



KENYA
GOVERNANCE
REPORT

2014



KENYA
GOVERNANCE
REPORT

2014

Table of Contents

Abbreviations and Acronyms	v
Foreword	vi
1. The Governance Year in Brief	1
2. Governance Reforms in 2014	2
2.1 The Presidency	2
2.2 The Legislature	3
2.3 Devolution	6
2.4 Amending the Constitution	10
3. The Judiciary	13
3.1 Judicial Service Commission (JSC)	13
3.2 The International Criminal Court Cases	14
4 The Fight Against Corruption	16
4.1 Auditor General	16
4.2 The Continuing Plunder of Public Funds	17
4.3 Procurement	21
4.4 Parastatals	24
4.5 The EACC	25
5 Security and Insecurity	27
5.1 Growing Influence of Military	27
5.2 Insecurity	28
5.3 Mpeketoni	29
5.4 Kapedo	29
5.5 Mandera	30
5.6 Operation Usalama Watch	30
5.7 Drivers of Insecurity	31
6 Transnational Crime	33
6.1 Poaching	33
6.2 Illicit Drugs	33
7 The Year Ahead	35

Abbreviations and Acronyms

CEC	County Executive Committee
CIDP	County Integrated Development Plan
CITES	Convention on International Trade in Endangered Species of Wild Fauna & Flora
CORD	Coalition for Reforms and Democracy
CRA	Commission on Revenue Allocation
CRBC	China Road and Bridge Corporation
DPP	Director of Public Prosecutions
EABI	East African Bribery Index
EACC	Ethics and Anti-Corruption Commission
GSU	General Service Unit
ICC	International Criminal Court
IEBC	Independent Electoral and Boundaries Commission
IED	Improvised Explosive Device
IIAG	Ibrahim Index of African Governance
IIEC	Interim Independent Electoral Commission
JKIA	Jomo Kenyatta International Airport
JSC	Judicial Service Commission
KEBS	Kenyan Bureau of Standards
KNCHR	Kenya National Commission on Human Rights
KPTJ	Kenyans for Peace with Truth and Justice
LA	Local Authority
LSK	Law Society of Kenya
NIS	National Intelligence Service
NLC	National Land Commission
NPSC	National Police Service Commission
NYS	National Youth Service
PPOA	Public Procurement and Oversight Authority
SFO	Serious Fraud Office
SGR	Standard Gauge Railway
SRC	Salaries and Remuneration Commission
TA	Transition Authority
TFV	Trust Fund for Victims
TNA	The National Alliance
TSDI	Third Railway Survey and Design Institute Group
UNODC	United Nations Office on Drugs & Crime
URP	United Republican Party

Foreword

The Kenya Governance Report 2014 is the fourth in a series by the Africa Centre for Open Governance. Every year, AfriCOG reviews the events of the past year as they relate to critical issues and developments in governance reform and efforts against corruption, analyses their implications, and makes recommendations for the future.

The Kenya Governance Reports have developed over time into a valued resource on governance and anti-corruption for our partners in civil society, the public sector, the international community and the general public.

Major concerns in 2014 are corruption and insecurity. Corruption continues unabated, despite numerous pronouncements from the presidency and the government that its elimination would be a priority. Security remains a primary concern for the majority of Kenyans, as they face unprecedented random attacks of violence, originating both internally and externally.

It is impossible to ignore the links between corruption and insecurity. A holistic strategy that takes into account current thinking, best practice on the issues, as well as changing circumstances, will need to be developed. Insecurity in the 21st century cannot be countered with traditional methods. A new approach is long overdue.

Without focused and principled leadership, corruption will continue to flourish and negate any progress. Kenya must move beyond the rhetoric that has become all too common and take measures that demonstrate seriousness in attacking corruption, starting with the punishment of corrupt officials and individuals to the fullest extent of the law.

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

Gladwell Otieno

Executive Director

1. The Governance Year in Brief

Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both public and private sectors, so as to address the structural causes of the crisis of governance in the country. The overall objectives of our programme activities are: to strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy; and to build Kenya's capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors. Our reports, policy briefs and overall work add value to anti-corruption and governance reform processes in Kenya by stimulating policy discussion and supporting evidence-based advocacy and the mobilisation work of our partners.

The Kenya Governance Report 2014 is the fourth in a series by AfriCOG. Since 2011, AfriCOG has reviewed the events of the previous year as they relate to critical issues and developments in governance reform and efforts against corruption, analysed their implications, and made recommendations. It is hoped that these

reports will over time develop into a key resource on matters of governance and anti-corruption for our partners in civil society, the public sector, the international community and the general public. The reports make it possible to research and analyse trends in the governance and anti-corruption sector, a requirement for informing interventions.

The Kenya Governance Report 2014 revisits thematic areas examined in previous editions. It provides analysis on these events and issues, focusing on their significance in, and impact on, the country and offers recommendations for their effective resolution to government agencies, civil society and members of the Kenyan public. The continued implementation of devolution features prominently, as do the challenges Kenya faces in the wake of rising insecurity. Also examined is the Judiciary, and the implications of diminishing faith in this critical institution. In keeping with AfriCOG's mandate, we report on the fight against corruption, outlining the claw-back of constitutional gains and the continued plunder of public funds.

2. Governance Reforms in 2014

2.1. The Executive

Following the post-election learning curve of 2013, the Executive was expected to hit its stride in 2014 and focus on delivery of services to Kenyans. There were numerous challenges to contend with, including the growing odour of corruption in a number of the major projects planned by the government. With the Cabinet mostly comprised of non-political 'technocrats', expectations were high that dockets would be run more professionally, despite the fact that few office-holders were paired with dockets that matched their expertise.

It soon became clear that a 'technocratic' Cabinet was not a silver bullet to ensuring the service delivery expected from a lean and professionalised unit. President Kenyatta himself declared early in the year that the honeymoon was over, and that those who did not deliver would have no room in his government. As perceptions grew that the Cabinet was not performing according to expectations, this raised serious questions about the individuals in question, as well as the system. The reality was that despite most being seasoned professionals, Cabinet members were being asked to perform and deliver in an environment that was overtly political. Their appointments were marked by horse-trading and, post-appointment, they were under constant pressure from the Jubilee government to deliver its election promises. One such promise was the laptop project, contained in Jubilee's election manifesto, which envisaged provision of a laptop for every Class 1 child¹.

During this period, much emphasis and resources were also placed on the issuance of three million title deeds, the digitising of registries at the Ministry of Lands and the Registrar of Companies, and the restructured Provincial Administration. These seemingly disparate

issues were inextricably linked and served a number of priorities. Firstly, all three were part of the Jubilee manifesto. Secondly, in a country where land is an extremely emotive issue, the issuance of title deeds would serve to demonstrate the government's commitment to addressing long-standing historical grievances. The digitisation of registries at the Ministry of Lands also served multiple purposes: to legitimise the 'digital government', by computerising an area known to suffer rampant corruption, thereby increasing transparency; and to enable land transactions to be processed and authenticated online, and verified by the issuance of title deeds. The digitisation at the Registrar of Companies served similar purposes: to increase transparency and accountability, to seal loopholes that could enable the registration of shadowy companies, and to enable a seamless registration process for companies. It would appear that the intention of these initiatives was also to improve investor confidence, by quickly addressing areas that impeded investment.

Throughout the year, political imperatives continued to consume the attention of the Cabinet. In approving the 2014/15 budget, the Cabinet sought to reduce the cost of living and spur growth. However, Cabinet's attempt to 'approve' the budget demonstrated a lack of understanding of roles under the new constitution. Under the previous constitutional order, the Cabinet approved the budget. Under the new constitution, in keeping with presidential systems, the budget making process is the exclusive preserve of Parliament. It may delegate this to the Executive but it retains the final say over the final shape of the budget. For the Cabinet to play a role in terms of approval showed a lack of clarity, or deliberate disregard of the provisions of the Constitution.

¹ Nic, Cheeseman, Democracy In Africa, 18 January 2014, *The Executive is Too Political for Technocrats to Work Well* Available at: <http://democracyin africa.org/executive-political-technocrats-work-well/>

2.2 The Legislature

Following the 2013 election, the size and composition of the Legislature changed considerably. A bicameral Parliament was introduced, consisting of the National Assembly and the Senate. According to the Constitution of Kenya 2010, the National Assembly is charged with the responsibility of making laws at the national level, while the Senate is charged with protecting the interests of the Counties and their governments and exercising oversight in this regard². The number of elected representatives in the National Assembly increased to 349, while the Senate consisted of 67 Senators. The Jubilee Coalition enjoyed a clear majority in both Houses of Parliament.

As reported in the Kenya Governance Report 2013, the 2013 elections rang in the transition from a mixed presidential-parliamentary system to a full presidential system of governance. However, this shift is not yet fully understood by the majority of the population, including, apparently, the Legislature. The government/opposition divide, a feature of the old system continues to define debate in, as well as the workings of the Legislature. "In a pure presidential system, the legislature is first and foremost a law making and oversight body, and if it was to live up to that billing the party affiliation should recede to the background and [the priority ought to be] doing the appropriate legislation for the good of the country³".

The current legislature functions under a situation where the President comes from the coalition with a majority in both houses. This will not always be the case. However, the legislature continues to 'rubberstamp' the policies of the Executive, as in the case of the amendments to the security laws (discussed in the following section). To better understand their roles in a

pure presidential system, it would be a prudent starting point for the legislature to adopt the appropriate nomenclature of majority and minority, as opposed to government and opposition.

Under their primary mandate of legislation, the National Assembly considered 77 Bills at various stages, and passed 19. Four further laws awaited assent when the Parliamentary calendar came to a close. The Senate, on their part, passed 11 Bills, and approved an additional seven that were referred by the National Assembly. The Bills passed include: the Marriage Bill; the National Flag, Emblems and Names Bill, which sought to settle questions on entitlements to use the title "Excellency" and the flying of the national flag on official vehicles; the Kenya Heroes Bill; the Victim Protection Bill; the Division of Revenue Bill, which sought to provide for the equitable division of revenue between the national and county governments; the Finance Bill; the Appropriations Bill; and the Security Laws (Amendment Bill).

2.2.1 Members of Parliament

In 2014, Members of Parliament again did little to endear themselves to the Kenyan public. Early in the year, they acrimoniously debated the Marriage Bill, which, in its original form, sought to amend and consolidate laws on marriage and divorce. Debate on the Bill addressed polygamy, which is governed under customary law among many communities in Kenya and hence not illegal. The Bill initially required a man to gain the consent of his current spouse before entering into a polygamous marriage. An amendment overturning this provision, allowing men to take more wives without consulting existing spouses, was passed by Parliament and assented to by the President, after male MPs closed ranks against their female counterparts.

² Constitution of Kenya, 2010. Articles 95 & 96.

³ Adams, Oloo, Friedrich Ebert Stiftung, 9 April 2013, *From A Hybrid System to A Pure Presidential System* Available at: <http://www.feskenya.org/media/publications/From%20a%20Hybrid%20System%20To%20a%20Pure%20Presidential%20System%20-%20Dr.%20Adams%20Oloo.pdf>

MPs pressured the Parliamentary Service Commission to ensure availability of funds for car loans and mortgages, a move that proved unpopular with wide sections of the public. Unsatisfied with the allocation of Ksh 1 billion in the supplementary budget, the Commission leveraged Ksh 5 billion, citing mortgage, car loans, committee operations, refurbishment of buildings and rent, as underfunded in the budget⁴. Since it is the role of the Salaries and Remuneration Commission (SRC) to set salaries and benefits, the constitutionality of this allocation is questionable. The SRC endured significant pressure from Parliament with regards to MPs' remuneration. Following a protracted back and forth, and threats to disband the SRC, a negotiated settlement was reached. Since then, the SRC has appeared to tread more cautiously in their demands for fiscal prudence in the setting of salaries and benefits of public officials, despite this being well within their mandate.

The year 2014 also witnessed an unfortunate battle for supremacy between Parliament on the one hand, and the Judiciary and governors on the other. Parliament accused the Judiciary of flouting separation of powers, by the repeated issuance of conservatory orders against county and national legislative chambers. These orders, Parliament argued, prevented the chambers from conducting business pending the full hearing and determination of court challenges.

The Senate and the National Assembly set aside their own simmering supremacy war to train their collective guns on governors, for refusing to appear before them to account for the use of public funds. They also set their sights on the Judiciary, for seemingly providing legal cover for the governors. Examples cited included the impeachment and reinstatement of Governor Martin Wambora⁵; orders granted to the Council of Governors; and the shielding of Machakos Governor Alfred Mutua,

Trans Nzoia Governor Patrick Khaemba, Wajir Governor Ahmed Abdulahi Mohammed and Kakamega Governor Wycliffe Oparanya, from appearing before the Senate⁶. The situation deteriorated to an extent that drove President Kenyatta to enter the fray, stating that it was right for senators to hold Wambora and other governors to account.

Perhaps the lowest moment for MPs came in December during debate on the contentious security laws. Following public outrage at the rising insecurity levels in the country as a result of terrorist attacks that had led to the death of scores of people, towards the end of the year the President dismissed the Cabinet Secretary for Internal Security Joseph Ole Lenku and the Inspector General of Police David Kimaiyo. The government further drafted the Security Laws (Amendment) Bill that aimed at totally overhauling the security infrastructure. The Security Laws (Amendment) Bill was a hastily prepared raft of amendments to various security related laws. While the stated aims of the Bill were to address rising insecurity in the country, the effect of the proposed amendments would have been to limit rights enjoyed under the Constitution. Some of the key areas of contention were the provisions to allow the National Intelligence Service (NIS) to eavesdrop on phone calls, intercept communications, and conduct searches without court warrants, and additional powers given to NIS and the police to detain suspected terrorists for up to one year before trial. The Bill also defined certain new offences related to terrorism, such as a requirement for media houses to seek the permission of the police before publishing or broadcasting of information related to on-going terrorism. Any amendment to the constitutionally enshrined Bill of Rights (Chapter 4) requires a referendum, but Parliament ignored this requirement. Due to the haste with which the Bill was presented to Parliament, there was no time for public

⁴ Caroline, Wafula, Daily Nation, 25 February 2014, *MPs Get More Cash For Cars, New Houses*

⁵ Petition 3 of 2014, Kenya Law Reports, *Martin Nyaga Wambora v Speaker County Assembly of Meru & 5 Others*

⁶ Reference 1 of 2014, Kenya Law Reports, *Council of Governors vs Senate & Another*

debate or scrutiny, itself a fundamental violation of the constitutional requirement of public participation.

The Bill sought to amend the National Intelligence Security Act to broaden the powers of security forces to arrest and detain suspects in violation of due process rights; to search and seize private property and to monitor communications without a court warrant⁷. Section 62 of the Bill was particularly vague, allowing National Intelligence Service (NIS) officers to “do anything necessary to preserve national security”. Furthermore, the Bill sought to enable the police to extend pre-charge detention for up to 90 days with court authorisation, well beyond the 24-hour limit allowable by the Constitution⁸; and to allow prosecutors not to disclose evidence to the accused if “the evidence is sensitive and not in the public interest to disclose⁹”. The Bill also sought to amend Kenya’s refugee laws, to cap the number of refugees in the country at 150,000, and confine refugees to designated camps while their asylum applications were processed.

The Security Laws (Amendment) Bill 2014 further sought to restrict speech and media, penalising citizens who would expose and criticise violations by the security forces¹⁰. The interpretation of ‘radicalisation’ under the Bill was expanded in such a way as to include civic activism¹¹, while also broadly prohibiting the broadcast of any information likely to undermine investigations or security operations. The Bill also prohibited publishing or broadcasting photographs of victims of a terrorist attack without police consent¹².

When the Bill finally came to Parliament, the floor of the house descended into an all-out brawl. MPs tore

up order papers and reportedly engaged in pushing, shoving and even fisticuffs, preventing debate on the security laws. The minority knew that the so-called “tyranny of numbers” was likely to carry the day, and would therefore prevent any meaningful debate on the matter. The “tyranny of numbers”, characterised by the dominance of the Jubilee coalition, has manifested itself in an unfortunate intolerance and intransigence that has been dismissive and even contemptuous of alternate points of view. December 18 2014 produced one of the most chaotic scenes ever witnessed in Parliament. To date, no MP has been held accountable, which sets an unfortunate precedent, but the incident was also an illustration of the deep-seated resentment over the “tyranny of numbers” which characterises relations in the assembly.

Before closing an ignominious year, and prior to the shameful incident above, Parliament voted to double the foreign borrowing limit, in a vote supported by 79 MPs with 42 voting against. However, according to the Deputy Director of the Parliamentary Budget Office, Martin Masinde, the bid to double the country’s external debt ceiling would result in a high interest payment burden. For that reason, he told the Finance, Planning and Trade Committee that the proposed debt ceiling was too high. Analysis of the country’s debt and the government’s debt management reveals an even more alarming narrative. As a prominent economist pointed out in a newspaper article, “...the debt increase for the year (2013) is Sh750 billion. The Grand Coalition increased our debt by Sh1,000 billion (one trillion) in five years. The Jubilee Government has done three quarters of that in one year¹³”.

⁷ Security Laws (Amendment) Act, 2014. Sections 63-66

⁸ Constitution of Kenya. Article 49(f).

⁹ Security Laws (Amendment) Act, 2014. Section 19.

¹⁰ Ibid. Section 75, S. 30(a)

¹¹ Ibid. Section 64.

¹² Ibid. Section 75, S. 30(f) (1) & (2)

¹³ David, Ndi, Daily Nation, 15 August 2014, *From Rising Star to Almost Basket Case: Tough Lessons for Kenya from Ghana*.

2.3 Devolution

The challenges of implementing devolution continued in 2014. A lack of capacity was apparent in many quarters. A staff rationalisation process commenced early in the year, to determine the staffing levels in the various Counties. A 2012 report by the then Public Service Ministry, entitled the “Report of Devolved Functions, Structures and Staffing for County Governments”, attempted to prepare the national government for the shift to devolution by recommending recruitment and training of staff at various levels, prior to the 2013 General Election. The report found that Nairobi and Kiambu would require the least number of additional civil servants as they already had 32,099 and 8,254 respectively. The report further proposed that workers in the core civil service and local authorities be retained at the districts where they were deployed to serve the respective county governments.

2.3.1 Cost of Devolution

The ballooning bureaucracy ushered in by the Constitution of 2010, including 47 county governments, raised concerns over the size and sustainability of the wage bill, at both county and national level. In the 2013/14 financial year, the wage bill accounted for 51% of revenue, taking a large share of resources, and representing the most costly item in the budget. At the same time, the budgetary allocation for development was lower than that for recurrent expenditure. The wage bill rose to 12.1% of GDP in 2012 and 12.5% of GDP in 2013, well above the internationally desirable 7% ratio of wage bill to GDP¹⁴. It is also worthwhile to note that since 2008/9, there has been a steady increase in the share of revenue allocated to payment of salaries of civil servants. In 2009/10, this was 47.3%, well above the

internationally desirable level of 35%. This further increased in 2011/12 to 48.1% and 55% in 2012/13¹⁵. Therefore, it seemed drastic measures would be required to tame the runaway wage bill.

It would be unfair to blame the rising wage bill on devolution alone. The problem can be traced back to the 2008 Grand Coalition Government, which also placed a strain on the wage bill. To accommodate political imperatives, more public service officials were employed in various classes, mainly teachers and nurses. In addition, trade unions pushed for a pay increase for their members. As a result, the public sector wage bill almost doubled, from Ksh 239.9 billion in 2008/9 to Ksh 464.9 billion in 2012/13.

The above notwithstanding, in his first State of the Nation address President Kenyatta identified devolution as one of the major successes of his government, noting that all 47 county governments were up and running. Despite President Kenyatta’s repeated public statements in belied support of devolution, this was not always evident. For instance, the decision to create county commissioners, a structure that replicated the provincial administration under the previous constitution, belied his professed commitment. The Constitution of Kenya 2010 contemplated a restructuring of the provincial administration “...to accord with the system of devolved government established under this Constitution¹⁶”. Questions were raised in various quarters, including by governors, as to whether the new structure of county commissioners was in keeping with the proposed restructuring or an attempt to maintain the spirit of the discarded former prefectural structure of government.

¹⁴ Stephen, Jairo, Institute for Economic Affairs Newsletter, June 2014, *Brief on Public Sector Wage Bill: Policy Options*.

¹⁵ Ibid

¹⁶ Constitution of Kenya 2010, Sixth Schedule, Article 17

2.3.2 Standoff

A standoff between the Senate and governors ensued over the reluctance by governors to honour a Senate summons and account for their use of public funds. Article 96 (3) of the Constitution states that, “The Senate determines the allocation of national revenue among counties...and exercises oversight over national revenue allocated to the county governments”. On the basis of this constitutional principle, the Senate sought to summon governors to account for their use of public funds. Some governors, in an attempt to circumvent the summons, resorted to the courts to avoid having to appear before the Senate Public Accounts and Investment Committee. The courts, on their part, provided temporary reprieve for the governors. Senate Speaker, Ekwee Ethuro, declared that the Senate committee was justified in simply carrying out their mandate, and those who were clean should have nothing to fear in explaining themselves. Indeed, the role of the Senate is central to devolution as it includes oversight of counties.

The Senate further differed with the National Assembly on several occasions throughout the year over the unprocedural passage of Bills. The National Assembly passed a number of laws without reference to the Senate. The Senate objected to not being consulted. These differences, manifested as supremacy battles, often led to delays in the legislative process. Article 110 (3) of the Constitution requires that before either House considers a Bill, the Speakers of both houses must jointly resolve the question as to whether the Bill concerns counties or not. This determines whether the Senate has a role to play in the passage of a particular piece of legislation. Such an occurrence played out during the debate on the contentious security laws, with the Senate acknowledging that provision of security was the

preserve of the national government, but asserting that since counties were affected, the Senate ought to have played a role. Ultimately, the Senate sought an advisory opinion from the Supreme Court over the passage and constitutionality of 46 laws in which they were not consulted¹⁷.

The majority opinion saw the Division of Revenue Bill, 2013 as an instrument essential to the due operations of county governments, as contemplated under the Constitution, and advised that it was thus a matter requiring the Senate’s legislative contribution.

Despite hard economic times, counties were spendthrift. Devolved county governments recruited personnel against the advice of the Transition Authority (TA). Altogether, the county governments hired 36,000 new employees despite TA warnings. As a result of this unchecked recruitment most counties were forced to divert the lion’s share of their allocations to salaries. A report by the Controller of Budget, Agnes Odhiambo, revealed that counties spent Ksh 132.8 billion on recurrent expenditure during the 2013/14 financial year, equivalent to 78.4% of total expenditure for the financial year¹⁸.

2.3.3 County Budgeting

After examining audit results for the counties for this period, the Office of the Controller of Budgets (OCOB), the supervising body for county budget expenditure, concluded that county governments had not been sufficiently prepared for public finance management responsibilities¹⁹. The first resources allocated to counties were based purely on assessments because the Transition Authority (TA) and the Commission on Revenue Allocation (CRA) were unable to consult with counties as they were yet to be established. OCOB made recommendations to improve the planning

¹⁷ Advisory Opinion Reference 2 of 2013, Kenya Law Reports, *Speaker of Senate & Another v Attorney General & 4 Others*

¹⁸ Everlyn Kwamboka, The Standard, 22 September, 2014, *CoB Report: Sh132B Spent on Recurrent Expenditure*

¹⁹ Office of the Controller of Budget - OCOB (2013b), Budget Implementation Review Report – First Quarter, 2013/2014

capacity of counties, to ensure they followed correct procedures and to encourage revenue growth through a legal framework. OCOB also stressed that counties should examine their labour needs and audit the previous Local Authority's (LA) accounts.

With the planning and budgeting framework in mind, building the capacity of County Executive Committees (CEC) is key to achieving the participatory planning and budgeting mandated by the Constitution and related legislation. Among other things, it will enable the CECs, to conduct informed civic education. The TA, however, repeatedly lamented its own failure to fulfil its devolution mandates, such as civic education and CEC capacity assessment. The TA's Samburu County Representative noted a resource constraint that meant his work outside the office depended on the programmes and goodwill of other departmental heads. A seven-county study by the Institute of Economic Affairs found that the majority of counties did not set aside any budget resources for civic education. Consequently, awareness of the status of county planning remained low among the public. A 2013 study of Kilifi, Kwale and Mombasa counties found that 96%, 87% and 84% of respective respondents reported not being aware of County Integrated Development Plans CIDPs.²⁰

The Quality of FY 2013/14 Budgets

Besides the weak information systems on planning and budgeting, OCOB noted that time constraints compounded the weak capacity of county governments to plan realistic budgets for the 2013/14 financial year. OCOB also noted that, ahead of that financial year, counties in general had neither Fiscal Strategy Papers nor CIDPs, meaning that some of the budgets were based on material most probably generated from the outgoing District Development Plans, or arbitrarily by CEC members. The county governments also did not have an accurate idea

of their staffing status and the consequent public expenditure burden. They inherited LA staff and some officers from various government departments, and were actively hiring new staff for the new institutions. This area also suffered from the TA's inability to fulfil its mandate within a reasonable time. As a consequence, county governments produced budgets that were 'unrealistic', with 'big deficits' without a clear statement of how the latter would be resolved.

County budgets in this period lacked sufficient detail to explain how the overall figures had been reached. Nor did they explain the choice of activities included, as opposed to those excluded. Additionally, some budget proposals lacked Kenya's forward-looking tradition reflected in the Medium Term Expenditure Framework (MTEF) approach, in which governments plan expenditure over several years to secure long-term economic success and maximise the efficient use of limited public resources, taking into account policy making, planning, and budgeting. Other budgets were presented as a lump sum figure with no distinction between proposed recurrent and development spending. In some instances, where such distinctions were attempted, structural inconsistencies, such as the misallocation of spending, weighed against good budget practice. This undermined the scope for fiscal responsibility mandated by the Public Financial Management Act (PFMA) on budget structures. A major problem with the proposed budgets was that they carried little or no evidence of unit costs that the TA should have developed, with which to evaluate the aggregate figures. The failure to disaggregate the wage bill by sector also undermined scrutiny of the figures.

To improve their performance, counties should be more aware of the Constitution 2010, which devolves power, taking it from the central government and giving it to the people of Kenya (Articles 1, 10, 100, 118, and 196). They should also familiarise themselves

²⁰ AfriCOG, 2014, *Delivering on Devolution? Evaluating County Budgets 2013-2014*

with the County Government Act which defines the devolution concept, including citizen participation, public communication and access to information, civic education, planning and service delivery. Each county is obliged to publish its financial strategy and its budget review. Yet most Kenyans are unaware of the tools used for county budgeting, including the County Budget and Economic Forum, which are supposed to include representatives of the public.

The extensive employment of new staff at inception by county governments was unnecessary, and could have been avoided had the TA audited pre-existing human resources. The effect has been to burden county governments with the wages of their new employees as well as former LA employees²¹.

2.3.4 Members of County Assemblies

Devolution contributed significantly to the wage bill debate, with the creation of county structures adding a burden to the public purse. Immediately after the 2013 election, Members of County Assemblies (MCAs) embarked on a sustained campaign for enhancement of their salaries and perks, and even went on a go-slow until their demands were met. Despite improved salaries, MCAs continued to agitate for improved perks. This led President Kenyatta to wade into the debate and declare, perhaps seeking to gain political mileage, that MCAs ought to be treated equally with Senators and MPs and receive car grants, notwithstanding attempts by his government to reduce public expenditure.

Having secured their personal emoluments, MCAs began to get to grips with their legislative role. In some cases, they were fairly robust in their legislative dealings. Embu Governor Martin Wambora, for example, found himself on the wrong side of the County Assembly on two separate occasions, surviving

successive impeachment motions over allegations of corruption and abuse of office. In the first attempt, allegations of violation of public finance and public procurement laws were levelled against the governor. Following impeachment by the County Assembly and Senate, a three-judge bench in the High Court at Kerugoya ultimately reinstated the governor. The Bench cited the fact that both the County Assembly and Senate impeachment processes were undertaken in breach of a conservatory court order. The judges held that any proceedings held in disregard of court orders were a nullity in law. Both the County Assembly and the Senate Committee disregarded court orders preventing them from proceeding with their motions. Furthermore, the judges found that the County Assembly violated their own standing orders by not granting Wambora an opportunity to be heard, and thereby not adhering to rules of natural justice²². In the second impeachment attempt, the Embu County Assembly again proceeded with the motion despite a court summons against the Speaker, Justus Kariuki Mate, the Clerk, Jimmy Kauma, and the Deputy Speaker, Ibrahim Swaleh. Mate claimed that the summons did not warrant stopping the proceedings, and therefore allowed them to proceed²³.

Emboldened, county assemblies across the country flexed their legislative muscles, much to the chagrin of governors. The situation on occasion went to extremes, as governors found themselves held hostage by MCAs' threats of impeachment any time they disagreed over substantive issues. MCAs from Baringo, Vihiga, Elgeyo Marakwet, Kitui, Garissa, Nairobi, Tana River and Kericho all threatened to impeach their governors at some point during the year, for transgressions ranging from delayed ward development funds, to failure to approve car grants. CRA Chairman, Micah Cheserem, came to the aid of governors, terming the "...impeachment fever worrying, and (that it)

²¹ Ibid

²² Constitutional Petition No. 7 of 2014, Kenya Law Reports, *Martin Nyaga Wambora v Speaker Of The County Of Assembly Of Embu & 3 Others*

²³ Constitutional Petition No. 8 of 2014, Kenya Law Reports, *Andrew Ileri Njeru & 34 others v County Assembly of Embu & 3 others*

could consequently hinder service delivery²⁴. He urged MCAs to exercise tolerance, and appreciate that threatening to impeach governors at every turn would ultimately derail development. He said that impeachment was not the correct means to resolve all disputes.

While MCAs thus terrorised governors, they also spent colossal sums on foreign travel, often without discernible objectives. Eventually, the Ministry of Foreign Affairs and a number of countries expressed embarrassment over the number of delegations from Kenya visiting their countries, sometimes concurrently. The numerous foreign trips and repeated clamour for better pay and perks did little to win over the hearts and minds of the Kenyan public, who began to cast MCAs in the same light as MPs. Seeking recognition for their new-found status in society took up much of the MCAs' time, as they gradually came to appreciate the influence held in their county offices. A clear demonstration of this arose over the referendum debate: pursuant to Art 257 (7) of the Constitution, a majority of county assemblies are required to approve a draft bill in respect of a referendum. Thus, both the CORD and Jubilee coalitions went out of their way to woo MCAs, knowing they were the key factor as to whether a referendum would be held.

OCOB's first annual "Budget Implementation Review Report" revealed that nearly half the county assemblies spent more than half of their budgets on travel in the previous financial year. In total, county assemblies spent a staggering Ksh 7.7 billion on domestic and foreign travel, with 5 counties exceeding their allocated budgets²⁵. The report also revealed that a further Ksh 2.4 billion was spent on sitting allowances, where again, some counties exceeded their budgets. Nyeri County, for instance, spent Ksh 69 million on sitting allowances for MCAs; twice their budgetary allocation of Ksh 34.5 million. Furthermore, eight

counties exceeded their budgets on motor vehicles. Despite this excessive spending, Controller of Budget Agnes Odhiambo noted improved performance in budget executions by the last quarter of 2013/14. This indicated progress in awareness, which will hopefully translate to enhanced civic education and public participation, areas where much work remains to be done. It is hoped that the novelty of high office will wear off soon, and MCAs will come to appreciate not only their legislative roles, but also their roles in sensitising and educating their communities.

2.4 Amending the Constitution

As the dust settled on the election and subsequent appeal, the Jubilee coalition wasted little time entrenching itself in power. This entrenchment was often manifested in hubris and intolerance, grounded in the large majorities achieved in both Houses of Parliament. The opposition CORD coalition, perhaps seeking a national issue around which to regroup and rally their support base, began calling for a referendum to 'correct' a number of pressing national issues.

With the transition to devolved governance still in its early stages, CORD launched a referendum initiative with several aims, including increased allocation to counties. Dubbed *Okoa Kenya* (Save Kenya), the referendum also sought to address electoral reforms, land reforms and inclusivity. Electoral abuse and land injustices have perennially plagued Kenya. The issue of inclusivity, on the other hand, illustrates the deep-rooted ethnic cleavages within Kenya. The polarising issue of ethnicity as a driver of conflict was acknowledged by the drafters of the Constitution, who stressed repeatedly the need for "regional and ethnic diversity" to ensure that all peoples and communities were accommodated within the nation-building process. Thus, including inclusivity as an agenda item for the proposed referendum

²⁴ Daily Nation, 28 April 2014, *Impeachment Wave Raises Alarm*

²⁵ Ngare, Kariuki, Daily Nation, 2 December, 2014, *Counties Sank Ksh 7.7 Billion on Travel in the First Year*

highlighted the perception that a few leaders now in power were appropriating more than their fair share of the national cake.

While many suspected a political motivation behind the drive for a referendum, CORD claimed that it merely sought to strengthen devolution and address pressing national issues. A similar referendum bid by the Council of Governors, *Pesa Mashinani* (Money to the Grassroots) was also in the offing. It proposed increasing allocation to counties to 45% or more of national revenue. In addition, governors also sought the inclusion of grants (non-repayable aid from foreign governments and financial institutions) and grants and appropriations-in-aid (revenue spent

and thereafter deducted from approved budgets). The *Pesa Mashinani* initiative proposed that counties retain 15% of oil, gas, and other mineral income from their regions, with 5% going to local communities. Finally on the governors' wish list was control over the Equalisation Fund, a fund into which 0.5% of all revenue collected by the national government is to be paid each year. This fund is used to provide basic services such as water, roads, health facilities, and electricity to marginalised areas in a manner that would equalise those areas with the rest of the country. By the end of 2014, CORD and the Council of Governors had begun consultations on the possibility of merging their initiatives.

3. The Judiciary

Activities within the Judiciary in 2014 remained focused on the need and desire for reforms to improve service delivery and access to justice. The year began with the appointment of Anne Amadi as the new Chief Registrar of the Judiciary following the protracted and contentious removal of Gladys Boss Shollei on accusations of financial mismanagement, incompetence, and insubordination. Speaking when Mrs Amadi took the oath of office, Chief Justice Willy Mutunga tasked her to focus on eradicating corruption, which still bedevilled the Judiciary despite its reform efforts. Other priorities noted by the Chief Justice were modernisation and equitable distribution of Judiciary resources. Given the circumstances under which the former Chief Registrar left office, it was clear that expectations and the level of scrutiny were likely to be high. It was certainly hoped that this administrative change would herald a long-awaited new era in the dispensation of justice in Kenya.

Before long, the Judiciary found itself at loggerheads with other arms of government. This was partly due to rulings on attempted impeachment of governors, which tended to favour the elected officials, as in the case of Embu Governor Martin Wambora. Parliament, on its part, was unhappy with the Judiciary ruling that only the Salaries & Remuneration Commission could determine the pay of public officers, including MPs, thereby scuttling their attempts to manipulate their own remuneration. The House further accused the Judiciary of undermining its authority by issuing decisions that barred senators from summoning governors. The reaction of Parliament, seemingly with the approval of the Executive, was to retaliate against the Judiciary, threatening to discuss the character of individual judges or to slash the Judiciary's budget.

As a result of the disharmony between arms of government, it was reported that the speakers of the National Assembly and Senate held a meeting with the Chief Justice in an attempt to resolve the stalemate.

In that meeting, the speakers allegedly told the Chief Justice that Parliament would not obey "stupid orders" made by the courts. This presumably referred to the courts barring senators from summoning governors to account for their use of public funds. Parliament had already disregarded orders issued by the High Court in Embu seeking to block the intended debate on Embu Governor Martin Wambora, whom the Senate eventually impeached. The High Court reversed the impeachment order²⁶.

The supremacy battle among the three arms of government was not the only challenge to face the Judiciary. A number of controversial rulings led to questions on the courts' credibility. These rulings included the reinstatement of Governor Martin Wambora following his impeachment by the Senate on allegations of corruption and abuse of office, and the apparent shielding of Machakos Governor Alfred Mutua, Trans Nzoia Governor Patrick Khaemba, Wajir Governor Ahmed Abdulahi Mohammed and Kakamega Governor Wycliffe Oparanya, from appearing before the Senate to account for their use of public funds. With the history of the Judiciary being used as a tool to settle political scores still fresh in the minds of many, these rulings created an impression that the Judiciary was intent on protecting those in high office. For an institution said to be engaged in extensive reforms, this was a significant setback.

Chief Justice Willy Mutunga also had concerns about interference in judicial affairs by powerful cartels within government. He lamented the challenge of reforming institutions without the requisite political will. One of his key concerns was what he termed blatant attempts by the Executive and Legislature to undermine the independence of the Judiciary. According to Dr Mutunga, however, the Judiciary would, on its part, actively root out vested interests seeking to interfere with its internal affairs.

²⁶ Kegoro, George, Daily Nation. 1 March 2014 *Lawmakers and the Drive to Defy 'Stupid Orders'*.

The doctrine of separation of powers secures the independence of each arm of government, such that none should interfere with the work of the other. Territorial disputes may be expected early on in a new constitutional dispensation, as each arm of government seeks to claim its space and set boundaries. Parliament may have had a legitimate grievance in feeling that the courts, at times, overreached and interfered in legislative territory. However, while judges should exercise discretion in the granting of orders, threats to exercise discretion in obeying court orders were inadvisable. Attempts to disrespect and enfeeble the Judiciary in any democracy are dangerous. Courts' decisions ought to be obeyed by all, and where injustice is perceived to be done, relief should be sought from the same or higher courts.

3.1 Judicial Service Commission

On the basis of a request by the Public Accounts Committee of the National Assembly, and a similar request by Chief Justice Willy Mutunga, the Auditor General carried out a special audit on the Judicial Service Commission (JSC) and the Judiciary. Four similar and concurrent investigations were carried out by the Ethics and Anti-Corruption Commission (EACC), the Public Procurement Oversight Authority (PPOA), the Office of the Ombudsman, and the Internal Auditor-General from the National Treasury²⁷. The special audit report revealed a number of irregularities, overrides of stipulated controls, overstepping of mandate, and breach of procurement laws and regulations. The Constitution provides that the JSC shall "...promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice²⁸". The audit report found instances in which the JSC had been involved in

improper operational activities, or had failed to carry out proper procedures. These included failure to keep minutes of meetings, failure to approve payments to suppliers, failure to develop human resource and training policies, and direct procurement of its offices at Mayfair Centre (for which rent of Ksh 7.4 million was paid for two years prior to occupying the office)²⁹. Over and above these irregularities, the JSC was also found to have sanctioned the irregular payment of Ksh 9.8 million in allowances to non-commissioners who attended JSC meetings, and Ksh 1.6 million to commissioners who attended meetings that were not duly constituted pursuant to S. 22(5) of the Judicial Service Act, 2011.

Against the background of the findings of the special audit report, the judiciary and the JSC found themselves in the limelight. Removal proceedings against former Chief Registrar of the Judiciary Gladys Boss Shollei were the catalyst for retaliatory removal proceedings against six members of the JSC, with a tribunal being set up by the President to look into the suitability of the six members. The tribunal, led by retired Justice Aaron Ringera, was composed of individuals perceived to be sympathetic to the ruling coalition and specifically, President Uhuru Kenyatta, precipitating a legitimacy crisis. Ultimately, the Law Society of Kenya (LSK) intervened and sponsored the position of the perceived principal target of the removal proceedings, Ahmednasir Abdullahi. Abdullahi made himself a target when he came to be seen as the face of the JSC due to his robust and sometimes belligerent demeanour, and perceived arrogance during the vetting of judges. Following internal consultations, Abdullahi decided not to contest the position for a further term, thus defusing the crisis³⁰.

²⁷ Office of the Auditor-General, April 2014, *Special Audit Report on the JSC & Judiciary*.

²⁸ Constitution of Kenya 2010, Article 172.

²⁹ Office of the Auditor-General, April 2014, *Special Audit Report on the JSC & Judiciary*.

³⁰ Harold, Ayodo, Law Society of Kenya, *Three Year Term of One Representative Ends This Year*. Available at: <http://www.lsk.or.ke/index.php/component/content/article/1-latest-news/254-ahmednasir-volunteers-out-of-jsc>.

3.2 The International Criminal Court Cases

As in previous years, intrigues around the International Criminal Court (ICC) continued to take centre stage. The cases against President Uhuru Kenyatta, Deputy President William Ruto, and Joshua Arap Sang had far reaching implications around the country. The cases had on several occasions showed signs of faltering, with ICC Prosecutor Fatou Bensouda challenged by witness withdrawals in both the *Ruto* and *Kenyatta* cases. A significant number of witnesses lined up in both cases at The Hague withdrew, raising serious questions around the possibility of witness tampering and intimidation. The exodus of critical witnesses was a major blow to the prosecution. Eventually, the prosecution was forced to withdraw charges against President Kenyatta, due to the withdrawal of one key witness, and after learning, late in the case, that a star witness professed to have lied about being present at a key meeting where President Kenyatta was allegedly present. The prosecution cited non-cooperation by the Kenyan government, which consistently failed to provide the prosecution with outstanding evidence³¹, some of which pertained to President Kenyatta's financial records. These records were required to substantiate a key allegation by the prosecution that President Kenyatta had financed the post-election violence in Nakuru and Naivasha.

In the case against Deputy President Ruto, the prosecution was equally alarmed at the number of witnesses who had withdrawn from the case, and issued an arrest warrant against Walter Barassa, a journalist suspected of corruptly influencing a number of witnesses. Several witnesses also swore affidavits recanting their earlier testimony, further complicating matters for the prosecution.

The judges in the Kenyatta case severely criticised the investigation carried out by the prosecution. They expressed serious misgivings about the thoroughness of its investigations, and specifically whether the prosecution had acted "...in accordance with its responsibilities under Article 54 (l) (a) of the Statute—verifying the credibility and reliability of the evidence upon which it intended to rely at trial³²". All judges expressed displeasure with the prosecution for failing to review the consistency and reliability of their witnesses. At the same time, it is clear that the case was severely hampered by the withdrawal of witnesses, especially after the election of Uhuru Kenyatta as President of Kenya, and the Kenyan government's resistance to cooperating with the prosecution.³³

Prior to a scheduled status conference requiring the attendance of President Kenyatta, there was great speculation as to whether he would attend the Court, considering the possibility of an arrest warrant if he failed to appear. As speculation reached fever pitch, the President called a special session of Parliament during a recess, requiring MPs to hurry back. In a seemingly unprecedented move, he announced that he would indeed appear at The Hague, not as a president, but as a private citizen. He informed Parliament that he would temporarily transfer power to Deputy President, William Ruto, to maintain the sovereignty of the nation. Much was made of this, with media jostling to capture Kenyatta leaving Parliament, and travelling outside Kenya without state trappings.

In reality, little out of the ordinary had transpired. Images of Deputy President Ruto traveling in the presidential motorcade, and 'private citizen' Kenyatta checking himself in at the airport to board a flight to The Hague, were cleverly executed PR. In actuality, each time the President leaves the country, he

³¹ Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-01/11-982.

³² Felix, Olick, The Standard, 3 April 2014, *ICC Judges Slam Prosecutor Fatou Bensouda Over Evidence Against President Uhuru Kenyatta*.

³³ For example, refer to KPTJ, 5 December 2014, *All Bark, and no Bite; State Cooperation and the Future of the ICC*, Available at: <http://kptj.africog.org/wp-content/uploads/2015/02/FINAL-ICC-COOPERATION-210215.pdf>

temporarily hands over power to his deputy. Indeed, while seeking excusal of his continuous presence at the Court, President Kenyatta famously made a speech in which he declared that he and Ruto would not leave a vacuum, and would alternate appearances at the ICC. The ICC acceded to this position.

As the case against President Kenyatta reached its most crucial juncture, judges retreated to consider the options available to them. These included: termination of the case, an acquittal, indefinite adjournment, temporary withdrawal of charges, or to refer Kenya to the Assembly of States Parties (ASP) for the Kenyan government's alleged non-cooperation with the ICC. Attending the status conference to discuss the case, private citizen Kenyatta was careful to maintain perfect silence. All parties made spirited arguments before the Court, clearly in recognition of the fact that the case was at a crossroads. Fergal Gaynor, representing the interests of the victims, made an impassioned plea to the Court not to reward the Kenyan government for its failure to cooperate. In what was now a familiar feature at The Hague, numerous Kenyan leaders travelled with the President, ostensibly to offer support and solidarity. Despite protestations to the contrary, it was not clear whether any, or all of these trips to support a private individual, were paid for by taxpayers.

Finally, on 5 December 2014, the prosecutor decided to withdraw the case against President Uhuru Kenyatta after the Trial Chamber's failure to refer Kenya to the ASP for non-co-operation. The prosecution reserved the right to reinstitute proceedings if evidence became available at a later date. The withdrawal left only the cases against Deputy President Ruto and Joshua Arap Sang to proceed at The Hague, with charges dropped against the other four Kenyans.

Throughout the ICC-Kenya trials, the story most muted is that of the victims. The bulk of media attention has been devoted to the accused, with victims more often than not forgotten. Their suffering and quest for justice, often only came to light as an afterthought. Civil society groups also complained that the Trust Fund for Victims, seemed to have grown indifferent to the victims' plight³⁴. Prosecutions and reparations remain elusive. The primary responsibility of investigating and prosecuting these crimes has always been that of the Government of Kenya and on this score, it has failed dismally. Victims of post-election violence have long viewed the ICC as their only viable option for justice. Furthermore, there is still no tangible effort by the Trust Fund for Victims to commence operations in Kenya. The vast majority of victims continue in urgent need of assistance to rebuild their lives and regain their dignity³⁵.

³⁴ Nzau, Musau, The Standard 26 October 2014, *Civil Society Locks Horns With ICC Over Trust Fund*.

³⁵ Kenyans For Peace With Truth And Justice (KPTJ), *Statement At The 13th Session Of The Assembly Of State Parties To The Rome Statute During The General Debate*

4. The Fight Against Corruption

Kenya continues to battle unbridled corruption. Numerous scandals emerged in 2014, while the political will and capacity of the government to address them remained in question, despite a robust constitutional and legal framework. Since coming to power, the Jubilee led government has made numerous anti-corruption promises. However, the Transparency International Corruption Perception Index for 2014 ranked Kenya at position 145 out of 174 countries³⁶. The previous year, Kenya was at position 136 out of 177, suggesting that perceptions of Kenyan corruption had grown. Kenya's transparency score dropped two points in 2014 to 25, down from 27 in 2013 and 2012, with 0 being very corrupt and 100 being very clean. It is of great public concern that Kenya consistently features in the lower quadrant of this index. A report by Transparency International Kenya ranked Kenya as the third most corrupt country in East Africa, after Tanzania and Burundi in second and first places respectively. The East African Bribery Index (EABI) further indicated that the Kenya National Police Service was the most corrupt sector this year³⁷.

The Ibrahim Index on African Governance (IIAG) 2014, on the other hand, showed that Kenya was closing in on several East African nations that often held top positions in the governance ranking. The Ibrahim Index measures four criteria: safety and rule of law, participation and human rights, sustainable economic opportunity and human development. Overall, Kenya scored 57.4 points out of a possible 100, a slight improvement from 53.6 last year when it ranked position 21. This was two points above the continental average score of 51.6, though Kenya continued to perform below the continental average on personal and national safety, where it was ranked 39 out of 52 African nations. The poor score on security was linked to the gun and grenade attacks by terror networks.

The recent rise in ranking, the report says, was largely driven by Kenya's performance in the category of human development, where it ranked 16 out of 52, and economic opportunities, where it was at position 11³⁸.

The magnitude of the problem prompted Western government representatives in Kenya to speak out in an effort to spur the government and anti-corruption agencies into action. In a joint statement, heads of mission from the US, UK, Switzerland, Canada and Denmark (among others) noted that corruption threatens Kenya's economic growth, security and the provision of government services³⁹. They went on to note that, as the country works to implement devolution, corruption holds Kenya back. Of utmost concern is the effect of corruption on security, as it facilitates the success of terrorism, sometimes with the complicity of state officials. While applauding President Kenyatta's commitment to ending corruption in his state of the nation speech, the Heads of Mission highlighted the need for a sustained effort to strengthen governance and transparency alongside rigorous enforcement of anti-corruption laws.

4.1 Auditor General

The Auditor General, Edward Ouko made the startling revelation that Ksh 500 billion could not be accounted for since 2012. He noted that this massive misappropriation of public resources through outright theft, mismanagement and waste was widespread throughout the government. This amount accounts for almost half of the projected tax revenue for the previous financial year. The Auditor General lamented that little had changed in approach and attitude towards public resources, and in fact, accountability issues arose from the same government departments on a regular basis. Such wastage at a time when the

³⁶ Transparency International Corruption Perception Index 2014. Available at: <http://www.transparency.org/cpi2014/results>.

³⁷ East African Bribery Index 2014.

³⁸ Ibrahim Index of African Governance Rankings 2014.

³⁹ Chiefs of Missions in Kenya, The Standard, 13 April 13, 2014, *Corruption Undermines Kenya's Efforts to Fight Terrorism*.

government professed its keenness to drastically reduce unnecessary expenditure was unfortunate.

The Auditor General further estimated that as much as 30% of the government's total budget is wasted. To put this into perspective, he noted that the Ksh 338 billion lost in the previous financial year could have financed the Nairobi-Mombasa phase of the Standard Gauge Railway. Instead, Kenya had assumed a significant debt for this project, on terms that remain unclear.

4.2 The Continuing Plunder of Public Funds

As in previous years, there were numerous instances of outright plunder of public funds. In addition, wastage and irresponsible use of funds from the exchequer were also reported. A cavalier attitude towards public funds and the uncontrolled desire for illicit enrichment fuelled the losses. Public sector impunity for economic and other crimes fuelled a continuation, and even intensification, of massive corruption.

4.2.1 Sky Team

In 2014 rumours began to emerge of a cartel of politicians from the Jubilee coalition that was allegedly prompting senior members of the public service to think twice before making procurement decisions. Referred to colloquially as the "Sky Team Fixers"⁴⁰, the group was said to be led by two Senators and a member of the National Assembly close to the Presidency. They allegedly used their influence and the names of the President and his deputy to intimidate accounting officers, and to extort and solicit funds. Reports within government circles reportedly detailed parastatal heads who were induced to disburse large sums of public money from their institutions for *harambees*, or donations, sometimes on a weekly basis, through threats of reprisals or job loss. The allegation

that senators were members of the Sky Team caused a heated debate in the Senate, but no names were specified⁴¹.

The Sky Team was said to be ambitious, powerful, and blatant in its approach. No demand was too high, nor was anyone outside their reach, regardless of office. The team was said to be responsible for blocking Jubilee campaign financiers from accessing certain government contracts; benefits these financiers had expected as rewards for their campaign support. Lending credence to these reports, the President's Chief Adviser on Political Affairs, Nancy Gitau, also claimed to have fallen prey to the Sky Team⁴². Sources linked the Sky Team Fixers to one side of the Jubilee coalition, suggesting that they were exposed only due to infighting within the coalition over the distribution of the spoils of office.

The Sky Team Fixers were apparently assembled for political purposes: to engage with the opposition and perceived opponents on the political battlefield. In time, their influence and reach grew beyond measure, providing them with access to numerous lucrative opportunities at the public's expense. When the story broke, it raised deep suspicions between members of the two dominant parties in the Jubilee coalition, The National Alliance (TNA) and the United Republican Party (URP).

In one of its more brazen acts, the Sky Team attempted to alter requirements for a Ksh 2.7 billion tender to inspect vehicles prior to their importation into Kenya. Through a proxy, the Sky Team allegedly protested to the management of the Kenya Bureau of Standards (KEBS). Officials at KEBS claimed they were forced by the Sky Team to amend rules to drop marks that would be earned for having zero incidents of clearing over-

⁴⁰ Mwaniki, Munuhe, The Standard, 8 November 2014, *Trouble in Jubilee Government Over MPs in Extortion Ring*.

⁴¹ Hansard. 23 September, 2014

⁴² Munuhe, loc.cit.

age and radiation-infected vehicles. This violated the law that states that only vehicles up to eight years of age may be imported. The tender contemplated penalties for firms that had a history of importing over-age vehicles. These kinds of activities greatly frustrated parastatal heads and business executives, forcing them to seek redress from the Office of the President⁴³. The manipulation of procurement processes by politicians to eliminate fair competition was criticised as a barrier to business.

4.2.2 Chickengate

The 2013 election was dogged by questions of credibility, discussed at length in the 2013 Kenya Governance Report. The procurement processes prior to the election were also called into question. A multi-million shilling corruption scandal, now referred to as “Chickengate” only raises further questions about the 2013 election. A four-year investigation by the UK’s Serious Fraud Office (SFO) revealed damning email exchanges between officials of Smith and Ouzman, a UK printing firm, and managers in the Interim Independent Electoral Commission (IIEC), the predecessor to the IEBC. Bribes offered to Kenyan IIEC officials by Smith and Ouzman, to win contracts for printing polling materials, were referred to as “chicken” in communications between the company and their Kenyan go-between.

Though the IEBC engaged the services of Smith and Ouzman to print ballot papers in 2013, it emerged soon after that the firm was under investigation for bribery to secure printing contracts in Africa. The IEBC ignored

advice from the National Intelligence Service about the impending investigation and went on to engage Smith and Ouzman for the 2013 electoral process. The tender process itself was riddled with controversy. Justice Odunga overturned a challenge against the single sourcing of Smith and Ouzman, citing public interest⁴⁴, due to insufficient time to put the contract to tender before the election⁴⁵. Among those suspended from the IEBC over Chickengate is James Oswago, who served as CEO, and was alleged to have received a bribe through Smith and Ouzman’s agent in Kenya, Trevy Oyombra. Oswago denied the claim.

Smith and Ouzman Ltd and their two employees were convicted on the 22 December 2014 for corrupt payments totalling UK£395,074. Christopher Smith, Chairman of Smith and Ouzman, was convicted of two counts of corruptly agreeing to make payments while Nicholas Smith, Sales and Marketing Director, was convicted of three counts of the same offence⁴⁶. The convictions caught the attention and imagination of the Kenyan public and media. The question in the minds of most was that if two individuals had been convicted of corruptly agreeing to make payments, surely the recipients of those payments in Kenya should also have a case to answer. AfriCOG and KPTJ wrote to the SFO, detailing the effects of bribes paid to electoral officials on the people of Kenya, the consequences of compromised electoral integrity and exacerbated political uncertainty. The letter was made available to the judge in the UK courts by the SFO⁴⁷. Whether prosecutions will follow in Kenya remains to be seen.

⁴³ Mwaniki, Munuhe, Shiundu, Alphonse & Ronoh, Faith, The Standard, 15 November 2014, *Sky Team’s Fresh Bid to Influence Ksh 2.7 Billion Kenya Bureau of Standards Tender*

⁴⁴ Miscellaneous Civil Application 2 & 11 of 2013

⁴⁵ Mwaniki, Munuhe, The Standard, 22 March 2014, *Did Firm That Printed 2013 Ballots Bribe To Get Deals?*

⁴⁶ Serious Fraud Office, 22 December 2014, UK printing company and two men found guilty in corruption trial

Available at: <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found-guilty-in-corruption-trial.aspx>

⁴⁷ Corruption Watch, 13 February 2015, *No Room at the Witness Stand – Kenyan Groups Raise the Question of Victims of Corruption in the UK Courts* Available at: <http://www.cw-uk.org/2015/02/13/no-room-at-the-witness-stand-kenyan-groups-raise-the-question-of-victims-of-corruption-in-the-uk-courts-2/>

4.2.3 Standard Gauge Railway Project

The Standard Gauge Railway (SGR) project has been dogged by controversy almost from inception. Demonstrating a clear resolve to proceed with the project, the government sweepingly dismissed concerns raised. In unclear circumstances, the overall cost of the project rose by Ksh107 billion between July 2012 and November 2013. The China Road and Bridge Corporation (CRBC), a Chinese State Corporation, was awarded the contract the fact that it had conducted the feasibility study for the project. It was then paid Ksh 100 billion as a first instalment, despite Parliament and the EACC launching an investigation into the project⁴⁸. Transport Principal Secretary Nduva Muli refuted claims that the new line would cost the country Ksh 1.3 trillion. However, the cost of the Nairobi to Mombasa phase of the project, Ksh 327 billion, was still Ksh 107 billion higher than the Ksh 220 billion Mr Muli himself agreed with CRBC when he awarded them the contract in July 2012.

The procurement process for SGR continues to generate numerous queries⁴⁹, few of which have been satisfactorily addressed. Analysts note that Mr Muli was MD of Kenya Railways, and thus the main correspondent on the contract, at the time the contract award was made. The glaring conflict of interest that arises out of CRBC both carrying out the feasibility study and tendering for the contract also went unexplained. Further controversy befell the SGR project when it emerged that a contract for the supervision of construction and procurement of facilities was awarded to another Chinese State Corporation, Third Railway Survey and Design Institute Group (TSDI). TSDI was to supervise the main SGR work undertaken by CRBC, alongside a Kenyan company, APEC, which had supervised works undertaken by other Chinese companies, including the Thika highway. One of the unsuccessful bidders, Team Engineering

of Italy, protested in writing that Kenya Railways kept other bidders in the dark on the outcome of the tender process. It was apparently only as a result of the protest letter that an email communication was sent to other bidders, informing them of the tender bid winner.

The process of the acquisition of land for a totally new right-of-way also created a significant delay on the SGR project. In total, 11,000 acres were earmarked for acquisition along the proposed route. A team from the Transport Ministry, Kenya Railways, and the National Land Commission (NLC) was set up to oversee the land acquisition process. Some leaders, however, threatened to block the implementation of SGR, on the basis that the NLC had not done a full valuation of land along the proposed line to enable compensation for those displaced. The leaders, including Governor John Mrutu (Taita Taveta), MPs Jones Mlolwa and Thomas Mwadeghu, and a number of ward representatives, claimed that some land owners had been left out of the compensation exercise. They claimed that a number of landlords had not signed the paperwork necessary to facilitate compensation, and had thus been locked out of the process. They therefore sought a re-valuation process to include those locked out.

By the end of 2014, the government was well on its way to completing the land acquisition. Roughly 85% of the exercise was done, with the remainder expected to be complete by the end of February 2015, at a total cost of Ksh 10 billion. Initial works were underway, with the project expected to be completed in 42 months. The government hoped that the employment potential of the project would partly allay opposition from various quarters. At its peak, the SGR was projected to create in the region of 30,000 jobs. Expectations were soon dampened, however, by reports of the importation of 5,000 Chinese workers, although the Kenya Railways Corporation managing director said that they would not supplant the projected local jobs⁵⁰.

⁴⁸ Paul, Wafula, The Standard, 14 January 2014, *Lifting the Veil: Inside the Ksh 327 Billion Standard Gauge Railway Tender Row*

⁴⁹ See, for example, 2014, Joint Forum of Religious Leaders, *Frequently Asked Questions on the Standard Gauge Railway*

⁵⁰ Kiarie, Njoroge, Business Daily Africa, 5 August 2014, *5,000 Chinese workers expected for railway project*

4.2.4 Police Recruitment

The regular police recruitment exercise offers a valuable vocational opportunity to young Kenyans. Previous exercises were rife with reported corruption. The level of scrutiny of the 2014 exercise was therefore high. Unfortunately, it was once again marred by irregularities. Those who missed out on recruitment complained of corruption, ethnic discrimination, nepotism and political interference. Many claimed to have paid amounts of Ksh 200,000 to Ksh 300,000 as bribes. The High Court found that the hiring was tainted with corruption, irregularities, and blatant violation of the Constitution. High Court Judge Isaac Lenaola held that, "In the instant case...the National Police Service Commission (NPSC) failed itself, it failed Kenyans, it failed the recruits, it failed the Constitution and it must be told so⁵¹". The NPSC, in a joint statement with the Ethics and Anti-Corruption Commission set up a multi-agency working group to collect, collate, and analyse all complaints, and make recommendations to the NPSC for further action⁵². The prevalence of bribery and the amounts involved made it clear that the very first thing on young recruits' minds would be to recoup the significant "investment" by their families, rather than to provide "service to all", in keeping with the police motto.

4.2.5 Controversy in the Land Sector

Throughout the year, matters concerning land issues were slowed down by on going turf wars between the National Lands Commission (NLC) and the Ministry of Land, Housing, & Urban Development. The National Lands Commission derives its mandate directly from Article 67(2) of the Constitution, which provides that the functions of the NLC are, *inter alia*:

- to manage public land on behalf of national and county governments
- to recommend a national land policy to the national government

- to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya
- to initiate investigations, on its own initiative, or on a complaint, into present or historical land injustices, and recommend appropriate redress.

The responsibilities of the Commission are further articulated under the National Land Commission Act, which provides the NLC with powers to alienate public land (with the consent of the national and county governments), and to monitor the registration of all rights and interests in land. The Ministry of Land, Housing & Urban Development, on the other hand, was established in May 2014, through Executive Order No. 2/2014, and charged with the responsibility of providing policy direction and coordinating all matters related to land, housing and urban development. With mandates to execute in the same area, but without a clear demarcation of roles, conflict between the two institutions was perhaps inevitable. Over time, the situation escalated markedly, with disagreement over access to registries and records, and custodianship of land records. Eventually, President Kenyatta intervened and demanded that the two protagonists, NLC's Muhammad Swazuri and Cabinet Secretary Charity Ngilu, end hostilities by signing a memorandum to that effect in his presence. During a ten-day freeze on land transactions by the Lands Ministry, ostensibly to audit the central registry, the NLC claimed the closure was illegal. The NLC insisted that some of the functions frozen, such as determining the form of a land register that shall be maintained in each registration unit, were squarely within the remit of the Commission. NLC officials also claimed that the Cabinet Secretary deployed armed officers to prevent them from doing their work. The Cabinet Secretary (CS) countered by maintaining that NLC was an advisory body whose role was limited to providing recommendations to the ministry.

⁵¹ Paul, Ogemba, Daily Nation, 31 October 2014, *Court Halts Hiring of 8,000 Police Recruits*.

⁵² National Police Service Commission, 2014, *Joint Statement on the Police Recruitment Exercise* Available at: <http://www.npsc.go.ke/index.php/latest-news/132-joint-statement-on-the-police-recruitment-exercise>.

These conflicts affected land transfers, leases and the signing of title deeds. The fight also extended to routine issues such as office space and who had the power over land administration. While the genesis of the animosity is unclear, CS Charity Ngilu's attempt to transfer senior gazetted officers – former Commissioner of Lands, Zablon Mabea, Chief Lands Registrar, Wambugu Ngatia and Director of Survey, Euphantus Murage – undoubtedly played a part. There was also disagreement on appointments and sacking of employees in the Lands Ministry.

The wrangles at national level carried down to the counties. The battle in the counties was sparked by a letter written by the NLC staking claim to signing of titles. As a result of the differences between Ngilu and Swazuri, the Ministry of Lands, one of the highest income earners for the Consolidated Fund, contributed less than Ksh 1 billion of an anticipated Ksh 16 billion to the fund. Attempts by Parliament's Land Committee to reconcile the two were futile, as both insisted their authority derived from the Constitution.

Issues around land transfers remain in crisis due to the divided mandate between the Cabinet Secretary and the NLC.

Karen Land Saga

The year was marred by mega scandals in the lands sector. Of note was the Karen land dispute, involving a multibillion-shilling plot of land in Karen, whose ownership became the subject of a high-profile court case. At the centre of the dispute were claims that the land had been invaded by a group of influential individuals, among them public servants, including Members of Parliament.

In a report signed by only 8 of the 29 members, the Parliamentary Committee on Lands, chaired by Alex Mwiru, observed that there was systematic

documentation of ownership of the land from 1919 to 2005. This documentation recorded the transfer of the land from one Arnold Bradley to John Mugo Kamau to Telesource.com Limited.⁵³ The matter moved to court after private developers moved in and subdivided the land for development.

However, committee Vice-Chair, Moses ole Sakuda, did not append his signature to the report. Sakuda had instigated a petition aimed at ousting the Chair over his stand on the matter. The committee observed that entries made in the provided title copy suggested tampering, cancellations and entries made at a single sitting. The committee also recommended that the Ethics and Anti-Corruption Commission (EACC) and the Directorate of Criminal Investigations (DCI) verify the authenticity of the title and transfer documents through forensic analysis. However, reports that beneficiaries of the fraudulent land allocations included both MPs, and members of the National Assembly's Lands Committee who were investigating the matter, dented the credibility of the enquiries⁵⁴. Ascertaining the true origins of corruption controversies is a common feature of a system where institutions are often captured and perverted to serve particular interests and impunity reigns on all sides.

4.3 Procurement

4.3.1 Safaricom Security Tender

As a response to rising insecurity, the government sought to implement a communication and surveillance system, initially in Nairobi and Mombasa. The system aimed to improve surveillance within the cities and link police stations to a National Police Operations Centre. Questions were raised on due process when Safaricom was single-sourced to implement the project. Further questions arose on security, as Safaricom is 40% owned by Vodafone, a foreign company. There were concerns about the security risks posed by the engagement of a foreign entity in a project with national security implications.

⁵³ Report of the Departmental Committee on Lands on disputed Karen land, LR 3586/3

⁵⁴ Samuel, Kisika, News24 Kenya, 19 November 2014, *Karen land investigation report to be released in 30 days*

Though initially conceptualised in 2006, the project did not get off the ground due to a number of court challenges. Following the eventual award of the contract, the process seemed set for the same fate as previous attempts, when Parliament sought to suspend the project, primarily over breach of procurement laws in single-sourcing Safaricom. The National Assembly Committee on Administration and National Security began an inquiry into the Ksh 15 billion project in June 2014. In the course of their investigations, the committee questioned the Ministry of Interior and Coordination of National Government, the Ministry of Information, Communication, and Technology, the National Intelligence Service (NIS), and Safaricom. Enquiries revealed that the then Communications Commission of Kenya had been embroiled in a court case with Tetra Radio Ltd, the company that originally won a licence to provide a communication system for the police in 2002⁵⁵. The licence was cancelled due to a lack of capacity to meet the terms of the tender, precipitating the on-going court case.

The Ministry of Interior and Coordination of National Government, the procuring entity in this matter, told the Parliamentary Committee that the decision to procure directly from Safaricom was made to avoid the protracted process of previous tenders for police communications and surveillance systems, due to the urgency of the project. Investigations further revealed that of the Ksh 15 billion contract value, Ksh 12.7 billion would be used for building the system, while Ksh 2.2 billion would cater for maintenance support of the system for the next five years. Committee Chair, Asman Kamama noted that review of the tender by the Public Procurement Oversight Authority (PPOA) found that the procurement method used was legal, as the ministry had met the threshold for direct procurement as provided in the Public Procurement and Disposal Act⁵⁶. Kamama stated that the committee took

cognisance of Article 227 of the Constitution requiring state entities contracting for goods and services to do so through a process that is fair, equitable, transparent, competitive and cost effective, and S. 74 of the Public Procurement Disposal Act which allows for direct procurement if certain conditions are met. Thus, the contract was signed in November 2014, with an expectation that the works would be completed within 18 months.

4.3.2 Laptop Project

In keeping with their 'digital' tagline, one of the Jubilee coalition's main campaign pledges was the provision of laptops to all Standard 1 pupils during their first year in office. The challenge of implementing a project of this magnitude became clear early on in their administration. No comprehensive, systematic policy or plan was presented to justify the project. Rather, the promise appeared to be a quickly thought up gimmick to attract votes. Practical considerations included:

- Would it not be better to provide schools with computer labs for all their students?
- In areas without electricity, how would laptops be charged?
- Were teachers trained to teach using laptops?
- What maintenance infrastructure would be set up, and would it sufficiently cover marginalised areas?
- Is the curriculum designed to accommodate teaching in this manner?

A report by Uwezo Kenya found that there was at least one computer for every ten schools in Kenya, and only five out of ten schools use them for learning purposes⁵⁷. These and many more questions continued to haunt the implementation of the project. None, however, was more troublesome than that of procurement.

⁵⁵ Hansard, 26 August 2014

⁵⁶ Hansard, 26 August 2014

⁵⁷ Uwezo Kenya, Annual Assessment Report 2012, *Are our Children Learning?*

The Public Procurement Administrative Review Board cancelled the tender awarded by the Ministry of Education, Science, & Technology to an Indian firm, Olive Telecommunications Pvt Ltd., ruling that Olive did not win the tender fairly, that Olive did not have the financial capacity to supply the 1.2 million laptops required, and that Olive had received insider information on the progress of tendering. In addition, Olive altered its final quotations from the initial asking price, a violation of the Procurement Act. Finally, Olive was not an original equipment manufacturer (OEM), and thus was not qualified to bid. As a result, the board asked the ministry to re-tender the contract within 45 days, to previous bidders only, excluding Olive.

Olive sought judicial review of the decision. The High Court ultimately nullified the tender process. A three judge bench ruled that the nullification of the tender was "...in order to strive towards the achievement of the constitutional principles and values enunciated in Article 227 of fairness, equity, transparency, competitiveness and cost-effectiveness as well as the statutory aim in section 2 of the Act of increasing public confidence in procurement procedures, the tendering process which was conducted by the [Ministry of Education, Science, & Technology] herein ought to be and is hereby annulled and the tendering process is set aside in its entirety⁵⁸". The court also found that the Public Procurement Administrative Review Board exceeded its jurisdiction in barring Olive Telecommunications from re-tender, and ruled that any subsequent project should be undertaken "...*de novo* in accordance with the Act and Regulations⁵⁹".

4.3.3 Corruption in the Judiciary

Residence of the Chief Justice

The Judiciary itself, was found to be guilty of a number of procurement irregularities. The Judiciary sought to acquire an official residence for the Chief Justice from Machakos Senator, Johnstone Muthama. The fully furnished residential property was found to have been procured irregularly, at a total cost of Ksh 310 million, as it had not been valued by a government or professional valuer. The only available valuation, conducted by JKUAT Enterprises Ltd, was unsigned. Despite this, the purchase was sanctioned by the JSC⁶⁰.

Rahimtullah Towers

Further irregularities were discovered in the leasing of space at Rahimtullah Towers and Elgon Place. In the case of Rahimtullah Towers, the Judiciary Tender Committee awarded the lease of 41,897 square feet at a monthly charge of Ksh 6.3 million, which included rent payable, service charge and parking fees. However, the signed lease between the Judiciary and Ismail Rahimtullah Trustees & Sony Holdings Limited was for 35,224 square feet at a monthly charge of Ksh. 3.3 million. Thus the award exceeded the lease agreement by Ksh 3 million.

The Judiciary also paid Ksh32.4 million as rent and service charge for six months. The deposit paid was calculated on the basis of rent payable effective 1 July 2017 of Ksh 4.4 million, instead of rent applicable at the time the lease was signed of Ksh 3.3 million. This overpayment of Ksh1.08 million per month amounted to Ksh 6.4 million for the six months. Although these payments are in accordance with the lease agreements, the Judiciary failed to safeguard public resources and its own interests⁶¹. Furthermore, the lease agreement was not registered as required by law.

⁵⁸Kenya Law Reports, 2014, *Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited*

⁵⁹ Ibid

⁶⁰ Office of the Auditor-General, April 2014, *Special Audit Report on the JSC & Judiciary*

⁶¹ Ibid

Elgon Place

The Judiciary tendered a contract in 2012 for the provision of new premises for the Court of Appeal. The Tender Document and Appendix stated that the price was to be quoted in Kenya shillings. The availed tender committee minutes, however, indicated that the successful bidder, Knight Frank (K) Ltd presented their quote in US dollars. According to the tender, the premises were to be in a serene and secure location and in move-in condition as of January 2013. Elgon Place, the buildings offered by Knight Frank (K) Ltd, was still under construction.

The Tender Committee approved the award to Knight Frank (K) Ltd (agents of Sealink Holdings Ltd) for the lease of 34,400 square feet at a monthly charge of Ksh 4.2 million, which included rent, service charge and parking fees. But the signed lease agreement between the Judiciary and Sealink Holdings Ltd was for 47,890 square feet at a monthly charge of Ksh. 5.8 million. The Judiciary therefore irregularly leased an additional 13,490 square feet, for Ksh 1.6 million in excess of the approved tender.

Physical verification confirmed that Elgon Place had not been occupied for one year since the Judiciary signed the lease agreement. Therefore the Judiciary paid Ksh 70.1 million for space it had not occupied⁶². Court of Appeal judges, who were supposed to move into the building, were also concerned about the health impact of several telecommunications masts at the building. In the previous year, the LSK had advised its members against moving into the building until fears of the effects of harmful radiation were allayed⁶³.

4.4 Parastatals**4.4.1 Parastatal Reforms**

State corporations employ a total of 119,689 workers with an annual wage bill of over Ksh 131.2 billion. When the Jubilee government came to power, it promised to reduce the number of parastatals from 262 to 187. A Presidential Task Force was appointed, led by the President's Constitutional and Legal Affairs Adviser, Abdikadir Mohammed, and CEO of the Commercial Bank of Africa, Isaac Awuondo, to cull parastatals.

The task force recommended the following mergers of state corporations:

- Kenya Industrial Property Institute, Anti-Counterfeit Agency and Kenya Copyright Board into the Kenya Intellectual and Industrial Property Corporation
- Kenya Forest Service, Kenya Wildlife Service (KWS) and Kenya Water Towers Agency to form the Kenya Wildlife and Forest Service
- Brand Kenya Board, Export Promotion Council and KenInvest to be absorbed by the Kenya Investment Corporation (KIC)⁶⁴.

The task force recommended the dissolution of Kenya Yearbook Editorial Board, National Social Security Assistance Authority, Privatisation Commission, Kenya Rural Roads Authority, Kenya Urban Roads Authority, Canning Crops Board, Tourism Research Institute, Kenya Coconut Development Authority, Cereals and Sugar Finance Corporation, Coffee Development Fund and Cotton Development Fund.

Two bills, the Government Owned Entities Bill 2014 (GOE) and the National Sovereign Wealth Fund Bill 2014 were proposed to provide a legal framework for the reforms. The GOE Bill seeks to streamline parastatal operations, and adopt a leaner and more efficient structure, requiring the closure or merger of some state firms to avoid a duplication of roles. The

⁶² Ibid

⁶³ Mugumo, Munene, Daily Nation, 14 September 2014, *Lawyers told to avoid new building over cancer fears*

⁶⁴ Report of The Presidential Task Force on Parastatal Reforms

National Sovereign Wealth Fund Bill revamps how the government manages its' shareholdings in listed companies. It further considers how Kenya's mineral wealth will be managed and seeks to establish a national wealth fund from mineral rights revenues.

Other recommendations by the taskforce are yet to be effected and speculation is rife that this is due to political opposition. However the proposals themselves drew criticism, since the reforms seemed aimed at both successful and unsuccessful parastatals. The inclusion of the Sovereign Wealth Fund under the task force's deliberations was also seen as an anomaly.

Parastatal reforms stalled for the better part of 2014. Over 70 parastatals operated without boards while more than 100 had crucial positions vacant, including those of chairperson, chief executive officer and managing director.

4.5 The EACC

As the primary body responsible for the fight against graft, it is ironic that the Ethics and Anti-Corruption Commission (EACC) has faced a multitude of challenges. Its predecessors, the Kenya Anti-Corruption Authority and the Kenya Anti-Corruption Commission were both unceremoniously disbanded before they could have any real impact. The EACC, therefore, walks a tightrope between this legacy and the Constitution's promise of transparency and accountability in public life. Public confidence in the EACC remains low in the absence of high profile prosecutions emanating from its investigations. The public perceives the EACC to be a moribund institution, whose officials earn large salaries, but do little to fight corruption.

4.5.1 Appointment of Chairman

The appointment of EACC Chairman Mumo Matemu was a long and convoluted process. Originally nominated by former President Kibaki in 2012, it would

be over a year before he assumed office. During an acrimonious debate in the House, MPs questioned his suitability. Some claimed that he lacked 'passion' for the job. More substantively, documents were tabled claiming that while at the Kenya Revenue Authority, he failed to collect Ksh 2.4 billion in tax. Eventually, requisite numbers were mobilised in Parliament and his name was approved. However, his appointment was then challenged in a Nakuru court by the Trusted Society of Human Rights Alliance on a question of integrity, and the fact that this issue appeared to have been ignored during the appointment process. A three-judge bench proceeded to nullify his appointment. It was only on appeal that Matemu was eventually cleared to assume office.

4.5.2 Performance of EACC

During the 2013/14 financial year, the EACC reported that it had investigated and completed 68 reports, forwarding the files to the Director of Public Prosecutions (DPP) for action. The commission also undertook a total of 22 asset-tracing investigations of illegally acquired assets estimated at Ksh 7.2 billion. Assets valued at Ksh 2.1 billion were actually recovered through court proceedings and out of court settlements. Proactive investigations reportedly disrupted 16 corruption networks, averting the loss of public resources valued at Ksh 5.6 billion⁶⁵.

To fulfil its public education mandate, the EACC trained 90 Integrity Assurance Officers and 499 members of Corruption Prevention Committees on performance contracting in public service. Under the Public Outreach Programme, the Commission said it had sensitised over 600,000 people. Additionally, 72,078 students from 101 primary and secondary schools in nine counties were sensitised on the formation of Integrity Clubs and value-based character. The commission also trained 451 managers in the education sector⁶⁶. While these initiatives appear progressive, it is unclear what

⁶⁵ EACC Annual Report, 2013-14

⁶⁶ Ibid

effect they have had. Many experts judge awareness-raising drives to have little impact in contexts where corruption is endemic⁶⁷.

It was hoped that Chapter 6 of the Constitution and the Leadership and Integrity Act would go some way towards taming errant behaviour in public office. Sadly this was not the case. As this area falls squarely within the mandate of the EACC, much criticism of the commission was based on failures in this regard. The commission developed draft Leadership and Integrity Regulations and submitted them to Parliament. In addition, the EACC reviewed codes of conduct for 25 public institutions within the framework of performance contracting. Notices were also issued to responsible commissions, independent offices and county governments on their responsibility to implement the provisions of the Leadership and Integrity Act 2012⁶⁸. These measures did not satisfy a public longing to see the perpetrators of grand corruption face real consequences for their crimes.

Low in the confidence of Kenyans, the EACC must both communicate its efforts better, and speed up investigations of grand corruption, such as the Anglo Leasing scandal. The EACC is not mandated to prosecute, and so cannot be held solely responsible for the very poor record of prosecuting grand corruption,

or corruption involving prominent personalities and leaders. However, the EACC is responsible for investigations, and has performed this function dismally in the past. Long drawn-out investigations allow perpetrators to escape justice. The Anglo Leasing matter is a case in point; investigations are still on going more than ten years after they began.

Corruption: an entrenched culture

Despite decades of making laws and developing policy, corruption thrives in almost every facet of public and private life. It has become a deeply entrenched culture, one which cannot be eradicated simply by enacting new laws. In the first instance, it is imperative that anti-corruption laws are strictly enforced, rather than the haphazard, selective and politicised application that has more often than not been the case. Kenya's anti-corruption infrastructure is fairly robust, and if strictly adhered to, would go a long way towards dismantling endemic corruption. Secondly, a lack of leadership renders anti-corruption efforts piecemeal and disjointed. Committed leadership at the political, national, and county level would set the tone required for a sustained onslaught. The autonomy afforded to counties by the constitution allows dedicated county governments the opportunity to adopt robust anti-corruption policies, regardless of the rot at the national level.

⁶⁷ Cf. Daniel Kaufmann, 2005, "Back to Basics—10 Myths About Governance and Corruption", Finance and Development

⁶⁸ Ibid

5. Security and Insecurity

5.1 Growing Influence of Military

A clear tendency to appoint military officials to government positions has emerged over the last few years. For a country unaccustomed to military engagement in civilian affairs, the growing presence of military personnel, past and present, in civilian roles within the state, is a matter of concern, even though these officials are appointed in their individual capacities. This tendency speaks of a leaning towards prescribing simplistic authoritarian solutions to problems rather than engaging in the more complex tasks of political engagement and persuasion of constituents and stakeholders.

5.1.1 Appointments

Since coming to power in April 2013, the Jubilee government has appointed several military officials to positions of civilian authority. Former Major-General Gordon Kihlangwa was appointed Director of Immigration. Having attained the mandatory retirement age a year prior to his reappointment, Kihlangwa was expected to reform a department accused of compromising national security by issuing visas and residency permits for bribes.

Major-General Philip Kameru, a former head of military intelligence, was appointed Director General of the National Intelligence Service, after the surprise resignation of Major-General Michael Gichangi, also a former military officer.

Major-General (Rtd) Joseph Nkaissery, a former military official and opposition politician was appointed Cabinet Secretary for the Interior. Replacing the gaffe-prone and heavily criticised Joseph Ole Lenku, Nkaissery was tasked with addressing alarming levels of insecurity. President Kenyatta's appointment of a serving opposition politician and former military official to the sensitive post of the Interior caused much speculation in political circles.

Joseph Boinett, a one-time policeman who then joined the National Security Intelligence Service was nominated and appointed Inspector General of the National Police Service to replace David Kimaiyo. Nothing distinguished Boinett for the position, at a time of urgent security concerns. A mid-level NSIS officer, he shared the ethnic background of the outgoing Kimaiyo, prompting suggestions that ethnic considerations drove his appointment.

Despite constitutional principles on ethnic balance in public positions, numerous senior security appointments are of individuals from the same ethnic group as the President and his deputy. This creates the perception that certain ethnic groups seek to control the security services for their own purposes, or that individuals from other ethnic groups simply cannot be trusted with such sensitive dockets. This violates both constitutional principles and the agenda for national unification through ethnic inclusivity.

5.1.2 KDF Deployment for Police Functions

In addition to senior appointments that seemed to favour military personnel, the military was increasingly deployed on police duties. Its presence was evident during the attacks at Westgate, Tana River, Mpeketoni, and Kapedo. However, the increased deployment and presence of the military around the country does not appear to have improved security. If anything, Al Shabaab and other terrorist elements seem to have grown bolder and more successful.

Rather than deploying the military to tackle insecurity, investing in specialised capabilities in the police force would appear to be a better strategy. The Recce Squad of the General Service Unit (GSU) have proved themselves better at handling terror, especially in urban situations. The reputation of the military was severely dented when footage emerged of military officers looting Westgate during the four-day siege by AlShabaab gunmen in 2013. Reports reveal that the Recce Squad, by contrast, may have been close

to containing the situation on the first day of the siege, until KDF stormed the building, forcing the Recce Squad to retreat after suffering a “friendly-fire” incident. The Recce Squad is drawn from the larger GSU, which also provides protection to the presidency and various VIPs.

Police reforms contemplated a reformed police *service*; a service able to respond to citizenry in a timely, efficient, and professional manner. Requisite training is essential to transform a police force to a police service. It is also vital that specialist disciplines within the service (such as the Recce Squad), receive adequate attention and resources.

The experience of other African countries with military control over civilian affairs has not been positive. Images of the President in military attire are new and disturbing to Kenyans. On-going vigilance is called for against the militarisation of the state, lest security threats be used as a pretext to implement desired expediencies.

5.2 Insecurity

The year recorded an abnormally high number of incidents related to terrorism. Al Shabaab claimed responsibility for the Westgate (2013) and Mpeketoni attacks, maintaining they were in retaliation for the presence of Kenyan troops in Somalia. While Kenya has been vulnerable to terrorism in the past, the frequency and intensity of the attacks has escalated.

Assaults around the country through terrorism and other forms of insecurity have displaced thousands, and caused extensive loss of lives and property. Residents

have lost access to essential services such as education and health, in Baringo, Turkana, Wajir, Mandera, Tana River, Lamu, Samburu, Marsabit, Kisumu, Kericho, Narok, Kitui, Garissa and Isiolo. This has also led to the exodus of professionals, skilled labour and traders from these areas⁶⁹.

5.2.1 Incidents of Terrorism

The following incidents were recorded in the period under review:

- 14 March 2014: two suspects in Mombasa were arrested while driving a car carrying two improvised bombs⁷⁰.
- 19 March 2014: police parked an impounded car outside the Anti-Terror Unit offices in Mombasa. The car was later found to be carrying a massive cache of explosives⁷¹.
- 1 April 2014: six people were killed in Eastleigh and dozens more injured when terrorists hurled explosives at a food kiosk and bus stop about 50 metres apart⁷².
- 23 April 2014: a car bomb exploded outside Pangani Police Station, killing four people⁷³.
- 3 May 2014: twin attacks in Mombasa killed three people. The first incident took place at a bus station in Mwembe Tayari resulting in three deaths, while in the second, a bag containing an improvised explosive device (IED), exploded at the gates of the Reef Hotel, Nyali, causing no casualties⁷⁴.
- 4 May 2014: in an apparently coordinated attack on Thika Highway in Nairobi, IEDs exploded on two commuter buses, nearly simultaneously and about a kilometre apart. Three people were killed and at least sixty-two others were injured⁷⁵.

⁶⁹ KNCHR, 2014, *A Country Under Siege: The State of Security in Kenya, An Occasional Report (2010-2014)*

⁷⁰ BBC, 18 March 2014, *Kenya Arrests 2 After Bombs 'Found In Car'*

⁷¹ Mike, Pflanz, The Telegraph, 19 March 2014, *Kenyan Police Park Massive Car Bomb Outside Their Offices After Missing Explosives in Vehicle*

⁷² Cyrus, Ombati, The Standard, 1 April 2014, *Death Toll in Eastleigh Blast Rises to 6*

⁷³ BBC, 23 April 2014, *Kenya Car Bomb Kills Four in Nairobi's Pangani Quarter*

⁷⁴ The Telegraph, 3 May 2014, *Kenya Blasts: Three Dead After Twin Blasts in Mombasa.*

⁷⁵ Cyrus, Ombati, The Standard, 4 May 2014, *Three Dead After Twin Blasts Hit 2 Buses Along Nairobi Thika Highway).*

- 16 May 2014: at Gikomba Market in Nairobi, twin explosions claimed the lives of more than ten people. One explosion went off in a *matatu*, while the second was in the open-air market⁷⁶.

Aside from the incidents above, there were also a number of higher profile attacks as listed below.

5.3 Mpeketoni

A hitherto little known town, Mpeketoni in Lamu County is a settlement created during the tenure of the first President of Kenya in the late 1960s and early 1970s for landless Kenyans. Those settled at Mpeketoni were mainly from Murang'a and other parts of central Kenya⁷⁷. On the evening of 15 June, an attack, claimed by Al Shabaab, took 60 lives and left the region in terror. About 50 masked gunmen hijacked a van and raided a police station. They then went on to shoot men at random, reportedly sparing women. Witnesses reported that the attackers asked victims if they were Muslim or Christian. Muslims were spared, the others shot or hacked to death. The gunmen also burned hotels, restaurants, vehicles and government property. A similar overnight attack occurred, less than two days later, on the villages of Majembeni and Poromoko, in which 15 people were killed.

Again, concerns arose on the efficacy of official responses to the crises. The British High Commission had reportedly closed its consulate in Mombasa the preceding Friday over terror warnings⁷⁸. Western travel agencies also alerted their customers to the risks of travelling in Kenya at that time. Security sources claim that there was intelligence suggesting an imminent attack, though the information did not specify where, and in any event, was not acted upon.

In the wake of the Mpeketoni attack, disquiet grew over the delayed security response. It took about ten hours for first responders to arrive at the scene, despite intelligence on an impending attack and the proximity of security units in the area.

A redacted report by the Independent Policing Oversight Authority noted:

"The Administration Police Rapid Deployment Unit (RDU) left their Mkunumbi base which is about 16 km from Mpeketoni at around 2108 hours. They arrived in Mpeketoni at midnight but remained out of sight until 0445 am. The (...) who travelled with some officers from 30 km away, arrived in Mpeketoni at 0130 hours. This sequence of arrival is corroborated by police officers and civilian witnesses the team interviewed who reported that the General Service Unit (GSU) officers led by were the first to venture into the town at about 3:30am after firing had stopped. The RDU was spotted later at 0500 hours."

The methodical approach and religious overtones of the attack are noteworthy. The targeting of Christians and sparing of Muslims suggests that the attackers had foreknowledge and clearly understood and aimed to exploit the schisms in Kenyan society.

5.4 Kapedo

Ambushed while escorting exam papers to Kapedo, Turkana East Constituency, 21 police and three civilians were killed by bandits. After spraying the lorry and accompanying van with bullets, the attackers collected the firearms and ammunition from all the slain officers. In all, they reportedly made away with 22 rifles, and thousands of rounds of ammunition.

⁷⁶ BBC, 16 May 2014, *Kenya's Nairobi Hit by Twin Bomb Blasts in Gikomba Market*

⁷⁷

⁷⁸ Cyrus Ombati, and Reuters, *The Standard*, 16 June 2014, *Gunmen Kill At Least 48 People in Mpeketoni, Lamu*

⁷⁹ IPOA, 2014, IPOA Report Following the Mpeketoni Attacks (15 and 16 June 2014) Redacted Version

5.5 Mandera

A heavily armed group waylaid a Nairobi-bound bus on 22 November and killed 28 people. Traveling from Mandera in north-eastern Kenya to Nairobi, the bus was intercepted in Arabiya area. The morning attack followed a similar pattern to Mpeketoni and plunged the larger Mandera County into fear. Once more, attackers separated Christians from Muslims, so as to spare Muslims. Unlike Mpeketoni, women were not spared in the attack. 19 men and 9 women were killed.⁸⁰

Questions have now multiplied on the ability of the security services to receive and process intelligence effectively; to prevent attacks; to prepare for them; and to improve response times. Despite on-going security alerts in Kenya, and available intelligence, response times continue to be painfully slow. In Mpeketoni, despite intelligence, no mitigating measures were taken. As with the Westgate attack a year earlier, inexplicably slow responses unconscionably increased the death toll.

5.6 Operation Usalama Watch

Following the attacks in Mombasa and Eastleigh, the government launched a purported security operation known as “Operation Sanitise Eastleigh” which then became known as Usalama Watch. The original nomenclature, and the later, more PR-conscious designation, recalled associations with historical incidents including even genocide, where dehumanising language laid the ground for punitive actions against targeted groups. Thousands of Somalis and Kenyans of Somali origin were subjected to arbitrary arrest, extortion, harassment, and ill-treatment,

on no other basis than that of their appearance, which they were forced to legitimise through the production of the requisite identity documents (these have often been reported as the subject of corruption in various surveys and reports). Over a thousand were relocated to refugee camps in Northern Kenya, while hundreds more were deported to Somalia in direct violation of Kenya’s international obligations. Security sweeps in Eastleigh indiscriminately and often brutally rounded up and arrested thousands of people. The operation ostensibly targeted those who were illegally present in Kenya, but factually victimised the Somali community, and refugees from other countries, who could be physically perceived as ‘Somali’. Scores of people, including refugees and migrants from other countries in the region, were caught up in the net and held indefinitely in the Moi International Sports Centre, Kasarani, which had been gazetted as a prison at extremely short notice. It is unclear how many were ultimately charged with terror related offences⁸¹.

To remedy an apparent illegality, Kasarani Stadium was designated a police station, which would validate the detention of scores of people there, well after initial groups were held. It was here that detainees were ‘screened’. Access was denied to human rights organisations, humanitarian organisations and media. Men, women, and children were forced to share cells in unsanitary conditions. Operation Usalama Watch was a clear violation of both national and international law. Ethnic profiling and collective punishment, by feeding resentment and grievances, ultimately increases the likelihood of future attacks, rather than enhancing security⁸².

⁸⁰ The Guardian, 23 November 2014, *Kenya Bus Attack Survivor Tells How Gunmen Selected Their Victims*

⁸¹ Amnesty International, 2014, *Somalis Are Scapegoats in Kenya’s Counter-Terror Crackdown*

⁸² Ibid

Table 1: National Insecurity Losses 2010 -2014

Category of Loss	Total Figures Recorded 2010 - 2014
Deaths from gunshots	1,894
Deaths due to ethnic clashes	574
Deaths from armed robberies	260
Deaths from terror attacks	277
Police officers killed	91
People displaced	180,300
Livestock stolen or killed	3,682
Homes burned due to ethnic clashes	845

Source: KNCHR sources, other state and non-state actors⁸³

5.7 Drivers of Insecurity

Given the efforts deployed in countering threats, the question arises as to why insecurity in Kenya has increased on such a scale? Why does it appear that the state is unable to stem it? A confluence of factors may be responsible. For several years, youth unemployment has been identified as a driver of insecurity. Kenyans under the age of 34 comprise roughly 78% of the population, and suffer an unemployment rate of 70%⁸⁴. The sheer mass of unemployed young people makes rising crime, as well as radicalisation, seem inevitable.

Corruption cannot be overlooked as a major driver of insecurity, especially given its pervasive presence in Kenya. Numerous surveys over the years show that immigration officials and police officers are habitually compromised through bribery. This breaches security internally and at Kenya's borders and erodes the morale of the organs that are entrusted with the security of Kenyans.

Working conditions and terms of service for the police are deplorable, constituting another driver of insecurity. Lack of serious action on corruption, of dignity in living conditions, inferior equipment combined with deficient working conditions and low corporate morale, push many officers to supplement their income unlawfully. Evidence of corruption networks or syndicates in the sector abounds. Endemic corruption within the security sector blocks reforms. Corruption also creates opportunities for disgruntled officers to collude with criminal elements to enrich themselves, thus undermining security⁸⁵.

The slow pace of security sector reforms is another contributing factor to rising insecurity. The NPSC undertook to vet all officers within a three-year period from its inception in 2012. Two years later, only 198 out of 1,200 senior officers had been vetted, out of the total officer population of 80,000.

Another challenge faced by police is the deployment of officers to non-core duties. The increase in the number of government officials demanding police protection at national and county level has created a crisis. It is estimated that roughly 10,000 officers are assigned to VIP protection of governors and their deputies, members of the National Assembly and Senate, speakers of both houses, parastatal heads, judges, and members of constitutional commissions⁸⁶, among others. Members of county assemblies have also called for VIP security, a demand yet to be met.

Other drivers of insecurity include ineffective coordination among security agencies, and political and resource-driven conflicts.

⁸³ KNCHR, *Ibid* p. 15

⁸⁴ KNCHR, 2014, *A Country Under Siege: The State of Security in Kenya, An Occasional Report (2010-2014)*

⁸⁵ *Ibid*

⁸⁶ *Ibid*

Disappearances and Extra-Judicial Executions

Security officers and units have responded to terrorist and security threats with a policy that seems to focus on eliminating perceived threats and circumventing the courts. According to the Kenya National Commission on Human Rights (KNCHR), 41 people disappeared during the period 2013/2014, an unusually high number in comparison to previous years. The commission attributed this to intensified efforts to respond to terror threats⁸⁷. Unfortunately, no statistics were available on the exact number of extra-judicial killings, though the commission continued to receive reports, which were then placed under investigation. There were also reports of enforced disappearances and extra-judicial executions by the Anti-Terrorism Police Unit. Human Rights Watch noted, “Kenyan counterterrorism forces appear to be killing and disappearing people right under the noses of top government officials, major embassies, and the United Nations.”⁸⁸ In research conducted between November 2013 and June 2014, Human Rights Watch documented at least ten killings, ten enforced disappearances, and 11 cases of mistreatment or harassment of terrorism suspects with strong evidence of counterterrorism unit involvement. The violations recorded occurred mainly in Nairobi, since 2011⁸⁹. The year 2014 also

saw the apparent execution of prominent Mombasa Muslim cleric, Abubakar Shariff, an outspoken radical imam known as Makaburi and the chief cleric of the Masjid Musa mosque.

Inadequate responses

Given the number of attacks Kenya has faced in the last few years, it is surprising that there is little evidence of a concerted effort by Government to resolve the security challenges. The response by authorities has more often than not been knee-jerk, as opposed to measured. Despite official reassurances, there has been minimal serious enquiry into serial security failures, and no record of lessons learned. Attempted legislative responses give the impression of government taking advantage of the security situation to roll back constitutional gains. The coordination of security assets and resources currently available may be a logical first step towards taming runaway insecurity. Urgent efforts to address the drivers of insecurity mentioned above are also critical. Without serious efforts to win over the communities who are perceived to be sympathetic to, or “harbouring” terrorists, rightly or wrongly, the security forces will not be able to effectively gather intelligence and prevent further attacks.

⁸⁷ Ibid

⁸⁸ Human Rights Watch, 18 August 2014, *Kenya: Killings, Disappearances by Anti-Terror Police*
Available at: <http://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police>

⁸⁹ Human Rights Watch, 18 August 2014, *Kenya: Killings, Disappearances by Anti-Terror Police*
Available at: <http://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police>

6 Transnational Crime

6.1 Poaching

Poaching in Kenya remains alarmingly high. Just reviewing experiences in one specific area, poaching far exceeds the natural elephant population growth rates, resulting in shrinking elephant numbers. In June 2014, a large ivory haul, weighing 2,152 kilograms, was recovered in a warehouse at Tudor in Mombasa County. It comprised 228 uncut tusks and 74 pieces of cut ivory. This was the largest ivory recovery of the year⁹⁰. Jomo Kenyatta International Airport (JKIA) and the port of Mombasa have been cited in various international reports as major exit points for the illegal trade in ivory.

Sadly, the year 2014 also saw the killing of the world's largest elephant, Satao, in Tsavo East National Park. Celebrated globally as one of the last surviving great 'tuskers', a bearer of genes that produces bull elephants with huge tusks that reach the ground, Satao was killed by poachers using poisoned arrows.⁹¹

A report by the Convention on International Trade in Endangered Species of wild fauna and flora (CITES) identified Kenya among seven countries most heavily implicated in the illegal ivory trade chain as source, transit or destination countries.⁹²

The lack of political will to halt ivory smuggling allows poachers to operate with near total impunity. A recent study by conservation NGO, Wildlife Direct, found that just four people out of those convicted of wildlife crime spent time in jail. This throws some light on the extent of policy weakness, corruption and deficiencies in the wildlife laws.

6.2 Illicit Drugs

The slow but steady increase in illicit drugs transiting through Kenya has not been matched by state efforts to curb drug trafficking. A former United Nations Office on Drugs and Crime Executive Director noted that "... East Africa is fast becoming an economic free zone for all sorts of trafficking – drugs, migrants, guns, hazardous wastes and natural resources."⁹³ A 2011 report found that, "While to the onlooker Kenya appears to be in a relatively healthy state, it is in fact weakening due to a process of internal decay. Endemic corruption and powerful transnational criminal networks are "white-anting" state institutions and public confidence in them. Termites are at work, hollowing out state institutions from the inside. As a result, development is being hampered, governance undermined, public trust in institutions destroyed, and international confidence in Kenya's future constantly tested."⁹⁴

6.2.1 Drug Seizures

In April, the Australian Navy made the largest seizure of heroin in Africa, off the Kenyan coast. The 1,032 kilogram haul, hidden in 46 sacks, was estimated to be worth Ksh25 billion. The heroin was immediately destroyed by the Australian Navy, perhaps showing its lack of confidence in Kenyan state institutions to handle such a substantial drug cache. The seizure was made after a three-day surveillance of a *dhow*, (traditional ship), carrying cement, by an Australian vessel. The *dhow* was said to be sailing beyond Kenya's territorial waters.

The second major seizure of the year came in July when Kenya Police captured 341 kilograms of heroin hidden in the diesel tank of a ship at the port of Mombasa. While it was not possible to determine

⁹⁰ Kenya Wildlife Service, 9 June 2014, 21 Tonnes of Ivory seized at a warehouse in Mombasa Available at: <http://www.kws.go.ke/info/news/2014/9ivory2014.html>

⁹¹ The Guardian, 13 June 2014, Kenya's biggest elephant killed by poachers

⁹² CITES, 2013, Elephants in the Dust: The African Elephant Crisis. Available at: http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf

⁹³ UNODC, 2009, Africa Under Attack: Drug Trafficking Has Acquired a Whole New Dimension. Available at <http://www.unodc.org/unodc/en/about-unodc/speeches/2009-08-12-africa-under-attack.html>

⁹⁴ Peter, Gastrow, 2011, Termites at Work: Transnational Organized Crime and State Erosion in Kenya

the departure point of the MV Bushehr Amin Darya, a stateless vessel, the Kenya Police carried out the raid after receiving intelligence reports that the vessel might be transporting drugs to Mombasa. Initially, 900 grams of heroin were discovered, hidden in bags of cement, leading the police to unearth the larger haul.

Also in July, the MV Al Noor, a ship was seized by the Kenyan Navy and found to be carrying 370 kilograms of heroin in Kenyan waters. To demonstrate Kenya's tough stand on drug trafficking, President Kenyatta ordered the ship to be destroyed. Despite an order from the High Court preventing the destruction, the Navy executed the order, witnessed by the President from a military helicopter. This action raises questions about the commitment to the rule of law; the destruction of the evidence violated an order from the High Court and makes it difficult to prosecute those found culpable for this offence.

6.2.2 Drug Cartels

The levels of drug related activity in Kenya, and the relative ease of drug trading, are an indicator of the infiltration of the state by cartels that seem to operate with impunity, and end up compromising security, customs, and judicial officials. It appears likely that Kenya is favoured by drug cartels due to pervasive corruption, making it possible to compromise almost any official, regardless of seniority. "Criminal networks have penetrated the political class and there are growing concerns about their ability to fund elections and to exercise influence in Parliament and in procurement processes."⁹⁵ Over the years, reports have linked senior officials to drugs cartels, with no resultant prosecutions.

Reports indicate that drug trafficking through East Africa has experienced a manifold increase since 2009. Traffickers easily exploit weak maritime border controls in the region. While Kenya and Tanzania have become major transit points for drugs, the number of drug users within the two countries has also increased.⁹⁶ Drugs are sourced in Afghanistan, Pakistan, and India, enter Kenya by sea and air, and are then re-exported to other markets, including the US and UK.

One such cartel is reportedly run by the Akasha family. Ibrahim Akasha, a notorious drug kingpin, was shot dead by a gunman on a motorcycle in Amsterdam in May, 2000. Since then, his sons, thought to have taken over his empire, have been repeatedly implicated in reports on drug cartels in Kenya, and have been embroiled in numerous court battles as a result. A US court case revealed the extent of the cartel through an elaborate sting operation set up to ensnare Baktash Akasha Abdalla and Ibrahim Akasha Abdalla. As a result of the sting operation, warrants of arrest were issued for these Akasha brothers by the US court. The operation involved dealings with members of a drug cartel based in Colombia, who were in fact US undercover agents. The indictment detailed an eight month operation, most of which was captured on videotape and recorded telephone discussions. The prosecutors accused the Akasha brothers of conspiring to ship heroin and methamphetamines to the US. Efforts to extradite the brothers to the US are on-going. That the Akashas could have run their operation from Kenya for so long, points to the inability or unwillingness on the part of Kenyan authorities to investigate and prosecute. The role of the elder Akasha was only ended by his assassination in Amsterdam. The trafficking reportedly continues under the management of his sons, indicating the reach of the cartel, and its ability to infiltrate the state.

⁹⁵ Peter, Gastrow, 2011, *Termites at Work: Transnational Organized Crime and State Erosion in Kenya*

⁹⁶ UNODC, World Drug Report, 2013

⁹⁷ Kevin, Kelley, Daily Nation, 15 November 2014, *How US Secret Agents Foiled Akasha's Drug Plot*

7 The Year Ahead

The effects of on-going insecurity on politics, development, society and the economy cannot be underestimated. The tourism industry is suffering extensive losses due to uncertainty about the security situation in Kenya. Major challenges for Kenya are the restoration of public security and the rebuilding of public confidence.

The year ahead marks the mid-term for the Jubilee administration. The impending 2017 election will shape political realignments and machinations, and inform the priorities of the government going forward. The politics of re-election will take centre stage and make it difficult to achieve positive progress on many of the issues that bedevil the country. This will probably mean that implementation of the constitution will take a back seat to the mobilisation of political capital for the next elections. Political tolerance is unlikely to flourish as elections near, although the possible need to search for new alliances may temper Jubilee's apparent penchant for belligerent rhetoric.

The coalition will also be subject to a test of its resilience if the remaining ICC cases continue into next year, and if the court finds that the defendants, particularly Deputy President Ruto, have a case to answer.

Economic prospects may be more uncertain as the bills for various excesses, past and present, are presented to the Kenyan taxpayer. During the new year, progress, or lack of it, on various mega-projects embarked upon or continued by the Jubilee government will become more apparent and raise more questions.

The five year window envisaged for the passage of the Constitution of Kenya 2010 will close on 27 August. There will obviously always be a continuing need to pass new legislation to bring the Constitution into fuller effect, but at this point, an appraisal of what has been achieved, and what has not, will be called for. Devolution, still in its infancy, presents a major opportunity in the year to come. Viewed positively by a large portion of the population, the potential of the counties for growth and service delivery offers the best hope for improving the daily lives of ordinary Kenyans.

Acknowledgement

AfriCOG thanks team members, Noreen Wahome, Wilfred Muliro, Susan Karegi, James Gondi, Beryl Anyango, Jennifer Kamau, Maryconcepter Nzakuva, Eric Mwendwa and Raynor Polo for their contribution in the development of this publication

The production of this publication has been made possible by the support of the Drivers of Accountability Programme, a programme of the Government of the United Kingdom's Department for International Development (DFID), the Danish International Development Agency (DANIDA) and the Canadian International Development Agency (CIDA).

We are also grateful to the Open Society initiative for East Africa (OSIEA) for their institutional support to our work.

The views expressed in this study are those of AfriCOG alone.

June 2015



Africa Centre for Open Governance
P.O. Box 18157-00100, Nairobi, Kenya
Telephone: +254 20-4443707/0737463166
Email: admin@africog.org
Website: www.africog.org