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Effectiveness of Anti-Corruption Agencies in East Africa:  
Kenya, Tanzania and Uganda

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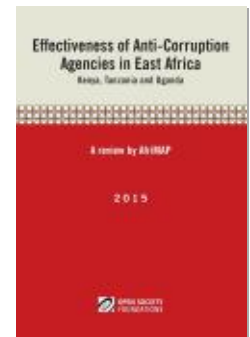
Published by African Books Collective

AfriMAP, AfriMAP.

Effectiveness of Anti-Corruption Agencies in East Africa: Kenya, Tanzania and Uganda.

African Books Collective, 2016.

Project MUSE.[muse.jhu.edu/book/45597](https://muse.jhu.edu/book/45597).



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# 2

## Kenya

### A. Executive summary

Corruption remains endemic to Kenya's public sector. The media and civil society have, for at least a decade, freely exposed corruption scandals; however, this exposure has not ended corruption and its attendant impunity. The laws and institutions to combat corruption are in place and yet the situation does not improve.

Prevention, suppression and punishment of corruption frequently feature in Kenyan political rhetoric, but rarely is this rhetoric matched by action. Kenya has seen consistent promises and then attendant inaction concerning corruption since independence. Analysts note that the levels of campaign financing indicate that the race for political office is partly motivated by profit. A report by Cambridge University found that illegal funds were used to finance the Kenya African National Union's elections in the 1990s.<sup>3</sup> The funds were raised through the so-called Goldenberg affair, whereas those aimed at financing the National Rainbow Coalition's elections in December 2007 were to be raised through what was known as the Anglo Leasing scandal.

Kenya ratified the United Nations Convention against Corruption (UNCAC) on 9 December 2003. On 3 February 2007, Kenya ratified the African Union Convention on Preventing and Combating Corruption (AU Convention). Kenya is a partner state and has expressed support for the draft East African Community Protocol on Preventing and Combating Corruption. The Ethics and Anti-Corruption Commission (EACC) is a founding member of the East African Association of Anti-Corruption Authorities (EAAACA). As of July 2014, Kenya's national assembly had passed laws to domesticate the UNCAC and AU conventions, including the 2012 Leadership and Integrity Act, the

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3 See: <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1874776&fileId=S0022278Xo8003224>.

2011 Ethics and Anti-Corruption Commission Act, and the 2009 Proceeds of Crime and Anti-Money Laundering Act.

The EACC was established under article 79 of the Constitution of 2010. The EACC has consistently been the target of major destabilisation, or the threat of destabilisation, since its inception. It is strange that most instances of destabilisation seem to coincide with periods when the institution seems to be making progress on politically sensitive cases.

The commission appoints, with the approval of the national assembly, a suitably qualified person to be the commission secretary. The commission secretary is the commission's chief executive officer, as well as its accounting officer.

The commissioners of the EACC are state officers as per the Constitution. Commission staff are appointed through competitive, open processes and are given limited-period contracts that are renewable. The commissioners of the EACC have security of tenure through certain constitutional guarantees. The EACC has its headquarters in Nairobi, Kenya's capital, and has five regional offices in major towns (Mombasa, Kisumu, Nyeri, Eldoret and Garissa).

The EACC has a clear mandate in terms of the prevention of corruption, as well as regarding the sensitisation and education of the public in the fight against corruption. However, the EACC is not widely relied upon by Kenyans in reporting corruption. For example, a 2012 survey by the commission found that, whereas 60% of those surveyed had 'observed or witnessed a corrupt act by a public officer' in the past 12 months, only 6% reported the incident. The EACC has a public-feedback mechanism whereby, after submitting a report, a member of the public has the option of creating an anonymous postbox in order to receive feedback on progress in handling the issue. It operates a German-designed, online whistle-blowing system known as the Business Keeper Management System (BKMS), sponsored by GIZ, which facilitates anonymous online corruption reporting. The EACC and its predecessors have seen some successes. It has investigated over 13 000 cases and successfully developed over 650 cases for prosecution between 2008 and 2013. The commission also recovered KES6.8 billion (USD80.4 million) during the same period.

The commission does not have prosecutorial powers. Such power is vested in the Director of Public Prosecutions.

The EACC perennially faces the challenge of inadequate resources, as it is not allocated its annual budget request. This is mainly due to government resource constraints.

This report recommends the reinstatement of a previous governance structure that separated the secretariat, with its technical and implementation responsibility, and an oversight board that held the secretariat to account. The report also recommends that the EACC establish a presence in each county if it is to adequately meet the expectations and needs of the majority of the population. It further recommends that the EACC be given powers to prosecute.

The report further recommends adequate allocation of resources to enable the EACC to execute its mandated functions. In 2014, the EACC reported no partnerships with donors or non-governmental organisations (NGOs). Also worth noting is the fact that the EACC received no donor funding despite significant funding gaps. This is an astounding decline from KES126 million (15% of annual expenditure) in 2011.

## B. Introduction

Since the late 1990s, anti-corruption has been a major policy issue in Kenya. The government initially perceived the raising of the issue as simply a matter of foreign-donor intervention, though it later gradually began to address the issue. Despite this, corruption in Kenya's public sector remains endemic. Practised with impunity, Kenyan corruption is also much studied and recorded. Citizens report bribery experiences with great frequency. Moreover, the and civil society have, for at least a decade, freely exposed corruption scandals, and, in truth, operate in an environment that is not as oppressive as, the first three decades of independence. This exposure has not, however, ended corruption. The laws and institutions to combat corruption are in place and yet the situation does not improve.

This report looks at the Kenyan EACC and attempts to assess the reasons for its successes and failures as an anti-corruption body. The EACC was established pursuant to the Constitution of 2010 as an investigative body without prosecutorial powers. Its statutory bases and structures are described in detail below and some key developmental events in its history and activities are analysed. The chapter ends with some policy conclusions and recommendations.

## C. State of corruption

Despite its domination of political-competition rhetoric, and despite regime change, corruption in Kenya's public sector remains endemic. Citizens report bribery experiences with great frequency. An NGO<sup>4</sup> contains records of citizens' complaints about official bribery demands. Following the advent of multiparty democracy in 1992, media and civil society have frequently exposed corruption scandals in an environment that is less repressive, yet where corruption continues with impunity.

In the decade since 2003, Kenya's score on Transparency International's Corruption Perceptions Index (CPI) has never been higher than 3/10. According to the CPI, this indicates that corruption in Kenya's public sector is perceived to be rampant by survey respondents. Table 2.1 records Kenya's ranking on the CPI from 2002 to 2013.

An empirical survey tool developed in 2001 by the Kenya chapter of Transparency International documents bribery experiences of Kenyans in their interactions with Kenyan public institutions. Each year, the Kenya Bribery Index (KBI) observes that Kenyans frequently have corruption experiences in their interactions with national and local government institutions. The lawenforcement sector and the police, in particular, are ranked as the most corrupt Kenyan institution in all editions of the KBI.

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4 <http://ipaidabribe.or.ke>

Table 2.1: Kenya score and rankings in the CPI (2002–2013)

Year	CPI score	Ranking/no. of countries ranked	No. of surveys used to compile CPI
2002	1.9	96 / 102	5
2003	1.9	122 / 133	7
2004	2.1	129 / 145	7
2005	2.1	144 / 158	8
2006	2.2	142 / 163	7
2007	2.1	150 / 179	8
2008	2.1	147 / 180	7
2009	2.2	146 / 180	7
2010	2.1	154 / 178	7
2011	2.2	154 / 183	9
2012	2.7	139 / 176	8
2013	2.7	136 / 177	8

The EACC also conducts regular anti-corruption surveys. For example, in 2012, the EACC surveyed over 6 400 respondents on, among other things, the incidence, frequency, prevalence, and extent of bribes and unethical conduct in 42 of Kenya’s 47 counties.

This survey found that the top six most corrupt public institutions were:

1. The police (48.1%);
2. Traffic police (18.7%);
3. Government hospitals (15.7%);
4. Local authorities (15.4%);
5. The registrar of persons (13.2%); and
6. The provincial administration (10.3%).

The EACC survey also reported that:

- 67% of respondents believed that corruption levels in Kenya were high;
- 60% of respondents had ‘observed or witnessed a corrupt act by a public officer’ in the previous 12 months, but only 6% reported the incident (Of those who reported the incident, only 11.7% made the report to the EACC);
- 48% believed that the corruption levels were actually increasing;
- 32% believed corruption levels were decreasing;
- 45% did not believe that the Kenyan government was committed to fighting corruption and promoting ethical behaviour in the public service; and
- 35% believed that greed was the leading cause of corruption. (Relatively fewer believed often-mentioned causative factors were responsible, e.g. low pay (12%), culture (11%) and poverty (11%).)

It is worth noting that the level of trust in the EACC and the police is so low that only 6% of corruption incidents are reported to them. This is likely to feed impunity. Also, given that the police are a key institution in access to justice, the rampant corruption in the institution completely compromises the ability of citizens to access justice, despite the relative integrity of the other justice institutions, such as the judiciary.

The Kenyan public widely believes that corruption is one of the primary causes of insecurity. The national assembly often echoes this sentiment with statements to the effect that corruption has grave national security implications and is recognised as a key driver of the collapse of the Kenyan border controls. The joint committee inquiring into the Westgate Mall terror attack of 21 September 2013, which killed 67 and wounded 200, thus concludes in its final report that

*corruption has greatly led to the vulnerability of the country in many cases, including where immigration officials are compromised, thus permitting 'aliens' who could be terrorists to enter the country and acquire identification. This [affords] terrorists ease of movement ... . They are therefore able to plan and execute attacks without fear of discovery. Further compromising of security officials enables [the individuals concerned] to fail to pursue suspected terrorists and enables [such terrorists] to secure early release when caught or reported [as participating] in suspicious criminal activities.<sup>5</sup>*

## The politics of corruption

Prevention, suppression and punishment of corruption frequently feature in Kenyan political rhetoric, but rarely is this rhetoric matched by action. Kenya has, since independence, consistently seen undertakings being given regarding corruption, only for these undertakings to be followed by inaction.

Analysts note that the levels of campaign financing indicate that the race for political office is partly motivated by profit. A report by Cambridge University found that illegal funds were used to finance the ruling Kenya African National Union's elections in the 1990s.<sup>6</sup> The funds were raised through the Goldenberg affair, whereas those aimed at financing the ruling party's national unity elections in December 2007 were to be raised through the Anglo Leasing scandal. Corrupt campaign financing, therefore, poses a threat to democracy in the country. The democratic space created and expanded by multiparty politics has, however, provided new opportunities for waging the war against corruption. It is in the context of these arguments that the conclusion of this chapter raises broader issues relating to corruption and democracy in Africa.

In the Goldenberg affair, the Kenyan government subsidised fraudulent exports of gold by paying the company, Goldenberg International, 35% more (in Kenyan shillings) than

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5 Kenya National Assembly (2013) *Report of the Joint Committee on Administration and National Security and Defence and Foreign Relations on the Inquiry into the Westgate Mall Terror Attack, and Other Terrorist Attacks in Mandera in North-Eastern and Kilifi in the Coastal Region*. Available at: [http://info.mzalendo.com/media\\_root/file\\_archive/REPORT\\_OF\\_THE\\_COMMITTEE\\_ON\\_WESTGATE\\_ATTACK\\_-\\_4.pdf](http://info.mzalendo.com/media_root/file_archive/REPORT_OF_THE_COMMITTEE_ON_WESTGATE_ATTACK_-_4.pdf) [accessed: 21 September 2014].

6 See: <http://journals.cambridge.org/actiondisplayAbstract?fromPage=online&aid=1874776&fileId=S0022278X08003224>.

their notional foreign-currency earnings. It is also reported that no gold, or very little gold, was actually exported. It is estimated that the scheme cost Kenya the equivalent of more than 10% of the country's annual gross domestic product (GDP).

The opposition to the Kenya African National Union (KANU)<sup>7</sup> used parliament as a forum to expose the pervasiveness and magnitude of corruption in government. For example, the Goldenberg affair was first exposed by two opposition members of parliament (MPs) who had received whistle-blower information from within the Central Bank of Kenya.

As the opposition consolidated itself, it used the public accounts and public investments committees of parliament (which, according to law, the opposition automatically chaired) to investigate corruption in the government, to devastating effect with regard to the ruling party's credibility. Thus, in October 1999, the Public Accounts Committee (PAC) report was acrimoniously debated in parliament. The speaker of the national assembly at the time, a KANU sinecure, even blocked a public reading of the so-called list of shame, a list which detailed losses suffered ministry by ministry, even though the summary was extracted from the main report.

The report claimed that the government had lost, or not collected, taxes to the staggering amount of over half a trillion Kenyan shillings (USD8.2 billion).<sup>8</sup> It was exposures like these that led directly to the eventual defeat of the KANU in the December 2002 presidential election.

Table 2.2 depicts the extent of the auditor general's queries relating to government expenditure and the conclusions of the PAC.

Kibaki, whose presidency lasted from 2002 to 2013, was initially elected by way of a landslide election victory, in large measure because of his anti-corruption campaign pledges. In his first address to parliament in February 2003, President Kibaki stated:

*Corruption is one of the most serious problems Kenya faces. It has undermined our most important institutions and tarnished our reputations as Kenyan leaders. This is going to change. As president, I intend to lead this change. Corruption, they say, starts at the top. Now the fight against corruption in Kenya will start at the top.*

Within a year of his inauguration, 18 allegedly grossly overpriced state security contracts worth a combined USD770 million were concluded with several foreign and domestic entities, which was later to be termed 'Anglo Leasing scandal'. The then permanent secretary in the office of the president, John Githongo, had to go into exile following his exposé of top-level government officials' involvement in the scandal. It was only in March 2015 that 15 accused were charged in court with this flagrant theft of public resources.

A study by the Coalition for Accountable Political Financing (CAPF), a Nairobi-based think tank, estimates that President Mwai Kibaki and Prime Minister Raila Odinga spent USD 75 million on their presidential bids in 2007.

In 2012, *The East African* estimated that the top presidential contenders – such as Uhuru

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7 The KANU was the political party that formed the government from independence on 12 December 1963 until 27 December 2002.

8 USD8.2 billion is the figure at the prevailing average exchange rate of USD 1=KES 70.

Kenyatta, William Ruto, Raila Odinga, Kalonzo Musyoka, George Saitoti, Peter Kenneth, Raphael Tuju and Martha Karua – could each spend in the range of USD100 million to USD150 million if they were to launch serious national campaigns.

Table 2.2: The PAC Report of 1999<sup>9</sup>

Ministry	Auditor general query (KES)	PAC Report: Amount lost (KES)	PAC Report: Amount lost (USD) <sup>9</sup>
Office of the President	13 479 138 253	4 611 076 104	65 872 516
State House	218 099 055	142 200 484	2 031 435
Directorate of Personnel Management	471 840 595	137 817 650	1 968 824
Foreign Affairs & International Cooperation	2 821 961 313	826 955 373	11 813 658
Home Affairs & National Heritage	262 080 204	103 643 125	1 480 616
Planning & National Development	701 475 795	227 406 635	3 248 666
Defence	928 253 376	278 691 476	3 981 307
Agriculture & Livestock Development	12 743 992 588	4 139 705 624	59 138 652
Health	11 768 641 015	2 334 578 245	33 351 118
Local Government	9 350 069 670	7 914 397 990	113 062 828
Public Works & Housing	5 606 374 768	4 141 970 550	59 171 008
Transport & Communications	15 212 847 638	**	**
**	**	**	**
Total	924 866 342 392	580 475 884 256	8 292 512 632

\* Amount of money lost or taxes not collected by these ministries.

\*\* The PAC chairperson, Henry Obwocha, was prevented from reading out the details of any other ministries by the speaker, Francis Ole Kaparo.

During his annual state-of-the-nation address to parliament in 2014, Uhuru Kenyatta, incumbent president of Kenya, stated:

*It remains a hard truth that some of our public services are rife with waste and corruption. That waste threatens the productivity we have so painfully begun to build. I have appointed a cabinet*

9 Kenya National Assembly (1999) *Report of the Public Accounts Committee on the Accounts of the Government of Kenya for the Year 1995/1996 Laid on the Table of the House on 8th June 1999*. Kenya National Assembly Official Record (Hansard) 5 October 1999. pp. 1714–1715. Available at: <http://books.google.co.za/books?id=kucOiw>.

10 The exchange rate in 1999 was USD 1=KES 70.



*committee to return us to prudence and probity in public service. The team has already issued a preliminary report, and soon I will give detailed attention to the proposed measures. I also wish to highlight the [overarching] theme that government spending must be brought under control.<sup>11</sup>*

## D. Civil society, donors and media engagement

### The EACC and the public

The EACC has been fairly active in communicating with the public and has sponsored special broadcasts on national and regional radio and television for a number of years. It has partnerships with government departments, semi-autonomous government agencies, and other state corporations in terms of which corruption-reporting boxes are made accessible to the public.

Under the public-education directorate, the commission:

- Conducts county-based outreach clinics;
- Trains public officials within the framework of performance contracting;
- Develops and disseminates information, education and communication materials;
- Mainstreams anti-corruption content in the formal-education system;
- Promotes of integrity clubs in schools; and
- Trains various interest groups in the education and civil-society sectors, among others.

In 2014, the commission carried out public outreach in four counties reaching over 600 000 people directly.

### The Media and anti-corruption

Kenya has a well-developed and independent media, by world standards. Since the advent of multiparty politics in the early 1990s, Kenya has consistently reported on corruption and advocated accountability and transparency in the use of public resources.

Indeed, the infamous Goldenberg and Anglo Leasing scandals were made public by courageous reporters despite the best efforts of the respective sitting governments to suppress the affairs by any means necessary.

However, the public's attitude to corrupt leaders seems to place ethnic affiliation above distaste for moral affliction. As a result, corrupt leaders tend to enjoy continued adulation and re-election despite media reports on their illicit activities.

### The EACC and donors

In 2014, the EACC reported no partnerships with donors or NGOs. Also worth noting

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<sup>11</sup> State-of-the-nation address to parliament by President Uhuru Kenyatta, 27 March 2014. Available at: <http://www.president.go.ke/state-at-the-nation-address-at-parliament-by-h-e-president-uhuru-kenyatta> [accessed: 23 July 2014].

is that the EACC received no donor funding despite significant funding gaps. This is an astounding decline from KES126 million (15% of annual expenditure) in 2011.

### **Civil society and anti-corruption**

Kenyan civil society is one of the most robust on the continent. It has consistently agitated for accountability and transparency since the early 1990s. Its activism has, however, not borne the desired results, mainly due to the entrenched nature of corruption in, and impunity of, governments. For example, the KBI has consistently ranked the police as the most corrupt public institution, yet little reform with regard to police accountability has taken place. The incidence of corruption within the institution has consequently not abated over the years.

### **Donors and anti-corruption**

The donor community has been vocal concerning the levels of corruption in Kenya since the early 1990s. In 2014, a former British envoy, Edward Clay, famously complained of the government of Kenya:

*But they can hardly expect us not to care when their gluttony causes them to vomit all over our shoes. Do they really expect us to ignore the lurid and mostly accurate details conveyed in the commendably free media and pursued by a properly-curious parliament?*

This was at the onset of the Anglo Leasing scandal mentioned earlier. Unfortunately, his and other donors' concerns were ignored then, and continue to be ignored to this day. This can be attributed to the fact that official donor funding in Kenya constitutes less than 3% of the annual national budget.

## **E. Commitment to international conventions on corruption**

As mentioned above, Kenya ratified the UNCAC on 9 December 2003. On 3 February 2007, it ratified the AU Convention. Kenya is a partner state and has expressed its support of the draft East African Protocol on Preventing and Combating Corruption. The EACC is a founding member of the EAAACA.<sup>12</sup>

Kenya's Constitution provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya'.<sup>13</sup> The 2012 Treaty Making and Ratification Act<sup>14</sup> provides for the ratification and repudiation of treaties by Kenya. After the commencement of such Act on 14 December 2012, no person or body can ratify a treaty on behalf of the government of Kenya unless the treaty has been considered and approved by the cabinet and parliament.<sup>15</sup>

The Act requires the cabinet to assess the constitutionality of any proposed treaty and

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12 For more information about the EAAACA, see its website at [http://eaaaca.org/?page\\_id=16](http://eaaaca.org/?page_id=16).

13 Constitution of Kenya, 2010, article 2(6).

14 Act No. 45 of 2012.

15 Treaty Making and Ratification Act No. 45 of 2012, section 12.

to consider the financial implications and administrative or legislative requirements before approving it. The Act also establishes a registry and a registrar of treaties whose purpose is to archive and maintain a record: of treaties to which Kenya is a signatory; treaties proposed for ratification by Kenya; treaties that Kenya has ratified; Kenya's reports to any treaty body; and the recommendations and concluding observations of any treaty body on Kenya's reports.<sup>16</sup>

Kenya was the first country to sign and ratify the UNCAC when the convention was opened for ratification in Merida, Mexico, on 9 December 2003.

## Domestication of international conventions

As of July 2014, Kenya's national assembly passed the following laws to domesticate the UNCAC and the AU Convention:

- Election Campaign Financing Act, 2013, which was passed and received presidential assent on 24 December 2013;
- Leadership and Integrity Act, 2012;
- Ethics and Anti-Corruption Commission Act, 2011;
- Proceeds of Crime and Anti-Money Laundering Act, 2009;
- Witness Protection Act, 2006;
- Public Officer Ethics Act, 2004; and
- Anti-Corruption and Economic Crimes Act, 2003.

A multisectoral review of progress in implementing chapters 3 and 4 of the UNCAC is under way and the executive is working on a draft Whistle-Blower Protection Bill.<sup>17</sup> Also pending is an Access to Information Bill, which would give effect to such right as conferred by the Constitution.<sup>18</sup> The national assembly is also currently considering a Transfer of Prisoners Bill.<sup>19</sup>

## Corruption reporting and international-instrument implementation

A gap analysis of the status of implementation of the UNCAC indicated that, by 2009, there were several areas in which implementation was lacking.

According to the then Minister for Constitutional Affairs and Administration of Justice, Mutula Kilonzo:

*The gap analysis report also shows that there are several measures which Kenya needs to put in place. For example, Kenya has not implemented many of the requirements of chapter 5 of the convention, which provides for measures for asset recovery. There is an urgent need to enact a comprehensive and effective law for the confiscation and forfeiture of proceeds of*

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16 Treaty Making and Ratification Act No. 45 of 2012, section 13 and section 14.

17 Author's interview with Key Informant, TI-Kenya, September 2014.

18 Constitution of Kenya, 2010, article 35.

19 Transfer of Prisoners Bill, 2014, Kenya Gazette Supplement No. 68 (National Assembly Bills No. 23), Nairobi, 16 May 2014. Available at: <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/TransferofPrisonersBill2014.pdf> [accessed: 23 July 2014].

*crime and for the criminalisation of illicit enrichment and money laundering. There is also an urgent need for domestic law on mutual legal assistance, transfer of prisoners and transfer of criminal proceedings. The existing laws on extradition also need to be updated and the usefulness of wealth declarations as an anti-corruption tool should be enhanced by providing for an efficient and effective method of verifying the declarations.*

## **F. Legal framework for preventing and combating corruption**

### **Ethics and Anti-Corruption Commission Act, 2011**

This Act establishes the EACC and outlines its functioning, independence and oversight. Though endowed with robust powers of investigation and arrest, the EACC does not have prosecutorial powers.

### **Election Campaign Financing Act, 2013**

This Act was passed and received presidential assent on 24 December 2013. It empowers the EACC to make rules for purposes of administration of the Act and to regulate management, expenditure and accountability in respect of election-campaign funds during election and referendum campaigns, and for related purposes. The Independent Electoral and Boundaries Commission (IEBC) is in the process of developing regulations to implement the Act ahead of the 2017 general elections. The first draft regulations were discussed by stakeholders in April 2014.

The IEBC is initiating the legal reforms early to avoid inconveniences due to late amendments to electoral laws, as was witnessed in the run-up to the 4 March 2013 general elections. Some of the issues that the regulations seek to address include the spending limits for candidates, political parties or referendum committees during the election period. The regulations will also provide guidelines on campaign-financing donations, expenditure, reporting and disclosure, as well as dispute-resolution mechanisms.

### **Leadership and Integrity Act, 2012**

This Act enforces standards of ethics and integrity among public officers. It is intended to give effect to, and establish, procedures and mechanisms for the effective administration of chapter 6 of the Constitution, and for related purposes. The Act obliges state officers to:

- Respect and abide by the Constitution and the law, and lays down that the public trust, and the authority and responsibility, vested in a state officer must be exercised by the state officer in the best interest of the people of Kenya;
- Take personal responsibility for the reasonably foreseeable consequences of any acts or omissions arising from the discharge of the duties of the office;
- Carry out the duties of the office efficiently and honestly, and in a transparent and accountable manner;
- Observe, and subscribe to, ethical and professional requirements;

- Not use the office to unlawfully or wrongfully enrich themselves or any other person;
- Not engage in activities that amount to abuse of office;
- Not misuse public resources;
- Not discriminate against any person;
- Not participate in a tender for the supply of goods or services to a public entity in which they are serving, or with which they are otherwise similarly associated; and
- Not solicit contributions from the public for a public purpose unless the president has, by notice in the gazette, declared a national disaster and allowed a public collection for the purpose of the national disaster in accordance with the law.

### **Proceeds of Crime and Anti-Money Laundering Act, 2009**

Kenya's Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) regime had been under review by the International Cooperation Review Group (ICRG) since June 2009. Kenya was initially referred to the ICRG for being a high-risk area/jurisdiction and for its lack of anti-money laundering and terrorist financing laws. Over time, Kenya has addressed the deficiencies that led to the Financial Action Task Force (FATF) review process. Some of the measures that have been introduced include enacting the 2009 Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and its regulations, which provide for the criminalisation of money laundering and for the establishment of an independent institution responsible for AML/CFT issues, namely the Financial Reporting Centre (FRC). The FRC's objective includes, among other things, assisting in identifying proceeds of crime and combating money laundering.

In 2013, the FRC entered into a memorandum of understanding (MoU) with the respective domestic financial-sector regulators comprising the Central Bank of Kenya, the Capital Markets Authority, the Insurance Regulatory Authority and the Retirement Benefits Authority. The MoU provides for supervision and enforcement of POCAMLA by the supervisors with respect to institutions under their purview. The MoU also provides for the exchange of information that is necessary to support effective anti-money laundering supervision of financial institutions.

### **Witness Protection Act, 2006**

Witness protection remains a fundamental human right under the Bill of Rights (chapter 4) in the Constitution. Also, article 48 guarantees the right to access to justice, while article 50(9) provides for the need to legislate for the protection, rights and welfare of victims of offences. The two articles read together obligate the government to protect witnesses in Kenya.

Section 4 of the Witness Protection Act obligates the witness protection agency concerned to establish and maintain a witness protection programme and further provides for protection measures to be applied by the agency. Sections 13 to 29 of the Act provide for the protection of the identity of the witness. Such protection is secured through:

- Obtaining a new identity for a witness, including recording such identity in the proper registries of birth and marriage (section 13);
- Non-disclosure of a participant's identity (section 22);
- Non-disclosure of the former identity of a protected person (section 23); and
- Non-disclosure of the identity of a participant in legal proceedings (section 24).

### **Public Officer Ethics Act, 2004**

The Act sets forth a code of conduct for public servants. This code is divided into six parts: Part 1 (s 1–4) contains preliminary provisions; part 2 (s 5–6) provides for specific codes of conduct and ethics; part 3 contains a general code of conduct and ethics (s 7–25); part 4 (s 26–34) regulates declarations of income, assets and liabilities; part 5 (s 35–39) deals with enforcement of the code of conduct and ethics; and part 6 (s 40–42) contains general provisions.

### **Anti-Corruption and Economic Crimes Act, 2003**

This specific code calls for selflessness, financial probity, integrity, transparency and accountability.

The general codes in the Act call for instilling public confidence in public office, avoiding conflicts of interest, observing work hours, respecting constitutionalism/the rule of law, and not compromising the public interest.

### **Access to information**

It is indeed challenging to discern and report corruption in an environment of limited access to public information. The right to access public information refers to the right of any person to look for, request, and receive information held by the government.

The Constitution of Kenya provides for access to information under article 35. Thus: (1) Every citizen has the right of access to (a) information held by the state and to (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The state must publish and publicise any important information affecting the nation.

The state is obliged by article 35(3) of the Constitution to publish and publicise any important information affecting the nation; however, the Constitution does not provide any indication of what is deemed to be important information. This absence of such a definition therefore calls for legislation, policies and guidelines in this regard.

Despite the absence of laws governing access to information, the Kenya Open Data Initiative and the Open Governance Partnership make key government data freely available to the public through a single online portal and constitute a country action plan to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.

## G. Ethics and Anti-Corruption Commission

The country's anti-corruption legislation dates back to 1956 and the enactment of the now defunct Prevention of Corruption Act (formerly Cap. 65, LOK). This statute was in operation from August 1956 to May 2003.

Initially, the Prevention of Corruption Act (Cap. 65) was enforced by the police directorate, notably the anti-corruption squad, which was established in 1993. The squad was, however, disbanded in 1995 before it could make any significant impact.

The amendment of the Prevention of Corruption Act (Cap 65, LOK) in early 1997 led to the creation of the Kenya Anti-Corruption Authority (KACA) in 1997.

On 22 December 2000, the high court ruled that the existence of the KACA undermined the powers conferred on both the attorney general and the commissioner of police by the Constitution of the Republic of Kenya.

Subsequently, the Anti-Corruption Police Unit (ACPU) was created by executive order in August 2001, under the criminal investigations department, until the Kenya Anti-Corruption Commission (KACC) was formed in 2003. The KACC was a public body established, on 2 May 2003, under the Anti-Corruption and Economic Crimes Act (ACECA) No. 3 of 2003. The Act also established the Kenya Anti-Corruption Advisory Board, an unincorporated body comprising persons nominated by a cross section of stakeholders. The advisory board made recommendations for appointing a director and assistant directors. It also advised the commission generally on the exercise of its powers and on the performance of its functions under the Act.

Parliament disbanded the KACC on 24 August 2011, in line with the requirements for change as stipulated in the new constitutional dispensation. The EACC was established after President Kibaki signed the Ethics and Anti-Corruption Commission Act (EACA) on 29 August 2011.

The EACC was established under article 79 of the Constitution of 2010, which provides as follows:

*Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of chapter 6 of the constitution.*

It is important to note that article 80 of the Constitution also provides that parliament must enact legislation to give effect to the provisions of chapter 6 of the Constitution. Chapter 6 prescribes the constitutional standards of leadership and integrity in public office. It further sets out the responsibilities of leaders, provides for a code of conduct, prescribes the oaths of office, and lays down rules of financial probity in respect of state officers. The national assembly subsequently enacted the EACC in 2011.<sup>20</sup>

Pursuant to the Constitution (2010), the national assembly enacted the EACA to

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<sup>20</sup> The Ethics and Anti-Corruption Commission Act No. 22 of 2011 came into operation (Cap. 65A) commenced on 5 September 2011.

establish the EACC, in place of the former Kenya Anti-Corruption Commission. The EACA codifies the functions and powers of the commission and provides for the qualifications and procedures for the appointment of the chairperson and members of the commission.

Section 11 of the EACA details the functions of the commission as follows:

- (1) *In addition to the functions of the commission under article 252 and chapter 6 of the constitution, the commission shall:*
  - (a) *In relation to state officers;*
    - (i) *Develop and promote standards and best practices in integrity and anti-corruption;*
    - (ii) *Develop a code of ethics;*
  - (b) *Work with other state and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;*
  - (c) *Receive complaints on the breach of the code of ethics by public officers;*
  - (d) *Investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this act or any other law enacted pursuant to chapter 6 of the constitution;*
  - (e) *Recommend appropriate action to be taken against state officers or public officers alleged to have engaged in unethical conduct;*
  - (f) *Oversee the enforcement of codes of ethics prescribed for public officers;*
  - (g) *Advise, on its own initiative, any person on any matter within its functions;*
  - (h) *Raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption, but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act (No. 3 of 2003) regarding confidentiality;*
  - (i) *Subject to article 31 of the constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and*
  - (j) *Institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the [freezing] or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.*
- (2) *Any person who contravenes subsection (1)(i) commits an offence.*
- (3) *The commission may cooperate and collaborate with other state organs and agencies in the prevention and investigation [of] corruption.*
- (4) *The commission shall have all powers necessary or expedient for the efficient and effective execution of its functions under the constitution, this act or any other written law.*
- (5) *The commission may request and obtain professional assistance or advice from such persons or organizations as it considers appropriate.*
- (6) *The functions of the commissioners shall be to:*
  - (a) *Assist the commission in policy formulation and ensure that the commission and its*



- staff, including the secretary, perform their duties to the highest standards possible in accordance with this act;*
- (b) Give strategic direction to the commission in the performance of its functions as stipulated in this act;*
  - (c) Establish and maintain strategic linkages and partnerships with other stakeholders in the rule of law and other governance sectors;*
  - (d) Deal with reports, complaints of abuse of power, impropriety and other forms of misconduct on the part of the commission or its staff;*
  - (e) Deal with reports of conduct amounting to maladministration, including but not limited to delay in the conduct of investigations and unreasonable invasion of privacy by the commission or its staff.*
- (7) The commissioners shall meet at least once every quarter, or as often as the need arises for the execution of their functions.*

Section 13 of the EACA lists the powers of the Commission as being all powers generally necessary for the execution of its functions under the constitution, the EACA, and any other written law, namely:

1. To educate and create awareness relating to any matter within the commission's mandate;
2. To undertake preventive measures against unethical and corrupt practices;
3. To conduct investigations on its own initiative, or as a result of a complaint made by any person; and
4. To conduct mediation, conciliation and negotiation.

Essentially, the EACC investigates the offences codified in the 2003 Anti-Corruption and Economic Crimes Act. The offences over which the EACC has jurisdiction are as follows:

- Bribery of an agent in either the public or private sectors (s 39 of the ACECA);
- Secret inducements for advice (s 40 of the ACECA);
- Deceiving principals (s 41 of the ACECA);
- Conflicts of interest (s 42 of the ACECA);
- Improper benefits to trustees for appointments (s 43 of the ACECA);
- Bid rigging (s 44 of the ACECA);
- Unlawful handling of public property (s 45 of the ACECA);
- Abuse of office (s 46 of the ACECA); and
- Dealing with suspect property or proceeds of corrupt or criminal conduct (s 47 of the ACECA).

The EACC is operationally independent of both the executive and the legislative branches; however, the EACC is constituted by an appointment process that requires vetting by, and approval of, the national assembly and formal appointment by the president. Removal of a commissioner is also a process involving the president and the national assembly.

Operationally, the EACC must make annual and other periodic reports to the national assembly and the president, as well as be accountable through the auditor general's audit for its use of public funds.

### **Agency stability**

The EACC has consistently been the target of major destabilisation, or threat of destabilisation, since its inception. It is strange that most instances of destabilisation, or threatened destabilisation, seem to coincide with periods when the institution seems to be making progress on politically sensitive cases.

#### *1995: The Anti-Corruption Squad (ACS) is disbanded*

The (first) anti-corruption squad constituted in 1993 was disbanded in 1995 before it could make any significant impact.

#### *1998: The director of the KACA, John Harun Mwau, is removed*

The amendment of the Prevention of Corruption Act (Cap 65, LOK) in early 1997 led to the creation of the KACA in 1997. The first director was John Harun Mwau, who was appointed in December 1997. After only six months in office, Mwau was suspended and later removed in 1998 through a judicial tribunal appointed by the president at the time, Daniel arap Moi. Justice Aaron G Ringera was appointed to replace him in March 1999.

#### *2000: The KACA is disbanded*

On 22 December 2000, the high court in the case of *Gachiengo vs. Republic (2000) 1 EA 52(CAK)* ruled that the existence of the KACA undermined the powers conferred on both the attorney general and the commissioner of police by the Constitution of the Republic of Kenya.

In addition, the high court further held that the statutory provisions establishing the KACA were in conflict with the Constitution. That death knell of the KACA and of various efforts in the fight against corruption in Kenya.

#### *2001: The ACPU is created*

The ACPU was created by executive order in August 2001.

#### *2003: The Kenya Anti-Corruption Commission is created*

The KACC was a public body established under the ACECA on 2 May 2003. The first director and three assistant directors of the KACC formally took office on 10 September 2004. Wilson Shollei would later fill the vacant position of assistant director of finance and administration.

#### *2009: The KACC directors are removed*

Following parliamentary pressure in July 2009, all directors were forced to resign, paving the way for Dr PLO Lumumba to be appointed as director in September 2010. Jane

Onsongo (preventive services) and Pravin Bowry (legal services) joined the existing team of Dr Mutonyi and Wilson Shollei as KACC assistant directors.

### *2011: The Ethics and Anti-Corruption Commission (EACC) is established*

On 24 August 2011, the KACC was disbanded in line with the provisions of the new Constitution. The EACC was established on 29 August 2011.

### *2012: Several cases are filed against Mumo Matemu*

The high court blocked the appointment of Mumo Matemu as chairperson of the EACC on 20 September 2012,<sup>21</sup> but Matemu's appointment was ultimately confirmed on appeal,<sup>22</sup> which reversed the high court decision and concluded his appointment to the EACC.

In questioning the constitutionality of Matemu's appointment, the Trusted Society of Human Rights Alliance argued that Matemu's integrity was impugned by serious allegations of misconduct in his previous career positions with the Agricultural Finance Corporation (a state-owned bank) and with the Kenya Revenue Authority. It pleaded that Matemu's appointment violated article 73 of the Constitution, which requires that state officials be selected 'on the basis of personal integrity, competence, and suitability'. Essentially, the NGO alleged that Matemu was an unfit person to hold office as chairperson of the EACC and ought to be the subject of ongoing criminal investigations.

The NGO further alleged that the national assembly had failed to inquire into credible, unresolved questions about Matemu's past conduct in public-sector employment. It alleged that evidence existed to prove that Matemu's acts and omissions when he held several senior positions at the Agricultural Finance Corporation (AFC), a public body established under the Agricultural Finance Corporation Act (Cap 323), rendered him unsuitable for the position. These allegations included approving loans by the appellant without proper security, involvement in the fraudulent payment of loans to unknown bank accounts, making a false affidavit in a case before the high court, and failure to prevent the loss of public funds entrusted to the AFC.

The second unresolved allegation against Matemu was that, as a senior revenue officer, he failed to collect over KES2.4 billion (USD24 million) due by a tyre-importing company, despite a court judgment in favour of his employer, the Kenya Revenue Authority.

Essentially, it was averred that statutory due process had been followed and that all parties involved in the appointment – in particular the executive and parliament – had noted, discussed, and discounted the allegations brought by the NGO. The petition was opposed by Matemu and other respondents on the following grounds:

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21 *Trusted Society of Human Rights Alliance vs. Attorney General and Two Others* [2012] eKLR. Available at: [http://www.kenyalaw.org/Downloads\\_FreeCases/88833.pdf](http://www.kenyalaw.org/Downloads_FreeCases/88833.pdf) [accessed: 21 September 2014]. The decision was handed down on 20 September 2012 by three judges of the high court: Justice Joel Ngugi, Justice Mumbi Ngugi and Justice Odunga.

22 *Mumo Matemu vs. Trusted Society of Human Rights Alliance and Five Others* [2013] eKLR. Available at: <http://kenyalaw.org/caselaw/cases/view/84167/> [accessed: 21 September 2014]. The decision was handed down on 26 July 2013 by five judges of the court of appeal: Justice of Appeal, P Kihara Kariuki; Justice of Appeal, W Ouko; Justice of Appeal, PO Kiage; Justice of Appeal, S Gatembu Kairu; and Justice of Appeal, A.K Murgor.

- It was submitted that the NGO lacked locus standi to institute the case;
- It was argued that the petition did not disclose with reasonable certainty the actions complained about and the provisions of the Constitution and the EACA, which were alleged to have been contravened;
- It was urged that the petition be found to be an abuse of the court process, as the NGO had failed to submit its complaints about Matemu's character and integrity to the organs of appointment, that is, to the selection panel, the national assembly and the president; and
- Finally, it was argued that the petition was in contravention of the doctrine of separation of powers, as it constituted an attempt to undertake a *merit review* and not a *procedural review* of the appointment of the appellant.

The Director of Public Prosecutions (DPP) specifically submitted that the petition ought to be dismissed, since Matemu was not under investigation by the DPP, as claimed by the NGO. The DPP further submitted that the DPP had been wrongfully joined in the petition, and that the petition was an afterthought, since the NGO had failed to submit the complaints about Matemu's character and integrity to the organs of appointment.

Appearing as *amicus curiae*, the Kenya National Commission on Human Rights and the International Commission of Jurists (Kenyan Section) pleaded that 'fulfillment of article 73 of the constitution by members of the EACC was a requirement for the independence of this important constitutional organ'. They submitted that the high court had a duty to use its own objective measure to determine whether parliament had acted in accordance with the Constitution. Such bodies further argued that sufficient documentary evidence had been placed before the high court impugning adherence to constitutional requirements.

The high court found that, as a matter of fact, during the debate on the committee report in the national assembly, there was no attempt to craft a test that would enable the MPs to determine if Matemu had passed the constitutional test under chapter 6 of the Constitution. The court stated that the Constitution obliged the national assembly to investigate the applicant's backgrounds and to 'conclusively consider any information that went to his qualifications' under article 73 of the Constitution.

The court further held that the national assembly had not fulfilled its obligation. It had not followed the prescribed procedure and therefore it was 'not possible to return a verdict that due procedure in an appointment or nomination to a state or public office has been followed when there is absolutely no evidence that the appointing authority considered the constitutional test'. Additionally, 'a procedure cannot be deemed to have been duly followed if it appears from available evidence that the appointment process was designed and executed in such a way that no proper inquiry into pertinent issues related to the qualifications of the appointee was conducted'.

Finally, the court analysed the effect on institutional integrity that Matemu's appointment would have on the EACC. The judges found that Matemu's appointment was made despite allegations he would, as chairperson of the EACC, be expected to investigate. Identifying

the obvious conflict of interest, the court concluded that

*it requires no laborious analysis to see that this state of affairs would easily lead many Kenyans to question the impartiality of the commission or impugn its institutional integrity altogether. Were that to happen, it would represent a significant blow to the very institution the interested party is being recruited to head and lead in its institutional growth. In our view, this makes the interested party unsuitable for the position.*

On 24 September 2012, Matemu appealed against the decision to the court of appeal in Nairobi, requesting that it issue a declaration (i.e. an order of mandamus) that he was lawfully appointed as the chairperson of the EACC by all the relevant organs of appointment. He further petitioned the court to set aside the entire judgment and all orders made by the high court. In effect, the appeal sought reconfirmation of Matemu's gazetted appointment. The court of appeal conducted an 'intensely fact-based enquiry' and ruled in favour of Matemu, rejecting the conflict-of-interest argument as being based on unproven allegations. The final words of the court in confirming Matemu's suitability to head the official anti-corruption commission were:

*We have examined each of these grounds and our finding is that the evidence before the high court or before us is not probative of any of the claims. We note that the high court itself noted the evidentiary shortcomings by stating that it was not in a position to make any findings whether the above allegations had been proved or not. Therefore, we respectfully hold that the court misdirected itself by concluding that the appellant was unsuitable to hold office, despite its own finding that there had been no conclusive proof of the allegations. It is our considered view that in cases seeking review of an appointment on grounds of the integrity of the appointee, the review cannot be half-hearted. It must be conclusive, fair and just. It was not enough for the high court to state its commitment to an intensely fact-based enquiry, and then proceed to declare that only later legal proceedings would determine the unresolved questions, while still holding the appellant to be unsuitable to hold state office. To do so would be to drown the imperatives of due process, justice and fairness [in] tumultuous waters.*

## **EACC staff**

By the end of 2014, the commission had a staff of 264, distributed over five regions of the country.

### *Recruitment and tenure*

The commission appoints, with the approval of the national assembly, a suitably qualified person to be the commission secretary. Section 16(1) of the EACA provides that the recruitment should be transparent and competitive. The commission secretary is the commission's chief executive officer (CEO), as well as its accounting officer. The current holder of this office is responsible for:

- Carrying out the decisions of the commission;
- Day-to-day administration and management of the affairs of the commission;

- Supervision of other employees of the commission; and
- The performance of such duties as may be assigned by the commission.

The commissioners of the EACC are state officers, as per the Constitution, and, as such, cannot be officers of a political party, and cannot run for or hold political or elected offices. The committee of the national assembly that vets nominees should assess the suitability of commissioners based on their qualifications for the office, which are stated in the EACA. The chairperson of the EACC and the two members of the commission are appointed by virtue of the Constitution of Kenya (articles 79 and chapter 6), the EACA, and the Parliamentary Approval Act, No 33 of 2011. The qualifications for appointment to the EACC are set out in section 5 of the EACA.

The chairperson and members of the EACC must also hold a degree from a university recognised in Kenya and must have knowledge of, and experience of not less than 15 years in, any of the following: Ethics and governance, law, public administration, leadership, economics, social studies, auditing, accounting, fraud investigation, public relations and media, and religious studies or philosophy, and must have had a distinguished career in his/her respective field.

The current chairperson, Mumo Matemu, and the two commissioners, Irene Keino and Jane Onsongo, were sworn into office by the chief justice on 5 August 2013 after a long-drawn-out appointment process, which started in September 2011. The process involved lengthy parliamentary debate and, ultimately, litigation, which resulted in a far-reaching decision of the court of appeal on the application of chapter 6 of the Constitution of Kenya to vetting persons nominated to constitutional commissions and other high public offices. The timeline and the process by which the current commissioners were appointed to their offices were as follows:

Following the enactment of the EACA, the president constituted a selection panel that held its inaugural meeting on 12 September 2011. The panel was comprised of representatives of the Office of the President, the Office of the Prime Minister, the Ministry of Justice, National Cohesion and Constitutional Affairs, the Judicial Service Commission, the National Gender and Equality Commission, the Kenya National Commission on Human Rights, the Media Council of Kenya, the Joint Forum of Religious Organisations and the Association of Professional Societies in East Africa.

The selection panel advertised a vacancy for the position of chairperson and two vacancies for the positions of members of the commission in the *Daily Nation* and the *Standard*.

Twenty-one applications were received for the position of chairperson and 164 applications for the positions of members of the commission. However, due to an insufficient number of qualified female applicants for the position of chairperson, the selection panel decided to readvertise the said position.

The names of all the applicants for the positions of members of the commission and the shortlisted candidates were published in the media on 18 October 2011. All interviews for the position of members of the commission were conducted on 1 and 2 November 2011 at the offices of the Public Service Commission.

Readvertising of the position of chairperson was done on 24 October 2011, in the *Daily Nation* and the *Standard*. By the time that applications for the positions closed on 1 November 2011, the selection panel had received a total of 79 applications. Nine candidates for the position of chairperson were shortlisted by the selection panel and their names, as well as the names of all the applicants for the position of chairperson, were published in the print media on 4 November 2011. The public was invited the same day to submit any relevant information on the candidates.

Interviews for the position of chairperson were conducted on 8 and 9 November 2011. The selection panel, pursuant to section 6(5)(e), (f) and (g) of the Act, forwarded to the president three names for the position of chairperson and four names for the positions of members of the commission.

On 24 November 2011, the Office of the Permanent Secretary, Secretary to the Cabinet and Head of Public Service wrote to the clerk of the national assembly indicating that the president had, in consultation with the prime minister, nominated Mumo Matemu as the chairperson, while Dr Jane Kerubo Onsongo and Irene Cheptoo Keino had been nominated as members of the EACC.

On 1 December 2011, the speaker of the national assembly referred the three names to the Departmental Committee on Justice and Legal Affairs for vetting and directed the committee to submit its recommendation to the House by 7 December 2011.

At a meeting held on 14 December 2011, the committee considered the candidates on the basis of the criteria set out in the schedule on public appointment of Parliamentary Approval Act No. 33 of 2011, which lays down criteria for the vetting and approval of nominees for appointment to public office by parliament. The criteria require nominees to disclose information on their personal and professional life, including their political affiliations, tax compliance and potential conflicts of interest, among other things.

On 15 December 2011, the committee reported to the national assembly that, having considered the curricula vitae of all the applicants, it could not support their appointment because they lacked the 'passion, initiative and the drive to lead the fight against corruption in this country'. The report made, however, made no recommendations relating to the unfitness or unsuitability of any of the nominees.

On 20 December 2011, by a division vote of the plenary, the national assembly rejected the committee's report. The deputy speaker used his casting vote in favour of rejecting the report, in effect overturning the recommendation to disapprove the three nominees. The speaker then ruled that the three names could be reintroduced by way of a motion for approval. Five months later, on 10 May 2012, the three nominees were reintroduced before the national assembly and their appointment was approved by acclamation of the plenary. During this debate, allegations of violations of chapter 6 of the Constitution (which deals with leadership and integrity issues) were raised against the proposed chairperson of the commission, but were discounted by the plenary.

The president then appointed the three nominees to their respective positions under

Gazette Notice Number 6602 (Volume CXIV – No. 40), dated 11 May 2012. Four days later, on 15 May 2012, the Trusted Society of Human Rights Alliance filed the petition questioning the constitutionality of the appointment of Mumu Matemu, as detailed above.

### *Appointment of secretariat staff*

The commission's staff are appointed in terms of limited-period contracts that are renewable. This is done through a competitive process and in accordance with the Constitution, applicable laws and a robust internal human resource and administrative system.

### *Security of tenure*

The commissioners of the EACC have security of tenure, and the commission has certain constitutional guarantees. On paper, the Kenyan law grants stability and continuity to the EACC; thus, EACC commissioners serve with security of tenure for six-year terms, which is longer than the terms of the president and the national assembly (five years).

Commissioners can also only be removed by a tribunal following a recommendation by parliament to the president, who then appoints such tribunal.

### *Capacity*

The EACC has its headquarters in Nairobi, Kenya's capital, and has five regional offices in the major towns (Mombasa, Kisumu, Nyeri, Eldoret and Garissa). This is no longer ideal. Since the promulgation of the new Constitution of Kenya in August 2010, the country has devolved public resources and many governmental responsibilities to 47 counties, each of which have an executive (governor) and a legislature (county assembly).

In its 2011/2012 annual report, the commission states that it trained staff in collaboration with the government of Kenya, the United Nations Development Programme (UNDP), the World Bank, and local institutions. An analysis of the scope of training, and of the staff involved in such training, in the 2012/2013 annual report reveals in greater detail who was trained in what field, when the training took place, and whether it was local or foreign-based training.<sup>23</sup> The training programme appears to be ad hoc and generated by requests of staff to attend seminars. Many of these seminars appear to be attended for the purposes of meeting professional accreditation requirements. For example, attendance at Council of Legal Education (CLE) courses is a mandatory requirement for advocates wishing to renew their certificates of practice. Advocates earn points for attending such events. Table 2.3 shows how, in reporting to the national assembly, the EACC includes lawyers attending CLE training, and accountants attending their professional body's annual conferences, in its training. In 2012/2013, the report on training included the attendance of 27 officers as part of continuous legal education. This could have misled MPs as to the actual extent of training actually provided by the EACC.

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23 EACC (2013) *Ethics and Anti-Corruption Commission Annual Report, 2012–2013*. Nairobi: Ethics and Anti-Corruption Commission. pp. 45–49. Available at: <http://www.eacc.go.ke/docs/2012%20-%202013%20Annual%20Report%20Final.pdf> [accessed: 23 July 2014].



Table 2.3: Examples of training from the EACC Report, 2012/2013

Number trained	Subject matter	Venue	Comment
3 Officers	Prevention, analysis and detection of corporate fraud	Eastern and Southern African Management Institute, Arusha, Tanzania 27 May–14 June 2013	Skills in preventing corporate fraud Useful in working with state enterprises and government departments
1 Commissioner	Developing effective policy	London, England 24–28 June 2013	
1 Officer	International visitors, leadership programme	Washington DC 22 March–13 April 2013	
3 Officers	Forensic auditing and detecting fraud in the procurement and supply chain	EAAACA Kampala, Uganda 8–19 March 2013	Introduction to forensic auditing and fraud detection in procurement Key for the EACC
1 Officer	Public-sector financial management	Intelligent Africa Marketing and Training, South Africa 26–30 November 2012	
1 Officer	Not stated	OLAF, Brussels, Belgium 19–23 November 2013	Training programme with African partners
1 Officer	Reward management	Eastern and Southern African Management Institute, Durban, South Africa 29 October–9 November 2012	Reward management
1 Officer	UNCAC training in effective legal and practical measures against corruption	JICA, Tokyo, Japan 8 October–14 November 2012	
5 Officers	Trial advocacy in cases of complex crimes	US Department of Justice Office of Overseas Prosecutorial Development and Training 1 & 2 August 2013	
2 Officers	Monitoring and evaluation	AMREF Centre, Nairobi 1–26 July 2013	Does not indicate who conducted the three-week training
8 Officers	Integrated public complaints reporting and referral mechanism (IPCRM)	Nairobi 20–24 May 2013	IPCRM training facilitates complaint referrals for six organisations, apart from the EACC
5 Officers	Investments, realities, opportunities and challenges	Institute of Certified Public Accountants of Kenya (ICPAK), Mombasa, 28 May–1 June 2013	
2 Officers	Continuous professional development seminar: Building professionals in the new dispensation	Kenya Board of Registration of Architects and Quantity Surveyors (BORAQS), Nairobi, 24 May–31 May 2013	

Number trained	Subject matter	Venue	Comment
1 Officer	Professional mediation training	Nairobi, 20–25 May 2013	Does not indicate who conducted the six-day training
2 Officers	Information technology security	Mombasa, 28–30 May 2013	Does not indicate who conducted the three-day training
1 Officer	29 <sup>th</sup> ICPAK annual seminar	Mombasa, 29 May–1 June 2013	
1 Officer	29 <sup>th</sup> ICPAK annual seminar	Continuing Legal Education, Mombasa, 29 & 30 May 2013	CLE
2 Officers	Procurement laws and practices	Continuing Legal Education, Nakuru, 15–18 May 2014	CLE
2 Officers	Legislative-drafting course	Continuing Legal Education, Nairobi, 24 May 2013	CLE
1 Officer	Annual governance and ethics conference	Continuing Legal Education, ICPAK, Mombasa, 9–13 May 2013	CLE
1 Officer	Entry course on arbitration and alternative dispute resolution	Chartered Institute of Arbitrator – Continuous Legal Education, 24 & 25 April 2013	CLE
1 Officer	Supplier and customer relationship management	Institute of Supplies Management, Continuous Legal Education 3–5 April 2013	CLE
2 Officers	Computer forensics, cyber realm investigations, and wireless LAN networks best practices	Continuous Legal Education Mombasa, 25–30 March 2013	CLE
2 Officers	New land laws seminar	Continuous Legal Education, Eldoret, 21 & 22 March 2013	CLE
2 Officers	New land laws seminar	Continuous Legal Education, Nyeri, 21 & 22 February 2013	CLE
1 Officer	Certified information systems auditor training (Kenya College of Accountancy)	Continuous Legal Education, Nairobi, 8 & 9 June 2013	CLE
2 Officers	Practical use of FIDIC conditions of contract: Module one	Continuous Legal Education, Nairobi, 18 & 19 February 2013	CLE
2 Officers	Tactical analysis and dissemination workshop	28–31 January 2013	Does not indicate who conducted the training
1 Officer	Procurement leadership workshop (KISM)	Continuous Legal Education, Mombasa, 5–7 December 2012	CLE



Number trained	Subject matter	Venue	Comment
5 Officers	2 <sup>nd</sup> Interpol Global Programme on Anti-Corruption and Asset Recovery	Interpol, Kenya Institute of Monetary Studies, Nairobi 17–21 December 2012	
2 Officers	Training summit (2012), gala night and awards for excellence	Public Relations Society of Kenya, Continuous Legal Education, Nairobi, 5 & 6 December 2012	Not clear what the training component was
2 Officers	Electoral process laws and practices	Continuous Legal Education, 11 January 2013	CLE
1 Commissioner	Good corporate governance for ethical, effective, productive and sustainable organisations	Mombasa, 21–25 January 2013	Does not state who conducted the training
1 Officer	Seminar on international law: Council for Legal Education (CLE)	Continuous Legal Education, Malindi, 7 December 2012	CLE
1 Officer	Inaugural Forensic Audit Conference	ICPAK, Mombasa, 3–5 October 2012	
1 Officer	2012 Fellows Forum	Institute of Certified Public Secretaries of Kenya (ICPSK), Naivasha, 15–17 November 2012	

### *Ethics*

The chairperson, the two members of the commission and the commission secretary must – within seven days of being sworn into office – sign the Leadership and Integrity Code for State Officers in the EACC. This commits them to abide by the requirements of the Leadership and Integrity Act of 2012. The code covers the following areas and issues:

- Fidelity to the rule of law;
- Respect for public trust;
- Responsibility, performance of duties, and professionalism;
- Financial probity;
- Moral and ethical requirements;
- Treatment of gifts or benefits in kind;
- Conflict of interest;
- Participation in tenders issued by the commission;
- Participation in public collections;
- Prohibition against holding bank accounts outside Kenya;
- Acting on behalf of foreigners;
- Care of official property and misuse of official information;
- Obligation to be politically neutral (through impartiality in the giving of advice);
- Prohibition of other gainful employment;
- Treatment of offers of future employment;

- State officers not to be engaged by the commission until after a two-year cooling-off period;
- Misleading the public and falsification of records;
- Conduct in respect of private affairs, bullying, and dress code;
- Acting through others and reporting improper orders;
- Confidentiality;
- Duty to prevent corruption or unethical practices in carrying out the business of the commission; and
- Promotion of ethics, integrity, and best practices in the fulfilment of the duties of the commission.

The code explicitly states that a breach of its provisions ‘amounts to misconduct for which the state officer may be subjected to disciplinary proceedings including, in the case of a violation of chapter 6 or any other provision of the constitution, removal from office’ under article 251 of the Constitution. Article 251 provides that a member of a commission may be removed from office only for:

- Serious violation of the Constitution or any other law, including a contravention of chapter 6;
- Gross misconduct, whether in the performance of the member’s or office holder’s functions, or otherwise;
- Physical or mental incapacity to perform the functions of office;
- Incompetence; or
- Bankruptcy.

In the event of a breach of the code of conduct, which does not amount to a violation of the Constitution, any person may lodge a complaint alleging breach of the code and may submit a petition to the cabinet secretary responsible for the commission (the attorney general). The cabinet secretary must then submit the petition to the president, who, in turn, must constitute an independent review panel to inquire into the allegations contained in the petition in accordance with section 51 of the 2012 Leadership and Integrity Act. The panel is to be comprised of five state officers of good character and integrity drawn from any of the commissions established under chapter 15 of the Constitution. The independent review panel has to inquire into the alleged contravention, and, if the inquiry discloses that a member of the commission has violated chapter 6 of the Constitution, the independent review panel must thereafter take the appropriate disciplinary action, or, if it does not have the power to take the appropriate disciplinary action, refer the matter to a body or person who is vested with the necessary power. Regulations made under section 54(f) will apply to the disciplinary action. A person who is dissatisfied with the decision of the independent review panel may apply for a review within 15 days from the date of the decision. The independent review panel must review its decision within 15 days. A person who is dissatisfied with the decision of the independent review panel may appeal to the high court and the court shall make a decision within 30 days of the appeal.

Section 52 of the 2012 Leadership and Integrity Act provides that the code will apply to all commission staff in pari passu, except that public officers may participate in public collections, conditionally. The third schedule to the EACA also contains another iteration of the codes of conduct, which must – as per section 21 – be signed by all members and employees of the commission.

Section 18 of the EACA establishes the secretariat of the commission and thus the authority and terms of staff recruitment and engagement. It designates the staff of the commission as public officers and makes provision to ensure the diversity of staff. No one gender can therefore be represented in excess of two-thirds of the total staff establishment, and recruitment to the commission must ‘reflect [the] ethnic and regional diversity of the people of Kenya’.

Additionally, in accordance with section 34 of the EACA, after the establishment of the EACC, 251 staff of the former KACC, who wanted to be taken on by the new commission. Of these, 236 officers were retained, while the contracts 21 officers were either not renewed or were terminated.

### Remuneration

The remuneration of the members of the EACC is generous (see Table 2.4.).

Table 2.4: *Approved remuneration structure for staff of the EACC*<sup>24</sup>

Grade	Designation	Minimum gross monthly remuneration (KES)	USD	Maximum gross monthly remuneration (KES)	USD
1	Commission Secretary	526 058	6 189	701 441	8 252
2	Deputy Secretary	400 000	4 706	550 000	6 471
3	Chief Officer/Director	300 000	3 529	450 000	5 294
4	Principal Officer/ Deputy Director	230 000	2 706	350 000	4 118
5	Senior Officer/ Assistant Director	180 000	2 118	270 000	3 176
6	Officer I	130 000	1 529	200 000	2 353
7	Officer II	90 000	1 059	130 000	1 529
8	Officer III	80 000	941	120 000	1 412
9	Assistant Officer I	70 000	824	100 000	1 176
10	Assistant Officer II	50 000	588	75 000	882
11	Assistant Officer III	45 000	529	65 000	765
12	Office Assistant	37 000	435	59 000	694

24 GA Otieno (2013). Letter to the chairperson of the Ethics and Remuneration Commission. 10 December 2013.

The chairperson's remuneration is KES750 000 (USD8 823) per month; the vice-chairperson earns KES694 000 (USD8 164) per month; and a commissioner earns KES685 000 (USD8 058) per month. The Salaries and Remuneration Commission approved the EACC's remuneration structure for the EACC, as shown in table 2.4.

Despite the Salaries and Remuneration Commission's guidance, some officers who entered into employment prior to December 2013 earn more than the approved remuneration. In particular, including cash allowances and perks, the secretary/CEO's pay is KES930 000 (USD12 400) per month; the deputy secretary of the commission (support services) earns KES655 600 per month (USD7 712); and the deputy secretary (operations) earns KES780 000 per month (USD10 400).

## Investigative and prosecutorial powers

The EACC has a clear mandate in terms of the prevention of corruption, as well as the sensitisation and education of the public in the fight against corruption. It also has a statutory mandate to engage with the public in the fight against corruption. Since its establishment, the organisation has invested considerable resources in public-awareness and education campaigns and other efforts, including hosting the International Anti-Corruption Day events celebration in Kenya. It chairs the Kenya Integrity Forum,<sup>25</sup> which convened a national leadership and integrity conference in June 2013, and collaborates with other public-sector institutions, such as educational facilities for outreach to students at junior, tertiary, and higher education levels. The forum also works with professional associations and civil-society organisations in developing codes of conduct and working to improve ethical conduct and introduce better corporate and institutional governance standards.

Despite this, the EACC is not widely relied upon by Kenyans in reporting corruption. For example, a 2012 survey by the commission found that, while 60% of those surveyed had 'observed or witnessed a corrupt act by a public officer' in the past 12 months, only 6% had reported the incident. Of those who reported such incidents, only 11.7% made the report to the EACC.<sup>26</sup>

This is not easily explicable by commission insiders, but it is more likely that the commission is not as ubiquitous a presence as the police and the provincial administration to which the Kenyan public is more used to reporting crimes. The survey thus found that 34% of those who had observed a corrupt act in the 12 preceding months had made a report to the police, and that the provincial administration had received reports from 29% of this segment of the population. Nearly 20% of the respondents did not, in any event, know where to report such incidents, and only 3.6% were able to say that they had 'access to ethics and anti-corruption services in the past one year'.

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25 EACC (2013) *Conference Resolutions Adopted at the National Leadership and Integrity Conference*. Kenya Integrity Forum, Kenya School of Monetary Studies, Nairobi, 12 June 2013. Available at: <http://www.eacc.go.ke/Docs/Resolutions-2013.pdf> [accessed: 23 July 2014].

26 EEAC (2014) *National Survey on Corruption and Ethics 2012*. Ethics and Anti-Corruption Commission Research and Planning Department, Directorate of Preventive Services. Available at: <http://eacc.go.ke/docs/National-Survey-Corruption-Ethics-2012.pdf> [accessed: 23 July 2014].

As stated earlier, the commission does not have prosecutorial powers. Constitutionally, criminal prosecutions may only be conducted by the DPP. However, the DPP may gazette/designate prosecutors, and has done so in some cases involving the anti-corruption commission, such as in the prosecution of a former minister, Amos Kimunya,<sup>27</sup> and in the extradition proceedings against Samuel Gichuru and Chris Okemo.<sup>28</sup>

The commission, upon concluding that a case warrants prosecution, submits the files to the DPP, who, after assessing the evidence gathered, may initiate a prosecution and file charges, or may return the file requesting further evidence from the commission, or may recommend that the evidence is incapable of sustaining a criminal charge and that the matter should be closed.

The Office of the DPP and the EACC have developed a joint case management system that enables both institutions to keep track of the various files moving between them. In the annual report for 2013, the commission reported that it had forwarded about 1 400 cases to the DPP in that year alone.

In the past, relations between the commission and the DPP were strained and subject to casting blame. However, both the EACC and the DPP have reported that the mutual cooperation between the two institutions was much improved in 2014. Both attribute this improvement in relations to the integrated public complaints referral mechanism which they use for improving and facilitating institutional collaboration.<sup>29</sup>

The EACC's mandate is limited to the public-sector and public funds, but includes state-owned enterprises or private sector entities with public investments in in such enterprises. For example, the EACC mandate would extend to the fiduciary conduct of the national air carrier, Kenya Airways, a publicly traded company in which the government is now a minority shareholder.

The EACC is mandated to engage in civil litigation and negotiations for the purposes of the recovery of assets and proceeds of corrupt conduct. The ACECA of 2003 has provisions that permit asset seizure and the civil recovery of corruptly acquired property.<sup>30</sup> The commission has, through litigation, recovered assets and proceeds of corruption of quite substantial value. Recoveries are banked in a statutory Asset Recovery Fund on which the EACC reports annually to the national assembly and which is audited by the auditor general.

## **Public-feedback mechanism and witness protection**

The EACC has a public-feedback mechanism. After submitting a report, a person has the option of creating an anonymous postbox. From here, that person can access feedback from

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27 William Korir, 'Kimunya Criminal Case to Continue: High Court', *News24 Kenya*, 8 July 2014. Available at: <http://m.news24.com/kenya/MyNews24/Kimunya-criminal-case-to-continue-High-Court-20140708> [accessed: 3 November 2014].

28 See second case study.

29 Author's interview with Key Informants at the EACC and the DPP, June 2014.

30 Anti-Corruption and Economic Crimes Act, 2003 (Cap. 65), part VI, sections 55 and 56. Available at: <http://www.eacc.go.ke/docs/legal/aceca.pdf> [accessed: 23 July 2014].

the EACC on the progress of the report, or receive messages in case there is a need for more clarification and details. This creates a dialogue between the whistle-blower and the EACC, and, since the messages are encrypted, the dialogue remains secure and anonymous.

## Financial resources

Together with other ministries and agencies, the EACC bids for annual budgetary allocations in the national budget. The commission does not get allocated what it requests, due to government resource constraints. It is widely recognised, though, that the commission should be better funded. For example, during the debate on the 2014/2015 Appropriation (Budget) Bill, an MP (GW Omondi) stated: ‘I would have also liked to see the empowerment of the EACC. This Commission should have been given the money that it requested because we need to know what is going on so that we arrest things that divert us from our development goals.’ Nonetheless, the funding of the commission has risen significantly and the institution has grown in terms of human resources and reach in the decade since it was established in 2003.

The controller of budget reports that, for the year 2013, the absorption capacity of the commission was relatively stable year on year. The following table compares first-quarter expenditure of the commission for the financial years 2012 and 2014.

Table 2.5: EACC absorption capacity

EACC analysis of first-quarter recurrent and development expenditure vis-à-vis net exchequer issues (USD)						
Quarter 1 FY 2012–2013	Gross estimates	Net estimates	Exchequer issues	Expenditure	% Exchequer to net estimates	% Expenditure to gross estimates
Recurrent budget	16 000 000	16 000 000	4 000 000	3 000 000	25	18.8
Development budget	2 000 000	2 000 000	0	0	0	2.3

Quarter 1 FY 2013–2014	Gross estimates	Net estimates	Exchequer issues	Expenditure	% Exchequer to net estimates	% Expenditure to gross estimates
Recurrent budget	10 000 000	10 000 000	3 000 000	3 000 000	26.1	25.5

The Kenya National Audit Office annually audits and reports on the accounts of the commission. The audit report comprises an opinion, which may be qualified should there be issues identified in the financial statements that indicate misuse or losses of funds that require further action by the commission or the national assembly.

For example, the 2012/2013 annual report of the EACC contained a qualified opinion by the Kenya National Audit Office, because – bearing in mind materiality – the audit identified



KES5.8 million (USD68 000) worth of irregular personal allowances that were paid to a former chief executive, and that had not been recovered by 30 June 2013, (the last day of the financial year). The audit further revealed that the commission had paid, but could not account for, KES2.9 million (USD34 000) worth of consumable stock (specifically, computer toner cartridges). In addition, the audit found that, as of 30 June 2013 a United Nations-funded wealth declaration management system project had spent KES20.4 million (USD204 000) ‘without fully attaining the desired deliverables and goals as spelt out in the project’s financing agreement signed on 5 April 2011’.

Table 2.6 details the budget allocation of the EACC for the financial years 2010 to 2013.

*Table 2.6: Ethics and Anti-Corruption Commission government of Kenya grants and donor support, 2010–2013*

	FY 2013	FY 2012	FY 2011	FY 2010	TOTAL
GOVERNMENT OF KENYA GRANTS					
Recurrent exchequer receipts	12 100 000	12 921 485	13 700 000	14 907 500	53 628 985
Development exchequer receipts	100 000	0	0	0	100 000

DONOR SUPPORT					
UNDP/ADB grants	146 623	131 051	1 264 303	0	1 541 978
GoK grants	0	7 682	650 000	500 000	1 157 682
ADB–GJLOS grants	0	0	0	209 429	209 429

OTHER INCOME					
Sale of tender documents	11 330	4 780	9 130	7 660	32 900
Sale of non-assets and boarded materials documents	320 838	0	0	0	320 838
Interest income	13 539	0	0	0	13 539

TOTAL	12 374 701	13 064 999	15 623 433	15 624 589	56 687 724
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Source: EACC (2011) *Annual Report, 2010/2011*. Nairobi: Ethics and Anti-Corruption Commission. EACC (2012) *Annual Report, 2011/2012*. Nairobi: Ethics and Anti-Corruption Commission. EACC (2013) *Annual Report, 2012/2013*. Nairobi: Ethics and Anti-Corruption Commission.

The national assembly’s Departmental Committee on the Administration of Justice reviews audit findings and recommendations regarding the EACC, since it deliberates on the commission’s

budget requests before they are placed before the Budget Committee of the national assembly. The Public Accounts Committee of the national assembly also issues an annual report on the accounts of the EACC based on the audits of the Kenya National Audit Office.

## Relationship with the public and other stakeholders

Although, in direct interviews, respondents from the EACC, the DPP's office and civil-society organisations, such as Transparency International, reported good, collaborative working arrangements between the EACC and stakeholders, the real picture is likely to be a little less rosy.

Interviewees confirmed the impression that, among state institutions, there has been a reduction in the turf wars of the past. Former chairperson, Justice Ringera, engaged in public spats with the Office of the Attorney General (and, by extension, the DPP) over the handling of investigations. The DPP maintained that the files passed on by the EACC were not adequate for prosecution purposes, an opinion which provoked the ire of Justice Ringera and the commission on several occasions.<sup>31</sup> In contrast, both the EACC and the DPP tout their much improved working relationship and collaborative report-handling endeavours. It is also fair to say that the relationship between the EACC and some non-state stakeholders<sup>32</sup> is in better shape, and is less antagonistic, than it was under the directorship of Justice Ringera (2003–2008), when relations with the members of civil society became so strained that they actively campaigned against the renewal of his term as director. This is somewhat surprising considering the controversy surrounding the appointment process of the EACC chairperson, Mumo Matemu.

Nonetheless, the latest annual report to parliament by the EACC reveals severe collaboration challenges in the following stark terms:

*The efforts in the fight against corruption by the EACC and other relevant institutions remain uncoordinated and varied due to the absence of national anti-corruption policy to guide the process. This has affected investigation and asset recovery by the EACC, particularly in areas that require an integrated approach among all institutions [that] may be involved in the matter. Thereby, the EACC's capacity to deliver on its mandate is affected. Despite ongoing reforms taking place in the judiciary, the judicial process and adjudication of cases [are] still slow. The EACC continue to be affected by adverse judicial decisions, which stopped investigations or prosecution of cases.<sup>33</sup>*

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31 See, for example: US State Department (2006). Wikileaks. *AG Wako Sends Anglo-Leasing Files Back to KACC: Shell Game Continues*. Nairobi, 27 October 2006. Available at: [http://www.wikileaks.org/plusd/cables/06NAIROBI4631\\_a.html](http://www.wikileaks.org/plusd/cables/06NAIROBI4631_a.html) [accessed: 21 September 2014].

32 Notably the Transparency International Kenya Chapter. See, for example, EACC and TI joint courtesy call to the president and the resulting statement by the Office of the President, *Government to work with Transparency International (TI) against corruption, Nairobi, 19 February 2014*. Available at: <http://www.president.go.ke/government-to-work-with-transparency-international-ti-against-corruption/> [accessed: 21 September 2014].

33 EACC (2013) *Annual Report 2012/2013*. Nairobi: Ethics and Anti-Corruption Commission. p. xiii. Available at: <http://www.eacc.go.ke/docs/2012%20-%202013%20Annual%20Report%20Final.pdf> [accessed: 22 September 2014].

During the constitutional review processes of 2008 to 2010, there was a debate between those who wanted an anti-corruption commission with prosecutorial powers and those who wanted criminal prosecution to remain the exclusive mandate of the DPP. In the end, it was the latter view that prevailed. In the final draft of the Constitution, which was put to the vote by way of a referendum, another implicit change was introduced: henceforth, the commissioners would become the executive of the anti-corruption commission and the advisory board would be removed from the structure of the institution. This had far-reaching effects on the accountability of the EACC, which may not have been anticipated at the time.

### **Relationship with the private sector**

The EACC's mandate is restricted to the public sector; thus it has very limited interactions with the private sector.

### **Kenya's membership of, and participation in, regional anti-corruption bodies**

Kenya is a member of the Eastern and Southern African Anti-Money Laundering Group. Moreover, Kenya's law enforcement authorities cooperate through the Eastern Africa Police Chiefs Cooperation Organization. Also, the EACC is a member of the East African Association of Anti-Corruption Authorities (EAAACA).

### **Reporting mechanism and public perception**

The EACC operates a German-designed online whistle-blowing system<sup>34</sup> known as the BKMS.<sup>35</sup> This system, which is sponsored by way of German bilateral aid through GiZ, facilitates anonymous online corruption reporting. The system is reportedly safe from hacking or other attempts to identify complainants, thus securing whistle-blower protection. The BKMS was designed to escalate corruption complaints within the EACC in order to prevent any officer, or group of officers, from stopping an investigation of reported corruption without reference to the complainant, something which is required by law.<sup>36</sup> While the EACC reports that the system has been a successful intervention, it is difficult to independently verify how the system is actually being used. The obvious difficulty is that an independent auditor would have to have access to the back-end. However, in gaining such access, the auditor be able to identify complainants, or, at the very least, be able to know who the EACC is investigating, which might constitute a breach of the 2003 ACECA.<sup>37</sup>

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34 KACC (2007) *Annual Report, 2006/2007*, p. 10. Available at: [http://eacc.go.ke/Docs/Annual\\_Report\\_0607.pdf](http://eacc.go.ke/Docs/Annual_Report_0607.pdf) [accessed: 23 July 2014].

35 Sponsored by the German Development Agency (GiZ), the BKMS (Business Keeper Management System) was implemented by the EACC in 2007. It can be accessed online at <http://www.business-keeper.com/whistleblowing-systems.html>.

36 Anti-Corruption and Economic Crimes Act, Cap. 65 Laws of Kenya, 2003, section 25.

37 See Anti-Corruption and Economic Crimes Act, Cap. 65 Laws of Kenya, 2003, section 33.

According to the KBI, 27% of Kenyans encountering bribery did not report such bribery cases, as they believed that no action would be taken. This is an indictment of the justice institutions, including the EACC.

## H. The EACC's performance

### Investigation and case development

The EACC and its predecessors have investigated and developed cases as illustrated in Table 2.7.

Table 2.7: EACC performance matrix

Year <sup>37</sup>	Complaints received	Investigations arising from complaints	Investigation files forwarded to AG/DPP <sup>38</sup>	Prosecutions approved by the AG/DPP (number)	Prosecutions approved by the AG/DPP (percentage)
2004	3 552	242	0	0	0
2005	3 234	384	35	23	65
2006	7 888	1 150	84	70	83
2007	8 188	1 611	111	70	63
2008 <sup>39</sup>	4 485	1 232	86	70	81
2009	4 335	1 270	122	87	71
2010	4 372	1 281	104	75	72
2011	7 106	2 445	134	95	70
2012	5 230	2 183	89	54	60
2013	3 355	1 688	32	28	87

38 Data for the years 2003–2006 taken from Mars Group Kenya, KACC Independent Assessment, Nairobi, 2007, p. 14. Available at: [http://publications.marsgroupkenya.org/GAP\\_Report3\\_KACC/GAP3\\_Report\\_Web\\_Version.pdf](http://publications.marsgroupkenya.org/GAP_Report3_KACC/GAP3_Report_Web_Version.pdf) [accessed: 23 July 2014].

39 After promulgation of the Constitution, the responsibility for public prosecutions moved from the Office of the Attorney General to the DPP.

40 Data for 2008–2013 from KACC/EACC annual reports. Available at: <http://eacc.go.ke/default.asp?pageid=20> [accessed: 23 July 2014].

## Asset recovery

Between 2008 and 2013, the commission reported to parliament that it had recovered property and cash amounting to KES6.8 billion (USD80.4 million). Table 2.8 analyses the amounts recovered in the five years between 2008 and 2013.

Table 2.8: Kenya EACC asset recoveries summary 2010–2013

Year	Value of ongoing asset recovery enquiries during year	Value of assets recovered (KES)	Examples
2012–2013 <sup>40</sup>	16.38 billion (USD192.7 million)	567 408 217 (USD6.6 million)	Ministry of Health land valued at KES145 million and Uasin Gishu County Trust land valued at KES80 million
2011–2012 <sup>41</sup>	16.285 billion (USD191.58 million)	526 641 044 (USD6.19 million)	Including Mombasa's Uhuru Gardens, a public park
2010–2011 <sup>42</sup>	771 710 000 (USD9.078 million)	4 119 218 (USD484 591)	
2009–2010 <sup>43</sup>	2.336 billion (USD27.4 million)	1.78 billion (USD20.9 million)	Land reserved for the Kenya Broadcasting Corporation within the Ngong Road Forest Reserve, land forming part of Nairobi National Park, and Kenya Railways Corporation houses in Kisumu
2008–2009 <sup>44</sup>	5.61 billion (USD66 million)	144.4 million (USD1.69 million)	Properties recovered were located in Nairobi, Nakuru, Tigon and Kisii. Most belonged to the Kenya Agricultural Institute and the City Council of Nairobi
2007–2008 <sup>45</sup>	[not stated]	3.779 billion (USD44.45 million)	Including recovery of the Grand Regency Hotel, a luxury hotel built with Goldenberg corruption proceeds

41 EACC (2013) Annual Report, 2012/2013. Nairobi: Ethics and Anti-Corruption Commission, p. 15. Available at: <http://www.eacc.go.ke/docs/2012%20-%202013%20Annual%20Report%20Final.pdf> [accessed: 22 September 2014].

42 EACC (2012) Annual Report, 2011/2012. Nairobi: Ethics and Anti-Corruption Commission. Available at: <http://www.eacc.go.ke/docs/EACC%20annual%20report%20-%202011-2012-final.pdf> [accessed: 21 September 2014].

43 EACC (2011) Annual Report, 2010/2011. Nairobi: Ethics and Anti-Corruption Commission, p. 21. Available at: <http://www.eacc.go.ke/docs/KACC-ANNUAL-REPORT%202010-2011.pdf> [accessed: 21 September 2014].

44 KACC (2010) Annual Report, 2009/2010. Nairobi: Kenya Anti-Corruption Commission, p. 29. Available at: <http://www.eacc.go.ke/Docs/Annual-Report09-10.pdf> [accessed: 21 September 2014].

45 KACC (2009) Annual Report, 2008/2009. Nairobi: Kenya Anti-Corruption Commission, p. 19. Available at: <http://www.eacc.go.ke/Docs/KACC-Report-08-09.pdf> [accessed: 21 September 2014].

46 KACC (2008) Annual Report, 2007/2008. Nairobi: Kenya Anti-Corruption Commission, p. 12. Available at: [http://www.eacc.go.ke/Docs/Annual\\_Report\\_0708.pdf](http://www.eacc.go.ke/Docs/Annual_Report_0708.pdf) [accessed: 21 September 2014].

## I. Conclusion

The gulf between words and official action remains. Kenya's leadership over the past decade has been prone to indulge itself in overblown public declarations, such as stating that 'corruption is a crime against humanity,'<sup>47</sup> while condoning corruption when partisan political or economic interests are at play. Kenya's anti-corruption policy is a matter of form exceeding substance. The laws are there, the policy intent and instruments exist, and there is even a rapid and vibrant exposure to 'reaction tango' that has developed between the press and NGOs on the one hand, and the government on the other. The only thing absent is results. For all the activity, Kenya's public service is empirically demonstrated to be corrupt, year after year.

Grand corruption remains a severe challenge to good governance in Kenya. One is tempted to agree in principle with the following statement in the 2012 Anti-Corruption and Ethics Survey Report:

*Compared [with] international practice, elements of a good anti-corruption strategy exist in Kenya. The country has a solid legislative, regulatory and institutional framework, largely put in place since 2003. The public service utilises good management practices, including a code of conduct, modern employment practices, financial disclosures, fair procurement and a progressive disciplinary system for ensuring economic utilization of all state resources.*

However, Kenya needs to get past the point of celebrating the existence of the legal and institutional instruments needed to fight corruption and start to use these to end its perennial status and ranking as a country in which corruption is rampant. Kenya has never suffered for want of adequate legislation; its problem is impunity and lack of operationalisation of laws and policies.

Kenya's peculiar problem is impunity. This explains why, despite bribery and corruption having been criminalised since 1956, with over a dozen major legislative amendments being enacted to better codify the offences, increase penalties and create new anti-corruption institutions, Kenyans are hard pressed to name a single major corruption prosecution, let alone a conviction, for such notorious crimes. For all the civil-society investment in agitation against corruption, and despite the obviously enlightened Kenyan public seeing the economically deleterious effects of corruption, the menace is not a political issue that wins votes.

Where anti-corruption features as an election issue, it is espoused by every candidate without exception and is cynically appropriated by corrupt politicians who argue that the fact that they have never been convicted by any court means they cannot be held accountable for fairly obvious corrupt or unethical acts. In Kenya, the principle of innocence until guilt has been proven is so grievously abused that the principle's elasticity has been tested to absurd levels, to the point of actually negating chapter 6 of the Constitution.

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47 Kiraitu Murungi (2003). 'When corruption is a crime against humanity'. Speech delivered at 11<sup>th</sup> International Anti-Corruption Conference, 25 May 2003. Available at: [http://iacconference.org/en/archive/document/when\\_corruption\\_is\\_a\\_crime\\_against\\_humanity](http://iacconference.org/en/archive/document/when_corruption_is_a_crime_against_humanity) [accessed: 4 November 2015].

The situation is so serious that even the appointment of the chairperson of the EACC is based on a shaky jurisprudence of the court of appeal, which essentially upheld the view that serious allegations are of no consequence in the vetting of public officials and that only convictions by a court count. The court of appeal may have believed that it was raising the standard high enough to protect potential appointees against frivolous and vexatious allegations, which is not an unmeritorious intention, but what it ended up doing was lowering the bar for candidates suitable for public office so patently low that any unconvicted criminal, no matter how notorious their crime, is now eligible for the highest office in the Republic of Kenya.

The court of appeal's decision concerning the Matemu case may very well have followed a prior decision in the matter of Kenyatta and Ruto, in which a challenge against the candidacy of the sitting president and deputy president of Kenya was dismissed, essentially because the court decided to ignore indictments at the International Criminal Court for crimes against humanity when deciding on suitability for nomination to run for president of Kenya. In such an environment, can any anti-corruption institution really be expected to succeed, or is it more likely that it will tread water and seek political signals on how far up it can aim and how wide it can cast its net?

## J. Recommendations

In order to address some of these challenges, the following recommendations are being made:

### 1. Strengthen the overall legal framework for combating corruption

The Independent Advisory Board of the former Anti-Corruption Commission played a useful advisory, control and oversight role that has been lost now that the commissioners are executives and constitute the commission. Ideally, the secretariat should have the benefit of an independent board appointed or nominated, as per the old statute, by stakeholders, with an oversight mandate in respect of the commission and its secretariat (executives). Parliament cannot adequately play this role, as it engages with the commission *ex post facto* at the end of the year through the audit and budget process, and because it is legally prohibited from having any role in the anti-corruption operations conducted by the EACC. It is obvious why this should be so; no one would want parliament to be involved in the commission's investigative work.

It is therefore recommended that the national assembly should take the necessary legislative action to reinstate, with appropriate modification, an independent oversight body that would represent the public interest in holding the commissioners of the EACC accountable for their work. Rectifying the existing structural weakness will require amendment of the EACA to reinstate the repealed part 3 provisions of the ACECA, and, with appropriate modification, re-establish an independent stakeholder-nominated

advisory board<sup>48</sup> to work with the executive commissioners and secretariat in ensuring public confidence and fidelity with regard to the commission's mandate.

It is necessary for the EACC to establish a presence in each county and sub-county if it is to adequately meet the expectations and needs of the majority of the population.

Technology should be to allow greater for public access. The EACC must find ways of enhancing the use of its website, both for corruption reporting and learning. It must invest in web-to-mobile application development so as to take advantage of the growing smartphone penetration in Kenya which constitute (67% of all new mobile devices sold<sup>49</sup>). The commission last reported, that as of 2012, its website had handled 304 unique visitors daily, less than 20% of whom were using Kenyan IP addresses.<sup>50</sup>

## **2. Strengthen the agency's status (legal framework, appointment, tenure and removal procedures, external oversight, autonomy and independence)**

- The EACC should be listed in article 248 of the Constitution so that the question of interpretation does not arise. Getting the EACC listed under article 248 may, however, require a referendum. The supreme court should therefore provide an interpretation of what it would mean to include the EACC under article 248.
- The EACC should be given powers to prosecute. This is in line with Jubilee Manifesto No. 3 and article 157(12) of the Constitution, which allow for delegation of prosecutorial powers by parliament.
- The requirement for the DPP to take on a case once a citizen has begun prosecuting should be removed, with the citizen being allowed to carry the prosecution process forward to the end.

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48 A review of the nominating bodies is necessary to ensure that the advisory board is as representative as possible. The old advisory board was comprised of 12 members nominated by the following bodies:

1. Law Society of Kenya
2. Institute of Certified Public Accountants of Kenya
3. Kenya Association of Manufacturers
4. Joint Forum of Religious Organisations
5. Federation of Kenya Employers
6. Kenya Bankers Association
7. Central Organisation of Trade Unions
8. Association of Professional Societies in East Africa
9. Architectural Association of Kenya
10. Institution of Engineers of Kenya
11. Kenya Medical Association
12. International Federation of Women Lawyers (Kenya Chapter)

49 C Udemans. '67% of phones sold [are] smartphones.' *Safaricom*, HumanIPO, 21 April 2014. Available at: <http://www.humanipo.com/news/42985/kenyas-smartphone-penetration-at-67-safaricom/> [accessed: 3 November 2014].

50 EACC (2102) *Annual Report, 2011–2012*. Nairobi: Ethics and Anti-Corruption Commission, p. 69. Available at: <http://www.eacc.go.ke/docs/EACC%20annual%20report%20-%202011-2012-final.pdf> [accessed: 3 November 2014].



### **3. Strengthen the EACC's mandate and interagency collaboration with state and non-state actors and with regional/continental networks**

The EACC should focus on asset recovery in order to win public confidence and to justify the resources supplied to it out of the Consolidated Fund. The current EACC is in its first year of operation and is struggling to earn the confidence of a public that is increasingly cynical about the official institutions charged with the fight against corruption in Kenya. Prior to the swearing in of the current commissioners on 5 August 2013, the EACC went without substantive leadership for two years, during which public confidence in the commission all but evaporated. The institution – being leaderless – became moribund and performed poorly. For example, it recovered less than half a million US dollars in two financial years (2010/2011), compared with the previous recovery of USD20.9 million in 2009/2010 and USD6.19 million in the subsequent years (2011/2012).<sup>51</sup> In 2012/2013, it reported recovery of USD 6.6 million, mainly comprising land belonging to the government that had been illegally allocated to private entities. The EACC needs to convince the public that there is an anti-corruption dividend in terms of asset recoveries contributing to the public fiscus.

Until Kenya frustrated cooperation in 2009, the Serious Fraud Office (SFO) in the United Kingdom (UK) was investigating UK entities that had received Anglo Leasing scandal-related funds from the government of Kenya. The SFO director at the time indicated that he would consider reopening the investigation if evidence was received from Kenya in the future.<sup>52</sup> Now that the EACC and the attorney general have mutual legal assistance to the Swiss authorities, it is hoped that the same would apply to the UK investigation, which has already obtained evidence from France, Spain and Switzerland.

### **4. Improve agency financing, independence and sustainability**

With regard to financial independence, efforts need to be made to ensure that there is sufficient budgetary and fund allocation to enable the EACC to execute its mandated functions without any delay. Key anti-corruption projects and programmes, like the National Anti-Corruption Strategy and Action Plan (NACSAP), have been reliant on heavy donor funding and, as such, their continuity is not guaranteed. The study therefore recommends that, to the extent possible, the EACC be fully funded from internal resources to avoid the problems caused by the unreliability of donor financing.

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51 See Table 2.8: Kenya EACC asset recoveries summary 2010-2013.

52 Serious Fraud Office (2009) *Anglo Leasing—SFO to Discontinue Probe into Kenyan Contracts*. London: Serious Fraud Office. 4 February 2009. Available at: <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2009/anglo-leasing---sfo-to-discontinue-probe-into-kenyan-contracts.aspx> [accessed: 3 November 2014].

## 5. Strengthen administration, staff capacity and the infrastructure

- The number of commissioners should be increased to five, with the CEO as an ex officio member. This will reduce the risk of compromise and will also ease decision-making.
- There should also be mechanisms to ensure internal checks and balances, including an internal team that mirrors the work of the commission.
- There should be a schedule to the EACA specifying the relationship between the secretariat and the commissioners. This will reduce risk of conflict by clarifying mandates.