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Report of the Tribunal to Inquire into the Competence and Capability of Mr. John Harun Mwau

(Director, Kenya Anti-Corruption Authority (KACA))

1. We, The Hon. Mr. Justice R.S.C. Omolo (Chairman), The Hon. Mr. Justice E.O. O'Kubasu and The Hon. Mr. Justice D.M. Rimita, were appointed by His Excellency the President of the Republic of Kenya under and in accordance with the provisions of the Prevention of Corruption Act, Chapter 65 of the Laws of Kenya and our appointment was under Gazette Notice No. 3960 of 1998 dated the 29th day of July, 1998. Our appointment was pursuant to Section 11B (2H) (a) of the afore-mentioned Act and we were directed and mandated to:

> ***"Inquire into the capability or competence of John Harun Mwau, Director of the Kenya Anti-Corruption Authority, to properly perform the functions of his office."***

The Gazette Notice of 29th July, 1998, required us to submit our findings to the President within sixty (60) days from the date of our appointment. The Gazette Notice is to be found in the Report as Appendix A.

2. By Gazette Notice No. 4290 of 7th August, 1998, His Excellency the President was pleased to appoint Mr. John Onyango Oriri, a Principal State Counsel in the Attorney-General's office, to be an Assisting Counsel to the Tribunal and Ms. Rosemelle Anyango Mutoka, a Senior Resident Magistrate at the Nairobi Law Courts, was appointed to be a Secretary to the Tribunal. We shall have a few remarks to make hereinafter on these appointments. The Gazette Notice itself is to be found at Appendix B.

3. By Gazette Notice No. 5311 of 28th September, 1998, His Excellency the President was pleased to enlarge for the

Tribunal the time within which it was to make its report by a further thirty (30) days from the date of the Gazette Notice. We are grateful to the President for that enlargement. The Gazette Notice is Appendix C.

4. Following upon his appointment as an assisting Counsel, Mr. Onyango drew up a list of six allegations against Mr. Mwau, the subject of our inquiry. These allegations were:

   i. Instituting and undertaking criminal investigations into criminal offences and related matters outside the provisions of the Prevention of Corruption Act, Cap 65, Laws of Kenya, in the following cases:

      (a) NAIROBI CM CRIMINAL CASE NO. 1673 OF 1998 REPUBLIC VS
         1. JOSEPH KANJA KINYUA
         2. SAMUEL CHEBII

      (b) NAIROBI CRIMINAL CASE NO. 1674 OF 1998 REPUBLIC VS JOB NJERU KIRIRA & 13 OTHERS

      (c) NAIROBI CM CRIMINAL CASE NO. 1410 OF 1998 REPUBLIC VS
         1. GAKIO WANYOIKE
         2. WILSON CHEBIEGON

      (d) NAIROBI CM CRIMINAL CASE NO. 1411 OF 1998 REPUBLIC VS
         1. KENNETH IRUNGU MWANGI
         2. WILSON CHEBIEGON BOWEN

      (e) NAIROBI CM CRIMINAL CASE NO. 1419 OF 1998 REPUBLIC VS
         1. DAVID WAMBUA MALUTI
         2. PATRICK NJOGU KARIUKI
         3. DAN AUTO & EQUIPMENT LTD

      (f) NAIROBI CM CRIMINAL CASE NO. 1633 OF 1998 REPUBLIC VS
         1. NAFTALIEDGAR MUYONGA
         2. WILBERFORCE OSODO
         3. JAMES OWANGE OBARA
         4. JULIUSWALUCHO MAKHOHA
         5. NICANORY SAYI

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      (g) NAIROBI CM CRIMINAL CASE NO. 1617 OF 1998 REPUBLIC VS ELISHEBA WANJIRU MWANGI

   ii. Instituting and undertaking criminal investigations in the afore-mentioned criminal cases in violation of Section 11B(3)(a)(b)(c)(d)(e) and (f) of the Prevention of Corruption Act, Cap 65 Laws of Kenya.

   iii. The said criminal investigations are accordingly and therefore ULTRA-VIRES the provisions of the Prevention of Corruption Act, Cap 65 Laws of Kenya .

   iv. Instituting prosecution of the afore-mentioned criminal cases in the Chief Magistrate's Court, Nairobi, without due compliance with the requirements of Section 11B (3)(b) of the Prevention of Corruption Act, Cap 65 Laws of Kenya.

   v. The said criminal prosecutions are accordingly and therefore ULTRA-VIRES Section 26(3) of the Constitution of Kenya and the provisions of the Prevention of Corruption Act, Chapter 65 Laws of Kenya.

vi. Investigations into and prosecution of the afore-mentioned criminal cases were undertaken in excess of the statutory powers and authority given by the provisions of the Prevention of Corruption Act, Cap 65 Laws of Kenya. A list of the Allegations is to be found at Appendix D.

5. Section 11B (1) of Cap 65 establishes an Authority called Kenya Anti-Corruption Authority (hereinafter called KACA). KACA is a body corporate with a perpetual succession and a common seal, and with power, in its corporate name:-

a) to sue and be sued;
b) to take, purchase or otherwise acquire, hold charge or dispose of both movable and immovable property;
c) to borrow or lend money;
d) to enter into contracts;
e) to do or perform all such things or acts necessary for the proper performance of its functions under the Act which may be lawfully done by a body corporate.

6. Section 11B (2) of the Act sets out who the members of the Authority shall be. They are:

a) the Director who shall be the chief executive of the Authority; and
b) such number of Assistant Directors, not exceeding three. The Director and the Assistant Director are to be appointed by the President on the recommendations of an Advisory Board which is itself created under Section 11B (11) of the Act.

7. The Director and Assistant Directors are to hold office for 4 years (Section 11B (2A) and are eligible for re-appointment for a further four years provided that no Director or Assistant Director shall hold office for more than two terms (proviso to Section 11B (2A) of the Act).

8. To qualify to be a Director or an Assistant Director, one must not:

a) be a member of the National Assembly; or
b) be a salaried employee of any public body (except on a secondment basis).

9. The appointment of a Director or an Assistant Director can be terminated by the President if the Director or the Assistant Director –

a) becomes a member of the National Assembly or a salaried employee of any public body (except on secondment basis);
b) is adjudged bankrupt or enters into a composition or scheme of arrangement with his creditors;
c) is convicted of an offence involving dishonesty, fraud or moral terpitude;
d) is adjudged or is otherwise declared to be of unsound mind;
e) is absent without the leave of the Authority from three consecutive meetings of the Authority;
f) becomes for any reason incapable or incompetent of properly performing the functions of his office.

10. But even where any of these situations arise in respect of the Director or an Assistant Director and the President

wishes to terminate the appointment because of that situation, the Act does not empower the President to act on his own. As it is popularly put in Kenya, the office of the Director or Assistant Director enjoys security of tenure.

11. Section 11B (2H) of the Act sets out what the President is to do if there is a need to terminate the appointment of the Director or Assistant Director. The President is obliged to set up a Tribunal consisting of three Judges or three persons qualified to be appointed Judges either of the High Court or the Court of Appeal. The Tribunal is then to inquire into the situation that is alleged to have arisen against the Director or Assistant Director and then recommend to the President whether or not the Director or Assistant Director ought to be removed. Where a Tribunal has been appointed to inquire into a matter, the President may suspend the Director or Assistant Director from office (Section 11B (2I)).

12. Mr. Mwau was appointed the Director of KACA in December, 1997. On the 29th July, 1998, the President suspended Mr. Mwau and instituted our Tribunal. It appears that no Assistant Directors have been appointed and the consequence of that must be that the Authority has not been constituted as required by the Act. That was the view held by Dr. Kiplagat, who is a Member of the Advisory Board. However, the failure to constitute the Board cannot be blamed on Mr. Mwau as the appointment of the members of the Authority is not in the province of his jurisdiction. Whether he was entitled to operate in the absence of the Assistant Directors is another issue altogether.

13. We have already set out what the President directed us to inquire into, namely:

> ***"whether Mr. Mwau has, for any reason, become incapable or incompetent to properly perform the functions of his office"***

– that is Section 11B (2F)(f). Mr. Mwau produced before us a copy of a letter written to him by the President suspending him from office (Exhibit 68). According to that letter, the President appointed a Tribunal:

> ***"to inquire into the proper performance of the functions of your office".***

A copy of the letter is at Appendix F. A list of all the Exhibits produced before us is at Appendix G.

14. Mr. Mwau told us that this was what we were required to inquire into, and not anything else. We, however, pointed out to Mr. Mwau that the letter was a private communication between him and the President. It was not copied to the Tribunal and its contents were not reproduced in any of the Gazette Notices setting up the Tribunal. In any case, there is no provision in Cap 65, which empowers the President to set up a Tribunal to inquire into the proper performance of the functions of an office. What the Act authorises the President to do is to institute a Tribunal to inquire into the question of whether the Director or an Assistant Director ought to be removed from office for any of the reasons set out in Section 11B (2G) (a) to (f) of the Act. An office cannot become incapable or incompetent to perform a function; only a human being holding an office can become incapable or incompetent.

15. We accordingly conclude that what we were directed to inquire into is what was contained in the Gazette Notice No. 3960 of 1998 dated the 29th July, 1998 and not what is contained in the letter of the President written to Mr. Mwau on the same day. In our view, the essence of that letter was to inform Mr. Mwau of his suspension and that the President had appointed a Tribunal to inquire into the matters set out in the relevant provisions of the Act. Accordingly, Mr. Mwau's contention that it is what was contained in the letter to him by the President was the subject of our inquiry has no basis either in fact or in law.

16. Because we were required to determine whether Mr. Mwau has, for any reason, become incapable or incompetent to properly discharge the functions of his office as Director of KACA, it was necessary to know, right from the very beginning, what it was that Mr. Mwau had done or failed to do to warrant the inquiry. This was the basis on which the Assisting Counsel drew up the allegations which we have already set down herein. Our inquiry was accordingly confined to those allegations and it is on the basis of the allegations that we shall make our findings and report.

17. The Act does not provide for the appointment of an Assisting Counsel or a Secretary. Mr. Mwau took objection at the very onset to the presence and participation of the Assisting Counsel and Secretary in the affairs of the Tribunal. We gave our ruling on those issues at the very beginning of the proceedings. We stand by that ruling and a copy of the same is to be found at Appendix H to the report.

18. Equally, while the Act provides that "the Tribunal shall inquire into the matter and report on the facts to the President and recommend to him whether the Director or

Assistant Director ought to be removed from office" – Section 11B (2H) (b) – the Act does not set out the manner in which the inquiry is to be made. Accordingly, the Tribunal under the hand of the Chairman made and published its rules for the conduct and management of its proceedings. The rules were published as Gazette Notice No. 4291 of 10th August, 1998. A copy of the rules is to be found at Appendix J.

19. Mr. Mwau objected to those rules on the basis that the Act does not give the Tribunal power to make such rules. Our decision on this objection is to be found in our ruling at Appendix H.

20. The Tribunal had its first sitting on the 17th August, 1998, at Court No. 1 in the High Court. At that meeting, only procedural matters were dealt with, such as supplying Mr. Mwau with the list of allegations drawn up by the Assisting Counsel.

21. We realised right from the very beginning that this inquiry is the first of its kind in independent Kenya and may well form a precedent for similar inquiries in the future. Other officers who have security of tenure and who can only be removed in the same way are the Chief Justice, Judges of the Court of Appeal and High Court (Section 62 (5) of the Constitution), the Attorney General (Section 109 (7) of the Constitution), the Controller and Auditor General (Section 110 (6) of the Constitution), members of the Electoral Commission of Kenya (Section 41 (7) of the Constitution), members of the Public Service Commission of Kenya (Section 106 (8) of the Constitution) and the Governor of the Central Bank of Kenya (Section 14 (3) of the Central Bank of Kenya Act, Chapter 491, Laws of Kenya).

22. We decided to hold the proceedings in public but not before giving Mr. Mwau the right to choose whether he wished to have the proceedings held in public or in private (in camera). We appreciate that a particular officer may want to have the proceedings held in camera and if that had been the choice of Mr. Mwau, we would have seen no objection to it.

23. The Tribunal subsequently sat at the Kenyatta International Conference Centre and heard evidence from a total of 27 witnesses including Mr. Mwau himself. A list of all the witnesses is to be found at Appendix L. At the end of the evidence Mr. Mwau objected to the Assisting Counsel and Mr. Fred Ojiambo, whom we had allowed to appear on behalf of certain persons charged in the criminal cases which are set out in the allegations, making any submissions on the evidence and law. We upheld Mr. Mwau's objection and our ruling on that issue is to be found at Appendix M.

24. Having set out the background matters, we turn to the allegations against Mr. Mwau. They can be fairly summed-up in one line – that he acted ultra-vires the provisions of Cap 65 which creates KACA.

25. The doctrine or concept of ultra-vires simply means this:

> a body created by an Act of Parliament, such as KACA, can only do and perform such functions as are conferred on it by the Act creating it. If the Act of Parliament sets out the method or manner of performing the function, then the body must perform that function in that method or manner. But if the body does something which the Act, either expressly or by necessary implication, does not authorise it to perform then the body is said to

> be acting ultra-vires the Act creating it – that is, that it is acting in contravention of or in excess of the powers given to it by the Act of Parliament creating it. Again, if the body does not follow the method or manner of performing its functions as set out in the Act creating it, the body will be said to be acting ultra-vires the Act. That, in our view, is the simplest way in which we can explain the doctrine of ultra vires.

26. What functions can KACA perform under Cap 65? Those functions are listed in Section 11B (3) of Cap 65 as follows:

a) to take the necessary measures for the prevention of corruption in the public, parastatal and private sectors;
b) to investigate and subject to the directions of the Attorney-General, to prosecute for offences under this Act and other offences, involving corrupt transactions; and
c) to advise the Government and parastatal organizations on ways and means of preventing corruption;
d) to inquire and investigate the extent of liability of any public officer in the loss of any public funds and to institute civil proceedings against the officer and any other person involved in the transaction which resulted in the loss for the recovery of such loss;
e) to investigate any conduct of a public officer which is connected with or conducive to corrupt practices and to make suitable recommendations thereon;
f) to undertake such further or other investigations as may be directed by the Attorney-General;

g) to enlist members of the public in fighting corruption by the use of education and outreach programmes.

27. These are the functions which KACA may lawfully perform. In paragraph (a) for example, KACA is authorised to take measures for the prevention of corruption in the public, parastatal and private sectors. The Act does not specify what such measures shall be; nor does it specify the manner in which such measures are to be taken. All these are left to the discretion of KACA and so long as KACA can show that any particular measure undertaken by it was necessary for the prevention of corruption there cannot be any quarrel about the measure or the manner in which it was undertaken.

28. Again, paragraph (c) authorises KACA to advise the Government and the parastatal organizations on ways and means of preventing corruption. On this particular matter of advising the Government and parastatal organizations, the private sector is excluded. So if KACA were to purport to give advice to the private sector on ways and means of preventing corruption, KACA would be acting in excess of the powers conferred on it, that is, it would be acting ultra-vires Section 11B (3)(c) of Cap 65.

29. How do these issues of law, which we have tried to explain, relate to the six allegations brought against Mr. Mwau? We have already set out those allegations and we shall now go through each one of them to see whether the acts alleged therein were performed by Mr. Mwau who is the Chief Executive of KACA and whether those acts were in excess of the powers conferred on KACA by Cap 65.

30. (a) **ALLEGATION NO. 1**:

This states that Mr. Mwau instituted and undertook investigations into criminal offences and related matters outside the provisions of Cap 65. A total of seven criminal cases of which Mr. Mwau allegedly instituted and undertook investigations are then listed. We understand this allegation to mean that Mr. Mwau instituted and undertook the investigations of these cases falling outside the purview of Cap 65. Mr. Mwau himself told us in his evidence that he did not investigate any of the cases listed.

(i) perhaps we can now say here that KACA had police officers seconded to it from the Kenya Police Force. A copy of the letter seconding such officers to KACA was produced before us as Exhibit 73 and it was dated the 15th May, 1998. A copy of the letter is to be found at Appendix N of the Report.

(ii) Among the officers so seconded were Senior Assistant Commissioner of Police Samuel Kilemi and Superintendent of Police Peter Mugweru Muchori. Kilemi was in charge of those seconded to KACA; he testified before us as witness No. 8; Mugweru also testified before us as witness No. 9.

(iii) It was agreed on the evidence before us that KACA received complaints of corruption from various sources and places. It was also agreed before us that those complaints were

passed to Kilemi and Mugweru to investigate. They investigated, found no sufficient evidence to warrant charges of corruption, but found sufficient evidence of other offences under the Penal Code, Cap 63 Laws of Kenya. They consulted Mr. Mwau who told them that since the two of them were police officers, they should proceed with the charges under the Penal Code. They did so. Kilemi and Mugweru were also of the view that since they are police officers, they could not simply close their eyes to the other offences disclosed though those offences did not fall under Cap 65.

(iv) Mr. Bernard Chunga, the Director of Public Prosecutions, was one of the witnesses who testified before us as witness No. 13. He thought that though Kilemi and Mugweru were police officers, they were acting on behalf of KACA, and that being so, they could only do that which Cap 65 authorises KACA to do. We agree with Mr. Chunga that while enforcing the provisions of Cap 65 on behalf of KACA, Kilemi and Mugweru, despite their being police officers, could only do that which KACA is allowed to do by the Act creating it.

(v) Does Cap 65 authorise KACA to institute investigations into offences under the Penal Code or under any other Act? Mr. Chunga was of the view that KACA cannot do so. The Solicitor-General, the Hon. Mr. Justice Aaron Ringera, was another of the witnesses before us. He testified as witness No. 18. He

was of the view that KACA can bring charges under other Acts.

(vi) As we see it ourselves, the issue is to be resolved by determining the meaning of the phrase

> ***"and other offences involving corrupt transactions"***

found in Section 11B (3) (b) of Cap 65. Parliament has not defined what constitutes ***"corrupt transactions"***. In Section 3 (1) and (2) of Cap 65, the circumstances which would constitute ***"corruption in office"*** are set out. ***"Other offences involving corrupt transactions"*** cannot, therefore, fall under Section 3 of the Act. Mr. Chunga thought they must be offences similar in nature to those set out in Section 3. Mr. Mwau's view was that if only offences under Cap 65 were meant to be covered, paragraph (b) of Section 11B (3) would have read

> ***"to prosecute for offences of corruption and other offences involving corrupt transactions under this Act"***

– that is, the word "Act" would have been the last in the paragraph.

(vii) We think we agree with the interpretation given by the Hon. Mr. Justice Ringera and Mr. Mwau. The interpretation which Mr. Chunga sought to place on the words ***"and***

other offences involving corrupt transactions" is not tenable on the construction of the whole paragraph.

(viii) Accordingly, we now find and hold that KACA is mandated by the Act creating it to investigate offences under other Acts such as the Penal Code so long as those offences can be shown to involve corrupt transactions. Accordingly we find that Allegation No. 1, in so far as it seeks to limit the powers of KACA to investigate only offences falling under Cap 65 is fallacious and is not proved. We reject that allegation.

30. (b) **ALLEGATION NO. 2:**

This states that Mr. Mwau instituted and undertook criminal investigations into the cases cited in violation of Section 11B (3) (a) (b) (c) (d) (e) and (f) of Cap 65. Save for paragraph (b) of the Section, we find the other paragraphs cited as being wholly meaningless.

(i) As regards paragraph (a) we do not see how Mr. Mwau could have instituted and undertaken investigations of the cases in violation of KACA's function

> ***"to take necessary measures for the prevention of corruption in the public, parastatals and private sectors".***

(ii) As regards paragraph (c) it is equally difficult for us to see how KACA could have instituted and undertaken investigations in violation of its function

> ***"to advise the Government and parastatal organizations of ways and means of preventing corruption".***

(iii) The same comments would apply to paragraphs (d) (e) (f) and (g).

(iv) Paragraph (b) of Section 11B (3) (b) is the one which gives KACA authority to investigate criminal cases. The paragraph states

> ***"to investigate, and subject to the directions of the Attorney-General, to prosecute ..."***

Our understanding of this paragraph is that KACA is given unrestricted power to investigate offences under the Act and other offences involving corrupt transactions. To institute such an investigation, KACA does not require the consent, or direction of the Attorney-General. If Parliament had intended that KACA should seek the directions or consent of the Attorney-General before instituting and undertaking a criminal investigation,

paragraph (b) would have commenced thus:

> ***"subject to the directions of the Attorney-General, to investigate and prosecute ..."***

(v) We are, accordingly, of the view and we find and hold that Mr. Mwau did not institute and undertake criminal investigations of the listed cases in violation of Section 11B 3 (a) (b) (c) (d) (e) and (f) as alleged in Allegation No. 2. That allegation also fails.

30. (c) **ALLEGATION NO. 3**:

This allegation is to the effect that because the matters stated in Allegations No. 1 and No. 2 were in violation of the provisions of Cap 65, it follows that those matters were ultra-vires the powers given by the Act to Mr. Mwau as the Director of KACA. Since we have rejected Allegations No. 1 and No. 2, the 3rd Allegation, which is based on them, must automatically fail. We reject it.

30. (d) **ALLEGATION NO. 4**:

This is to the effect that Mr. Mwau instituted the prosecution of the listed criminal cases in the Chief Magistrate's Court in Nairobi without due compliance with the requirements of Section 11B (3) (b) of Cap 65. The court files in respect of all the seven criminal cases were produced before us by Mr. Ali Said, an executive officer in charge of the registry of the Chief Magistrate's court at Nairobi.

Mr. Said testified before us as witness No. 1 and the files were produced as Exhibits 1, 2, 3, 4, 5, 6 and 7. By the time the files were produced before us, the charges contained in Exhibits 4 and 5 had been terminated by the entry of a ***Nolle Prosequi*** by Mr. Chunga, purportedly on behalf of the Attorney-General.

(i) In respect of the Nolle Prosequi, Mr. Mwau contended before us that it was invalidly entered as according to Mr. Mwau, section 26 (6) of the Kenya Constitution does not authorise anyone else purporting to act on behalf of the Attorney-General or otherwise to enter a Nolle Prosequi on behalf of the Attorney-General. According to Mr. Mwau, only the Attorney-General personally can enter a Nolle Prosequi in a criminal prosecution and that under section 26 (6) of the Constitution, the Attorney-General cannot delegate his power to enter a Nolle Prosequi. Mr. Mwau was supported in this contention by Professor Kivutha Kibwana, of the Faculty of Law, University of Nairobi. Professor Kibwana testified before us as witness No. 26.

(ii) For our part, we do not find it necessary to determine the constitutional question of whether or not the Attorney-General can delegate to his subordinates the power to enter a Nolle Prosequi conferred on him by Section 26 (3), (5) and (6) of the Constitution. The fact, however, is that there is a Nolle Prosequi in respect of the criminal charges contained in the files we marked as Exhibits 4

and 5. If Mr. Mwau or whoever took the charges before the Chief Magistrate of Nairobi, thinks that the Nolle Prosequi entered in respect of the charges are invalid, then all it would mean is that the charges are still validly pending before the Magistrate and Mr. Mwau or whoever filed the charges can go ahead and prosecute them. We have no doubt the persons accused in those charges would contend before the Chief Magistrate that the charges have been constitutionally terminated by the Attorney-General entering the Nolle Prosequi. In those circumstances, the Magistrate would be obliged to make a constitutional reference to the High Court, or to a constitutional court as it is popularly called, under Section 67 of the Constitution and we have no doubt the High Court would determine the matter one way or the other and the Magistrate would be obliged to comply with that determination. That being our view on that issue, we do not feel called upon to determine the validity or otherwise of the Nolle Prosequi entered by the Attorney-General.

(iii) As to who instituted the prosecutions in all the seven criminal cases, Mr. Mwau told us he did not do so. The charges were not signed by him and they were properly registered in various police stations within Nairobi. There is no doubt on the evidence that the charges were registered at the Chief Magistrate's court at Nairobi. The charges were in fact investigated and registered in the Chief Magistrate's Court by Mr. Kilemi and

Mr. Mugweru. They admitted that much and they did not in any way seek to hide that fact.

(iv) As we said earlier, Mr. Kilemi and Mr. Mugweru were some of the police officers seconded to KACA. The initial reports on the cases were made to them at the KACA offices and the two officers said it was Mr. Mwau who instructed them to investigate the complaints. They did so and kept Mr. Mwau informed of what was going on with their investigations. When they were satisfied that various criminal offences had been disclosed by their investigations, they informed Mr. Mwau about the position and Mr. Mwau told them that as police officers, they ought to proceed to court. Both Mr. Kilemi and Mr. Mugweru told us they thought Mr. Mwau had done the necessary consultations. They proceeded and filed the charges in the court of the Chief Magistrate, Nairobi.

(v) It is true that both Mr. Kilemi and Mr. Mugweru, even though they were seconded to KACA, retained their powers as police officers and were bound to comply with the provisions of the Police Act, Cap 84 of the Laws of Kenya. But when stationed at the offices of KACA, they were obviously deployed to enforce the provisions of Cap 65 on behalf of KACA. Otherwise there would have been no reason for them to keep Mr. Mwau abreast of their investigations. There would have been no reason for them to expect Mr. Mwau to do the necessary consultations. They were clearly acting on behalf of KACA

and with the knowledge of KACA. KACA was at that time constituted by only one person – Mr. Mwau the Director and chief executive of the Authority.

(vi) When enforcing the provisions of Cap 65 on behalf of KACA, Mr. Kilemi and Mr. Mugweru could not do that which KACA itself could not lawfully do. Having initiated their operations on behalf of KACA, they could not suddenly turn around and say:

> ***"Though we are agents of KACA, we shall now drop that agency and proceed as ordinary police officers"***.

To be able to do so, they would have had to completely have their secondment to KACA withdrawn, move back to their respective stations from which they had come and then start to operate as ordinary police officers from there. There is absolutely no evidence that they at any stage had their secondment to KACA withdrawn.

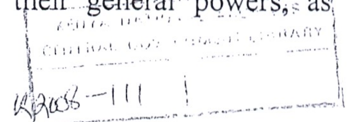
(vii) Mr. Mwau made comparisons between the police officers seconded to KACA on one hand and those seconded to the Central Bank of Kenya (the Bank Fraud Investigations Branch) headed by Senior Assistant Commissioner of Police Joseph Mwangi Kamau (witness No. 15), the Anti-Motor Vehicle Theft and Robberies Unit (The "Flying Squad") headed by Senior Superintendent of Police Sammy Cheruiyot Langat (witness No. 20) and the Anti-Narcotics Unit at the CID Headquarters,

Nairobi, headed by Senior Superintendent of Police Michael Jackobam (witness No. 19).

(viii) Mr. Mwau's contention on this aspect of the matter was that though these officers were seconded to their respective units or departments, they retained their general powers as police officers and can investigate any offence and if necessary charge suspected offenders with any crime. He contended that the police officers seconded to KACA are and must be in a similar position.

(ix) Our answer to this contention is that one must look at the Act of Parliament that each unit or department of the police force is enforcing. KACA is specifically given powers to investigate and where appropriate, prosecute for certain offences – Section 11B (3) (b) of Cap 65. We are not aware that the Central Bank of Kenya Act gives the Governor or any other authority created thereunder, the power to investigate and prosecute anyone for any offence; we are equally not aware that The Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994, creates any authority with specific powers to investigate offences and to prosecute offenders. The "Flying Squad" is simply operating under the Police Act, that is, Parliament has not enacted a specific legislation dealing with robberies and theft of motor vehicles.

(x) That being the position the police officers seconded to the various units and departments can only exercise their general powers, as



police officers and in accordance with the police Act. But the officers seconded to KACA can investigate cases and prosecute for offences as KACA itself can do and if the officers are exercising the powers or functions bestowed on KACA by Cap 65, these officers, as we have said, must comply with the provisions of Cap 65 which KACA itself is required to comply with.

(xi) We have found and held that in investigating the criminal cases cited in the list of allegations and in filing the charges before the Chief Magistrate, Mr. Kilemi and Mr. Mugweru were acting as agents of KACA, that is, they were purporting to exercise on behalf of KACA, the powers conferred on that body by Section 11B (3) (b) of Cap 65. What does that section require of KACA? That it should:

> ***"investigate, and subject to the directions of the Attorney-General, to prosecute for offences under this Act and other offences involving corrupt transactions***".

(xii) We have already held that this section gives KACA the authority to start investigations without any reference to the Attorney-General or anyone else. We have also held that the section gives KACA authority to investigate cases outside Cap 65, so long as those cases involve corrupt transactions. What about when KACA wants to exercise its power to prosecute?

(xiii) The section lays it down that KACA can only prosecute subject to the directions of the Attorney-General . Our understanding of the phrase, ***"subject to the directions of the Attorney-General, prosecute ..."*** is that KACA can only launch a prosecution on the directions of the Attorney-General, who may even continue to give such directions in the middle of the prosecution. The allegation we are now dealing with is that Mr. Mwau instituted the prosecutions in issue without complying with the requirements of Section 11B (3) (b) of Cap 65. What does the phrase, ***"institute a prosecution"*** mean? Our understanding of the expression ***"to institute a prosecution"*** is to start or begin or launch a prosecution. And when can one say that a prosecution has been started or begun or launched?

(xiv) Professor Kivutha Kibwana told us that a prosecution is started when a police officer at the police station draws up a charge against an accused person. Even Mr. Mwau, on whose behalf the Tribunal summoned Professor Kibwana disagreed with this contention. With the greatest respect to Professor Kibwana, his view on this point is wrong. No-one is prosecuted at a police station. A police officer may draw up a charge at his station and if he simply keeps that charge in a file at the station, one cannot say that the subject of that charge has been prosecuted. Nor can the subject of that charge successfully sue for malicious

prosecution. He can only sue successfully on a claim for false arrest and imprisonment if he was arrested, taken to the police station and detained there before the charge was drawn up. We reject Professor Kibwana's view that a prosecution is instituted by the drawing-up of a charge at a police station. We think this contention is as wrong as was Professor Kibwana's assertion before us that it is not necessary to set up a tribunal to remove the Attorney-General from office, unless of course, Professor Kibwana was speaking as a politician and not as a professor of law. Section 109 (7) of the Constitution sets out the procedure for removing an Attorney-General from office.

(xv) Mr. Mwau, for his part, told us that a prosecution only commences from the period a magistrate takes a plea and the prosecutor is the person appointed by the Attorney-General to be a public prosecutor under the provisions of Section 85 of the Criminal Procedure Code, Cap 75 Laws of Kenya. Mr. Mwau appeared to us to be arguing that if directions of the Attorney-General are necessary, it is the public prosecutor who appears before the magistrate and conducts the actual prosecution who should seek directions from the Attorney-General.

(xvi) Mr. Mwau's contention on this part is, of course, wrong. Section 11B (3) (b) of Cap 65 gives KACA the right not only to investigate cases, but to prosecute them as well. So KACA is, apart from being an investigator, a

prosecutor as well and as far as we know, there is nothing in the Constitution or the Criminal Procedure Code, which would bar Parliament from conferring upon other bodies such as KACA, the right to prosecute cases before courts. We do not understand the words, ***"to prosecute"*** in Section 11B (3) (b) of Cap 65 to simply mean ***"to register or file cases"*** before a magistrate. KACA is itself entitled to prosecute cases before the courts.

(xvii) KACA, as we know it, is a body corporate; it has neither legs, arms, eyes nor a mind of its own. It is a legal person and can only ***"investigate and prosecute"*** cases through its officers such as the Director or Assistant Directors if appointed, or through agents such as Kilemi and Mugweru. So that in respect of the criminal cases cited in the allegations against Mr. Mwau, KACA was obviously acting through Kilemi and Mugweru and the only member of KACA whom Kilemi and Mugweru could represent was Mr. Mwau. It is idle to claim that the acts of the Director or Assistant Director are not the acts of KACA - at any rate in the circumstances of the matter before us, there is no evidence that the acts of the Director were not those of KACA. As we have repeatedly stated, Mr. Kilemi and Mr. Mugweru were acting as agents of KACA and Mr. Mwau, being the only Director of that body, cannot escape liability for the actions of the two police officers. He was not only aware of the officers' action but had in the first place directed them to carry out the

investigations and then told them to file the cases in court.

(xviii) Before filing the cases before a magistrate, KACA was required to obtain the directions of the Attorney-General. Mr. Mwau told us that Cap 65 does not impose on him as the Director of KACA, the duty to seek instructions. It is true Cap 65 does not say that KACA shall seek directions from the Attorney-General. But logic and common-sense would dictate that if directions are required, someone has to seek them. How is the Attorney-General to know what cases have been investigated by KACA so that he (Attorney-General) can give directions as required by Cap 65? We think that in the ordinary course of things, the only person or body to seek directions from the Attorney-General would be KACA and KACA can only do so either through its Director Mr. Mwau, or through its agents such as Mr. Kilemi or Mr. Mugweru.

(xix) It is agreed that no directions were ever sought from the Attorney-General. During the proceedings before us, Mr. Mwau made several suggestions as to why directions were not sought:

(a) that the Attorney-General was, at the relevant time or times, out of the country, in Algiers, Algeria. This suggestion was never seriously pursued, and understandably so. No one could ever seriously contend

that when the Attorney-General, or any other public officer in the government, however high he or she may be, goes out of the country, he or she locks up his or her office and carries the keys thereto with him or her to the country being visited.

(b) It was next suggested that it takes a very long time to obtain either consent or directions from the office of the Attorney-General and in this connection, Mr. Ali of the Chief Magistrate's Court at Nairobi was recalled to produce a schedule of very many cases. It was intended to show by those cases that it took the Attorney-General about one year to give consent to prosecute. The office of the Attorney-General was, rightly in our view, concerned about this negative portrayal and a lot of evidence had to be recalled to rebut it. Mr. Chunga's evidence-in-chief was largely directed towards that rebuttal and at the end of it all, it came out clearly that consent in respect of the cases in issue had been given within a period ranging between ten days to one month. The suggestion by Mr. Mwau that it took the office of the Attorney-General over one year to give or refuse consent to prosecute was clearly without any basis and we

reject it. But even if it had been true, that would not be a lawful justification for not complying with the specific provisions of Cap 65 that KACA can only prosecute subject to the directions of the Attorney-General. A public officer performing the functions imposed on him by the law cannot be heard to say that he cannot follow the law imposing the function on him because that law is too inconvenient or cumbersome. If that were to be allowed to happen, the rule of law would become meaningless.

(c) Lastly, Mr. Mwau contended that it was not the prosecutors of KACA who were required to seek the directions of the Attorney-General, but the public prosecutor conducting the cases before the Chief Magistrate. We have already rejected that contention and we can only add that that contention, appears to us to be perilously close to shifting responsibility by a man who proclaimed before us: ***"I want responsibility, not power"***. We shall return to this aspect of the matter at some later stage.

(xx) We accordingly find and hold that Mr. Mwau, as the only Director of KACA, instituted criminal prosecutions in the court of the Chief

Magistrate, Nairobi, without due compliance with the requirements of Section 11B (3) (b) of Cap 65. In the end, Mr. Mwau asserted before us that his signature was not appended to any of the charges taken before the Chief Magistrate and he thanked his God that his signature was so absent. We do not think it was necessary that his signature be on any of the documents before he can take responsibility for them. The cases were investigated and taken to court by Kilemi and Mugweru. These officers, as we have said many times, conducted the investigations on behalf of KACA and they obviously filed the cases in the Chief Magistrate's court on behalf of KACA. Mr. Mwau was aware of their investigations and was equally aware that the cases were being taken to court. He was the only Director who could have given directions on behalf of KACA. How can he be allowed to disown the actions of Kilemi and Mugweru? Once again, this appears to us to be shirking responsibility for an act, which has become awkward or inconvenient. There cannot be any doubt but that Mr. Mwau, as the Director of KACA, instituted the prosecutions in the Chief Magistrate's court, Nairobi. Those prosecutions, as we have said, were in express violation of Section 11B (3) (b) of Cap 65. We accordingly find Allegation No. 4 proved both on the evidence and in law.

30. (e) **ALLEGATION NO. 5**:

This is to the effect that the prosecutions launched by Mr. Mwau in the court of the Chief Magistrate were, because of the matters alleged in Allegation No. 4, ultra-vires section 26 (3) of the Constitution of Kenya and the Provisions of Cap 65. The allegation sets out two aspects in which it is said that Mr. Mwau's actions were ultra-vires, namely under section 26 (3) of the Constitution of Kenya and under the provisions of Cap 65.

(i) As to the prosecutions being ultra-vires section 26 (3) of the Constitution, the matter is not clear to us. Section 26 (3) of the Constitution confers upon the Attorney-General, the sole right to institute criminal prosecutions on behalf of the people of Kenya. That right, namely the right to prosecute on behalf of the Republic, undoubtedly belongs to the Attorney-General, but we do not understand that to mean that no other person or body could ever lawfully institute a criminal prosecution. Sections 88 and 89 of the Criminal Procedure Code allow any citizen of Kenya, the right to lay a complaint or charge before a magistrate and if the magistrate is satisfied that the complaint or charge discloses a known criminal offence and grants the person laying the same before him or her, permission to prosecute, the same person would be entitled to proceed with the prosecution without any

reference to the Attorney-General. These are what are commonly called private prosecutions. That, however, does not take away the constitutional right of the Attorney-General to at any stage intervene in such a prosecution by taking it over and either proceeding with it or terminating it. That is exactly what the Attorney-General did in respect of the Chief Magistrate's files produced before us as Exhibits 4 and 5. So that the mere fact that Mr. Mwau instituted the prosecutions before the Chief Magistrate does not, per se, make those prosecutions ultra-vires Section 26 (3) of the Constitution. That aspect of Allegation No. 5 as it relates to Section 26 (3) of the Constitution must accordingly fail.

(ii) The allegation also asserts that the institution of the prosecutions were ultra-vires the provisions of Cap 65. We held earlier that KACA can in fact investigate and prosecute for offences outside Cap 65 so long as these offences involve corrupt transactions. Accordingly, as far as we can make out the only provision of Cap 65 which the prosecutions violated is that which lays it down that such prosecutions can only be done subject to the directions of the Attorney-General. We have already held that Mr. Mwau, in his capacity as the Director of KACA and being the

only Director, acted ultra-vires by instituting the prosecutions without the directions of the Attorney-General. Accordingly our answer to Allegation No. 5 is as follows:

(a) Mr. Mwau did not act ultra-vires the provisions of Section 26 (3) of the Constitution of Kenya;

but

(b) he acted ultra-vires Section 11B (3) (b) by bringing in the court of the Chief Magistrate, Nairobi, the named criminal prosecutions without seeking the directions of the Attorney-General. Apart from that, we do not find any other provision(s) of Cap 65 which he breached and, therefore, acted ultra-vires. Allegation No. 5 accordingly, partly fails and partly succeeds in the manner we have set out herein.

30. (f)**ALLEGATION NO. 6**:

This is to the effect that the investigations into and the prosecution of the afore-mentioned criminal cases were undertaken in excess of the statutory powers and authority conferred by the provisions of Cap 65 to KACA. We think we have sufficiently dealt with this matter. In so far as the allegation purports to show that KACA cannot prosecute for offences outside Cap 65,that is, offences under other Acts, we reject it. KACA can prosecute for offences under other Acts of Parliament so long as such offences involve corrupt transactions. But in so far as the allegation was meant to show that KACA acted ultra-vires Section 11B (3) (b) of Cap 65 by instituting the prosecutions without the directions of the Attorney-General, the allegation is valid and we uphold it.

Lastly, in so far as the allegation purports to show that the investigations of the cases were ultra-vires Cap 65, we are satisfied there was nothing like that. Section 11B (3) (b) gives KACA the unrestricted right to investigate offences under the Act and other offences involving corrupt transactions. This allegation accordingly partly fails and partly succeeds in the manner and to the extent we have indicated herein, namely:

(a) that KACA did not act ultra-vires Cap 65 by investigating offences under other Acts in so far as those offences may have involved corrupt transactions;

(b) that KACA did not act ultra-vires Cap 65 by investigating offences under Cap 65 and offences involving corrupt transactions under other Acts because KACA has the unrestricted right to investigate such offences without reference to anyone; but

(c) KACA acted ultra-vires the provision of Section 11B (3) (b) by instituting the criminal prosecutions in the Chief Magistrate's court without having obtained directions from the Attorney-General.

31. We have now considered each of the individual allegations made against Mr. Mwau and we must now attempt to relate our conclusions with regard to the allegations to what His Excellency the President required of us, namely,

> ***"to inquire into the capability or competence of Mr. John Harun Mwau, the Director of the Kenya Anti-Corruption Authority, to properly perform the functions of his office".***

32. We have rejected Allegations No. 1, No. 2 and No. 3 as unsubstantiated so they can no longer be relevant to the determination of the main issue before us; namely the capability or competence of Mr. Mwau to properly perform the functions of his office as the Director of KACA.

33. We have, however, wholly accepted as proved, Allegation No. 4; we have also accepted as partly proved Allegations No. 5 and No. 6. The allegations which we have accepted as proved must be the basis on which we shall determine the capability or competence of Mr. Mwau to properly discharge the functions of his office.

34. The basic proved complaint against Mr. Mwau, as matters stand before us now, is that he acted ultra-vires Cap 65 by failing to obtain the directions of the Attorney-General before instituting the criminal prosecutions. We have already dealt with some of the propositions which Mr. Mwau put forward to justify his failure to obtain the directions. We have already rejected the explanations offered by Mr. Mwau.

35. Mr. Mwau himself told us that even if we were to find that he acted in excess of his powers, that alone cannot make him incapable or incompetent. He gave us various examples:

(i) a judge exceeding his jurisdiction;

(ii) the Attorney-General giving consent to prosecute and in the end the person being prosecuted is acquitted by the court;

(iii) the Commissioner of Police as regards the accused persons taken to court by police officers under him and are in the end acquitted;

(iv) the Governor of the Central Bank who is supposed to supervise commercial banks and yet such banks keep on collapsing.

36. The point Mr. Mwau was making by these examples appeared to us to be that:

(a) the judge who exceeds his jurisdiction is not necessarily incapable or incompetent;

(b) the Attorney-General who grants consent to prosecute and such prosecution is dismissed by the court is not necessarily incapable or incompetent;

(c) the Commissioner of Police is not necessarily incompetent if the court acquits the accused persons whose cases were investigated by police officers under him;

(d) the Governor of the Central Bank of Kenya is not necessarily incapable or incompetent if commercial banks which he is supposed to be supervising keep on collapsing due to mismanagement by the owners of such banks.

37. Mr. Mwau then asked us why his institution should be treated differently from such others in similar situations. Our answer to the questions posed by Mr. Mwau must be this:

38. That in all these situations, the circumstances surrounding each office must be looked at:

(a) if it can be shown that a judge has exceeded his jurisdiction or taken a wrong decision deliberately, or because he is too lazy to read and learn, or for such-like reason, that may well be evidence of inability to perform. Incidentally, judges are removable from office only for misbehaviour or inability to perform;

(b) as regards an Attorney-General who gives consents to prosecute and such prosecutions end up failing, the first point to note is that in granting a consent the Attorney-General cannot be said to be

guaranteeing the success of such a prosecution. But if it can be shown, for example, that the Attorney-General does not even read the files in which such consents are granted, that may well be evidence of incapability or incompetence;

(c) as for the Commissioner of Police, we do not know that there has to be any particular reason for removing him from office. His office does not enjoy statutory security of tenure and it would be pure speculation on our part to say why he may or may not be removed from office. But at the end of the day, the actions of the officers under him may well be placed at his door and he may well be made answerable for such actions. Our immediate former Commissioner of Police was thought to have left the force because, among other reasons, some officers under him shot and killed a university student. And yet the Commissioner of Police was nowhere near the University, and if he had been there, would most probably not have allowed what was alleged to have taken place. But as we have said, this is pure speculation and we do not wish to say anything more on it.

(d) As to the Governor of Central Bank of Kenya and collapsing banks, if it can be proved, for example, that the banks are collapsing because of lack of supervision by him, that in our view, may well be evidence of incapability or incompetence. We think we have sufficiently answered this point. In any case, the point in issue in the matter before us is not that the people who were taken to the court of the Chief Magistrate were tried and acquitted and it is being alleged that because of those acquittals, Mr. Mwau has become incapable or incompetent. That

is not the issue before us. The issue being alleged against Mr. Mwau is that he did not have the power to take people to court on criminal charges without having obtained the directions of the Attorney-General. That is why its being alleged he acted ultra-vires Cap 65.

39. Why did Mr. Mwau, as Director of KACA, not seek the directions of the Attorney-General before instituting the prosecutions in court? One thing is clear to us and that is this. It cannot be said that Mr. Mwau did not seek the directions because he was ignorant of the provisions of the Act he was required to enforce. To use his own expression before us, he knew the provisions of the Act like the back of his hand. He, therefore, must have known that he was required to seek the directions of the Attorney-General, before launching himself head-long into the prosecutions. Why then did he ignore the requirement for directions?

40. We think this is now an appropriate stage for us to express our observations on Mr. Mwau. We saw him conduct his matter before us for many days and the observations we make are based on the definite impressions we got of Mr. Mwau during the process.

41. We got the definite impression that Mr. Mwau thinks very highly of himself and of his abilities as a person. We equally got the impression that he does not think very much about those who may have views different from his. In Mr. Mwau's view, the office of the Attorney-General is generally incompetent and would take upto two years to grant consent to prosecute. Mr. J.O. Oriri, the Assisting Counsel, lost the prosecution against Mr. Koigi Wamwere and therefore could not be expected to do much. Mrs. R.A. Mutoka, the Tribunal's Secretary, is still a magistrate seeking to rise in her career and, therefore, cannot be expected to act professionally and independently of the Attorney-General. The Chief Justice of Kenya and the Chairman of the Tribunal are the type of judicial officers who would secretly sneak into State House, presumably to take orders therefrom. Dr. Kiplagat, a member of the Advisory Board was a director in one of the companies he was investigating and, therefore, could not be expected to act honourably by withdrawing from any discussion which might have ensued if he (Mr. Mwau) had sought the advice of the Advisory Board on any of the prosecutions that he eventually lodged.

42. As regards the Advisory Board, it is obvious to us from its very first minutes that Mr. Mwau made it clear to them he would have no track with them – the Board was simply advisory unlike, for example, the governing Board of Directors, created under section 6 (1) of Kenya Revenue Authority Act, Act No. 2 of 1995. Explaining to us why he would not want to get advise from the two advocates on the Advisory Board, Mr. Mwau pointed out to us certain portions of a letter written to him by Dr. Kiplagat (Exhibit No. 17) and according to Mr. Mwau, Dr. Kiplagat displayed his lack of understanding of the legal role the Board was to play. He contended before us that it was him who always educated the Board members on the provisions of Cap 65. He obviously did not think much of the Board. A copy of Exhibit 17 is at Appendix P.

43. To us, it is incredible that a public officer such as Mr. Mwau should dismiss in such a manner the Board which is composed of reasonably well educated country-men, particularly in view of the fact that KACA itself had only Mr. Mwau as a Director. We would have thought that a man launching himself into the contentious area of criminal prosecutions would be grateful for any second

opinion which might be availed to him, particularly by lawyers experienced in such matters. Not only did Mr. Mwau ignore the office of the Attorney-General, he ignored the Advisory Board created under the very Act he was enforcing. To us, having had the chance to see and listen to Mr. Mwau, this is not surprising.

44. We have already said Mr. Mwau thinks very highly of himself and his abilities while giving virtually no consideration to the other people's abilities. Nowhere did this come out more clearly than when he took the witness stand and both Mr. Onyango and Mr. Ojiambo tried to cross-examine him. He simply saw the cross-examination as a contest of who, as between him and Mr. Ojiambo in particular, was cleverer than the other, and who knew more law than the other. Having for some reason concluded in his mind that the Tribunal had no power to compel him to answer any questions, he simply refused to answer questions, terming them either irrelevant or in violation of the Official Secrets Acts, Cap 187, Laws of Kenya. The questions which were being put to him had absolutely nothing to do with the Official Secrets Act, but he nevertheless, pitied Mr. Ojiambo for his lack of knowledge of such simple requirements. Mr. Ojiambo was in the end compelled to point out to him that being cheeky would not help him with anything.

45. For our part, we do not think Mr. Mwau was being cheeky. He was clearly showing his true character, intolerant of views which are opposed to his own and for Mr. Onyango and Mr. Ojiambo having had the audacity to challenge the correctness of his views or decision on any matter whatsoever.

46. We think Mr. Mwau would have found it and will find it extremely irksome if not down-right beneath his dignity,

to seek directions from the Attorney-General or advice from the Advisory Board. To seek the directions or advice in that manner, it appears to us, would be contrary to his nature and personality. No doubt, Mr. Mwau is a fiercely independent-minded man, but even an independent mind must comply with the law and the law is that KACA can only prosecute subject to the directions of the Attorney-General.

47. Only a person who does not understand the central role occupied by the Attorney-General in criminal prosecutions would ignore such a simple requirement as that for seeking directions. The powers of the Attorney-General with regard to criminal prosecutions are given to him by the Constitution. The power to prosecute given to KACA is given by an ordinary Act of Parliament. Parliament would obviously not wish to create any conflict between the Constitution and Cap 65; were that to be so, Cap 65 to the extent of the conflict would be void – Section 3 of the Constitution. It is accordingly not difficult to see why Parliament would lay it down that before KACA starts a prosecution it should seek the directions of the Attorney-General. Had Mr. Mwau sought the directions of the Attorney-General with regard to cases such as those now forming Exhibits 4 and 5, the apparent conflict between Mr. Mwau and the office of the Attorney-General would not have arisen. The result of the apparent conflict between the office of the Attorney-General and Mr. Mwau is that the Kenyan public is given the impression that while one institution created by the Government is serious in eradicating corruption, another section of the same Government, (the Attorney-General's office) is placing obstacles in the path of those fighting corruption. This kind of conflict is unfair to Kenyans. From what we heard during the proceedings, it is clear Kenyans are deeply fed up with the vice. Mr. Hamad Mohammed Kassim, the

Kadhi of Nairobi, spoke on behalf of the Muslims; they are tired of it. Pastor Bonifes Adoyo of the Nairobi Pentecostal Church, Valley Road, spoke on behalf of his Christian flock; they are also tired of corruption. Mr. Michael John Christopher Mills of Nairobi is a crusader against the vice; he denounced it before us. We have no doubt that if it was possible for ordinary Kenyans to lynch the perpetrators of the vice, they would do so. It is accordingly wrong that bodies such as KACA, which are created specifically to fight corruption should engage themselves in theatrics and high-profile disputes which may not necessarily result in practical victory over corruption. The Director of KACA must be one able to comply with all the requirements of Cap 65 and not to engage himself in uncalled-for conflict with the office of the Attorney-General. The other alternative is for KACA to be created and vested with its powers under the Constitution. If that happened, Mr. Mwau would at least be in a position to say that his powers to prosecute for corruption are at par with those of the Attorney-General. That is not the legal position at the moment and Mr. Mwau must seek directions from the Attorney-General where he proposes to exercise the powers of criminal prosecution given by Cap 65. He refused to seek such directions and as we have said, we think he is unlikely to do so even in the future. By the way, Section 11B (3) (d) of Cap 65 gives KACA the right to institute civil claims for the recovery of any public money which can be shown to have been lost by a public officer and any other person involved in the transaction from which the loss arises. In instituting such a civil claim, KACA is not even required to seek the directions of the Attorney-General or any other person. But we suppose that civil claims are not as glamorous as criminal prosecutions. We, of course, do not subscribe to Mr. Mwau's contention that a civil claim can only be brought after a criminal prosecution.

48. We have already discussed the issue of whether or not Mr. Mwau was aware of what Kilemi and Mugweru were doing on behalf of KACA. We have found that he was in fact aware and that he in fact authorised them to proceed to court with the cases they were investigating. But even if we had found that he was not aware of the doings of Kilemi and Mugweru, we would then have been bound to consider the issue of whether he was in charge or was capable of being in charge of the operations of KACA, as its chief executive. As it is, we do not have to consider those issues as Mr. Mwau was fully aware of the doings of Mr. Kilemi and Mr. Mugweru. Those two officers in fact, expected Mr. Mwau to carry out necessary consultations and we think such consultations would include seeking directions of the Attorney-General.

49. Having inquired into the matter regarding the capability or competence of Mr. Mwau to properly perform the functions of his office as Director of KACA, we can now humbly report to your Excellency on the following facts:-

(a) Mr. Mwau as the Director of KACA and with the assistance of police officers seconded to KACA, investigated a total of seven criminal cases. Those cases were reported to KACA as being cases under the Prevention of Corruption Act. Mr. Mwau and the police officers were entitled to investigate the complaints made to them and they did not need the direction or consent of anyone to do the investigations.

(b) The team investigating the cases found that no offence of corruption could be proved under section 3 (1) and (2) of the Prevention

of Corruption Act. But the officers thought that the evidence they had come upon could prove offences involving corrupt transactions. They decided to go ahead with the prosecution of those offences under the Penal Code, Cap 63 Laws of Kenya. They reported all their findings and conclusions to Mr. Mwau. Mr. Mwau authorised them to proceed to court and prosecute for the offences.

(c) Before instituting a criminal prosecution in court, KACA is required to obtain the directions of the Attorney-General. The police officers who investigated the cases on behalf of KACA thought Mr. Mwau would do the necessary consultations. Mr. Mwau did not do so. Specifically, he did not seek the directions of the Attorney-General. Nor did he seek any advice from the Advisory Board created under Section 11B (11) of the Prevention of Corruption Act. One of the functions of the Advisory Board is

> ***"to advise the Authority [KACA] generally on the exercise of its powers and the performance of its functions".***

Mr. Mwau who was and still is the only member of KACA refuses to seek advice from the Board on the ground that no section of the Act imposes on him a duty to seek advice. He also told us no section of the Act imposes on him a duty to seek directions from the Attorney-General. Our understanding of the position is that the Attorney-General can

only give directions if somebody seeks such directions. The Advisory Board can only give advice to KACA if such advice is sought. Mr. Mwau was and still is the only member of KACA and only him could seek directions or advice. He did not do so.

(d) We have found that Mr. Mwau's disposition and personality is such that he believes very much in the rightness of what he is doing and believes that other people whose duty it is to work with him are either always wrong, have improper motives or do not understand what they are supposed to do. It will be very difficult for Mr. Mwau to work in harmony with the office of the Attorney-General and the Advisory Board. So long as Mr. Mwau remains the Director, and therefore, the chief executive of KACA, that body will most likely remain embroiled only in high-profile conflicts. It (KACA) will generate a lot of heat but very little light. That kind of a public face-off may be very popular with the public but in the end, will achieve virtually nothing.

50. Because of all these considerations we are of the definite view that Mr. Mwau is not capable or competent to properly perform the functions of his office as Director of the Kenya Anti-Corruption Authority.

51. We accordingly humbly recommend to Your Excellency that Mr. Mwau ought to be removed from office as Director of the Kenya Anti-Corruption Authority.

We beg to remain,

Your Excellency's Most Obedient Servants

R. S. C. OMOLO

....

CHAIRMAN

E. O. O'KUBASU

....

MEMBER

D. M. RIMITA

....

MEMBER

SPECIAL ISSUE

APPENDIX A

THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

Vol. C—No. 42 NAIROBI, 29th July, 1998 Price Sh. 35

GAZETTE NOTICE NO. 3960

THE PREVENTION OF CORRUPTION ACT

(*Cap.* 65)

APPOINTMENT OF A TRIBUNAL OF INQUIRY

IN EXERCISE of the powers conferred by section 11B (2H) (*a*) of the Prevention of Corruption Act, I, Daniel Toroitich arap Moi, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, appoint a tribunal to inquire into the capability or competence of John Harun Mwau, Director of the Kenya Anti-Corruption Authority to properly perform the functions of his office.

The tribunal shall comprise of—

Justice R. S. C. Omolo—(*Chairman*);

Members:

Justice E. Okubasu;

Justice D. Rimita.

The tribunal shall report to me, within sixty (60) days from the date hereof, on the facts and recommend to me whether the director ought to be removed from office.

Dated the 29th July, 1998.

D. T. ARAP MOI,
President.

[1351

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

APPENDIX B

SPECIAL ISSUE

THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

Vol. C—No. 47 NAIROBI, 7th August, 1998 Price Sh. 35

GAZETTE NOTICE No. 4290

THE PREVENTION OF CORRUPTION ACT
(*Cap.* 65)

APPOINTMENT OF A TRIBUNAL OF INQUIRY

Amendment

IN EXERCISE of the powers conferred by section 11B (2H) of the Prevention of Corruption Act, I, Daniel Toroitich arap Moi, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, amend the Gazette Notice No. 3960 of 1998 by inserting the following immediately after the names of the members—

Assisting Counsel:

John Oriri Onyango;

Secretary:

Rosemelle Mutoka.

Dated the 6th August, 1998.

D. T. ARAP MOI,
President.

[1439

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

APPENDIX C

SPECIAL ISSUE

THE KENYA GAZETTE

Published by the Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

Vol. C—No. 57 NAIROBI, 28th September, 1998 Price Sh. 35

GAZETTE NOTICE No. 5311

THE PREVENTION OF CORRUPTION ACT
(*Cap.* 65)

APPOINTMENT OF A TRIBUNAL OF INQUIRY

Amendment

IN EXERCISE of the powers conferred by section 11B (2H) (*a*) of the Prevention of Corruption Act, I, Daniel Toroitich arap Moi, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, amend Gazette Notice No. 3960 of 1998 by deleting the expression "sixty (60) days" and substituting therefor the expression "ninety (90) days".

Dated the 25th September, 1998.

D. T. ARAP MOI,
President.

[1777

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

APPENDIX D

IN THE MATTER OF
TRIBUNAL OF INQUIRY
INTO THE CAPABILITY OR COMPETENCE
OF JOHN HARUN MWAU TO PROPERLY PERFORM
FUNCTIONS OF THE OFFICE OF DIRECTOR OF THE
KENYA ANTI-CORRUPTION AUTHORITY

THE PREVENTION OF CORRUPTION ACT
(CAP 65 LAWS OF KENYA)

SUBJECT OF INQUIRY: JOHN HARUN MWAU

ALLEGATIONS AGAINST THE SUBJECT OF INQUIRY

1. Instituting and undertaking criminal investigations into criminal offences and related matters outside the provisions of the Prevention of Corruption Act Cap 65 Laws of Kenya in the following cases:-

(a) NAIROBI CM CRIMINAL CASE NO. 1673/98
REPUBLIC VS (1) JOSEPH KANJA KINYUA
(2) SAMUEL CHEBII

(b) NAIROBI CM CRIMINAL CASE NO. 1674/98
REPUBLIC VS JOB NJERU KIRIRA AND 13 OTHERS

(c) NAIROBI CM CRIMINAL CASE NO. 1410/98
REPUBLIC VS (1) GAKIO WANYOIKE
(2) WILSON CHEBIEGON

(d) NAIROBI CM CRIMINAL CASE NO. 1411/98
REPUBLIC VS (1) KENNETH IRUNGU MWANGI
(2) WILSON CHEBIEGON BOWEN

(e) NAIROBI CM CRIMINAL CASE NO. 1419
REPUBLIC VS (1) DAVID WAMBUA MALUTI

(2) PATRICK NJOGU KARIUKI
(3) PAN AUTO & EQUIPMENT LIMITED

(f) NAIROBI CM CRIMINAL CASE NO. 1633/98
REPUBLIC VS (1) NAFTALI EDGAR MUYONGA
(2) WILBERFORCE OSODO
(3) JAMES OWANGE OBARA
(4) JULIUS WALUCHO MAKOKHA
(5) NICANORY SAYI

(g) NAIROBI CM CRIMINAL CASE NO. 1617/98
REPUBLIC VS ELISHEBA WANJIRU MWANGI

2. Instituting and undertaking criminal investigations in the aforementioned criminal cases in violation of Section 11B(3)(a)(b)(c)(d)(e) and (f) of the Prevention of Corruption Act Cap 65 Laws of Kenya.

3. The said criminal investigations are accordingly and therefore ULTRA-VIRES the provisions of the prevention of Corruption Act Cap 65 Laws of Kenya.

4. Instituting prosecution of the aforementioned criminal cases in the Chief Magistrate's Court Nairobi without due compliance with the requirements of Section 11B(3)(b) of the Prevention of Corruption Act Cap 65 Laws of Kenya.

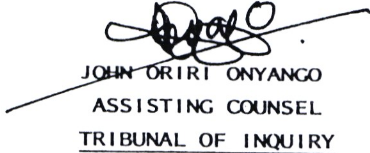
5. The said criminal prosecutions are accordingly and therefore ULTRA-VIRES Section 26(3) of the Constitution of Kenya and the provisions of the Prevention of Corruption Act Cap 65 Laws of Kenya.

6. Investigations into and prosecution of the aforementioned criminal cases were undertaken in excess of the statutory powers and authority given by the provisions of the

...../3

Prevention of Corruption Act Cap 65 Laws of Kenya to the Kenya Anti-Corruption Authority.

DATED at NAIROBI this ..17th..day of August,........1998.



JOHN ORIRI ONYANGO
ASSISTING COUNSEL
TRIBUNAL OF INQUIRY

Please acknowledge this Service by signing hereunder:

JOHN HARUN MWAU........................

Date of Service ....

Service by ....

DRAWN AND FILED BY:

JOHN ORIRI ONYANGO
ASSISTING COUNSEL
TRIBUNAL OF INQUIRY
C/O TRIBUNAL OF INQUIRY
NAIROBI.

TO BE SERVED UPON:

JOHN HARUN MWAU
P.O. BOX 10972
NAIROBI.

APPENDIX F

STATE HOUSE
P.O. BOX 40530
NAIROBI
KENYA

29th July, 1998

Mr. John Harun Mwau,
Director,
Kenya Anti-Corruption Authority,
P. O. Box 61130,
NAIROBI.

SUSPENSION FROM EXERCISE OF FUNCTIONS

I have today, the 29th day of July, 1998 appointed a tribunal to inquire into the proper performance of the functions of your office. Consequently, pursuant to Section 11B(2)(1), I hereby suspend you from the exercise of the functions of your said office pending the outcome of the inquiry.

DANIEL T. ARAP MOI
PRESIDENT

APPENDIX G

TRIBUNAL OF INQUIRY

List of Exhibits

Ex. 1	Chief Magistrate Nairobi Criminal Case No. 1410/98
Ex. 2	Chief Magistrate Nairobi Criminal Case No. 1411/987
Ex. 3	Chief Magistrate Nairobi Criminal Case No. 1633/98
Ex. 4	Chief Magistrate Nairobi Criminal Case No. 1673/98
Ex. 5	Chief Magistrate Nairobi Criminal Case No. 1674/98
Ex. 6	Chief Magistrate Nairobi Criminal Case No. 1617/98
Ex. 7	Chief Magistrate Nairobi Criminal Case No. 1419/98
Ex. 8	Charge Register
Ex. 9	Crime and incident Report
Ex. 10	Crime Report
Ex. 10B	Crime Report
Ex. 11	Criminal Register
Ex. 12	Letter dated 31st December 1997
Ex. 13	Letter dated 12th January 1997
Ex. 14	Minutes of the Kenya Anti-Corruption Authority Advisory Board held on 6th February, 1998
Ex. 15	Minutes to the Kenya Anti-Corruption Authority Advisory Board held on 8th May, 1998
Ex. 16	Minutes of the Kenya Anti-Corruption Authority Advisory Board held on 17th July, 1998

Ex. 17	Letter dated 17th July 1998
Ex. 18A	Statistics of Cases from Central and Kileleshwa Police Stations
Ex. 18B	Statistics of Corruption Cases in Chief Magistrates Court Nairobi
Ex. 19	A bundle of Crime and Incident Reports
MFI 20	Chief Magistrate Nairobi Criminal Case No. 1425/98 (Ex.20)
Ex.21	Letter dated 4th August 1998
Ex. 22	Letter Ref. No. 134/769/98 dated 5th August 1998
Ex. 23	Letter Ref. No. 134/770/98 dated 5th August 1998
Ex. 24	Letter Ref. No. 134/771/98 dated 5th August 1998
Ex. 25	Letter Ref. No. 134/772/98 dated 29th July 1998
Ex. 26	Letter Ref. No. 134/773/98 dated 29th July 1998
Ex. 27	Letter Ref. No. 134/774/98 dated 5th August 1998
Ex. 28	Letter Ref. No. 134/775/98 dated 29th July 1998
Ex. 29	Letter Ref. No 134/776/98 dated 5th August 1998
Ex. 30	Letter Ref. No 121/750/98 dated 16th July 1998
Ex. 31	Letter Ref. No 121/752/98 dated 17th July 1998
Ex. 32	Letter Ref. No. 141/227/98 dated 29th July 1998
Ex. 33	Statistics of Cases sent to the Attorney General for purposes of consent

MFI 34	Letter dated 7th August 1998 Ref No. 134/768/98 (Ex.34A & B)
MFI 35	Chief Magistrate Court No. 1426/98 (Ex. 35)
MFI 36	Letter dated 7th August 1998 Ref. No. 134/769/98 (Ex.36A & B)
MFI 37	Criminal Case No. 1427/98 (Ex.37)
MFI 38A	Letter dated 7th Ref No. 134/770/98
MFI 38B	Consent letter dated 7th August 1998 (Ex.38, 38A, 38B)
MFI 39	Criminal Case No. 1428/98 (Ex. 39)
MFI 40	Letter Ref. No. 134/771/98 dated 7th August 1998 (Ex. 40A & B)
MFI 41	Criminal Case No. 1429/98 (Ex. 41)
MFI 42	Letter Ref. No. 134/772/98 dated 4th August 1998 (Ex.42A & B)
MFI 43	Criminal Case No. 1430/98 (Ex. 43)
MFI 44	Letter Ref. No. 134/773/98 dated 4th August 1998 (Ex. 44A & B)
MFI 45	Criminal Case No. 1431/98 (Ex. 45)
MFI 46	Letter Ref. 134/774/98 dated 7th August 1998 (Ex. 46A & B)
MFI 47	Criminal Case No. 1432/98 (Ex. 47)
MFI 48	Letter Ref. 134/775/98 dated 4th August 1998 (Ex.48A & B)
MFI 49	Criminal Case No. 1433/98 (Ex. 49)
MFI 50	Letter Ref. 134/776/98 dated 7th August 1998 (Ex. 50A & B)

MFI 51	Criminal Case No. 1436/98 (Ex. 51)
MFI 52	Letter Ref. 121/750/98 dated 28the July 1998 (Ex. 52A & B)
MFI 53	Criminal Case No. 1437/98 (Ex. 53)
MFI 54	Criminal Case No. 1438/98 (Ex. 54)
MFI 55	Letter Ref. 121/752/98 dated 28th July 1998 (Ex. 55A & B)
MFI 56	Criminal Case No. 1728/98 (Ex. 56)
MFI 57	Letter Ref. 141/227/98 (Ex. 57A & B)
MFI 58	List of Corruption Cases from Police Prosecutions indicating their current position (Ex. 58)
MFI 59	Chief Magistrates Nairobi Criminal case no. 2297/97 (Ex. 59)
MFI 60	Letter dated 11th December, 97 (Ex. 60)
Ex. 61	Letter dated 18th January 1998
Ex. 62	Letter dated 1st March 1998
Ex. 63	Letter dated 25th April 1998
Ex. 64	Letter dated 25th July 1998
Ex. 65	Charge Sheet
MFI 66	Letter dated 28th July 1998 (Ex. 66A)
Ex. 66B	Letter dated 28th July 1998
Ex. 68	Letter dated 29th July, 1998 addressed to John Harun Mwau
Ex. 69	Letter dated 12th June 1998

Ex. 70	Letter dated 24th July 1998
Ex. 71A	Terms and Condition of Service for Kenya Anti-Corruption Authority
Ex. 71B	Financial and Accounting Regulations and Procedures for Kenya Anti-Corruption Authority.
Ex. 71C	Procurement Regulations and Procedures for Kenya Anti-Corruption Authority
Ex. 72	A bundle of letters addressed to various Ambassadors
Ex. 73	Confirmation letter of Police secondment to KACA

APPENDIX H

REPUBLIC OF KENYA

THE PREVENTION OF CORRUPTION ACT
(CAP. 65)

TRIBUNAL OF INQUIRY

RULING OF THE TRIBUNAL:

Mr. Mwau, the subject of our inquiry, has raised various preliminary objections before us. The first objection relates to the composition of the Tribunal. By Gazette Notice No. 3960 dated the 29th July, 1998, His Excellency the President appointed a tribunal of inquiry and the appointment was stated to be under Section 11B (2H) (a) of the ***Prevention of Corruption Act Cap 65 of the Laws of Kenya***. The Tribunal had a named chairman and two other members who were also named. The mandate of the Tribunal was:-

> ***"to inquire into the capability or competence of John Harun Mwau, Director of Kenya Anti-Corruption Authority to properly perform the functions of his office."***

We did not understand Mr. Mwau to challenge this first appointment. Indeed Mr. Mwau, as the Director of Kenya Anti-Corruption Authority has security of tenure under the Act and cannot be removed from his office except upon the recommendation of such a tribunal. The President was clearly entitled to appoint a tribunal, and as we have said, we did not understand Mr. Mwau to challenge the appointments contained in the Gazette Notice of 29th July, 1998.

But on the 7th August, 1998 and vide Gazette Notice Number 4290 the President amended the earlier Gazette Notice and appointed Mr. John Oriri Onyango as an Assisting Counsel and Mrs. Rosemelle Mutoka as Secretary to the Tribunal. The appointments were said to be under and in accordance with Section 11B (2H) of the ***Prevention of Corruption Act***. Because of these latter appointments, Mr. Mwau argued before us, and with some considerable force of reason behind it, that our appointment is ultra vires the provisions of the Act as Section 11B (2H) (a) under which the latter appointments were purportedly made do not provide for the appointment of an assisting counsel or secretary. Mr. Mwau contrasted the provisions of the ***Prevention of Corruption Act*** with those of the ***Commissions of Inquiry Act Cap 102 Laws of Kenya***. Section 6 of the Cap 102 specifically provides for the appointment of a secretary. We are, however, unable to find any section in Cap 102 which specifically deals with the appointment of an assisting counsel. Mr. Mwau argued before us that if Parliament had intended that a tribunal appointed under Section 11B (2H) (a) of Cap 65 should have an assisting counsel and secretary, Parliament would have specifically said so as it did in Cap 102. We have said we have not been able to find any section in Cap 102 specifically providing for the appointment of an assisting counsel as opposed to a secretary. Yet it is common practice and is a matter of public knowledge that an assisting counsel is always appointed under Cap 102. There were assisting counsel in the ***Njonjo Commission of Inquiry***. There were assisting counsel in the ***Ouko Commission of Inquiry*** and there are assisting counsel in the current ***Commission of Inquiry into the Tribal Clashes in Kenya***. We think the appointing of assisting counsel is good practice based on practical experience and use. As Mr. Oriri Onyango pointed out to us, if there was no assisting counsel, this Tribunal will find it impossible to carry out its mandate. Judges do not go around looking for witnesses, interviewing them and recording statements from them. In any

case, if we did that, we would have descended into the arena of battle and it would be difficult to see how we would be viewed as being impartial. Section 11 (2H) specifically provides that only persons who hold or have held or are qualified to hold the office of a judge shall be appointed to be a chairman or member of a tribunal. Parliament must be assumed to know the way judges conduct their business and that is to listen to the disputing sides, and at the end of such listening, give decision. We do not have the system of examining magistrates or judges in Kenya and this Tribunal does not intend to initiate that system in the country. We are satisfied Mr. Oriri Onyango was lawfully appointed as an assisting counsel to put forward the side of those who might wish to say Mr. Mwau is incapable or incompetent to properly perform his functions as the Director of the Kenya Anti-Corruption Authority. Mr. Mwau will be at liberty to challenge that proposition as vigorously as he may wish and at the end of it all, the duty will be upon us, the three members of the Tribunal, to decide the matter in accordance with the law and the evidence that may be brought before us.

As for the appointment of the Secretary, we do not wish to say much. Just like the Assisting Counsel, she is not a member of the Tribunal. She is the administrative arm of the Tribunal and is not even entitled to say anything during the proceedings. Judges, for example, are appointed under the Constitution of Kenya and the Constitution does not specify which persons shall assist them in the discharge of their duties. Yet it is known that they have court-clerks, messengers, drivers and such like personnel. The appointment of a secretary cannot be a matter of concern to anyone and yet the presence of the secretary is indispensable for the operations of the Tribunal. We hold that she was properly appointed. As to whether the Assisting Counsel and the Secretary are persons beholden to the favours of the Attorney-General, we do not see how their participation in the affairs of the Tribunal can affect the decision of the Tribunal. As we have said both are not members of the Tribunal; Mr. Oriri

Onyango is, to us, no more than a counsel or advocate and it does not matter to us whether he be from the office of the Attorney-General or elsewhere. Neither Mr. Onyango nor Mrs. Mutoka can dictate to us what our decision in the matter shall be. In any case, we are satisfied that Mr. Onyango and Mrs. Mutoka are professional persons, and can be expected to act as such.

As to the oath which the members of the Tribunal took before the Chief Justice before embarking on its business, we do not think, with the greatest respect to Mr. Mwau, that it was or could ever be any of his business. Parties who came before the courts or tribunals such as this one are not entitled to find out from the Judges whether they are properly in office before their cases can be heard. In any case Mr. Mwau did not tell us that we have become disqualified from being members of the Tribunal because of the oath we took. We have no more to say on that subject.

As to the Rules of Procedure which were made by the Chairman of the Tribunal, all we wish to say is that they are rules made by the Tribunal itself for the orderly conduct of the proceedings before us. Neither Mr. Mwau nor anyone else was entitled to participate in the making of those rules. Parliament has imposed on the Tribunal the duty to inquire into the matter before us, yet Parliament has not set down for us the manner or method of making the inquiry. It is accordingly left to our discretion how we are to do it. The rules we made were and are intended to assist us in the manner of conducting the proceedings. It is all too easy to shout oppression, unfairness, injustice and so on but we note that Mr. Mwau did not point out to us any single thing in the rules which is oppressive or contrary to the rules of natural justice. We uphold our rules as having been validly made.

One last thing. Mr. Mwau pointed out to us that instead of using the words "incapable" or "incompetent" the Gazette Notice

appointing us used the words "capability or competence". We are, however, satisfied that Mr. Mwau clearly understands what we are to do, namely to inquire into his capability or competence to hold the office of the Director of the Kenya Anti-Corruption Authority. The Gazette Notice could not have asked us to inquire into his incapability or incompetence. Someone would then have concluded that he was incompetent and incapable and there would have been nothing for us to inquire into. We accordingly over-rule all the preliminary objections and direct that the Tribunal shall now proceed to inquire into what we were asked to do.

Dated and delivered at Nairobi this 27th day of August, 1998.

R. S. C. OMOLO

....

CHAIRMAN

E. O. O'KUBASU

....

MEMBER

D. M. RIMITA

....

MEMBER

APPENDIX J

SPECIAL ISSUE

THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

Vol. C—No. 48 NAIROBI, 10th August, 1998 **Price Sh. 35**

GAZETTE NOTICE NO. 4291

THE PREVENTION OF CORRUPTION ACT

(*Cap. 65*)

TRIBUNAL OF INQUIRY

Rules of Procedure

THIS Tribunal of Inquiry has been convened pursuant to its appointment to inquire into the capability or competence of John Harun Mwau, Director of the Kenya Anti-Corruption Authority, to properly perform the functions of his office, as stated in Gazette Notice No. 3960 of 1998.

The tribunal makes the following rules for the conduct and management of the proceedings of the inquiry under section 11B (2H) (*b*) of the Act.

(*a*) The Attorney-General may appear as *amicus curiae*.

(*b*) The tribunal shall sit daily from Monday to Friday commencing at 9.00 a.m.

(*c*) The subject of the inquiry shall have the right to be present during all of the proceedings and may choose to be represented by counsel of his choice.

(*d*) Counsel assisting the tribunal will present evidence relating to the inquiry.

(*e*) The counsel assisting the tribunal may draw up a list of allegation or allegations against the subject of the inquiry and the subject of the inquiry shall be entitled to a copy of the document containing the allegation or allegations.

(*f*) The tribunal may at its sole discretion summon any person or persons to testify before it on oath, and the person so summoned shall be obliged to attend and the provisions applying to witnesses summoned by ordinary courts of law shall apply to such person.

(*g*) The tribunal shall be guided by the ordinary rules of evidence and procedure and in particular, the rule of relevancy.

(*h*) The subject of the inquiry shall have the right to cross-examine any or all witnesses. If the subject is represented by counsel, then counsel shall do the cross-examination.

(*i*) The subject of the inquiry shall be entitled to call evidence to rebut allegations made against him.

(*j*) Counsel assisting the tribunal may cross-examine the subject of the inquiry and any witnesses called by him.

(*k*) At the close of all the evidence that may be called before the tribunal, counsel assisting tribunal and the subject of the inquiry or, if represented, his counsel, may make such submissions as they may think necessary.

R. S. C. OMOLO,
Chairman.

[1441

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

APPENDIX L

TRIBUNAL OF INQUIRY
LIST OF WITNESSES

NO.	NAME
TW 1	Ali Saidi
TW 2	Francis Shem Obwak
TW 3	Chief Inspector Jared Mugo
TW 4	Chief Inspector James Kariuki
TW 5	Police Constable William Macharia
TW 6	Samuel Githui Mithamo
TW 7	Police Constable Joram Kinyua
TW 8	Senior Assistant Commissioner of Police Samuel Muchui Kilemi
TW 9	Superintendent Peter Mugweru
TW 10	Kenneth Kiplagat
TW 11	Superintendent Peter Olianyo
TW 12	Stephen Mutuku Munguti
TW 13	Bernard Chunga
TW 14	Hamad Mohamed Kassim
TW 15	Joseph Mwangi Kamau
TW 16	Michael John Christopher Mills
TW 17	Pastor Bonifes Adoyo
TW 18	Justice Aaron Ringera
TW 19	Michael Jackobam
TW 20	Sammy Cheruiyot Langat
TW 21	Sergeant Howard Mwania
TW 22	Sergeant Susan Nduku
TW 23	Stephen Lemoyo Ole Mpesha
TW 24	Chief Inspector David Wambugu
TW 25	Erastus Waithombe
TW 26	Professor Kivutha Kibwana
TW 27	John Harun Mwau

APPENDIX M

REPUBLIC OF KENYA

THE PREVENTION OF CORRUPTION ACT
(CAP. 65)

TRIBUNAL OF INQUIRY

RULING OF THE TRIBUNAL:

For one reason or another which we need not state in this ruling, the Tribunal has now completed hearing formal evidence from witnesses, including the evidence of the subject of the Tribunal's inquiry, Mr. John Harun Mwau. Both Mr. Oriri Onyango, the Assisting Counsel, and Mr. Ojiambo, who appears on behalf of certain interested parties, have indicated to the Tribunal that each of them would wish to make final submissions before the hearing is closed. Mr. Mwau objects to this.

In respect of Mr. Ojiambo, Mr. Mwau's objection is to the effect that though Mr. Ojiambo's *"clients"* are the subject of certain criminal charges contained in Exhibits 4 and 5 produced before the Tribunal, yet all the evidence which has been adduced before the Tribunal does not in any way touch upon them adversely and that consequently Mr. Ojiambo is not entitled to make submissions. In our previous ruling, we allowed Mr. Ojiambo to participate in the proceedings because his clients, being the subject of the charges, were, by that very fact, adversely mentioned. As at that stage, we did not know and could not anticipate what evidence might be brought before the Tribunal and the manner in which such evidence might affect Mr. Ojiambo's clients. We have now listened to all the evidence and apart from the fact that Mr. Ojiambo's clients are the subject of certain charges contained in Exhibits 4 and 5 and which

charges have in fact been terminated, there is no other material touching upon Mr. Ojiambo's clients either adversely or in any other way. In those circumstances, we think Mr. Mwau is in fact right in objecting to Mr. Ojiambo making final submissions in the matter and that being our view, we uphold Mr. Mwau's objection as relates to Mr. Ojiambo.

As to Mr. Onyango, he is the Tribunal's Assisting Counsel and that fact alone would entitle him to make submissions before the Tribunal. ***Rule (K)*** of the Tribunal's Rules of Procedure confers upon him the discretion to make such submissions. The fact, however, remains that Mr. Onyango remains an Assisting Counsel. It is not mandatory that he makes submissions. We have listened to the evidence brought before us, and we need not say we have listened to that evidence with a lot of care and attention. Very able witnesses, including the Solicitor General, the Director of Public Prosecutions, and a learned professor of law, have been brought before us and they have given to us their varied views on the interpretation to be given to the various statutes which have been made the subject of discussions before us. We think Mr. Onyango's views would not take the matter any further and we think we have had adequate assistance on those matters. The factual evidence is itself rather simple and we do not feel obliged to look for assistance in its summary and the interpretation to be given to it. Accordingly, while we do not doubt that in law an assisting counsel is entitled to make submissions, we are satisfied that we do not, in the particular circumstances of the matter before us, need the assistance of Mr. Onyango in respect of submissions. We accordingly rule that we shall not hear any submissions from Mr. Onyango.

Mr. Mwau himself is the subject of our inquiry and as such, he is the one who will be directly affected by any recommendation that we may in the end make. He is

accordingly entitled to make any submissions that he may feel inclined to make.

Dated and delivered at Nairobi this 30th day of September, 1998.

R. S. C. OMOLO

....
CHAIRMAN

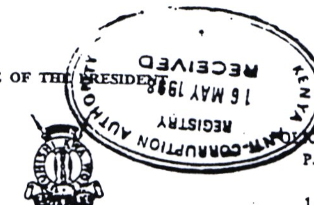
E. O. O'KUBASU

....
MEMBER

D. M. RIMITA

....
MEMBER

APPENDIX N

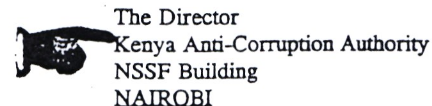


OFFICE OF THE PRESIDENT

Telegrams: "VIGILANCE", Nairobi
Telephone: Nairobi 335124
When replying please quote

Ref. No. ...SEC.POL.2/16 VOL V/62 and date

P. 188
POLICE HEADQUARTERS
P.O. Box 30083
NAIROBI
15th May 1998



Confidential

The Director
Kenya Anti-Corruption Authority
NSSF Building
NAIROBI

SECONDMENT OF POLICE OFFICERS TO KENYA ANTI-CORRUPTION AUTHORITY

I have been directed by the Commissioner of Police to submit the list of the officers seconded to Kenya Anti-Corruption Authority as follows:-

1. Mr. Samuel Kilemi S/ACP — In charge of the Team
2. Mr. Andrew Mutuku SSP — 2nd In charge of the Team
3. Mr. Peter Mugweru Muchori SP
4. No.209638 C.I. Geoffrey Mwangi Ng'ang'a
5. No.216006 C.I. John Maritim Kiplasoi
6. No.216014 C.I. Albert Ariada
7. No.216323 C.I. Daniel K. Cheptoo
8. No.218226 Ag I.P. Alfred Muia Makoma
9. No.65426 Ag.I.P. Eric Oluoch Okello
10. No.65581 Ag. I.P. Joseph Mutuku Mukanda
11. No.215048 I.P. Boniface Gitau Gikonyo
12. No.215833 I.P. Anthony Gitau
13. No.214794 I.P. Daniel Mwangi Gitonga
14. No.218940 I.P. George Ojuka Obara
15. No.218085 I.P. Stephen M. Mutty
16. No.218416 I.P. Adan Hassan Abikar
17. No.65648 I.P. Sangoroh Onyango Allan

Confidential

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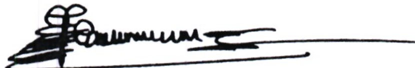
18. No.219495 I.P. Stanley Miriti Wang'ondu
19. No.71274 P.C. Robert Nyandoro Onchiri
20. No.62413 P.C. Elijah Too
21. No.40021 P.C. Peter Kariuki
22. No.62198 P.C. Kariuki Kigondu
23. No.63769 Bernard Onyango Nyakwaka
24. No.63875 P.C. Alexander Kyenze Munyao
25. No.63927 P.C. Antony Katumo

These officers will be reporting to you on Monday 18th May 1998 at 9.00 a.m. for deployment. Other modalities will be worked out later.



(F.K.A. SANG) MBS, DSM
for: COMMISSIONER OF POLICE

cc Permanent Secretary
Provincial Administration & Internal Security
Office of the President
P.O. Box 30510
NAIROBI

OFFICE OF THE PRESIDENT

Telegrams: "VIGILANCE", Nairobi
Telephone: Nairobi 335124
When replying please quote
Ref. No. ....SEC.POL.2/16 VOL V/61 and date

P. 188
POLICE HEADQUARTERS
P.O. Box 30083
NAIROBI
15th May, 1998

Confidential

Mr. Samuel Kilemi S/ACP

SECONDMENT OF POLICE OFFICERS TO KENYA ANTI-CORRUPTION AUTHORITY

I have been directed by the Commissioner of Police to inform you that you have been appointed on secondment to Kenya Anti-Corruption Authority. You will be in charge of the Police Officers appointed for this secondment. You are required to report to the Director of Kenya Anti-Corruption Authority for further deployment on duties. You will be expected to report directly to the Commissioner of Police on your operations and assignments. All other administrative matters will be handled in this headquarters.

I wish you all the best in your new undertaking.

(F.K.A. SANG) MBS, DSM
for: COMMISSIONER OF POLICE

cc Director
Kenya Anti-Corruption Authority
NSSF Building
NAIROBI

Permanent Secretary
Provincial Administration & Internal Security
Office of the President
P.O. Box 30510
NAIROBI

APPENDIX P

17TH JULY, 1998

THE DIRECTOR,
KENYA ANTI-CORRUPTION AUTHORITY,
NAIROBI.

Dear sir,

RE: MANAGEMENT OF THE AUTHORITY

At a meeting of the Kenya Anti-Corruption Advisory Board held on the 17th July, 1998 it was resolved that I address you as follows:

The Board is unable to discharge its functions under the Prevention of Corruption Act on account of the manner in which you have chosen to conduct the affairs of the Authority. It is the view of the Board that the manner in which the affairs of the Authority are being conducted is neither transparent nor consistent with principles of accountability. The Authority is exposed to the very vices it was established to eradicate. As far as the Board is concerned there are no checks and balances in the Authority and no objective criteria for conducting the affairs of the Authority have been laid down. There are no systems or procedures established for effectuating the goals of the Act. On the contrary, there is a real likelihood of sycophancy being engendered within the Authority under circumstances in which considerations other merit infiltrate the management of the Authority. The above factors coalesce into a fertile mix for the growth of corruption within the Authority.

The Board has, consistent with its statutory power, previously raised the above concerns but your office has chosen to be insensitive to these matters. The fight against corruption is critical for the survival of this nation. The public has huge expectations! The international community has chosen to use corruption as a barometer for the disbursement of funds to this country. The Board cannot afford to fail in the responsibility it has been given. Yet the Board is not being given the chance to perform its functions! Board Members are unwilling to be associated with a moribund institution. Board Members have reputations to protect. Some Board Members have given notice that they would rather resign their positions on the Board rather than risk the prospect of their names being soiled through association with an institution that that does not satisfy accountability and transparency benchmarks. At base there is a crisis of confidence amongst the various organs created under the Act.

It is also useful to bring to your attention the fact that Parliament has elected a select committee to look into the issue of corruption and there is little doubt that Board Members will be summoned to appear before it. The IMF Mission is soon to visit Kenya and will similarly wish to hear from the Board. Board Members do not have any idea whatsoever on the goings-on in the Authority and will not be able to offer substantive responses to any inquiries that may be made. That will, of course, cause considerable embarrassment to the reputation of Board Members!

To afford your office an opportunity of being heard before the Board takes up these concerns with the appointing authority the Board is giving your office **FOURTEEN (14) DAYS** notice, commencing upon receipt of this letter, to convene an urgent meeting to resolve all the outstanding issues herein.

Yours faithfully,
ADVISORY BOARD

Kenneth Kiplagat
Secretary