in the Extractive Industry

Following discoveries of minerals, such as commercial coal deposits in Mui Basin in Kitui County, huge crude oil wells in Turkana, and titanium deposits in Kwale, the country was gripped with excitement, knowing that its economic fortunes could change dramatically in the near future. However, integrity issues relating to the exploration and commercial exploitation of these resources began to surface.

Oil Discovery in Turkana

Reports in the media alleged that a cabinet minister, a permanent secretary and a former adviser to the Kenya government, were associated with a company that made a fortune by selling land in a block where oil was discovered. Trade Minister Moses Wetang'ula, Energy Permanent Secretary Patrick Nyoike and businessman Aryn Lakhani were alleged to have been at one time or another, associated with Turkana Energy Incorporation, the parent company of Turkana Development Corporation which sold a piece of land, block 10B to Africa Oil Corporation for Ksh840 million. Soon after, oil was discovered at Ngamia 1 well, which lies within block 10B.⁴⁷



Ngamia 1 oil rig in Turkana, Block 10B

<http://allafrica.com/download/pic/main/main/csiid/00221219:12de50bb0f55586a50f4bd43b0764bbfarc614x376:w614:us1.jpg>

Coal in Mui Basin

Controversy surrounded the award of concessions to mine coal in Kitui's Mui Basin to Fenxi Mining Industry Group of China.

While the residents of Mui Basin went to court alleging infringements of their constitutional rights, the local MP, Kiema Kilonzo alleged that Fenxi lacked the financial and technical capacity to deliver on the project. He claimed that while on a fact finding visit to China, his entourage neither saw evidence of projects handled by the company, nor profiles of its activities in China or elsewhere.

Fenxi Mining Industry Company Limited on its part accused Kiema Kilonzo of extortion. The company is reported to have said that the legislator exhibited "unfriendly and undiplomatic behaviour" while repeating "intimidating demands for special favours" during a visit to its facilities in China.⁴⁸

⁴⁷ Daily Nation. 31 March 2012. *The inside story of Kenya's oil discovery*.

⁴⁸ Capital FM. 29 July 2012. Kenya: *Chinese Firm Now Accuses MP of Extortion* by Victoria Rubadiri.

4.12. Bribes and Fraud in the Private Sector

Oxford University Press

A leading publisher in the country was blacklisted by the World Bank for three years after it was found to have made irregular payments to government officials for two contracts to supply textbooks under programmes funded by the Bank. Oxford University Press was also fined Ksh292 million by UK authorities and the World Bank as part of the settlement agreement.⁴⁹

CMC Holdings - Directors Banned

The Capital Markets Authority banned seven former directors of CMC Holdings from holding office in any listed firm for flouting legal and regulatory requirements leading to losses of millions of shillings. The seven are: former Attorney General Charles Njonjo, Martin Forster, Sobakchand Shah, Peter Muthoka, Jeremiah Kiereini, Richard Kemoli and Andrew Hamilton.

Boardroom wrangles had rocked CMC since 2011 with some directors accusing former chairs of the Board of defrauding the company of billions of shillings. Kiereini was alleged to have siphoned off hundreds of millions of shillings and hidden them in offshore accounts in Jersey (Channel Islands) while he was the Chair. Peter Muthoka, who replaced Kiereini, was accused by some directors of defrauding CMC through his company Andy Forwarders. The company allegedly overcharged CMC by Ksh2 billion on logistic services over a five-year period.

⁴⁹ Business Daily. 3 July 2012. *Bribery scandal locks Oxford out of World Bank contracts* by Victor Juma.

5. The Murky Practice of Money Laundering

Parliament pushed for the reopening of Charterhouse Bank amid claims that a Parliamentary Committee on Finance, Planning and Trade cleared the bank of any wrongdoing in 2010, and that the bank's creditors were suffering from the freezing of their assets at the bank. Several MPs took issue with Minister of Finance Njeru Githae and Central Bank (CBK) Governor Professor Njuguna Ndungu, accusing them of frustrating efforts to reopen the bank. In response to questions raised in Parliament on the bank, in September 2012 the finance Minister asked Parliament to censure the CBK Governor for his failure to honour Parliament's resolution to have Charterhouse Bank reopened. The bank was placed under statutory management by Central Bank for its alleged involvement in money laundering and tax evasion in 2006.

High Court judge Weldon Korir in October temporarily ordered that Charterhouse Bank remain closed following a petition by a local NGO, the Centre for Human Rights and Democracy. The organisation argued that only the Central Bank could make the decision on whether to reopen the Bank. (The case was to be heard 14 days after the judge issued the order, but at the time of writing nothing has been reported on the progress of the case).



Charterhouse Bank

http://www.the-star.co.ke/sites/default/files/styles/node_article/public/images/articles/2012/10/05/88502/charterhousebank.png

Kenya remains on the watch list of the Financial Action Task Force's (FATF) (the global anti-money laundering body) for its key deficiencies in curbing money laundering. However, the FATF acknowledged that Kenya has made significant steps towards addressing money laundering through the enactment of the Prevention of Terrorism Act 2012, the Capital Markets (Amendment) Act 2012, the passing of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act 2012 and the establishment of the Financial Reporting Centre (FRC). The FRC, which began operating in April 2012, is tasked with receiving reports on suspicious transactions that may be related to money laundering, forwarding them to the relevant law authorities, developing anti-money laundering policies and putting into operation the Proceeds of Crime and Anti-Money Laundering Act.⁵⁰ Had Kenya failed to put up these measures in its anti-money laundering regime, it would have risked joining the ranks of other countries that are facing international trade sanctions from the FATF for their failure to adhere to global standards in the war against money laundering.

⁵⁰ *Money Laundering Act approves FRC*, at <http://www.citizennews.co.ke/business/2012/national/item/1365-money-laundering-act-approves-frc>, 17 April 2012

6. The Year Ahead

2013 may be a make or break year for the country. It will herald a new era with freshly elected leadership and a break away from centralised government.

6.1. Transition to Devolved Government

Kenya's governance architecture is about to change radically following the March 2013 election, marking the transition from a centralised to a devolved government. The foundations for this change were put in place in 2012 with the enactment of The Transition to Devolved Government Act of 2012. The Act established the County Transition Authority to facilitate and coordinate the shift to the new devolved system of government. Its members were sworn in during the period of the enactment of the Act.

Decentralising government to the counties has the potential to greatly enhance transparency and accountability because citizens will be able to exercise greater scrutiny over the management of their county's affairs. It also has the added advantage of achieving a better match between the preferences of citizens and the plans and actions of their leaders. However, it comes with the risk of creating a torrent of misappropriation of public funds, given the country's consistently poor record with management of decentralised funds, such as the CDF.

Concerns have also been expressed about the level of preparedness for what amounts to a quantum leap in governance. According to some observers, many Kenyans are not adequately aware of how the new system will operate. A report by South Consulting in May 2012 for instance, found that about 29 per cent of citizens do not know the role of the governor, while 44 per cent of citizens do not know the role of the County Assembly Representative. A survey commissioned by AfriCOG also exposed these and other major gaps in citizens' expectations of devolution. Other observers have highlighted gaps in awareness among the citizenry with anxiety lingering on the following issues:⁵²

- Which functions will be transferred to counties, when and why?
- Do counties have enough money to deliver services?
- What will happen to existing assets and liabilities?
- How will government officers be redeployed?

6.2. The Exit of President Mwai Kibaki

The year ahead will also see a new occupant at State House, as President Mwai Kibaki concludes his tenure. What can the new Head of State emulate and what pitfalls should he avoid? What lessons can he learn from the Kibaki years?

51 AfriCOG Survey on Devolution: http://www.africog.org/sites/default/files/Devolution%20Survey%20by%20AfriCOG_final.pdf

52 Sunday NATION. February 2 2013. *Transition authority running out of time to get the basics right* by Wanjiru Gikonyo-The Institute for Social Accountability. See also AfriCOG survey on devolution: http://www.africog.org/sites/default/files/Devolution%20Survey%20by%20AfriCOG_final.pdf

A comprehensive assessment will have to wait a little longer, but for now, it is safe to say that Kibaki's term in office has attracted barbs and bouquets in equal measure. On the economy he appears to have succeeded. Even some of his most ardent critics concede that Kibaki transformed an economy that, when he took over, was on its knees.⁵³ A comparison with progress in some other countries in the region, however, does point to quite some unachieved potential, with the main barrier to progress being endemic corruption.

Nonetheless, some of the achievements under his watch were quite remarkable. In its early days the Kibaki government introduced free and compulsory primary education, an initiative that received accolades, including praise from former US President Bill Clinton. The move more than doubled school enrolment, from 800,000 in 2002 to 1.9 million in 2012. Besides free primary education, some major gains were made in the education sector. Transition from primary to secondary education jumped from 43 per cent in 2003 to 73 per cent in 2012. Access to university education grew phenomenally - from 75,000 in 2002 to 252,554 in 2012 - with the launching of 15 new universities.⁵⁴

Perhaps the most indelible mark of the Kibaki years will be the expansion of infrastructure. Projects on roads, energy, electricity networks, fibre-optic cables and mobile telephony all expanded exponentially. The signature projects were the Thika Superhighway and the US\$37 billion road, rail, oil pipeline, air and sea ports mega-programme, LAPSET (the Lamu Port-Southern Sudan-Ethiopia Transport project). The development has attracted significant growth in investment. Nairobi for example, has, over the Kibaki years, become the destination of choice for multinationals setting up office in parts of Africa, including General Electric, Google, IBM, Visa International, Pepsi, Nestle, Foton Automobiles, World Bank's International Finance Corporation (IFC) and South Africa's FirstRand Bank.⁵⁵

Kibaki's tenure also witnessed the country becoming a global leader in mobile banking. In addition, tax collections soared, enabling the country to become more self-reliant. In spite of a stuttering start that resulted in a rejection of a proposed draft constitution in 2005, Kenya did eventually achieve a new constitutional dispensation in 2010, under Kibaki's watch. The new constitution secured greater personal freedoms, human rights and civil liberties, besides setting the stage for far reaching reforms particularly in the Judiciary. Kibaki broke away from tradition with his controversial low-key leadership style. He did not have his portrait on all currency units or have a plethora of streets, places and institutions named after him. He did not sanction praise songs composed in his honour, nor seek to dominate and lead all news bulletins with reports of his activities. All this was a refreshing departure from the oppressive omnipresence of his predecessor, Daniel arap Moi.

53 Sunday Nation. January 12 2013. *History will judge Kibaki as Kenya's best president* by Makau Mutua.

54 State House. 2012. *Building a Working and Caring Nation; Mwai Kibaki and the Transformation of Kenya*.

55 Daily Nation. 13 October 2012. *Multinationals now turning Nairobi into hub for Africa* by Griffins Omwenga.

Kibaki leaves a country that is on the verge of economic take off, provided the necessary reforms are energetically pursued. To his admirers he was the best thing that could have happened to Kenya – a view best articulated by Macharia Kamau, (a Kenyan representative at the UN) (2012): *“At any other time in history, in any other country, Kibaki’s achievements would have been immortalized for posterity.”*⁵⁶

While his achievements on reviving the economy were significant, so were Kibaki’s failures. There were times when he displayed ambivalence and sardonic indifference on burning issues of national importance. In matters relating to governance and anti-corruption in particular, his critics point to some catastrophic failures.

In the early days of his presidency, he reneged on a memorandum of understanding on power-sharing with leading politicians, which had seen him ascend to power. He then proceeded to make appointments in key docket such as security and finance that were heavily skewed in favour of his cronies. Throughout his tenure, virtually all senior positions in the Ministry of Finance, internal security, the Central Bank and the Kenya Revenue Authority were held by persons from his ancestral backyard. This, more than any other factor, led to ethnic polarisation, discontent and instability, culminating in the rejection of the draft constitution in 2005.



Mwai Kibaki

<http://jambonewspot.com1.jambonewspot.netdna-cdn.com/wp-content/uploads/2013/04/Kibaki-era.jpg>

⁵⁶ Macharia Kamau. 2012. A Statesman’s Legacy. Gale, Cengage Learning. IC Publications Ltd.

Having been elected on an anti-corruption platform and starting off well by appointing renowned anti-corruption campaigner John Githongo to spearhead the fight, he quickly abandoned the cause and looked the other way as scandal after scandal littered his stay in office. He failed to conclusively bring closure to the Goldenberg scandal, not to mention the unresolved Anglo Leasing, Triton Oil and maize scandals, the sale of the Grand Regency hotel, the cemetery scandal and so on. There were attempts at window dressing - some ministers stepped aside for a while - but most perpetrators got away scot free.

In addition, some very strange happenings took place during the Kibaki era. Posterity may well look back at the confusion surrounding the Standard Media Group raid by security forces, the Artur brothers and their links to significant senior figures, and the crackdown on Mungiki followed by the release of their leader from prison, and wonder what that was all about.

The biggest blot on the Kibaki legacy has to be the violence that engulfed the nation following the dispute over the 2007 elections, culminating in the International Criminal Court indictments. He will have to accept that it was during his tenure that the country almost self-destructed, following allegations of election rigging, resulting in over 1,000 Kenyans losing their lives and over 600,000 being displaced. Some observers believe this to have been the worst crisis in Kenya since the state of emergency in the 1950s.

The writer, Tee Ngugi summarizes the greatest failures of the Kibaki administration as *"the opportunity it missed to re-engineer a national culture consistent with the values spelt out or assumed by the new Constitution: a less tribalised nation, a less selfish society, a culture where people claim their rights as well as their responsibilities, a culture that does not tolerate mediocrity and excuses..."*⁵⁷

⁵⁷ The East African. 19 January 2013. *Mugumo trees and the odd ambivalence of Kibaki* by Tee Ngugi.

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