

**EFFECTIVENESS OF THE ETHICS AND ANTI - CORRUPTION  
COMMISSION IN COMBATING CORRUPTION WITHIN THE EXECUTIVE IN  
KENYA**

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## **DEDICATION**

To God for his grace in granting me wellbeing and good health throughout this study and to my Family for their unwavered support, inspiration and prayers.

## **ACKNOWLEDGEMENT**

I am greatly indebted to my supervisor Mr. Francis Kariuki for his knowledge, insight and positive criticisms he gave me throughout this dissertation.

**DECLARATION**

I, ABASS HAMIDA AHMED, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Francis Kariuki]

## **ABSTRACT**

One of the impediments that hinder Kenya's economic growth is corruption. It has crept into the various arms of the governments and its respective institutions and as a result has stifled Kenya's economic growth. Corruption has invariably costed Kenya a lot from being blacklisted by the International Monetary Fund, the World Anti-Doping Agency and being poorly ranked in the Corruption Index Reports.

This study explains the very core of the cognitive dissonance in Kenya's fight against corruption. In as much as this endemic has affected various arms of government, this study particularly focuses on the corrupt practices within the Executive.

This study will commence by giving the historical discourse of corruption in Kenya citing the most notorious scandals associated with the Executive. It will then address the various regimes that have been in power in Kenya since 1963, when Kenya gained independence, to date and bring to light the scandals associated with each regime.

Thereafter, it will conclude by giving the findings gathered from it and draw out recommendations for the fight against corruption. Its recommendations will revolve around the best practices from the countries used for the comparative analysis.



## **LIST OF ABBREVIATIONS.**

NCPD-National Cereals and Produce Board

UDHR- Universal Declaration of Human Rights

EACC- Ethics and Anti Corruption Commission

KACC- Kenya Anti Corruption Commission

IMF-International Monetary Fund

NARC-National Rainbow Coalition

KANU-Kenya African National Union

PPP-Public Private Partnerships

OECD-Organisation for Economic Co-operation and Development

## **LIST OF STATUTES.**

Constitution of Kenya (2010).

Ethics and Anti-Corruption Act (2011).

Proceeds of Crime and Anti Money Laundering Act (2009).

International Covenant on Civil and Political Rights (1966).

United Nations Convention against Corruption (2004).

New Zealand Constitution Act of 1852.

## LIST OF CASES.

*Republic v Attorney General & 3 other Ex-parte Kamlesh Mansukhlal Damji Pattni*  
(2013) eKLR.

*Mwangi Stephen Mureithi v The Attorney General (1981) eKL*

# CHAPTER ONE

## INTRODUCTION

### 1.1 Background

Kenya's systemic corruption has been seen to be on the rise in recent times. This endemic has been in our DNA for far too long and has mutated into various moulds. There is no universal definition of corruption as it has various connotations. Despite this, there have been various attempts in defining corruption and some have said it arises out of the monopoly of power and lack accountability.<sup>1</sup> Other definitions suggest that it is the abuse of entrusted power for private gain.<sup>2</sup> However, for the ordinary Wanjiku it revolves around the notion that the big fish is stealing 'their' money.<sup>3</sup> This has become a common narrative in the Kenyan society as the rampant practice of corruption has been widely accepted and is seen to have taken root in every facet of our life. It is a paradox to say that we have anti-corruption initiatives in place and that we have enacted all possible legislations to address this plague yet this scourge has grown over the years. This study therefore seeks to particularly explain the lacunae in the Ethics and Anti Corruption Commission being the main agency charged with the mandate of enforcing the tenets of integrity<sup>4</sup> and combating corruption in Kenya.<sup>5</sup> It aims to establish the laxity of the Commission in combating corruption particularly within the Executive since the Executive, which consists of the President, the Deputy President and the rest of the Cabinet,<sup>6</sup> has been a repeat offender. Kenya still ranks poorly in the global corruption index which is why one of the objectives of this study is to dissect why this is the case. Corruption in Kenya has been on the rise at an exponential rate hence calling to question both the institutional and legal frameworks in place that are tasked with the duty of countering it.

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<sup>1</sup>Kinisu P, 'Facing the challenge of ethical governance in Kenya- a call for action,' Institute of Certified Public Accountants of Kenya (2016) 3.

<sup>2</sup> [www.transparency.org/what-is-corruption](http://www.transparency.org/what-is-corruption) last accessed 1/12/2016.

<sup>3</sup> Kenya National Assembly Official Record (2010) 22.

<sup>4</sup> Article 79, *Constitution of Kenya* (2010).

<sup>5</sup> Section 11(1)(b), *Ethics and Anti-Corruption Commission Act* (2011).

<sup>6</sup> Article 130(1), *Constitution of Kenya* (2010).

The Ethics and Anti Corruption Commission is established pursuant to Article 79 of the Constitution of Kenya as read together with section 3(1) of the Ethics and Anti Corruption Act of 2011. The Commission has been tasked with several functions including educating and creating awareness on corruption related matters, undertaking preventive measures against unethical and corrupt practices and conducting investigations on its own initiative or on a complaint made by any person.<sup>7</sup> The various governments in Kenya have also bypassed the provisions of the law in order to further their political interests,<sup>8</sup> this in turn has led to a culture of impunity and an amnesty for the corrupt officials. Consequently, this provides both an enabling and a thriving environment for corruption.<sup>9</sup> However, if the rule of law was to be followed, there would be adherence of principles and procedures and there would be no manifestation of corruption in the Executive.

The Judiciary has been submissive to the Executive and in several instances its attempts to hold the Executive accountable has born no fruit.<sup>10</sup> For example, in the Goldenberg scandal it was revealed that the fraudulent scheme was intended to defraud the government millions of shillings. The report on the scandal pointed towards high state officials including the then retired president Moi.<sup>11</sup> The scam was unearthed during Kibaki's reign and the Attorney General entered the plea of *nolle prosequi* which meant to stop and curtail further prosecutions relating to the same matter. The Attorney General entered this plea in an attempt to pervert the course justice and prevent the conviction of those involved.<sup>12</sup>

This culture of impunity can be traced back to the early fledgling years after Kenya gained independence through which the President had extreme powers vested in him and in addition to this had unrestricted constitutionally backed powers.<sup>13</sup> In the case of *Mwangi Stephen Muriithi v Attorney General*<sup>14</sup>, for example, the Plaintiff in this case was working in the Intelligence Branch of the police, he was forced to retire for reasons unknown to him, he thereafter sought for his pensionable rights as an officer to which the court held that his

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<sup>7</sup> Section 13(2), *Ethics and Anti Corruption Commission* (2011).

<sup>8</sup> Mbote P and Akech, *Justice Sector and the Rule of Law* (2011) 21.

<sup>9</sup> Nduku E and T John, *Corruption In Africa: A Threat to Justice and Sustainable Peace* (2014) 28.

<sup>10</sup> Mbote P and Akech, *Justice Sector and the Rule of law* (2011) 98.

<sup>11</sup> Report of the Commission of Inquiry into the Goldenberg Affair (2005) 10.

<sup>12</sup> *Republic v Attorney General & 3 others Ex-parte Kamlesh Mansukhlal Damji Pattni* (2013) eKLR.

<sup>13</sup> Section 25 (1) 1963 Constitution.

<sup>14</sup> *Mwangi Stephen Mureithi v The Attorney General* (1981) eKLR.

retirement was effected by virtue of Section of 25 of the 1963 constitution, which provided that *'every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President.'* The suit was thereafter dismissed with costs.

This culture is further buttressed by the fact that the various Presidents appointed individuals to occupy constitutional offices without following any vetting procedures, these offices include the office of the Chief Justice and other Judges of both the High Court and Court of Appeal.<sup>15</sup> However, we see a turning point with the coming of the 2010 Constitution whereby the presidential excesses were now limited and the powers of the president were clearly outlined.<sup>16</sup> Furthermore, the President is now under a duty to seek the approval of the National Assembly when nominating individuals to Constitutional offices and only when the National Assembly approves of that nomination would it qualify as an appointment.<sup>17</sup>

Despite the extensive efforts done by the Ethics and Anti-Corruption Commission in the prevention of corruption, it has also been noted that this institution tends to be reluctant in pursuing the suspects of grand corruption schemes. This is further reinforced by the fact that the institution only goes after the easy victim and on the occasion that it follows up on the big fish it is because they are no longer in power.<sup>18</sup>

Another example of a scandal connected with the Executive is the Anglo leasing scandal in which the Ministry of Home Affairs had initially sought to manufacture special passports.<sup>19</sup> It had as a result solicited various firms to bring in their proposals for the process. A committee formed by the Ministry of Finance then cancelled all the proposals and then included various elements such as visas to the project. This in effect inflated the overall cost of the Project hence outsourcing external finances. Anglo leasing and finance limited, a company that was supposedly based in the United Kingdom was granted this tender and it was later discovered that it was a non-existent firm and by then the Government had lost billions.<sup>20</sup>

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<sup>15</sup> Mbote P and Akech, *Justice Sector and the Rule of Law* (2011) 56.

<sup>16</sup> Article 132(1), *Constitution of Kenya* (2010).

<sup>17</sup> Article 132(2), *Constitution of Kenya* (2010).

<sup>18</sup> Perrson A, *'Why Anti-corruption reforms fail'* International Journal of Policy, Administration and Institutions(2013)26.

<sup>19</sup> Hassid J, *'Scandals, Media and Good Governance in China and Kenya'*, Journal of Asian and African Studies(2014) 7.

<sup>20</sup> *'Court stops Anglo Leasing Payments,'* - [www.lsk.or.ke](http://www.lsk.or.ke), 1, last accessed 1/12/2016.

The Kenya Anti Corruption Commission (KACC) investigated the matter and made recommendations to the Attorney General to prosecute certain public officers in the Executive linked with this. However, the Attorney General declined this prosecution to take effect apparently on matters of technicality and evidence.<sup>21</sup>

Many other scandals are tied with the laxity of the anti-corruption measures and bureaucratic control of the Executive arm. This is evident even in the procurement processes and in the privatisation processes. One of the basic legal impediments with privatisation in Africa especially Kenya is the fact that the process of privatisation is not entirely democratic and participatory<sup>22</sup>. Consequently, lawlessness will automatically be born and impunity will prevail. The convoluted nature of public private partnerships has led to an indefinite procurement span.<sup>23</sup> It is due to this complexity that many officials have found loop holes in the procurement systems and consequently taken advantage of the process.

In Nyeri County for instance, some county officials faced charges on irregularly awarding a contract for consultancy of audit services without the approval of the County Tender Committee. The officials said that they were following the governor's order yet the case still continued against them without tying the governor to it for aiding the misappropriation of funds.<sup>24</sup> In another instance, procurement malpractice was evidenced when the government planned a twenty five year concessions policy for the road network when the plan was at its foetal stage it was established that three top officials were attempting to siphon these funds into their individual accounts.<sup>25</sup>

## **1.2 Statement of the problem**

The 2010 Constitution proposed the establishment of the Ethics and Anti-Corruption commission.<sup>26</sup> This Commission is tasked with the mandate of undertaking preventive measures against unethical and corrupt practices.<sup>27</sup> Despite this, corruption has exponentially increased

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<sup>21</sup>Gachenga E and Franceschi L, '*Governance, Institutions and the Human Condition*' Strathmore University Press (2015)98.

<sup>22</sup>Akech M, '*Privatization & Democracy in East Africa*'(2009) 22.

<sup>23</sup>Yescombe E , '*Public-private partnerships, principles of policy and finance* ' (2007) 17-24.

<sup>24</sup>Kanyi W 'Three top Nyeri officials deny Sh 3.7m graft' –www.thestar.co.ke, last accessed 1/2/17.

<sup>25</sup>Safari J and Omwega J, '*Factors affecting the performance of public private partnerships in infrastructure financing in Kenya*' International Journal of Social Management and Entrepreneurship (2015) 7.

<sup>26</sup> Article 79, *Constitution on Kenya* (2010).

<sup>27</sup> Section 13, *Ethics and Anti Corruption Commission Act* (2011).

more so in the Executive arm of the government making the citizens lose confidence in the governance of the country.<sup>28</sup>This is further reinforced by Transparency International's corruption index reports that have shown a drop in Kenya's index.

### 1.3 Theoretical framework

Despite the broad context of corruption and the lack of a universal definition of corruption, there have been various theoretical underpinnings that suggest the causes and factors influencing corruption. They include the public choice theory, bad apples theory and correlation theories.<sup>29</sup>

The following discourse will discuss each of these theories;

- ✓ *Public Choice Theory* is premised on the axiom that an individual makes a rational choice that leads to a predetermined outcome. It further posits that a corrupt official tries to maximise his or her utility. The corrupt officials are corrupt because they have mentally calculated that the potential benefit of corruption exceeds the potential costs of being caught.<sup>30</sup>
- ✓ *Bad Apples theory* hinges on one's moral character and uprightness. It suggests that there is a connection that leads bad character to corrupt practices. This theory posits that the root cause of corruption is found in defective human character e.g. greed within our elected politicians and therefore, if we have a high number of bad elected leaders then chances of them being corrupt is even higher than if we had a smaller proportion.<sup>31</sup>
- ✓ *Correlation theories* are based on a correlation of a number of factors that contribute to the corrupt activities by an official or individual. This includes certain political, social and individual factors.<sup>32</sup>

### 1.4 Literature review

Several scholars have talked about the cancer of corruption as it is not a novel creature in the Kenyan context. Attempts have been made to describe several corrupt indulgences in various

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<sup>28</sup> Daily Nation, 'Corruption in Kenya worse than ever', Agence France Press, 2 August 2015.

<sup>29</sup> Graaf G, 'Causes of corruption: Towards a contextual theory of corruption' (2007) 31.

<sup>30</sup> Rowley C and S Friedrich, 'The Encyclopedia of Public Choice', Kluwer Academic Publishers (2004) 75.

<sup>31</sup> Leon G, 'Bad Apples: Political Paralysis and the Quality of Politicians', London School of Economics (2009) 4.

<sup>32</sup> Lederman D, 'Accountability and Corruption: Political Institutions Matter' West Chester University Press (2004) 3.



public sectors from the Executive to the Legislature and Judiciary. Different tangents and angles have been taken by these scholars in addressing the longevity and resilience of this plague. Various governmental and non-governmental reports, articles, working papers and projects have been written to further delve into the discourse on corruption.

One of the avid scholars regarding this topic of corruption is Professor Migai Akech in his book *'Privatisation and Democracy in East Africa'*. He takes a different tangent talking about corruption in the procurement and privatisation processes in Kenya's public sector. He expounds on the idea that corruption in the privatisation process in Kenya is further enhanced by the fact that the process in itself is not democratic, procedural and participatory.<sup>33</sup> He ties this idea of corruption in the privatisation processes with neo-patrimonialism which in essence entails a system whereby those in positions of power use state resources for self benefits and to get hold of the allegiance of clients in the general population.<sup>34</sup> Neo-patrimonialism has consequently provided a wide array of options for political actors to choose which way of doing things best serves their interest. This therefore obviously means that they will support whatever proposition that best serves their interest and inhibit whatever goes against their interests.<sup>35</sup> Professor Migai's book in summary deals with corruption in the ambit of privatisation processes in Kenya.

Another scholar who gives a discourse on corruption is Professor Kameri Mbote and Migai Akech in their book *'Justice Sector and the Rule of Law'*.<sup>36</sup> The two authors delve on the corrupt practices in the Executive and the Judiciary with a concentration on the Judiciary. They explain the history of corrupt acts in the Judiciary which dates back to the early years post independence in which the President had excessive amounts of power and discretion and he chose judges to serve his interests since there was no guarantee of judicial independence.

The two scholars further propound that the culture of Executive impunity is predated to early independent Kenya and owed its origins to the establishment of an imperial presidency.<sup>37</sup>

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<sup>33</sup> Akech M, 'Privatisation in East Africa' (2009) 22.

<sup>34</sup> Bach D and Gazibo M, *'Neopatrimonialism in Africa and Beyond'* Routledge Press (2012) 79-89.

<sup>35</sup> Akech M, 'Privatisation in East Africa' (2009) 24.

<sup>36</sup> Mbote P and Akech M, *Justice Sector and the Rule of Law* (2011)23.

<sup>37</sup> Mbote P and Akech M, *Justice Sector and the Rule of Law* (2011) 55.

The authors further explained that with the new dispensation of the Constitution of 2010, the rule of law is paramount and checks and balances.<sup>38</sup>

E R Yescombe is another scholar who has written extensively about the corrupt practices that are often seen in procurement processes. This study relies on his sound knowledge of private public partnerships and the various advisory opinions he has provided governments with. In his book '*Public Private Partnerships*' he explains both the financial aspect of corruption and the democratic aspect of PPPs (public private partnerships).<sup>39</sup>

Another scholar this study relies on is Francis Fukuyama, an American Political scientist. In his book '*State Building, Governance and World Order*'<sup>40</sup> he gives a comprehensive state of the art type of governance that would ensure the application of the rule of law, accountability and transparency. He also cites the importance of political will and citizen support in the fight against various vices in the society including corruption.

Various governmental and non-governmental reports also aid the objects of this study which is why this study will rely on papers written by various governmental bodies including the office of the ombudsman in Rwanda, the Ethics and Anti Corruption Reports in Kenya, International Monetary Fund and the Organisation of Economic Development.

Other articles include the article '*Corruption in Kenya: A call to action*' which gives insightful discourses on corruption. This article by the Institute of Economic Affairs dates itself to the year 2000 when the then Kenya Anti Corruption Commission was charged with the mandate of combating corruption.<sup>41</sup> This article explained the manner in which the Kenya Anti-Corruption Commission (KACC), predecessor of the existing Ethics and Anti-Corruption Commission (EACC), had been subjective and picky on whom it sought to go after. This meant that the public lost confidence in the institutions charged with the mandate of combating corruption. It further explained the effect that corruption has posited in the economy to the extent that Kenya lost foreign investment on account of the endemic corruption.

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<sup>38</sup> Article 174 (i), *Constitution of Kenya (2010)*.

<sup>39</sup> Yescombe E, *Public-Private Partnerships: Principles of policy and finance* (2013)16.

<sup>40</sup> Fukuyama F, *State Building, Governance and World Order*, Cornell Press (2004)23.

<sup>41</sup> Section 15 *repealed*, Anti-Corruption and Economic Crimes Act (2003).

Reports on the irregular and illegal allocations of land in Kenya are also cited in this study because of their close links with the Executive of the different presidencies and how corruption aided the irregular allocations. Various analysis of the Constitution of Kenya will also be highlighted in this study in a bid to show the constitutional stance on corruption. It will compare the 1963 Constitution alongside the 2010 Constitution and show the progresses made in limiting the historical unfettered powers of the Executive. Pursuant to this, various scholarly articles including those written by constitutional scholars on Imperial Presidency and the abuse of power will be cited. In addition, this study will also cite several other legislations from other countries for example the Constitution of New Zealand, Constitution of Rwanda and various accompanying Acts that deal with corruption in these countries. It will also establish the nexus of Corruption with Human Rights as provided under the International Covenant on Civil and Political Rights (ICCPR) and United Nations Convention Against Corruption (UNCAC).

The World Bank has also been at the forefront in discussing the challenge corruption poses. It further explained the incapacity that the bank has in combating corruption effectively therefore, necessitating action at a level of micro-economic management for which the Bank neither has the mandate nor the professional capacity to act effectively.<sup>42</sup> Despite this encumbrance, the bank has supported policy and institutional reform that contributes to the fight against corruption for example by its support of Rwanda in its monetary policies.

Notwithstanding the extensive literature written on corruption, this review highlights the fact that not many scholars have given much attention to corruption especially in the locus of the Executive. Despite this, this study attempts to discuss the history of the corruption mechanisms and framework that were in place from independence to date.

## **1.5 Objectives**

- 1) To analyse the number of corruption cases filed with the Ethics and Anti-Corruption Commission.
- 2) To examine the effectiveness of the Commission in curbing corruption.
- 3) To make recommendations on how to tackle corruption in the Executive.

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<sup>42</sup> Polzer T, 'Corruption: *Deconstructing the worldbank discourse*, London School of Economics Press(2001)6.

## **1.6 Hypotheses**

1) The legal and institutional framework is not adequate in combating corruption in the Executive in Kenya

2) The Ethics and Anti-Corruption Commission is mundane as it lacks prosecutorial powers.

## **1.7 Research Methodology**

This study approaches its objectives by using primary and secondary sources in the review. The primary sources include the Constitution of Kenya 2010, legislations in place for corruption and policies that have been undertaken. Whereas books, online journals, working papers and reports will constitute the secondary sources.

This study does not involve active field research due to the time constraints put in place in the submission of this dissertation by the University. Therefore, the research will be entirely based on desktop research.

In its comparative study, it will analyse and compare Kenya's Anti-Corruption regime to that of Rwanda because Rwanda was named the least corrupt country in East Africa. It also uses Botswana and New Zealand as case studies as they have been named by the Corruption Index Report of 2016 to be the least corrupt in their regions respectively. This comparative analysis is used in order to establish why Kenya is lagging behind and what can be borrowed from them.

## **1.8 Limitations**

This study is restricted by two elements; the first element is the time constraint and the second element is the gap within the existing literature already mentioned.

## **1.9 Chapter Breakdown**

### **a) Chapter One- Introduction**

This chapter will provide an introduction to the study, the statement of the problem, the literature review, the objectives, the hypothesis and the methodology of the study.

### **b) Chapter Two-History of corruption**

This chapter gives a trail of the corrupt practices since independence and how the various Executives have abused ones power. It delves into each of the presidency and divides them according to their era's; 1) The Kenyatta I era 2) The Moi era 3)The Kibaki era and it finally concludes by giving the progress made by the 2010 constitution especially in how it has curtailed presidential powers within the Kenyatta II era.

c) **Chapter three- Comparative Study with the least corrupt countries**

This chapter looks into the practices of the least corrupt countries as reported by the various corruption indices. It seeks to look into the structure of their governance and institutional frameworks to see whether there are lessons Kenya can borrow a leaf from.

It will use the case studies of Rwanda, Botswana and New Zealand.

d) **Chapter four-Best practices**

This chapter explains the best practices and what we should incorporate in our system in the fight against corruption.

e) **Chapter five- Conclusion and Recommendations**

This chapter makes a conclusion and attributes it to the findings of chapter two, three and four respectively. It thereafter comes up with recommendations that Kenya as a country should pursue to resolve its corruption problem.

## CHAPTER TWO

### HISTORY OF CORRUPTION IN KENYA

#### 2.1 Introduction

This chapter examines the history of corruption in Kenya from 1963 when Kenya gained independence up until 2010 with the coming of the new constitution. It seeks to show how the different governments of the day have abused their power and how this abuse culminated to corruption.

This chapter will analyse the three different Executives and their impact on corruption in Kenya. It will start with the Kenyatta era, the Moi era , the Kibaki era and conclude by giving the progresses introduced by the 2010 constitution.<sup>43</sup>

It will also give an overview of the other legislations that cover corruption related matters.

#### 2.2 Imperial Presidencies

Since independence, the various presidential regimes in Kenya have been linked to prime corruption scandals whose fruits only benefited a few amongst the elite class.<sup>44</sup> This creates a situation in which there is a huge gap between the rich and the poor and a vicious cycle that makes the ruling elite richer while making the poor, poorer.<sup>45</sup>

The historical context of corruption in Kenya is rooted in the imperial presidency created after the end of the colonial rule even though before it was also manifested by the colonial masters.<sup>46</sup> The Independence Constitution had no form of checks and balances or institutional frameworks in place to ensure accountability of the Executive.<sup>47</sup> During this period, there were profound Constitutional amendments that had the effect of transferring powers from other arms of government to the Presidency. This, therefore, created the problem of a lack of separation of

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<sup>43</sup>Article 259 (1) (b), *Constitution of Kenya (2010)*.

<sup>44</sup> Mutula S,Muna W and Koma G, *Leadership and Political Corruption in Kenya : Analysis of the 2010 constitutional provisions on the presidency, Journal for Social, Political and Economic Studies (2013)* 38.

<sup>45</sup> United Nations Economic Commission for Africa, *Measuring corruption in Africa(2016)* 6.

<sup>46</sup>I Zareen, *Kenya's New Constitution: Erasing the Imperial Presidency*, International Institute for Justice and Development (2010) 1.

<sup>47</sup> Mutula S,Muna W and Koma G, *Leadership and Political Corruption in Kenya (2013)* 38.

powers. The lack of separation of powers has been known for the subjugation of liberties and enhancing the prevalence of tyranny.<sup>48</sup>

The overlapping of powers and functions of the different arms of government has long been criticized by scholars including Baron Montesquieu in that:

*“When the legislative functions and the Executive functions are tied to the same institution headed by the same individuals then there can be no existence of liberty in those institutions, there can be no liberty if the authority to judge something is not separated from the legislative arm and the Executive arm and this would be a recipe for a dysfunctional system if the same body were to exercise all those powers under one umbrella”.*<sup>49</sup>

Under Chapter Five of the Independence Constitution, the President was given many roles including the power to allocate portfolios to Ministers, power to appoint Permanent Secretaries and members of the Judiciary amongst others.<sup>50</sup> In fact, there was no succinct legislation in place that checked the powers of the President and this therefore created a vacuum and a safe haven for the President to work under his own terms and discretion.<sup>51</sup> The legislations that were in place actually aimed at giving the Executive broad powers without establishing institutions and mechanisms that would watch them. In addition, the legislations did not circumscribe how the functions of the Executive were to be performed. As Migai Akech explained where there is a lack of operative regulations the laws often propagate the abuse of power<sup>52</sup> from this it would be correct to infer that with the abeyance in the law came the abuse of power.

The National Rainbow Coalition (NARC) regime was elected on an anti-corruption platform as the then government promised Kenyan's that corruption would not be tolerated at any level. The president, Mwai Kibaki, had installed a spirit of hope amongst Kenyan's. It was later during his tenure that Kenyan's became disillusioned due to the reluctance of the government in pursuing the corrupt officials who sat in the same Executive. Contradicting the

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<sup>48</sup> Benwell R and Gay O, *The separation of powers* Parliament and constitution centre, (2011) 53.

<sup>49</sup> Montesquieu Charles de secondat, *The spirit of laws* Cambridge university press, United Kingdom, HOC (1989)2.

<sup>50</sup> Section 98, *Constitution of Kenya* (1963).

<sup>51</sup> Section 25, *Constitution of Kenya* (1963).

<sup>52</sup> Akech M, *Privatisation and Democracy in East Africa* (2009) 16.

promise they gave, the Executive misused their opportunity to fight corruption and those who occupied these offices used them to enrich themselves and their comrades.<sup>53</sup>

The various Presidential regimes have also been ethnically centered.<sup>54</sup> It therefore followed that politics was ethnically determined and this meant that the smaller communities were at a disadvantage as the national cake was only shared amongst the big fish.<sup>55</sup>

Corruption within the public sector has been the barometer that elucidates broader governance issues.<sup>56</sup> The past three Presidential regimes in Kenya are said to have destroyed the very fabric of unity and co-existence in Kenya as they amassed power and wealth at the expense of the general populace.<sup>57</sup> This favoritism further widened the ethnic divide that existed in Kenya and this was clearly reinforced during the 1992 state backed violence with the formation of KAMATUSA alliance (Kalenjin, Maasai, Turkana and Samburu).<sup>58</sup> This coalition was formed with the sole objective of countering the GEMA alliance (Gikuyu, Embu and Meru) and was in essence an anti-kikuyu movement.

We see from the very onset that this ethnic divide led to special treatment of some individuals in public office. For example, during Kenyatta's regime he was said to handpick members of the Cabinet. His system was posited on loyalty and allegiance whereby many individuals were recompensed either by being given monetary gifts, tracts of land and respectable positions.<sup>59</sup>

This unaccounted for rewards has caused a lot of legal disputes that have posed a great challenge to the whole nation. An example of such a corruption riddled problem is the issue of the land question in Kenya. Land was used to reward those political faithful's who were loyal to the ideals of a political campaign or were supporters of a Presidential candidate.<sup>60</sup> There was no

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<sup>53</sup> Amutabi M, 'Beyond imperial presidency in Kenya: Interrogating the Kenyatta, Moi and Kibaki Regimes and Implications for Democracy and Development' *Kenya Studies Review* (2009) 1.

<sup>54</sup> Roberts M, *Conflict Analysis of the 2007 post-election violence in Kenya* (2009)6.

<sup>55</sup> Amutabi M, 'Beyond imperial presidency in Kenya' (2009)1.

<sup>56</sup> Biau c and Biau J, *Government Reform in Developing Countries: The case of Kenya*, University of Warwick Press(2008)3.

<sup>57</sup>Maathai W, *Bottlenecks to development in Africa* , 4<sup>th</sup> UN World womens

[www.greenbeltmovement.org/wangari-maathai/key-speeches-and-articles/bottleneck-to-development-in-africa](http://www.greenbeltmovement.org/wangari-maathai/key-speeches-and-articles/bottleneck-to-development-in-africa)

<sup>58</sup>Kenya Human Rights Commission Report, *Killing the vote: State sponsored violence and flawed elections in Kenya* (1998)9.

<sup>59</sup> Muna K, *Leadership and Political Corruption in Kenya* (2010)6.

<sup>60</sup> Report on illegal and irregular allocation of public lands (2003)13.



form of accountability and nobody was allowed to question the President(s). Mzee Kenyatta and Moi's regimes were well known for suppressing any form of opposition and it was not until 1992 when there was immense public pressure that Kenya became a multi-party state.<sup>61</sup>

In fact, the two presidential regimes were well known for circumventing the rule of law and constitutional provisions because they knew constitutionalism brought transparency, accountability and diverse opinions which they objected to.<sup>62</sup> This is why they both tried imposing a totalitarian regime in which they controlled the media and the kind of information that the public would receive.<sup>63</sup> KBC (Kenya Broadcasting Corporation) and VOK (Voice of Kenya) were the only media outlets that were allowed to disseminate information to Kenyan's until the early 2000s.

## **2.3 Manifestations of corruption in the Executive in Kenya**

### **2.3.1 Kenyatta I Era**

When Kenyatta was hailed as President he knew he had to secure enough power for him to have sufficient control which is why he consolidated power around the Presidency and established a set of loyalists who supported him. The same loyalists were given rewards through the reward system as a token of appreciation and continuance of their support. The loyalists were rewarded with positions in parastatals, positions in parliament and even in the defense forces.<sup>64</sup>

The aim of the reward system was to ensure that the loyalists were part and parcel of his aristocracy. It therefore followed that those who questioned his regime or who appeared to become independent of him, the likes of Oginga Odinga, Tom Mboya and Kungu Karumba were sidelined and isolated. Needless to say that the regions they came from were not developed and did not have a share of the national cake.<sup>65</sup>

Many civil servants were occasionally transferred from one institution to another without any regard to their suitability for their new positions. This system was usually at the pleasure of

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<sup>61</sup> Oyugi W and Wanyande P, *The Politics of Transition in Kenya From KANU TO NARC*, Heinrich Boll Foundation Publishers (2003) 180.

<sup>62</sup> Vvondoepp P, *Routledge Handbook of African Politics*, Routledge Press (2013) 45.

<sup>63</sup> Section 35A(repealed), Films and Stage Plays Act (2012).

<sup>64</sup> Oyugi W and Wanyande P, *The Politics of Transition in Kenya* (2003) 32.

<sup>65</sup> Mutula S Muna W and Koma G, *Leadership and Political Corruption in Kenya: Analysis of the 2010 constitutional provisions* 6.

the president<sup>66</sup> and individuals would be removed from office and replaced without any procedural mechanisms.<sup>67</sup>

Kenyatta's regime was perforated with a lot of suspicious assassinations of high profiled individuals who were coincidentally critics of the Kenyatta regime.<sup>68</sup> An example of such an assassination is that of Josiah Mwangi Kariuki who was a great critic of the corrupt doings of the government. He was even quoted to say that Kenya '*has ten millionaires and ten million beggars in Kenyatta's rule*', by this he meant that a few enjoyed the public resources at the expense of the citizens.<sup>69</sup> Another stronger personality who was assassinated was Tom Mboya his assassination was linked to Mzee Kenyatta and the suspected assassin Isaac Njenga, one of Mzee Kenyatta's loyalists was convicted.<sup>70</sup>

The rule of law was a dream many Kenyan's hoped and prayed for. However, the Kenyatta I regime created a hegemony which made it to be above the law and all other institutions were subordinated. This is depicted in the various instances in which amendments were made to the Constitution, whose effect was to grant more power to the Presidency. An example of this was the Constitutional amendment that gave the President power to choose whoever he wanted to seat in the Public Service Commission without consultation.<sup>71</sup>

The laws in place allowed the President to do as he wished since he could appoint Members of Parliament, decide on the parliamentary calendar and determine the size of the Cabinet without any form of accountability.<sup>72</sup> The vacuum that the law had can also be attributed to this problem of corruption since there were no stipulations in the law neither were there institutions put in place to monitor the workings of the Executive.<sup>73</sup>

During his reign, Kenyatta I employed the art of neo-patrimonialism.<sup>74</sup> In order to garner support from the euphoric state that Kenya was experiencing after breaking the yoke of

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<sup>66</sup> Section 25,1963 Constitution.

<sup>67</sup> Akech M, 'Abuse of power and corruption in Kenya,' *Indiana Journal of Global Legal Studies* (2011) 1.

<sup>68</sup> JM Kariuki: Millionaire who stood up for the poor- [www.standardmedia.co.ke](http://www.standardmedia.co.ke) –last accessed 1/5/2017.

<sup>69</sup> '*High profile assassinations a stain on our political history*,'- [www.standardmedia.co.ke](http://www.standardmedia.co.ke)- last accessed 1/7/2017.

<sup>70</sup> P Kantai, *Who killed Tom Mboya? Declassified Documents Raise New Questions*- [www.questia.com](http://www.questia.com) –last accessed 1/7/2017.

<sup>71</sup> Article 106(2),*Constitution of Kenya*,(1963).

<sup>72</sup> Section 25 ,1963 Constitution.

<sup>73</sup> Kivuva J, '*Restructuring the Kenyan State*,' Society for International Development,Working Paper No.1 (2011)8.

<sup>74</sup> Amadi H, *Persistence and Change of Neo-patrimonialism in Post-Independence Kenya*, University of Nairobi Press (2009) 4.

colonialism, he employed the clientelism approach through which he would give financial, political and many other favors to those who proved loyal to his control. The state elites mostly relied on this patron-client relationship and in turn this relationship created a heavy dependence on state resources for private gain and curtailed the development of the private sector which is possibly why the economy was in a bad state.<sup>75</sup>

### **2.3.2 Moi era**

During Moi's Presidency there was a lot of centralization of power and after ascending to power he immediately ensured it was a one man show making it a totalitarian regime. In 1982, when other politicians including Jaramogi Oginga Odinga tried to form another political party he immediately made Kenya a one party state by law which in effect subjugated any form of opposition.<sup>76</sup>

To further fortify his powers, he usurped the powers of other arms of the government such as the Judiciary, in 1986 parliament passed Act No.14 which was in effect stripping the Judiciary off its independence. It granted the President power to elect the Judicial Service Commission and Judges of the High court and Court of Appeal; as a result this made the Judiciary be at the beck and call of the Executive.<sup>77</sup> He further ensured the Constitution was amended by removing the security of tenure for the Attorney General and Auditor General hence making their stay in office at his pleasure.<sup>78</sup>

Kenya's most grand corruption scandal, the Goldenberg scandal, transpired during Moi's regime and it was not until Mwai Kibaki's regime that the grand scandal was unearthed. It was reported that the scandal costed Kenya approximately ten percent (10%) of its total Gross Domestic Product.<sup>79</sup>

The Goldenberg report further negatively implicated senior government officials including the then Minister for finance Honorable George Saitoti to the shady deals. This scandal involved the fictitious exports of gold and diamond from Kenya by a company called Goldenberg

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<sup>75</sup>Oyugi W and Wanyande P, *The politics of transition in Kenya* (2003)8.

<sup>76</sup>Mutula S and Muna Wilson, *Leadership and Political Corruption in Kenya: Analysis of the 2010 Constitutional Provisions on the Presidency*, Journal for Social, Political and Economic Studies (2010)6.

<sup>77</sup> Adar K and Munyae I, *'Human Rights abuse under Daniel Arap Moi-1978-2001*, African Studies Quarterly (2001)4.

<sup>78</sup> Constitution of Kenya (Amendment) Act No.4

<sup>79</sup> Report of the Commission of Inquiry into the Goldenberg Affair (2005)18.

International Company, which was owned by Kamlesh Pattni a businessman. In exchange for this, the Central Bank of Kenya paid the company on its quoted foreign exchange of the fictitious gold and diamond exports and by the time it was discovered, the Central Bank of Kenya had already lost billions of shillings.<sup>80</sup>

The effects of corruption are manifold and lasting, which is why after the twenty four year rule under Moi's Presidency, Kenya was at the brink of an economic depression.<sup>81</sup> Investors had withdrawn their investments and potential investors on the other hand found it unsafe to invest their money where there was no rule of law and accountability.<sup>82</sup>

### **2.3.3 Kibaki era**

Amidst the hopeless reality many Kenyan's faced regarding the fight against corruption came Mwai Kibaki, whose central campaign was centered on ensuring an end to impunity and corruption in Kenya. It thereafter followed that he was elected as President on an anti-corruption platform in 2002.<sup>83</sup>

#### **2.3.3.1 Goldenberg Scandal**

It was during his reign that the nitty gritty of the Goldenberg scandal that happened in Moi's regime were brought to light. He set up the Bosire Commission which was tasked with the mandate of investigating the scandal.<sup>84</sup> In his report, Mr. Justice Bosire implicated high profiled politicians to the scam including the former President Moi and the then Finance Minister George Saitoti. No convictions and suits have followed which is why this study considers the report not worth the paper it was written on.

#### **2.3.3.2 The Anglo Leasing scandal**

The Kibaki regime just like its predecessor was also caught up in the corruption endemic. The Anglo Leasing scandal precipitated during this regime, it was unraveled in 2003 after John Githongo who was the then Permanent Secretary in charge of ethics and governance investigated and found out that a non-existent company Anglo-leasing limited had been awarded a contract by

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<sup>80</sup> How Goldenberg scandal was hatched and executed- [www.nation.co.ke](http://www.nation.co.ke) last accessed 1/8/2017.

<sup>81</sup> Hewitt S, *Africa Review: The economic and business report*, Wolden Publishing Ltd (2003)163.

<sup>82</sup> Hewitt S, *Africa Review: The economic and business report* (2003)165.

<sup>83</sup> Kenya 'close to anti-corruption group'- [news.bbc.co.uk](http://news.bbc.co.uk) – last accessed 1/8/2017.

<sup>84</sup> Hon. Justice S E Bosire, *Report of the Judicial Commission of Inquiry into the Goldenberg Affair* (2005).

the Ministry of Home Affairs.<sup>85</sup> In his report, Githongo linked the findings of the case to several ministers who were members of the Executive and high profile politicians were said to be connected to the scandal including the then Vice President Moody Awori.<sup>86</sup> For fear of his life, Githongo went into exile in Britain as he got threats from those he implicated in the report.<sup>87</sup> In addition, it was then that Githongo released an audio tape which involved a conversation with the then Justice Minister Kiraitu who was seen to blackmail Mr. Githongo seeking him to stop the inquiries and in return Mr. Kiraitu would forego Githongo's father's loan.<sup>88</sup> The Kenya Anti Corruption Commission as it then was held that there was no conclusive evidence and as a result could not pursue the case any further.

### **2.3.3.3 The Maize scandal**

In 2008, we had the maize scandal whose ramifications caused the ordinary Kenyan to almost go into starvation. During this period, Kenya experienced a shortage in maize due to the aftermath of the post-election violence that led to destruction of approximately three million bags.<sup>89</sup> This crisis was heightened by the increased fertilizer and fuel prices which in turn made the prices of maize to sky rocket. It was then that the National Cereals and Produce Board (NCPB) imported maize to counter this shortage. The NCPB thereafter entered into several arrangements with various milling companies and sold the maize to the millers at a subsidised rate and in return the millers were meant to sell the flour at a reduced price to the ordinary mwananchi. The selection of millers became the root cause of this scandal since certain members of the Executive found it to be a lucrative opportunity despite not having any milling capacity or experience. Several ministries were implicated in this scandal including the Ministry of Agriculture headed by William Ruto, the Ministry of Finance headed by Uhuru Kenyatta and even the then Prime Minister's Office headed by Raila Odinga.<sup>90</sup> PricewaterhouseCoopers audit found that indeed there was impropriety and tenders were arbitrarily given and the report stated that Kenya lost approximately twenty three billion shillings in this scam.<sup>91</sup> Another report by the departmental committee on agriculture, lands and natural resources pointed out that Raila Odinga

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<sup>85</sup> Mbote P and Akech M, *Justice sector and the Rule of law*, 139.

<sup>86</sup> John Githong'o Dossier into Corruption in the Government of Kenya (2005) 4.

<sup>87</sup> Githongo wants to return to Kenya – news.bbc.co.uk- last accessed 1/8/2017.

<sup>88</sup> Taped evidence in Kenya scandal- news.bbc.co.uk- last accessed 1/1/17

<sup>89</sup> Kenya National Assembly Official Record (2009) 17.

<sup>90</sup> 'Ruto says not to blame over maize scandal,' - [www.nation.co.ke](http://www.nation.co.ke) last accessed 1/7/2017.

<sup>91</sup> Aron M, 'Kenya lost 23b in maize scandal', - [www.nation.co.ke](http://www.nation.co.ke) last accessed 1/7/2017.

wanted to benefit from this fraudulent scheme by inflating the price of maize and therefore making profits eventually.<sup>92</sup> Interestingly, even after the Kenya Anti Corruption Commission found that certain members of the Executive were connected to the scam; it went ahead and recommended to the Attorney general for the closure of the case.

This case is an exemplification of how the anti corruption agencies in Kenya have never bothered going after hard targets even when there's a case that holds water. This lack of institutional and political will can be said to be one of the reasons why corruption seems immortal in Kenya.

Every individual under the bill of rights has the right to be free from hunger and to have adequate food of acceptable quality.<sup>93</sup> This brings into effect that corruption is also a form of human right violations.<sup>94</sup>

#### **2.3.4 The Grand Regency scandal**

In this scandal, the Central Bank of Kenya sold the Grand Regency Hotel, which was a state-owned hotel, to unknown Libyan investors at a throw away price that was below the appraised market value.<sup>95</sup> This in turn caused loss of billions by the treasury. The controversy of this case is also attributed to the fact that the bid was not made public and its sale was conducted behind closed doors. This improper sale of public property made Kenya enters an unfair deal that only benefited a few.<sup>96</sup>

### **2.4 Other forms of corruption:**

#### **2.4.1 Corruption in Land Sector**

Corruption in Kenya has surfaced in various aspects including the question of land. Various reports have shown how corruption and the lack of respect for the rule of law have affected land distribution. The Ndung'u Land Report on illegal and irregular allocation of land compares and contrasts the genesis of land grabbing in Kenya to other grand corruption scandals

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<sup>92</sup> 'Probe Railas family over maize, say MPs,' - [www.nation.co.ke](http://www.nation.co.ke) last accessed 1/8/2017.

<sup>93</sup> Article 43(1), *Constitution of Kenya* (2010).

<sup>94</sup> Article 1, *Universal Declaration of Human Rights* (1948).

<sup>95</sup> Zwi P, *Principled Negotiation and Mediation in the International Arena*, Cambridge University Press (2013) 347.

<sup>96</sup> Patni firm claims 2bn from CBK over grand regency, [www.nation.co.ke](http://www.nation.co.ke), last accessed 1/8/2017.

like Anglo leasing and Goldenberg scandals.<sup>97</sup> It further goes ahead and states that the effects of these two corruption scandals are of a smaller magnitude as compared to the effects of corruption in the land sector of Kenya.<sup>98</sup> The report calls for the assistance of human rights defenders to help combat corruption because it has been linked to violations of human rights and hence the denial of basic human rights guaranteed by law.<sup>99</sup>

#### **2.4.2 Corruption in the electoral process**

The unscrupulous activities and tampering of the electoral process is said to affect the enjoyment of civil and political rights<sup>100</sup> it is common especially in African States where respect of the people's choice with regards to their choice of leaders is undermined. This arises in instances in which the electoral process is tampered with hence causing undemocratic elections.<sup>101</sup> The Constitution provides that every adult citizen has the right without unreasonable restrictions to vote in an election and therefore corrupt electoral officials can be said to be infringing this right.<sup>102</sup>

The post-election violence of 2007-2008 in Kenya has also been attributed to corruption.<sup>103</sup> It is well known that when politicians go for their campaigns in villages they dish out money and other forms of promises in order to get elected.<sup>104</sup>

Kenya's corrupt history predates the fight for independence and this corrupt practice has become so widespread creating a culture of impunity. Successive governments have also been criticized for acquiescing to the corrupt doings of their Executive. In as much as President Kibaki was elected on an anti-corruption ticket, his regime was said to have been deeply engulfed in the corrupt scandals then<sup>105</sup> and it is clear that corruption in Kenya has proved its resilience by mutating and resurfacing in the different regimes.

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<sup>97</sup> Commission of Inquiry into the illegal and irregular allocation of public land (2003)29.

<sup>98</sup> Commission of Inquiry into the illegal and irregular allocation of public land (2003)15.

<sup>99</sup> Article 5, *United Nations Convention Against Corruption* (2005).

<sup>100</sup> Article 25, *International Covenant on Civil and Political Rights* (1966).

<sup>101</sup> Rock M, *Corruption and Democracy*, Working Paper No.55, Bryn Mawr College Press (2007) 3.

<sup>102</sup> Article 38(3), *Constitution of Kenya* (2010).

<sup>103</sup> M'Inoti K, *'The Kenya Electoral System'* Association of Law Reform Agencies of Easter and Southern Africa (2011)6.

<sup>104</sup> R Mara, *Conflict analysis of the 2007 post election violence in Kenya* (2009)12.

<sup>105</sup> [www.transparency.org](http://www.transparency.org) 'Overview of corruption and anti corruption in Kenya'.

## 2.5 Changes brought about by the 2010 Constitution

Following the previous abuses of power by the various Presidents, the Constitution of 2010 was seen to be a turning point.

It was in this very progressive document that the previous presidential excesses were limited. The rule of law was emphasized and the separation of powers was clearly enunciated. In order to right the wrongs made by the previous presidencies, this Constitution provides that the President can only occupy the presidency and no other office. The presidential office term has now also been limited to two terms this in turn gives opportunity for new leadership.<sup>106</sup>

The 2010 Constitution has also introduced the concept of devolution<sup>107</sup> which is essentially premised on the sharing of power and promotion self governance. The objects of devolution under the Constitution include the promotion of democracy, national unity, fostering self governance and enhancing the decentralization of State organs amongst others.<sup>108</sup> Previous Presidencies were known for excluding different communities while only developing their regions, the drafters foresaw this problem and as a measure to prevent such future occurrences introduced the very concept of a devolved government.<sup>109</sup>

The Executive has now been molded in a way that would make it more accountable, transparent and on its toes. The Constitution ordains that executive authority is derived from the people and would be exercised in way that it ensures the principle of service to the people is effected.<sup>110</sup> By emphasizing the concept of separation of powers, the Constitution has clearly divided the mandate of each of the three arms of government in a way that would avoid future overlapping of roles.<sup>111</sup>

Another positive impact of the 2010 constitution was the strong independent judiciary it has created. In exercising judicial authority the Constitution provides that the judicial officers will only be bound by the laws and not by any authority.<sup>112</sup> Under the 1963 Constitution the Chief Justice was appointed by the President without any consultation. However, as per the 2010

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<sup>106</sup> Article 142(2), *Constitution of Kenya* (2010).

<sup>107</sup> Article 174, *Constitution of Kenya* (2010).

<sup>108</sup> Article 174 (a)-(i), *Constitution of Kenya* (2010).

<sup>109</sup> Chapter 11, *Constitution of Kenya* (2010).

<sup>110</sup> Article 129 & 130 , *Constitution of Kenya* (2010).

<sup>111</sup> Article 185(3), *Constitution of Kenya* (2010).

<sup>112</sup> Article 160 (1), *Constitution of Kenya* (2010).



Constitution the President is obligated to seek advise from the Judicial Service Commission and also attain the approval of the National Assembly before appointing a Chief Justice.<sup>113</sup>

In 2011, President Mwai Kibaki made some arbitrary appointments which contravened the constitutional provision on constitutional offices. He had appointed Al Nashir Visram as Chief Justice and Professor Githu Muigai as Attorney General as a result he was forced to revoke these appointments as they were not in accordance with the procedures highlighted in the Constitution.<sup>114</sup>

The Constitution also established a watch dog institution, Ethics and Anti Corruption Commission, that is tasked with the mandate of investigating and reporting corruption related matters.<sup>115</sup> The Commission is tasked with the duty of developing a code of ethics, receiving complaints on the breach of the code of ethics by public officers, report corrupt matters to the Director of Public Prosecution amongst other functions.<sup>116</sup> In as much as this Commission has restored hope in the fight against the corruption endemic, it still has no prosecutorial powers and no convictions have been effectuated.<sup>117</sup>

Despite the progressive nature of the 2010 Constitution, corruption has still maintained its stand in the Executive of Kenyatta II's regime. This idea is supported by the recent corruption scandals that have been tied with the Executive. A clear depiction of this was the misappropriation of Kshs. 791 Million Shillings that was set aside for the National Youth Service. The Devolution Cabinet Secretary Anne Waiguru who was in charge of this project could not give conclusive answers on how the money was lost.<sup>118</sup> Auditor General, Edward Ouko in his report pointed out the irregular payments were made to supplier without conducting proper due diligence and in fact the Registrar of Companies confirmed that the suppliers involved were not companies in practice but had just registered their names.<sup>119</sup>

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<sup>113</sup> Article 166, *Constitution of Kenya* (2010).

<sup>114</sup> *'Lest we forget: the faces of impunity in Kenya,'* Kenya Human Rights Commission, (2011) 8.

<sup>115</sup> Article 79, *Constitution of Kenya* (2010).

<sup>116</sup> Section 11, *Ethics and Anti Corruption Commission Act* (2011).

<sup>117</sup> Tobiko opposes prosecution powers for EACC- [www.nation.co.ke](http://www.nation.co.ke) –last accessed 1/9/2017.

<sup>118</sup> Ruto and Waiguru in bitter exchange about NYS theft – [www.nation.co.ke](http://www.nation.co.ke) – last accessed 1/9/2017.

<sup>119</sup> Auditor says Sh1.9Billion lost in NYS scam – [www.businessdailyafrica.com](http://www.businessdailyafrica.com) – last accessed 1/10/2017.

Another blow to the hopes the 2010 Constitution promises was the Euro Bond scandal, the Euro bond was a borrowing meant to facilitate the financing of major projects<sup>120</sup> and due to misappropriation of the funds billions of shillings went unaccounted for.

## **2.6 Other laws on corruption**

### **2.6.1 Ethics and Anti Corruption Commission (2011)**

Article 79 of the Constitution mandated parliament to enact a legislation that would establish an independent body to ensure compliance with Chapter Six of the Constitution. The Commission is required to prevent corruption, investigate allegations of corruption and also give civic education to the members of the public.<sup>121</sup> It is worth noting that the Act does not grant the Commission prosecutorial powers which is why the commission is somewhat incapacitated.

The Act gives the promise of the independence of the Commission. This in essence promotes its efficiency and functioning since it can work without the fear of being held liable for duties discharged within their mandate. The officers are also granted immunity from any liability in executing the powers granted by the commission.<sup>122</sup>

The Commission is tasked with a number of duties highlighted in the Act and they include; the duty to educate and create awareness on any matter within the Commission's mandate, duty to undertake preventive measures against unethical and corrupt practices and the duty to conduct investigations on its own initiative.<sup>123</sup>

### **2.6.2 Public Procurement and Disposal Act (2005)**

This Act ensures fair play when it comes to the tendering processes and it is partly guided by Kenya's history of malpractices during procurement processes. Its purpose is to ensure economic efficiency, fair competition in the tender process, transparency in procurement system and promoting integrity in the local industries. It also establishes the public procurement oversight authority whose role is to monitor and assist the public procurement system.

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<sup>120</sup> Daily Nation, <http://mobile.nation.co.ke/news/Kenya-Borrowing-Debt-Eurobond-Treasury/1950946-2784270-format-xhtml-an60a7z/index.html> Kenya's heavy borrowing pushed interest rates up, 11/7/2015.

<sup>121</sup>Section 13, Ethics and Anti Corruption Act 2011.

<sup>122</sup> Section 28, Ethics and Anti Corruption Act 2011.

<sup>123</sup> Section 13, Ethics and Anti Corruption Act 2011.

### **2.6.3 Proceeds of crime and Anti-money laundering Act (2009)**

The objective of this legislation is to enable the identification, tracing freezing, seizing and confiscation of the proceeds of crime. In addition, it also seeks to create a financial reporting centre and assets recovery agency to criminalize money laundering. The main duty of the financial reporting centre is to assist in the identification of the proceeds of crime and the combating of money laundering and the financing of terrorism <sup>124</sup>which has posed a great threat to Kenya recently.

### **2.6.4 Leadership and Integrity Act (2012)**

The purpose of this Act is to ensure that the individuals who hold public office act in a moral and ethical manner. It requires state officers to respect the national values and principles established under the constitution this include national unity, respect, rule of law, social justice and equity.<sup>125</sup>

## **2.7 Conclusion**

It is manifestly clear that we have adequate legal frameworks in place that ensure corruption is kept in check yet we still seem to be grappling with the same problem. This plight therefore shows that it is not in the laws that we lack something but in our inherent selves. Institutions cannot be run on rules without having individuals willing to ensure the implementation of the rules. Likewise, the legal framework in place will only be efficient and effective if the people driving the institutions have the willpower to fight corruption. Political will power is also another aspect that needs to be inculcated in our society because it is only through the help of our elected leaders that we can jointly win this fight.

The case study of Rwanda which will be discussed later in Chapter Three elucidates the fact that political will is a key driving factor in curbing corruption in Rwanda. The office of the Ombudsman in Rwanda has taken the fight against corruption on another level because Rwandan's have understood the side effects of corruption. Since political will is central in this fight perhaps Kenyans can start electing their leaders based on their merits than on their ethnic allegiance.

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<sup>124</sup> Section 23, *Proceeds of crime and Anti-Money Laundering Act* (2009).

<sup>125</sup> Article 10, *Constitution of Kenya* (2010).

It is also worth noting that the office of the Ombudsman in Rwanda has been given prosecutorial power and as such does not wait for the go ahead to prosecute suspected individuals. It is high time the Ethics and Anti Corruption Commission is granted prosecutorial powers in order to achieve its objectives.

## CHAPTER THREE

### COMPARATIVE ANALYSIS ON THE FIGHT AGAINST CORRUPTION IN OTHER JURISDICTIONS

#### 3.1 Introduction

This chapter will give a comparative analysis with the least corrupt Executive in East Africa and Southern Africa and it will specifically zero in on Rwanda and Botswana as case studies. Thereafter, it will give a shift to New Zealand which has been termed as the least corrupt country in the world. The aim of this comparative study is to see where Kenya went wrong and what Kenya can learn from these countries in its fight against corruption.

The corruption perception Index released by Transparency International ranked Rwanda as the least corrupt country in East Africa and Botswana was the least corrupt country in sub Saharan Africa.<sup>126</sup>

#### 3.1.1 Rwanda

After the 1994 Rwanda genocide, in which the country broke out into a civil war that saw an ethnic divide between the Hutus and Tutsis, the Tutsi minority were slaughtered by the majority Hutu community and this violence was catalysed by the political elite who had occupied top positions of the national government.<sup>127</sup>

Despite this, Rwanda has made positive developments in the state of its governance.<sup>128</sup> These progressive moves have been attributed to Rwanda's anti-corruption mechanism. It has also been said to have good governance which explains why it has the highest donor funding in East Africa. During Moi's presidency, Kenya was denied donor funding<sup>129</sup> due to its lack of accountability and transparency within the state's governance this was brought to light after the happening of the Goldenberg scandal that hit international news. In the Kibaki era, the World

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<sup>126</sup> Corruption perception Index ,Transparency International (2015).

<sup>127</sup> Hintjens H,*Explaining the 1994 genocide in Rwanda*, The Journal of Modern African Studies,Cambridge University Press(1999) 11.

<sup>128</sup> Rwanda Joint Governance Assessment Report (2008) 8.- [www.afdb.org](http://www.afdb.org), last accessed 1/8/2017.

<sup>129</sup> L Donatella, *Is Kenya sliding back toward repression?* (1995) 5- [www.nytimes.com](http://www.nytimes.com) , last accessed 1/8/2017.

Bank warned the Government of Kenya that it would impose sanctions against Kenya if the Anglo Leasing money is not accounted for.<sup>130</sup>

One of the contributing factors to Rwanda's success tales in fighting corruption is the government's political will to fighting corruption. This commitment has been reiterated in the country's legislations and buttressed by the institutional frameworks in place.

The Rwandan government has established several institutions including the office of the ombudsman, the Rwanda public procurement authority, procurement appeal commission and a robust anti-corruption unit within the revenue authority.<sup>131</sup>

The ombudsman, Aloysie Cyanzaire, has also shown great impetus in her fight against corruption, in addition this office also has prosecutorial powers granted to it and it has taken several state officers to court on its own motion.<sup>132</sup> The office has also established a public data base that publishes the names of convicted persons and the punishments meted out, as it stands it has over five hundred individuals ranking from state officers to ordinary citizens who are serving their sentences.<sup>133</sup>

The collaboration between the institutions is also one of the reasons Rwanda has been able to reduce corruption levels.<sup>134</sup> One of the mandates of the office of the ombudsman in Rwanda as enshrined in the Constitution is to engage both public and private institutions in the fight against corruption. In addition, the office of the Ombudsman, the Rwanda Public Procurement Authority and the Public Service Commission have worked hand in hand.

In 2012, the Whistleblower protection law was passed the main object of this law is to ensure that whistle blowers have the force of law behind their backs and their interests are protected.<sup>135</sup> The Law defines a whistle blower as being a public servant, an employee of a private institution or any other person who has information on crimes, acts or behavior contrary to law.<sup>136</sup>

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<sup>130</sup> Kenya 'safe' for anti-graft czar- news.bbc.co.uk, last accessed 1/9/2017.

<sup>131</sup> Chene M, *Overview of Corruption In Rwanda*, Transparency International (2008) 5.

<sup>132</sup> Chene M, *Overview of Corruption In Rwanda* (2008) 4.

<sup>133</sup> Ombudsman.gov.rw , last accessed 1/15/2017.

<sup>134</sup> Article 182, Constitution of Rwanda (2003).

<sup>135</sup> Law no 35/2012 of 19/09/2012, Relating to the protection of whistleblowers.

<sup>136</sup> Article 2, Law no 35/2012 of 19/09/2012.

The office of the ombudsman has also been involved in sensitization campaigns in which they involve the public in knowing and understanding the effects of corruption and the need for them to report corruption. The Rwandans have now been seen to report cases including petty bribes<sup>137</sup> and state officers who have been prosecuted of corruption related matters are not allowed to hold a state office even after completing their sentence.<sup>138</sup>

Rwanda is further praised for its good governance due to the efficiency by the government to manage projects this is also attributed to the fact that there is low nepotism and favoritism as officials in state offices are elected based on the meritocracy system, this therefore means the jobs are given to those who are the best in their game.<sup>139</sup>

Rwanda has proved to be victorious amid its past history which made it one of the unstable countries in Africa during the genocide period. The contributing factors to Rwanda's success story include strong institutional and legal frameworks, clear separation of powers both in theory and in practice and the political will by the top leaders to fight corruption.<sup>140</sup> This success has further bolstered economic growth by encouraging investments and it has as a result acquired a respectable status in the international community for its honesty, transparency and its respect for the rule of law.

Kenya is struggling to fight corruption<sup>141</sup> which has seen to plague almost all arms of the government and perhaps borrowing a leaf from Rwanda's state practice would change the status quo. Members of the Executive who have been linked to corruption related matters refused to step down and in fact some were transferred from one institution to another. After John Githongo handed over the report on the Anglo Leasing scandal to President Kibaki, it would be expected of him to request the resignation of the implicated Minister's. However, this was not the case and in fact , Chris Murungaru , the then Minister in charge of National Security was transferred to the Ministry of Transport even after the report pointed him out.<sup>142</sup> Vice president Moody Awori

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<sup>137</sup> Bozzini A, *Fighting corruption while undermining accountability: The case of Rwanda*, German Institute of Global and Area Studies (2013).

<sup>138</sup> Ombudsman.gov.rw , last accessed 1/15/2017.

<sup>139</sup> Bozzini A, *Fighting corruption while undermining accountability: The case of Rwanda*, (2013).

<sup>140</sup> <http://www.newtimes.co.rw/section/article/2015-06-18/189829/>, Top leaders call for tougher measures to fight corruption.

<sup>141</sup> <http://www.bbc.com/news/av/world-africa-11962944/struggle-to-end-corruption-in-kenya> , Is the Fight to end corruption in Kenya working?

<sup>142</sup> [www.nation.co.ke/news/Meticulous-minister-felled-by-Anglo-Leasing-scandal/1056-3889304-1315htyz/](http://www.nation.co.ke/news/Meticulous-minister-felled-by-Anglo-Leasing-scandal/1056-3889304-1315htyz/)

refused to step down even after the report was made public. The finance minister Kiraitu Murungi stepped down for more investigations but he was later reinstated as the Energy Minister.

### 3.1.2 Botswana

Another jurisdiction this study seeks to use is the example of Botswana according to the corruption index report of 2016;<sup>143</sup> Botswana was ranked as the least corrupt country in Africa.<sup>144</sup> One of the contributing factors is the democratic space Botswana seems to enjoy.<sup>145</sup> It has been praised for its respect of human rights and democracy since it gained its independence in 1966. It has proved different from other African states like Kenya, this is because most African states were known to centralize power immediately they gained independence and a perfect exhibit of this would be Kenya. Immediately we gained independence, Kenyatta tried amassing power and concentrating in the hands of a few who were his loyalists this consolidation of power amongst his cronies is what came to be known as the Kikuyinization of the state.<sup>146</sup> However, the narrative in Botswana was quite different as the country has enjoyed pluralism in the political sphere since independence.<sup>147</sup> One of the reasons pluralism was achieved in Botswana is partly attributed to the fact that Botswana does not have a huge ruling elite and therefore the elites' existence cannot form the majority. The Government's zero tolerance approach to fighting corruption can also be said to be a contributing factor to the low corruption levels. The Directorate of Corruption and Economic Crime has been seen to take the cases of corruption head on. As much as it has no prosecutorial power this body has been praised for implementing preventative strategies and conducting risk assessments.<sup>148</sup>

The legislations in place have also tightened the noose on corruption for example the country amended the Serious Crimes Act by introducing the mandatory disclosure of suspicious

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<sup>143</sup> [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016) , Corruption Perception Index 2016.

<sup>144</sup> <http://www.voanews.com/a/botswana-again-wins-title-as-africas-least-corrupt-nation/1558608.html>, Botswana Again Wins title as Africa's least corrupt countries

<sup>145</sup> *Botswana country profile*- news.bbc.co.uk, last accessed 1/15/2017.

<sup>146</sup> *Gender and Equality and Political Processes in Kenya*, Konrad Adenauer Stiftung ,Strathmore University Press (2016) 139.

<sup>147</sup> M Zibani, *Forty years of democracy in Botswana*, Mmegi Publishers (2005) 26.

<sup>148</sup> [www.gov.bw](http://www.gov.bw) , last accessed 1/15/2017.



bank accounts by the banks.<sup>149</sup> This has fostered transparency within the system and has inculcated a culture of responsibility. Good governance and the respect for the rule of law has also been the cornerstone for its success story.<sup>150</sup>

### 3.1.3 New Zealand

One of the factors that have contributed to New Zealand's low corruption level is the robust backing provided by its laws.<sup>151</sup> The legal frameworks in place have toughened their fight against corruption through the Serious Fraud Office.<sup>152</sup> This office has demonstrated good governance and respect for the rule of law in its anti-corruption measures by delivering a synchronized, efficient and effective response to the reported financial crimes.<sup>153</sup> This office has further engaged the public through sensitization campaigns and civic education and it is through this engagement that the civil society in New Zealand has also taken a strong stance against corruption. The complementarity between the citizens, civil society and the Government has contributed to the success tale of New Zealand in its fight against corruption.<sup>154</sup> Unlike in the Kenyan context where public matters are not essentially participatory, New Zealand has a participatory form of governance which involves its citizens in public deliberations and discourses.

In order to fathom why New Zealand has been ranked highly by the World Governance Indicators, we need to understand its historical context. This country had appropriate legal frameworks as early as 1852.<sup>155</sup> In addition, by 1986, the New Zealand Constitution Act had already envisaged the concept of the Bill of Rights and in 1993 they had the Electoral Act which laid the foundations for the electoral procedures and the division of New Zealand into electoral districts.<sup>156</sup> Perhaps the many years of experience can be said to be a contributing factor to its success story and maybe Kenya has hope considering we are a young nation.

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<sup>149</sup> Partv, *Money Laundering*, Proceeds of Serious Crimes Act (2008).

<sup>150</sup> Kuris G, 'Managing corruption risks: Botswana builds an Anti-Graft Agency' Princeton University Press(2013) 6.

<sup>151</sup> Ministry of Justice Anti-corruption guide, *Saying No to Bribery and Corruption- A Guide for New Zealand Businesses*- [www.justice.govt.nz](http://www.justice.govt.nz), last accessed 1/15/2017.

<sup>152</sup> Serious Fraud Office – [www.govt.nz](http://www.govt.nz), last accessed 1/15/2017.

<sup>153</sup> State Service Commission, Review of the Serious Fraud Office (2014) 4.

<sup>154</sup> What Role for Civil Society? The experience of OECD (2003) 23, [www.oecd.org](http://www.oecd.org), last accessed 1/16/2017

<sup>155</sup> Constitution Act 1852, [www.teara.govt.nz](http://www.teara.govt.nz), last accessed 1/16/2017.

<sup>156</sup> Section 35, Electoral Act 1993.

The low corruption levels in New Zealand is further corroborated by the ethos that underpins its national principles.<sup>157</sup> Egalitarianism is a concept that has thrived in New Zealand and has been manifested in the various facets of life including the equality before the law, equality of opportunities and social equality.<sup>158</sup> This sense of egalitarianism in this country has managed to make it impossible for corruption to thrive.

### **3.2 Conclusion**

The anti-corruption initiatives put in place by all these three countries point towards common determinants that have aided their fight against corruption. These include the strong political will power to end corruption, strong institutional frameworks coupled with individuals with merits, strong ethical backgrounds and a sense of national unity in the fight against corruption.

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<sup>157</sup>Gregory R, *Assessing Good Governance and Corruption in New Zealand* (2013) 30.

<sup>158</sup> Gregory R, *Assessing Good Governance and Corruption in New Zealand, Working Paper no.13* (2013) 22.

## CHAPTER FOUR

### LESSONS FOR KENYA IN CURBING CORRUPTION

#### 4.1 Introduction

This chapter seeks to map out the best practices gathered from this study; it particularly aims at gathering practices that Kenya omitted in its fight against corruption.

These best practices will be drawn from the comparative analysis done in chapter three together with reports from the World Bank.

##### 4.1.1 Political openness

A politically open society is one which engages its citizens in decision making and in crucial debates. The citizens in a politically open society tends to have monopoly over such discussions. The underpinnings of political openness include elements like fairness in procurement processes. Having fairness in the procurement process creates a healthy environment for competition which in turn makes sure the best bidder is given the deal.<sup>159</sup>

In the Kenyan context, we saw during the Maize Scandal of 2008 the procurement of the maize was done under shady transactions<sup>160</sup> and the deal was granted to ‘brief case’ millers who had no knowledge of milling. It has also been a common occurrence in other corrupt countries whereby those in power award tenders to their cronies without due regard to their suitability.

Another essential element of political openness is the concept of accountability this hinges on the very core of political openness because a politically open society thrives only where its leaders are accountable and subjected to scrutiny from time to time.

This concept of transparency is so essential because it assists in determining other factors for example if there is a conflict of interest in particular matter then one can recuse himself.

##### 4.1.2 Political will

Countries which have recorded low corruption levels over time have indicated that one common factor they all have in their systems is the political will to fight this endemic. The case

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<sup>159</sup> Koster F, *The effects of social and political openness on the welfare state in 18 OECD countries, 2008, 4.*

<sup>160</sup> H Njuguna, *The Influence of political patronage on the operationalisation of public procurement law in Kenya.* Pg.28

studies of Rwanda, Botswana and New Zealand have demonstrated the zeal these leaders have towards fighting corruption.

It has been demonstrated by the Kenyan experience that where there is lack of political will it is mainly because top officials were involved in the corrupt malpractices. This is evident from the scandals which implicated the various members of the Executive. As such it would only be prudent for Kenyans to elect leaders with sound ethical background, appropriate merits and credentials.

#### **4.1.3 Freedom of speech and whistleblower protection**

Corrupt free countries have demonstrated a sense of progress when it comes to freedom of speech especially by the civil societies. In Kenya we have seen many experiences in which the freedom of speech has been curtailed because those implicated felt threatened. A good example of this would be the David Munyakei case,<sup>161</sup> an accounts clerk at the Central Bank, who blew the whistle on the happenings of the Goldenberg scandal, and lost his job at the Central Bank. It is clear that corruption blooms in secrecy and when exposed the whistleblowers are left unprotected in Kenya.<sup>162</sup>

When John Githongo the chairman of the ethics and governance section blew the whistle on the Anglo leasing scandal he got threatened by several politicians who he implicated in the Githongo dossier. As a result, Githongo had to go into exile in Britain for fear of his life.

#### **4.1.4 Media independence**

A democratic society is judged by how its media is treated. In Kenya we have seen during the various presidencies for example in Moi's regime the only existing media outlet that was allowed was KBC which was even state owned. In Kibaki's regime there was an instance whereby the Standard Media House was raided by covered bandits who took out essential papers that documented the Artur Borther's connection to Government scams and drug trafficking.<sup>163</sup> The media was treated harshly and information was filtered to suit the presidents need. In fact the, the only media houses allowed during Moi and Kenyatta's era was Voice of Kenya and

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<sup>161</sup> Kenya-Whistleblowers and corruption, [www.redworld.org](http://www.redworld.org) (2008)10.

<sup>162</sup> Transparency International, *Good Practice in Whistleblowing Protection Legislation (WPL)* (2009) 3.

<sup>163</sup> *Revealed: Secrets of the Artur Brothers-* [www.standardmedia.co.ke](http://www.standardmedia.co.ke), last accessed 1/17/2017.

Kenya Broadcasting Corporation this is a clear depiction of how media was controlled in the past. Media independence is seen to be one of the elements necessary in fighting corruption.<sup>164</sup>

#### **4.1.5 Access to information**

Information in a democratic society should be easily accessible the importance of accessing information has been reiterated in many documents. It is a fundamental human right to access information that affects the political life of a country.<sup>165</sup> The access to information has further prevented government censorship and has ensured citizens are aware of the happenings in their country. This approach has been used by New Zealand; under the 1982 official New Zealand Information Act state revenues and information are not kept a secret unless it is due to compelling reasons such as national security.<sup>166</sup>

#### **4.1.6 Prosecutorial powers**

The Ethics and Anti Corruption Commission in Kenya is given a duty that can only be fully dispensed if the Commission is granted prosecutorial powers. The case study of Rwanda demonstrated how granting prosecutorial powers to this Commission would be of use. The office of the Ombudsman in Rwanda has prosecutorial powers and as such does all its work without depending on any other institution.<sup>167</sup>

#### **4.1.7 Independent elections**

The 2007 post elections violence happened due to the fact that certain individuals were dissatisfied with the results and were of the view that the elections were rigged and corrupt. The defunct Electoral Commission of Kenya proved open to manipulation as the Chairman Samuel Kivuitu released inconsistent results from various polling stations.<sup>168</sup>

### **4.2 Conclusion**

The core elements in fighting corruption are seen to all hinge on the basic tenets of good governance and respect for the rule of law. Good governance ensures transparency in the day to day administration, invites criticism, allows for accountability and disseminates information to

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<sup>164</sup> Mudhai F, 'Media, corruption and elections in Kenya' The International Journal of Communications Ethics (2007)6.

<sup>165</sup> Section 18, *Universal Declaration of Human Rights* (1948).

<sup>166</sup> Section 5, *New Zealand Information Act* (1982).

<sup>167</sup> [www.acauthorities.org/sites/aca/files/casestudy/OfficeoftheOmbudsmanofRwanda](http://www.acauthorities.org/sites/aca/files/casestudy/OfficeoftheOmbudsmanofRwanda), A review of the anti corruption agencies (2010)9.

<sup>168</sup> 'Kenya's unfinished democracy' Human Rights Watch (2002)14.

the public. The various case studies have shown how good governance coupled with political will to curb corruption has proved successful.

Kenya has all these principles in place from the national values enshrined in the constitution to the various legislations that have been passed. Therefore, what remains for Kenya to do is to strengthen the institutions responsible for implementing these policies because the adequate legal framework has proved that the weakness in the institutions lays the whole problem.

# CHAPTER FIVE

## CONCLUSION, FINDINGS AND RECOMMENDATIONS

### 5.1 Introduction

This chapter outlines the findings, recommendations and conclusions of this study. This study was undertaken with the objective of establishing the effectiveness of the Ethics and Anti Corruption Commission in combating corruption within the Executive of Kenya.

#### 5.1.1 Findings

##### a) **Consistent abuse of power by the Executive of the day**

The study has also arrived at this finding, in Chapter Two after dissecting the history of corruption in Kenya since 1963. The history has shown how the various Presidents in Kenya had perpetually contravened the law and some even formulated laws to serve their interests. For example, in 1982 President Moi made Kenya a one party state by law in a bid to quell opposition. This transformed Kenya into an authoritarian regime which did not allow any form of opposition or differing ideologies. President Kenyatta in turn also made it illegal to have any opposition and in fact those who opposed his rule faced the law of the day by being detained.

##### b) **Lack of respect for the rule of law**

The various Executives of the day have been seen to not respect the rule of law by circumventing the procedures given under the laws. In 2011, we saw how President Mwai Kibaki attempted to appoint a Chief Justice, Attorney General and other Commissioners arbitrarily. These appointments were later revoked due to public pressure; it was in this instance that we saw the positive effects of implementing the rule of law in order to curb arbitrary practices.

##### c) **Lack of political will power**

This study under Chapter Three made a comparative analysis of the anti-corruption frameworks with the two least corrupt countries in Africa (Rwanda and Botswana) and the least corrupt country in the world (New Zealand) according to the Corruption Index Report of 2016 done by Transparency International.

An important element that all these countries had in common was the political will to fight corruption. Their leaders had taken upon themselves to fight corruption by employing a zero tolerance approach in the fight against corruption. The Executive of the day in Kenya cannot be trusted due to the fact that many of the members in the Executive have been implicated in the graft activities as enunciated in this discourse.

It would be an irony to expect a robber to protect ones house from being robbed and this is the paradoxical case with Kenya. This study therefore found that in order to curb corruption we need to elect leaders with good ethical and moral backgrounds rather than electing them based on ones ethnic allegiance.

**d) Weak Institutional Frameworks**

The institutions in place have been found to be weak not because the laws are weak but because the individuals occupying these offices lack integrity and have cultivated an environment that condones corruption. This goes to the very essence in their management and unless a culture of accountability is sowed we will only reap corruption.

**e) Weak whistleblower protection laws**

The whistleblowers in Kenya face the risk of losing their jobs, losing protections under law and even losing their lives. The case of David Munyakei is an exemplification of weak whistleblower protection laws. He lost his job after bringing to light the Goldenberg scandal and despite the fact that the Whistleblower Protection Act of 2012 envisages a comprehensive regime for the protection of whistleblowers, there is still a lot left to do including the implementation of the Act itself.

**f) Positive moves by the 2010 Constitution**

This study found that the 2010 Constitution has made a progressive impact in the way the Executive currently works. It has limited the powers of the Executive and has made sure there is separation of powers. The 2010 constitution also introduced the concept of a devolved government which makes it easy for the marginalized communities to now have a share of the national cake.

It has also established an Independent Judiciary under Chapter Ten and it has granted this Judiciary independence and protection from interference by any authority.



### **5.1.2 Recommendations**

#### **a) Need for better and stronger institutions**

The study found that the institutional frameworks are weak due to the personnel occupying these institutions as such there is need to restore strength in these institutions by encouraging them to engage more in the fight against corruption

#### **b) Need to grant prosecutorial powers to the Ethics and Anti-Corruption Commission**

It was noted that this Commission only has powers to investigate and report on corruption related matters but it cannot initiate any prosecution this lack of power incapacitates this institution as its mandate has been limited.

#### **c) Need to teach values and ethics in schools**

Ethics classes need to be introduced in all curriculums starting from primary schools to university level. Inculcating sound beliefs, ethical values and teachings from a tender age will help create a society of upright individuals.

#### **d) Need to strengthen whistleblower protection laws**

It is not sufficient to have the laws in place if they are not being implemented. Whistleblowers in Kenya risk a lot when they decide to come forward which is why they should actually be crowned heroes and offered full protection and backing by the law.

#### **e) Fostering growth of civil society**

The civil society has a huge role to play when it comes to fighting corruption, it inherently has a difficult time establishing itself in a society where evil is encouraged and the good is shunned. The civil society act as watchdogs as they limit and control power of the state, they watch how state officers use their powers and raise concern whenever there is misuse of power. Even where anti-corruption initiatives exist, they cannot function effectively without the active support and participation of civil society.<sup>169</sup>

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<sup>169</sup> What civil society can do to develop democracy, Presentation to NGO leaders, *Convention center, Baghdad (2004)*.

**f) Need to enforce the rule of law**

It has been evidenced in this study that the Executive tends to circumvent the Law because they are 'above' the law. This is because even after being implicated the law enforcement officers do not go after them. However, if the status quo is changed then the rule and respect for law can be said to be restored. From the case study of Rwanda, we saw that the office of the ombudsman in Rwanda is even tasked with the duty of publicizing the corrupt convicted officials on their database for deterrence purposes.

**g) Need to encourage political good will**

The lack of political will power to fight corruption in Kenya is mainly attributed to the fact that the same political leaders are the ones implicated to the corrupt scandals. It would thus follow that they would not set themselves up. In order to overcome this hurdle, we need to start electing leaders based on their merits and their good ethical background as provided for Leadership. Proper and diligent background searches should be conducted before electing a leader and an individual with a history of corruption should not be allowed to be elected this in turn should also be reflected in the laws.

**h) Role of Auditor General**

The role of the auditor general is critical in ensuring public resources are utilised efficiently and in a transparent and accountable manner. The office of the Auditor General is established under the constitution with the central mandate of auditing and reporting accounts of the national and county governments, accounts of all courts, accounts of every commission and independent office established by the constitution.<sup>170</sup>

**5.2 Conclusion**

This study has achieved the purpose of its objective and responded to its statement of problem. The objectives were;

i) To analyse the number of corruption cases filed with the Ethics and Anti-Corruption Commission.

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<sup>170</sup> Article 229, Constitution of Kenya.

- ii) To examine the effectiveness of the Commission in curbing corruption.
- iii) To make recommendations on how to tackle corruption in the Executive.

### **Objective i**

This study has brought out the manifestations of corruption in the various Executives in Chapter Two. It gave a detailed analysis of the corruption that has happened by citing the most notorious scandals together with their reports. The reports mainly implicated individuals who sat in the Executive and it was seen in various instances for example the Goldenberg and Anglo Leasing scandals, the Attorney General would either enter a plea of *nolle prosequi* or request the case to be closed on the grounds of evidence and technicality. It therefore followed that the Ethics and Anti-Corruption Commission was unable to pursue such cases since the matter was closed.

### **Objective ii**

In analyzing how the Ethics and Anti-Corruption Commission has handled the cases brought to it so far, it has been clear that the institution only has the capacity to receive reports on alleged corruption and investigate corruption related matters. In addition, this Commission has not been granted prosecutorial powers and as such it cannot do more than that which it is mandated by law.

### **Objective iii**

In Chapter Three of this study, an analysis is made with three countries; Rwanda, Botswana and New Zealand. The purpose of this analysis was to dissect the manner in which these countries have tackled corruption in their jurisdictions as they have been reported to have low corruption levels by the various corruption reports. In its conclusion, the study gave a set of measures and recommendations that can be put in place to alleviate the corruption problem in Kenya.

### **Hypotheses**

This study has tested and proved the two hypotheses it had stated;

1) The legal and institutional framework is not adequate in combating corruption in the Executive in Kenya

2) The Ethics and Anti-Corruption Commission is mundane as it lacks prosecutorial powers.

It has proven the hypotheses by showing the various loopholes in the institutional frameworks for example through the lack of political will and the culture of impunity sowed in the Executive. It has further highlighted the lack of effective prosecutorial powers by the Ethics and Anti-Corruption Commission which has in turn incapacitated the working of the Commission. It has highlighted how the Commission cannot sue or institute any proceedings on its own motion without consulting several other institutions including the Office of the Director of Public Prosecutions.

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