



*How Commissions of Inquiry are  
used to circumvent justice in Kenya*



# ***POSTPONING THE TRUTH***



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# Executive Summary

Commissions of inquiry have become a popular avenue for addressing public interest issues in Kenya over time. In the past 100 years, Kenya has had about 31 commissions of inquiry, all with mixed outcomes. Two commissions of inquiry were appointed in early 2008 — one to look into the disputed 2007 elections and the other to examine the violence that followed it. Recently a Commission of Inquiry has been established to look into the sale of the Grand regency Hotel.

All commissions of inquiry — whether they are gathering information to help create policy or establishing facts around allegations of wrongdoing — seek to inform governments. Over time, they have acquired a reputation for openness in their processes and have been used to achieve a variety of ends. Some of these are responding to public pressure, pacifying public anger and outrage, solving policy bottlenecks or settling political scores.

President Mwai Kibaki's government, and that of former President Daniel arap Moi before it, has favoured commissions of inquiry in dealing with complex problems facing the country — often with little or no hindsight on how previous efforts have fared.

The Commissions of Inquiry Act allows the President to appoint a commission any time he chooses, set the duration it will last, and decide the number and names of people who will sit on it. The absence of a specified duration for a commission to do its work has been a source of public frustration because of concern over resources and the desire to reach closure on important public interest issues.

**Although the Goldenberg Commission of Inquiry completed its report in October 2005, it did not present it to the President until February 2006**

The law does not set qualifications for people who should be appointed as commissioners, even though in the past 25 years, practising or non-practising lawyers as well as serving or retired judges have been named to commissions of

inquiry. The participation of serving judges in inquiries has recently come into question.

At the Goldenberg Commission of Inquiry, Justice Samuel Bosire, who was the chairman, pointed out that appointing judges to commissions of inquiry could negatively affect the independence of the Judiciary. He argued that commissions are essentially political assignments from which judges need protection in order to preserve their independence.

The spate of public challenges to the commission's authority could have undermined the reputation of the Judiciary.

The appointment of Appeal Court Judge Philip Waki to the Commission of Inquiry into the Post-Election Violence flies in the face of this recommendation.

Appointing sitting judges to commissions of inquiry also negates the constitutional principle of separation of powers. It places a judge under the supervision of the Executive, yet he belongs to a Judiciary that is supposed to be independent.

Significantly, a review of the recommendations of previous commissions of inquiry makes it plain that the recommended actions have not been implemented.

The less-than-enthusiastic reception the reports from commissions of inquiry get is often a forerunner of Government disinterest in implementing recommendations from them.

Although the Goldenberg Commission of Inquiry completed its report in October 2005, it did not present it to the President until February 2006 — nearly five months later. There have been other inquiries after that, such as the Kiruki Commission, which was investigating the activities of two Armenians believed to have caused numerous security breaches at sensitive locations within the country. Again, although the commission completed its work many months ago — and in spite of an official pledge to release its report — its findings have not been published.

The Commissions of Inquiry Act has no rules on when a report should be released and so it is left to the President's discretion. In recent times, a timetable has been set for the commission investigating the 2007 elections to complete its work and publish a report.

The delay or failure to release commission reports has been a source of much public disquiet in the past. The Government has once disowned a commission's report — in the case of the inquiry into the Tribal/Land Clashes — and disbanded another — the Commission of Inquiry into the death of Foreign Affairs minister Robert Ouko — before it could complete taking evidence and write its report.

Yet commissions of inquiry are not just a harmless political pastime. They cost the taxpayer money. The poor record-keeping of past commission costs notwithstanding, it is estimated that the Narc government spent more than Sh1 billion on task forces and inquiries within its first year in office, according to a Government statement in Parliament. The bulk of this expense was on allowances.

In an attempt to spur debate on the issue, this study assesses public interest arguments used to justify establishing commissions of inquiry and measure the effectiveness of commissions in answering questions before them. It recommends that the country should review the place and use of commissions of inquiry, particularly the law that is used to set them up. As long as commissions are established to deal with technical problems and their recommendations implemented, or valid reasons given for not doing so, they are a useful tool in seeking the truth.

## 1. Introduction

From colonial times, successive governments in Kenya have appointed commissions of inquiry to look into myriad issues of public interest. Starting with the Native Labour Commission of 1913 to the Kiruki Commission of 2006, Kenya has had about 31 Commissions of Inquiry.<sup>1</sup> In 2008, the Independent Review into the 2007 Elections Commission was created, followed by another on the Post-Election Violence. A third commission is inquiring into the sale of The Grand Regency Hotel.

An examination of past commissions of inquiry reveals that the Government created these tribunals for various reasons. They include responding to public pressure, pacifying the public, re-examining national policies and as tools for settling political scores.

A common thread that runs through almost all the commissions is the failure or lack of enthusiasm by the Government to implement the recommendations in the reports that the tribunals make.

Public concern has been growing over the escalating cost of commissions of inquiry in the recent past, especially given that they yield little benefit.

## 2. Nature of Commissions of Inquiry

In the Commonwealth, commissions of inquiry are generally set up in situations so unusual that no other approach would suffice. Such situations are characterised by:

- Considerable public anxiety about the matter for inquiry.
- A major lapse in Government performance appears to have occurred.
- Circumstances giving rise to the inquiry being unique with few or no precedents.
- The issue in question falling beyond the capacity of the normal Government machinery or the criminal or civil courts.
- The issue being in an area too new, complex or controversial for mature policy decisions to be taken.

In Kenya, commissions of inquiry have been set up in line with the 1962 Commissions of Inquiry Act (Chapter 102 of the Laws of Kenya). Under this law, commissions of inquiry are a tool for the Executive to seek information and advice on problematic issues of public interest.

The law gives the President power to appoint commissioners, determine the commission's terms of reference as well as the manner of fulfilling them, the duration of the inquiry, and the place where it is to be held. The President also has power under the law to determine the designation of chairperson and vice-chairperson, amendment of a commission, addition or removal of commissioners and revocation of a commission.<sup>2</sup>

The President also appoints the secretary to the commission.<sup>3</sup>

Under the law, the President may appoint a commission to inquire into any matter that he deems to be in the public interest. A commission is required to make a full, faithful and impartial inquiry into the matter for which it is established. It is also expected to conduct the inquiry in accordance with directions contained in the commission, make a written report to the President and outline the reasons for its conclusions. If required to do so by the President, the commission should give him or her a full record of its proceedings.<sup>4</sup> A commission shall, if so directed, make recommendations on the subject of inquiry or other matters arising from or connected with the inquiry.

## 3. Features of Commissions of Inquiry

### i. President's information-gathering tools

Commissions of inquiry are appointed and asked to inquire into matters that the President considers to be of public interest. They are supposed to report their findings and recommendations to him in writing.

Under section 4 of the Commissions of Inquiry Act, the President may at any time, issue a commission amending a commission previously issued, appoint an additional commissioner or commissioners, vary the designation of chairman or deputy chairman of

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<sup>1</sup>1913 – The Native Labour Commission, 1914 – The Coconut Commission, 1919 – The Land Settlement Commission, 1921 – The Public Works Department Commission, 1950 – The Kenya Meat Commission, 1956 – The Nairobi City Council Commission, 1959 – The Television Commission, 1959 – The Teachers Salaries Commission, 1962 – The Economic Commission, 1963 – The National Anthem Commission, 1963 – The Lutta Commission, 1964 – The Ominde Commission, 1965 – The Maize Commission, 1967 – Agricultural Education Commission, 1967 – The Muller Craig Commission, 1967 – The Commission of Inquiry into the Law of Marriage and Divorce, 1967 – The Commission on the Law of Succession, 1971 – The Ndegwa Commission, 1974 – The Commission on the Law of Adoption, 1980 – The Waruhiu Commission, 1984 – The Miller Commission, 1990 – The Gicheru Commission, 1994 – The Commission of Inquiry into the Cult of Devil Worship in Kenya, 1994 – The Mtongwe Ferry Disaster Commission, 1998 – The Akiwumi Commission, 1998 – The Davy Koehn Commission, 1999 – Commission of Inquiry into the Land Law Systems of Kenya, 2003 – The Bosire Commission, 2003 – The Commission of Inquiry into the Illegal and Irregular Allocation of Public Land, 2003 (the Nding'u Commission) – The Muthoga Commission, 2006 – The Kiruki Commission, 2008 – The Independent Commission on the 2007 Elections and the Commission on Post-Election Violence.

<sup>2</sup>Section 3 of the Act reads, "(3) (1) The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest. (2) Every commission shall specify the matter to be inquired into, and shall direct where and when the inquiry shall be made and the report thereof rendered, and, where more commissioners than one are appointed, the commission may designate one such commissioner to be chairman, and, if the President so thinks fit, another such commissioner to be deputy chairman, of the commissioners.

<sup>3</sup>Under section 6, "The President may appoint a person to be secretary to the commissioner or commissioners appointed by a commission issued under this Act."

<sup>4</sup>Ibid, section 7

the commissioners, appoint a new commissioner in place of any commissioner who is or becomes unable or unwilling to act or dies, or is, in the opinion of the President, for any reason unsuitable to continue to serve as a commissioner, or revoke a commission previously issued.

### ii. Commissions are ad hoc in nature

Commissions of inquiry are appointed by the President to inquire into a specific matter and last as long as the President desires. Through the Gazette notice appointing commissions of inquiry, the President either sets specific life spans for the commissions or directs that they carry out the terms of reference and hand over the report within a reasonable time.

Although the law requires that the appointment of a commission and its revocation be published in the Gazette<sup>5</sup>, only appointments have been published.

Commissions of inquiry die a natural death once they present their reports to the President.

### iii. Commissions are not courts of law

Under the law, commissions of inquiry have no power to determine guilt or civil liability against any person. Such a determination is the preserve of courts under section 77 of the Constitution. Indeed, the law does not provide for the qualifications of persons who can be appointed to a commission of inquiry. Neither does it require that the persons appointed have any legal training.

Except for the limited guidelines that must be contained in a commission under section 3(3) of the Act — regarding admission of primary, hearsay or opinion evidence adverse to the reputation of a person — the law does not require a commission of inquiry to observe rules of evidence.

Again, contrary to the fundamental characteristic of judicial proceedings that the hearings be held in public (in open court) section 3(4) of the Act expressly provides that:

*“A commission may direct that the public shall not be admitted to all or to any specified part of the proceedings of the inquiry; and subject to any such direction, every inquiry shall be held in public, but the commissioner may exclude any person or class of persons from all or any part of the proceedings of the inquiry if he is satisfied that it is desirable so to do for the preservation of order, for the due conduct of the inquiry, or for the protection of the person, property or reputation of any witness in the inquiry or any person referred to in the course of the proceedings thereof, and may, if he is satisfied that it is desirable for any of the purposes aforesaid so to do, order that no person shall publish the name, address or*

*photograph of any such witness or person or any evidence or information whereby he would be likely to be identified, and any person who contravenes such an order shall, without prejudice to section 121 of the Penal Code, be guilty of an offence and liable to a fine not exceeding two thousand shillings.”*

However, in order to give commissions of inquiry authority over witnesses and other persons appearing before them, the law gives a commission the powers of the High Court for purposes of summoning witnesses and declares the proceedings of the commission judicial proceedings for purposes of punishing perjury and offering privilege for what is said before it. There is, however, further need for commissions to have the power to offer protection for witnesses who require it.

### iv. They do not consult Parliament; are not supervised by it

Unlike in other Commonwealth nations, such as Australia, commissions of inquiry are not accountable to Parliament. In fact, the law makes no connection between commissions and Parliament, either in their appointments or in submitting their reports.

### v. No requirement for accountability to the public

The law does not require a commission of inquiry or the President to publish the findings of the inquiry. Neither does it require the President or any other organ of state to implement the findings or recommendations of a commission of inquiry.

### vi. Commissioners are generally not entitled to remuneration

The law says that unless the appointing commission directs so, a commissioner shall not be entitled to any remuneration but shall be paid for expenses incurred in carrying out the inquiry. The section reads:

*“17(1) A commissioner shall not be entitled to any remuneration unless the commission otherwise provides. (2) Subject to the general or special directions of the Minister, a commissioner shall be paid the expenses incurred by him in holding the inquiry, including the cost of employing a secretary and any other persons employed in or about the inquiry and any other expenses attendant upon the carrying out of the commission.”*

## 4. Kenya’s Experience with Commissions of Inquiry

It has become almost predictable for Presidents to appoint commissions of inquiry whenever difficult national issues arise. Although there have been numerous commissions of inquiry in Kenya, no

<sup>5</sup>Section 18 of the Act provides that: “Every commission and every revocation of a commission, under this Act shall be published in the Gazette, and shall take effect, without prejudice to the provisions of subsection (2) of section 4, from the date of publication.”

official explanation has ever been given for their appointment. The present and past Presidents have offered no reasons for appointing commissions as the best tool to investigate certain issues. As such, the exact reasons for establishing each inquiry is not obvious from circumstantial evidence. However, an examination of the factors surrounding the appointment of the various commissions of inquiry reveals that they have been set up in response to one or a combination of the following factors.

### *i. Response to public pressure*

Response to public pressure seems to have informed the appointment of the Devil Worship and the Mtongwe Ferry Disaster Commissions in 1994 by President Daniel arap Moi. The Devil Worship Commission was named in the wake of a sustained campaign by the Church, supported by the media, over claims of the extensive practice of devil worship in Kenya. The Mtongwe Commission also came in the wake of unrelenting pressure for answers to the marine disaster at Mtongwe that claimed the lives of hundreds of commuters.

President Kibaki seems to have similarly responded to public pressure when he appointed the Kiruki Commission to inquire into the activities of the alleged Armenian brothers going by the name of "Artur". The Kiruki Commission was set up in the face of rising public anger at the apparent impunity of the two alleged brothers who had stayed in the country, enjoying official privileges without proper explanation of their status, role or mission, and in the face of public allegations that they were known mercenaries.

### *ii. Appeasing the public*

Temporary appeasement of the public seemed to have been the motive for the appointment of the Gicheru Commission in 1990 by former President Moi. The Commission was set up during a period of great political upheaval arising from the death of former Foreign Affairs minister Robert Ouko in mysterious circumstances that suggested Government complicity or its attempts to block investigations.

The establishment of the Gicheru Commission served to pacify an angry public and postpone any reckoning resulting from the minister's death.

When it appeared that the commission was determined to make a faithful and impartial inquiry into the truth on the minister's death and was unwilling to spare the mighty and influential members of the Government suspected of involvement in the murder, the President exercised his powers under section 4 of the Act and revoked the commission midstream.

### *iii. Problem-solving*

The Davy Koech Commission of 1998 on the 8+4+4

education system and the Muthoga Commission of 2003 on the Busia plane crash that killed Cabinet minister Ahmed Khalif appear to have been established for more benign reasons.

The Government had been implementing the 8+4+4 model of education for just over two decades and felt that it was time to review its impact. The Davy Koech Commission was appointed for this reason. The Government would have been open to any reasonable suggestions resulting from the review.

As for the Muthoga Commission, the death of the minister in the plane crash and the exposure of a large number of senior officials to peril in the same flight must have severely embarrassed the Government. It was in the public interest to find answers to the disaster.

It also emerged in the media that the state of disrepair of the Busia airstrip and the lack of necessary navigation equipment was a reflection of the neglect at airstrips and aerodromes around the country. It appeared that such disasters were bound to recur in other airstrips. It was, therefore, necessary to find remedial measures urgently.

### *iv. Settling political scores*

The Miller Commission of 1984, the Akiwumi Commission of 1998, the Ndung'u and, the Bosire Commissions of 2003 fall in this category.

These Commissions were established either expressly or implicitly to inquire into the personal conduct of one or several individuals in matters that amounted to breaches of the law. In the case of the Miller Commission, the inquiry was specifically to focus on the alleged subversive or treasonable conduct of Mr Charles Mugane Njonjo, former Attorney General and Minister for Justice and Constitutional Affairs.

The Akiwumi Commission was appointed to investigate participation of individuals in the ethnic clashes that occurred in the country in 1991, action or inaction on the part of law enforcement officials in dealing with the clashes and to recommend prosecutions of those implicated.

The Ndung'u and Bosire Commissions were appointed to inquire into suspected unlawful and/or illegal activities of a large number of public officials that led to loss of public land and public money, respectively.

## **5. Acting on Commission Recommendations**

For the Miller, Akiwumi, Ndung'u and Bosire commissions, their respective subject matters of inquiry, if proven, constituted serious criminal offences — treason in the case of Charles Njonjo; assault, malicious damage to property, unlawful

wounding and murder for those implicated in the Akiwumi Commission; and corruption, stealing and related offences for those implicated in the Ndung'u and Bosire Commissions. It was possible to deal with Njonjo and all those implicated by the Akiwumi, Ndung'u and Bosire Commissions using the criminal law.

However, the Government shunned this course of action in favour of commissions of inquiry.

The two Presidents in question reacted differently to the findings of the commissions. For President Moi, he pardoned Njonjo instead of prosecuting him. For the report of the Akiwumi Commission, Moi opted to ignore it entirely. In fact, as the Government released the Akiwumi Report, it also published a terse rejoinder dismissing the findings.<sup>6</sup> Curiously, the Government rejoinder was undated, unsigned and did not disclose the ministry or department of government that authored it.

On the other hand, President Kibaki ordered the immediate publication of the Bosire Report and promised that, 'the release of the report marked the beginning of a new phase in the war against corruption and that the Government would move decisively and with speed to implement these recommendations.'

Subsequent conduct on the part of the Kibaki Government reveals that opting for the Bosire and Ndung'u commissions of inquiry instead of direct

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prosecutions for the suspected corruption under inquiry was a tactical political exit from a potential fratricidal war with Kenya's power and property barons implicated in the reports. These barons were cast on both sides of the political divide.

The appointment of commissions of inquiry has been characterised by a violation of the constitutional principle of separation

of powers. Although commissions of inquiry are Executive instruments, the past 25 years in Kenya have established a trend where serving judges are appointed to commissions of inquiry.<sup>7</sup> The trend clearly compromises the express constitutional safeguards of independence and autonomy of the Judiciary.

The issue of serving judges being appointed to commissions of inquiry arose in Australia in 1923 when the Attorney General requested the Chief Justice of Victoria, Sir William Irvine, to allow the appointment

of one of the judges of the Supreme Court to serve in an inquiry. The Chief Justice consulted all the judges of the court and, in declining the request, he wrote, in what has come to be called the Irvine Memorandum:

*"The duty of His Majesty's Judges is to hear and determine issues of fact and law arising between the King and a subject, or between subjects and subjects ... There begins and ends the function of the Judiciary."*

The Chief Justice explained that 'Parliament supported by a wise public opinion, had jealously guarded the bench from the danger of being drawn into the region of political controversy'. It was his view that it should remain that way. He explained that even inquiries, which on their face had a judicial character, were likely to result in reports, which generate political debate. Further, determinations of inquiries often end up in court. This may raise a conflict between the findings of a judge as a commissioner and the findings of another judge on the same facts in a court of law.

In Kenya, the appointment of serving judges to commissions of inquiry came into focus at the Bosire Commission.

Based on its experiences, the Commission specifically recommended in its report that in future serving judges, especially those of the Court of Appeal, should not be appointed to commissions of inquiry. The Commission based this recommendation on a number of reasons:

Firstly, the Commission said, judges who serve in politically motivated inquiries run the risk of being dragged into politics and having their reputation for impartiality ruined.

Secondly, the tendency to sue members of commissions for things done as commissioners exposed judges to the risk of being condemned to personally pay costs of the suit. Justice Bosire had been a subject of two legal suits while he chaired the Commission.

Thirdly, the appointment of serving judges kept them away from their substantive duties for very long periods, thus unfairly hurting parties to cases before them.

Fourthly, any shortcomings in the reports of commissions may follow the judge to the bench since there is no system of appeal through which the judge could be vindicated.

Based on these reasons, the Commission wrote:

*"We recommend that before the issue is finally settled no sitting judge should be appointed to*

<sup>6</sup>The government response published by the Government Printer was entitled, "Comments by the Government on the Report of the Judicial Commission appointed to Inquire into Tribal Clashes in Kenya (Akiwumi Report).

<sup>7</sup>All the three members of the Miller and Akiwumi Commissions were serving judges, two of the initial members of the Bosire Commission were also serving judges.

*participate in a public inquiry unless the Chief Justice has satisfied himself that the nature of the intended public inquiry has no political implications and signified his consent to the appointment.”<sup>8</sup>*

Further, the participation of Mr Justice Bosire in the Commission resulted in embarrassment when the conduct of the Commission was challenged in the High Court. As a judge of the Court of Appeal, Justice Bosire was a member of a court superior to the High Court and he would ordinarily sit on appeal in decisions made by the High Court. As a member of the inquiry, however, he was subject to the jurisdiction of the High Court.

The embarrassment caused by the frequent challenges on the decisions of the inquiry in the High Court led the Commission to recommend that the Commissions of Inquiry Act should be amended to exclude appointment of Judges of Appeal and above from serving in commissions of inquiry.<sup>9</sup>

It seemed that this recommendation had been taken to heart when the President constituted the Kiruki Commission, but that trend has been reversed with the appointment of Justice Philip Waki of the Court of Appeal to head the commission inquiring into the post-election violence.

The recommendations of the Bosire Commission are understandably mild and guarded in deference to the appointing authority. But the point ought to be firmly made, that in Kenya as in Australia, serving judges of the High Court and the Court of Appeal are constitutionally unavailable for service in any other capacities. Constitutional guarantees of independence, autonomy and security of tenure of judges must forbid their appointment to executive functions such as commissions of inquiry.

Whereas the law does not provide for remuneration of commissioners, the emerging trend has been to pay commissioners and commission staff hefty allowances. It is estimated that the Narc government spent more than Ksh1 billion on task forces and commissions of inquiry within its first year in office.

The Government estimates that it spent Ksh609 million on commissions alone, according to a report issued in parliament, while another Ksh75 million went to the National Anti-Corruption Campaign Steering Committee. A further Ksh45 million was paid out to the Government Properties Investigation Task Force. The task force on the sugar industry is said to have spent Ksh13.6 million.

An official breakdown of the costs of the three inquiries set up in the recent past provides a clear picture

of just what it takes to maintain a commission. The Goldenberg Commission of Inquiry cost Ksh503 million, of which Ksh200 million was spent on operations and Ksh303 million on allowances.

The Ndung'u Commission cost Ksh78.1 million in total of which Ksh7.4 million went to operations and Ksh70.7 million was paid out as allowances. The Kiruki Commission cost Ksh19.97 million of which Ksh13.37 million was paid out in allowances and Ksh6.6 million went to operations.

Once commissions of inquiry have completed their work and submitted their reports, the trend has been to either delay publication of the findings or completely fail to release them. It took the threat of an order issued by the High Court in Mombasa to obtain release of the Akiwumi Commission.<sup>10</sup>

**Kenya's experience with commissions of inquiry reveals that they are a very expensive postponement of the moment of truth and justice**

## 6. Commissions Role in Fighting Corruption and Impunity

Investigating crimes is not the province of commissions of inquiry. Yet, corruption and allied practices are specific offences under statutes, particularly the Penal Code, the Anti-Corruption and Economic Crimes Act, 2003, and the Public Officer Ethics Act, 2003.

Investigations into economic crimes, and any other crimes for that matter, should be left in the hands of the legitimate statutory institutions created for the purpose and, the courts of law.

Kenya's experience with commissions of inquiry reveals that they are a very expensive postponement of the moment of truth and justice. Even after expending such colossal sums of money, the most that commissions of inquiry tasked with investigating possible crimes can do is simply to draw the Government's attention to what has occurred. As the Bosire Commission observed, it would be a usurpation of the Attorney General's powers to prosecute if a commission of inquiry were to recommend direct prosecutions:

*“Regarding those persons whose acts or omissions are, in our view, contrary to the law, and are criminal in nature, we have agonized over whether or not to recommend prosecution. We have, however, decided against such recommendation as there are many imponderables on what the Attorney General*

<sup>8</sup>Report of the Judicial Commission of Inquiry into the Goldenberg Affair, page 25, paragraph 43.

<sup>9</sup>Ibid, page 22 paragraph 36.

<sup>10</sup>The suit had been filed by a Mombasa farmer, Mr. Pradhan, seeking orders to compel the AG to release the report.

*considers before deciding to prefer criminal charges against any person or group of people. In view of that we will list names of those who in our view were in one way or another, responsible for those acts and omissions for the attention of the Hon. Attorney General for any possible criminal or civil action.”<sup>11</sup>*

The utility of commissions of inquiry in investigating wrongdoing of a criminal nature is further diminished by the fact that their findings are subject to judicial review by the High Court.

The current jurisprudence of the High Court has determined commissions of inquiry as inferior tribunals whose findings are susceptible to quashing orders in judicial review.<sup>12</sup>

## 7. Conclusion

Kenya's experience with commissions of inquiry reveals that there is an urgent need to clarify their place

and role. There is need to determine who should be appointed to serve in such commissions, their costs rationalised and their accountability to Parliament and the people of Kenya spelt out.

As enacted in 1962, the Commissions of Inquiry Act is today, certainly, a relic of Kenya's monarchical colonial past. The written Constitution of Kenya does not countenance exercise of prerogative powers whose philosophy informs the Commissions of Inquiry Act.

Kenya needs to ask itself what place it would like commissions of inquiry to occupy in its present constitutional set-up as a democratic republic. Commissions have proved to be legitimate and useful tools for solving problems of a technical nature as long as their recommendations are acted on.

<sup>11</sup>Report of the Judicial Commission of Inquiry into the Goldenberg Affair, page 300, paragraph 846.

<sup>12</sup>*Biwott vs The Akiwumi Commission of Inquiry and Saitoti vs The Bosire Commission on the Goldenberg Affair.*



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