

**ANNUAL REPORT**

**BY**

**THE HON. ATTORNEY GENERAL**

**IN RESPECT OF PROSECUTIONS OF ANTI- CORRUPTION  
/ECONOMIC CRIME RELATED CASES**

**PURSUANT TO THE**

**PROVISIONS OF SECTION 37 OF THE ANTI-CORRUPTION  
AND ECONOMIC CRIMES ACT NO. 3 OF 2003**

**FOR THE PERIOD JANUARY 2004 TO DECEMBER 2004**

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## P R E A M B L E

The commencement date of the Anti-Corruption and Economic Crimes Act 2003 is 2<sup>nd</sup> May 2003. Section 37 (1) of the Act requires the Attorney General to prepare an annual report with respect to prosecutions for corruption or economic crime. Section 37(2) further provides that the period covered by the annual report shall be the year ending 31<sup>st</sup> December.

The contents of the report as provided for under section 37 (3) of the Act shall include a summary of the steps taken by the Attorney General, during the year, in each prosecution and the status, at the end of the year, of each prosecution.

Pursuant to the provisions of section 37(4) of the aforementioned Act the annual report shall also indicate if a recommendation for corruption or economic crime was not accepted and shall set out succinctly the reasons for not accepting the recommendation.

The Attorney General is required to lay each annual report before the National Assembly following the first ten sitting days of the National Assembly following the end of the year to which the report relates as provided for under section 37(5) of the Anti Corruption and Economic Crimes Act.

The Attorney General is empowered by the Constitution of Kenya to conduct all public prosecutions in the Republic of Kenya. Section 26 (1) of the Constitution provides;

**“There shall be an Attorney General whose Office shall be an office in the public service”**

Section 26(3) provides;

**“The Attorney General shall have power in any case in which he considers it desirable to do so”**

- (a) To institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person.
- (b) To take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority ; and
- (c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

The powers of the Attorney General under this section may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

The Attorney General has continued to exercise his constitutional and statutory mandate to prosecute the cases that were referred to his office by the Anti-Corruption Commission pursuant to the provisions of the Anti-Corruption Act Section 35(1) which provides that;

**“Following an investigation the commission shall report to the Attorney General the results of an investigation”**

In exercise of his powers under section 26(3) of the Constitution the Attorney General advised, directed upon and prosecuted various cases that were forwarded to his office and hereby tables this report before the National

Assembly in compliance with section 37 of the Anti-Corruption and Economics Crimes Act.

This report is divided into the following categories.

- (a) Cases prosecuted to conclusion.
- (b) Cases pending in court.
- (c) Cases *stayed* pending determination of constitutional reference.
- (d) Cases pending judicial review.
- (e) Cases recommended for prosecution.
- (f) Cases referred to back to KACC for further investigation.
- (g) Cases forwarded to the Director of Criminal Investigations for re-evaluation of evidence for penal code offences.
- (h) Administrative action recommended.
- (i) Recommended for closure with no further action.
- (j) Restitution accepted *in lieu* of prosecution.

During the year under review, the Attorney General exercised his mandate to direct and prosecute the investigation files cases that were brought to his attention. However it should be noted that the Commission was not fully operationalized and the quality of investigations was affected by incompetence and the lack of specialized training on the part of officers seconded from the Kenya Police. This led to files being constantly returned to the Commission for further investigations.

Cases were not immediately filed in court, due to the fact that Special Magistrates were not appointed and gazzetted by the Chief Justice until 5<sup>th</sup> August 2003 vide Legal Notice No. 5342 of 2003. Thereafter my office despite severe capacity limitations as indicated hereunder proceeded to vigorously mount prosecutions under the new Act.

For the entire balance of 2003 the accused persons aggressively challenged the constitutionality of Act No. 3 of 2003, the Commission, the Special Magistrates, the power of the Commission to investigate offences under the Penal Code and present charges etc. At some stage the Special Magistrates went as far as refusing to accept charge sheets or arguments on law relating to validity of charges. At the same time magistrates exercising normal penal jurisdiction would refuse to admit any corruption related charges. This triggered a slow down on the filing and prosecution of corruption cases.

In the cases where accused persons raised constitutional challenges, heavy reliance was placed on the Constitution of Kenya (Protection of Fundamental Rights & Freedoms of the Individual) Practice and Procedure Rules, 2001 promulgated and Gazetted by the Chief Justice which provides under Rule 8 that ***"While the reference to the High Court is pending, all proceedings in the subordinate court shall be stayed pending the determination of the reference."*** The rules as framed provide a loophole as no court is empowered to determine whether or not the constitutional reference filed has any probability of success before a stay is granted. These rules have been grossly abused to the extent that in 2003 very few cases proceeded to determination before the Special Magistrates, while at the same time due to the large numbers of references made to the constitutional court, a bottleneck was created further slowing down the prosecution of corruption cases.

On 1<sup>st</sup> April, 2004 the prosecution of the criminal cases filed by KACC were temporarily halted by a ruling in CM criminal case No.752/03, and others, which was later consolidated with CM criminal case No.3156/03 where the court held that the Kenya Anti-Corruption Commission cannot investigate offences outside the Anti-Corruption and Economic Crimes Act nor can its officer sign and stamp a charge sheet as it is not a gazetted police station. This necessitated amendments of the charge sheet and filing a fresh cases in various Magistrate's Courts.

This ruling affected several other cases already filed, which had to be terminated and started afresh. I also wish to point out that during the month of April, 2004, 32 Police Investigating Officers in the then Anti-Corruptions Police Unit were redeployed to CID Headquarters as part of a restructuring exercise and a new set of Police Investigators seconded to the Commission. This resulted in delay as the new investigators had to acquaint themselves with the Act and the files.

My office made significant progress in clearing the legal hurdles setup in the Constitutional Court in particular in High Court Criminal Application No. 495 of 2003 Professor Julius Meme vs Republic and the Principal Magistrate Anti-Corruption Court. After a marathon hearing where my office was represented by a team led the Director of Public Prosecutions, the Court delivered its ruling on 24<sup>th</sup> June 2004 in which it declared the Act, the Commission and the Special Magistrates as being consistent with the Constitution. This milestone decision by the High Court paved the way forward the appointment of the new Director and Assistant Directors of KACC and the full operationalization of KACC. Subsequent to this development, the Government has since allocated to the KACC an annual budget of Ksh.1 Billion, while the annual budget for Department of Public Prosecutions (which prosecutes all criminal cases including those from CID, and corruption cases amongst others) a mere Kshs.60 million per annum. An example being the fact that a junior investigator at KACC earns about ten times more than what a junior anti-corruption prosecutor earns. This serious disparity continues throughout the ranks will inevitably lead to an exodus from the prosecuting ranks in my office and cripple the prosecution of corruption cases. This lopsided allocation of resources is bound to create both a bottleneck and demotivational factor to the anti-corruption prosecutors. It will be necessary to harmonize the terms and conditions of service of all officers in public institutions involved in the anti-corruption.

## **CASES PENDING IN COURT**

1. **KACC/ CON.4/2 CRIM CASE NO.***(No. 5, Jan-Mar. 2004)*

This was an inquiry into allegations that the Executive Director of Citizens' Alliance against Corruption had demanded a bribe from a Cabinet Minister in order to postpone a damaging press conference and drop a court case filed against him. The suspect was charged with Corruption contrary to Section 39(3)(a) of the Anti- Corruption and Economic Crimes Act as read with Section 48 of the same Act.

### **STATUS**

The case is partly heard before the Special Magistrate.

2. **KACC/INO.37/27.10.03/COURT FILE NO. 433/2005***(No. 1, Jan-Mar. '04)*

The inquiry was into an allegation that motor vehicle No. GK 288V Mercedes Benz Tipper was irregularly boarded by the Department of Chief Mechanical and Transport Engineer (CM&TE) and sold. Investigations revealed that the disposal of stores and equipment was irregular as the procedure was not followed and further that the questioned motor vehicles were generally under valued to the disadvantage of the government.

### **STATUS**

The case is pending in court.

3. **KACC/CR No. 1/1/12/03 (Kisumu CF 75/2004) (No. 3, KACC Jan-Mar. '04)**

Inquiry into allegations that a CID Officer attached to Nyanza Provincial CID demanded Ksh. 20,000/- to forbear charging complainant with stealing and forgery.

**STATUS**

Case is pending before court in Kisumu.

4. **KACC/No. 1/1/2/03 ACC39/03 (No. 3, KACC July.-Sept. '04)**

Inquiry into alleged Ksh.7,000/- bribe demand by a clerk attached to Motor Vehicles Registration Section to assist in the registration of a motor vehicle. The suspect was charged in ACC No. 39 of 2003 on charges of Corrupt transaction by Agent contrary to Section 39(3) as read with Section 48(1) (a) of the Anti –Corruption and Economic Crimes Act, 2003.

**STATUS**

Case pending before court.

5. **KACC/No. 1/1/1/04 ACC 2/04 (No. 4, KACC July.-Sept. '04)**

Inquiry into alleged Ksh.100,000/- bribe demand by police officers attached to Kamukunji Police Station so as to assist release items confiscated from the complainant. The suspect was charged in ACC No. 2 of 2004 on charges of Corrupt Transaction by Agent contrary to Section 39(3) as read with Section 48(1) (a) of the Anti –Corruption and Economic Crimes Act, 2003.

**STATUS**

Case pending before court.

6. **KACC/INQ.6/5/5.2.04 (No. 2, KACC Oct.-Dec. '04)**

Inquiry into allegations that the County Clerk at the time, Maragua County Council solicited for Ksh.50,000/- bribe for facilitating a tender award.

The suspect charged with Corruption contrary to Section 39(3) (a) of the Anti –Corruption and Economic Crimes Act, 2003.

**STATUS**

Case pending before the Special Magistrate at Embu Court.

7. **KACC/INQ. 40/27.9.04 (No. 4, KACC Oct.-Dec. '04)**

Inquiry into alleged soliciting of Ksh. 10,000/- by City Council employees to allow complainant carry on with repairs on a pavement. Suspects charged on 28.9.04 with Corruption contrary to Section 39(3) (a) of the Anti –Corruption and Economic Crimes Act, 2003.

**STATUS**

Case pending before the Special Magistrate.

8. **KACC/ INQ. 30/3.8.04 (No. 5, KACC July.-Sept. '04)**

Inquiry into alleged soliciting of Ksh.2,000/- bribe by the suspect, at the

time attached to Ruai Police Station, to forbear charging the complainant with a criminal offence. Suspect charged on 5.8.04 with Corruption contrary to Section 39(3)(a) of the Anti –Corruption and Economic Crimes Act, 2003.

**STATUS.**

Case pending before the Special Magistrate.

**RECOMMENDED FOR PROSECUTION**

9. **ACPU/86/12.11.02** (NO.1, July-Sept. '04)

This is an inquiry into allegations of illegal sale of Kiamokama Farmers Society plot No. 11/23 in Kisii town by former members of the society. It was recommended that former officials to be charged with the offences of Conspiracy to Defraud contrary to section 317 of the Penal Code and the offence of making False Documents contrary to section 347 of the Penal Code.

**STATUS**

File forwarded to CID with directions for the suspect to be charged.

10. **KACC INQ. NO. 44 OF 1.10.2003**(NO.6, July-Sept. '04)

This is an inquiry into allegations that NSSF award of contracts to M/s Alexander Forbes Financial Service Ltd, for the provision of actuarial services to NSSF was fraudulent.

## **STATUS**

The case has been referred to CID to take over and re-evaluate the evidence in respect of the former Managing Trustee of NSSF since the offence falls under the Penal Code Cap 63. In respect of the allegations of conflict of interest against the former Chairman NSSF, KACC has been directed to separate the case, recompile it forward the same to the Attorney General for further directions.

### 11. **KACC INQ. NO. 16(D) OF 2.12.2003 (No.1, April-July 2004)**

The allegations giving rise to this inquiry were that the former Managing Director of the East African Portland Cement Co. Ltd (EAPCC) irregularly obtained an advance of Kshs.1.5 million from the Company whereas a senior accountant at EAPCC Ltd irregularly advanced a Nairobi transporter a sum of Kshs.150,000/=.The recommendation of KACC is for the prosecution of the former Managing Director and the transporter be charged with an economic crime and the Financial Accountant be charged with Abuse of Office under Act No.3 of 2003.

## **STATUS**

The Attorney General accepted the recommendation of KACC and directed that the suspects be charged with committing economic crimes.

## **REFERRED TO KACC FOR FURTHER INVESTIGATION**

### 12. **KACC/INQ/43/14.11.2003(No.5, April-July 2004)**

This is an inquiry into allegations that the Managing Trustee of the National Social Security Fund (NSSF) falsified his age in order to obtain a withdrawal benefit from the Fund in April 2002.

**STATUS**

The evidence gathered was not sufficient to enable the Attorney General give directions on the investigation consequently, the file was sent to KACC for further investigations

**FORWARDED TO DIRECTOR OF CRIMINAL INVESTIGATIONS FOR FURTHER INVESTIGATIONS**

13. **ACPU/INQ.19A/7.03.2003** *((No.4, April-July 2004)*

This is an inquiry into allegations of misappropriation of funds by the Management Committee of the Ol Kalou Farmers' SACCO in Nyandarua District.

**STATUS**

Upon perusal of the file, the Attorney General concluded that the facts disclosed an offence of Stealing under the Penal Code which is under the mandate of the Criminal Investigations Department and directed that investigations be conducted by CID before submission to the Attorney General for directions.

14. **KACC/CON.4/21 (10)** *((No.2, Jan-March 2004)*

This is an inquiry into allegation that a former Member for Parliament and his accountant stole Kshs.10,605,000/= from his Constituency Bursary Funds.

**STATUS**

The Attorney General forwarded the file to the Director of Criminal Investigation to complete the investigation into the Penal Code offence of Stealing, before submission to him for appropriate directions.

15. **KACC/INQ.51(a)/17.12.03** *((No.2, April-July 2004)*

Inquiry into allegation that former directors of The Kenya College of Communications and Technology (KCCT) advanced themselves loans amounting to millions of shillings in abuse of the authority of their offices.

**STATUS**

Upon perusal of the file, the Attorney General concluded that the facts disclosed an offence of Stealing under the Penal Code which is under the mandate of the Criminal Investigations Department and directed that further investigations by CID. File already sent to the C.I.D. for evaluation and submission to the Attorney General for further directions.

16. **KACC/INQ/47(A)/17.12.2003** *(No. 5, KACC July.-Sept. '04)*

Inquiry into alleged Abuse of Office at the National Cereals and Produce Board in purchase of computers.

## **STATUS**

Upon perusal of the file, the Attorney General concluded that the facts disclosed an offence of Stealing under the Penal Code which is under the mandate of the Criminal Investigations Department and directed that further investigations by CID. File already sent to the CID for evaluation and submission to him for appropriate directions.

## **ADMINISTRATIVE ACTION RECOMMENDED**

17. **ACPU/ INQ 14 B/17.03.2003** *(NO.4, Jan.-Mar.2004)*

Inquiry into allegations that the top management of Harambee SACCO society drew cheques amounting to Kshs.8,498,900/= disguised as reimbursement. The inquiry revealed that seven officers of a task force irregularly received Kshs.7,696,400/=.

## **STATUS**

Filed forwarded back to the KACC . The Attorney General concurred with the recommendation of KACC that the Head of Public Service to take administrative action.

## **RECOMMENDED FOR CLOSURE**

18. **KACC/ INQ/5/4.02.2004** *(NO.7, July.-Sept. 2004)*

Inquiry into allegations of bribery of delegates to the delegates to the Constitution of Kenya Review Conference made by a Member of

Parliament against two ministers. The KACC found no evidence to support the allegations and recommended closure of the file.

### **STATUS**

Attorney General concurred with the recommendation of KACC and returned the file for closure.

19. **KACC/INQ 55/27.11.03** *(NO.2, July.-Sept. 2004)*

Inquiry into allegations of Abuse of Office by a Senior Litigation Counsel in the Attorney Generals Chambers. Upon investigation of the same, KACC found no evidence of any wrong doing and recommended closure of the file.

### **STATUS**

The Attorney General concurred with the recommendation of KACC and the file was returned for closure.

20. **ACPU/INQ.43(A)/6.6.2002** *(No. 3, KACC Apr.-June. '04)*

Inquiry into allegations of misappropriation of funds at the Investments Promotion Centre (IPC) through repair of leased houses. KACC found no evidence to support the allegations and recommended closure.

### **STATUS**

The Attorney General concurred with the recommendation and returned the file to KACC with directions for closure.

21. **KACC/ INQ/5/4.02.2004** (NO.1, Oct.-Dec. 2004)

An inquiry into allegations of bribery of delegates to the Constitution of Kenya Review Conference and uttering of false and alarming statements. KACC found no evidence to support the allegations.

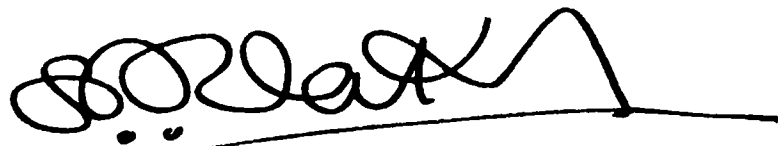
**STATUS**

The file has been returned to KACC for closure.

**STATISTICAL SUMMARY**

<b>PARTICULARS OF CASES</b>	<b>NUMBER</b>
<b>A INVESTIGATION FILES RECEIVED BY THE ATTORNEY GENERAL</b>	
From KACC Jan.-Dec. 2004	21
<b>TOTAL</b>	<b>21</b>
<b>B ACTION TAKEN BY THE ATTORNEY GENERAL</b>	
Pending in Court	8
Recommended for Prosecution	3
Referred to the KACC for further investigation	1
Forwarded to the Director of Criminal Investigations for re-evaluation of evidence	4
Administrative action recommended	1
Recommended for closure	4
<b>TOTAL</b>	<b>21</b>

**DATED** at Nairobi this...4<sup>th</sup>...day of...April...2005

A handwritten signature in black ink, appearing to read 'S. Amos Wako', written over a horizontal line.

**S. AMOS WAKO**  
**AT TORNEY GENERAL**