

POLICIES AND LEGAL FRAMEWORK ON ANTI-CORRUPTION IN KENYA

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LAY OUT OF THE PRESENTATION

- Introduction
- Corruption risk areas
- Policy framework
- Legal Framework
- Challenges in implementation of the policy and legal framework

INTRODUCTION

- The anti-corruption regime is shared across several pieces of policies and legislations.
- There are a number of policies and legislations which have been enacted to curb corruption in Kenya. It is amazing that there are many policies and legislations in place to curb corruption.
- Despite of all these, corruption still remains arguably the greatest challenge to Kenya's social economic development in Kenya.

CORRUPTION RISK AREAS AND CORRUPTION PRACTICES IN THE UNIVERSITY

- All functional areas in the University are potential risk areas. They include: -
 - Financial Management Systems and Procedures
 - Information, Communication and Technology Systems (ICT)
 - Procurement, Processes and Disposal of Stores
 - Human Resources and Administration Areas
 - Planning and Management of Projects
 - Records Management
 - Teaching and Conduct of Examinations
 - Professional responsibilities and accountability

POLICY FRAMEWORK (NATIONAL POLICIES)

The following policies are in place
in the fight against corruption:

THE CODE OF CONDUCT AND ETHICS FOR PUBLIC UNIVERSITIES 2003

- A shared statement of the University's commitment to uphold the highest ethical, professional and legal standards used as the basis for daily and long-term decisions and actions.
- University members are individually and collectively accountable for their actions and upholding of ethical standards of behavior and compliance with all applicable laws and policies of the Country and the Institution, respectively.

It prohibits:

- Dishonesty in the execution of public duty;
- Immoral conduct in professional and personal life;
- Disregard for professional duties, arising under the codes of professional conduct;
- Impropriety;
- Lack of objectivity and impartiality;
- Corruption;
- Failure to disclose a conflict of interest;
- Failure to be accountable to the public for decisions or actions taken;
- Lack of discipline and commitment to public service;
- Lack of diligence and neglect of duty

Tom Ochieng Odhiambo v Kenya Literature Bureau [2014] eKLR

- This suit was brought by the Claimant via a Memorandum of Claim dated 17th September 2012 seeking payment of terminal benefits and compensation for wrongful termination of employment. He worked continuously until when his employment was terminated for loss of stock. The duties of the Claimant included being in charge of Stock Inventory and Movement. He also made requisition of stock upon information by the Clerical Officer.

- On 9th November 2011, the suppliers of paper delivered 200 reams. The delivery note indicated that they had delivered 250 reams. The Claimant signed the delivery note acknowledging receipt of 250 reams of paper. The Claimant told the Court that he signed the delivery note on the understanding that the shortfall of 50 reams would be brought the following day.

- On 10th November 2011, the supplier brought 250 reams of paper and did not bring the 50 reams to compensate the shortfall for the day before. The Claimant altered the delivery note for 10th November 2011, to reflect 200 reams had been delivered so as to cater for the shortfall for the day before.
- The Security Officer at the point of delivery had noted the discrepancy in the delivery note for the 9th November 2011. He reported the matter to his superiors.
- This triggered a chain of events leading to the suspension of the Claimant, physical stock take of the stores and an Audit to determine whether the stocks received on paper were indeed received at the warehouse. Discrepancies were discovered leading to the disciplinary measures against the Claimant and his termination from employment.

- The Claimant denies that he was involved in misappropriation of the company stock to the loss and detriment of the Respondent stating that he relied on the staff to update the bin cards. That the supply chain manager was responsible for the stock movement and stock levels.

- That on the 9th November 2011, he had informed the stock inspection committee and his supervisor about the shortage in the delivery made. He had no intention to cover up the matter.

Respondent's case

- The Respondent provides the following reasons for the termination of employment of the Claimant;

- That on 9th November 2011, the Claimant and RWI, a security guard received 200 reams of paper on behalf of the Respondent but the Claimant signed for 250 reams being the figure that appeared in the invoice and delivery note.

- The Respondent states that the action by the Claimant contravened the Respondent's procedures for procurement. The Respondent states that the explanation by the Claimant was not plausible and was rightly rejected by the Respondent.
- It is the Respondent's case that the Claimant was responsible for the shortfall since he was in charge of stock receipts and movement.

Final Determination

- From the totality of evidence, the Court is satisfied that the Claimant was grossly negligent in the performance of his duties.

- Absenteeism;
- Being intoxicated during working hours;
- Use of abusive or insulting language or behaving in a manner insulting to public officers or members of the public;
- Being arrested for a cognizable offence punishable by imprisonment and not being, within fourteen days, released on bail or bond or otherwise lawfully set at liberty; or
- Committing or being suspected, on reasonable and sufficient grounds, of having committed a criminal offence against or to the substantial detriment of the Government or the Government's property.

IN THE INDUSTRIAL COURT AT NAIROBI CAUSE NUMBER 981 OF 2011 JAMES MUGERA IGATI VERSUS THE PUBLIC SERVICE COMMISSION OF KENYA-ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

- The Claimant's position was that he was employed by the Respondent on or about 12th October 1982 as a Subordinate Staff in the Civil Service and later re-designated as a Machine Operator.
- On 19th July 2005, the Claimant was arrested and charged with the offence of making a document without authority.
- The Permanent Secretary, Directorate of Personnel Management in the Office of the President interdicted the Claimant through a letter dated 28th July 2005.

- The letter reads,
- “ *Following your appearance in a court of law charged with the offence of making document without authority, you are hereby interdicted with effect from 19th July 2005, pending the outcome of your case.....*”
- On 13th September 2006 while the criminal case was still unresolved, the Ministry wrote to the Claimant a letter asking him to show cause why disciplinary action should not be taken against him for gross misconduct.

- The letters states,

- “It has been reported to this office that you are accused of making a document without authority contrary to section 357 [9] of the Penal Code. This is viewed as gross breach of discipline and this office is contemplating your dismissal on account of gross misconduct.*

- However, before it is done, you are hereby called upon to show cause why such action should not be taken against you. Your representations if any should reach this office within 21 days from the date of this letter,*

failure to which contemplated action will be taken against you without further reference to you.”

- On 20th February 2007, the Permanent Secretary in the Ministry of State for Public Service in the Office of the President issued the Claimant a letter of dismissal.
- Dismissal was effective from 31st October 2006, and the reason for dismissal was alleged to be gross misconduct.
- The Claimant was advised he had lost all his benefits on dismissal, and had the right to appeal against the decision to the Public Service Commission within 42 days.

THE UNIVERSITY OF NAIROBI CODE OF CONDUCT AND ETHICS 2003

- Contains general rules of conduct to be observed by University employees
- Maintain integrity and uphold the dignity of self and that of the University
- Places great emphasis on some particular core values which distinguish the University from its competitors.
- Guide management and staff in making personal or financial decisions and in judging what is right and acceptable.

THE UNIVERSITY OF NAIROBI CHARTER 2013

- Establishment and Functions of the University
- Membership and governance of the University
- Staff of the University
- Financial provisions

- Honesty standard of honesty, not only in professional practice, but also in scholarship work.
- Trustworthiness inspires confidence for those who rely on the good intentions of others to perform services competently and in their best interest.
- Official working hours,
- Orderly behavior, dress code and hygiene, misuse of official information, chain of command etc.

UNIVERSITY OF NAIROBI INTELLECTUAL PROPERTY POLICY (Revised 2013)

- The University of Nairobi (UoN) has the largest concentration of scholars and in the country.
- Inventions, discoveries, copyrightable works, and other creative works that have the potential to be brought into practical use may be developed by the UoN employees within the scope and in the course of their duties or through the use, by any person, of the UoN resources such as facilities, equipment and funds.
- Eliminates the infringement, improper exploitation and abuse of the intellectual property assets belonging to the University and/ or its customers.

- Various professional Institutions, Acts and Codes of Conduct (Doctors, Lawyers, Accountants, Procurement Professionals, Architectures, Nurses, etc).

THE MWONGOZO CODE OF CONDUCT.

- The Board of Directors
- Transparency and Disclosure
- Accountability
- Risk Management and Internal Control
- Ethical Leadership and Corporate Citizenship
- Shareholder Rights and Obligations
- Stakeholder Relationships
- Sustainability and Performance Management
- Compliance with Laws and Regulations

The EACC –Bible Study Guide for Use by Groups and individuals 2008.

- Religion can inspire all of us in leading lives of integrity and shunning corruption.
- The Law of God provides the most enduring influence on our conduct as human beings.
- The Guide has identified the Books of the Bible that speak to God's will for humanity.
- Inspire personal resolve to shun evil, do well and aspire towards a society that promotes excellence in values, word and deed.
- Intended to help Kenyans interact with the Bible and discover God's position on corruption and His direction on living a corrupt free life.

The Proceeds of Crime and Anti-money Laundering Act (Revised 2014)

- Provide for the offence of money laundering
- Introduce measures for combating the offence of money laundering
- Provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of offence of money laundering crime,
 “Affected gift, “proceeds of crime, tainted property”
- Failure to report suspicion regarding proceeds of crime commits an offence.
- Secrecy obligations overridden
- Protection of information and informers
- Property tracking and monitoring orders

Leadership and Integrity Act No.19 of 2012

- Gives effect to and establish procedures and mechanisms for the effective administration of chapter six of the Constitution.
- Guiding values and procedures-Sect 3 of the Act(Respect values, principles and the requirements of the Constitution-Articles 10,73,75,99(1)(b),175,193(1)(b),232).
- Gifts and benefits in Kind- Sect 14.
- Bank accounts outside Kenya-Public /State officers and conditionality's attached thereon. Sect 19.
- Leadership Education and training generally for all public officers.-Sect 53.

The Public Finance Management Act 2012

- It set out rules how the national and county governments can raise and spend money in accordance with the Constitution.

The Public Audit Act No. 34 of 2015

- Gives effect to Article 229 of the Constitution 2010,
- Provides for the functions and powers of the Office of the Auditor General
- "Effectiveness" means prudent, efficient, economic, transparent and accountable use of public funds to ensure government achieves value for money and that such funds are applied for intended purpose;
- "Lawful" includes compliance with a state organ's internal regulations, internal policies, programmes and the prescribed measures for securing efficient and transparent fiscal management;
- Forensic and procurement audits

THE FAIR ADMINISTRATION ACTION ACT NO. 4 OF 2015

- Gives effect to Article 47 of the Constitution 2010.
- The exercise of administrative authority, that is expeditious, efficient, lawful, reasonable and procedurally fair.

The Anti-Corruption and Economic Crimes Act, No 3 of 2003 (ACECA).

- The Act was intended to be the substantive anti-corruption legislation. Sought to implement the United Nations Convention Against Corruption.

Meaning of corruption

- Section 2 of the Act lays out the general parameters of what constitutes corruption to include:
 - Bribery,
 - Abuse of Office,
 - Fraud,
 - Embezzlement or misappropriation of public funds
 - Breach of trust,
 - An offence involving dishonesty- in relation to taxes, or underwritten law relating to elections of persons to public office.

•Offences under section 39-44, 46 and 47A of the Act are:

- Bribery involving Agents,
- Secret inducements for advice,
- Deceiving the principal,
- Conflicts of interest,
- Improper benefits to trustees for appointment,
- Bid rigging,
- Dealing with suspect property,
- Attempts and Conspiracies

•A public officer maintains high standards of professional ethics if that public officer-

(a) is honest;

(b) displays high standards of integrity in that officer's dealings;

(c) is transparent when executing that officer's functions;

(d) Can account for that officer's actions,,

(e) is respectful towards others,;

(f) is objective;

(g) is patriotic,; and

(h) Observes the rule of law.

OTHER LAWS

- The Penal Code Act
- The Criminal Procedure Code Act
- The Extradition (Contiguous and Foreign Countries) Act
- The Witness Summonses (Reciprocal Enforcement) Act
- The Foreign Judgments (Reciprocal Enforcement) Act

International legal instruments

- Acting against corruption is high on the global agenda .The anti-corruption efforts by the international community have lead to establishment of global and regional institutions to fight corruption.

The UN Convention Against Corruption (ratified 9th December, 2003).

- The Convention was adopted in 2004 and entered into force in 2005.
- The Convention is also known as Principle 10 within UN system.
- It is an important global tool to fight corruption in all its forms, including extortion and bribery.
- Requires States Parties to proactively develop policies and concrete programmes to address corruption with the aim of realizing a more transparent global economy.
- Call from business to governments to sign Anti-Corruption Call to Action.

- The UN Convention Against Transnational Organized Crime(acceded 16th June,2004)
- The African Convention on Preventing and Combating Corruption(ratified 3rd July,2007)
- The UN Declaration Against Corruption and Bribery in the International Commercial Transactions
- The International Code of Conduct for Public Officials
- The Organization for Economic Co-operation and Development (OECD) Protocol to combat bribery by foreign public officials in international business transactions

Other important sources of policies and laws on corruption

- The United Nations Handbook on Practical Anti-Corruption Measures- for Prosecutors and Investigators.
- The United Nations Guide for Anti-Corruption Policies which contains a general outline of the nature and scope of the problem of corruption and a description of the major elements of anti-corruption policies, suitable for use by political officials and senior policy-makers.

Other important sources of policies and laws on corruption

- The United Nations Handbook on Practical Anti-Corruption Measures- for Prosecutors and Investigators.
- The United Nations Guide for Anti-Corruption Policies.
- The General United Nations Anti-Corruption Toolkit.
- The Compendium of International Legal Instruments on Corruption.

- **The General United Nations Anti-Corruption Toolkit,**

Contains a detailed set of specific Tools intended for use by officials called upon to elaborate elements of a national anti-corruption strategy and to assemble these into an overall strategic framework, as well as by officials called upon to develop and implement each specific element.

- Tailor-made for judges, civil society and prosecutors in requesting countries to address their specific needs.

The Compendium of International Legal Instruments on Corruption,

All the major relevant global and regional international treaties, agreements, resolutions and other instruments are compiled for reference purposes.

These include both legally binding obligations and some so-called "soft-law" (or normative) instruments intended to serve as non-binding standards

Challenges in the implementation and enforcement of policies and laws on corruption in Kenya

- Legal Constraints- introduction of a new subsection which in effect significantly curtailed the EACC mandate and process.
- Judicial challenges- in the enforcement of anti-corruption laws generally. Delays in concluding corruption related cases

**IN THE HIGH COURT OF KENYA AT NYERI MICSELANEOUS
CRIMINAL APPLICATION NO. 20 OF 2014 STEPHEN MBURU NDIBA-
VERSUS-ETHICS & ANTI-CORRUPTION COMMISSION and DIRECTOR
OF PUBLIC PROSECUTION.**

The applicant filed an application by way of a notice of motion dated 4th July, 2014 in which he sought prayers which have been framed as follows:-

That this application be heard on priority basis.

That the honourable court be pleased to stay and/or quash the proceedings in Nyeri **CM A/C 5/2014** before the Chief Magistrate coming up for hearing on 24th and 25/7/2014 against the Petitioner/Applicant.

That the basis of the criminal charge is Nyeri High Court Civil Case No. 202 of 2013 where E.A.C.C is the plaintiff and the Petitioner/Applicant the 2nd Defendant and the complainant in second count is the 1st Defendant.

- Corruption in the Courts

The Law Society of Kenya in statement seeking removal of three Supreme Court Judges Said “ The time has come for the Country to start a debate on whether the Supreme Court is desirable .Through a Constitutional amendment, the role of the Supreme Court may be performed by the judges of the Court of Appeal or an ad hoc Supreme Court. Such an amendment will benefit the country in cutting down on unnecessary expenditure”

Lack of universal/political support- EACC has never enjoyed universal public support. Initial problems arose from the difficulties experienced when establishing the EACC.

(H.Mwau, Rt.Justice H.Ringera, PLO, Mumo Matemu).

•Cases involving the former CSs.Charity Ngilu and Micahel Kamau

In March, 2015 the President had ordered all state officials mentioned in EACC Report to step aside to pave way for investigations. He also ordered the EACC to complete pending investigations within sixty days and forward the completed files to the DPP for prosecution.

On 9th March, 2016, Justices George Odunga, Mumbi Ngugi and Joseph Onguto ruled that:-

The President broke the Constitution by ordering EACC to complete investigations against named state officers within sixty days, without considering the magnitude of investigative work involved. The directives were declared unconstitutional.

The independence of the EACC and those of Constitutional Offices ought to be respected. Court declined to stop prosecution of the accused.

The appointment process of directors is subject of controversy between Parliament, the President and the leadership of the EACC. Political Challenges- successive governments have also found themselves entangled in the same web of corruption. Political pressure and the lack of insulation from such pressure.

Kenya and Singapore in 1982. (Integrity matters Oct-Dec, 2015, a publication of the Ethics and Integrity Institute Issue No.04)

Quote from U.S President Barak H.Obama during his State visit to Kenya

“Even the president is fighting corruption .But in my view; he’s not been able to do it because even the senior people in the government, those friends of the president, are involved in corruption”

In 1982, in Singapore, LOKPAL Bill was implemented and 142 corrupt ministers and officials were arrested in one single day. Today Singapore has only 1% poor people and no taxes are paid by the people to the government, 92 % literacy rate ,better medical facilities, cheaper prices, 90% money is white and only 1% unemployment exists.

Lack of commitment by senior officials who see no difference between their personal gains and official duties.

Ineffective enforcement of whistleblower protection, despite the existence of the Witness Protection Act.

What are the weaknesses in the anti-corruption policies and legislations in Kenya?

Thank you