



PRESS STATEMENT

**BY THE KENYA ANTI-CORRUPTION COMMISSION IN RESPONSE TO
COMMENTS ATTRIBUTED TO THE HON. THE ATTORNEY GENERAL ON
THE INVESTIGATIONS FILES FORWARDED TO THE OFFICE OF THE
ATTORNEY GENERAL.**

The Kenya Anti-Corruption Commission takes this opportunity to respond to Statements appearing in the local media of Wednesday 18th October 2006 attributed to the Attorney General in relation to recommendations made by the Commission;

- a) That the former Permanent Secretary, Office of the President, be charged with three counts of breaching procurement regulations and one count of economic crime
- b) That the former Deputy Chief Finance Officer be charged with two counts of breaching procurement regulations
- c) That the former Minister for Finance be charged with two counts of Economic Crime for approving a project without ensuring that provision for repayment of credit was made in the estimates of expenditure approved by Parliament and failing to adhere to provisions of the Central Bank of Kenya Act.
- d) That the former Minister of State in Charge of Provincial Administration and Internal Security be charged with one count of neglect of official duty.
- e) That the Director of Kenya Meteorological Dept. be charged with one count of abuse of office for disclosing content of a KMD report to LBA systems Ltd and three counts for failing to adhere to procurement regulations.
- f) That the former Head of Debt. Management Department in Treasury with one count of deceiving principal.
- g) That the former Postmaster General be charged with four counts for failing to adhere to laid down procurement regulations.
- h) That the former Permanent Secretary, Treasury, be charged with two counts of Economic Crime and three counts of Abuse of Office for improperly approving payment to Globetel Incorporated (UK) of Euros 1,489,500 being Commitment Fee, Euros 4,000,000 being the first instalment and Euros 3,315,854 being the second instalment.

The Commission now wishes to respond to the technical, legal issues relating to the investigation files and sufficiency of evidence disclosed in them in a point-by-point manner in response to the Statement attributed to the Hon. Attorney General;

1. Page 1 Paragraph 2:

That it is now an established legal requirement that the prosecution must disclose to the defence the entirety of the prosecution docket in advance of the trial ...

- This is not an established legal requirement either under the Constitution of Kenya or under any other Statute.

2. Page 1 Paragraph 3:

The investigation files from KACC made recommendations that suspects be charged with various misdemeanours of a technical nature ...

- The proposed offences are not only misdemeanours but also include Kenya Anti-Corruption Commission felonies. The misdemeanours relate to offences committed before the Anti-Corruption and Economic Crimes Act, 2003 was enacted.

3. Page 2 Paragraph 2:

Most of the suspects named in all the inquiry files are proposed to be charged for failure to ensure that budgetary provisions were made for the projects in the estimates of expenditure approved by Parliament contrary to section 3(2) of The External Loans and Credit Act ...

- The Assistant Director, External Loans and Reserves Management Department of the Central Bank of Kenya, has recorded an elaborate statement explaining the role of the Central Bank in settlement of foreign debts incurred on account of the Government.
- The proposed charges disclose sufficient evidence of *offences of omission*. While the legal burden of proof never shifts from the prosecution to the defence, the *onus of proof* in the sense of the evidential burden can be shifted in the trial, and this is fully approved by the Constitution under section 77(12)(a). In an offence founded on omission the burden can be on one who discounts the omission, and in this case an accused may have an evidential onus to discount the questions posed by the Attorney General. This applies and relates to the questions
 - whether or not provisions were made in the Estimates of Expenditure;
 - whether or not Parliament was informed of the security contracts as required under section 5 of The External Loans and Credits Act ;
 - whether the payments paid for the projects from the Consolidated Fund were approved by Parliament

4. Page 3 Paragraph Numbered 2:

Most of the suspects are proposed to be charged for failure to consult the Central Bank of Kenya before entering into the external loans agreements in question contrary to section 31 of The Central Bank of Kenya Act...

- There is no requirement in the Constitution of Kenya, the Criminal Procedure Code, The Evidence Act, The Penal Code or The Anti-Corruption and Economic Crimes Act 2003 that before a charge is laid when there is sufficient evidence to disclose an offence, detailed and conclusive statements must, first, as a *condition precedent* to preferring criminal charges, be taken.
- Every day in Kenya, in all types of prosecutions, investigators regularly take *Further Statements* from witnesses, and take *New Statements* from *new witnesses* whose statement evidence was not available or on file at the time a charge was preferred against a suspect.

5. Page 4 Paragraph Numbered 3:

A number of the proposed charges are based on failure to comply with regulations under The Exchequer and Audit Act (Public Procurement) Regulations 2001...

- The questions posed by the Hon. Attorney General numbered (i) through (iii) are *issues of law* to be settled by the Court before which suspects are charged.
- They are issues that the Commission has covered adequately, to which the *defence* would need to provide answers or justifications favourable to the suspects. After hearing both the prosecution and the defence, the trial court would make a finding on the issues in determination of the guilt or innocence of the suspects vis-à-vis the charges laid.
- In each of the files submitted to the Hon Attorney General there is a statement by the Director of Public Procurement that sufficiently addresses the issues on public procurement regulations.

6. Page 5 Paragraph Numbered 4:

The cases under inquiry are document-based. Consequently the document examiner's reports in respect of each file are essential and should therefore be availed...

- The document examiner's report is provided in the course of a trial when signatures on documents are proved or disproved. The Commission, in the forwarded files, brought to the attention of the Attorney General that the documents in question have *already* been forwarded to the document examiner, whose report is awaited.
- It has never, prior to now, been a condition precedent to preferring criminal charges that the document examiner's report be on file.

7. Page 5 Paragraph Numbered 5:

Detailed statements of the Investigating Officers should be recorded and their investigation diaries be prepared and availed ...

- All the statements and investigation diaries of the investigating officers are in the files forwarded to the Attorney General. There are also detailed covering reports summarising the evidence gathered and the conclusions and findings of the investigators.

8. Page 5 Paragraph Numbered 6:

That some of those recommended for prosecution are also at the same time prosecution witnesses in other files; that it is unlikely that these accomplices will give any evidence favourable to the prosecution and may turn out to be hostile witnesses; and that they should be replaced by any other relevant officers...

- The Criminal Procedure Code and The Evidence Act have elaborate provisions for the treatment of hostile witnesses by the trial court; they give guidance on the weight to be attached by the court to the testimony of a witness who decides to disown his statement and become hostile, and they provide for a mechanism by which the trial court can delve into the reasons why a witness has decided to become a hostile witness.
- These are possibilities which are alive in all prosecutions, and which the law has foreseen and given guidance to the trial court, the prosecution and the defence on what should be done to uncover the real reasons why a witness decides to turn hostile.
- The possibility that a witness may turn out to be hostile has never been a bar to the preferring of charges against a suspect; this only goes to the weight to be attached to the testimony of the witness, with the statement originally given being the reference point of truth, and tested through Examination-in-Chief, Cross-Examination and Re-Examination.

9. International Investigations

- The investigations already conducted and the evidence disclosed relate to project planning, budgeting and procurement. The investigations and evidence in support of these charges are complete and are not dependent on any external or international investigations. The necessary witnesses are all available and have recorded statements.
- The international aspects of the investigations, which are still ongoing, may lead to other, or further charges of a different type being recommended in the future against the same or other suspects in

relation to the files forwarded or those yet to be forwarded to the Attorney General.

- There is no causal connection between the proposed charges against the proposed suspects in the files forwarded to the Attorney General, and any proposed charges in the future that may be laid against the same or other suspects in relation to the same files forwarded to the Attorney General or other files where investigations are still ongoing.
- The proposed offences against the proposed persons are complete, and are wholly domestic, and not international.
- To tie domestic and international causes of action in the matters under investigation would have the effect of unnecessarily delaying criminal trials where offences are disclosed and where there is sufficient evidence to sustain prosecutions, as recommended by the Kenya Anti-Corruption Commission.

Be that as it may, the Kenya Anti-Corruption Commission will await official communication from the office of the Attorney General.

As regards Hon. Soita Shitanda we note that the Attorney General has appreciated that an offence had been committed but he has opted to exercise his discretion to confer mercy on the Minister. However, contrary to the reasons given by the Attorney General for the discretion, the case concerning Hon. Soita was different from the other 64 MP's, in that his was a case of fraud. The Hon. Minister had claimed payment for use of own vehicle whereas he had in reality used a GK Vehicle.

We have also noted from the press reports that the Hon. Attorney General has given a 30 day deadline for completion of the investigations, and has called for progress reports. We wish to state that the Anti Corruption and Economic Crimes Act, 2003 is sufficiently clear that the Commission and the Director, shall not be subject to the direction or control of any other person or authority.

SIGNED:



Fatuma Sichale

Deputy Director – KACC

FOR: DIRECTOR/CHIEF EXECUTIVE

19th October 2006