

ALL THAT GLITTERS?

An Appraisal of the Goldenberg Report



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List of Abbreviations

CBK	Central Bank of Kenya
GIL	Goldenberg International Limited
ICSID	International Centre for Settlement of Investment Disputes
LSK	Law Society of Kenya
KACC	Kenya Anti-Corruption Commission
KANU	Kenya African National Union
KES	Kenya Shillings
KLR	Kenya Law Reports
OMO	Open Market Operation
PS	Permanent Secretary
PTA	Preferential Trade Area
USD	United States Dollar
WDFA	World Duty Free (Africa)

Foreword

“All that Glitters? An Appraisal of the Goldenberg Report” is part of AfriCOG’s contribution to the struggle against impunity and for accountability in Kenya.

In the current climate, as sections of government gear up a campaign to escape accountability for post-election violence, it is instructive that no one has ever been penalised for the mind-boggling series of massive fraud and theft of public funds described in the report of the Commission of Inquiry into the Goldenberg Scandal.

This report forms part of AfriCOG’s series reviewing the implementation status of the recommendations of various commissions of inquiry in Kenya. The series began with a general overview in *“Postponing the Truth: How Commissions of Inquiry are used to circumvent justice in Kenya”* and continued with a review of the recommendations of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the Ndung’u Commission), in our publication entitled *“Mission Impossible?”*

It is hoped that this report will contribute to ensuring continued informed debate on grand corruption in Kenya in general and on the so-called Goldenberg Affair, for which no-one has ever been held accountable. Through this report AfriCOG also hopes to help keep alive public vigilance and the demand for those behind this and other economic crimes to be brought to book.

One of the most noteworthy moments of the Goldenberg Commission’s proceedings was the testimony given by a brave Kenyan whistleblower, David Sadera Munyakei. Ironically, unlike the powerful officials who hid behind pleas of defencelessness against the overweening power of the corrupt Moi dictatorship, he was a humble clerk at the Central Bank at the time. He noticed irregularities in the processing of export compensation monies to a little-known company; Goldenberg International. After receiving warnings to keep quiet about the matter, he smuggled the incriminating documents to opposition MPs who tabled them in Parliament. David lost his job and was jailed for some time.

It was not until 2003 that the Kibaki government, in the first flush of its short-lived “zero tolerance of corruption” policy, made an ultimately unsuccessful attempt to address the scandal by establishing a commission of inquiry.

Unlike many of the criminals who perpetrated one of Kenya’s biggest crimes and continue to profit from their stolen wealth and enjoy public prominence to this day, David died in poverty on July 16, 2006 of tuberculosis.

This report is dedicated to keeping alive the memory of David Munyakei.

Gladwell Otieno

Executive Director

GOLDENBERG

ALL THAT GLITTERS?

AN APPRAISAL OF THE GOLDENBERG REPORT

Introduction

After public hearings characterised by high-drama that riveted the attention of the nation for a period of over 20 months, the Judicial Commission of Inquiry into the ‘Goldenberg Affair’ completed its work and presented its report to President Kibaki. It is telling that the report dated October 2005, was only received by President Kibaki on February 3, 2006.

The Report, running into some 847 paragraphs with appendices from A to Q, was a collation of oral evidence from some 102 witnesses whose verbatim record ran into a staggering 18,824 pages. The fundamental question that remains to be answered is whether the Report met the high expectations all around, which were well captured by the Commission’s chair in his opening address, “... the Government, the private sector and indeed, the public in general are anxious that the ‘Goldenberg Affair’ be unravelled and conclusively dealt with”¹

This anxiety stems from the image that the ‘Goldenberg Affair’ conjures up in the minds of the public. Commenting on this in his address at the opening of the Inquiry, Attorney General Amos Wako stated:

“One can think of no other matter which has engaged the time of all organs of Government; the Executive, the Legislature and the Judiciary, as much as the ‘Goldenberg Affair’. Nothing in the public perception has come to epitomise corruption as the ‘Goldenberg Affair’....The ‘Goldenberg Affair’ became, in the words of that British Dramatist and Novelist, Dodd Smith, ‘the dear octopus, whose tentacles we never quite escape’”²

In the sentiments of the Law Society of Kenya, the public expected that the Commission would do a good job in the discharge of its mandate, and solve the messy deceit and deception that was the ‘Goldenberg Affair’.

¹Appendix C of the Report

²Appendix D of the Report

Mandate of the Commission

The appointment of the Commission on February 24, 2003, was considered one of the first bold acts indicating the newly elected government's desire to put a decisive end to economic crimes, corruption and the culture of impunity. The Commission was mandated to:-

“Inquire into allegations of irregular payments of export compensation to Goldenberg International Limited, popularly known as the ‘Goldenberg Affair’, and into payments made by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims”³

Clearly, the understanding was a rather narrow one limited to:

- (a) The origin, acceptance and implementation of the export compensation, proposal and scheme;
- (b) Irregular payments of export compensation;
- (c) Payment of fictitious foreign exchange claims to Exchange Bank Limited by Central Bank of Kenya (CBK) amounting to USD210 million (KES13.5 billion);

The initial terms of reference for the Commission published by the President on February 24 2003⁴ were no more than an amplified version of the existing understanding of the Affair, namely:

- a) To inquire into the origins, acceptance and implementation of the proposal to award export compensation for the export of gold and diamond jewellery, by the Government under the Local Manufacturers (Export Compensation) Act (Chapter 482 of the Laws of Kenya). Subsequently, the Commission would inquire into allegations of irregular payments of export compensation under the Local Manufacturers (Export Compensation)

Act to Goldenberg International Limited, which were a percentage of the value of gold and diamond jewellery allegedly exported from Kenya by Goldenberg International Limited with a view to establishing whether any gold or diamond jewellery was exported from Kenya and, if so, how much and to whom; whether the exports was processed through Customs as required; whether the alleged foreign currency earnings were declared and remitted, among others.

- b) To inquire into the alleged payment of USD210 million (KES 13.5 billion) by the Central Bank of Kenya to the Exchange Bank Limited for fictitious foreign exchange claims in order to establish:
 - (i) whether the equivalent in Kenya Shillings was paid to Exchange Bank Limited and/or Goldenberg International Limited and, if so, how the money was utilised; and
 - (ii) whether any or all monies were paid to third parties and, if so, the identity of such parties and the amounts paid to them.
- c) To establish all persons involved in the alleged irregular claims and payments to Goldenberg International Limited and/or Exchange Bank Limited and the extent of their responsibility;
- d) To inquire into and investigate any other matter that is incidental to, or connected with the foregoing;
- e) To recommend-
 - (i) the prosecution or further criminal investigations against any person or persons who may have committed offences related to such claims or payments;

³Gazette Notice No. 1237 of 24.2.03

⁴Gazette Notice No. 1238

- (ii) ways, means and measures that must be taken to prevent, control or eradicate such schemes or frauds in the future;
- (iii) any reimbursement and/or compensation to the Government by any person and the extent of such reimbursement and/or compensation; and
- (iv) any other policy or action that may conclusively deal with the 'Goldenberg Affair'

Essentially, the task of the Commission was to provide the names of the main players in the 'Goldenberg Affair', as it was then understood, to establish the value of the alleged exports and foreign exchange involved and to identify any third party beneficiaries of the fraud.

Increased understanding of the 'Goldenberg Affair' necessitated a broadening of the terms of reference and an expanded version, published on July 29, 2003⁵, mandated the Commission to inquire into:

- (a) the origins of, acceptance and implementation by the CBK of the Rediscounting Facility for Pre-Export Bills of Exchange;
- (b) allegations that under the Central Bank of Kenya Rediscounting Facility for Pre-Export Bills of Exchange, various amounts were fraudulently paid out of the CBK through the Exchange Bank Limited, Kenya Commercial Bank Limited, National Bank Limited, Trade Bank Limited and any other commercial bank, to Goldenberg International Limited, Siro Voulla Rousalis and any other party, occasioning loss to the CBK;

- (c) allegations that the monies fraudulently paid to Goldenberg International Limited, Exchange Bank Limited and other companies as export compensation under paragraphs (b) and (c), and under the Rediscounting Facility for Pre-Export Bills of Exchange under paragraph (h), were allegedly used by those companies, their shareholders or directors to fraudulently earn profits by speculating in convertible foreign exchange bearer certificates;
- (d) allegations that the Exchange Bank Limited, Goldenberg International Limited, their shareholders and directors, used the monies paid to them under paragraphs (b), (c) and (h), jointly with Pan African Bank Limited, Delphis Bank Limited, Transnational Bank Limited and Post Credit Bank Limited to defraud the CBK through a fraudulent scheme of cheque kiting;
- (e) origins of, acceptance and implementation of the special issue of Treasury Bills by the CBK during the years 1992 and 1993, in relation to the monies obtained under paragraphs (b), (c) and (h) and establish the further loss, if any, occasioned to the CBK;
- (f) whether the monies illegally obtained from the CBK, the Customs Department and the Treasury were utilised, in part or at all, to fund the campaigns of any political parties, and if so, which parties and to what extent;
- (g) the effect the Goldenberg-related litigation had on the administration of justice in Kenya;
- (h) the identities of the shareholders, directors and beneficial owners of all companies, partnerships and other business entities involved in the transactions in question;
- (i) all assets, local and international, acquired directly or indirectly with moneys illegally obtained from the CBK, the Customs Department and Treasury through the transactions under inquiry;

Once the Commission began its hearings, however, it became immediately clear that the 'Goldenberg Affair' was far more extensive and complex than originally thought. The original terms of reference were excessively narrow and incapable of unravelling a matter of such grand scale.

⁵ Gazette Notice No. 5134

- (j) the identities of the parties involved in the destruction of documents and other materials in a scheme to cover up the colossal loss to the Government occasioned by the 'Goldenberg Affair' in order to avoid detection, investigation and prosecution or otherwise obstruct the course of justice;
 - (k) allegations that the disputed acquisition of the World Duty Free Company Limited, incorporated in the Isle of Man, by Kamlesh Pattni, was in pursuance of the cover-up of the irregularities in the 'Goldenberg Affair';
 - (l) the identities of all persons adversely affected or who suffered any loss or damage as a result of the illegal attempt to cover up the irregularities in the 'Goldenberg Affair';
 - (m) the overall detrimental effect on the Kenyan economy following the irregular payments and the extent of the damage, if any, that these transactions had on the economy, and may continue to have in future;
 - (n) any other matter that is incidental to or connected with the foregoing terms of reference;
 - (o) to recommend:
 - (i) the prosecution or further criminal investigations against any person(s) who may have committed offences related to such claims or payments;
 - (ii) ways, means and measures that must be taken to prevent, control or eradicate such schemes or frauds in the future;
 - (iii) any reimbursement and/or compensation to the Government by any person and the extent of such reimbursement or compensation; and
 - (iv) any other policy or action that may conclusively deal with the 'Goldenberg Affair'.
- (a) The emergence of a Rediscounting Facility for Pre-Export Bills of Exchange by the CBK, under which the Bank lost various sums of money through fraudulent payments to various banks and Goldenberg-related companies;
 - (b) The use of ill-gotten funds for the purchase of convertible foreign exchange certificates for fraudulent speculative purposes by Goldenberg International and its principals;
 - (c) The perpetration of a fraud on the CBK by Exchange Bank Limited, Goldenberg International with their principals and a coterie of commercial banks through a fraudulent cheque kiting scheme;
 - (d) The issuance of special Treasury Bills by the CBK in 1992 and 1993 specific to monies fraudulently obtained under the Goldenberg scheme;
 - (e) The utilisation of Goldenberg's ill-gotten monies for the funding of a political party;
 - (f) The baleful and far-reaching effect of the avalanche of litigation spawned by Goldenberg on the country's administration of justice;

The extended terms of reference thus required the Commission to delve deeper and wider to establish, among others,

- (i) The identities of the true owners of the business entities involved in the fraud.
- (ii) The local and international assets acquired using monies illegally obtained from the Government under the Goldenberg scheme.
- (iii) The identities of persons involved in the destruction of vital documents in an attempt to cover up the Goldenberg scandal.
- (iv) Whether the acquisition of World Duty Free assets by Kamlesh Pattni was part of a cover-up of the Goldenberg fraud.
- (v) The identities of all persons who were adversely affected by such cover-up attempts

The added terms of reference took cognisance of a number of facts and factors related to the 'Goldenberg Affair', including:

- (vi) The overall detrimental effect of the illegal Goldenberg payments on the Kenyan economy.

For instance, task number (m) requiring the Commission to “inquire into, establish and trace, locally and internationally, all assets acquired directly or indirectly with monies illegally obtained” is a complete assignment on its own. If the same were to be executed effectively, it would require extensive time, personnel, monetary and international travel resources sufficient to occupy the full attention and span of the Commission.

The same goes for task (k) which mandates the Commission to inquire into the effect of the Goldenberg-related litigation on the administration of justice. This would require an in-depth examination and study of the numerous cases involved in order to establish the progress and manner of handling of each case.

Additionally, it would call for the computation of judicial time spent, the examination of the effect on other cases, an analysis of the jurisprudence emanating from the said cases and how this compares to previous general jurisprudence and a study on the effect of the cases on the mobility of the staff at the Judiciary. This would need a full inquiry on its own.

The broad sweep of the terms of reference had a direct impact on the Commission’s ability to deliver and partly explains the glaring gaps that emerge on a full examination of its outputs. This also explains why the recommendations of the terms of reference appear unclear and incomplete. By casting the net as wide as it did, and expanding the territory the Inquiry had to cover, the terms of reference compromised the depth and thoroughness of the final product given the time, personnel and resource constraints. Even with the best efforts of the Bosire Commission, or any other commission for that matter, a neat, exhaustive and complete coverage of the subject as required would be a tall order.

This would also explain the errors and inconsistencies in the Report. Indeed, this was demonstrated when the High Court, in exercise of its constitutional and judicial review jurisdiction, sided with an Applicant, one of the persons adversely named in the Final Report. Although the Court was of the view that the Report contained “a litany of 28 errors”⁶, which it attributed to malice on the part of the Commission, there really was no sufficient cause or evidence to warrant such a conclusion.

On the face of it, the initial terms of reference were scanty and covered only a small facet of what the ‘Goldenberg Affair’ entailed. On the other hand, the expanded version, while permitting a more exhaustive and complete picture of Goldenberg, was unachievable due to the sheer enormity of what it required of the Commission.

⁶*Republic vs Judicial Commission of Inquiry into the ‘Goldenberg Affair’ and Two Others ex parte George Saitoti* [2006] e KLR. (H.C. Misc. Civ. Appl. 102 of 2006)

Performance of the Commission's Mandate

Even before addressing the specific terms of reference, a major flaw of the Goldenberg Report is that it is not reader or user-friendly. There is no progression from one term of reference to the next. There is no chapter or section dedicated to the findings or conclusions, from which the Commission formed its recommendations. Instead, it is a lengthy report of nearly 850 substantive paragraphs, which sets out the process, evidence and findings of the Inquiry in narrative form. It is difficult and time-consuming to search for findings on specific issues or terms and, assuming that the appointing authority and the responsible Departments of Government and institutions have the desire and willingness to adopt and act upon the report, it would be difficult to do so bearing in mind its structural flaws.

(i) Origins, Acceptance and Implementation of Export Compensation for Export Of Gold and Diamond Jewellery

The goal of this task was to unravel the genesis of the Goldenberg Scandal. The required evidence included correspondence, application forms and policy pronouncements by principal officers at the Treasury (Ministry of Finance) including the Minister, Assistant Ministers and the Permanent Secretary. Together with the oral testimonies of the key protagonists, these documents would constitute the best evidence.

The Commission responded to this particular aspect of the Inquiry by making a categorical finding that James Kanyotu and Kamlesh Mansukhlal Pattni registered Goldenberg International Ltd (GIL) on July 11 1990. The business was to:

(a) *Import and export any or all types of minerals, gold, silver, diamonds, precious and semi-precious stones ... In Kenya to all PTA countries, Europe, India and other parts of the world;*

(b) *Prospect, explore, open and work claims and raise, dig and quad for gold, silver, minerals ores ... diamonds, precious and semi precious stones - In Kenya and in other parts of East Africa”;*⁷

Just two months after its incorporation, GIL applied to the Minister for Finance for sole rights to export diamond jewellery and gold for a period of five years, with the option of a five-year extension thereafter, and for 35 percent export compensation for such exports. This would enable the company to compete effectively with smugglers of those commodities.

The Commission found that the Minister's handling of the application was opportunistic and calculated. There seems to be a contradiction in the findings, however, in that the Commission says the Minister granted exclusive rights to GIL in one paragraph⁸ and in the next paragraph states that he declined to grant it such monopoly.⁹ The bottom line, however, is that “the Ministry of Finance approved *de facto* monopoly through administrative and licensing measures”.

Further, the Commission found the speedy grant of the application by Goldenberg to have been rather curious, bearing in mind that there had been other applications made prior, which were still pending. In November 1987, Collins Owayo, then Commissioner of Mines and Geology, made a case for monopoly and an enhanced rate of export compensation for Aurum Ltd, which was already a significant player in the industry, but the application was still awaiting a decision by the Ministry of Finance.¹⁰ The Commission found that the application by Goldenberg, which came much later, was rushed through, approved,

⁷Para. 47

⁸Para. 93

⁹Para. 94

¹⁰Para. 85

and the company received assistance in starting its operations with no justification. Similarly, there was no justification for the delay in acting on Aurum Ltd's application.¹¹

Despite these inconsistencies, the discharge of this term of reference was satisfactory.

(ii) Irregular Payments of Export Compensation to Goldenberg International

This particular term of reference sought to inquire into the propriety and legality of the export compensation claimed and paid as well as the procedures followed (or flouted) in such payments. It had six areas to investigate, which required the examination of records and other documents, oral testimony as well as an analysis of the Local Manufacturers (Export Compensation) Act.¹²

• Export of gold and diamond jewellery from Kenya

The Commission made the startling finding that the alleged gold or diamond jewellery exports were non-existent.

Not only does Kenya NOT produce any diamonds at all¹³, but also, GIL's Chairman made "a clear admission that what was presented as exports were not genuine exports ... We have no evidence that any gold or diamond jewellery was ever received by any other party as purchaser."¹⁴ In fact, the alleged destinations of the exports were mere pseudonyms of Pattni and his companies, as he admitted in his testimony.

Therefore, the questions of "whether the exported gold and diamond jewellery was processed through Customs as required", "whether there was a declaration and remittance of the alleged foreign currency earnings" and "whether the alleged foreign currency earnings were remitted to the Central Bank" were irrelevant. There were no exports, and no earnings made. The Commission found that all the documents showing exports were false.

The figures allegedly earned as foreign exchange from the ghost exports were no more than a fraudulent

ploy to earn export compensation out of nothing. Goldenberg funds would be remitted by several banks, including its sister company, Exchange Bank, to offshore accounts, which would then be transmitted to Kenya as supposed proceeds from exports. Melvin Smith, a witness, stated, "These export proceeds [for] which export compensation was claimed ... was definitely for money that had been exported and then imported."¹⁵ His testimony was confirmed by a report to the Commission by PriceWaterhouse Coopers.

• Foreign Exchange Laws

The Commission found that the existing laws on foreign exchange were flagrantly flouted. Thus, the alleged exporter (GIL) remitted the alleged export proceeds, in cash and in several currencies, in contravention of the Exchange Control Notice No. 13. The Notice requires that remittances of export proceeds must be made by the importer's bank. GIL made some remittances even before any purported exportations had been done.

Because of the ensuing false export compensation claims, about over KES1.1B (KES1,179,612,151), being 20 percent of the alleged exports, was paid to Goldenberg. In addition, the company obtained an extra KES254 Million (KES 254,600,650), being 15 percent over and above the allowed statutory rate for the same exports. Total compensation was therefore over KES1.4B (KES1,433,212,501), about 35 percent of the fictitious exports.

• False Export Compensation Claims

Apart from the compensation being for non-existent exports, the Commission established that Hon. Saitoti, the then Vice President and Minister for Finance, granted the enhanced rate of compensation at 35 percent while

¹¹Para. 93

¹²Cap. 485 of Laws of Kenya

¹³Para. 131

¹⁴Para. 144

¹⁵See Hansard Report p. 4107

fully aware that the maximum allowed under law was 20 percent. There was no legal or economic basis for the enhanced rate of export compensation.

The Commission also found that “[these] extra 15 percent payments were later placed before Parliament in the Supplementary Estimates of 1991/1992, disguised as Customs Refunds, and were approved”¹⁶. Such approval was immaterial and the payments remained irregular, since no customs duty had been paid to form a basis for any refunds.

Even though this item in the terms of reference includes the payment of KES5.8 billion as part of ‘export compensation’, the Commission found the payment to be extraordinary. It was a payment from the Treasury direct from the Consolidated Fund that the recipient, GIL, was hard-pressed to explain. Dr. Karuga Koinange, the then Permanent Secretary at Treasury, had made the payment without complying with the Constitution, rendering it both illegal and unconstitutional. Indeed, in his lengthy testimony before the Commission, Dr. Koinange finally acknowledged the illegality of his action.¹⁷

The main term of reference on export compensation was fully explored and satisfactorily addressed by the Commission and its findings and conclusions are supported by evidence presented before it.

(iii) Alleged Payment of USD210 million (KES13.5 billion) by Central Bank of Kenya to Exchange Bank Ltd in Fictitious Foreign Exchange Claims and its Utilisation

This task called for an examination of two specific contracts involving a total of USD210 million (KES13.5billion) between the CBK and American Express Bank Ltd, London, in one contract and Banque Indosuez Sogem Aval Ltd, London, in the other. Under the contracts, some previous undelivered foreign exchange contracts were to be replaced with the effect that the two banks would deceptively show that the CBK had about USD 210 million in its reserves. After the necessary accounts were opened, Exchange Bank Ltd and CBK entered into contracts for the sale of that amount in dollars through

the two foreign Banks. In reality, Exchange Bank had placed no money whatsoever in those banks, yet the CBK had paid KES13.5billion. The Commission found that the contracts were clearly fraudulent.¹⁸ By the time the fraud was discovered and the new Governor of the Central Bank ordered the reversal of the necessary accounting entries, the CBK had lost over KES3.6 billion due to the reduced rate by interest¹⁹.

The Commission was emphatic that the persons involved in the fraudulent contracts were Mr. M. Wanjihia and Mr. J. Kilach of the Central Bank of Kenya, working in collusion with two foreigners.

This term of reference was fully exhausted.

iv) Origins, Acceptance and Implementation of CBK Re-Discounting Facility for Pre-Export Bills of Exchange and Related Payments to Various Entities

These terms of reference would require oral evidence from those charged with the implementation of the facility as well as examination of bank and other records and statements tracing the movement of funds from the CBK.

The Commission examined this aspect of the ‘Goldenberg Affair’ in Chapter III of its report. It was essentially a facility for credit initiated by the World Bank, in conjunction with the Government of Kenya, to assist exporters of non-traditional exports in preparing their exports. An exporter with a firm export contract or order in place would enjoy a low interest rate of about 16.44 percent.²⁰

From the onset, GIL was the largest beneficiary of the facility and drew down payments through several banks. The

¹⁶Para. 191

¹⁷Para. 400

¹⁸Para. 372

¹⁹para 381

²⁰Para. 209

scheme was, however, open to abuse since it was possible for false export orders to be made by fraudsters thereby obtaining huge amounts of credit. An initial objection by Eric Kotut of the CBK to the manner of implementation that left too much discretion to commercial banks was overruled.²¹ Certain groups of persons took advantage of the loopholes within Trade Bank Limited such that by the time of its insolvency, Alnoor Kassam, the Spiro Voula Rousalis Group and various other companies owed over KES3 billion on account of pre-export finance. This was a loss to the CBK²².

Other banks used to abuse this facility were Post Bank Credit Ltd, Delphis Bank and Trust Bank. However, in the case of Trust Bank, the liquidator was unable to trace the documents relating to pre-export financing for Goldenberg.

The lion's share of these dubious transactions was conducted through Exchange Bank Ltd to the benefit of Goldenberg International Ltd. The Commission found that by the time the pre-export facility was halted on March 9 1993, Exchange Bank Ltd had drawn over KES 7,716,639,809/45 on behalf of Goldenberg International and associated companies and by April 2 1993, the outstanding sum was KES 4,445,853,052/90.²³

The Commission found that a further sum of over KES8.3B (KES 8,360,121,657) had been irregularly advanced to GIL through various commercial banks. These funds were advanced based on repeated applications for credit to different banks, giving the same documentation in support. The Commission concluded that there could have been no genuine financing of exports through this fraudulent system.

The Commission exhausted its mandate under these twin terms of reference.

(v) Cheque Kiting

Principal players in the 'Goldenberg Affair' had exploited the pre-export finance system in order to make huge sums of money. Following its discontinuation, these players faced a cash crunch, with large sums to be repaid,

without the benefit of further funds under the halted scheme. The task of the Commission was to find out whether there was a deliberate move to defraud the CBK through a system of cheque kiting perpetrated by GIL and a number of banks.

The Commission found that this system involved a manipulation of credit balances. When a bank credits a customer's account with a bill of exchange, there is an immediate credit balance in that account even though the instrument clears later. In the meantime, the customer is free to use that credit balance for his own purposes, even if the bill is later dishonoured or, as was often the case with Goldenberg, replaced with yet another bill.

The Commission examined bank records and statements, heard testimonies from the witnesses who were involved in the scheme and perused analytical reports from experts. Its objective was to unravel the subtle form of fraud and deceit that involved the non-existent credit sums in the accounts of select banks, which were then 'advanced' to other commercial banks in 'overnight' lending thereby producing 'an enormous volume of interest against non-existent money'. Such interest at the time could exceed 70 percent²⁴.

Specifically, the Commission found that the banks involved in the cheque kiting, which occurred between March 18 and April 20, 1993 and between April 20 and May 14, 1993, were Pan African Bank Ltd, Delphis Bank Ltd, Transnational Bank Ltd, Trust Bank Ltd and Exchange Bank Ltd. The accounts involved were always those of GIL and its associated companies. This well-calculated scheme of cheque kiting was put in place simultaneously as Mr. Pattni took control of Pan African Bank on March 17, 1993, with his employee, Nadir Akrami, as its Managing Director. This bank was to become a major player at the very centre of the cheque-kiting scheme.²⁵

²¹Para. 210

²²Para. 218

²³Para. 239

²⁴Para. 299

²⁵Para. 297

In a report to the Commission by PriceWaterhouseCoopers dated July 16, 1993, the estimated interest lost or foregone by CBK by through the cheque-kiting scheme was KES588million.²⁶ ‘When the cheque kiting came to an end, and when the object set out was achieved, both Pan African Bank and Post Bank Credit Ltd were allowed to go into liquidation’²⁷ in yet another demonstration of the institutional corruption, compromise and collapse associated with the ‘Goldenberg Affair’.

The Commission effectively and adequately covered this term of reference.

(vi) Special Issue Treasury Bills

According to the relevant term of reference, another facet of the ‘Goldenberg Affair’ revolved around shady and preferential dealings in Treasury Bills issued in 1992 and 1993. The Commission was required to examine records from various commercial banks and the CBK as well as correspondence exchanged and instructions given by various persons. Additionally, it heard oral testimonies from the various officers at these institutions who dealt with Treasury Bills as well as higher-ranking officers responsible for policy decisions.

Treasury Bills are short-term government debt paper, with maturity dates not exceeding one year, sold by the Central Bank of Kenya on behalf of the Government. They may be ordinary for purposes of raising short-term money to meet a budgetary deficit or Open Market Operation (OMO) bills for monetary policy operations.²⁸ The latter are bought through the Registrar of National Debt and by selling or buying them back, the Central Bank is able to control liquidity in the economy.

Ordinarily, OMO bills are sold at an auction and cannot be rediscounted. The Central Bank, therefore, is required to hold them until maturity. The Commission had the opportunity to examine certain OMO bills that were issued from April 1993, not by advertisement, as was the usual practice, but by discreet sale to a select group of commercial banks, consisting mainly of Exchange Bank Ltd, Delphis Bank and Pan Africa Bank. These bills, valued

at KES4.248billion, were redeemed at full value before their respective maturity dates. What was unusual was that no penalties were imposed and as a result, the CBK lost an estimated KES 216million to GIL.

The Commission found that the special issue Treasury Bill was initiated and then later rolled over several times to meet the illegal payment of KES 5.8 billion to Goldenberg from the Postmaster-General’s account. This was part of a mopping up operation. Interest rates would sometimes be as high as 82 percent to encourage purchase of the Bills and reduce excess liquidity in the market. This clearly meant huge losses to the CBK but, upon hearing evidence, including that of Dr. Karuga Koinange, the Commission rightly concluded that there was an anticipated loss in special issues operations or at least an engineered loss to conceal the debt of KES 5.8 billion in the Postmaster-General’s account.²⁹

The motive, rationale and extent of the plot were analysed and key players involved in the scheme identified by the Commission as Dr. Koinange, the Governor of the Central Bank, and such other ‘economic managers’. The Commission thought it “only fair that they bear full responsibility for the illegal payment”.³⁰

Indeed, the Commission successfully tackled this term of reference.

(vii) Funding of Political Parties

This term of reference required the Commission to determine whether the monies illegally obtained by means of the various schemes and strategies were used to fund political parties. This task generally flowed from the inevitable realisation that the architects of the ‘Goldenberg Affair’ must have been the beneficiaries of tremendous political patronage and largesse. This was

²⁶Para. 309

²⁷Para. 310

²⁸Para. 408

²⁹Para. 424

³⁰Para. 425

the only explanation for the manner in which they could operate, as they did, beyond the arm of the law and in disregard of various institutions of government.

The Commission was tasked with tracing the trail of the enormous amounts of ill-acquired wealth to the political benefactors. This was largely due to the fact that after bowing to pressure and allowing the re-introduction of multi-party democracy, the then ruling party, KANU, and its long-serving chairman and then President, were faced with the fiercest challenge in the 1992 General Elections. Thus, there was urgent need to ensure their re-election and perpetuation of power. To this end, an abundant supply of money was a necessity.

However, unlike the previous aspects of the investigation, it would have been highly unlikely that any political party would attach its party symbols and logo to any of the less-than-transparent dealings of Goldenberg. They would be unlikely to sign any acknowledgments or leave any incriminating paper trail. That being so, if any of the evidence tabled was to be acted upon, it had to come from admissions by the recipients or the testimony of donors of the funds. Since no recipient would have any incentive whatsoever for owning up to it, the only evidence left, other than inferences drawn from the circumstances surrounding the various schemes and the 1992 General Elections, was that of the chairman of Goldenberg International Ltd, Kamlesh Pattni.

He testified that he was close to the KANU top brass and that it was agreed with the former President Mr. Daniel Moi that he (Pattni) would fund the KANU electoral machine of 1992.³¹ He claimed that the former President's Personal Assistant, Joshua Kulei, would issue chits in favour of various people who would simply present them to Mr. Pattni and walk away with cash or cars. He estimated his election-related expenditure to be over KES4 billion.

Whereas Mr. Pattni mentioned two persons, namely his brother and his assistant, who, apart from himself, allegedly recorded these payments, the two did not testify nor could they be traced. The Kulei chits were not produced before the Commission.

In the end, the Commission dismissed the 'Pattni List' as 'startling and spectacular but useless evidence.'³² Having had the benefit of seeing and listening to Mr. Pattni in the witness box and observing his demeanour, the Commission gave a scathing assessment of him and his testimony:

As for Mr. Pattni's evidence in support of the exhibit, we again repeat that Mr. Pattni was given to melodrama, gross exaggeration and at times outright perjury. Furthermore, the evidence was selective and tailored to 'fixing' those with whom he had a bone to pick.³³

At the end of the Inquiry, the Commission was unable to ascertain the amount, nature and extent of financial support to KANU.

This aspect of inquiry was problematic and an ambiguous verdict is the best the Commission could come with.

(vii) Effects of Goldenberg Litigation on the Administration of Justice in Kenya

The effects of the 'Goldenberg Affair' on the administration of justice in Kenya have been quite widespread and difficult to analyse or describe. The Justice sector encompasses several institutions, including the State Law Office, the Police, the Judiciary, the Practising Bar and the Prisons Service. The fact that the Commission focused on the first three with no mention of the others goes to show the complexity of the task and renders inevitable the perception that this particular task was not, and perhaps could not be tackled exhaustively within the stated framework.

Bearing in mind the limitation in time, the Commission could only conduct a general examination of relevant court records. A full analysis of the effect of the scandal

³¹Para. 479

³²Para. 484

³³Para. 485


would have entailed interviewing various players including judges, magistrates, clerical staff, prison wardens, inmates, and the police in circumstances that assure confidentiality and by the use of other information-gathering tools such as questionnaires, surveys and observation, rather than the adversarial question-and-answer courtroom style of the Commission.

- **Selective investigations and complacency in prosecuting culprits**

Despite the limitations, the Commission's observations in this area were nonetheless relevant. It was noted that the police appeared helpless in matters touching on Mr. Pattni in the face of the VIP treatment he was receiving, which had made it impossible for him to be arrested and prosecuted for all of his illegal and irregular actions.³⁴ The Commission fingered political interference and fear of victimisation as the reason for this emasculation of the police and the resultant ring of impunity that Mr. Pattni and Goldenberg International enjoyed.

The Commission also found that "the records were always available in the various government offices for all to see. But, interestingly, we did not receive any evidence to show that the Attorney General moved to order police investigations into the affair."³⁵ The investigations conducted by the Police were not upon direction of the Attorney General - who had a constitutional mandate to do so - but upon direction of Mr. Cheserem, the Governor of the CBK. Even then, "the investigations and consequent prosecutions were selective"³⁶.

When the Law Society of Kenya (LSK) took the initiative to mount a private prosecution, the Attorney General later applied to be enjoined as *amicus curiae* (friend of the Court) and promptly objected to the prosecution referring to the LSK as a busy body without *locus standi* to prosecute Goldenberg. The complicity of the Judiciary was better demonstrated by Hon. Mrs. Uniter Kidulla, who, in upholding the Attorney General's objection, remarked:-

 *The only knowledge the Law Society of Kenya seems to be acquiring is that relating to stealing from clients and telling them to pay exorbitant fees on*

*the pretext that so much is needed for the trial magistrate or judge.*³⁷

The roots of Goldenberg had grown so deep that Hon. Mrs. Kidulla, who was so evidently opposed to the Goldenberg prosecution, was thereafter appointed Director of Public Prosecutions. This came subsequent to the elevation of the former holder of that office, who had raised the objection to the LSK prosecution, to the post of Chief Justice of Kenya.³⁸ With just one stroke, these individuals were placed in positions requiring them to exercise their discretion in the very matter. It was a classic case of wolves herding the sheep.

- **Interference with ongoing prosecutions**

Aside from the lack of commitment on the part of these state functionaries to pursue prosecution in the 'Goldenberg Affair', the immediate consequence of these actions was that whatever Goldenberg prosecutions that had commenced ground to an immediate halt, thus necessitating their fresh commencement. The Commission found that the Attorney General's office had 'proceeded with the cases in a most haphazard and lethargic fashion'³⁹. In addition, the Attorney General had, for reasons known only to himself, elected to bring a multiplicity of cases against the same accused persons, which cases were withdrawn, consolidated and/or otherwise terminated only to be instituted afresh thereby 'creating needless delays through the chaotic situation caused by these many cases'⁴⁰, resulting in a 'pointless merry go round'⁴¹.

³⁴Para. 754

³⁵Para. 761

³⁶Para. 765

³⁷See Speech by Ahmed Nassir Abdullahi, Chairman, Law Society of Kenya at Appendix E

³⁸Para. 781

³⁹Para.773

⁴⁰Para.777

⁴¹Para.778

The muddle created by the Attorney General’s office is highly suggestive of deliberate mischief aimed at sabotaging or scuttling any serious prosecution. The immediate consequence of the delays and multiplicity of suits was the increase in judicial review proceedings at the High Court, in which Mr. Pattni and his co-accused persons complained that the prosecutions were prejudicial to them and infringed on their constitutional rights.⁴²

All these left the Commission grappling with the question of whether the mess at the State Law Office was the product of design or coincidence; whether it was the manifestation of sheer negligence and inattention or part of an orchestrated cover-up intended to aid and abet the culprits of the ‘Goldberger Affair’ or to subvert the cause of justice. The Commission also considered engaging in selective prosecutions and in literally coaching one of the potential witnesses, Mrs. Mwatela of the Central Bank on what to record and omit from her statement. The Director of Public Prosecutions, Mr. Bernard Chunga, was guilty of professional misconduct and abuse of office.⁴³

In its recommendations, the Commission underscored the need to further investigate both the Office of the Attorney General and of Mr. Chunga himself, to determine the exact role and intent of the officers concerned and unravel the Goldberger mystery.

The question that arose immediately was: *who would initiate the investigations and to whom would the result of such investigations be forwarded to for action? Would it be the same Attorney General, whose acts and omissions clearly contributed in large measure to the legal and procedural predicament that Goldberger had become?*

The muddle created by the Attorney General’s office is highly suggestive of deliberate mischief aimed at sabotaging or scuttling any serious prosecution.

• Abuse of the Court Process

Within the Judiciary, the Commission found that apart from the criminal cases in which the role of the Attorney General had been considered, approximately 42 other Goldberger-related cases were filed at the High Court in Nairobi, out of which eight were tax-related. The Commission’s findings were that Mr. Pattni and his associated companies used the court process to stop attempts to recover tax from him.⁴⁴ He found in the Judiciary a ready shield that granted him injunctive relief, after which he failed and/or neglected to prosecute the substantive suits to completion. His *modus operandi* was that “as soon as injunctions were obtained, the suit would pend indefinitely.”⁴⁵ In some cases, the losing party would go to the Court of Appeal and there, too, there would be an array of applications with the effect that none of the Goldberger cases was ever completed. The Commission found that:

*The ‘Goldberger Affair’ serves to illuminate in real terms the institutional, structural and procedural weaknesses prevailing in our court system and how a party can effectively exploit them to defeat the very purpose of the system of administration of justice.*⁴⁶

Curiously, the Commission did not point out what these weaknesses were and how they could be dealt with. Further, the Commission’s report is silent on the question of how Mr. Pattni and his cronies managed to subvert the cause of justice and to literally capture and control the courts. The questions that need answering include;

- Who were the players within the corridors of justice that aided and abetted Mr. Pattni in his underhand operations? Why is it that the courts could not dispense with the needless rounds of applications,

⁴²Para. 779

⁴³Para.284

⁴⁴Para. 789

⁴⁵Para. 791

⁴⁶Para. 793

adjournments and objections, and deal with the substantial issues before them?

- What price was paid by those who benefited from these manoeuvres within the courts?
- Was there bribery involved in the temporary injunctions that seemed to favour Mr. Pattni?
- Was the transfer of various judicial officers in the course of hearing Goldenberg-related cases merely coincidence or part of a more sinister plot to sink the 'Goldenberg Affair' deeper into a web of mystery and incomprehension?

The Report did not investigate the effect of Goldenberg-related cases on the administration of justice. It appears the Commission merely skimmed the surface and raised a few pertinent questions but left the greater, darker part of the saga unexplored.

(x) Identities of Shareholders Directors and Beneficial Owners of all Entities Involved in the Transaction

This term of reference was intended to establish the real owners and beneficiaries of the 'Goldenberg Affair' in its various permutations. It is based on the concept of a legal or juristic person, which, since the celebrated case of *Salomon vs. Salomon*⁴⁷ decrees the separate and distinct legal existence of a company. This principle that a company is distinct from the directors who run it and the shareholders who own it, is often abused to conceal fraud and all manner of mischief. Essentially, the Commission was required to look beyond the veil of incorporation and unmask the individuals involved.

The Commission was expected to proceed on the basis that corporate personality is really legal fiction, the company being considered as a person under the law yet having no physical existence. A company exists, deals, and acts through its human controllers who are the mind and soul of the company, its alter ego. As such, a company may be guilty of criminal offences if its controllers commit them. Whereas there are few references to the directors and shareholders in a number of the companies mentioned

in the Report as having been involved in the 'Goldenberg Affair', one does not get the sense that the Commission made any serious, focused and/or deliberate attempt to discharge the burden of this particular mandate.

It is instructive that the other shareholder and Director of Goldenberg International Ltd and Exchange Bank Limited was Mr. Kanyotu, the then Director of Intelligence. Did he hold that position in those most favoured of companies for himself or at the behest of some higher, hidden hand to which he was beholden? The Commission did not pursue this line of question.

Not even when it emerged that Uhuru Highway Development Ltd, which is related to the iconic Grand Regency Hotel at the centre of Goldenberg and its proceeds, had among its shareholders H. E. Daniel Arap Moi,⁴⁸ as at February 12 1985, did the Commission consider it prudent or expedient to vigorously pursue this line of inquiry. Perhaps that was the reason it did not.

To sum it up, this term of reference was not properly or fully investigated and the true movers of the entities in the Goldenberg matrix remain faceless and shrouded in mystery.

Apart from the time constraints and the unavailability of information regarding beneficial owners, who may hold shares through proxies or nominees, it is certain that the Commission just did not pursue this line of inquiry diligently or confidently. There was some anecdotal evidence that very powerful individuals were somehow connected with the companies, partnerships and other entities entangled in the intricate web of Goldenberg.

⁴⁷[1897] A.C. 22

⁴⁸Para. 434

(x) Tracing, Locally and Internationally, the Assets acquired With Money Illegally Obtained

This term of reference proceeded from the position that the large sums of money spirited from the CBK, the Customs Department and Treasury must have been invested in some form either in Kenya or abroad. It also appreciated that such investment may not have been direct or single-stop but rather indirect. This required the Commission to conduct a forensic audit pursuing a paper trail in the convoluted maze of money laundering.

On the face of it, this would have entailed in-depth investigation covering the asset records of various companies, examination of books of account and bank accounts as well as co-operation and follow up with law enforcement agencies and foreign banks. Indeed, travel would be a necessity. It was a Herculean task requiring a near blank cheque in terms of time, personnel and financial resources. It is doubtful that the Commission had that kind of largesse and expertise at its disposal and this task was too broad and complex to be undertaken within the framework of the Inquiry as constituted.

In short, although the Commission was not able to execute and deliver on this particular task, this cannot be said to be due to inattention or lack of diligence on the part of the Commission.

(xi) Identities of Document Destroyers in a Cover-up Attempt

This was a curious term of reference. Whereas other terms are specific as to what they sought, this one does not refer to the nature of the documents and materials in question nor where they may have been destroyed.

Indeed, it appears that no evidence was led and no finding made by the Commission on the alleged destruction of documents or materials. On the contrary, it is clear from the mountain of documentary evidence before the Commission that the largely unsubstantiated claim of destruction of documents is not and cannot be the real barrier to the taking of decisive action against the perpetrators of the Goldenberg fraud.

(xii) Whether the Acquisition of World Duty Free Company Ltd was Part of a Cover-up

This particular line of inquiry would logically be encompassed in the more general one on establishing and tracing the assets acquired with monies illegally obtained from the Goldenberg transactions. It is, therefore, unnecessary to repeat the concerns, constraints and limitations of the inquiry already mentioned.

Regarding the World Duty Free Limited, Mr. Pattni stated before the Commission that he purchased the asset from Mr. Nassir Ali. The company became the subject of protracted litigation and the Commission opted not to comment on the disputes due to the *sub judice*⁴⁹ rule.⁵⁰ Nevertheless, the Commission observed that if Mr. Pattni did purchase the World Duty Free Ltd as well as other assets from Ketan Somaia, “he can only have done so with the proceeds of the Goldenberg fraud”⁵¹.

Based on that observation, the Commission remarked,

*Whatever the result of the litigation between Mr. Somaia and Mr. Pattni and Mr. Ali, it will be necessary for the Government to address itself to the matter in future. This is particularly so because this is a matter which can only be properly addressed after the pending litigation is over and we shall therefore say no more about the same.*⁵²

It is of interest that the World Duty Free Limited filed a claim against the Government of Kenya before the International Centre for Settlement of Investment Disputes (ICSID)⁵³ claiming damages and restitution for Kenya’s alleged expropriation of its property and violation of an investment agreement. Mr. Ali, its agent, claimed that he was solicited to give a USD2 million

⁴⁹In law, sub judice (under judgment) means that a particular case or matter is currently under trial or consideration by the Court.

⁵⁰Para. 492

⁵¹Para. 494

⁵²Para. 497

⁵³*World Duty Free Company Limited vs The Republic of Kenya* Case No. ARB/00/07, ICSID.7 in *I.T.A. Monthly Report* Dec. 2006, Volume IV, Issue XVIII

(approximately KES150 million at current forex rates) 'personal donation' to President Moi believing it to be legal under the 'Harambee' system and that the amount was covertly received by the latter.

Dismissing the claim, the Tribunal concluded that the USD2 million payment was a bribe calculated to procure the investment agreement. Since a contract based on bribes is unenforceable as a matter of *ordre public international*,⁵⁴ Kenya, therefore, could be legally entitled to avoid the contract.

In doing so, the Tribunal acknowledged the unfairness of the resulting outcome since the bribe was solicited by Kenya's highest official, who had never been prosecuted for the illegal action. This decision absolved the country from having to pay millions of dollars for a Goldenberg-related transaction. Nevertheless, its reputation internationally stands further blighted by the fact that its highest official demands and receives bribes and nothing is done about it. This has given rise to the perception that Kenya is a country where bribery is daily fare yet considerations of public policy apply to its people as to the rest of the world.

In light of this specific finding of illegal conduct by President Moi by a far-away Tribunal, it is curious that the Commission was unable to find him culpable in the matter of Goldenberg. Indeed, this serves to fuel public perception that the Commission itself fell victim to powerful forces and ended up 'sanitising' certain persons by seeming to absolve them of any wrongdoing.

This finds curious expression in the words of Dr. Gibson Kamau Kuria, one of the additional Assisting Counsel, who stated on the occasion of the Robert F. Kennedy Memorial Human Rights Award that he and Dr. Khaminwa,

*Were appointed Assisting Counsel on March 28, 2003 after President Kibaki concluded that there was a likelihood of the Moi-appointed judges manipulating the Commission to defeat its legal objective and consequently Counsels (sic) who would assert the independence of Counsel were needed.*⁵⁵

Whether what he said was true or not, and whether that independence was achieved or not, will long engage pundits and scholars.

(xiii) Identities of All Persons Adversely Affected

This term of reference must have been prompted by a need for completeness under the cause-and-effect rule, which presupposes that the perverse effects of the 'Goldenberg Affair' must have had adverse effects on some people. This would have necessitated having to invite persons claiming to have suffered harm to prove it, though the usefulness of such an approach is doubtful since the Commission was itself in no position to award any reliefs, remedies or compensation of any sort to such persons.

Of those that claimed to have been adversely affected by the Goldenberg transactions, the Commission almost invariably found their claims to be either personal in nature or otherwise outside the scope and mandate of the Commission.

⁵⁴International public order

⁵⁵Para. 38

Consequently, they were advised to institute legal proceedings in the proper fora for appropriate remedies. Indeed, even for Mr. David Munyakei, the acclaimed Goldenberg whistle blower, the Commission found that in the absence of any legislation protecting the employment of whistle blowers, his dismissal from the CBK was technically legal.⁵⁶

Nothing much became of this term of reference. It seems to belong more within the framework and set up of a Truth and Reconciliation Commission as opposed to a Judicial Commission of Inquiry.

(xii) Overall Detrimental Effect on the Kenyan Economy

That the ‘Goldenberg Affair’ was a massive rip off and a heinous economic crime perpetrated by a few greedy characters against the people of Kenya, has long been in the public domain. What was never fully known or understood was the full extent of the damage done. This term of reference sought to address that. Its breadth was, however, way beyond the capacity of the Commission especially with regard to its mandate to address the effect that the Goldenberg transaction ‘may continue to have in future’.

In order to effectively tackle this issue, the Commission needed the input of an expert in Economics. Prof Terrence C.I. Ryan, an Economic Consultant associated with the Government since 1962, was one such expert. His clarity of thought and felicity in expression saw him simplify the economic data in a span of fifteen days.

The Commission found that ‘the negative economic impact of the ‘Goldenberg Affair’ on the country was so massive that its effects continue to be felt to date.’⁵⁷

Ex-gratia payments caused ‘further unanticipated pressure on fiscal structures’.⁵⁸ There was increased money supply leading to increased inflation and the devaluation of the shilling, which was frowned upon in serious financial transactions to the extent that contracts for leasing upmarket houses involving foreigners were negotiated in dollars. Interest rates rose to a stunning 80 percent per annum.⁵⁹

Public funds were diverted to debt servicing and virtually all public-related activities stagnated. Jobs were lost due to sackings and redundancies and many of the banks caught up in the ‘Goldenberg Affair’ collapsed occasioning huge losses to the public.

The Commission did not give exact figures but painted the grim picture in broad terms sufficient to address the task.

The Commission found that ‘the negative economic impact of the ‘Goldenberg Affair’ on the country was so massive that its effects continue to be felt to date.

⁵⁶Para. 807

⁵⁷Para. 726

⁵⁸ibid

⁵⁹Para. 731

Recommendations

Part of the Commission's mandate was to make recommendations pertaining to the following areas;

- (i) Prosecutions or further criminal investigations of culprits
- (ii) Preventive measures
- (iii) Reimbursements or compensation of Government by culprits
- (iv) Any other policy in action to conclusively deal with the 'Goldenberg Affair'.

The Commission appears to have been inconclusive in dealing with recommendations. This is in spite of categorical pronouncements contained in its Report, in which the Commission found and declared certain persons as having engaged in theft or fraud or otherwise aided and abetted these fraudulent activities.

The Commission singled out former President Moi, his aide Joshua Kulei and former PS Joseph Magari as well as a company called Multiphasic Company Ltd for 'further investigations' to determine their roles, 'if any', in the whole scam, and whether they were, 'in any way, involved in any wrongdoing' This was to be done 'at the discretion of the Attorney-General.'⁶⁰

This is a rather surprising recommendation. First, it seems to ignore the fact and evidence on record that the then Attorney General himself was in serious need of investigation. It is his acts and omissions that allowed the 'Goldenberg Affair' to grow into the monumental and insoluble riddle it had become. Further, by wording the recommendation in such ambiguous terms, the Commission comes across as being uncertain of its own recommendation, which is the surest way of ensuring that nothing is done about it.

The Commission then lists 15 individuals who were 'in one way or another' responsible for those acts or omissions.

This list is compiled for the attention of the Attorney General for 'any possible criminal or civil action'. However, once again, the Commission stops short of categorically calling for the prosecution of these individuals. In fact, whereas the appointing authority separated criminal prosecutions and civil claims, the Commission strangely combines the two thereby rendering its recommendation ambiguous, even confusing.

In addition, there are other areas of possible recommendation that the Commission seems to have overlooked.

Censure, removal or sacking: For instance, in situations where an individual implicated in the scandal was still holding office, including the Attorney General himself, the Commission ought to have recommended censure or removal for incompetence or complicity in the Goldenberg matter. For those not holding constitutional offices or those with statutory security of tenure, the Commission should have recommended dismissals.

Restitution or reparation: The process of restitution or reparation, whether by way of suit or direct negotiation, should also have been stated as a specific recommendation, separate and distinct from any criminal action.

The Commission singled out former President Moi, his aide Joshua Kulei and former PS Joseph Magari as well as a company called Multiphasic Company Ltd for 'further investigations' to determine their roles, 'if any', in the whole scam, and whether they were, 'in any way, involved in any wrongdoing'. This was to be done 'at the discretion of the Attorney-General.'

⁶⁰Para. 845

Lustration: This measure was open for the Commission to consider and recommend. It involves the prohibition of culprits in the scandal from holding public office. Such a move would satisfy the public need for action while avoiding the pitfalls of both criminal prosecutions and civil litigation.

In the ensuing political climate, had lustration been recommended and acted upon, the discontentment caused by the declaration by Kamlesh Pattni, the architect of the ‘Goldenberg Affair’, of his intention to run for public office would have been avoided.

Special legislation: It is worth noting that even as it made recommendations about certain monies being recoverable and payable to Treasury or the Central Bank of Kenya for those who had obtained it illegally, the Commission was careful to note the possibility of a limitation period being in the way of such recoveries. It is, however, possible for Parliament to pass special legislation to extend the limitation period in respect of any specific set of cases. The Goldenberg Scandal would be a beneficiary of such legislation.

Procedures used in performing its mandate

In the collection of evidence and discharge of its mandate, the Commission used procedures established by it pursuant to the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya.

One of the more controversial aspects of procedure was that certain individuals who were considered crucial witnesses with information vital to the unravelling of the Goldenberg mystery, were never summoned to testify. This is especially so for the two Ministers in charge of the Treasury at the time, namely, Hon. George Saitoti and Hon. Musalia Mudavadi. So heated was this issue that just before the close of its sittings, the Commission was sued at the High Court of Kenya.⁶¹ In the suit, the Applicants sought to have the Court issue orders compelling the Commission to summon certain individuals, including former President Moi and the two former Ministers. These individuals were to appear, testify and be cross-

examined on their role in the ‘Goldenberg Affair’. The Application was allowed.

The view of the Commission and the Attorney General, was that while the Commission generally had the power to compel witnesses to attend before it, it lacked the power to compel persons mentioned adversely to testify. This would amount to self-incrimination.

This particular case is not the only one in which various parties had gone to the High Court obtaining all manner of orders against the Commission. Indeed, there were times when the Commission and its Commissioners were the target of contempt of court proceedings⁶² as the High Court always proceeded on the premise that the Commission was an inferior body and subject to its supervisory jurisdiction. However, this was complicated by the fact that the Commission comprised of not only the then senior-most Judge of the High Court, but also a sitting Judge of the Court of Appeal. This prompted the Commission to make the recommendation that -

We also think that in future the Commissions of Inquiry Act should be suitably amended either to exclude Judges of Appeal and above from conducting public inquiries or limiting the type of judicial review applications which may be brought where such Judges are presiding, to obviate embarrassment as happened on several occasions in the course of this Inquiry, where Judges of the High Court made orders requiring their senior to comply ... [which] clearly offends the doctrine of precedence.⁶³

In fact, the Commission went further to recommend that appointment of sitting judges to conduct public inquiries, especially those with political implications, be reconsidered since the appointment of a judge *per se* “does not de-politicise an inherently political issue”.⁶⁴ Some of the reasons for the recommendation were the

⁶¹Misc. Civ. Application no. 1274 of 2004

⁶²Para .29

⁶³Para. 36

⁶⁴Para. 37

increasing tendency to sue judges conducting inquiries, the cost and length of the inquiries that often disrupts the judge's primary tasks of conducting judicial business at their stations, as well as the fact that any deficiencies in the resulting report are likely to stick to the judge(s) in question.

The recommendation takes into account the separation of powers and the dignity and independence of the judiciary. Judges should be free from the risk of deployment of judges for the political ends of diffusing public outrage in the window-dressing exercises that Commissions of Inquiry have turned out to be.

In its report, the Commission alluded to some of the peculiar problems that faced the inquiry. These included the public wrangling of senior advocates involving allegations of impropriety made against Assisting Counsel, suspension of the Vice-Chairman over corruption allegations, allegations of bribery against the Chairman, a Commissioner and Assisting Counsel and ultimately, a suit by the Assisting Counsel against the Commission. Even though each inquiry is unique, the Commission would have been guided by a number of principles and practices borrowed from other Commonwealth jurisdictions, namely;

(i) **Division of the Inquiry into Factual Inquiry and Policy Review**, which necessitates the employment of two separate approaches to the task. The factual inquiry involves adjudicative fact-finding by way of evidentiary hearings with trial-like features to determine specific facts.

This is followed by Policy Review, which is research-based and consultative and requires the examination of a wide range of policy-related issues, practices and experiences, both domestic and international. It is particularly useful in forming the basis for remedial or transformative recommendations.

(ii) **Consultative Rule-making**: In order to avoid conflict in the interpretation, understanding enforcement and compliance with the Rules, it may be useful to invite the input, comments and contribution of those parties given standing before the Commission prior to the crystallisation of the Rules. This inclusive

process may have the single effect of reducing tension and conflict.

- (iii) **Standing and Funding**: Commissions of Inquiry elsewhere publish a Public Notice inviting all persons interested in the Factual Inquiry to apply for standing and funding. The standing may be at different levels namely party standing - where such a party participates fully and examines witnesses; intervener standing - where participation may be limited to submitting reports and written memoranda; or witness standing. There would ordinarily be funding available for parties and interveners, which makes sense especially when an Inquiry may be complex and protracted.
- (iv) **Appointment of Fact-Finder**: Since the scope of the Inquiry may be complex and broad, the appointment of a seasoned expert to delve into the issues and prepare and file a report on the issue is an invaluable tool of fact-finding.
- (v) **Clear Principles**: The Commission or Tribunal of Inquiry needs to have clear principles guiding it in the discharge of its task and these must include thoroughness, expeditiousness, openness to the public and fairness. It has been stated authoritatively that "it is crucial that an Inquiry ... be and appear to be independent and impartial in order to satisfy the public desire to learn the truth"

This test of independence and impartiality applies not just to the process of setting up the rules and the Factual Inquiry itself, but more so to the Report that the Inquiry comes up with.

"To realise this duty of independence and impartiality, the Inquiry must be thorough and examine all relevant issues with care and exactitude to leave no doubt that all questions raised by its mandate were answered and explained".

Conclusion

Without a doubt, Goldenberg was a complex and convoluted affair and an Inquiry meant to unravel it in accordance with the prescribed terms of reference would be seeking to undertake a huge task requiring a lot more in time, personnel, expertise and resources than was readily available.

Despite the various limitations and challenges, the Commission completed its task and prepared a report, which in time was released to the public. A study of the Report reveals several weaknesses and evidently some of the terms of reference were not answered satisfactorily, if at all. The conclusion is that the mandate was not tackled exhaustively and faithfully. Some of the recommendations appear half-hearted and of no consequence, especially on the questions of reparation, restitution, compensation and prosecution of the perpetrators.

In spite of these shortcomings, the Report is memorable for its truth-telling in permitting persons in the know or affected by the 'Goldenberg Affair' to speak publicly and, therefore, shedding some light on the mega-scandal.

Even in the absence of prosecutions, the Inquiry and the Report identified the culprits and provided a public record sufficient to act as a measure of deterrence. In addition, the Report could still form a sound basis for further investigation or action by law-enforcement agencies that may wish to exorcise the Goldenberg ghost.

The Report provides a sobering picture of how complicity, cowardice, negligence and greed on the part of individuals charged with the protection and preservation of public funds and institutions can conspire to give rise to and encourage the flourishing of fraud, crime and impunity.

In recommending continuing education for staff at the Central Bank of Kenya, the Commission called for the sensitisation of staff members, as well as the general public, on the need to uphold the law.

Laws are not enough. Continued training of staff and the knowledge among them that constitutional and institutional safeguards cannot be overridden, also need to continue to be emphasised.⁶⁵

The 'Goldenberg Affair' remains an object lesson and a perpetual warning testament to constitutional and institutional failure.

A study of the Report reveals several weaknesses and evidently some of the terms of reference were not answered satisfactorily, if at all. The conclusion is that the mandate was not tackled exhaustively and faithfully.

⁶⁵Para. 829

Digest of the Recommendations of the Goldenberg Commission

	Recommendation	Implementation	Remarks
1.	<p>Prosecutions or further criminal investigations of culprits</p> <p>Office of the Attorney General, The Chief Justice, former President Daniel Moi, Joshua Kulei, Joseph Magari and Multiphasic Company Ltd</p> <p>15 individuals were listed for the attention of the AG</p>	<p>Selective part Implementation, but later stalled</p>	<p>It is noteworthy that the first case relating to the Goldenberg Scandal was filed not by the Attorney General but by the Law Society of Kenya. At the time, there was a public outcry for the prosecution of the Goldenberg suspects. The Law Society of Kenya launched private prosecutions No. 1 of 1994 - <i>L.S.K. - vs- Eric Kotut, Charles Mbindyo, Collins Owayo, Dr. Wilfred Koinange, Francis Cheruiyot and Kamlesh Pattni</i>. As noted in the Commission's Report, the Attorney-General moved swiftly to join himself in this prosecution as 'amicus curiae' and later objected to the prosecution on the ground that he was to undertake his own prosecution. The Court upheld the submission and the private prosecution was dismissed.</p> <p>Thereafter, Raila Odinga (now the Prime Minister of Kenya) undertook a private prosecution No. 107 of 1995 against George Saitoti, Wilfred Koinange, Kamlesh Pattni and Charles Mbindyo among others. Once again, the Attorney-General moved swiftly to take over and terminate this prosecution. As a result, only nine criminal cases remained, namely:-</p> <p>(i) Criminal Case No. 2271 of 1994: Republic - vs- Kamlesh Pattni, Eliphaz Riungu and Lazarus Wanjohi</p> <p>The latter two were charged with theft by persons employed in Public Service. The case was later withdrawn and consolidated with Criminal Case Number 4053 of 1994, which continued until February 24, 2003 when a <i>nolle prosequi</i> was entered by Horace Okumu, State Counsel on behalf of the AG.</p> <p>(ii) Criminal Case No. 2348 of 1994: Republic - vs- Job Kilach & Michael Wanjihia</p> <p>This case was withdrawn and consolidated with Criminal Case No. 4052 of 1994.</p> <p>(iii) Criminal Case No. 4053 of 1994: Republic - vs- Kamlesh Pattni, Eliphaz Riungu, Lazarus Wanjohi, Job Kilach & Michael Wanjihia</p>

Recommendation	Implementation	Remarks
		<p>This case was terminated on February 24, 2003 when a <i>nolle prosequi</i> was entered by the State Counsel.</p> <p>(iv) Criminal Case No. 1902 of 1995: Republic - vs- Kamlesh Pattni & Charles Mbindyo</p> <p>This case was withdrawn and consolidated with Criminal Case No. 2208 of 1995.</p> <p>(v) Criminal Case No. 2208 of 1995: Republic - vs- Kamlesh Pattni, Wilfred Koinange, Eliphas Riungu, Michael Wanjihia & MS Goldenberg International Ltd</p> <p>The case was withdrawn on July 16, 1997 following a prohibition order made by the High Court in High Court Miscellaneous Civil Application No. 322 of 1999.</p> <p>(vi) Criminal Case No. 1474 of 1997: Republic of Kenya - vs - Kamlesh Pattni, Wilfred Koinange, Eliphas Riungu, Michael Wanjihia & MS Goldenberg International Ltd</p> <p>This was the only case which proceeded, but was later stopped following a High Court prohibition order and eventually a <i>nolle prosequi</i> was entered on February 24, 2003</p> <p>(vii) Criminal Case No. 9438 of 1998: Republic - vs- Kamlesh Pattni & Bernard Kalove</p> <p>The case did not proceed to hearing and was also stopped by a prohibition order of the High Court in High Court Miscellaneous Civil Application No. 322 of 1999.</p> <p>(viii) Criminal Case No. 392 of 1999: Republic - vs - Kamlesh Pattni</p> <p>This case did not proceed to hearing. It was withdrawn, and no reasons given for the withdrawal. A <i>nolle prosequi</i> was entered on February 24, 2003.</p>

	Recommendation	Implementation	Remarks
			<p>(ix) Criminal Case No. 741 of 1999: Republic - vs- Kamlesh Pattni & Goldenberg International Limited</p> <p>The case did not proceed to hearing. A <i>nolle prosequi</i> was entered on February 24, 2003.</p> <p>The common denominator in all these cases is that none of them was meritoriously concluded. Between 1994 when the first case was instituted and 2003 when the Commission of Inquiry was formed, it was only in 1998 that the hearing of only one case commenced.</p> <p>By September 1999, all these cases were still pending, with only one partly-heard before Mrs. Uniter Kidulla, Chief Magistrate. Mr. Bernard Chunga who was the Director of Public Prosecutions at the time was personally involved in prosecuting the cases, including the partly-heard case. On September 13, 1999, Mr. Chunga was appointed to the position of Chief Justice while Mrs. Kidulla was appointed to the position of Director of Public Prosecutions.</p> <p>The delays and multiplicity of cases gave Mr. Pattni and other accused persons the perfect excuse to lodge High Court Miscellaneous Civil Case No. 322 of 1999¹ and Court of Appeal Civil Application No. 301 of 1999 in which they complained that the delays and number of cases had, among other things, prejudiced them and violated their constitutional rights.</p> <p>In 2006, the Attorney General ordered eight suspects to be charged over the 'Goldenberg Affair'. These included Eric Kotut, Kamlesh Pattni, Wilfred Karuga Koinange, Eliphaz Riungu, George Saitoti and James Kanyotu. All suspects except Tom Werunga were charged.</p> <p>In the same year, George Saitoti² was cleared of wrong doing after a Constitutional Court ruled in his favor, quashing parts of the Commission's Report on the approval of 15 percent ex gratia payments to gold and diamond exporters, in which Saitoti had been implicated. On November 15, 2006, George Saitoti was reinstated as Minister for Education.</p>

¹Heard by Honorable Justices Githinji, Osiemo and Otieno; Mr. Rebello for Applicant, Horace Okumu for Respondent, Mr. Muthoga as *Amicus Curiae*.

²Republic - vs - Judicial Commission of Inquiry into the 'Goldenberg Affair' & 2 Others ex parte George Saitoti; High Court Miscellaneous Application No. 102 of 2006 heard by Honorable Justices Nyamu, Wendoh, Emukule. Mr. Nowrowjee & Mr. Ngatia for Applicant, Keriako Tobiko (Director of Public Prosecutions) & Emily Kamau for Attorney-General

	Recommendation	Implementation	Remarks
			<p>In November 2008, yet another Ruling by a Constitutional Court 3 terminated two cases filed against Kotut on the grounds that they had been filed against him based on a flawed Report. In the Court's view, the Commission which came up with the report went beyond its mandate and usurped the powers of the police to investigate.</p> <p>These court rulings are likely to give impetus to other culprits to apply to have their names expunged from the Report, thus casting a shadow of doubt on the work conducted by this and other Commissions of Inquiry.</p>
2.	Preventive Measures	Implementation progress unknown	<p>The Commission recommended the amendment of all relevant laws so as to empower the Controller and Auditor-General to audit the accounts of the Central Bank of Kenya and to give him oversight audit functions over the financial affairs of the Bank. The recommendation is yet to be implemented.</p>
3.	Reimbursements or compensation of Government by culprits	Selective Part Implementation; Amnesty for economic crimes	<p>The Kenya Anti-Corruption Commission (KACC) is a public anti-graft agency established under Section 6 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. It is empowered to institute civil suits on behalf of any public body for recovery of lost property or compensation for damage to such property.</p> <p>In line with its mandate, the KACC filed High Court Miscellaneous Application No. 1111 of 2003 for recovery of the Grand Regency Hotel amongst other prayers. Mr. Pattni, Uhuru Highway Development Limited and 15 other parties were sued jointly for the recovery. In 2007, through the Statute Law (Miscellaneous Amendments) Act, 2007, the Anti-Corruption & Economic Crimes Act was amended to provide for, among other things, negotiations and settlement of claims by KACC against any person(s) who may have caused loss of or damage to public property.</p> <p>It was on this basis that Pattni negotiated immunity from prosecution for his role in Goldenberg in exchange for the transfer of the Grand Regency to the CBK in April 2008.</p>

³Eric Cheruiyot Kotut - vs - S. E. Bosire & 2 Others; High Court Miscellaneous Civil Application No. 416 of 2006 heard by Honorable Justices Nyamu, Wendoh, Dulu. Mr Simani & Mr. Okoth Oriema for the Applicant.

	Recommendation	Implementation	Remarks
			<p>On the other hand, Mr. Nasir Ibrahim Ali, Chairman of the World Duty Free (Africa)(W DFA) filed a case at the International Centre for Settlement of Disputes (ICSD) against the former Kenyan Government, which he accused of involvement in the sequestration of duty free shops owned by W DFA. The Kenya Government, which is being sued for KES 40 billion, is accused of taking his duty free shops in Nairobi and Mombasa through use of forged documents as well as knowingly involving W DFA in the Goldenberg scandal. Prior to the case, Ali had been deported from Kenya, a move which was viewed to be politically motivated.</p>
4.	Any other policy in action to conclusively deal with the 'Goldenberg Affair'		<p>The Commission's Report recommended that Hon. George Saitoti, the Minister for Education at the time, should face criminal charges for his actions. On February 13, 2006, Hon. Saitoti resigned as a Cabinet Minister. Shortly afterwards, Saitoti and 20 other persons suspected to have been involved in the scandal were prohibited from leaving the country and ordered to surrender any weapons they possessed. These were:</p> <ul style="list-style-type: none"> (i) Gideon Moi, Retired President Moi's son and former Baringo Central MP (ii) Mr. Philip Moi, Retired President Moi's son (iii) Mr. Mutula Kilonzo, Mr. Moi's Lawyer (now Justice Minister) (iv) Mr. Joshua Kulei, Mr. Moi's former Personal Assistant (v) Eric Kotut, former Central Bank of Kenya Governor (vi) Eliphas Riungu, former Deputy Governor of the Central Bank of Kenya (vii) Job Kilach, former employee of Central Bank of Kenya (viii) Michael Wanjihia, former employee of Central Bank of Kenya (ix) Tom Werunga, former employee of Central Bank of Kenya (x) Philip Murgor, former Director of Public Prosecutions (xi) Charles Mbindyo, former Treasury Permanent Secretary

	Recommendation	Implementation	Remarks
			<p>(xii) Wilfred Karuga Koinange, former Treasury Permanent Secretary</p> <p>(xiii) Joseph Magari, former Treasury Permanent Secretary</p> <p>(xiv) Prof. George Saitoti</p> <p>(xv) Kamlesh Pattni</p> <p>(xvi) James Kanyotu, Pattni’s business partner and former Special Branch chief</p> <p>(xvii) Collins Owayo, former Commissioner of Mines and Geology</p> <p>(xviii) Arthur Ndegwa, Senior Mining Engineer in the Commissioner of Mines, Nairobi Office</p> <p>(xix) Francis Cheruiyot, former Commissioner of Customs and Excise</p> <p>(xx) Elijah arap Bii, former General Manager of Kenya Commercial Bank.</p>
5.	<p>Legislation</p> <p>The enactment of a Witness Protection Legislation in order to protect whistleblowers.</p> <p>The enactment of a Money Laundering and Proceeds of Crime Act in order to deal with issues of money laundering.</p> <p>Amend Commissions of Inquiry Act</p>	<p>The Witness Protection Act No. 16 of 2006 was passed and came into effect on 2nd September 2008.</p> <p>Parliament passed the Proceeds of Crime and Money Laundering Bill, 2009 in December 2009</p> <p>Implementation zero</p>	<p>The Commission further recommended the enactment of a Witness Protection Bill in order to protect whistleblowers. The Witness Protection Act No 16 of 2006 came into effect on September 2, 2008</p> <p>The legislation should be amended either to exclude Judges of Appeal and above from conducting public inquiries or limiting the type of judicial review applications which may be brought where such Judges are presiding so as to comply with the Doctrine of Precedence. The amendments should also bar sitting Judges from conducting public inquiries with political implications</p>

GOLDENBERG



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Who we are

AfriCOG is a civil society organisation dedicated to addressing the structural causes of corruption in Kenya. Its anti-corruption initiatives seek to address issues of poor governance in the public and private sectors.

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