

BEST PRACTICES IN KENYA ON INVESTIGATION AND PROSECUTION OF CORRUPTION AND RELATED OFFENCES, ASSET RECOVERY AND INTERNATIONAL COOPERATION

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I. INTRODUCTION

The promulgation of the Constitution of Kenya 2010 (the Constitution) was the beginning of a new dawn in Kenya as it established independent institutions and commissions crucial in the fight against corruption and economic crimes.

The Constitution binds all persons and State Organs in government¹ and incorporates international laws through adoption of the general rules of international law, treaties or conventions ratified as part of the law in Kenya.² For this reason, the United Nations Convention against Corruption (UNCAC) ratified by Kenya on 9 December 2003³ forms part of the laws of Kenya by virtue of the Constitution. Other international laws ratified by Kenya relevant in the fight against corruption are the United Nations Convention Against Transnational Organized Crime ratified on 5 June 2005⁴ and the African Union Convention on Prevention and Combating Corruption (AUCPCC) ratified on 7 March 2007,⁵ among others. In addition to the Constitutional provisions, there are legal frameworks in Kenya that provided for the standards, measures and rules to be implemented in the fight against corruption.

This paper will examine these legal frameworks, best practices and challenges faced in Kenya in the course of investigation and prosecution of corruption cases and more so in identifying, tracing, freezing, seizing, confiscation and recovery of proceeds of crime.

II. THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (ODPP)

The ODPP is an independent office established under the Constitution mandated to exercise State powers of prosecution. The Office is headed by the Director of Public Prosecutions (DPP) who under the Constitution exercises state power of prosecution and may:⁶

- i. Direct the Inspector-General of the National Police Service to investigate any offence or allegation of criminal conduct, which the Inspector General is obligated to comply with.
- ii. Institute and undertake any criminal proceedings against any person before any court (other than a court martial) in respect to any offence allegedly committed.
- iii. Take over and continue any criminal proceedings instituted against any person before any court (other than a court martial) that is instituted by another person or authority.

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¹ Constitution of Kenya 2010, Article 2(1).

² Ibid, Article 2(5) and (6).

³ <http://kenyalaw.org/treaties/treaties/129/United-Nations-Convention-against-Corruption>

⁴ <http://kenyalaw.org/treaties/treaties/142/United-Nations-Convention-against-Transnational-Organized>

⁵ <http://kenyalaw.org/treaties/treaties/38/African-Union-Convention-on-Preventing-and-Combating>

⁶ The Constitution of Kenya 2010, Article 157.

- iv. Discontinue with leave of court, at any stage before judgment is delivered, any criminal proceeding instituted or taken over by the DPP.

Other powers and functions of the DPP pursuant to Article 157 of the Constitution are to:⁷

- i. Promote appropriate standards of practice by public prosecutors, assistant prosecutors, and any other person exercising prosecutorial authority under the ODPP Act.
- ii. Implement an effective prosecution mechanism so as to maintain the rule of law and contribute to fair and equitable criminal justice and the effective protection of citizens against crime.
- iii. Cooperate with the National Police Service, investigative agencies, the courts, the legal profession and other Government agencies or institutions so as to ensure the fairness and effectiveness of public prosecutions.
- iv. Set the qualification for the appointment of prosecutors.
- v. Review a decision to prosecute, or not to prosecute, any criminal offence.
- vi. Advise the State on all matters relating to the administration of criminal justice; and
- vii. Do all such other things as are necessary or incidental to the performance of its functions under the Constitution, the ODPP Act or any other written law.

The DPP in exercise of his or her powers and function shall not require the consent of any person or authority in commencing criminal proceedings or be under the direction or control of any person or authority.⁸

A. Department of Economic, Organized and International Crimes

The ODPP is structured into six departments that specialize in different areas for effective service delivery. The Department of Economic, Organized and International Crimes is mandated to prosecute cases related to economic, international and emerging crimes. The Department has the following thematic divisions:

- i. Anti-Corruption and Economic Crimes Division
- ii. Anti-Money Laundering and Asset Forfeiture Division
- iii. Banking and Financial Crimes Division
- iv. International, Transnational and Organized Crimes Division
- v. Counter Terrorism Division
- vi. Land and Environment Division

The mandate of the Department includes:

- i. To prosecute all corruption and economic crimes investigated by the Ethics and Anti-Corruption Commission (EACC) and the Directorate of Criminal Investigations (DCI).
- ii. To advise and give directions to the EACC and the DCI over the investigations of corruption and related offences.
- iii. To prepare and submit to the National Assembly of Kenya an annual anti-corruption report as provided under section 37 of the Anti-Corruption and Economic Crimes Act.

⁷ Office of the Director of Public Prosecutions Act 2013, Section 5(4).

⁸ The Constitution of Kenya 2010, Article 157 (10).

- iv. To provide legal and policy guidelines to other agencies on Anti-Corruption and other related matters.
- v. To undertake research and make recommendations on the status of policies and laws relevant to corruption regarding economic crimes.

III. INVESTIGATIVE AGENCIES ON ANTI-CORRUPTION, MONEY-LAUNDERING AND PROCEEDS OF CRIME

The main investigative agencies in Kenya that conduct investigations into these cases are:

A. Ethics and Anti-Corruption Commission (EACC)

The EACC is established under the Ethics and Anti-Corruption Commission⁹ pursuant to Article 79 of the Constitution which is mandated among other functions to develop a code of ethics, promote standards and best practices in integrity and anti-corruption for State officers, investigate and recommend to the DPP cases of acts of corruption, bribery, economic crimes or violation of codes of ethics prescribed in law, and institute and conduct proceedings in court for recovery or protection of public property, or for freezing or confiscation of proceeds of crime related to corruption.

B. Directorate of Criminal Investigations (DCI)

The DCI is established under the National Police Service of Kenya¹⁰ mandated to among other functions undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money-laundering, terrorism, economic crimes, piracy, organized crime and cybercrime among others.¹¹

Following the establishment of the EACC in 2011, questions were raised on whether the DCI can investigate anti-corruption cases, which led to various petitions being instituted in the High Court challenging investigations conducted by the DCI on anti-corruption cases. This question has since been settled with courts finding that investigation carried out by the DCI and recommendations made thereby to the DPP cannot be faulted on account of not having been conducted by the EACC as the DCI are also mandated to investigate economic crimes under section 35(b).¹²

C. Asset Recovery Agency (ARA)

The Asset Recovery Agency¹³ is mandated to conduct investigations into suspected cases of money-laundering, confiscate and conduct criminal and civil forfeiture of proceeds of crime or unexplained assets suspected to have been acquired through crime.

IV. LEGAL FRAMEWORK GOVERNING ANTI-CORRUPTION AND MONEY-LAUNDERING IN KENYA

A. The Proceeds of Crime and Anti-Money Laundering Act (POCMLA)¹⁴

The Act was enacted in 2009 to provide for offences of money-laundering and the identification, tracing, freezing, seizing and confiscation of proceeds of crime. Section 2 of the Act defines proceeds of crime as:

⁹ Act No. 22 of 2011.

¹⁰ National Police Service Act No. 11A of 2011 of the Laws of Kenya, Section 28.

¹¹ Ibid, section 35(b).

¹² Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others [2016] eKLR; Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima. (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR; Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR.

¹³ Proceeds of Crime and Money Laundering Act No. 9 of 2009 of the Laws of Kenya, Section 53.

¹⁴ Act No. 9 of 2009.

Any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed.

It further defines property to mean:

all monetary instruments and all other real or personal property of every description, including things in action or other incorporeal or heritable property, whether situated in Kenya or elsewhere, whether tangible or intangible, and includes an interest in any such property and any such legal documents or instruments evidencing title to or interest in such property.

The common predicate offences in this Act are provided for under Section 3, 4, 5 and 7 of the Act, which provides for the offences of money-laundering, acquisition, possession or use of proceeds of crime, failure to report suspicious transactions related to proceeds of crime and financial promotion of an offence. The Act covers a broad range of offences encountered in Kenya and provides for prosecution of financial institutions that failing to report suspicious transactions and persons who act as intermediaries in transporting, transmitting or transferring property suspected to be proceeds of crime.

B. Anti-Corruption and Economic Crimes Act (ACECA)¹⁵

The Act was enacted in 2003 with the aim of providing for the prevention, investigations and offences on corruption, economic crimes and other related offences. The Act defines corruption as offences amounting to bid rigging, dealing with suspect property, bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust or offences of dishonesty connected to tax, rate or impost levied under any Act.¹⁶

Common predicate offences encountered in Kenya are provided for under section 42, 45, 46, 47, 47A of the Act, which provides for offences of conspiracy to commit offences involving corruption or economic crimes, conflict of interest, wilful failure to comply with applicable procedures of law, fraudulent acquisition of public property, abuse of office and dealing with suspect property.

C. Bribery Act¹⁷

This Act provides for the prevention, investigation and offences related to bribery. The most common offences under this Act are provided for under section 5 and 6 of the Act which provides for offences on giving and receiving of a bribe. The Act further provides for measures on protection of whistle-blowers which cautions against intimidation or harassment of persons who provide information to law enforcement institutions or testimony in court. Further, it provides for the offences against persons who harass or intimidate whistle-blowers or witnesses in regard to offences under the Act or persons who disclose information of informants and or witnesses causing the said informants or witnesses to be harassed or intimidated.¹⁸

D. Public Procurement and Asset Disposal Act¹⁹

The Act provides for the procedures of public procurement and asset disposal for public entities. This Act plays a crucial role in identification of offences arising from breach of procurement laws by public officers.

¹⁵ Act No. 9 of 2009 of the Laws of Kenya.

¹⁶ Ibid, section 2.

¹⁷ Act No. 47 of 2016 of the Laws of Kenya.

¹⁸ Ibid, section 21.

¹⁹ Act No. 33 of 2015 of the Laws of Kenya.

V. INVESTIGATIONS INTO THE IDENTIFICATION TRACING FREEZING, SEIZURE AND CONFISCATION OF PROCEEDS OF CORRUPTION IN KENYA

A. Identifying and Tracing Proceeds

1. Reporting of Suspicious Financial Transactions

As provided under Article 14 of UNCAC, Kenya has enacted legislation to enhance financial reporting of suspicious transactions as a measure to detect and prevent money-laundering. The Financial Report Centre (FRC) is mandated to assist in the identification of proceeds of crime and money-laundering.²⁰ FRC receives, analyses and interprets reports of suspicious transactions made by reporting institutions and upon review of the reports, if the Director-General finds that there are reasonable grounds to suspect that the transactions involve proceeds of crime or money-laundering, the Director-General refers the matter to the investigative agencies for investigation.²¹

Reporting institutions such as banks and designated non-financial businesses are required by law to report all suspicious transactions to FRC. Currently, it is a mandatory requirement for all financial institutions to report any cash transactions of Kenya shillings (Ksh.) 1,000,000 and above and provide supporting evidence on the nature and reasons of the transactions by their respective clients.²² Failure to report suspicious transactions by financial institutions or natural persons required by law to report such transactions is an offence in Kenya punishable to an imprisonment of a fine not exceeding ten million Kenya shillings or the amount of the value of the property involved in the offence, or for a natural person, imprisonment for a term not exceeding seven years or a fine not exceeding two million, five hundred thousand shillings or both.²³

A case study on reporting of suspicious transactions in Kenya is the case of *Family Bank Limited & 2 Others -vs- Director of Public Prosecutions & 2 Others*.²⁴ A brief background of this case was that sometime between 2014 to 2016 large sums of money estimated at Ksh. 791,385,000 were illegally paid from the Ministry of Public Service, Youth and Gender Affairs State Department for Public Services and Youth to bank accounts operated by one Josephine Kabura, a sole proprietor of several companies to wit Reinforced Concrete Technologies, Home Builders and Roof and All Trading held in Family Bank Limited.

Large cash withdrawals were then made by the said Josephine Kabura with no explanations for the large cash transactions where Family Bank Limited failed to report these transactions. Upon investigations being conducted by the DCI, the DPP was satisfied that Family Bank Limited contravened the reporting obligations under section 44 of POCAMLA among others and was criminally liable for the offence of failure to report suspicious or unusual transactions or activities related to money-laundering or proceeds of crime contrary to section 44(2) as read with section (5) and 16(2) of the POCAMLA. Recommendations were therefore made for charges to be instituted against the responsible bank officials.

The Bank through a Constitutional Application No. 488 of 2016 sort for conservatory orders to prohibit the DPP from prosecuting its officials for the stated offences. However, the high court dismissed the said application where the bank filed an appeal against the said ruling. The appeal was subsequently dismissed by the Court of Appeal.

2. Acquiring and Analysing Objective Evidence

The ODPP by virtue of Article 157(4) of the Constitution and section 5(b) of the ODPP Act mentioned above works closely with investigative agencies by either giving advice or conducting prosecution led investigations. The role of the ODPP in the course of such investigations is to ensure that the evidence acquired follows the money trail from its source to beneficiaries of the proceeds of crime. Secondly, the ODPP ensures that the evidence acquired is admissible in court by meeting the evidentiary threshold provided in the Evidence Act on admissibility of electronic records²⁵ and the Guidelines on the Decision to

²⁰ Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009, section 21.

²¹ Ibid, section 24.

²² Ibid section 44.

²³ Ibid section 5 as read together with section 16(2).

²⁴ [2018] eKLR.

²⁵ Cap 80 of the Laws of Kenya, Section 106B.

charge. The ODPP in analysing the evidence acquired applies the “*follow the money approach*” to ensure that each layer on the movement of money from one point to the other is followed to identify all suspects and beneficiaries of the proceeds of crime.

Investigative agencies are also equipped with experts specialized in different fields such as financial analysis, ICT and forensic document examiners who identify and extract information relevant to the areas of investigations and prepare forensic reports. The ODPP also engages experts trained in various fields such as fraud, finance and procurement to guide on areas of focus in cases of money-laundering and proceeds of crime to ensure that the Office prosecutes its cases effectively and efficiently with high chances of success.

3. Acquiring Suspect/Witness Statements

In Kenya, there is no legal framework in place on admissibility of evidence acquired through undercover operations. The same, however, is information that is acquired through intelligence by the National Intelligence Service (NIS) or the FRC, where upon review of the information, the intelligence services have reasons to believe that a crime has been committed, the same is forwarded to the investigative agencies for investigation. The aim is to ensure that information acquired through intelligence is converted into evidence admissible in court.

In Kenya, the law provides for the protection of informers whether from intelligence services or civilian.²⁶ This is in tandem with the Constitution, which provides for protection of witnesses and enactment of legislation providing for the protection, rights and welfare of victim of offences.²⁷ In line with this requirement, the Witness Protection Agency is established under section 3A of the Witness protection Act,²⁸ whose mandate is to provide protection to witnesses referred to them either by investigative agencies or the DPP. This function is extended to protection of Victims under the Victim Protection Act.²⁹

A case study relevant to protection of witnesses is in the case of *H.E Hon. Mbuvi Gidion Kioko Mike Sonko & Others -vs- DPP & Others*. In this case, the ODPP in collaboration with the EACC and Witness Protection Agency acquired orders to protect all witnesses including experts due to reports received on threats and intimidations of witnesses most of whom were employees of the organization under investigation. Aggrieved by this decision, Hon. Mike Mbuvi Gidion Kioko Mike Sonko filed an application before the High Court for review of the witness protection orders.³⁰ In the said application, the Applicant argued that the witness protection orders interfered with his rights to a fair hearing guaranteed under Article 50 of the Constitution of Kenya. The High Court in its ruling dismissing the application held that:

In determining the issues herein, the first issue of paramount importance is that of the position of witness protection. Article 50 in its various sub-articles guarantees an accused person the right to fair hearing. At sub-article 2(c) and (d), the right to adequate time and facilities to prepare a defence, and the right to public trial before a court established under the constitution, which seems to be the contested rights in this application are clearly anchored. At sub-article 8, the constitution states, thus:

‘This article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality public order or national security.’

The deduction that I reach from all these are that whereas Article 50 of the Constitution guarantees and declares the right to fair hearing for an accused person, the same article also declares that the same right guaranteed may be limited where it is justifiable, for the protection of witnesses, vulnerable persons, morality, public order or national security.

²⁶ Anti-Corruption and Economic Crimes Act No. 3 of 2003 of the Laws of Kenya, section 65; Proceeds of Crime and Money Laundering Act No. 9 of 2009 of the Laws of Kenya, Section 20; Bribery Act No. 47 of 2016 of the Laws of Kenya, section 21.

²⁷ The Constitution of Kenya 2010, Article 50(8) and (9).

²⁸ Act No. 16 of 2006 of the Law of Kenya.

²⁹ Act No. 17 of 2014 of the Laws of Kenya.

³⁰ High Court Anti-Corruption and Economic Crimes Miscellaneous Case No. 23 of 2020.

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However, in the case of *Director of Public Prosecution -vs- The Chief Magistrate Court Milimani Anti-Corruption Division & 18 Interested Parties*³¹ the DPP sort for review of orders of the trial court directing the DPP to supply a chronology of calling the witnesses accompanied by a list of documents that each witness will be relying on to the defence 7 days in advance to the hearing and any change to be communicated to the parties 3 days before the hearing.

The DPP in seeking review of these orders argued inter alia that the Learned Magistrate erred in law by failing to consider that its duty not only lied in guaranteeing the rights of accused person to fair hearing under Article 50 of the Constitution, but to also safeguard the rights of witnesses and victims under Article 50(9) of the Constitution on grounds that disclosing the order in which the witnesses would testify prior to the hearing would put the witnesses at risk of intimidation or interference as the witnesses were not under witness protection.

The court in its ruling, however, disagreed with the position of the DPP and found that the directions to supply a “chronology of witnesses” was necessary in the circumstance of the case and that in regard to the safety of the witnesses, the court was not persuaded that the directions shall expose them to danger.

The ODPP in developing its strategies for handling anti-corruption established the Victim and Witness Facilitation Unit intended to facilitate costs incurred by witnesses scheduled to testify in court.

It is an offence to give false information to the FRC or an authorized officer punishable by imprisonment for a term not exceeding two years or a fine not exceeding one million shillings or both.³² In addition, under ACECA, it is an offence to obstruct or hinder, assault or threaten a person conducting investigations under the act, deceive or knowingly mislead the commission, destroy, alter or conceal or remove documents, records or evidence that is relevant to an investigation or make false accusation to the commission. Such a person is liable on conviction to a fine not exceeding Kenya shillings five hundred thousand shillings or to imprisonment for a term not exceeding five years or both.³³

In regard to plea bargaining, the same is provided for under section 137A-O of the Criminal Procedure Code.³⁴ In 2019 the ODPP launched the ODPP Plea Bargain Guidelines to guide prosecutors on the best practices and application of the plea bargaining provisions. In addition to plea bargaining, the ODPP also has the Diversion Policy Guidelines also launched 2019.

Further, there is the Anti-Corruption and Economic Crimes (Amendment) Bill, 2021 that is currently pending before the senate that seeks to amend the Anti-Corruption and Economic Crimes Act to provide for the procedure of entering into deferred prosecution agreements. The same is targeted at dealing with offences arising from corruption or economic offences which include offences under POCAMLA. If passed, the same will allow the DPP to enter into Deferred Prosecution Agreement in considering prosecution of alleged offences of corruption and economic crimes.

This provides alternatives to prosecution in regard to offences under POCAMLA and addresses the challenges faced in identifying persons to be charged on behalf of artificial persons such as the financial institutions. Two cases relating to plea bargaining are:

*(a) Republic vs Family Bank Limited and 7 Others*³⁵

The brief background as provided above is that Family Bank and its senior managers were charged under the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009, with several counts of failing to report suspicious transactions and abetting money-laundering involving the National Youth Service transactions. The matter was concluded under plea bargain where the Court recorded the plea agreement, convicted them and fined Family Bank a total of Kshs. 64.5 million.

³¹ High Court Anti-Corruption and Economic Crimes Division Application No. E005 of 2021.

³² POCAMLA No. 9 of 2009 of the Laws of Kenya, section 10 as read with section 16.

³³ ACECA No. 3 of 2003 of the Laws of Kenya, section 66(1) and (2).

³⁴ Cap 75 of the Laws of Kenya.

³⁵ Anti-Corruption Case No. 306 of 2016.

*(b) Republic vs Jackson Mbutu Mbugua and 5 Others*³⁶

The accused persons were jointly charged with conspiracy to defraud the Government of L.R. No. 209/16441 which was allocated to the then City Council of Nairobi for use by Racecourse Primary School. Prior to the hearing of the matter, the accused persons initiated a plea agreement negotiation with the DPP. This resulted in an agreement to restore the parcel of land to the Government. At the time of conclusion of this case, the parcel of land was valued at KShs. 700 million.

The ODPP recognizes that corruption offences are complex in nature and in most instances, it becomes difficult to conclude criminal cases instituted in court expeditiously due to the large number of witnesses, accused persons and voluminous documents involved in proving the case. Secondly, in some instances, it is difficult to have witnesses who are not tainted with acts of corruption making them possible suspects in the case. In such cases, the ODPP considers the approach of “*Using the small fish, to catch the big fish*” in order to strengthen the prosecution’s case and hold the most culpable to account.

Interestingly, section 5 of ACECA also gives the trial magistrates the power to obtain evidence from any person either directly or indirectly involved in an offence and pardon such person on condition that he or she makes full and true disclosure of the circumstances within his or her knowledge in relation to the offence. This section, however, is yet to be actively utilized in corruption matters.

B. Freezing, Seizing and Confiscation of Proceeds of Crime and Money-Laundering and Asset Recovery

Section 53 of the POCAMLA established the Asset Recovery Agency that is mandated to handle criminal forfeiture provided under Part VII and civil forfeiture provided under part VIII of the Act.

The difference between criminal and civil forfeiture is that criminal forfeiture proceedings are based on investigations and/or prosecutions of criminal offences that lead to acquisition of proceeds of crime or money-laundering. Upon conviction of a defendant on the predicate offence(s), the court convicting the accused/defendant, upon application of the Attorney-General, the Asset Recovery Agency or on its own motion, inquires into any benefit which the accused/defendant may have acquired through the offence or criminal activity and if found that the accused/defendant benefited, the court in addition to any punishment imposed makes a confiscation order.³⁷

Prior to conviction and/or charging of suspects, the Agency may also apply for *ex parte* restraining orders/preservation orders to preserve properties suspected to be proceeds of crime or money-laundering. These orders are issued by court upon being satisfied that there are criminal investigations in regard to an offence, or reason to believe that a person leads a criminal lifestyle and has benefited from his criminal conduct.³⁸

Civil forfeiture on the other hand provided for under section 81 to 99 of the POCAMLA deals with unexplained assets. Unlike criminal forfeiture, which is anchored on predicate offences, civil forfeiture is based on evidence that a person is in possession of assets that are not commensurate to his earning (unexplained assets). These proceeds are instituted by the Asset Recovery Agency in the High Court where upon conclusion, the assets are confiscated if the court is convinced that the defendant failed to prove how he or she acquired the assets.

Aside from the ARA, the EACC also has powers to investigate and commence forfeiture proceedings of unexplained assets and apply for orders of preservation of suspect property.³⁹ Civil Forfeiture proceeds, therefore, provide for non-conviction-based confiscation of proceeds of crime.

Proceedings under civil forfeiture and criminal forfeiture are considered to be civil in nature and, therefore, unlike criminal proceeds, the burden of proof is on a balance of probability.⁴⁰

³⁶ Anti-Corruption Case No. 2 of 2012.

³⁷ POCAMLA, Section 61.

³⁸ Ibid, section 68.

³⁹ ACECA No.3 of 2003, Section 55 and 56.

⁴⁰ POCAMLA No. 9 of 2009, Section 56(1) and 81(1).

VI. INTERNATIONAL COOPERATION

Mutual legal assistance (MLA) in Kenya is governed by the Mutual Legal Assistance Act⁴¹ which provides for giving and received by Kenya information in regard to investigations, prosecutions and judicial proceedings touching on criminal matters. In addition to the MLA Act, POCAMLA provides for international assistance in investigations and proceedings under section 114 to 120 of the Act. The Attorney General (A.G) of the Republic of Kenya is the central authority, while competent authorities are made up of the A.G, criminal investigation agencies and any person or authority designated by the A.G by notice in the Gazette.⁴² As provided for in the MLA Act, ARA, EACC and DCI are competent authorities being investigative agencies.

The EACC has the power to cooperate and collaborate with other state organs and agencies, foreign governments, international or regional organizations in the prevention and investigation of corruption.⁴³ In addition, the DCI's functions include collection and providing of criminal intelligence and coordinating the country's Interpol Affairs.⁴⁴

In 2013, the Director of Public Prosecution was designated by virtue of a Gazette Notice No. 1847 by the A.G as a Competent Authority for purpose of processing requests in respect of MLA in criminal matters being the prosecutorial authority in Kenya as provided for under Article 157 of the Constitution.

Recognizing that international relations are key in enhancing MLA, the ODPP has enhanced its regional and international cooperation to strengthen its capacity in facilitation of MLA and Extradition. To begin with, the Office has enhanced collaborative engagements with prosecutorial authorities and professional networks which include the East Africa Association of Prosecutors (EAAP), International Association of Prosecutors (IAP) and the Africa Prosecutors Association (APA).

The EAAP is made up of prosecution authorities from Kenya, Rwanda, Burundi, South Sudan, Tanzania, Uganda, Ethiopia, DRC, Malawi, Mozambique and Zambia whose objective is to promote and facilitate cooperation among members in detection, investigations and prosecution of crimes in the Region and offering legal assistance to its members.

In addition, the ODPP actively participates in the IAP established with the aim of fighting transnational crimes such as drug trafficking, money-laundering and fraud. In May this year, the ODPP Kenya hosted the International Association of Prosecutors 4th Regional Conference of Africa and Indian Ocean and the East Africa Association of Prosecutors Conference 2022. The theme of the conference was "*Effective Mechanisms to Respond to Emerging Crimes and Transnational Organize Crime in Africa: Country Experiences and Challenges*". The conference was attended by prosecutors and actors within the criminal justice system across the globe saw participants discuss, among other topics, the best practices in the tracing, recovery and forfeiture of illicit funds held in crypto-currencies and harmonization of asset recovery legal frameworks. Through international and regional cooperation, the ODPP has entered into Memorandums of Understanding (MoUs) to enable provision of informal information sharing and cooperation, which is key in facilitating expeditious acquisition of information through MLA.

In addition, the ODPP has partnered with various development partners such as the European Union (EU), the United States Department of Justice (USDOJ), the British High Commission (BHC) among others that have played a key role in training of ODPP prosecutors and other agencies in regard to the MLA processed in their country and providing advice on acquiring expeditious MLA.

The ODPP in execution of its mandate also has the Anti-Money Laundering and Asset Forfeiture Division that facilitates MLA. In the case of *Director of Public Prosecutions vs Chrysanthus Barnabas Okemo & 4 Others*,⁴⁵ the supreme court confirmed that the ODPP is a lead agency in extradition matters in Kenya.

⁴¹ Act No. 36 of 2011.

⁴² Ibid, section 2.

⁴³ Ethics and Anti-Corruption Commission Act No. 22 of 2011, section 11(3).

⁴⁴ National Police Service Act No. 11A of 2011 of the Laws of Kenya, Section 35(a) and (i).

⁴⁵ (Petition 14 of 2020) [2021] KESC 13[KLR].

A successful case study involving MLA is the case of *Republic v Grace Sarapay Wakhungu & 2 Others*.⁴⁶ The accused persons among them being the then Sirisia Member of Parliament, being directors of Erad Supplies and General Contractors Limited were charged with an offence of uttering a false document contract to section 353 as read with Section 349 of the Penal Code Cap 63 of the Laws of Kenya, perjury contrary to section 108(1) as read with section 110 of the Penal Code and fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of the ACECA 2003.

The brief facts of the case were that the company fraudulently uttered a false invoice for the sum of US Dollars 1,146,000 as evidence to the arbitration dispute between Erad Suppliers and General Contractors Limited and National Cereal and Produce Board in Kenya purporting to be an invoice supporting a claim for cost of storage of 40,000 metric tonnes of white maize allegedly incurred by Chelsea Freight. Due to this, the Company acquired public property in terms of payments made thereto of Ksh. 297,086,505 allegedly incurred by Chelsea Freight on 19 March 2013, Ksh. 13,364,671.40 purporting to be the cost of storage of 40,000 metric tonnes of white maize on 27 June 2013 allegedly incurred by Chelsea Freight and loss of profit and interest and US Dollars 24,032.00 purported to be the cost of storage of 40,000 metric tonnes of white maize allegedly incurred by Chelsea Freight and loss of profit and interest on 2 July 2013.

Part of the evidence submitted in court by the DPP to prove the charges against the accused persons was acquired by the Investigating Officer from EACC through MLA from the Republic of South Africa in a bid to verify the existence of two companies of interest, namely Chelsea Freight and Ropack International, alleged to be domiciled in South Africa. Through MLA, the Investigating Officer managed to contact the directors of Chelsea Freight who denied having dealt with Erad Suppliers and General Contractors Limited, the third accused in the matter. The South African police also confirmed through MLA that some persons of interest alleged to have been domiciled in South Africa were not in South Africa. The witnesses from South Africa also testified in court in regard to the findings of the investigating officer acquired through MLA.

Upon conclusion of the matter, the accused persons were found guilty of the offences and convicted accordingly.

VII. STRATEGIES ADOPTED IN PROSECUTION AND INVESTIGATION OF CORRUPTION AND MONEY-LAUNDERING CASES IN KENYA

Some of the measures implemented in Kenya for effective prosecution and investigations of corruption are:

A. Development of Policies and Guidelines

The Guidelines on the Decision to Charge 2019, Plea Bargain Guidelines and Explanatory Notes 2019 and the Diversion Policy and Guidelines 2019 have been key policy documents in guiding prosecutors on the evidentiary threshold to be met prior to making the decision to charge and providing guidance on the application of plea bargaining and diversion in criminal matters. This has led to institution of watertight cases in court with high chances of success and has increased our conviction rates in corruption cases.

In addition, implementation of plea bargaining and diversion as alternatives to prosecution has encouraged expeditious conclusion of minor corruption cases, which in turn has created more room for hearing and determination of complex cases.

B. Inter-Agency Collaboration and Cooperation

The ODPP has been part of multi-agency teams consisting of various investigative agencies from the EACC, DCI, Kenya Revenue Authority (KRA) among other agencies conducting prosecution guided investigations so as to ensure that investigations of anti-corruption and money-laundering matters are concluded expeditiously while ensuring that the same meet the evidentiary threshold.

⁴⁶ Anti-Corruption Case No. 31 of 2018 [2020] eKLR.

C. Establishment of Special Anti-Corruption Courts

Section 3 of ACECA requires the Chief Justice of Kenya to appoint and gazette special magistrates to hear and determine cases on offences of corruption, bribery, economic crimes and related offences. In line with this provision, the Judiciary of Kenya established the Chief Magistrate Anti-Corruption Division whose mandate is to hear and determine the cases prescribed in the Act.

Further, in 2015, the then Chief Justice of the Supreme Court of Kenya Hon. Dr. Willy Mutunga established vide gazette notice No. 9123 the High Court Anti-Corruption Division to hear and determine all Constitutional Petitions, revision applications and appeals arising from offences of corruption, economic crimes and related offences. The Court also handles matters filed in relation to criminal and civil forfeiture provided under POCAMLA.

The judges and magistrates in these divisions are specially trained to handle such matters making judicial the process more efficient and expeditious.

D. Specialized Training of Prosecutors

The ODPP through its Prosecution Training Institute (PTI) has collaborated with various stakeholders and partners in providing specialized trainings to prosecutors on various thematic areas among them being transnational and economic crimes.

E. Use of Experts

The ODPP and Investigative Agencies recruit and consult experts in various fields such as financial, forensics and fraud to assist in technical areas of investigations and advice on areas of focus during prosecution of the case.

F. Preventive and Deterrence Measures

These are measures implemented in recognition that investigations into corruption, economic crimes and money-laundering offences are complex in nature and ordinarily take a long time to conclude and prosecute. For this reason, alternative measures are considered to disrupt the commission and/or furtherance of such offences. One of the measures implemented in the country is the investigation and prosecution of matters such as tax offences investigated by the KRA which are likely to be investigated and concluded much faster than other predicate offences.

Other strategies adopted are as discussed above such as international cooperation and witness facilitation that have been effective in regard to MLA and Extradition and ensuring that witnesses are available for the cases.

VIII. CHALLENGES IN IDENTIFYING, TRACING, FREEZING, SEIZING, CONFISCATING AND RECOVERING PROCEEDS OF CORRUPTION AND SOLUTIONS

Challenges faced in regard to investigations conducted in identifying, tracing, freezing, seizing, confiscating and recovering proceeds of corruption and prosecution of the same are:

- i. Limited capacity in expertise and resources.
- ii. Slow processes in identification of proceeds of crime outside the country.
- iii. Inadequate legislation especially in regard to handling of state officers suspected and or charged with offences related to proceeds of crime as they remain in office even after being charged.
- iv. Inadequate funds for the protection and facilitation of witnesses.
- v. Inadequate utilization of technology in the identification, tracing, freezing, seizing, confiscating and

recovery of proceeds of corruption.

Although Kenya has enacted various statutes in this regard, more needs to be done on the legal frameworks in order to seal the loopholes hindering effective investigations and prosecution. Further, there is need for more international cooperation and collaborations and funding towards the war against corruption.

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