

BEYOND ILLUSIONSⁱ
A REPORT ON THE STATUS OF THE STRUGGLE AGAINST
CORRUPTION IN KENYA

December 27th 2002 – December 27th 2003

By
Mwalimu Mati
Deputy Executive Director
Transparency International Kenya

Introduction:

Kenya was the first country to sign and ratify the United Nations Convention Against Corruption, on 9th December 2003. The UN Convention provides for mutual legal assistance and judicial cooperation between states parties, for the purpose of detecting, searching for and returning the proceeds of corruption. Seven days later, the Financial Times of London¹ of 16th December, 2003 reported that Kiraitu Murungi, Minister for Justice and Constitutional Affairs had visited London, England. The purpose of his visit related to over 1 billion United States' Dollars which had been traced to bank accounts in Europe by private investigators, Kroll and Associates, at the request of the government of Kenya. The money is said to be related to the Goldenberg scandal that is currently the subject of a Presidential Commission of Inquiry. How did all this come to pass?

NARC's Fight Against Corruption – Year One:

On the 27th December 2002, Kenyan voters rejected KANU, and its legacy of corruption, and gave the National Rainbow Coalition (NARC) a plurality mandate in excess of 70%, ushering in a new government with Mwai Kibaki at its helm. In his inauguration speech², President Kibaki stated that: *"Corruption will now cease to be a way of life in Kenya and I call upon all those members of my government and public officers accustomed to corrupt practice to know and clearly understand that there will be no sacred cows under my government."*

Barely 12 hours later, according to the Daily Nation³ of January 1st 2003, the reality of this pledge was communicated in rude fashion to an Othaya traffic officer, caught red-handed receiving a Sh100 bribe from a minibus tout.

It was apparent that the fight against corruption in Kenya had gained a new lease of life. The NARC government was elected primarily because the public believed its pledge to fight corruption and to promote economic recovery. From the beginning, and in all his major speeches, President Kibaki has reiterated a policy of zero-tolerance for corruption.

¹ see <http://www.transparency.org/cgi-bin/dcn-read.pl?citID=95219>

² see <http://www.statehousekenya.go.ke/speeches/kibaki/2002301201.htm>

³ see <http://www.nationaudio.com/News/DailyNation/01012003/News/News0101200317.html>

Among his first executive acts, President Kibaki, created a new Ministry of Justice and Constitutional Affairs, mandated to coordinate the anti-graft war and especially to spearhead the enactment of requisite laws to facilitate the execution of the campaign. He appointed Transparency International Kenya's founding Executive Director, John Githongo, to the new position of Permanent Secretary in the Office of the President in charge of Public Ethics and Governance, and by May 2003, his government had succeeded in enacting two major pieces of anti-corruption legislation: *The Anti-Corruption and Economic Crimes Act, 2003* and the *Public Officer Ethics Act, 2003*.

The first Act expands the definition of corruption and economic crime to include various forms of abuse of office, conflict of interest, misappropriation, theft and plunder of public resources. It also establishes an anti-corruption commission with investigative, prevention, public education and asset recovery functions. The second Act legislates mandatory separate codes of conduct for all public officers, including members of Parliament, the Judiciary, Civil Service, Co-operative societies, Local Government and parastatals. The codes of conduct, which are legally enforceable, prohibit corruption, conflict of interest, ethnicity, and nepotism in the public service. Most popularly it provides for the first time for the declaration of assets and liabilities of public officers; an innovation albeit one that doesn't provide for access to the information by the public. Other instruments, such as the *Public Procurement and Disposal Bill, 2003*, the *Privatisation Bill, 2003*, the *Public Audit Bill, 2003*, and the *Public Finance Bill, 2003* await debate and enactment.

In June 2003, President Kibaki, while attending the African Union summit in Maputo, Mozambique, adopted the *African Union Convention on the Combating and Prevention of Corruption*. It is now open for signing at the AU headquarters in Addis Ababa, Ethiopia.

A cabinet committee on anti-corruption meets fortnightly. Various task forces and commissions were instituted to look into past misdeeds and the root causes of endemic corruption and recommend changes. The President appointed a Commission of Inquiry into the *Goldenberg* scandal with a mandate to name wrongdoers and trace stolen assets.

During the course of the year, leading officials in public institutions and parastatals left office and some are being prosecuted. Among this number are the former Head of the *Kenya Revenue Authority*; and the Governor of the *Central Bank of Kenya*. Early in the year the Chief Justice and a High Court Judge resigned in the wake of charges of corruption levied against them. In the last month, steps towards a massive purge of the Judiciary have been taken with the President commissioning two tribunals to investigate 23 Judges of the *High Court* and the *Court of Appeal*. Over 80 Magistrates have been branded corrupt by a judicial investigation.

Some stolen assets (such as government land) have been recovered, or even returned.

A five year anti-corruption campaign announced by the President seeks to change the attitude of Kenyans towards corruption. It recognises that a warped view of wealth accumulation had developed after decades of endemic corruption – resulting in looters being admired as billionaire businessmen. The campaign cannot be said to have kicked off in high gear.

An official anti-corruption crusade has a shelf life of 18-24 months. The rhetoric, when not matched by tangible gains to disrupt patronage networks (perceivable by the public), will go stale and slogans such as “zero-tolerance” may become hackneyed and empty political phrases trotting of the lips of every public official (even the corrupt). As *World Bank* President Wolfensohn pointed out in Nairobi in July 2003, “you stay centre stage with everyone loving you for a very short time in this world”. The failure to achieve concrete irreversible policy and legislative gains will cause the people to lose faith in the assertion that fighting corruption is a condition precedent for economic recovery and growth. They will instead demand delivery of services, which the government, caught in a Catch 22 situation, would find itself unable to deliver precisely *because* of corruption. One of the main motivating forces for the fight against corruption is the attempt to free up resources for development. Consequent to this loss of faith will be a loss of legitimacy by government. The centrality of anti-corruption as a policy imperative for this or a future government would diminish and Kenya would slip back into a state of endemic corruption and crony networks of public and private sector operatives.

How is one to disrupt these networks? A quick-fire method is massive personnel change ranging from purging through vetting to early retrenchment, transfer and also by legal reform, and prosecution. On this score the government has done quite a bit. Since January this year the government has acted to remove 50 % of the High Court and Court of Appeal; suspended for a time all government and parastatal procurement officers; fired and vetted for rehiring all forest officers; reshuffled engineers and officers of the Ministry of Public Works; and closed the Lands Registry to ensure non-destruction of files.

These far-reaching actions, albeit it necessary to break up the cartels that dominated entire government departments, sometimes resulted in unintended consequences; such as the paralysis of the land conveyance system for months and a grinding to a halt of the government procurement system. Because legal and policy measures were not taken to ensure that new networks do not take their place- as graft abhors a vacuum – by the end of the 2003, there was a widespread feeling that some old networks survived the regime change or in the alternative that new networks patronised by new regime officials had come into being. For example, procurement scandals continue to be unearthed involving central government, local authorities and parastatal enterprises.

To credit the government though, counter-reform measures appear to be in play too. The Minister for Justice and Constitutional Affairs speaks often of the fact that within existing institutions are a large number of anti-reformers who benefited from corruption and are able, for the moment, to employ

resources accumulated through graft to frustrate reform. Anti-corruption prosecutions for example were impeded by technical objections accepted, at least early in the year by pliant judges; and investigators of the Kenya Anti-Corruption Commission frequently found themselves faced by defiant persons who refuse to record statements. Corruption fights back, so this behaviour is sadly typical when the corrupt find themselves under attack. They are richer, since they have the loot; they can get custody of the evidence; they can obstruct the judicial process; they are accustomed to manipulating and subverting the system. The ethnicisation and politicisation of the anti-corruption campaign in Kenya is a further complicating factor, with communities complaining of being unfairly targeted for political vendettas.

Despite the President's frequently declared commitment to the corruption fight, there are still great challenges that lie ahead. In plain words, the honeymoon is over and the government can no longer rely on picking low-hanging fruits. It is now time to concentrate energy on constitutional and policy reforms to strengthen key institutions such as the judiciary, parliamentary oversight committees, the Controller and Auditor-General, and introduce new arrangements like the Ombudsman in order to create a robust national integrity system – one that will be able to withstand now and in the future, the tendency towards patronage that characterises our governance situation. I would therefore suggest the following actions:

1. The constitutional reform process that is taking place at *Bomas of Kenya* requires urgent completion. The draft Constitution provides for numerous instruments to fight corruption including a Leadership and Integrity Code; and an Ethics and Integrity Commission.
2. The Kenya Anti-Corruption Commission Advisory Board must present a person to Parliament for approval as the new Director of the Kenya Anti-Corruption Commission.
3. The Public Officer Ethics Act, 2003, as was indeed proposed by the Parliamentary Committee on the Administration of Justice, should be amended to provide that the public shall have access to the contents of the declaration of assets and liabilities of public officers.
4. The Goldenberg Commission of Inquiry must be allowed all facilities to enable it to arrive at a logical conclusion: namely, the identification of culprits and the tracing of stolen assets. All persons able to unravel this mystery must be heard; and action taken on the culprits once they are identified.
5. Serving public officers, against whom there is *prima facie* evidence of misconduct in the Goldenberg and other corruption cases should stand suspended, pending investigation and prosecution.
6. The government should immediately sign and ratify the African Union Convention on the Combating and Prevention of Corruption. At the time of writing not a single African Union member has signed it.

7. The anti-corruption war desperately needs a spokesperson who can give information, about operations, on a more regular basis than the President ought to be required to.

It is important to recognize that initially, Kenyans had great faith in the government's initiatives but currently, public cynicism is developing regarding government intentions. Grumbles about public sector extravagance are growing and "task force fatigue" has definitely set in. The days of *Yote Yawezekana* are gone. Disillusionment as to the state of the NARC coalition is translating into a scepticism regarding so-called 'selective' actions taken in fight against corruption. For example, a current refrain is that though some judges were removed on the basis of the allegations in the *Ringera Anti-Corruption and Integrity Committee* report, no action is taken against cabinet ministers against whom fairly serious allegations have been made. This is a natural response to things *wananchi* see and hear. It may also explain two unkind articles in Kenya that appeared in *The Economist* recently.

On the occasion of Kenyatta Day (October 20th 2003), President Kibaki spoke again of his determination to fight corruption wherever it may be found. In his own words, "*my message on corruption this Kenyatta Day is that the writing is on the wall. We are sending a clear message that the day of reckoning for those who engage in corruption has come.*"

In the New Year, Kenyans and others will no doubt act to hold both he and his government to his word.

¹ The title of this essay borrows from the Minister for Justice and Constitutional Affairs speeches at the 11th Anti-Corruption Conference of May 2003, and the 1st Kenya National Anti-Corruption Conference of July 2003. On both occasions he was at pains to state the achievements of the government in the fight against corruption; whilst candidly admitting that the corruption networks of the past, and even of the present, were re-examining the current situation, and restructuring as well as repositioning themselves with a view to keeping Kenya under their grip.