

KENYA ANTI-CORRUPTION COMMISSION

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PRESS STATEMENT ON THE PERFORMANCE OF THE KENYA ANTI-CORRUPTION COMMISSION

The purpose of this Press Statement is to place on record the facts about the performance of the Kenya Anti-Corruption Commission (hereinafter “KACC”) in the last three years of its actual existence.

The passing by the National Assembly last week of amendments to *The Anti-Corruption and Economic Crimes Act 2003* has been roundly criticized in many quarters as a blatant weakening of Kenya’s anti-corruption legislative platform in favour of corruption cartels and networks.

Members of Parliament, led in this crusade by the Departmental Committee on Administration of Justice and Legal Affairs have voiced the following key concerns as their justification for their decision to weaken the KACC;

1. That the KACC has failed to use its existing powers.
2. That the KACC has only concentrated its attention on what are pejoratively referred to as “small fish”.
3. That the amendments sought by the KACC were unconstitutional.
4. That the KACC conducts its investigations selectively.

In adopting these positions, Members of Parliament and the Departmental Committee ignored and/or downplayed the following important facts about the establishment of the KACC;

1. *The Anti-Corruption and Economic Crimes Act 2003* was enacted on 2nd May 2003. However, and to the intimate knowledge of Members of Parliament, it was not until September 2004 – a mere 3 years ago - that a Director and Assistant Directors were appointed after completion of the Parliamentary Appointment and Presidential Confirmation process.
2. The KACC as it stands today is a completely new institution. The process of staff recruitment and institutional establishment took about one and a half years to reach the KACC’s approved establishment. This is itself a remarkable achievement.

3. Despite being in its infancy and establishment phase, the KACC has executed its mandate and complied with all the reporting obligations placed on it by *The Anti-Corruption and Economic Crimes Act 2003*. Two Annual Reports for the period 2004-2005 and 2005-2006 have been published. The Annual Report for the period 2006-2007 is due in October 2007. The KACC has also published Quarterly Reports detailing substantial activity as required by law, more about which will be said below.
4. Today, the KACC is only three years old since it was commissioned through appointment of a Director and Assistant Directors. Criticism about its performance, if honest and objective, must acknowledge the fact of time and capacity.

Despite these independently-verifiable facts, the KACC has been condemned as a non-performer, regardless of the substantial activity contained in two Annual Reports and 11 Quarterly Reports. Worse, the National Assembly has decided to give a blanket amnesty on Corruption and Economic Crimes undertaken before 2nd May 2003.

Regarding the accusations by the Departmental Committee, we state as follows;

1. Failure to use existing powers

Under Section 7 of *The Anti-Corruption and Economic Crimes Act 2003*, the KACC is empowered

- (a) to investigate corruption and economic crimes;
- (b) to provide advisory services to any person on ways and means of eliminating corrupt practices (no complaints);
- (c) to conduct examinations of the practices and procedures of public bodies with a view to reviewing methods of work or procedures that are conducive to corrupt practices (no complaints);
- (d) to educate the public on the dangers of corruption and economic crime (no complaints), and
- (e) to investigate losses of public funds or property and to institute civil proceedings to recover such public property or funds.

Clearly, complaints have been levelled against the KACC only with regard to investigation of corruption and economic crime, and not against the many other functions of the KACC as set out in Section 7 of *The Anti-Corruption and Economic Crimes Act 2003* in respect to which a lot of valuable work has been done.

With regard to the conduct of investigations by the Commission, the key investigative powers of the KACC are

- (a) Police powers, preserved under Section 23.
- (b) Powers to require associates and persons suspected of corruption or economic crimes to account for their wealth or produce necessary documents under Sections 26, 27 and 28.

Under the constitutional principle of separation of powers, the Judiciary has the role of interpreting legislation and pronouncing on the constitutionality or otherwise of specific legislation. With regard to the key investigative powers under Sections 26 to 28, the High Court of Kenya in Miscellaneous Application Number 54 of 2006, *Dr Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission and the Attorney General*, found and held that Sections 26, 27 and 28 are not unconstitutional, and that in fact, they are a necessary part of any good anti-corruption legislation, besides being international obligations under The United Nations Convention Against Corruption (UNCAC).

It is not lost on the KACC that the lawyer on record for Dr Christopher Murungaru in the above case is none other than the Chairman of the same Departmental Committee on Administration of Law and Legal Affairs that spearheaded the effort to cripple the KACC. The conclusion is tempting that the repeal of Sections 26, 27 and 28 at the behest of the Departmental Committee is nothing more than a back-door method to sidestep the findings of the High Court of Kenya on the Constitutionality of Sections 26, 27 and 28. One may draw their own conclusions as to the likely beneficiaries of the repeal of Sections 26, 27 and 28.

Notices under Sections 26, 27 and 28

It is not fair, or true, to say that the KACC did not use its powers under the Act. Before Dr Christopher Murungaru went to the High Court seeking to challenge a Notice he had received pursuant to Sections 26, the Commission had issued many Notices to persons suspected of corruption or economic crime, including Dr Murungaru. Subsequently, the Commission has issued many other similar Notices. How then, can the Departmental Committee accuse the Commission of not using its investigatory powers? As regards Notices under Section 28, they are issued routinely in the course of investigations. They are a useful and necessary instrument in the fight against corruption. The continued assertions by some Members of Parliament that these sections are unconstitutional are meant to hoodwink Kenyans and are dishonest.

2. Concentrating on “small fish” to the exclusion of “big fish”

The Anti-Corruption and Economic Crimes Act 2003 defines Corruption and Economic Crimes in broad terms. Since the establishment of the Commission in September 2004 up to 30th June 2007, the KACC received and processed a total of 19,310 complaints of suspected Corruption and Economic Crimes received from ordinary wananchi, civil servants, businesspersons, government agencies and its own intelligence. From these reports, a total of 3,145 cases were taken up for full investigation leading to various recommendations made to the Attorney General such as prosecution of suspects, administrative action against suspects and closure of investigation files for want of evidence.

Any honest appraisal of these reports shows that

- (a) The bulk of complaints, above 80%, that are brought to the Commission are outside the mandate of the Commission. This issue has been addressed through the establishment by His Excellency the President of the office of Ombudsman.
- (b) Of the 20% within the mandate of the Commission, the bulk of these are the actual experiences of ordinary citizens as they go about their daily lives. A citizen's ordinary experience in their normal life does not include exposure to and deals with Ministers, Permanent Secretaries and other so-called "big fish". Statistically, because "big fish" are vastly outnumbered by "small fish" in the population, it is inevitable that the bulk of reports processed by the KACC will come from what are called "small fish". These constitute 70% of the reports received by the KACC. The commitment of the KACC being to respond to and process all complaints received, the KACC has no apology to make for processing and acting on complaints by ordinary wananchi. As a point of principle, the KACC does not and will not tell any Kenyan that his or her complaint about suspected corruption is too petty to be attended to. The doors of the KACC are wide open to any Kenyan who wishes to report suspected corruption or economic crime. The distinction between "petty corruption" and "grand corruption" is not one which the KACC uses to either allow or disallow access by Kenyans to its services. It should also be remembered that all Corruption Perception Surveys, including those by Transparency International and even the KACC's own National Perception Survey, reflect the experiences of ordinary wananchi. If the corruption that affects ordinary wananchi is not dealt with, the ordinary Kenyan will have every right to think that there is no action being taken against corruption. This is why the KACC places equal emphasis on "petty" as on "grand" corruption.
- (c) In the criminal courts, up to 31st August 2007, 332 complete investigation files have been forwarded to the Attorney General. By June 2007, 231 of these files, or 75%, recommended prosecution of suspects. Also by June 2007, 107 cases have been finalized through the Judicial Process, with a conviction rate of 30% (32 convictions).
- (d) Following investigations, the KACC has recommended the prosecution of 2 Ministers of Government, and recommended the closure of investigation files on 3 Ministers of Government due to lack of sufficient evidence to sustain a prosecution in court. Investigations have been conducted on Members of Parliament, Heads of Parastatals, a Governor of the Central Bank of Kenya and countless Senior Civil Servants. For example, in the Anglo Leasing investigation, there are in court today a Permanent Secretary and a Finance Officer in the Office of the President in the Forensic Laboratory Project on charges of Abuse of Office. In the passports issuing system project, two Permanent Secretaries, a Director of Government Information Technology Services and the Head of the Debt Management Division in the Treasury are also in court. If these are not "big fish", then what are "big fish"?

The Commission is currently undertaking investigations into allegations of “grand corruption” whose value is estimated at Ksh 75.1 Billion. As part of its recovery mandate, the Commission has already recovered 16 parcels of misappropriated public land with an estimated value of Ksh 96,000,000. Similarly, 48 Title Documents have already been surrendered to the Commission. In turn, the Commission has begun transferring the parcels of land back to the Government or the affected public institution. In the civil courts, 112 civil cases have been filed seeking the recovery of property with an estimated value of Ksh 1,381,887,477. All these properties and money belong not to “small fish”, but to “big fish”, and their recovery is part of the implementation of the Ndung’u Report on Irregular/Illegal acquisition of public land. How can it then be honestly said that the KACC does not investigate or touch “big fish”?

Another popular complaint about “big fish” is that no single “big fish” has been prosecuted or jailed. While the KACC holds no brief for the Attorney General or for the Judiciary, this is an unfair complaint to make against the KACC. On prosecutions and convictions, the KACC

- (a) Does not prosecute, because it has no powers of prosecution. Only the AG can prosecute persons for Corruption and/or Economic Crime. In doing so, the duty of the AG as Chief Prosecutor is not just to obtain a conviction by any means, but to lay all the evidence, including evidence favourable to the accused person, before the court for its determination on the accused person’s guilt or innocence. Between September 2004 and 30th June 2007, there have been 32 convictions on various offences of Corruption and Economic Crime. There are 254 cases in various stages of criminal prosecution before our courts.
- (b) Does not conduct trials, because this is the province of the Judiciary. For the Judiciary, its duty is not to convict all persons who are charged with offences, but to weigh the evidence presented against the accused person and, if persuaded, to convict the accused person. If not persuaded, the court’s duty is to acquit the accused person.

It appears therefore that the National Assembly, in the factual circumstances of the KACC, wishes the KACC, between September 2004 to date, to have conducted investigations, prosecuted and convicted any and all “big fish” merely suspected of or mentioned as having some involvement in corruption or economic crime. So, with powers it does not have, the KACC is expected to prosecute, convict and jail persons. This is an unfair and dishonest accusation.

As has been said many times before, it is in the interests of every Kenyan that the war on corruption be conducted within the four corners of the Constitution of Kenya and laws made thereunder. This has been, is and continues to be the case. And if that is incompetence, KACC pleads guilty as charged and has no mitigation to offer.

3. Unconstitutionality of proposed amendments to strengthen the war on corruption.

In its operations, the KACC discovered weaknesses, loopholes and anomalies in *The Anti-Corruption and Economic Crimes Act 2003* that required to be rectified and amended in order to strengthen the legislative foundation of the war on corruption. These proposals were discussed exhaustively with the Ministry of Justice and Constitutional Affairs and with the Attorney General. Through various meetings with the Departmental Committee on Administration of Justice and Legal Affairs, the KACC and its Advisory Board sought to share the reasoning behind the proposals with the Committee.

Despite these consultations, the Departmental Committee took the position that most of the proposed amendments required Constitutional Amendment before *The Anti-Corruption and Economic Crimes Act 2003* and *The Public Officer Ethics Act 2003* could be amended. Nothing could be further from the truth. Suffice it to say that the Departmental Committee, and subsequently the National Assembly, declined and deleted all the proposed amendments that would have sealed loopholes and addressed weaknesses and anomalies in *The Anti-Corruption and Economic Crimes Act 2003*.

With respect, on the argument of Constitutionality, the Constitution of Kenya allows Parliament to enact legislation with retrospective effect provided Section 77 thereof is not offended, i.e. provided that no new offences are created to criminalise conduct that was not an offence at the time it was created, and that no new penalties are introduced that did not exist at the time of the commission of the act in question. A plain reading of Section 46(6) of the Constitution bears this observation out. Accordingly, the provisions proposed by the Attorney General to remove the limitation barrier to civil recovery and forfeiture of unexplained assets were not unconstitutional as has been contended by some Members of Parliament.

4. That the KACC conducts its investigations selectively

This accusation is manifestly false and absurd. For the record, it should be known that the KACC conducts its investigations with integrity and professionalism. There is no selectivity in the conduct of investigations. The accusation proceeds on the premise that any and all persons in Kenya who are merely suspected of or who have been mentioned in passing as having been involved in a corrupt practice should already have been investigated, prosecuted and convicted by the KACC in the 3 years to date since it began its operations.

Those persons who are under investigation for alleged involvement in corrupt practices, those others against whom complaints have been made or intelligence gathered but are yet to be investigated, and those who have not yet been prosecuted or convicted, will be investigated, prosecuted and convicted today, tomorrow or the day after tomorrow.

Conclusions

The National Assembly has done a major disservice to the public interest by passing amendments

- (a) to grant a blanket amnesty on past corruption and economic crime;
- (b) to weaken the KACC's capacity to conduct investigations into corruption and economic crimes; and
- (c) to worsen the weaknesses and loopholes in existing anti-corruption legislation.

In doing so, the National Assembly has taken its eyes off the ball on some important issues.

First, the war on corruption in Kenya is not personal to Justice (Rtd.) Aaron Ringera, or the Kenya Anti-Corruption Commission. It is the duty and obligation of every Kenyan, including Members of Parliament, to own the fight against corruption and to participate actively in it. This is especially so for Kenyans holding positions of power and influence, such as Members of Parliament. It is in this context that the KACC has spearheaded and coordinated the creation and implementation of a National Anti-Corruption Plan (NACP) whose highlight is the involvement of all organised sectors of Kenyan society working together under one common Plan to rid our country of corruption. The Legislature is a key pillar of the National Anti-Corruption Plan and Parliament has undertaken specific obligations thereunder to strengthen the war on corruption. The recent amendments fly in the face of Parliament's obligations under the NACP.

Secondly, the experience of countries that have successfully fought corruption is that it takes time, reliable political will and public support to succeed in the war against corruption and economic crimes. This is the testimony of countries such as Hong Kong and Singapore. There, their war on corruption has graduated from Investigation and Prosecution to Education and Prevention. It is necessary to remember that the long-term strategy for success is based on Prevention and Education, rather than closing the door after the horse has bolted – Investigation and Prosecution. In this regard, the Commission has undertaken a comprehensive public education campaign targeting the print and electronic media, through targeted interventions in high-traffic forums such as International Trade Fairs and Agricultural Shows, National Schools Drama and Music Festivals and through training of public officers including Integrity Assurance Officers. Millions of Kenyans have been sensitized against corruption through this media campaign in all these avenues employed by the Commission. To support corruption prevention measures, national surveys and considerable research have been conducted. It is notable that the Commission's surveys have shown that corruption in both the private sector and the public sector has declined significantly.

As part of corruption prevention, the Commission conducted reviews and assessments on the implementation of policy, legal, regulatory and systemic reforms geared towards sealing corruption loopholes in the Kenya Medical Supplies Agency (KEMSA), the Motor Vehicle Inspection Unit and the Immigration Department, the Roads sub-sector, the Teachers

Service Commission, the Pensions Department, the Nairobi City Council, the Mombasa Municipal Council and others. These measures are aimed at preventing corruption from occurring in the first place, and are key to the KACC's long-term goal to rid the country of corruption.

Third, success in the war on corruption is not measured by the body count of persons prosecuted or convicted, or by the number of recommendations made for prosecution, but also by the number of persons exonerated from wrongful implication in corrupt practices.

Fourth, even in a short period of only 3 years, there is much to show in the way of success in the war against corruption. For instance, the formerly ubiquitous 'harambee' contribution books in most Government offices are no more. The rampant corruption around illegal and irregular allocation of public land, better known as 'land grabbing', is no more. State Corporations have turned the corner from loss-making conduits for theft of public funds and resources to profit-making contributors to the Exchequer. Service delivery in public offices has undergone considerable improvement, as can be attested by any citizen seeking services in Government offices. To underscore this achievement, the Government recently won a United Nations Public Service Award for the Year 2007 for successful implementation of Performance Contracting in the public sector. In matters fiscal, revenue collection has increased significantly, enabling the Government to substantially fund its recurrent expenditure and increasing the development vote available throughout the country. All these positive results are significantly attributable to the success of corruption prevention measures in the public sector.

Incidentally, it is the Commission's experience that citizen awareness of corruption, and citizen participation in anti-corruption, is on the increase. The Commission's Rapid Response Unit that responds to bribe-demands and that catches bribe-takers *in flagrante delicto* is one of the busiest units in the Commission. When citizens receive bribe-demands, they are increasingly turning to the Commission as a partner to assist them to remove the public officer demanding a bribe from their office. We appreciate this cooperation from the citizens.

An objective assessment of Kenya today should distinguish between 'old' corruption, signified by such markers as 'Goldenberg, Land-grabbing and Anglo Leasing', and 'current' or 'new' corruption. Public dissatisfaction and opinion on the war on corruption today revolves around 'old' corruption. Yet, Parliament has gone ahead to grant an amnesty on "old" corruption, and is seeking to blame the KACC for this! The fact is that the impunity that led to these cases of 'old' corruption no longer exists today. This is augmented by the fact that the mere existence of the Kenya Anti-Corruption Commission, and the knowledge Kenyans have that the Commission will take appropriate action when cases of suspected corruption come to its attention, has converted the Commission into an effective Institutional Deterrent against corruption, especially in the Public Sector. Indeed, since Year 2004, there has not been a case of grand corruption in Kenya.

In conclusion, we have briefly outlined the achievements of the Commission in the short period of its existence, to demonstrate to all Kenyans, friends and stakeholders that all the criticisms levelled against it by Members of Parliament and others have no justification whatsoever. This is especially so in respect of Members of the Departmental Committee on Administration of Justice and Legal Affairs whom the Commission and the Advisory Board have taken the trouble to give comprehensive briefs, both in writing and in face-to-face discussions.

We do not claim to be perfect, and any objective, honest and constructive criticism will be warmly welcomed. What we vehemently deny is that in 3 years we have done “nothing” as some assert, that we have not exercised the legal powers granted by *The Anti-Corruption and Economic Crimes Act 2003*, that our investigations have been selective, etc. On the contrary, in the context of the Rule of Law and Constitutional Governance, the Commission’s scorecard is impressive. Consequently, those who have used such assertions in order to incapacitate the Commission must tell Kenyans what their agenda is – for theirs is certainly not in the interests of this nation.



JUSTICE A. G RINGERA
DIRECTOR & CHIEF EXECUTIVE
KENYA ANTI-CORRUPTION COMMISSION

18th September 2007