STRENGTHENING JUDICIAL REFORMS IN KENYA
THE ANTI-CORRUPTION COURT IN KENYA

Volume IX

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Philip Kichana
Executive Director

ABBREVIATIONS

AG	-	Attorney General of the Republic of Kenya
APPL.	-	Application
CID	-	Criminal Investigation Department
CJ	-	Chief Justice
CPC	-	Criminal Procedure Code
ICJ KENYA	-	Kenyan Section of the International Commission of Jurists
KACA	-	Kenya Anti-Corruption Authority
KACC	-	Kenya Anti-Corruption Commission
MISC.	-	Miscellaneous
NO.	-	Number
PAC	-	Parliamentary Accounts Committee

EXECUTIVE SUMMARY

Since 2000, ICJ Kenya has conducted surveys on the Judiciary with the objective of gathering information that would enable effective public interest in and demand for judicial reform. Under this project, ICJ Kenya continued to conduct internal analysis of the Judiciary as well as content analysis of its reform proposals and their implementation vis-à-vis ICJ Kenya's and other stakeholders' demands.

This is the ninth report in '*Strengthening Judicial Reforms*' series of publications[1] and it examines the operation of the Anti-Corruption Court in Kenya. The report focuses on the Court's operations, legal status and its relationship with other relevant organizations that deal with corruption. The report is based on the findings of both desk and field research carried out under the aegis of ICJ Kenya's Judiciary Programme in July 2004.

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[1] - Strengthening Judicial Reforms, Volume I
- Performance Indicators: Public Perceptions of the Kenya Judiciary, 2001
- Strengthening Judicial Reforms in Kenya, Volume II: The Role of the Judiciary in a Patronage System, 2002
- Strengthening Judicial Reforms in Kenya, Volume III : Public Perceptions and Proposals on the Judiciary in the new Constitution, 2002
- Strengthening Judicial Reforms in Kenya, Volume IV : Public Perceptions of the Court Divisions, Children's Court and the Anti-Corruption Court, 2002
- Strengthening Judicial Reforms in Kenya, Volume V : Public Perceptions of the Magistrate's Court, 2003
- Strengthening Judicial Reforms in Kenya, Volume VI: Public Perceptions of the Administrative Tribunals in Kenya, 2003
- Strengthening Judicial Reforms in Kenya, Volume VII : Public Perceptions of Chapter Nine of the Draft Constitution of Kenya
- Strengthening Judicial Reforms in Kenya, Volume VIII : Progress Assessment from 2000 - 2003

Corruption has not only been cited as a serious societal problem, but it has also contributed to a greater extent to the crippling of the administration of justice in Kenya[2]. Owing to the important role that the Anti-Corruption Court can play in fighting corruption, ICJ Kenya sought to find out more on the existence and effectiveness of this Court as well as to examine the environment within which it operates so as to evaluate its performance.

In order to effectively address the various components affecting this Court and the administration of justice in general, this report was divided into several chapters, each dealing with one specific issue. Chapter one offers the background information to the study by discussing among other things, research methodology, its objective, justification and challenges.

Chapter two deals with the history of the establishment of the Anti-Corruption Court and its relationship with other key institutions, particularly, the Kenya Anti-Corruption Commission (KACC) and the Attorney General's office. KACC plays an instrumental role because it investigates matters to be brought before the Anti-Corruption Court. The Attorney General on the other hand, determines which cases among those recommended to him are to be prosecuted in the Anti-Corruption Court. Thus, the success of the Anti-Corruption Court rests heavily on the effectiveness and efficiency of KACC in carrying out investigations on Corruption and Economic Crimes Offences and the expedient prosecution of the cases by the Attorney General.

Therefore, this chapter also examines the establishment and powers of KACC and its relationship with the Attorney General's office. In addition, a comparative analysis is also undertaken on the powers of the Anti-Corruption Court as well as functions of KACC vis-à-vis structures and mechanisms in other jurisdictions.

Chapter three explores in detail the Acts governing the Anti-Corruption Court specifically the Penal Code (Cap 63), the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 and the

[2] Widespread corruption in the Judiciary resulted into numerous slogans being coined such as, 'Why hire a lawyer, when you can buy a judge!'; 'Law courts have two commodities to sell, justice and injustice, what you get depends on your purchasing power.'

Public Officer Ethics Act, No. 4 of 2003. The study seeks to examine the suitability of these Acts in addressing corruption so as to offer the basis for evaluating the legal regime put in place to fight this vice.

Chapter four provides an analysis of the findings as to the effectiveness of the judicial reforms and gives recommendations for improvement. This is done to give a broader view of the functions of the Judiciary and highlight current issues in the administration of justice. This is necessary since the Anti-Corruption Court is located at the Magistracy level and therefore it is administered using the same rules and procedure applied to other courts. Issues about administration of justice, appointments of judges and magistrates, acting judges and the judicial purge are discussed in this chapter.

In Chapter five, specific recommendations on the Anti-Corruption Court and the judiciary generally are made aimed at making the court more efficient in handling all forms of corruption.It is my hope that the readers of this report will find it useful as we strive to open the Judiciary for public's participation and scrutiny as a means of achieving all-inclusive, effective and sustainable judicial reforms in Kenya. It is with pleasure that I welcome feedback on any or all aspects of this report to enable us continuously improve this product.

Philip Kichana
Executive Director

CHAPTER ONE

BACKGROUND INFORMATION

Corruption is a well-known phenomenon in Kenya. Despite attempts to curb the vice, corruption is still prevalent and a major threat to social order. It has plagued all sectors of the society including the Judiciary.

An effective judicial system has been recommended as one of the strategies of fighting corruption. It is in this light that the Anti-corruption Court was set up in the year 2002. This Court was set up to fight all forms of corruption as set out under the enabling Acts[3].

Corruption, especially in the Judiciary has a devastating effect as it breeds ground for injustice. It is paradoxical that a corrupt judicial system is always a preserve of the rich and mighty, yet it is supposed to guarantee and protect the rights of all citizens. Thus, it is important to rid any Judiciary of corruption if citizen's rights and freedoms are to be guaranteed, protected and enforced. In order to achieve this, the fight against corruption must be focused, intense, collective and sustainable. It is a fact that a properly established, independent and empowered Anti-Corruption Court can play a major role in curbing corruption based on two important premises, namely:

a) Such a Court can pass punitive sanctions that can act as a deterrent to corrupt practices; and
b) The Court can facilitate restitution or compensation of property acquired through corrupt deals.

[3] The Penal Code Cap 63 of the Laws of Kenya and the now repealed Prevention of Corruption Act, Cap 65 of the Laws of Kenya.

ICJ Kenya found it necessary to examine in depth the capability of the Anti-Corruption Court in Kenya in addressing corruption, and whether such a Court would achieve and facilitate the above-mentioned goals[4]. ICJ Kenya noted that very little is known of this Court's existence and operations, and that the Court faced constant legal threats, factors that have hampered accessibility to this Court thus undermining its impact in the fight against corruption. In addressing the effectiveness of the Court, ICJ Kenya has expanded its scope of study to other enforcement mechanisms and legal structures that complement its work in combating corruption. These include;-

a) The Kenya Anti-Corruption Commission
b) The relevant Laws
c) The Courts generally
d) The police force and its detective machinery as well as the AG's office.

The survey thus sought to critically analyze the court for the following reasons:

i) The apparent lack of awareness by members of the public of the existence of the Court and its functions;
ii) The feeling that corruption cases were rising despite the court having been set up;
iii) To explore how the court can be used to address corruption in the judiciary and other sectors of society;
iv) To establish the interlinkage between the Court, KACC, the Police and the AG; and
v) To establish the Court's legal status and the general legal environment that it operates in.

[4] It refers to a and b on page 1.

As part of the research into these questions, several issues were addressed which included:

a) The role of the Ministry of Justice in administration of justice in Kenya;
b) Judicial reforms in Kenya;
c) The role of the Anti-Corruption Court in fighting corruption and its effectiveness;
d) Other measures which can be put in place to enhance effectiveness of the Anti-Corruption Court; and
e) Lessons from other jurisdictions.

Research Objectives

The broad objective of this study was to assess the adequacy of the Anti-Corruption Court in addressing corruption in view of existing legislation and other ordinary courts and other institutions set up to fight corruption. This aimed at suggesting ways of enhancing the court's effectiveness in addressing the vice of corruption in the Judiciary and society at large.

Specific Objectives

I. Create awareness among the public of the operations of the court thus offer a chance for the public to critique the court.
II. Assess the adequacy of the Anti-Corruption Court in fighting corruption.
III. Evaluate existing legislation establishing the court with a view to establishing how the same enable or disable the Court in its functions.
IV. Evaluate the relationship of the court with the Kenya Anti-corruption Commission and the Attorney General's office.
V. To identify areas of improvement for the Court's effectiveness.

Justification

The usefulness of an effective Anti-Corruption Court in the fight against corruption cannot be gainsaid. Ordinary courts have not managed to fight corruption especially the grand corruption. In trying to establish why the courts have not been able to check corruption, one needs to evaluate the Acts that regulate the functioning of the Court. ICJ Kenya's previous studies have shown that the courts are themselves corrupt hence compromised their independence and impartiality. ICJ Kenya submits that a special, independent and empowered Anti-Corruption Court is important in the fight against grand corruption.

Literature Review

Very little is known about the Anti-Corruption Court and its operations. The court is quite young having been set up in 2002. A lot of focus and emphasis has been on the Kenya Anti-Corruption Commission (formerly the Kenya Anti-Corruption Authority), at the expense of the Court.

Thus, this study endeavored to offer the first ever-comprehensive report on the Court, and the enabling Acts.

Methodology

In order to establish the nature and extent of corruption, we sought data *inter alia* on:

a) Judicial reforms in Kenya;
b) Independence of judicial officers;
c) The establishment and operation of the Anti-Corruption Court;
d) Number of cases filed, heard, finalized and pending in the Court;
e) Number and nature of Constitutional references from the court; and
f) Nature and severity of sentencing for crimes by the Anti-Corruption Court

Data Sources

- Existing literature
- Statute books
- Newspapers
- Case law
- Different sectors of the population with a special focus on the Judiciary personnel, advocates, prosecutors, civil servants, business people and the public at large.
- Information from our past reports and other initiatives including a public lecture held on 5th August 2004 that was graced by Hon. Omingo Magara, immediate former Chairman of Parliamentary Accounts Committee (PAC) and Gitobu Imanyara, advocate and former MP.

Data Collection Methods

- Perusal of the different literature, statutes, case reports, newspapers
- Face to face interviews with the different segments of the population
- Use of questionnaires
- Electronic media

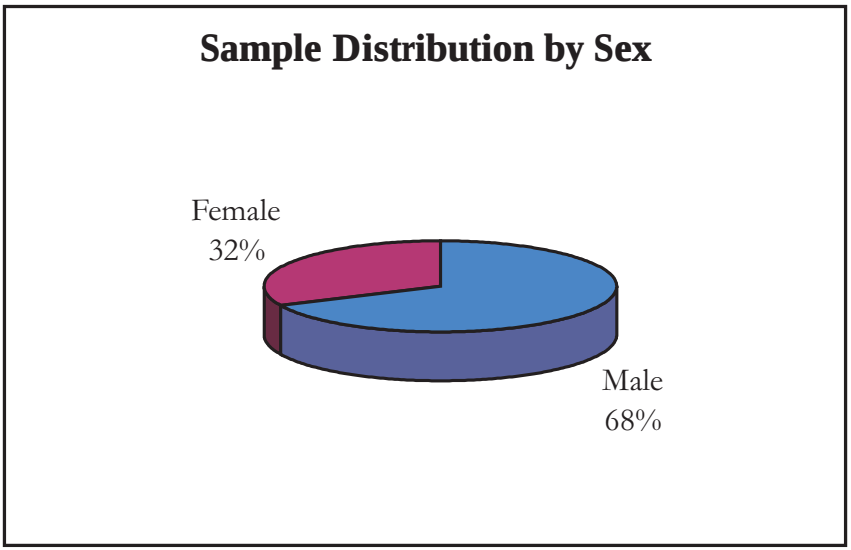
Coverage

The research was carried out in Nairobi. This is mainly because at the time of the study, it is only the two Courts in Nairobi that were functioning. In the course of our study we established that in other regions of the country Magistrates had now been gazzetted to handle corruption cases.

A total of 411 people were interviewed during the survey[5].

Sample Distribution based on Sex

Majority of the respondents in this survey were male who accounted for 68% of the total sample.



[5] They included judicial officers, legal practitioners, prosecutors, people from the Civil Society, the media and members of the public

CHAPTER TWO

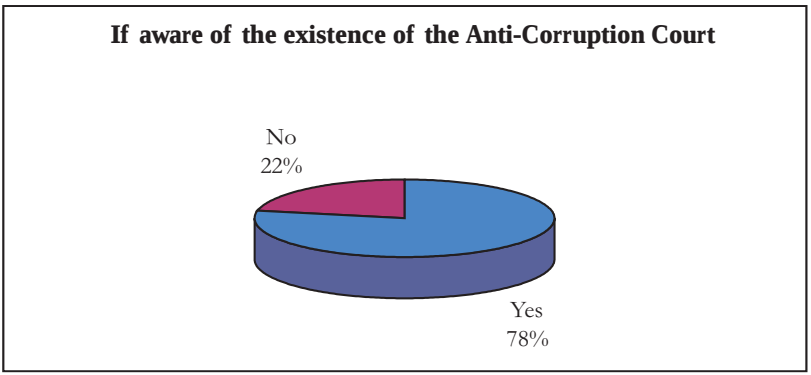
ESTABLISHMENT OF THE ANTI-CORRUPTION COURT IN KENYA: ITS FUNCTIONS AND RELATIONSHIP WITH OTHER KEY INSTITUTIONS

a) Establishment of the Anti-Corruption Court

The Anti-Corruption Court is an institutional arrangement that was set up to address the rampant scourge of corruption in Kenya. As highlighted by former Chief Justice Chunga this followed many complaints from investors and the Kenyan public on the high level of corruption[6]. The court is meant to ensure a fast track hearing of cases that impact on the Kenyan economy.

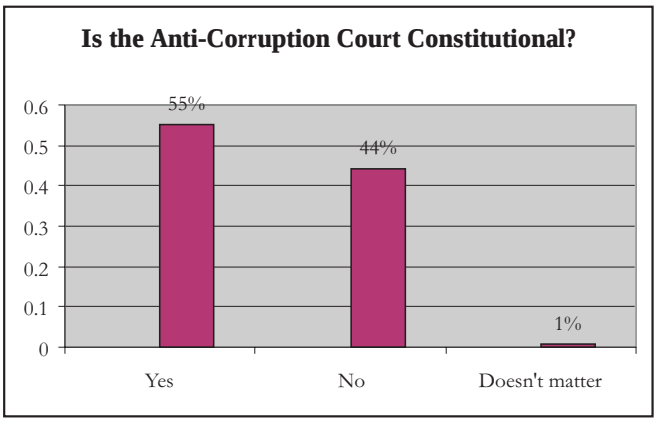
Our research findings showed that 78% of the respondents were aware of the existence of the Anti-Corruption Court. Apart from lawyers and prosecutors who knew of the Court's existence by virtue of the nature of their work, most members of the public stated that they learnt of the existence and operations of the Court through the media underlining the important role that the media plays in informing and educating the public.

[6] Speech by former Chief Justice Bernard Chunga, 25th April 2002



In examining the Court, ICJ Kenya sought to establish among other things, its legal status. The study revealed that the Court was established by former Chief Justice Bernard Chunga while exercising his administrative powers[7]. At the time, Justice Chunga ordered for the re-arrangement of Subordinate Court functions to make specific provisions for an Anti-Corruption Court to deal with corruption cases.

When a question was put to the public about the Court's constitutional status, 55% of the respondents thought that the Anti-Corruption Court as currently established is unconstitutional.



[7] Circular of former Chief Justice Bernard Chunga of 9th May 2002

b) Justification for the Court

The Chief Justice justified the move establishing the court by stating that corruption is a global issue that needs concerted and coordinated efforts of everyone to be won. He stated that courts would be in the forefront in supplementing efforts towards the eradication of corruption. He stated that the consideration of setting up the Anti-Corruption Courts was to ensure that corruption cases were addressed expeditiously and effectively.

c) The Operational Framework of the Court

As regards the aspect of operation of the Anti-Corruption Court, the Chief Justice clarified that the court would be established under the existing arrangement in the Subordinate Court as set up under the Constitution and ordinary law. The court would exercise jurisdiction set out in the provisions of various statutes with regard to Magistrates' Courts. The Chief Justice emphasized that the establishment of the court was purely administrative and done on the same principles underlying the establishment of traffic courts throughout the country as well as the creation of High Court divisions in Nairobi which is to speed up dispensation of justice.

d) Distribution of the Courts

Initially, there were two Anti-Corruption Courts based in Nairobi but they have been expanded to all the provincial headquarters. Though some Magistrates had been gazetted to run the Court in 2003 under Gazette Notice No. 5342 of 2003, this gazette notice was revoked by Gazette Notice No. 1821 of 20th August 2004, which established the Special Magistrates[8]. A look at the number and distribution of the special magistrates shows that the personnel is not sufficient to handle the cases of corruption.

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[8] The gazetted magistrates are: Mrs Ougo and Maureen Odero for Nairobi Province, Ms. Lucy Gitari for both Central and Eastern province, Ms. Beatrice Thuranira for North Eastern and Coast province, Ms. Helen Wasilwa for Rift Valley Province, Ms. Winfridah B. Mokaya for Nyanza and Western provinces.

These Courts are part of the existing court system but are run by these special Magistrates. The Magistrates in these Courts are selected from among the serving Magistrates appointed under the Magistrate's Act, Cap 10.

Jurisdiction of the Court

From our research findings we have established that when the Court was established in 2002, it used to hear very many cases in Nairobi and but not so in other jurisdictions. The cases were instituted under the now repealed Prevention of Corruption Act (Cap. 65)[9].

After the repeal of the Act, all the pending cases, which were brought under the repealed Act, were withdrawn. These included cases involving judicial officers and other judicial staff, local government officials among others. Cases that are triable by the special Magistrates serving in this Court are stipulated in Part V of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. From the survey ICJ Kenya has established that since the enactment of the Anti-Corruption and Economic Crimes Act, very few cases have been filed[10] or heard in this Court. Some of the reasons advanced by the interviewees were the fact that the KACC had no director thus not fully functional and the fact that some of the persons accused of corruption were still being charged in ordinary courts[11].

Accessibility

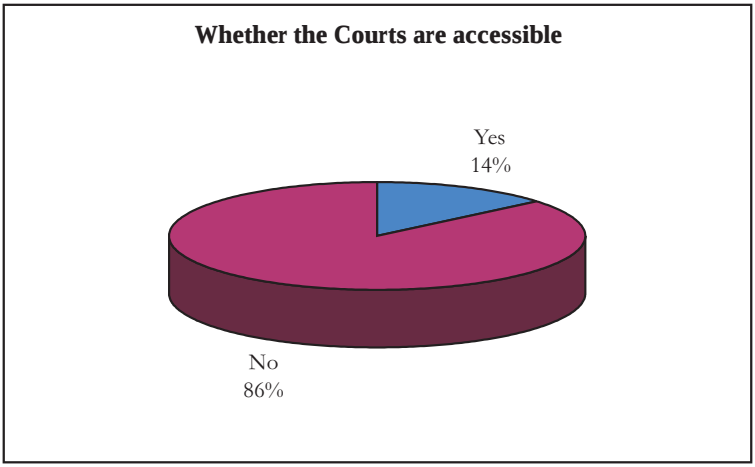
The few advocates who appeared before this Court represented clients who were charged with soliciting and obtaining bribes. Most of them stated that, there was no glaring distinction between the

[9] It was repealed in 2003 by the Anti-Corruption and Economic Crimes Act of 2003.

[10] For instance, no single case had been filed in this Court since April 2004.

[11] The Director of KACC was finally appointed in September 2004. Ordinary courts still have jurisdiction to hear corruption offences set out under the Penal Code

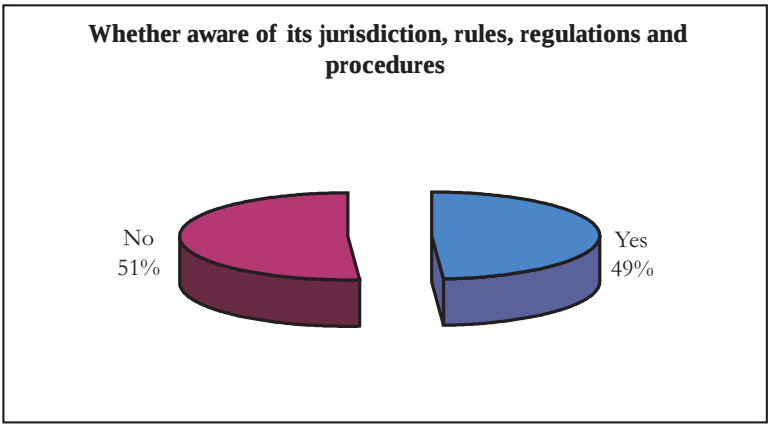
Anti-Corruption Court and the ordinary criminal courts. In addition, they observed that the judicial officers in the court took their work seriously but the prosecution exhibited laxity and incompetence. A negligible number of ordinary citizens had appeared before this Court. This is probably because of lack of matters to take to this Court and inaccessibility to the Court due to the uneven distribution. Out of the few who had appeared, none had appeared as an accused person. Overall, majority of the respondents stated that the Courts were highly inaccessible.



Procedure in the Courts

The Anti-Corruption Courts are regulated by all the ordinary rules of criminal procedure and evidence and guided by normal judicial practice as obtains in all the courts forming part of the judicial system. There are no special rules of procedure or evidence; thus, the Court is except for its name, a regular court in every respect guided by the principle of judicial independence.

Our research findings showed 51% of the respondents who included lawyers were not aware, familiar or conversant with the Court's jurisdiction, rules, regulations and procedures.



Appointment of Magistrates

Magistrates serving in the Anti-Corruption Courts are appointed under the normal guidelines governing the appointment of Magistrates under section 69 of the Constitution read with the Magistrates' Courts Act Cap. 10. They enjoy the same terms of service as other ordinary Magistrates of similar jurisdiction. The Magistrates derive their jurisdiction from the Magistrate's Act and can still try other matters by virtue of the jurisdiction conferred upon them upon them by the statute. Under the Anti Corruption and Economic Crimes Act[12], the Judicial Service Commission appoints Magistrates from those already serving and gazettes them as special Magistrates for the Anti-Corruption Courts.

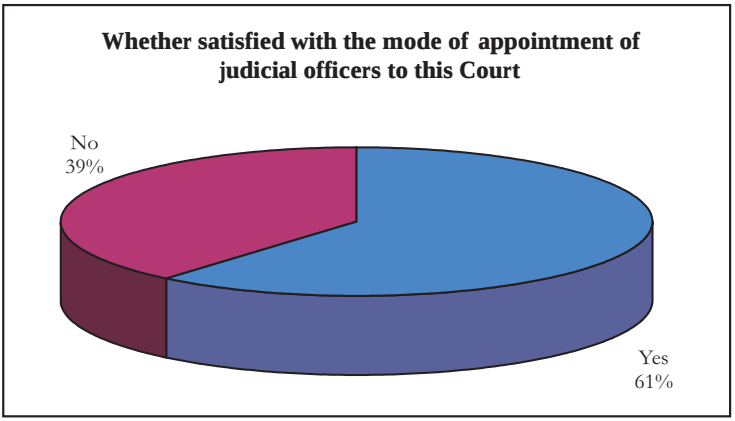
[12] Act No. 3 of 2003

Qualifications

Granted that corruption offences are generally complex, preference is given to the experienced Magistrates. Thus, for one to qualify to serve in this Court he/she must be either:

a) A serving Magistrate from the Principal Magistrates level (i.e. Chief Magistrate; or Senior Principal Magistrate or Principal Magistrate) or
b) An advocate of ten years standing.

Majority of the respondents stated that they were satisfied with the mode of appointment of judicial officers presiding in this Court since it is merely an administrative task. However, majority stated that in the event that a properly constituted Court is established with powers equivalent to those of the High Court, then a clear, known and transparent appointment criteria must be put in place.



Administration of the Court

The research findings revealed that the Court is under the jurisdiction of the Registrar of the High Court. The same administrative rules apply to this Court as they do to other courts.

The terms of service of the Magistrates in this Court are similar to other Magistrates within the same cadre. However, in Nairobi, the Court has its own registry, courtroom, chambers, personnel and controls its own case diary.

Justification on Matters

There is justification in the selection of matters to be tried by the Anti-Corruption Courts. These are matters that invariably share the common element of fraud upon the public or the government and they raise the need for trial by experienced magistrates.

Average Time of Trial

Currently there are not many cases going on. The study showed that many of the cases are pending awaiting rulings on constitutional references filed in the High Court. Most of these references seek to challenge among others:

I. The constitutionality of the Court among other issues.
II. The constitutionality of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 on its provisions of retrospectivity.
III. The alleged unconstitutionality of the appointment of Anti-Corruption Magistrates.

In the case of ***R vs. Professor Julius Meme***[13] the High Court bench of three ruled that the establishment of the court and the appointment of the special magistrates are constitutional. The reasoning was that the Court is established under the Magistrate's Courts Act Cap.10 of the Laws of Kenya, section 13(2) and the Magistrates hold appointment made by virtue of powers provided for in section 69 of the Constitution. Hopefully this will bring to an end litigation touching on the status of the court and thus enable the pending cases to continue.

[13] Prof. Julius Meme –vs- the Republic and others HCCC Misc. Criminal Application No. 495 of 2003.

The Status of Cases in the Anti-Corruption Court

As at 3rd September 2004, there were a total of 66 cases pending in the Anti-Corruption Court. The nature of cases included abuse of office, stealing by persons employed in public service and fraudulent accounting.

The breakdown of cases filed in this Court per year is as follows:

Year	No. of cases transferred to the Court from Criminal Court	No. of cases filed directly in the Court	Cases Concluded	Those discharged under s. 82(1), 87(a) and 89 of CPC	Those acquitted under s. 210 and 215 of CPC	Convictions	Pending	Performance Rate
2001	9		7	4	2	1	2	77.7%
2002	26	54	62	39	10	13	18	77.5%
2003		68	43	41	-	2	25	63.2%
*2004		26	5	3	-	2	21	19.2%

* As at 3rd September 2004

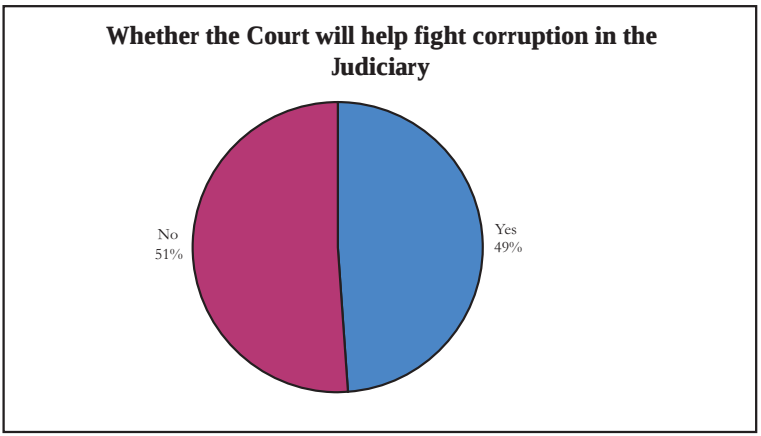
There are no special mechanisms set up to guarantee the Court's independence. Though the Court runs its own registry, some of the cases being handled in this Court involve very senior government officials and this exposes the Court to undue Executive pressure especially if the matter threatens to place the government and its officials in bad light. The Magistrates in this Court do not enjoy security of tenure neither do they have a security detail to ensure their safety, given the sensitive nature of cases that they handle. The poor terms of service, extensively dealt with in the Ringera Report, also make them susceptible to corruption.

The Role of the Court in addressing Judicial Corruption

The study revealed that the Court has handled very few cases touching on judicial officers. The few cases against some Magistrates were withdrawn following the repealing of the Prevention of Corruption Act. As for the Judges none has appeared before this Court. However, it is important to note that, there is an elaborate procedure of dealing with a judge alleged to be corrupt which involves appearance before a tribunal set up by the President to investigate the conduct of such a judge, before he/she can be arraigned in Court to answer any charges.

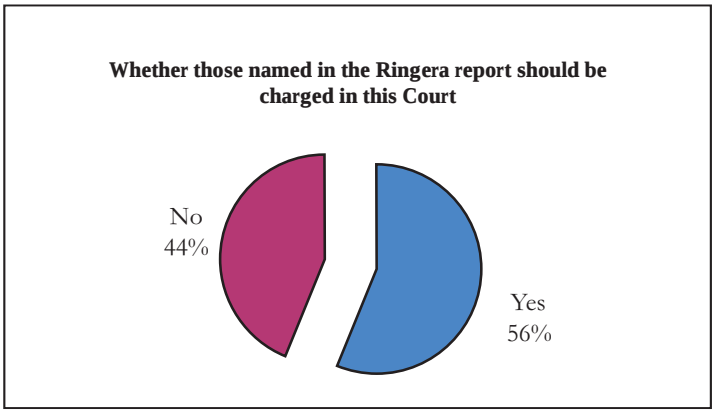
a) The fight against corruption in the Judiciary

51% of the respondents were of the opinion/view that the Anti-Corruption Court would help fight corruption in the Judiciary. This is a drastic decline from the study held at the same time last year, which at the time showed that 69% of the respondents thought the Court would help fight corruption in the Judiciary[14].



[14] See Strengthening Judicial Reforms in Kenya, volume VIII: Progress Assessment from 2000-2003, p.58

However, when asked whether those named in the Ringera report should be charged in this Court, 56% answered in affirmative, while 44% declined.



b) The fight against Corruption in Society

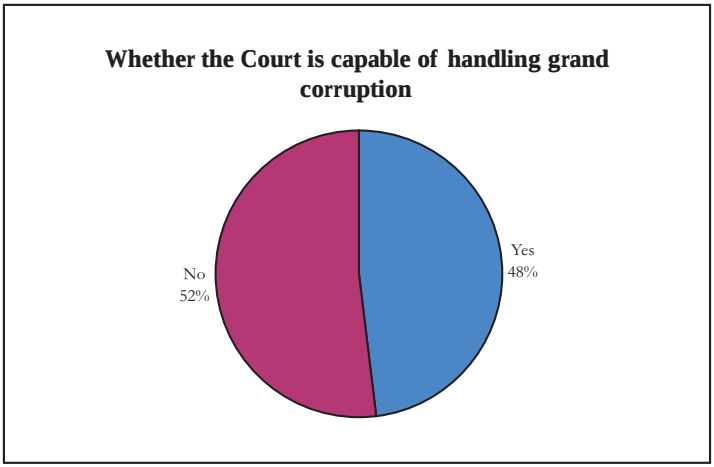
The same decline was evident in the public's confidence in the Court's ability to fight corruption in Kenya as a whole. The study findings showed that only 52% of the respondents thought that the Court would help fight corruption in Kenya compared to 87% last year[15].

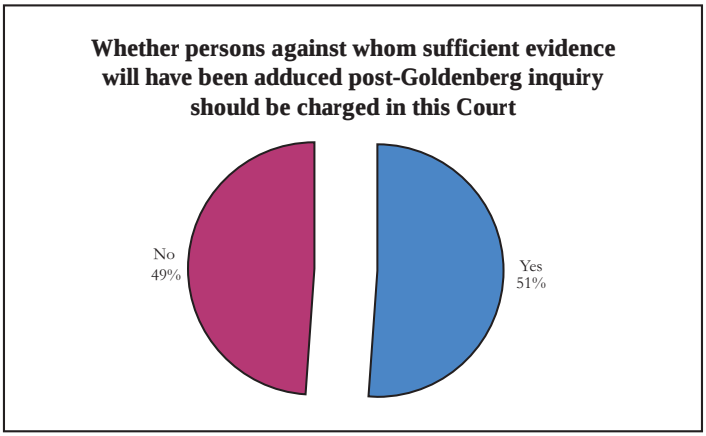
c) The fight against Grand Corruption

To demonstrate public's lack of faith in the Court, 52% of the respondents doubted its ability to handle grand corruption. When asked whether those cases where the Goldenberg inquiry finds sufficient evidence of the allegations having been adduced should be prosecuted in the Anti-Corruption Court, 51% said 'Yes' compared to 49% who said No' [16].

[15] See Strengthening Judicial Reforms in Kenya, volume VIII: Progress Assessment from 2000-2003, p.50

[16] There is every possibility that if there are recommendations for prosecution by the Goldenberg Inquiry, those implicated will not be charged in this Court since the offences were committed prior to the enactment of the Anti-Corruption and Economic Crimes Act.





The following views/opinions were advanced as to why the Court would not help in the fight against corruption both within and outside the Judiciary:

- The judicial officers will be reluctant to prosecute their own.
- The Court lacks legal and other resources to adequately deal with a problem of such magnitude. Its constitutional and legal status remains in doubt and the personnel in charge are few and the mere fact the Courts is handled by Magistrates, casts doubt on the effectiveness of the Court.

- The officers in charge have poor terms of service hence making them vulnerable to bribes and other solicitation from the corrupt lot.
- To effectively fight corruption, there has to be concerted effort to sensitize the public about the ills of corruption and strive to change their attitudes. Creation of institutions alone will not stem corruption. Further, the entire system needs an overhaul, which cannot be cured by such piece meal administrative changes.
- There is lack of genuine goodwill from the Government
- The court is not different from others in anyway hence, will face the same problems like the others.
- Poor investigation and weak prosecution processes and lenient punishments will hamper the operations of the Court rendering them inefficient.
- Judicial officers don't have security of tenure
- Lack of skilled judicial officers and prosecutors handling matters in this Court.
- The Penal Code can adequately address corruption hence no need for a special Court as it can be dealt with in the ordinary criminal court.
- There is selective prosecution targeting those involved in petty corruption and leaving out those involved in grand corruption.
- Those who had faith in the Court's ability thought it offered a good starting point towards elimination of corruption.

Relationship of the Court with Kenya Anti-Corruption Commission (KACC).

a) Establishment of the Commission

The Kenya Anti-Corruption Commission is established under section 6 of the Anti-Corruption and Economic Crimes Act, of 2003. The Commission is empowered by Section 73 of the Act to carry out all investigations formerly conducted by the anti-corruption unit of the

Kenya Police Force. KACC is part of the new institutional arrangement designed to be part of the set up for the protection of the public interest in relation to the scourge of corruption in public office. The functions of the Commission are set out under Section 7 of the Act and these include investigating acts suspected to amount to corrupt conduct, investigating economic crime, assisting in the suppression of corruption, as well as examining the practices and procedures of public bodies with a view to limiting corrupt tendencies. It is important to note that the Kenya Anti-Corruption Commission replaced the former Kenya Anti-Corruption Authority, which was declared unconstitutional and contrary to the principle of separation of powers for being headed by a High Court judge[17]. Thus, the success of the Anti-Corruption Court relies heavily on the existence and efficiency of KACC.

b) Constitutionality of the KACC

As regards the constitutionality of the establishment and functions of KACC, the Commission is not a constitutional body and it thus does not derive any powers from the Constitution. ICJ Kenya's position is that this body should be established under the Constitution to ensure autonomy and strengthen its independence and protect it from executive interference. These powers would be similar to those of the Attorney General and the Commissioner of police, which institutions the Commission is closely interlinked with. The Director and Assistant directors should also be given security of tenure under the Constitution.

The Commission only investigates offences under the Anti-Corruption and Economic Crimes Act and not those under the Penal Code. The Commission is meant to be independent thus the attempt to enhance its investigating framework to handle corruption cases. Further, KACC does not have prosecutorial powers and its power is only to prepare a

[17] Stephen Mwai Gachiengo and Another –vs- the Republic, HCCC Misc Application No. 302 of 2000. Thus, the retirement of Justice Aaron Ringera before assuming directorship.

report to the Attorney General on the results of the investigation which report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crimes[18]. It is however worthwhile to note that the Commission has powers to institute Civil proceedings to recover property lost in corruption deals[19]

c) Investigation of cases by the Commission and its relationship with the Police Unit

KACC is not the only body with powers to investigate under the Act. The police under the Police Act are mandated to enforce all laws generally[20]. This means they can also enforce the provisions of the Anti-corruption and Economic Crimes Act, No. 3 of 2003. The only powers that police do not seem to have and which are specifically given to KACC are: Forfeiture of assets; Institution of civil litigations to recover benefits; Public education; and Working with institutions to address loopholes in the regulations that seek to prevent corruption.

One notable shortcoming with the work of the police, which probably the Commission may cure, is that the police force is controlled by the Office of the President thus there is a likelihood of interference from the Executive, whereas the Commission is independent. KACC has been authorized to cooperate with other bodies in its work and in this regard it works closely with the police[21], Criminal Investigation Department (C.I.D), the Attorney General, the Anti-Corruption Court and the Kenya Revenue Authority. This calls for harmonization of the operations among these institutions to avoid duplication of efforts.

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[18] Section 35 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003

[19] Section 7(1) (h)

[20] Section 14 (1) of the Police Act, Cap. 84 Laws of Kenya

[21] There are police prosecutors in the Anti-Corruption Court who handle 'petty corruption' matters, such as traffic bribery. Grand corruption cases are handled by State Counsels. However, there is no clear guideline on this.

As noted earlier, one of the difficulties to be faced by KACC is lack of prosecutorial powers. Thus, it can be envisaged that the AG may frustrate KACC's work by deciding not to initiate proceedings or enter *nolle prosequi*[22] or simply withdraw a case under section 87 of the Criminal Procedure Code. However, there is a ray of hope in the fact that the AG is bound to report to Parliament on the number of cases instituted from those recommended by KACC. The report by the Attorney General shall be an annual report, which shall include a summary of the steps taken, during the year, in each prosecution and the status of each prosecution. The AG is also required to indicate reasons for not accepting a recommendation to prosecute by the Commission[23].

d) Prosecution of cases under the Anti-Corruption and Economic Crimes Act

The Attorney General is the only office vested with powers under Section 26 of the Constitution to institute and undertake proceedings against any person. Under Section 26(4), the Attorney General may require the Commissioner of Police to investigate a matter that relates to any offence but he has no such powers over KACC. As regards KACC, the Anti-Corruption Act stipulates that in the performance of their functions the Director and investigators shall have all the powers of a police officer to arrest any person for and charge them with an offence[24]. It appears this power to charge suspects is a contradiction to Section 35 of the Act, which provides that the Commission's powers are no more than preparing a report and recommendations to the Attorney General[25].

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[22] Section 26 (3) (c) of the Constitution of Kenya
[23] Section 37 of the Anti Corruption and Economic Crimes Act, Act No. 3 of 2003
[24] Section 32 ibid
[25] Section 35 of the Anti Corruption and Economic Crimes Act

e) Independence of the Kenya Anti-Corruption Commission

The Attorney General does not control KACC, which is only answerable to Parliament; neither does the Commission control or have power over the AG. Thus its recommendations are not binding on the Attorney General who may or may not prosecute the cases forwarded to him. As a result, there might be further conflict if KACC were to give directives to the police who derive their powers from the Constitution through the establishment of the office of the Commissioner of Police. For that reason, the independence and powers of the Commission need to be enhanced to give it prosecutorial powers.

Jurisdiction of the Commission

One notable issue is that KACC seems to be empowered to investigate cases only under the Anti-Corruption Act and not cases under the Penal Code. This means offences on corruption set out in the Penal Code can only be investigated by the Police Department. This appears to limit the operation of KACC. Although the Anti-Corruption and Economic Crimes Act empowers KACC to investigate and prosecute offences involving corrupt transactions such as theft, fraud, embezzlement, evasion of taxes or misappropriation in the Anti-Corruption Court these offences can still be framed as abuse of office or offences relating to misuse of property or public authority under the Penal Code and the charges brought before an ordinary court.

It is noteworthy that the offence of abuse of office is defined as a misdemeanor under the Penal Code and this therefore conflicts with provisions of the Anti-Corruption and Economic Crimes Act, which define the crime as a felony and provides for harsher sentences[26].

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[26] Section 46 of the Anti Corruption and Economic Crimes Act defines the offence of abuse of office and section 48 of the Act sets out the sentence.

The sentence for this offence as set out under the latter Act is a fine not exceeding one million shillings, or imprisonment for a term not exceeding ten years or to both. The Act also provides for an additional mandatory fine in a case where the suspect received a quantifiable benefit. It is however to be observed that given the seriousness of these offences, the sentences as set out are rather lenient and need to be reviewed.

Comparative Analysis of the Role of the Anti-Corruption Court And the Commission with Peers from the Commonwealth and other selected Jurisdictions

I. The Corrupt Practices and Other Related Offences Act 2000-Nigeria

The Corrupt Practices and Other Related Offences Act 2000 of the Federal Republic of Nigeria at section 3 establishes a Commission to be known as the Independent Corrupt Practices and Related Offences Commission whose functions as set out in section 6 of the Act include to receive, investigate complaints and prosecute offenders. This is different from Kenya since in Nigeria the Commission has prosecution powers thus making it more independent.

II. The Anti Corruption Commission Act 1996 of Zambia

The Anti-Corruption Commission Act 1996 of Zambia at section 4(1) establishes the Anti-Corruption Commission as a body corporate with perpetual succession and a common seal with the capacity to sue and be sued in its own name. The Commissions powers as set out under section 9(1) thereof include to receive and investigate complaints of alleged or suspected corrupt practices and subject to the directions of the Director of Public Prosecutions prosecute offences under the Act and such other offences under any written law as may have come to the notice of the commission during the investigation of an offence under the Act.

The Zambian Act provisions are more progressive than in Kenya since the Commission can prosecute if the Director of Public Prosecution agrees. In Kenya the Commission only has powers to institute civil proceedings for the recovery of lost or damaged property or for compensation and to enforce such an order[27].

III. The Federal Ethics and Anti-Corruption Commission of Ethiopia

The Federal Ethics and Anti-corruption Commission Establishment Proclamation, No. 235/2001 of the Federal Democratic Republic of Ethiopia provides as the powers and duties of the Commission under article 7 as *inter alia:-*

To investigate or cause the investigation of any complaints of alleged or suspected serious breaches of the code of ethics in government offices or public enterprises and follow up by taking proper measures.To investigate and cause the investigation of any alleged or suspected corruption offences specified in the Penal Code or in other laws where they are committed in public offices and public enterprises or in the private sector with participation of government officers and public enterprises or in the regional offices relating to subsidies granted by the Federal Government to the regions and prosecute the same.

The Ethiopian Law appears to give the commission much more powers than is the case in Kenya. For instance, the commission is given power to take **proper measures**. These could include prosecution, recovery of assets among others. Further the commission deals with Corruption cases under the Penal Code and other laws thus broadening its mandate. This is different in Kenya where the Commission is restricted to cases under the Anti corruption and Economic Crimes Act.

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[27] Section 7(1) (h) of the Kenyan Anti Corruption and Economic Crimes Act.

IV. The Prevention of Corruption Practices Act of Singapore

The Prevention of Corruption Practices Act (Cap 241 of the Laws of the Republic of Singapore) at section 3(1) establishes the office of Director of the Corrupt Practices Investigation Bureau. Section 18 of the Act provides for special powers of investigation vested in the Director of Corrupt Practices investigation bureau, any police officer of or above the rank of assistant superintendent, or special investigator named in the order of the public prosecutor. Further, Section 18 of the Act entitles the court to grant a certificate of indemnity (pardon) to an accomplice in a corrupt practice who makes a true and full discovery of all things as to which he was examined.

Section 8 of the legislation creates situations when presumptions of corruption may be made. The Bureau does not have prosecution powers. This appears to be in tandem with the Kenyan provisions under section 5(1) which provides that a special magistrate may with a view to obtaining the evidence of any person supposed to have been privy to an offence tender a pardon to such a person on condition of his making a full and true disclosure of the circumstances relating to the offence. This provision seems to be intended to encourage offenders to give information to the magistrates, however it may be necessary that the pardon be accompanied by restitution. On presumption of corruption, the Kenyan Law carries a similar provision[28].

V. The Corrupt Practices Act No. 18 of Malawi

The Corrupt Practices Act No. 18 of 1995 of Malawi at section 4 establishes the Anti-Corruption Bureau headed by a Director to be appointed by the President. Section 45 of the Act recognizes presumptions of corrupt practices. Section 10 of the Act

[28] Section 58 of the Anti Corruption and Economic Crimes Act.

empowers the Bureau to investigate complaints of corruption. This is similar to the Kenyan situation where the Bureau has merely powers to prosecute. The presumption of corruption is also provided for in Kenya.

VI. The Economic Crimes Act No. 13 of 1994 of Botswana

The Economic Crimes Act No. 13 of 1994 of Botswana establishes at section 3 what is known as the Directorate on Corruption and Economic Crime. Section 6 of the Act vests the Director with investigation powers. Section 39 of the Act provides; 'for reference of matters under the Act to the Attorney General for prosecution'. Section 42 of the Act provides for the presumption of corruption where certain Acts are proved. This appears very similar to the Kenyan situation where it is only the Attorney General who is vested with prosecution powers.

VII. The Prevention of Corruption and Economic Offences Act No. 5 of 1999 of Lesotho

The Prevention of Corruption and Economic Offences Act No. 5 of 1999 of Lesotho at section 3 establishes the Directorate on Corruption and Economic offences. Section 6 of the Act vests the Directorate with investigative powers. Section 43 provides for reference of matters under the Act to the DPP for prosecution. Other powers include detention without warrant and freezing bank accounts. These provisions obtain in the Kenyan situation, however for purposes of a search, the Kenyan Law requires the Director and investigators to obtain a search warrant. The officers also have powers to arrest and detain persons for purposes of an investigation however the Kenyan Law is silent on the requirement of a warrant in case of detention.

It is therefore clear from the comparative analysis with other jurisdictions that a number of Anti-Corruption Commissions in other jurisdictions have powers to not only investigate but also to prosecute suspected offenders before the courts. This power to investigate and prosecute is necessary in Kenya to avoid frustrating the efforts of the Commission in having to investigate and then wait for the Attorney General to take action, which may take much longer or not happen at all, thus defeating justice. This is so given the myriad roles that the Kenyan Attorney General is mandated to perform which brings into question his/her effectiveness in the light of all the diverse roles. The court, which relies on the cases, brought before it by the Attorney General may be rendered dysfunctional by such delays while offenders continue operating with impunity.

On the other hand, the presumption of corruption may lower the standard of proof in criminal proceedings, since the burden is on the state to prove its case beyond reasonable doubt. However, it may also be argued that since only the corrupt parties know exactly what transpired, then it is the duty of the accused to proof that the Act was not done corruptly and thus the evidential burden keeps shifting under the common law system.

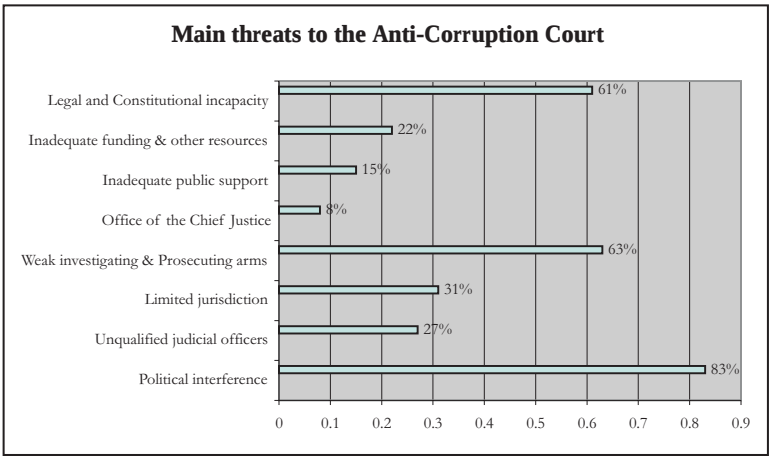
Main Threats to the Court

83% of the respondents cited political interference as the biggest threat to the Anti-Corruption Court in Kenya. Weak investigating and prosecuting arms and lack of clear legal and constitutional status were the next biggest threats accounting for 63% and 61% respectively. Loopholes in the Anti-Corruption and Economic Crimes Act also pose a major threat to the Court. For instance, the Act is found wanting in addressing all corruption related issues such as, abuse of office by public officers. In addition, it does not provide clear transitional provisions from the previous Act, Cap 65. The repeal of the Prevention of Corruption Act may mean effectively that the new

Act shall operate prospectively; therefore a proper interpretation of the law might lead to no prosecution of historical corruption. The Anti Corruption and Economic Crimes Act however *purports* to give the commission power to deal with cases under the repealed Act. The repeal of Cap 65 means effectively that the Anti-Corruption and Economic Crimes Act shall operate prospectively; therefore, a proper interpretation of the law might lead to no prosecution of historical corruption by KACC and AG.

Other threats include;-

- Conservative
- Untrained and incompetent judicial officers
- Limited jurisdiction
- Inadequate resources



CHAPTER THREE

A CRITIQUE OF THE ENABLING ACTS

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

In addressing the functioning of the Court, one needs to assess and address the legal regime within which it operates by reviewing the legal framework establishing it. In Kenya, the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 is one of the domestic legal arrangements for implementation of the global convention against corruption coupled with its attendant institutional arrangements for enforcement. The Constitutionality of the Act in form and application has been addressed. The intention of the Act seems to address specifically the serious threat of corruption in Kenya and prescribes commensurate sentences to deal with the same.

For the first time in Kenyan history, corruption and economic crimes have been defined and appropriate punishment upon convictions for specific offences is provided for including forfeiture of unexplained assets and stolen public funds and compensation offered to affected persons. The Act sets out the different types of offences falling under the definition of corruption as defined in the Act. It is important to note that the Act does not create an offence called corruption but rather it defines corruption and creates specific offences under section 39 to 44, 46 and 47.

The Act is the main law governing the conduct of corruption cases in Kenya. The Act seems to comprehensively address these offences. As earlier indicated the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 repealed the Prevention of Corruption Act, Cap. 65 of the Laws of Kenya, and addresses acts, which were offences under the repealed Act, committed before the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 came into operation.

There are different types of manifestations of corruption. However for purposes of this survey, corruption encompasses the meaning under the Anti-Corruption and Economic Crimes Act.

The Act defines corruption as:-

- Bribery
- Fraud
- Embezzlement or misappropriation of public funds
- Abuse of office
- Breach of trust
- An offence involving dishonesty
- Secret inducement for advice Bribing agents
- Deceiving the principal through false material
- Failure to disclose a conflict of interest to ones principal
- Receiving or soliciting improper benefits to trustees for appointments
- Bid rigging
- Dealing with suspect property

The Act further defines what constitutes Economic Crimes under Section 45 of the Anti-Corruption Act as follows: -

S. 45 (1): a person is guilty of an offence if the person fraudulently or otherwise unlawfully

- Acquires public property or a public service;
- Mortgages or charges or disposes off any public property;
- Damages public property;
- and Fails to pay taxes, fees or any levies or charges payable to any public body

(2) An officer or a person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person:-

- Fraudulently makes payment or excessive payment from public revenues for sub standard goods or goods not supplied for or services not rendered;
- Wilfully or carelessly fails to comply with the law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property; Engages in a project without prior planning.

Retrospectivity under the Act

Further the Act seeks to operate retrospectively to address offences committed before the Act came into force. Under the Act section 55 defines corrupt conduct to mean *inter alia*:

…b) conduct that took place before the Act came into operation and which at the time constituted an offence and if it had taken place after this Act came into operation would have constituted corruption or economic crime.'

The issue of retrospectivity is still pending in court and we can only await the decision of the Constitutional Bench. If the court decides against retrospectivity then the Commission and the court will have difficulties addressing offences that arose before the Anti-Corruption, and Economic Crimes Act came into force. This will obviously defeat justice given the magnitude of economic crimes committed before the Act came into force.

The Adequacy of the Penalties under the Act

Offences under this Act are felonies carrying a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both and an addition mandatory fine if as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss[29]. This is a much more severe sentence as compared to what is available under the Penal Code. However noting the kinds of economic offences that have been committed in this country, the sentences may as well be a slap on the wrist. The Act concentrates on the formal and structured forms of corruption. Other sanctions available under the Act include restitution and confiscation.

2) The Public Officer Ethics Act, No. 4 of 2003

The Public Officer Ethics Act, No. 4 of 2003 provides for codes of conduct for all public officers and compels these officers to declare their wealth including that of their spouses and dependent children. It is worth noting that the Public Officer Ethics Act of 2003 does not define corruption but simply identifies certain actions and omissions on the part of public officers and criminalizes them. The Act revolves around the incidence of bribery in a public office. Corruption has been known to occur in public offices, as well as private and civic enterprises and literally in all our institutions hence the Act fails in that it is not comprehensive. Granted that in our case the public sector is the biggest. Further, the declaration by public officers is sealed and secret. This defeats the purpose of declaration and fails the transparency test.

[29] Section 48 (1) and (2) of the Anti-Corruption and Economic Crimes Act, No. 2 of 2003

3) Stipulation of Corruption under the Penal Code, Cap 63

The Penal Code under section 101(1) stipulates the offence of abuse of office. Notably the Act defines the offence as a misdemeanor and where the act is done for gain then it is a felony and the sentence a maximum of three years. This Act contradicts the Anti-Corruption and Economic Crimes Act of 2003, which defines abuse of office as where any person uses his office to improperly confer a benefit on himself or anyone else, and the sentence provided for is a fine of one million or to imprisonment for a term not exceeding ten years or to both.

The only difference in the definition of the offences is that under the Penal Code, prejudice is a necessary ingredient of the offence while under the Anti-Corruption and Economic Crimes Act of 2003 this is not the case, because under the latter, one only needs to show that the offence has been committed irrespective of whether any one suffered prejudice.

This conflict presents a scenario where AG may charge an individual either under the Penal Code or under the Anti-Corruption and Economic Crimes Act of 2003 and for obvious reasons the culprits may offer bribes or other interventions in order be charged in the ordinary courts under the Penal Code[30]. Notably the Penal Code provides for other offences, which are also addressed under the Anti-Corruption and Economic Crimes Act of 2003. Nevertheless, the Penal Code stipulates much lesser sentences for these offences.

These include;

- The offence of stealing by persons in public office under section 280;
- All cases of false claims by persons employed in the public service contrary to section 100 of the laws of Kenya;

[30] For instance, Gachara's case was heard in an ordinary criminal court because the plea was taken under the Penal Code.

- False certificates by public officers contrary to section 102;
- Fraudulent false accounting contrary to section 330;
- Conspiring to defraud under section 317;

From the foregoing there appears to be a clear inconsistency between the two Acts. It is thus clear that the provisions of one of the Acts, notably the Penal Code, needs to be repealed or amended to be consistent with the Anti-Corruption and Economic Crimes Act of 2003 if the fight against corruption through the Courts is to succeed. Under the General Interpretations Act[31], where an act or omission constitutes an offence under fewer than two Acts, the offender shall, unless a contrary intention appears, be liable to prosecution and punishment under the two Acts but shall not be punished for the offence twice.

As earlier noted in the comparative analysis the Anti-Corruption and Economic Crimes Act of 2003, section 5(1) grants powers to the special Magistrates to grant pardon to persons supposed to have been directly concerned in or privy to an offence on condition of the persons making a true and full disclosure of the whole circumstance within his knowledge relating to the offence and to every other person concerned and such pardon so tendered shall be a pardon for purposes of section 77(6) of the Constitution. This situation is similar to that in Singapore, however, even under The Prevention of Corruption Practices Act (Cap 241 of the Laws of the Republic of Singapore) the rationale for this provision is not given. Section 77(6) stipulates that a person shall not be tried for a criminal offence if s/he shows he has been pardoned for that offence. This provision is meant to encourage people to confess their crimes and facilitate restitution. Nonetheless since restitution is not mandatory Magistrates **may** abuse the pardon provision.

[31] Cap 2 of the Laws of Kenya.

CHAPTER FOUR

1. JUDICIAL REFORMS IN KENYA

Chief obstacles to Judicial Reforms in Kenya

During the survey, we sought to find out from the public, perceived and real obstacles to judicial reforms in Kenya. As has been the case since 2000, majority of the respondents thought that political interference was the main threat to judicial reform in Kenya. This is in spite of the fact, that, a new government is in power. From the foregoing, one can conclude that all the developments that have taken place, notably, the purge subsequent to the Ringera report are still perceived as cosmetic changes in the eyes of Kenyans who are yearning for meaningful, institutional, long-term and sustainable reforms.

Another factor that has emerged which is peculiar to the NARC administration is the unsystematic and uncoordinated reform approach. 66% of the respondents thought that this posed a major threat to judicial reform in Kenya.

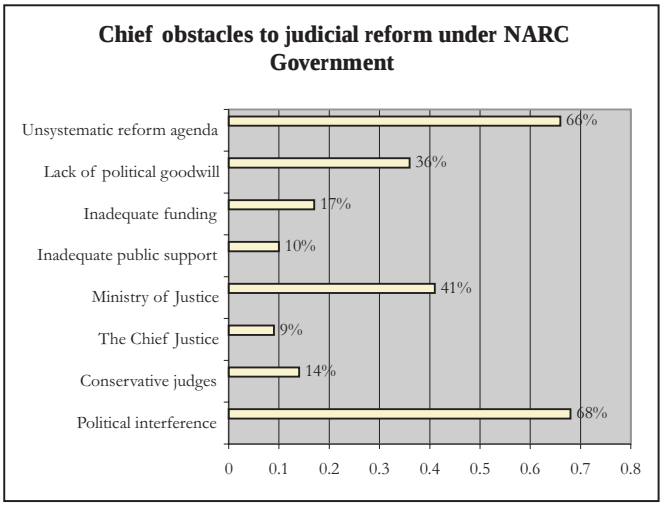
Other major factors are;

- The Ministry of Justice and Constitutional Affairs, 41% and
- Lack of goodwill from the government, 36%.

Overall, these statistics show that the NARC administration needs to improve and accelerate its reforms in the judicial and legal sector in order to improve perceptions by the public.

Other factors from the survey include;

- The Ringera report itself as it undermined the independence of judges and principle of natural justice.
- Rigid Judiciary towards reform initiatives.
- Few judicial officers in comparison with the population
- Poor terms and conditions of service for Magistrates and other judiciary staff.
- Nepotism and tribalism
- Lack of a clear and transparent criteria for recruitment of judges.



The Role of the Ministry of Justice and Constitutional Affairs in Judicial Reform

When the NARC government established the Ministry of Justice and Constitutional Affairs, many people had hope that it would transform the Judiciary[32]. Almost two years later, many questions still linger. Our study revealed that there are many skeptics than optimists about

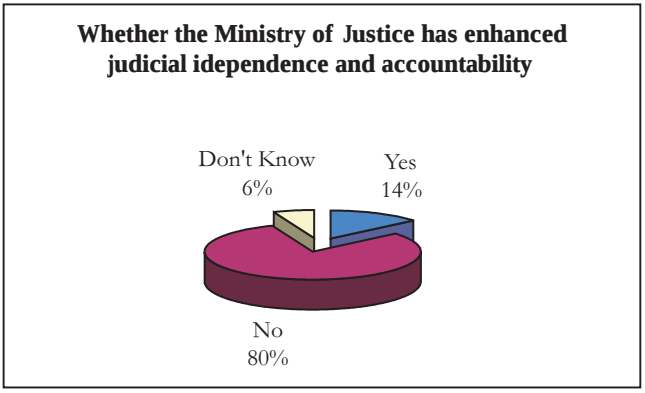
[32] A survey done by ICJ Kenya between August and September 2003 showed that 64% of the respondents had confidence in the ministry's ability to streamline the judicial and legal systems in Kenya. See Strengthening Judicial Reforms in Kenya, volume VIII: Progress Assessment from 2000-2003, p.49

the ministry's ability to transform the Judiciary. An overwhelming majority of 80% indicated that the ministry poses a real danger to the independence of the Judiciary. Thus, they doubted the ministry's ability to enhance judicial accountability and independence for the following key reasons,

- It has increased political (Executive) influence thus negating the principle of separation of powers.
- It has promoted political patronage in the Judiciary.
- It has increased fear among judicial officers. Therefore, in some instances creating paralysis of work.
- It has caused major confusion and disharmony not only in the judicial system but also in the constitutional review process and other institutions such as the Attorney General's office.
- It lacks a clear reform agenda and efficient mechanisms to enforce its own policies. For instance, under the Governance, Justice, Law and Order Sector (GJLOS) reform initiative the government has failed to publicize to its own advantage, its reform programme yet it is massively funded.

Nonetheless, 14% thought that the ministry would enhance the administration of justice for the following main reasons:

- It has increased independence and accountability in the Judiciary.
- It has offered the public a known avenue to lodge complaints against judicial officers and acts as a good watchdog.

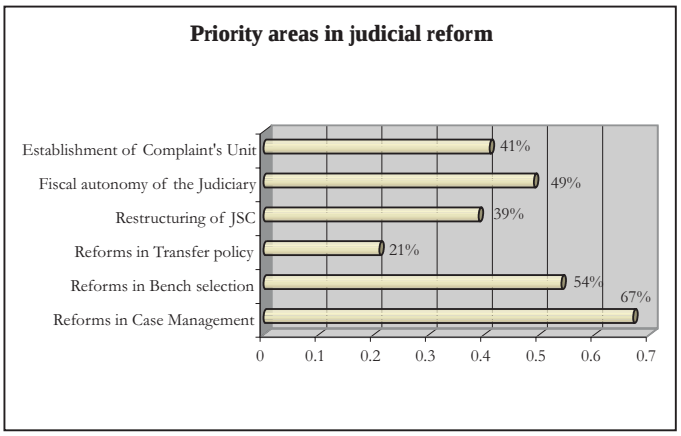


Priority Areas in Judicial Reform

In order to attain meaningful and sustainable reforms in the Judiciary, the respondents identified case management (67%) and reform in Bench selection (54%) as the priority areas in judicial reform. In order to make the Judiciary more accountable and enhance its independence, 41% of the respondents called for the establishment of a Complaint's Unit akin to the Advocates' Complaint Commission, while 40% called for fiscal autonomy of the Judiciary.

Other areas that were identified by the respondents include;-

- Improvement of terms and conditions of service for Magistrates and other Judiciary staff.
- Improvement of the filing system and total overhaul of the registries.
- Strengthening of the investigation and prosecution units.

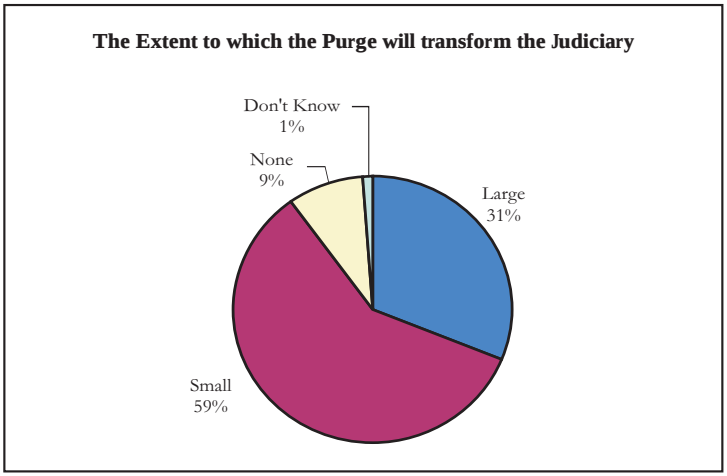


The Purge in the Judiciary

During our survey, we sought public's views on the purge in the Judiciary in regard to its impact as far as judicial reform is concerned and the way it was conducted[33].

a) It's Impact

59% of the respondents stated that the purge would only transform the Judiciary to a small extent, while 31% thought it would transform it to a large extent. A noticeable 9% thought the purge won't transform the Judiciary at all, stating that whatever had happened was merely a political move aimed at advancing the NARC government's popularity and ensuring that friendlier judges to the current administration were appointed.



[33] At the time of compiling this report, Hon. Philip Waki, J.A had been cleared of charges of corruption and misconduct as was alleged in the Ringera report by a tribunal led by Justice (Rtd) Akiwumi Akilano. He had thus been reinstated.

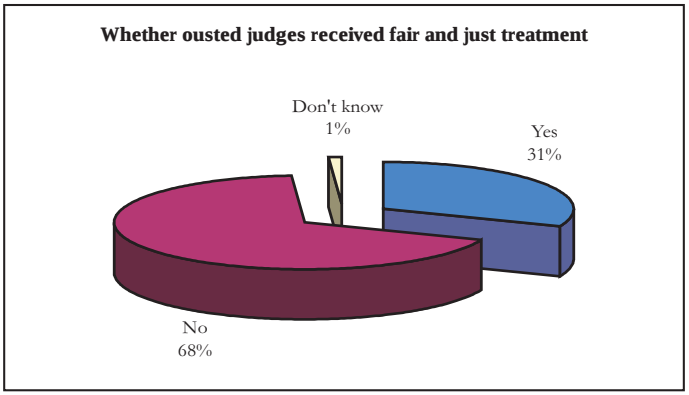
b) **It's Execution**

Majority of the respondents thought that the treatment accorded to the ousted judicial officers was unfair and unjust for the following reasons; -

- Due process of the law and the right to fair trial and hearing were not upheld. They stated that the named judicial officers were condemned guilty before they could be heard.
- It was a political gimmick aimed at short-term gains as opposed to attaining institutional judicial reform that would ensure better administration of justice.
- It was dehumanizing, degrading and lacked any shade of dignity, therefore, ended up undermining the Judiciary as a whole.

However, 31% supported the government's action based on the following reasons; –

- If those mentioned were innocent, they had a chance to defend themselves before the tribunals.
- It is not a new phenomenon, it has been happening in other circles and it was the Judiciary's turn to experience it, having been enclosed with evil for so long.
- The process had to start somewhere.



The position of Acting Judges

Subsequent to the purge that took place in October 2003, a number of acting judges have been appointed in what many perceived as a move aimed at filling the gap that had been left by the suspension, resignation and retirement of judges and a means of ensuring continuity in the administration of justice. However, it remains unclear why appointment of acting judges still continues even when it is apparent that there are existing vacancies that need to be substantively filled since majority of the named judges opted for retirement as opposed to facing tribunals. Further, it is puzzling that some of the acting judges have served for almost one year without confirmation. Worse still, some of the acting judges hold multiple positions in various institutions, which puts their efficiency, commitment and diligence to judicial duties in doubt. As at the time of compilation of this report, there were three (3) acting Court of Appeal judges[34] and twenty (20) acting High Court judges[35].

When asked about their opinion on the post of acting judges, 57% of the respondents did not support these appointments, citing among other things, the following reasons; -

- It compromises their independence and that of the Judiciary as a whole. Since, they all aspire to be confirmed, it is feared that their decisions are likely to be partisan in favour of government interests despite their best efforts.

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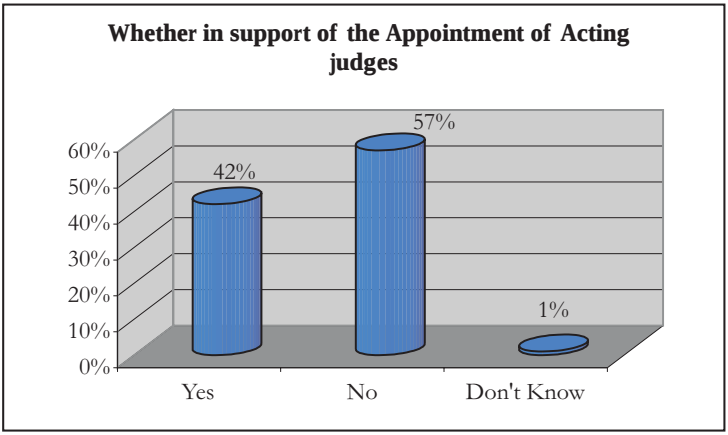
[34] Justice Onyango Otieno; Justice Aaron Ringera (who has since been appointed the Director of KACC) and Justice William Deverell (who is also a Commissioner of the Goldenberg Inquiry).

[35] Justices Roseline Wendoh, Paul K. Kariuki, J.B. Ojwang', Kaburu Bauni, Isaac Lenaola (who is also a Commissioner of the Constitution of Kenya Reform Commission and a member of the tribunal investigating the conduct of the named High Court judges), Daniel K. Musinga, David K. Maraga, George A. Dulu, Mary M. Kasango, Patrick J. Kamau, Mathew Emukule, Festus Azangalala, Murugi G. Mugo, Fredrick Andago Ochieng', Milton Makhandia, Kiprotich Kimaru, Mohammed Warsame, William Ouko, Ruth Nekoye Sitati and Wanjiru Karanja

- There is no clear and transparent appointment criteria in place, thus the appointments may have been influenced by other factors such as political, regional and tribal considerations which are likely to compromise the independence of the Judiciary and its efficiency and effectiveness.
- It is not a sustainable way of dealing with the problems in the Judiciary.

However, 42% supported the move stating that,

- It gives the government adequate time to evaluate their performance before confirmation.
- It ensures continuity in the administration of justice and helps in averting more case backlog.



CHAPTER FIVE

RECOMMENDATIONS

THE ANTI-CORRUPTION COURT

- The Court must be strengthened and entrenched in the Constitution to grant it a constitutional status. It must be well equipped to deal with all forms corruption both petty and grand corruption.
- Judicial officers in this court must be of unquestionable character and of high integrity, which must be granted security of tenure and given better terms of service to curb against temptation of being corrupted by those who are arraigned in the court.
- Further, the officers must receive special training to equip them with further knowledge and skills of handling matters in this Court. In addition, officers in this court like all other courts must be independent and free from all influences both internal ad external. The appointment must be done under new, clear and transparent criteria.
- The number of magistrates handling corruption related offences should be increased to ensure that all parts of the country are covered. Currently the magistrates are too few and one may wonder whether the government does really appreciate the high level of corruption in the country.
- The anti corruption court should be well managed if it is to achieve its goal of the efficient disposal of corruption cases.
- The Courts must be evenly spread across the country to enhance accessibility

THE KENYA ANTI CORRUPTION AUTHORITY

- KACC should be entrenched in the Constitution to give the institution autonomy just like that of the Attorney General. All corruption related offences and Economic Crimes, whether grand or petty, must be charged in a structured, independent and strengthened Anti-Corruption Court.
- A cursory look at the Anti-Corruption and Economic Crimes Act of 2003 shows that the powers of KACC are limited to the extent that it does not have prosecutorial powers. Thus, there is need to grant KACC these powers so as to affirm its independence and enhance its effectiveness like is the case in other jurisdictions.
- The office of the Director, Deputy Director and the Assistant Directors to the Commission should be made constitutional and granted a security of tenure

THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT

- The Act needs to be streamlined to avoid a deluge of constitutional references that delay prosecutions and cause heavy backlog of cases. Some of the sections that seem to be raising controversy include the issue of Presumption of corruption, the retrospective provision of the Act, powers of magistrates under the Act.
- The role of the Commission should be harmonized with that of the police to avoid duplication of efforts.
- Amending section 26 of the Constitution of Kenya to grant KACC prosecutorial powers in relation to corruption related cases is one necessary step.
- There should be a reconciliation of corruption related offences provided for under the Penal Code and now the Anti Corruption and Economic Crimes Act to streamline the definition, prosecution and sentencing of corruption related offences

- The sentences provided under section 48 of the Act should be enhanced to reflect the seriousness of the crimes committed. A suggestion would be to classify the offences according to the gravity and avoid generalizing the sentence.

PROSECUTORS

- During our research majority of the respondents stated that judicial officers in this Court must receive special training so as to effectively deal with corruption matters. However, this should also extend to the investigators and prosecutors practicing in this Court.
- The investigating and prosecution arms must be strengthened if the courts are to operate effectively. For instance, only qualified lawyers should handle prosecutions and they too, must receive additional special training.
- The Anti-Corruption and Economic Crimes Act should provide a mechanism on how to deal with inaction by the Attorney General.

THE GOVERNMENT'S ROLE

The government must show its total commitment to the fight against corruption and must grant this court all the necessary support and avoid selective prosecution.

GENERAL RECOMMENDATIONS

As a general proposal, the Judiciary must open up to the public and disseminate information on this Court and the judiciary in general to the public as a way of creating awareness. We acknowledge the newly launched Kenya Law Reports website[36] but appeal for percolation system to make it more useful and relevant. This will enhance accessibility to justice since more people will be aware of the existence of the court, hence will make use of it.

[36] www.kenyalawreports.co.ke

The Bench selection procedure in the judiciary must be reformed and improved to encourage specialization and enhance the development of jurisprudence in all areas of law. Further, the judiciary, as a whole needs to be proactive so as to keep up with the pace of a dynamic society. As a starting point, the judiciary must embrace the use of Information Technology and revamp its entire filing system using the modern technology. We however note that in October this year, the judiciary launched its website for e-reporting and we hope this will enhance access to judicial information.

APPENDIX:

SYSTEMS AND STRUCTURES SET UP BY THE GOVERNMENT TO FIGHT CORRUPTION: HOW EFFECTIVE AND WHAT MORE CAN BE DONE? Remarks made at a Public Lecture organized by the ICJ Kenya on Thursday 5th August, 2004 at the Stanley Hotel.

Gitobu Imanyara, *an advocate and former Member of Parliament.*

Systems and structures set up by the government to fight corruption. How effective and what more can be done to stem corruption? My first reaction when I received the invitation to be a discussant at this function was: What systems and structures?

Because I will and cannot be "neutral" in such a discussion let me begin by declaring my interest in the matter. I come from that much maligned area of Mt. Kenya known as Imenti and more particularly Imenti Central which I represented in the last parliament.

It is a constituency that has given us the current power brokers in the Kibaki administration: Ambassador Francis Muthaura the Head of Public Service and the Secretary to the Cabinet, the newly appointed Director of the Kenya Anti Corruption Commission Mr. .Justice Aaron Ringera, Permanent Secretaries Gerishon Ikiara and Erastus Mwongera, High Commissioner to India Ambassador Mutuma Kathurima, the man in charge of presidential security, the chairman of the Kenya Law Reform Commission and a host of other dignitaries in various arms of government. None of these gentlemen, you will notice there are no women, is a relative to the much hated and/or loved Minister for Justice & Constitutional Affairs Kiraitu Murungi, as has been alleged.

Given this galaxy of players in our current political dispensation and in keeping with the "our own" mind set that characterizes political debate in this country should I not be expected to say that there is no

corruption in Kenya today and hence "no need" for introducing any systems or structures? One must wear ethnic blinkers and therefore have an ethnic perspective on all issues or so it seems these days. For those who see corruption, there is corruption because their kinsmen are not "eating". Those who see corruption are disgruntled elements who can see nothing good. Who is Imanyara to talk about corruption anyway?

Isn't he the same Imanyara who was jailed and struck of the roll of advocates in the Moi era? Isn't it the same Imanyara who was arrested countless times and detained for "seditious" and other anti establishment writings? (They have even accused me of "escorting" people to State House to secure deposits for the collapsed Euro bank from the National Health Insurance Fund). Oh! Imanyara is simply unhappy with the current government because he expected to be appointed something. We shall deal with him in due course. Just as Moi did. Is this not, for example, the reason, after all, why Raila is "subverting" the Kibaki government? Because Kibaki has failed to honour the MOU and appoint Raila Prime Minister?

Why do Kenyans continue to refuse to accept to see the truth which is that the so called fight against corruption is nothing but a political tool, to advance the cause of a narrow minded kleptocracy that rules the country today.

I warn you that what I am going to say will probably raise temperatures but perhaps not to the same levels as those attained by British High Commissioner Edward Clay or my good old friend Smith Hempstone when he was US ambassador to Kenya in the early 90's.

The truth of course is that all the so called efforts to put in place "structures and systems" are not based upon any realistic commitment to eradicate corruption but solely to appease the "development partners". There is absolutely no commitment on this government to fight corruption. If there was even the feeblest commitment, no person

adversely mentioned in the on going Goldenberg Commission of Inquiry would be sharing government secrets at Cabinet meetings. What message is President Kibaki sending to Kenyans when the assisting counsel he has appointed to the Commission lead evidence adversely mentioning officials who served in the government kicked out of office because of institutional corruption and the following day he appoints them ministers in his government? If Moi followed Kenyatta's footsteps in institutionalizing official corruption, then Kibaki is more "Nyayo" than Moi.

How can a government elected to replace an alleged "corrupt" government return the people running the defeated government back to government as cabinet ministers? This is a betrayal of unpardonable proportions. I would go as far as submitting that the appointment of non NARC MP's into President Kibaki's government under the guise of a government of "national unity" is the boldest statement by the President that this professed commitment to fighting corruption is a cruel hoax. As Kenneth Matiba would say; 'it is a big joke'.

Allow me now to say something about the specific instances cited as examples of this government's commitment to fighting corruption.

The Anti Corruption and Economic Crimes Act is a donor induced piece of legislation representing at best a half-hearted measure that is incapable of achieving the ideals set out in its preamble. To begin with, those charged with the responsibility of enforcing the Act, with perhaps the exception of John Githongo, pay only lip service to its provisions. The Minister in charge is seen as aloof, arrogant and driven by a passionate zeal to settle scores with perceived enemies of the Democratic Party. He has proved himself to be totally incapable of detaching his official role from that of advancing the Democratic Party's aim of securing the next general elections without what is seen as LDP's nuisance inconveniences.

It is no coincidence that as I talk to you now, a minister of state in charge of the "special programme" of reorganizing the Democratic Party is having a meeting of DP representatives from Mt. Kenya region at this same hotel. This is going on even as the President is using the hallowed grounds of State House to meet with MP's from the same Mt. Kenya region to prepare groundwork of how to use the just started parliamentary recess period to inform the region of new political arrangement ensuring that "GEMA" rules forever. The President has fabulously succeeded in marginalizing an entire region and made those of us not sharing the DP agenda of ethnic chauvinism to be completely isolated.

Investigations and prosecutions under the Anti-Corruption and Economics Crimes Act have hitherto been selective and discriminatory. They are not inspired by any real commitment to bring culprits to book. The likelihood of any convictions arising out of cases so far instituted are almost nil. The public has lost confidence in the Kenya Anti-Corruption Commission because it is largely manned by officers from institutions such as the Kenya Police that will require complete disbandment and re-establishment before they can attain the capacity to conduct anti-corruption investigations. Despite alleged ban on harambees for example, Cabinet ministers and Members of Parliament continue to preside over these functions where they even make "contributions" from their ministries.

The timing of the decision to release Constituency Development Funds by Finance Minister yesterday was deliberately set to coincide with the Parliamentary debate on Ringera's confirmation and the Constitutional Review Commission amendment bill. It was a warning to recalcitrant MP's: Don't support the government and your constituency fund will be released " when funds become available". Its an old trick learnt from the Moi Era. It amounts to abuse of office. In the same way you must see the appointment of all these committees to fight corruption.

The Musyimi Committee for example is simply an exercise of co-option. It's a slight improvement to KANU's politics of patronage but the aim is the same. Buy the silence or acquiescence of whistle-blowers and critics by appointing them to some government committee. I hope the media practitioners including editors and clergy who have been enticed by Kiraitu to join the Anti-Corruption Steering Committee will see the folly of such inclusion.

Although the President led the "declare your wealth" campaign, one needs to go through a rigorous and expensive court procedures before one can access any information regarding our politicians' wealth. The law has absolutely no deterrence value. It is a public relations gimmick.
……..

Two "anti-corruption courts" exist in Nairobi but apart from the signboards outside the court rooms, these so called anti-corruption courts have no legal framework within which to work and the filing of the complaints still require consent of the Attorney General who is well known only for his famous public smile. A change of guard at the office of the Attorney General would certainly have indicated a change of policy towards investigations and prosecution of corruption cases. As it is now even the most zealous anti-corruption magistrate can be stopped in his or her tracks by a *nolle prosequi* from the Attorney General's Office. One also asks why are there no "anti- corruption" courts outside Nairobi?

The composition of the Advisory Board to the Anti-Corruption Commission's Board needs to be reconsidered. In particular the Chair to the Board should never be the Chair or Council Member of the Law Society of Kenya.

I conclude my remarks by citing to you two specific examples of corruption at work. Because these are cases now pending in the courts I will not identify the real names of the parties.

Example 1 involves one of the largest parastatals in the country entrusted with the custody of workers retirement contributions. In March 2003 this parastatal placed in the local media invitations for quotations for supply of insurance brokerage services. A large number of applications were made but eight who had achieved a cut-off point of 75 marks were short-listed. It was clear that had the eight short-listed companies been subjected to the criterion set out in the Exchequer and Audit Act some of the applicants who had links with senior government officials would have not met the rigorous standards required by the law. So what happens?

The Treasury issues a circular requiring that this parastatal insure only with three pre-determined insurance brokers. One of the affected insurance brokers appeals using the procedures established by Exchequer and Audit (Public Procurement) Regulations and the Appeals Board makes the following order:

"Taking into account all the foregoing, and in particular the serious flaws in the evaluation process, we hereby cancel the tender award and order re-tendering under supervision and guidance of the Public Procurement Directorate.

We further order as follows:

i) That the re-tendering be carried out within three months from the date hereof.
ii) That in order to ensure that the assets of …..are not exposed to risk, the insurance covers in place at the date hereof do remain in place until the new tender process is completed".

Under pressure from the Ministry of Finance, this parastatal ignores the decision of the Appeals Board and eventually gives the insurance brokerage contract to a favoured broker. That the government in the process loses more that 100 million shillings and opens itself up to a legal challenge is a small matter! And the President asks for evidence! This example is one of many.

My next example relates to the Judiciary. Even though there have been marked improvement in the administration of justice in the High Court, the situation in the lower courts, with the exception perhaps of the Nairobi Chief Magistrate's Court, has not shown much improvement. This example comes from Makadara Law Courts.

X makes a complaint of assault by a well known Kasarani businesswoman. Initially the Police at Kasarani Police Station are reluctant to enter the complaint in the OB but upon discovery that the matter has been referred to the OCPD they make an arrest and one of the accused is charged at Makadara Law Courts where she is bonded to appear for hearing. The complainant is bonded to appear in court but the date shown on his bond papers is different from one appearing in court file. So when the case comes up for hearing, the complainant will obviously not be there and the accused will be acquitted for lack of evidence! And just to make sure that this complainant does not enter the precincts of court even on the date shown on his bond paper, there is a police officer right at the entrance to ensure that only those carrying bond papers for cases shown on the day's cause list are allowed entry.

I don't know how many other similar cases obtain elsewhere in the country. What I have established however is that this conspiracy to corrupt the wheels of justice doesn't involve only police officers of the lower ranks. It involves court clerks and some unscrupulous magistrates.

So what is to be done?

First and foremost we must rethink the nature of political organization. Prior to registration, political parties should be required to ensure that their memberships are not restricted to one region or tribe. Minimum levels of membership from every district should be proved before obtaining certificate of registration. The policy of requiring schools to admit students from their own localities must be reversed

to that students to the country's secondary and teacher training institutions are required to train outside their own districts. This will inculcate a sense of belonging to the nation rather than the tribe.

The law requiring parliament to vet the appointment of the Director of the Kenya Anti Corruption Commission should be amended and the vetting procedure transferred to another body altogether. The current parliament has shown to be particularly unsuited for this task.

I would also say that the power to investigate and prosecute crimes should not be vested in one body only. If the police are going to continue investigation of criminal cases, then we immediately need a Criminal prosecution service that is independent of both the police and the Attorney General.

Finally, I conclude with a plea to civil society and the media. These two institutions provide the real checks and balances to our emerging democratic culture. Refuse to be co-opted into government.