

**AN ANATOMY OF**  
**CORRUPTION**  
**IN THE**  
**KENYAN JUDICIARY.**

The Report of the Integrity and  
Anti-Corruption Committee of the  
Judiciary



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The Hon. Mr. Justice Johnson Evans Gicheru,  
The Chief Justice of the Republic of Kenya,  
Chief Justice's Chambers,  
P.O. Box 30041,  
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**RE: LETTER OF TRANSMITTAL**

We the undersigned having been appointed by Your Lordship to investigate alleged corruption and unethical practices in the Kenya Judiciary pursuant to the Terms of Reference set out in this Report, have the singular honour and pleasure to submit to you this Report.

**SIGNED:**

**The Hon. Mr. Justice Aaron Gitonga Ringera  
CHAIRMAN**

**The Hon. Mr. Justice J.W. Onyango Otieno  
MEMBER**



**r Honour Mrs. Wanjiru Karanja**  
**MEMBER**

**Honour Mrs. Margaret W. Muigai**  
**SECRETARY**

## **ACKNOWLEDGMENTS**

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We would like to express our most sincere gratitude to His Lordship The Chief Justice for both the material and moral support he extended to our Committee from its inception upto the successful compilation and publishing of this report.

We also extend our gratitude to the Registrar of the High Court of Kenya and the Chief Court Administrator for their invaluable support and assistance towards facilitating the Committee's operations.

It is not possible to thank each and every individual who in one way or another assisted this Committee in its work. However we single out for mention the following people:-

The Minister of Justice and Constitutional Affairs, Hon. Kiraitu Murungi, Permanent Secretary, Office of the President in charge of Ethics and Governance, Mr. John Githongo, the Honourable Judges, Magistrates and other Judicial Officers and Paralegal Staff who made oral presentations, presented written memoranda and extended their hospitality to the Committee; the Permanent Secretary, Office of the President, Department of Defence, Mr. Sammy Kyungu; the Kenya Airforce Base Commander, Eastleigh, Colonel J.N. Waweru; and the Airforce Crew for the flights to North Eastern Province during the Committee's scheduled visits; the Provincial and District Administration more particularly the District Commissioner, Marsabit, Mr. Katee; the District Commissioner, Moyale, Mr. Joshua K. Chepchieng; the District Officer, Moyale, Mr. J. M. Mutula and the District Commissioner, Mandera, Mr. Lenayapa for transport, security and hospitality during our visit; Transparency International Kenya Chapter, the Law Society



of Kenya and individual members of the Bar for their invaluable contributions to the Committee; all the Mayors and Town Clerks of Councils where the Committee held hearings throughout the Republic; the Police Department for affording us necessary security and the Prisons Department for readily availing both prisoners and remandees for interviews; our members of staff Mr. Jackson M. Ngila, Mr. Daniel Ngumbi, Ms. Joyce M. Itotia, Mrs. Angeline A. Mwakawa, Mr. Kiarie Nganga, Morris Bondora, Simon Gatua, John Ndungu and Ms. Mary Wanjiku Wanyugi who worked overtime to ensure smooth running of the Committee's operations.

Last but not least, we thank all those who in their individual or representative capacities made oral presentations and submitted their memoranda to the Committee. Those numerous contributions form the basis of the following report.

## CHAPTER ONE

### 1:1:0 INTRODUCTION

#### 1:1:1 Establishment of the Committee

1:1:2 There have been widespread and persistent allegations of corruption in the Judiciary over the last couple of years. Indeed the survey by Transparency International (Kenya) T.I. (K), ranked the Judiciary sixth among the most corrupt public institutions in Kenya in the year 2001. The position however appears to have improved in the year 2002. It was then ranked eleventh. The statistics for the year 2003, had not been published by the time of writing this report. Being cognizant of that perception and being of the conviction that it is anomalous that the institution charged with the ultimate mandate to combat corruption is itself discredited by internal cases of the vice and being determined to wipe out the vice, the Chief Justice did on 19.3.03 appoint this Committee to specifically address the phenomenon.

### 1:2:0 TERMS OF REFERENCE

- 1:2:1 The Committee's terms of Reference were to:
- (i) investigate and report on the magnitude of corruption in the Judiciary;
  - (ii) identify the nature, forms and causes of

- corruption;
- (iii) find out the level of bribery in monetary terms;
- (iv) report on the impact of corruption on the performance of the Judiciary;
- (v) identify corrupt members of the Judiciary and recommend disciplinary or other measures against them;
- (vi) recommend strategies for the detection and prevention of corruption in the Judiciary; and
- (vii) address any other related matters.

**1:2:2** The Committee was required to report from time to time and to submit its final report not later than 30<sup>th</sup> September, 2003.

**1:3:0** METHOD OF WORK

**1:3:1** The Committee commenced its work immediately on its appointment. It set out to make the necessary administrative arrangements for the discharge of its mandate. Those arrangements were finalized on 6<sup>th</sup> April and on the 7<sup>th</sup> April, the Committee held a Press Conference to launch its activities. An appeal was made to all Kenyans to take advantage of the work of the Committee to rid themselves of the yoke of judicial corruption and unethical practices. We appealed for written memoranda, dossiers on corrupt dealings, the naming of names with sufficient details and representations from the Kenyan public.

**1:3:2** In order to allow individuals with information or complaints against members of the Judiciary to present the same freely and without inhibition and also in order to protect such persons against possible intimidation or reprisals and further in order

also to protect members of the Judiciary from public ridicule on the basis of allegations whose credibility has not been assessed, the Committee decided to hold all its hearings in Camera.

**1:3:3** The Committee established its headquarters in the Chief Justice's Boardroom at the Milimani Commercial Court. The Committee also decided that in order to allow as many people as possible to access it, the Committee would visit all Judicial "districts" in the country to receive memoranda, representations, evidence and submissions. Detailed schedules of visits were advertised in the print and electronic media.

**1:3:4** The Committee conducted its hearings in Nairobi between 8<sup>th</sup> April, 2003 and 28<sup>th</sup> April, 2003 and again between 25<sup>th</sup> and 29<sup>th</sup> August, 2003. The other provincial visits were as follows—

- (i) Western Province  
5<sup>th</sup> May, 2003 - 12<sup>th</sup> May, 2003.
- (ii) Nyanza Province  
14<sup>th</sup> May, 2003 - 28<sup>th</sup> May, 2003
- (iii) Rift-Valley Province  
4<sup>th</sup> June, 2003 - 24<sup>th</sup> June, 2003
- (iv) Central Province  
30<sup>th</sup> June, 2003 - 11<sup>th</sup> July, 2003.
- (v) Eastern Province  
14<sup>th</sup> July, 2003 - 30<sup>th</sup> July, 2003
- (vi) North Eastern Province  
4<sup>th</sup> August, 2003 - 7<sup>th</sup> August, 2003
- (vii) Coast Province  
14<sup>th</sup> August, 2003 - 21<sup>st</sup> August, 2003

The only advertised hearing not conducted was at Lamu and that was due to communication difficulties. However, we were able to receive memoranda and a presentation from Lamu in Nairobi on 29<sup>th</sup> August, 2003.



REPUBLIC OF KENYA

The Report of the Integrity and  
Anti-Corruption Committee of  
the Judiciary

Chairman:

The Hon. Mr. Justice A. G. Ringera

Presented to:

The Hon. Mr. Justice J. E. Gicheru  
The Chief Justice of the Republic of Kenya

September, 2003



1:3:5 During those hearings, the Committee received written memoranda and heard oral representations and submissions from a wide cross section of persons including ordinary persons, business people, the clergy, advocates of the High Court, remand and convicted prisoners, Non Governmental Organizations as well as Judicial officers and other public servants touching on all levels of the Judiciary including the Court of Appeal, the High Court of Kenya, the Magistrates Courts, the Kadhi's Court, the Paralegal Staff and the administrative branch of the Judiciary. All in all we heard representations from 925 persons and received hundreds of written memoranda.

1:3:6 Having carefully considered the memoranda and the oral as well as the documentary evidence furnished to us, we have the solemn and pleasurable duty to present the report that follows.

1:3:7 **We have every confidence that if the measures of discipline, policy, administration, and systems reform we have proposed in this report are adopted and implemented, the Kenyan Judiciary will be largely, if not entirely, corruption free and will assume its rightful place in the ranks of esteemed Judiciaries which are free, competent, disciplined and impartial arbiters of justiciable conflicts between the state and the individual as well as between the individuals themselves. It will be the hope for the aggrieved, a bulwark for individual liberties and freedoms, a champion for the rule of law and the despair and dread of the corrupt and other law breakers.**

## CHAPTER TWO

### 2:1:0 THE NATURE AND FORMS OF CORRUPTION IN THE JUDICIARY

#### 2:1:1 Definition of Corruption

2:1:2 There is no universally accepted definition of corruption. To many religious believers, all sin is corruption. To moral purists, all moral decadence is corruption. To most citizens, bribery is the epitome of corruption. In the perception of the World Bank, corruption is the abuse of public office for private gain. In the field we also received one or two interesting definitions of corruption. The first one was that:

“Corruption is Monopoly plus Discretion minus Accountability minus Transparency in running the affairs of the government and state power and/or in managing the resources of a country”.

The second one was that:

“Corruption is where people with authority or power are willing to act dishonestly or illegally in return for money or personal gain”.

And there are people who hold that any maladministration or mismanagement of resources is corruption. The Concise Oxford Dictionary defines corruption as:

“moral deterioration, especially widespread [or], use of corrupt practices’ especially bribery or fraud”.



:3 In the realm of written law, we find the Anti-Corruption and Economic Crimes Act, No.3 of 2003, in Section 2 thereof defining corruption to mean –

- (a) an offence under any of the provisions of Sections 39 to 44, 46 and 47, [Those sections deal with the offences of bribing agents, secret inducements for advice, deceiving principals, conflict of interest, improper benefits to trustees for appointments, bid rigging, abuse of office, and dealing with suspect property];
- (b) bribery;
- (c) fraud;
- (d) embezzlement or misappropriation of public funds;
- (e) abuse of office;
- (f) breach of trust; or
- (g) an offence involving dishonesty –
  - (i) in connection with any tax, rate or impost levied under any Act; or
  - (ii) under any law relating to the elections of persons to public office.

:4 **The Committee is of the view that all the above things are species of corruption. For the purpose of this report, we take judicial corruption to mean abuse of office for the gain of self or another, bribery, fraud, embezzlement or misappropriation of public funds and breach of the oath of office and trust.**

#### :0 **THE EVILS OF CORRUPTION**

:1 Corruption is an evil without mitigation. It undermines institutional delivery of services to the people of Kenya and

contributes in no small measure to the country's economic decline and consequent poverty. Corruption undermines the rule of law and the administration of justice; it is completely subversive of our electoral system and participatory democracy; it has undermined foreign and local investors confidence in our country; it is largely responsible for our dilapidated infrastructure; it has in the recent past stood between us, as a country, and good donor relations and, of course, it has undermined the moral fabric of our society.

2:2:2 For all those reasons, if there is one fight all Kenyans including the Judiciary should engage in, it is the fight against corruption. And yet, needless to state, a Judiciary which is itself infested with the virus of corruption cannot be expected to fight the same virus in its own ranks or in others. The vice of corruption in the Judiciary must therefore be addressed fairly and squarely with the rigour it merits.

#### 2:3:0 **NATURE OF CORRUPTION**

2:3:1 The phenomenon of corruption in any institution is either perceived or actual. In the Judiciary perceived corruption is a state of affairs where a person feels some corruption has taken place because of a misplaced or lost file; in a situation where a hearing has taken place in chambers; where there is delay in the trial, ruling or judgment; where there is a misunderstanding of the rules or the legal process; or existence of "pop in" litigants and/or self appointed brokers within the court corridors and precincts; and the very nature of the work in that there must be losers and winners. Actual corruption on the other hand comprehends the occurrence of the acts or omissions herein before defined as corruption. In this report we shall address the phenomenon of actual corruption.

- 3:2 There are two kinds of actual corruption: the petty or survival corruption practised by lowly paid employees to supplement their emoluments and the grand corruption practised by well paid employees in the public and private sectors in an endeavour to satiate their greed. Both kinds of actual corruption plague the Kenyan Judiciary.
- 3:3 At the risk of simplification, one may in mathematical language express corruption as the function of either need or greed plus opportunity. As regards opportunity, it would appear that opportunities for corruption are more prevalent in an environment of bad governance. In this context bad governance refers to a situation where there is a dishonest and/or incompetent leadership coupled with an institutional framework which is the antithesis of accountability and transparency in the management of public affairs and resources and where the rule of law is weak and there is impunity for some offenders.
- 3:4 The above perception of the matter points to two major fronts in the fight against corruption. In the first front, the campaign should address the needs of the lowly paid by paying them at least a living wage and deal with the greed of the well to do. As regards greed, we venture to suggest that although human greed cannot completely be eradicated, it may be dampened and kept in check by the adoption of various suppressive measures of a legal and administrative nature which ensure that corruption does not pay. Economists would call that increasing the opportunity cost or minimizing the incentives. Lawyers refer to it as elimination of impunity. The medicine for this malady is the taking of strong disciplinary and/or criminal process sanctions regularly and without exception. In addition the public should be sensitized to the effects of corruption on their everyday lives and on the economy generally

well enough for them to shun corrupt persons and stigmatize wealth acquired corruptly. The second front in the anti-corruption campaign should aim at eliminating or minimizing the opportunities for corruption by raising the level of good governance in the institution by improving management and creating a sound institutional framework. We shall address in detail the measures required to be taken on both fronts of the anti-corruption campaign in the Judiciary in Chapter Seven of this report.

#### **2:4:0 FORMS OF CORRUPTION IN THE JUDICIARY**

- 2:4:1 From the representations made to the Committee, corruption in the Judiciary takes one or more of the following forms:-
- (i) bribery;
  - (ii) fraud;
  - (iii) abuse of office; and
  - (iv) receipt of favour without consideration.
- 2:4:2 Bribery is effected in cash or kind. Bribery in kind takes the form of –
- (i) gifts of land, fish, goats and other livestock;
  - (ii) the supply of building materials;
  - (iii) supply of fuel;
  - (iv) harambee contributions;
  - (v) personal entertainment and hospitality; and
  - (vi) sexual favours.
- From the evidence gathered the most widespread form of bribery is in the form of cash and the least prevalent is the grant of sexual favours.
- 2:4:3 Fraud as a form of corruption takes the form of –
- (i) non accounting of money received from

- litigants;
- (ii) manipulation of official receipts so that the amount shown on the duplicate receipts kept by the court is less than what was actually paid and is reflected in the payee's original receipts;
- (iii) theft of exhibits and Government stores such as furniture; and
- (iv) pretended release of an accused person on cash bail which is paid whereas the record discloses no such payment and that the release was on free bond.

**2:4:4** Abuse of Judicial office takes the form of –

- (i) drawing of pleadings by judicial officers at a fee or gratis;
- (ii) rendering legal advice on actual or intended litigation;
- (iii) manipulation and doctoring of the record of evidence and proceedings and of the dates of delivery of judgments and rulings;
- (iv) acquiring an interest in the subject matter of litigation
  - e.g.
  - (a) Land; or
  - (b) a percentage of the damages awarded in tort or contract;
- (v) employment of relatives and friends;
- (vi) favoritism of some litigants, accused persons or advocates;
- (vii) unmeritorious recruitment and promotions;
- (viii) failure, neglect or indeed refusal by Judicial Officers to pay for goods sold and delivered or for services rendered at their request and instance;

- (viii) purchases of bonded goods at less than their market value;
- (ix) conduct of business without the necessary licence (s);
- (x) use of prison labour for private purposes; and
- (xi) receipt of per diem payment for official duty which is not performed.

**2:4:5** Receiving a favour without consideration takes the form of –

- (i) free transport;
- (ii) free entertainment and hospitality;
- (iii) employment of relatives and friends of judicial officers;
- (iv) gifts, and
- (v) sexual favours.



## CHAPTER THREE

### 3:1 THE CAUSES OF CORRUPTION IN THE JUDICIARY

3:1:2 In this Chapter, we consider the Causes of corruption in the Judiciary from the perspective of those who made representations to us: we endeavour to rank them according to the number of times they were canvassed; we analyse them and express our own views thereon, and we make some concluding remarks.

### 3:2:0 CAUSES OF CORRUPTION RANKED

3:2:1 On the preponderance of the representations made to us, the Causes of Corruption in the Judiciary were identified and ranked as follows in descending order –

- (i) Poor terms and conditions of service;
- (ii) Bad deployment and transfer policy and practice;
- (iii) Delays in the hearing and/or determination of cases;
- (iv) Non meritocratic recruitment and promotion practices;
- (v) Human greed;
- (vi) Ignorance by members of the public about

- their legal rights and entitlements, procedures and processes of the Court and about the law generally;
- (vii) The existence of wide discretion on the part of the Judicial Officers in both Civil and Criminal matters;
- (viii) The existence of a culture of corruption in the Society at large;
- (ix) Excessive workload on Judicial Officers due to insufficient personnel and inadequate and/or antiquated equipment;
- (x) Inadequate or non existent supervision of Judicial Officers and Staff;
- (xi) Inaction or ineffective action against identified corrupt officers;
- (xii) Protection of corrupt officers by their Superiors;
- (xiii) Loss or misplacement of court files;
- (xiv) Interference by the executive branch of Government;
- (xv) Retention in Service of Judicial Officers after attaining compulsory retirement age;
- (xvi) Conflict of interest on the part of Judicial Officers;
- (xvii) The legal system's inherent delays;
- (xviii) Existence of some procedural rules and regulations which allow corruption,
- (xix) Lack of sensitization of Magistrates on corruption issues; and
- (xx) Non availability or inaccessibility of Judicial services.
- (xxi) Existing phobia for courts among common people.
- (xxii) Poor conditions in prisons and remands



3:3:0 ANALYSIS OF THE CAUSES OF CORRUPTION

3:3:1 Poor terms and Conditions of Service

If there was any perceived Cause of Corruption which enjoyed an affirmative consensus from both members of the public and Judicial Officers, it was this one. We heard that the salaries and allowances paid to Magistrates and Paralegal Staff were inadequate to enable them live according to their high status in society. We were also told that where Government housing was not provided, the house allowance paid to the officers was inadequate to enable them lease accommodation commensurate with their status. The Committee was also told that lack of either institutional transport for Magistrates or adequate allowances or loans to enable them purchase their own motor vehicles exposed them to the temptations of accepting transport from members of the public and other public servants. Concerns were also expressed regarding the want of any or any adequate physical security for Magistrates. We were told that such want of security has occasionally forced some magistrates to accept bribes offered with menaces.

3:3:2 **The Committee concurs with the view that the aforesaid poor terms and conditions of service are conducive to corruption and must be addressed as one of the strategies of fighting against Judicial corruption. However, we are nonetheless of the persuasion that poor terms and conditions of service are not in themselves a Cause of Corruption. Examples abound of both lowly paid persons of impeccable integrity and highly remunerated persons whose**

second name is "corruption". Indeed although the thrust of representations before us was that Magistrates and Paralegal Staff suffer the yoke of poor remuneration compared to Judges, Chapter six of this report will show that Judicial Corruption is not a preserve of Magistrates and Paralegal Staff.

3:3:3 Poor deployment and transfer Policy and Practices

We were informed throughout Kenya that the practice in the Judiciary was largely to recruit and deploy Paralegal Staff in their home localities. We were informed that some joined service and retired without ever having been transferred. Examples were many of staff who had stayed in one station in excess of ten, fifteen and even twenty years. We were also informed that it was common for the Judiciary to recruit into Magisterial Service practising advocates and post them to the very towns and areas where they had been practising law. The Committee also received widespread submissions to the effect that there was a corruption problem emanating from overstay of all cadre of Judicial Officers in one station. The public view is that all those practices resulted in judicial corruption.

3:3:4 **We are in agreement with the public view that the above practices are conducive to corruption. They all result in Judicial Officers becoming unduly familiar with actual and prospective consumers of judicial services. Such over familiarity is a fertile ground for corruption.**

**3:3:5 Delays in the hearing and/or determination of Cases**

The Committee was informed that the legal process was replete with both deliberate and non deliberate delays in the conclusion of hearings and the delivery of rulings and judgments. In the opinion of many interviewees, such delay was a cause of corruption in the Judiciary.

**3:3:6 We agree with that view. We are of the view that delay, whether deliberate or otherwise has the effect of inducing anxiety on the part of litigants and that such anxiety leads them to make corrupt approaches to Judicial Officers. Indeed deliberate delay is always a signal that something is wanted. In the language of contract lawyers it is an invitation to treat.**

**3:3:7 Non-Meritocratic recruitment and Promotions**

We heard severally that the Judiciary was plagued with the cancer of unmeritocratic recruitment and promotions. We received representations that Judges were appointed and/or promoted on the basis of political and/or ethnic considerations rather than competence and integrity. We were informed of Judges who had been appointed to their offices while they had either serious disciplinary cases pending before the Advocates Disciplinary Committee or they had actually been found guilty of and disciplined for serious offences. The Committee also heard that the Judiciary had a practice of promoting all cadre of staff without advertising the existence of vacancies internally and/or externally and without any interviews whatsoever. Indeed one of our informants told us that she was surprised to receive a letter containing a decision to promote her to the rank

of Chief Magistrate when she had not even served the minimum period of three years contemplated by the Scheme of Service in the previous rank. We were also told that in recent times, the Judiciary had allowed heads of stations to recruit specified numbers of Paralegal Staff for their stations. That direction had resulted in the recruitment of relatives and friends and the outright purchase of positions in the Judicial Service. As a result of such practices, the Committee was informed, the Judiciary had become "a family business". We were informed that it is difficult to find a Paralegal Officer who is not either a friend or a relative of a serving or retired Judicial Officer. In a number of instances, members of a nuclear family worked together in the same station. The Committee was informed that those practices were a cause of corruption in the Judiciary.

**3:3:8 We concur with that view. Recruitment of Officers on the basis of a criteria other than one which is exclusively or mainly merit and competence based is not only itself a form of corruption but the officers who are recruited thus are themselves prone to corruption. In addition, the existence of family ties, corruption networks and patronage in the Judiciary as a result of such recruitment and promotion practices makes the discipline of staff virtually impossible. The impunity of the officers leads to unfettered corruption.**

**3:3:9 Human greed**

The factor of human greed was often cited as a Cause of Corruption in the Judiciary. We were told that greed on the part of members of the public, the prosecutors and Judicial staff all combine to cause corruption in the Judiciary.

**3:3:10 The Committee wholly agrees with that view. Indeed,**

we are of the persuasion that greed is the predominant Cause of Corruption and that the other factors cited are in reality either excuses, rationalizations, or opportunities and loopholes which afford corruption a chance. Greed is innate in human beings. However, the density varies from individual to individual. The propensity to indulge in corruption is directly proportional to the greed density in an individual. In the Judiciary, the greed of officers opens them to temptation to indulge in corruption, the greed of Prosecutors and Advocates makes them to broker corrupt transactions between themselves and/or members of the public on the one hand and Judicial Officers on the other hand, and greed on the part of litigants drives them to corrupt Judicial Officers. Indeed the depressing reality of the matter is that to the most greedy of the greedy no amount of money is enough, not even all the money in the world.

**3:3:11 Ignorance of the members of the public**

It is a truism that a majority of persons who deal with the Courts as litigants, complainants or witnesses are ignorant of their procedural and substantive legal rights, entitlements and obligations or the consequences of their acts or omissions in the eye of the law. They do not know of the free services they are entitled to and they do not know what Judicial Officers and Staff are supposed to do or not to do. The Committee was informed that such ignorance was taken advantage of by Judicial Officers, Prosecutors, Paralegal Staff, and even Probation Officers.

**3:3:12** We agree that ignorance of members of the public about their legal rights, privileges, entitlements, obligations, the legal process and the substantive law provides a fertile

ground for Judicial corruption. In their quest for help to tread the legal path, the public engages in acts of corruption knowingly and sometimes unknowingly.

**3:3:13 The Existence of wide discretion in Civil and Criminal matters**

Judicial Officers have wide discretion as regards the time taken to hear a case; adjournment of cases; whether or not to grant bail and on what terms and conditions; the severity of sentence in criminal cases; the time within which to deliver a judgment or ruling; the grant of equitable relief; the quantum of damages in tort and contract; the allocation of cases for hearing; and the prioritization of allocated cases. The Committee heard that this discretion was either a cause of or it contributed to Judicial corruption.

**3:3:14** We do not agree that the existence of Judicial discretion is of itself a cause of or a contributor of corruption in the Judiciary. We are, of the persuasion that it is the abuse of discretion which constitutes corruption and that the existence of the discretion provides an environment in which corruption may thrive. In that connection, we recall that one of the aphorisms is that corruption is monopoly plus discretion minus accountability and transparency. Given that the Judiciary has a monopoly of a very large percentage of the capacity and authority for conflict resolution, the existence of wide discretion on the part of its officers cannot be ignored in any anatomy of Judicial corruption.

**3:15 The existence of a culture of corruption in society**

The Committee heard several representations about the corruption of Kenyan society. We were told that corruption is viewed as normal in society, that corrupt individuals are not shunned and, that corruptly obtained wealth is not stigmatized. On the contrary, correct behaviour is seen as folly, the corrupt are feted and esteemed, and corruptly acquired wealth is envied and idolized. We were told that as a result of this climate, advocates collude with Judicial officers and induce them to be corrupt and they plausibly misrepresent Judicial Officers as corrupt and attribute adverse decisions to corruption. Prosecutors, too, we were informed, collude with magistrates for corrupt purposes and that occasionally, they withhold vital evidence. Their overstay in stations was condemned in round terms. We were also told that the Paralegal Staff do manage to plausibly misrepresent Judicial Officers as corrupt. We were further informed that members of the public desire to win cases by all means, fair and foul and many believe that justice cannot be obtained without a consideration. The Committee heard that the cause of this nefarious culture of corruption in Kenyan Society is human greed and moral degeneration.

**3:16 We accept that there is a culture of corruption in Kenyan society and that it is conducive to Judicial corruption. We do not however entirely agree that this culture has been caused by greed and moral degeneration. In our opinion, Kenyan society is not any more morally degenerate than other societies and Kenyans do not have a higher greed density than other mortals. We think that the culture of corruption in Kenya has been fostered largely by**

**a climate of impunity for corrupt individuals and poor governance in its broadest rendition to include poor leadership, weak rule of law, and inappropriate institutional frameworks.**

**3:3:17 Excessive workload on Judicial Officers**

The Committee heard that Judicial Officers are largely overburdened with official work due to their insufficient numbers and the prevalence of inadequate and antiquated equipment. Due to those constraints, a situation obtains whereby it is not possible to finalize hearings or obtain copies of proceedings expeditiously. Consequently members of the public resort to bribery to facilitate their jumping of the Judicial queue.

**3:3:18 The Committee concurs with those views. Shortage of personnel and inappropriate equipment both create an environment which is conducive to corruption.**

**3:3:19 Supervision of Court Staff**

The Committee received several representations that the Judiciary appeared to be the only institution in the country whose middle level and higher cadres were not supervised by any one. The Heads of Stations informed us that administrative authority is reposed with the Registrar at Nairobi and the staff under them know that no disciplinary action could be taken against them by anybody other than the Headquarters. Resident Judges also complained that in reality they had no authority over the Deputy Registrars or other Magistrates under them. Delegation of authority, we were informed, is not the forte of the Judiciary. The hallmark of Judicial authority is



centralized exercise of power. We heard that such a situation contributes to corruption.

**3:3:20** We concur with those views. In our view Judicial administration is creaking and a situation of near anarchy prevails. Many officers, including junior ones, are a law unto themselves. Such an atmosphere is of course conducive to corruption.

**3:3:21 Inaction or ineffective action against errant Judicial Officers**

The Committee heard several representations from various Heads of Judicial Stations that in many cases complaints against errant and corrupt officers are not acted upon. And when acted upon, the action taken is to transfer the said officers to other stations in the same capacities and occasionally on promotion. And sometimes, the affected officers are after a while retransferred to the same stations. We were also told that confidential information on officers is disclosed to them by Headquarters. And on occasion, an incharge complaining about a corrupt officer to the police is reprimanded and asked to institute an internal investigation.

**3:3:22** The Committee wholly agrees with the view that non existent or insufficient sanctions against errant Judicial Officers is a major contributor of corruption and indiscipline within the Judiciary. A policy of transferring errant officers is a futile one. Transfer should not be a punitive measure but one of the instruments of good administration.

**3:3:23 Protection of Corrupt Officers by their Superiors**

The Committee heard that due to the recruitment and promotion of officers on the basis of corruption, nepotism, tribalism, patronage or regionalism, errant Judicial Officers enjoyed a high degree of immunity from sanctions. Contemplated disciplinary action is often halted upon intercession of high personages in the Judiciary.

**3:3:24** We agree with these views. As long as there is a perception that no or no adequate disciplinary measures will be taken against corrupt and insubordinate officers in the Judiciary, corruption will thrive. In our view the cause of corruption contemplated by this rubric is inextricably intertwined with the cause expounded upon in paragraph 3:3:21 and both are two faces of the same coin: impunity.

**3:3:25 Loss or misplacement of files**

The Committee heard that the phenomenon of lost or missing files invites corruption from members of the public. A clerk is usually bribed to look for a misplaced or lost file and on occasion a litigant bribes a clerk to misplace a file with a view to halting or delaying proceedings where an adverse verdict is expected.

**3:3:26** We have no doubt that the phenomenon of lost or missing files is one of the contributors to corruption in the Judiciary.

**3:3:27 Interference by the Executive**

We heard that in outside stations, courts rely on the District Treasury for disbursement of the court's own funds. And in

other cases, courts rely on police transport to discharge their duties. We were informed that in such situations, the administration gets the upper hand in court matters and often takes advantage of the situation to demand for specific outcomes in certain cases.

**3:3:28 The Committee agrees with the view that want of independence by the Judiciary in matters financial or otherwise material are a cause of corruption in the Judiciary. The adage that he who pays the piper calls the tune is not out of place in these circumstances.**

**3:3:29 Retention of Judicial Officers after attainment of compulsory retirement age**

We received several representations that the practice of retaining Judicial Officers in service on contractual terms after their attainment of the compulsory retiring age was a cause of corruption in the Judiciary. We heard that Judicial Officers on contract feel indispensable and are inclined to make hay while the contractual sun shines for the usual disciplinary measures including dismissal with loss of benefits are no longer available to the employer. We were also told that such officers have no incentive to uphold high standards of ethical conduct in the discharge of duty.

**3:3:30 The Committee fully concurs with these views. Several cases of indolent, corrupt, and arbitrary retired magistrates on contract were brought to our attention.**

**3:3:31 Conflict of Interest**

The Committee received representations that some Judicial

Officers engage in businesses which by their very nature compromise their impartiality. Such businesses included operation of public transport, shop keeping, selling liquor and operating petrol service stations. We heard that such operations lead Judicial Officers to abuse their office by favouring their customers in litigation, rendering unfair decisions to their competitors and coercing consumers to patronize their establishments. We also heard that some of those operations serve as direct or indirect bribe collection centres. They are direct collection centres when bribes are deposited with the managers thereof. And they are indirect bribe collection centres when litigants "purchase" goods and services therefrom at above market prices. The margin above the market price is a disguised bribe.

**3:3:32 The Committee agrees that the existence of a conflict of interest on the part of a Judicial Officer is a cause of corruption and that the businesses in question are in reality avenues of corruption.**

**3:3:33 Inherent delays in the legal system**

The Committee received many representations to the effect that the inherent delays in the legal process were a standing invitation to corruption. In a criminal case, for example, an accused person enters a plea of not guilty and is released on bond or remanded in custody. He then has to wait for the hearing date and in between he has to contend with mentions every two weeks. All these delays are a drain on his emotional and financial resources. The temptation to short circuit the process is indeed high.

**3:3:34 We agree with the view that one of the causes of corruption in the Judiciary is the delay inherent in the legal process in**

both criminal and civil matters. The laws delays have been famous since their fictionalization by Charles Dickens in the 19<sup>th</sup> Century England. Any anti-corruption strategy mounted cannot ignore the phenomenon.

**3:35 The Existence of Procedural Rules and Regulations allowing Corruption**

The Committee heard that the practice of assessing party and party costs by the Executive Officers in the subordinate courts and the drawing of decrees by the court without notice to or participation of the parties was conducive to corruption.

**3:36** Whereas we accept that discretion may afford an environment for corruption, we are of the persuasion that the existence of a rule permitting discretion is not itself a cause of corruption. However, as Oliver Wendell Holmes, the great American Jurisprude posited many years ago, the path of the law has been experience rather than logic. It follows therefore that rules and practices sustaining the exercise of discretionary power which is often abused must be dealt with in the fight against judicial corruption.

**3:37 Lack of Sensitization of Magistrates on Corruption**

We were informed that one of the contributory causes to corruption is the lack of sensitisation of Magistrates on the issue.

**3:38** We don't agree. There is no Magistrate or other judicial officer who does not know that corruption is a crime. They engage in corruption with a doubly guilty conscience due to their training as lawyers and the ethics of their calling. Having said that the Committee is nonetheless supportive

of a training programme for Judicial Officers which incorporates corruption sensitization. We think such training is edifying in itself and might lead to better performance of judicial and administrative duties on the part of Judicial Officers.

**3:3:39 Non-availability or inaccessibility of Judicial Services**

The Committee heard that in those areas where judicial services were unavailable or were not close to the people, the litigants were inclined to bribe Judicial Officers and Court Prosecutors in order to cut the costs inherent in their appearances in distant Courts.

**3:3:40** The Committee accepts the above factor as a valid cause of corruption. It must be addressed alongside the other causes

**3:3:41 Existing phobia of courts among the common people**

The Committee heard from a cross section of people that many of them had inborn fear of appearing in court. There seems to exist a belief that anything can happen when one goes to court, and the likelihood of being sent to jail even for something done unintentionally looms large. In order therefore to avoid such a situation, one feels that they would rather pay some 'bribe' to the clerk in order to avoid standing in the dock. This mostly happens in traffic cases where we found out many people just give the money to the clerks for their matters to be "sorted out" instead of appearing in court.

**3:3:42** Whereas such fear may seem unfounded, the Committee

came across cases where members of the public attending court were imprisoned for not bowing on entering the courtroom. Such instances would aggravate such fears and exacerbate such phobia.

### **3:3:43 Poor Conditions in Prisons and Remands**

We received many complaints about the conditions prevailing in our prisons and remands. There is overcrowding, bad food, rampant diseases and even molestation of the remandees and prisoners by other prisoners. Every person would therefore like to avoid going to prison at any cost. If an accused person foresees a situation where he can be imprisoned or remanded in custody, he would then be ready to part with anything to avoid such a situation. This fear breeds corruption especially where processing of bond documents is concerned.

**3:3:44** We agree that this fear is well founded especially in instances where accused persons are taken to court on Fridays and there is a likelihood of their sureties not having proper securities. This is intertwined with 3:3:13 where the trial magistrate has wide discretion and can give an accused person a custodial sentence even for a petty offence.

### **3:4:0 CONCLUDING REMARKS**

**3:4:1** It is evident that the causes of judicial corruption are many and varied. They may be broadly categorized as personal factors, institutional weaknesses, the external environment and the shortcomings in the legal process itself. If one looked at the causes outlined and analyzed in this Chapter with that prism, one would attribute to personal factors such things as deliberate delay in the hearing and determination

of cases, abuse of judicial discretion, individual greed, protection of corrupt officers, deliberate loss or misplacement of records, and conflict of interest. To institutional weakness we would attribute such factors as poor terms and conditions of service, poor deployment and transfer policy, non deliberate delay in the hearing and determination of cases, non meritocratic recruitment and promotion of officers, excessive workload on officers, want of any or any adequate supervision of staff, inaction or insufficient action against errant officers; protection of corrupt officers, loss or misplacement of files, retention of judicial officers on contract after retirement age, lack of anti-corruption sensitization and unavailability or inaccessibility of judicial services. To the external environment, one can only visit ignorance by members of the public on their legal rights, the culture of corruption in the Kenyan Society and interference by the Executive in the administration of justice. And to the shortcomings of the law itself, one may attribute non-deliberate delay in the hearing and finalization of cases, the existence of wide discretion on the part of Judicial Officers, and the existence of rules and regulations which are corruption friendly.

**3:4:2** It follows from the foregoing paradigm that a successful anti-corruption strategy in the Judiciary must in the order of importance address the issues of institutional governance, personal idiosyncrasies, the external environment and the substance of our procedural law. Such an approach is adopted in Chapter Seven of this report.



## CHAPTER FOUR

### **4:1:0 THE MAGNITUDE AND LEVEL OF CORRUPTION IN THE JUDICIARY**

#### **4:1:1 The magnitude of corruption**

Allegations of corruption against Judicial Officers were widespread. In most of the places, we were told that the magnitude of corruption was high. Be that as it may, we are of the opinion that the best gauge of the magnitude of corruption is the empirical evidence gathered rather than the repetition of the allegations.

#### **4:2:0 THE EVIDENCE**

As at 30.8.03, the Judiciary had a workforce of 3,234 officers consisting of 11 Judges of Appeal, 44 Judges of the High Court, 254 Magistrates, 15 Kadhis, and 2910 Paralegal Staff. As the statistics in Chapter Six demonstrate, out of that number of officers, only one hundred and fifty two (152) of them were implicated in corruption and related activities. And out of that number only one hundred and five (105) Judges and Magistrates were implicated. On a percentage basis, the level of implication

was fifty six (56%) per cent in the Court of Appeal, fifty (50%) per cent in the High Court and thirty two (32%) per cent of the Magistrates. From these statistics it may be concluded that only a minority of Judicial Officers may be involved in corruption and unethical conduct.

**4:2:1** On the basis of empirical evidence, the Committee's finding is that the magnitude of corruption in the Judiciary is high but not too high. We think that the apparent conviction of many respondents to our interviews that corruption is very high in the Judiciary arises from the phenomenon of perceived corruption (rather than actual corruption) which we expounded upon in paragraph 2:3:1 of Chapter two. However, given the public expectation that Judicial Officers, like Ceaser's wife, should be above suspicion, even those levels of possible infection by the virus of corruption are intolerably high.

#### **4:3:0 THE LEVEL OF CORRUPTION IN MONETARY TERMS**

**4:3:1** The evidence and representations received by us impel a finding that on the whole, the level of bribery is directly proportional to the gravity of the matter in criminal cases or the value of the subject matter in civil cases, the rank in the Judiciary of the beneficiary of the bribe and of course the resources at the disposal of the benefactor. In other words, Judges on average receive bigger bribes than magistrates irrespective of the nature of the matter under consideration, and that as between officers of the same rank, the gravity of the matter and the resources of the supplicant to Judicial relief are decisive.

**4:3:2** In the paragraphs that follow, we attempt on the basis of



information gathered in the course of our work to construct a Judicial corruption tariff based on various activities by the Judicial Officers and the rank of the officers concerned:

#### 4:3:3 Criminal Cases

For purposes of our exposition, we classify situations in which bribes are sought and/or given in order to induce acquittals or reversal of convictions on appeal into minor offences, serious non capital offences and capital crimes. Minor offences include all manner of misdemeanors, theft, burglary and stealing, obtaining by false pretences, possession of illicit drinks, and assault. In the rubric of serious non capital offences, we include grievous bodily harm, firearm offences, drug offences, fraud, rape, simple robbery, manslaughter and such like felonies. Capital crimes include murder, robbery with violence and appeals thereon. The corruption tariff in the above situations is as follows—

- (i) Minor Offences:  
Kshs.2000/= to Kshs.50,000/=.
- (ii) Serious non-capital Offences:  
Kshs.20,000/= to Kshs.500,000/=
- (iii) Capital Offences:  
Kshs.40,000/= to Kshs.1,000,000/=

#### 4:3:4 Civil Cases

In the Magistrates Courts, the bribes range from Kshs.3,000/= to Kshs.60,000/= on average. However, we heard that in personal injury claims magistrates take a “cut” of between 10% and 30% of the award. In the High Court, the range is Kshs.50,000/= to Kshs.2,000,000/=. In the Court of Appeal,

the range is in excess of as much as Kshs.15 million.

#### 4:3:5 Other Judicial Activities

- (i) Approval of surety/release on bail:  
Kshs.2,000/= to Kshs.10,000/=.
- (ii) Reinstatement of cancelled bond:  
Upto Kshs.20,000/=.
- (iii) Variation of bail terms:  
Kshs.5,000/= to Kshs.13,000/=
- (iv) Certification of proceedings:  
Upto Kshs.5,000/=.
- (v) Inducing favourable exercise of Discretion in Sentencing:  
Kshs.10,000/= to Kshs.50,000/=
- (vi) Inducing a wrongful conviction:  
Upto Kshs.80,000/=.
- (vii) Processing of Surety documents by Clerks:  
Kshs.200/= to Kshs.500/=.
- (viii) Tracing lost/misplaced files:  
Kshs.50/= to Kshs.1,500/=.
- (ix) Drafting of pleadings by Paralegal Staff:  
Upto Kshs.5,000/=.
- (x) Typing of Proceedings:  
Kshs.500/= to Kshs.1,500/=.
- (xi) Employment as a Paralegal:  
Kshs.40,000/= to Kshs.50,000/=.

#### 4:3:6 Corruption Tariff according to Seniority:

- (i) Judge of Appeal:  
Upto an amount in excess of Kshs.15 million.
- (ii) High Court Judge:  
Kshs.50,000/= to Kshs.1.6 million
- (iii) Magistrate:  
Kshs.4,000/= to Kshs.150,000/=. The

Committee also heard that some Magistrates take anything available.

- (iv) **Clerks:**  
Kshs.50/= to Kshs.5,000/=.
- (v) **Secretaries:**  
Kshs.500/= to Kshs.1,500/=.

4:3:7 It is evident from the above analysis that it is not possible to state with certainty what the level of bribery is in monetary terms. What is very clear is that both petty corruption and grand corruption have a place in the Kenyan Judiciary and that to the corrupt officers, enhancement of rank is an invitation to enhanced bribes.



## CHAPTER FIVE

### 5:1:0 THE IMPACT OF CORRUPTION ON THE PERFORMANCE OF THE JUDICIARY

5:1:1 In the course of our hearings throughout Kenya we received several memoranda and representations on the impact of corruption on the Judiciary as an institution and on individual officers collectively. We also received representations touching on the impact of corruption in the legal system generally and even on the national economy. In the premises, although our specific term of reference was to examine the impact of corruption on the Judiciary only, we think we would not do justice to the people of Kenya if we exclude those other aspects touched upon by the public as the bitter fruits of corruption. Taking that view of the matter, we will in this Chapter identify and analyse the impact of corruption on both Judicial performance and otherwise and make some pertinent concluding remarks.

### 5:1:2 Impact of Corruption on Judicial Performance Determined

On a scale of descending importance, the public identified the impact of corruption on the performance of the Judiciary as—

- (i) Loss of confidence in the Judiciary;
- (ii) Denial of justice;
- (iii) Delay of justice;
- (iv) Undermining of the rule of law;
- (v) Promotion of apathy and inefficiency on the part of Judicial Officers;
- (vi) Dilution of the quality of jurisprudence;
- (vii) Disorganization in Court registries; and
- (viii) Loss of self respect and esteem on the part of Judicial Officers.

### **5:1:3 Other impact of Judicial Corruption**

In addition to Corruption's impact on judicial performance, the representations and submissions received by the Committee disclose that corruption has the following other impact –

- (i) Poor economic growth;
- (ii) Loss of Government revenue;
- (iii) Loss of confidence in the justice system as a whole;
- (iv) Increase in crime;
- (v) Prison congestion;
- (vi) Resort to extra Judicial methods of conflict resolution;
- (vii) Violence against Judicial Officers; and
- (viii) Reinforcement of a corruption culture in society.

## **5:2:0 THE IMPACT OF CORRUPTION ANALYZED**

### **5:2:1 Loss of Confidence in the Judiciary**

The Committee heard that corruption has led to loss of

confidence in the Kenyan Judiciary by Kenyans and by the International Community. This lack of confidence has arisen because of the perception that the Courts are not rendering pure justice in accordance with the law and the evidence. Many were of the view that corruption in the Judiciary has promoted both a denial of and delay of justice. We heard that as a result of corruption there are malicious prosecutions, wrongful convictions, unjust decisions and denial of justice to the poor in particular. We further heard that corruption promotes case delays and backlog in litigation. We also heard that corruption has the effect of spawning a suspect jurisprudence whereby different decisions are rendered by different courts and sometimes by the same court on similar facts and the law. In other words, the jurisprudence of the court has been diluted.

**5:2:2 The Committee entirely agrees with the public view that corruption's major impact has been the reduction of public confidence in the Judiciary.**

### **5:2:3 Rule of law undermined**

The Committee heard several representations that corruption undermines the rule of law. We heard that the integrity, moral authority and independence of the Judiciary are all undermined by corruption.

**5:2:4 We completely agree with the public perception. The gravity of the situation is indeed underscored by a deeper intellectual appreciation of the matter. The *raison d'être* for a Judiciary in modern constitutional governance is to afford an independent and fair mechanism for the adjudication of legal disputes between individuals and the state on the one hand, and between individuals inter se on the other hand. Indeed a free, independent and impartial Judiciary is the**

pivot on which the rule of law revolves. It is trite learning that the quintessence of the rule of law is that all Government power stems from the law; all persons are equal before the law; and none is to be deprived of life, liberty or property save in accordance with due process in an independent and impartial tribunal established by law. There can be little, if any, dispute that the rule of law is a necessary condition precedent to economic development, the enjoyment of human rights and even national security. If the above premise is correct, and in our view it is, then corruption's most serious impact is to undermine the rule of law.

**5:2:5 Resort to extra Judicial methods of conflict resolution**

The Committee heard that as a result of loss of public confidence in the Judiciary, people were increasingly taking the law into their own hands to settle interpersonal disputes. We heard of mob lynching of suspects and murder of adversaries in land disputes.

**5:2:6 We concur with the public view that one of the consequences of the loss of public confidence in the Judiciary was increased resort to extra legal methods of conflict resolution.**

**5:2:7 Increase in incidence of crime**

We heard submissions that the realization that one can buy justice and in effect impunity leads to increased crime. We also heard that corruption leads to recidivism of offenders who have been punished lightly.

**5:2:8 We concur with these views.**

**5:2:9 Violence against Judicial Officers**

The Committee heard that supplicants to justice who have paid a fee for an expected outcome are likely to resort to personal violence against the corrupted Judicial Officer if they felt shortchanged.

**5:2:10 Although no empirical evidence in support of such a proposition was offered, the Committee thinks the prospect is not far fetched.**

**5:2:11 Promotion of apathy and inefficiency on the part of Judicial Officers**

The Committee heard that corruption affects the morale and efficiency of Judicial Officers in two respects. In the first respect, the expectation that they will be bribed to do the work they are employed to do leads officers to adopt a slothful disposition until and unless their palms have been greased. In the second place, officers who have worked very hard to produce lengthy reasoned judgments are completely demoralized when these judgments are overturned on appeal by appellate Judges who have been corrupted and who do not even care to explain in detail or sufficient detail the reasons for their decisions. The latter was a common complaint from magistrates.

**5:2:12 The Committee accepts the validity of these representations. Corruption often strikes at efficiency and high morale in officers. However, it is also true that corruption also spurs otherwise lazy bones to burn the midnight oil and boosts the morale of the corrupted officers. That however is at**

the expense of justice and this Committee frowns at it.

**5:2:13 Loss of confidence in the legal profession and the legal system as a whole**

We heard submissions to the effect that as a result of the prevalence of corrupt practices involving Advocates and Judicial Officers working in concert, there was loss of public confidence in Advocates as officers of justice. We also heard variously and repeatedly that judicial corruption at the magisterial level has completely undermined the role of Advocates in the administration of justice and deprived them of legal business. We also heard that litigants in civil cases and accused persons in criminal cases were frequently told by magistrates that the final decision rested with them and, accordingly, there was no point of engaging an advocate. Apart from undermining the role of Advocates, we heard that judicial corruption has resulted in general loss of confidence in all stakeholders in the justice sector. Public Prosecutors, Investigators, Prison Officers and Probation officers were all viewed as walking magnets of corruption. The credibility of the justice system as a whole has been seriously undermined.

**:2:14** The Committee accepts the legitimacy of those submissions. They are, even according to our own individual experiences, well founded.

**:2:15 Loss of self-respect and esteem by Judicial officers**

We heard that one of the effects of corruption was on the psychology of the benefiting Judicial Officer. He loses his

sense of self-respect and esteem.

**5:2:16** Although the Committee did not receive any scientific evidence in support of the proposition, we accept it as valid. In our view a Judicial Officer who succumbs to corruption knows deep down that he is a judicial mercenary who has parted company with the cause of justice. Like a harlot, he cannot have any self-respect and esteem any appearances to the contrary notwithstanding.

**5:2:17 Disorganization of Court Registries**

The Committee heard that corruption was partly responsible for the disorganization apparent in court registries in two ways. First, corruption contributes to the delay in the hearing and finalization of cases either by virtue of expectation of a bribe or because a bribe has been paid expressly for such purpose. Either way, files accumulate in the registry. Secondly, files are deliberately misplaced either to induce a bribe to "find" them or because a bribe has been paid to hide them.

**5:2:18** We agree that corruption is partly responsible for the disorganization seen in our courts' registries.

**5:2:19 Prison Congestion**

The Committee was told that the congestion witnessed in our prisons and remand homes is partly due to corruption. We heard that some of the remandees were in prison due to denial of bail or grant of excessive bail. We heard that courts were quite liberal in dispensing prison terms to those who could not bribe the Judicial Officers concerned. In many places, we were told that the prisons are full of poor people and rich persons never



entered prison gates.

5:2:20 We think the above views were exaggerated. In our experience both rich and poor Kenyans inhabit our prisons, and denial of bail or grant of stiff bail terms is not necessarily connected with corruption.

#### 5:2:21 Public Culture of Corruption

The Committee heard representations that the prevailing state of corruption in the Judiciary contributes to and reinforces the culture of corruption in the society at large.

5:2:22 The Committee concurs with that view. Where citizens know that justice is for sale, they lose hope of fairness generally for if the institution which is supposed to be the guardian of due process is not straight, the people at large have little encouragement to be straight. They take the view that justice can be bought and accordingly corruption becomes the norm.

#### 5:2:23 Loss of Government Revenue

The Committee heard that corruption in the Judiciary results in non collection or under collection of various fees and charges.

5:2:24 That is undoubtedly true. The result is loss of Government revenue.

#### 5:2:25 Corruption's impact on the economy

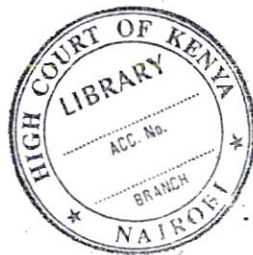
This matter was not canvassed directly or in detail in the public hearings. It was only obliquely referred to in the context of loss of investor confidence.

5:2:26 Be that as it may, in our opinion, the impact of judicial corruption on our economy is a big one. In the first place, one of the things a potential investor in a foreign country considers is the state of the rule of law. If it appears to him that the rule of law is porous in that contracts cannot be enforced as expected, there is no certainty in the law, no fair adjudication is generally possible and that awards of damages are prohibitive due to the prevalence of corrupt practices in the Judiciary, the potential investor will shy away. Indeed even existing investors have been known to relocate. In this country there are complaints that Bankers cannot realize securities due to corruption; insurance companies have been liquidated due to excessive awards of damages in personal injury cases; and in the sugar belt the Committee heard that company profits were on the decline due to awards of damages on fictitious claims and excessive awards in genuine cases. All those things, we were told, were due to judicial corruption. In our opinion, it follows that if there is no incoming investment or that the existing investors are relocating or not making profits, the result is a decline in economic growth and the consequential increase in national poverty. That is one of the most devastating consequences of judicial corruption.

#### 5:3:0 CONCLUSION

From the foregoing exposition this Committee has come to the conclusion that corruption in the Judiciary strikes a crippling blow against the rule of law as universally understood; it undermines the capacity of the Judiciary to be an independent and impartial arbiter of legal disputes and accordingly, the institution cannot be the champion of the rule of law, the guardian of individual rights and

freedoms, or an ally in the fight against corruption. It reduces the temple of justice into a cave of venality and exploitation. Furthermore, the esteem of the Judiciary as an institution and the respect and esteem of those who serve in it are lowered. As a direct consequence of the foregoing the national economy suffers in no small measure and the culture of corruption in the society at large is reinforced. That in our opinion is a state of affairs not to be viewed with equanimity. It calls for the strongest possible measures against judicial corruption.



## CHAPTER SIX

### **6:1:0 IDENTIFICATION OF CORRUPT MEMBERS OF THE JUDICIARY AND RECOMMENDED ACTION AGAINST THEM**

#### **6:1:1 Corrupt Judicial Officers Identified:**

The Committee received a legion of complaints and information on allegedly corrupt and unethical Judicial Officers. Most of the allegations were orally made. Others were in writing. We considered all the complaints and information supplied most cautiously in light of the fact that Judicial Officers are umpires in a game in which there must be a winner and a loser and never, or rarely ever, is there a draw. We were alive to the perfectly human tendency of blaming a loss in litigation to something untoward on the part of a Judicial Officer. In the premises, we have decided to include in this report only those members of the Judiciary in respect of whom we found the allegations of corruption, misbehaviour, or want of judicial ethics credible.

#### **6:1:2 Other forms of possible misbehaviour unearthed:**

In the course of our hearings the Committee came across some

credible allegations of misconduct by serving Judicial Officers when they were either advocates in private practice or when they were obviously otherwise engaged in private commercial transactions. We have decided to report thereon as well.

**:0 A SCHEDULE OF CORRUPTION,  
MISBEHAVIOUR AND WANT OF JUDICIAL  
ETHICS**

- 1 Due to the sensitivity of the matter under inquiry and the fact that the officers affected have not had the advantage of being confronted with the 'evidence' against them and are entitled to the due process of the criminal law and/or the appropriate disciplinary process, we think it is inappropriate to include the names of those officers in this main report. We have decided to disclose the names of the officers and the allegations and a summary of the evidence against them together with our findings thereon in a separate schedule to this report which is not for dissemination to the public.
- 2 The Schedule referred to is in two parts. Part A concerns those Judicial Officers who have been implicated in corruption, judicial misbehaviour and want of ethics in the course of the discharge of their official duties. Part B concerns those officers implicated in possible misbehaviour in their extra judicial capacities.
- 3 **A bird's eye view of the Schedule's content:**

Part A of the Schedule discloses that five (5) Court of Appeal Judges, eighteen (18) High Court Judges, eighty two (82) Magistrates and forty three (43) Paralegal Officers are implicated in judicial corruption, misbehaviour or want of

ethics. In this connection, it is of interest to note that as at 19<sup>th</sup> March, 2003 when this Committee was appointed, the Judiciary consisted of 9 Court of Appeal judges, 36 High Court Judges, 254 Magistrates and 2910 Paralegals. If the matter were expressed on a percentage basis the conclusion would be fifty six (56) percent of the Court of Appeal, fifty (50) percent of the High Court and thirty two (32) percent of magistracy is probably infected with the corruption virus. The paralegals, quite surprisingly, appear to be the least infected. We think this is because most of them are not involved in the discharge of Judicial work, *stricto sensu*, and accordingly don't have discretionary powers which attract inducements. Furthermore, whatever is given to them is so small that those giving do not consider the same to be a bribe.

**6:3:0 RECOMMENDATIONS**

- 6:3:1 For the Judicial Officers implicated in Judicial corruption, misbehaviour, and want of ethics and whose names are in Part A of the schedule, we recommend that the Chief Justice recommends immediate prosecution and/or initiates administrative disciplinary action as appropriate in the circumstances unless the Officers concerned voluntarily relinquish their Judicial offices.
- 6:3:2 For the Officers implicated in misconduct in their extra Judicial capacities who are in Part B of the Schedule, we recommend that the Chief Justice counsels them to live up to their personal obligations to their erstwhile clients or suppliers of services as the case may be.

## CHAPTER SEVEN

### **1:0 STRATEGIES FOR THE DETECTION AND PREVENTION OF CORRUPTION**

#### **1:1 Introduction**

From a broad theoretical perspective the burden of this chapter may be put in a nutshell this way: first, to detect corruption one has to employ necessary surveillance, monitoring and evaluation of the wealth, lifestyles, habits and the qualitative and quantitative performance of Judicial Officers; secondly, to prevent corruption, one must address and redress the causes of corruption. Those causes range from the needs and greed of officers, the existence of opportunities and loopholes for corruption in the institutional framework, rules and regulations, poor leadership, and a corruption-friendly legal regime, and external environment. In the rest of this chapter we consider the evidence and suggestions received from those who made representations to us, evaluate the same and make necessary practical recommendations.

### **7:2:0 CORRUPTION DETECTION**

Corruption is an offence and a moral aberration engaged in secretly. It usually results in two mutually satisfied parties. It is accordingly difficult to detect unless the deal has gone sour or sheer luck intervenes. Be that as it may, we received representations that there are certain pointers to a corrupt Judicial Officer which should in a properly functioning system give cause for investigation. Those pointers were said to be:-

- (i) living beyond one's known income;
- (ii) undue interaction with litigants or their friends or advocates outside the court;
- (iii) undue entertainment of visitors in chambers particularly early in the mornings and late in the evenings when the court premises are usually otherwise deserted;
- (iv) engagement in business inconsistent with the calling of a Judicial Officer such as bar, public transport, or pool tables;
- (v) knowingly registering, hearing and determining cases of which they have no jurisdiction;
- (vi) inordinate delay in delivering rulings and judgments;
- (vii) persistently inconsistent decisions on the same facts;
- (viii) patently illogical or irrational decisions when all the material facts are considered; and
- (ix) multiplicity of complaints against them by consumers of justice.

**7:2:1 We concur with the public view that the above are the garb by which corrupt Judicial Officers may usually be known. For our part, we think undue familiarity with court clerks,**



prosecutors and advocates is another pointer to a corrupt officer.

7:2:2 Those being the pointers of corruption, we recommend that the appropriate instruments for corruption detection are a periodic declaration of the quantum and sources of wealth by Judicial Officers and a permanent mechanism for monitoring their work and habits. We are happy to note that the former instrument has been instituted under the Public Officers Ethics Act, Act No.4 of 2003.-As regards the monitoring mechanisms, we shall say more anon.

### 7:3:0 CORRUPTION PREVENTION

We received very many recommendations on strategies to prevent corruption. These representations were by and large in the nature of scattered ideas. On close analysis they may be conceptualized as pertaining to personal factors, institutional governance measures; the legal regime, and the external environment. We shall consider the views received under those four broad rubrics with a caveat that some overlaps are to be expected.

#### 7:3:1 PERSONAL FACTORS

#### 7:3:2 Staff Welfare

We received several representations from both members of the public and Judicial Officers themselves that in order to remove the temptation to be corrupt and to motivate the officers it was necessary to improve the terms and conditions of service of Magistrates and Paralegal Staff. On that score we heard that the salaries and allowances should be improved by as much as 400%, others said the Magistrates should start at a salary of

Kshs.50,000.00 to Kshs.60,000.00 and the upward spread should be such that a long serving Chief Magistrate should be at the entry point of a newly recruited Judge. We heard that Judges were well remunerated. Apart from salary and allowances, we heard that the issue of appropriate housing, security, medicare, official transport and affordable car loans for Magistrates should be urgently addressed. We also heard that another demotivating factor in the Judiciary was lack of clear training policy and that the existing training opportunities were not fairly distributed. It was recommended that the Judiciary should have a clear training policy and that training opportunities should be distributed on merit.

7:3:3 Although we have elsewhere in this report expressed our conviction that poor terms and conditions of service are not in themselves a cause of corruption, we agree with the views expressed above that corruption cannot be prevented without addressing the material needs of Judicial Staff and their motivation.

7:3:4 We accordingly recommend the following measures-

- (i) Salaries for Magistrates and Paralegals should be considerably improved as a matter of urgency. The gap between the highest paid Magistrate and the lowest paid Judge should be narrowed considerably;
- (ii) The Judiciary should lease appropriate housing for its officers or pay them such housing allowances as will enable them to lease or purchase on mortgage terms houses commensurate with the honour and dignity of Judicial Officers;
- (iii) There should be an adequate medicare scheme for Judicial Officers and their

- families;
- (iv) All Judges and Magistrates should be accorded adequate security at work and at home;
  - (v) Senior Magistrates should be provided with official transport;
  - (vi) There should be a facility for easy and affordable car loans for all Judicial Officers; and
  - (vii) The Judiciary should develop and design a clear training policy for all cadre of officers and available training opportunities should be drawn to the attention of officers and beneficiaries thereof should be selected on the basis of need and merit.

#### 7:4:0 INSTITUTIONAL GOVERNANCE CONCERNS

##### 7:4:1 Recruitment and Promotion

The Committee heard that in order to address the issues of opaque and unmeritocratic recruitment and promotions which is characterized by nepotism, favoritism, 'godfatherism', outright purchase of opportunities, and other forms of corruption which had in themselves contributed to Judicial corruption, it was necessary that recruitment and promotions should be transparent and meritocratic.

- 7:4:2 We agree that recruitment and promotion ought to be transparent and merit based. To achieve that, we recommend the following measures –
- (i) Vacancies for Paralegals, Magistrates and Judges ought to be publicly advertised and

- the advertisement should clearly indicate the qualifications required for the job;
- (ii) Shortlisted candidates should be vetted for personal integrity and probity by appropriate means;
- (iii) Serving Judicial Officers should not participate in the interviewing of candidates in respect of whom they have a personal interest;
- (iv) The practice of delegating recruitment to heads of stations should be stopped and recruitment be centralized, and
- (v) There should be separate and clear schemes of service for Magistrates and Paralegals and the same ought to be strictly followed in promotions.

7:4:3 The Committee heard that for a transparent and meritocratic recruitment and promotion policy to be implemented it was necessary that members of the Judicial Service Commission be persons of integrity.

7:4:4 Without appearing to join those who may have indirectly cast aspersions on the integrity of any member of the Judicial Service Commission, we completely agree that if the recruiting and/or promoting body has in its ranks persons of dubious integrity, the recruitment and/or promotion exercise cannot be transparent and meritocratic. We accordingly recommend that all necessary measures should be employed to ensure that members of the Judicial Service Commission and those personnel officers to whom the task of recruitment may be delegated by the Judicial Service Commission are persons of the highest possible personal integrity.

**:4:5 Retention of retired Officers on contractual terms**

The Committee heard that in order to deal with the corruption attributable to the *laissez-faire* disposition of pensioned officers serving on contract, the practice of retaining Magistrates and Paralegals in employment after their retirement age should be discontinued.

**:4:6** Although we cannot say, and it was not said by the public, that all Judicial Officers on contract were corrupt and/or otherwise unethical, there was evidence that many of them were tarred and also we think there is merit on the preponderance of opinion gathered that contract employment was counter productive and demotivating to young officers. We accordingly recommend that the contracts of those Judicial Officers who have reached the mandatory retirement age should not be renewed and that the practice of employing retiring officers on short term contracts should be discontinued.

**:4:7 Deployment and transfer policy and practice**

The Committee heard that in order to deal with the issue of Judicial Officers overstay in stations with attendant undue familiarity with actual and potential consumers of justice and the resultant corruption, it was necessary to adopt a deployment and transfer policy and practice which ensured that officers did not stay in any place for more than 5 years. The public recommended that Judicial Officers should stay in a station for a period of between 3 to 5 years. It was also impressed on us that Paralegals, too, should be amenable to transfer just like Judges and Magistrates.

**7:4:8** We agree that all cadres of judicial staff should be subject to a predictable periodic transfer if the corruption contributed to by overfamiliarity is to be avoided. We accordingly recommend the following measures:-

- (i) High Court Judges and Magistrates should be transferred after every three (3) to five (5) years to any place in Kenya. The maximum period of stay in any station should be five (5) years. In order not to disrupt work in progress and to facilitate the conclusion of part heard matters without resorting to the expensive and disruptive frequent sojourns in the previous stations, we further recommend that officers be given a transfer notice at least four (4) months in advance;
- (ii) Paralegal Staff of the rank of Executive Officer and above should be amenable to the same transfer policy as Judges and Magistrates;
- (iii) As regards Clerical, Secretarial and Subordinate Staff, we consider that they should not be employed and deployed to their home areas. They too should be amenable to transfer every 3 - 5 years but in doing so, care must be taken not to deprive stations of competent interpreters of various local *lingua franca*;
- (iv) Under no circumstances should a transfer be resorted to as a disciplinary measure; and
- (v) Relatives should not work in the same station.

**7:4:9 Human greed and the Disciplinary question**

The Committee heard that in order to deal adequately with the corruption resulting from sheer human greed, it was necessary to implement adequate and effective disciplinary measures in addition to allowing the ordinary legal process to follow its course.

**7:4:10** We agree that corruption should be adequately punished. However, we think that discipline and other forms of punishment is only one element in any successful corruption suppression strategy. The other elements include a high probability of detection and an absence of impunity. Being so persuaded, we recommend the following measures:-

- (i) The Judiciary should invest in corruption detection institutions and measures including but not limited to-
  - (a) establishment of a permanent mechanism to receive and deal with complaints or allegations of corruption and unethical conduct and to randomly check on the performance of Judicial Officers in terms of competence, procedural compliance, the speedy disposal of matters, and otherwise monitor the corruption pointers adumbrated in paragraph 7:2:0 hereof. Such a mechanism should comprise of at least, a Judge of Appeal, a Judge of the High Court and a Senior Magistrate. It should be reporting

- directly to the Chief Justice. It may be called the Integrity and Anti-Corruption Committee or the Judicial Audit Committee;
- (b) There should be established corruption prevention Committees in all big stations to receive complaints and to advise the Head of Station on, inter alia, strategies of corruption detection and prevention;
- (c) There should be installed a suggestion-cum-complaints box at every Court house. Such box to be opened regularly by a Senior Officer of integrity and the contents thereof drawn to the attention of the Integrity and Anti-Corruption Committee or a similar body; and
- (d) The wealth declaration forms should be carefully studied and any suspicious accumulation of wealth should be investigated.
- (ii) Corruption and unethical behaviour should be promptly and adequately sanctioned by either –
  - (a) dismissal from office without benefits irrespective of the period served; and/or,
  - (b) criminal prosecution where appropriate; and/or
  - (c) recovery of all corruptly acquired property or the value thereof;

**AND never by a transfer or any other form of molly coddling. Indeed from the evidence**



gathered, this Committee is of the firm view that had respective past Chief Justices and High Court Registrars dealt with reported incidents of corruption and unethical conduct with the requisite promptitude and severity, the Kenyan Judiciary would be largely a corruption-free institution.

- (iii) There should be no protection of any corrupt or unethical Judicial Officer on considerations of kith or kin, tribalism, friendship or otherwise whatsoever and the disciplinary process and the ordinary law should be equally applied to all such officers. Impunity should not be in the vocabulary or psychology of any Judicial Officer.

#### **7:4:11 Conflict of interest**

It was suggested to the Committee that in order to avoid situations of conflict of interest and abuse of power on the part of Judicial Officers, the Judicial Code of Conduct should prohibit officers from engaging in businesses which are inconsistent with their calling. We were told such businesses included operation of public transport, shop keeping, pooltables, bar and restaurants and operation of petrol stations.

- 7:4:12 We concur. In that regard we note that the Judicial Code of Conduct and Ethics recently published addresses the issue in fairly broad terms. It provides that a Judicial Officer undertakes "not to engage in any occupation or business which might prejudice his status as a member of the Judicial Service or bring the Judicial Service into disrepute." We think the prohibition is in terms that mean different things

to different people. Accordingly we recommend that the Code be amended to include in addition to the generality an express prohibition of officers engaging in the businesses of public transport, service of food and beverages, shop keeping, pool tables, and petrol stations.

#### **7:4:13 Elimination or minimization of delay in the hearing and determination of cases**

The Committee heard that the elimination or minimization of delay (whether deliberate or not) in the hearing and determination of cases would lead to a reduction of the corruption induced by anxiety on the part of litigants. It was recommended that to address the matter it was necessary to keep official hours, automate the recording of proceedings, send Judicial Officers who have inordinately delayed in writing judgments and rulings on compulsory and unpaid leave, expand court facilities, recruit more Judicial Officers and fix set times for the hearing and conclusion of cases.

- 7:4:14 We agree that both deliberate and non deliberate delays should be minimized, if not eliminated, as a corruption fighting measure. In our view, to do so, it is necessary to increase the number of officers to reduce the workload; the officers should employ themselves diligently; they should be aided by modern technology and the errant ones should be sanctioned. We do not believe that the process of litigation is amenable to fixed timelines. Indeed if there was a fixed timetable, the same would be abused to the detriment of the course of justice. Taking that view of the matter, we recommend the following measures:-
- (i) All Judicial Officers should as a minimum keep the official hours;
  - (ii) The number of Judicial Officers should be

increased to cope with population increase and the increased workload. To that end we recommend a scientific study be undertaken of the optimum number of officers required;

- (iii) It would be idle to increase the number of officers without a corresponding increase in the number of court rooms, chambers and other supporting infrastructure and facilities. It is accordingly recommended that Judicial facilities be expanded as a prerequisite to the proposed increase in the number of officers;
- (iv) The recording of court proceedings should be automated to save on the time spent in manual recording;
- (v) Judicial Officers who are guilty of inordinate delay in the writing of judgments and rulings should be personally sanctioned with such measures as demotion, withholding of part of the pay, compulsory leave without pay, and even dismissal as may be appropriate considering the circumstances of the officer in question. In order to judge whether delay is inordinate we recommend that the timelines for writing judgments and rulings should be 45 days for judgments and 30 days for rulings and that those timelines be incorporated in the Judicial Code of Conduct.

#### **7:4:15 Effective supervision of Judicial Staff**

The Committee heard that to deal with the problem of inadequate and ineffective supervision of Judicial Staff which had in no small way contributed to the corruption in the institution, it was necessary to take measures to reverse the situation. We received proposals that there should be close supervision by the Registrar and the Resident Judges as well as by the Heads of Station. To attain that, we were told, it was necessary to empower the Resident Judges and the Heads of Station.

**7:4:16** The Committee agrees that it is necessary to have close supervision of all cadre of Judicial Staff without interfering with their adjudicatory independence. As to who is to supervise, we think it ought to be the Chief Justice, the Registrar and the Heads of Station. We think Resident Judges should concentrate on Judicial duties and render only such administrative advice as may be sought by the Deputy Registrars and Heads of Station. We accordingly recommend the following:-

- (i) Judicial administration should be decentralized upto to the station level. The Heads of Station or Deputy Registrars, as the case maybe, should be vested with administrative authority including disciplinary powers of reprimand and interdiction of errant staff.
- (ii) Resident Judges should keep out of Judicial administration but should be available for advice, if necessary.



**7:4:17 Transparent and corruption-free allocation of Judicial work.**

The Committee heard that to address the corruption relating to and facilitated by a manipulated/or manipulable allocation system, it was necessary to devise a system which would be corruption free and also give litigants little room for pre-hearing corruption.

**7:4:18 We concur. We accordingly recommend the following measures:-**

- (i) The task of allocation of judicial work should not be a clerical function. It ought to be exercised under the supervision of senior officers such as the Presiding Judge in the Court of Appeal or the various Heads of Divisions or Stations in the High Court and the Subordinate Courts;
- (ii) Save for partheards, the method of allocation ought to be random and, if technology allows, computer generated;
- (iii) The cause lists should be prepared and published only the day before the hearing.

**7:4:19 Ready availability of court files and records**

The Committee heard that to deal with the problem of lost or misplaced files and the attendant corruption it was necessary to expand and if possible computerize the various court registries.

**7:4:20 We agree. A lot of the cases of lost or misplaced files arise from or are facilitated by the congestion in the court**

registries. Others are due to poor record keeping. Be that as it may, it is obvious to us that staff dishonesty is a significant factor in the phenomenon of lost or misplaced files. We accordingly recommend the following measures:

- (i) Court registries should be expanded and computerized complete with back up systems; and
- (ii) Court registry staff should be closely supervised and monitored for integrity.

**7:4:21 Judicial Independence**

To deal with the actual or perceived corruption caused by the dependence of the Judiciary on the Executive on finances, housing and transport, we were told that it was necessary for the Judiciary to be independent in matters financial or otherwise material.

**7:4:22 We concur. We accordingly recommend the following:-**

- (i) The system of Judicial accounting should be wholly delinked from the Provincial Administration;
- (ii) The Judiciary should build or lease its own institutional housing; and
- (iii) Heads of Judicial stations should be provided with their own independent transport.

**7:4:23 Apart from the want of material independence and possible corruption induced thereby we think that the Judiciary should otherwise be and be seen to be independent. Accordingly we recommend that Judicial Officers should not participate in such forums as-**

- (i) District Development Committees;

- (ii) District Security Committees; and
- (iii) Political gatherings by whomsoever organized.

**7:4:24 Reduction of costs of litigation**

The Committee heard that in order to address the corruption contributed to by the high costs of litigation, it was necessary to make judicial services available and easily accessible and to lower the court fees and reduce the number of adjournments.

**7:4:25** We agree. We have indeed dealt with the solutions to the problem of judicial delays in paragraph 7:4:14. We have recommended an expansion of court facilities. We would reiterate that recommendation. In addition, we would recommend the following –

- (i) Judicial facilities should be easily accessible to the people;
- (ii) Court fees should be lowered to make a majority of citizens access the courts in a straightforward manner; and
- (iii) Judicial Officers should discourage the adjournment of matters save on the most compelling reasons.

**7:4:26 Adequate and Enforceable Code of Conduct**

The Committee heard variously that one of the instruments in the fight against corruption is an adequate and enforceable Code of Conduct.

**7:4:27** We agree. In that respect, we note with satisfaction that the Judiciary has recently published a Code of Conduct for

Judges and Magistrates. We also note that one of the mandates of the Judiciary Committee on Reforms and Development is to advise on the adequacy of that Code. We also note that there is no Code of conduct for Paralegals. In the premises we recommend that:-

- (i) There should be promulgated an adequate and enforceable Code of Conduct for Paralegals; and
- (ii) The existing Code of Conduct for Judges and Magistrates should be subject to periodic reviews to ensure it keeps pace with changing times and that at all times it is hostile to corruption and unethical behaviour.

**7:4:28 Adequate Anti-Corruption Education for Judicial Officers**

Although anti-corruption education and sensitization of Judicial Officers was recommended to us as a measure to fight corruption in the Judiciary, we have elsewhere expressed our scepticism on lack of adequate anti-corruption knowledge as a cause of corruption. We also did, however, venture the suggestion that such education would be edifying in itself and might lead to better performance of judicial duties.

**7:4:29** We accordingly recommend that –

- (i) All Judicial Officers should receive anti-corruption education and sensitization through a well devised training programme; and
- (ii) The Kenya Judges and Magistrate's Association (K.M.J.A.) could be used in that endeavour to reach all members.



## **:0 CREATION OF A CORRUPTION HOSTILE LEGAL REGIME**

The Committee received representations that the legal environment in which the Judiciary worked was conducive to corruption. We were told that Judicial Officers have a wide discretion in civil and criminal matters; that they were immune from suit for things done in the course of the discharge of their official duty; that in the subordinate Courts, costs are assessed rather than taxed and that decrees are drawn without reference to both parties. We were accordingly urged to redress all those concerns if judicial corruption were to be tackled. It was recommended that the judicial discretion in sentencing and adjournments should be reduced, that the immunity of judicial officers from suit be reduced, that decrees in subordinate Courts should be prepared in the same manner as High Court decrees and that party to party costs should be taxed. We were also told that Courts should adopt a realistic bail policy and that all prosecutions should be done by State Counsels.

- 1 The Committee is not in doubt that the existence of a wide and monopolistic discretion is usually a fertile ground for corruption. That being so and despite the conviction we expressed in chapter three that it is not the existence of the discretion *per se* which is a cause of corruption but the human greed which leads to abuse of discretion, we find merit in the submission that the whole question of discretion needs to be addressed. Be that as it may, we don't consider that we received sufficiently detailed input to enable us make definitive recommendations. As regards the existence of Judicial immunity from suit, we were unpersuaded that the same is a cause or contributory factor to corruption. Neither were we persuaded that police

prosecutions are bound to be any more corrupt than prosecutions by State Counsels. However, there can be no doubt that on the whole prosecutions by State Counsels are more competently conducted than those by police. As regards the adoption of a liberal and realistic bail policy, we agree that such a measure would reduce judicial corruption. We also agree that there is merit in the submissions that the practice of drawing decrees and the assessment of costs in the subordinate courts needs to be aligned with the practice in the High Court. In those premises we recommend:-

- (i) That a detailed study of the issue of Judicial discretion be commissioned by the judiciary and any necessary legislative reforms be informed by such a study;
- (ii) That Judicial immunity from suit should remain undisturbed;
- (iii) That as a matter of policy, all prosecutions should be undertaken by State Counsels, and to that end, Government should embark on a vigorous policy of recruitment and training of the necessary personnel;
- (iv) Judicial Officers should be encouraged through appropriate training and guidelines to adopt a liberal and realistic bail policy consistent with the peculiar circumstances in specific cases and places; and
- (v) The practice of assessment of costs by Magistrates or Executive Officers and the drawing of decrees without reference to both parties should be abolished and the pertinent rules in the Subordinate Courts should be amended to bring the practice at



par with High Court practice and procedure.

#### **7:6:0 AN ENABLING EXTERNAL ENVIRONMENT**

**7:6:1** The Committee received several representations to the effect that the fight against corruption cannot succeed in a situation where the external environment reeks with corruption. We were told that Judicial corruption is closely linked to corruption among Advocates and in the Police Force. We were also told that prison congestion and conditions make Judicial corruption an attractive alternative and that even Probation Officers were corrupt. We further heard that there was a culture of corruption in the Kenyan society which fed Judicial corruption. We were told that part of the reason for societal corruption was inadequate education on the evils and effects of corruption, public ignorance about their legal rights and privileges at both a procedural and substantive level, court phobia, and a deterioration in the moral fibre of society. In the premises, the public recommended to us that the Law Society of Kenya should address the corruption of Advocates, that the Ministry of Home Affairs should address the corruption of Probation Officers and the Police department should address the corruption of police investigators and prosecutors.

**7:6:2** We concur with those views. They are a clear call for a holistic and multisectoral approach to fighting Judicial corruption. We would to that end make the following recommendations:-

- (i) **There should be close co-operation and coalition building in the Justice Sector in confronting Judicial corruption. Within that framework, the Judiciary, the Executive and the Law Society of Kenya**

should devise and implement a holistic strategy to address the corruption of the principal stakeholders, namely Judicial Officers, Advocates, the Police Force and correctional services;

- (ii) **There should be public education on the rights, privileges and obligations of litigants and witnesses in the court process. Such an awareness campaign may be delivered by the Judiciary itself or civil society. In that regard the Judiciary should organize open days for courts at least twice a year whereby members of the public can interact with Judicial Officers and be educated on their basic procedural rights and privileges and the forms and dangers of Judicial corruption and their role in eradicating it; and**
- (iii) **There should be a campaign of public education on the impact of corruption on the national economy and life generally. Such a campaign should also aim at inculcating new positive ideas in the minds of Kenyans.**

**7:6:3** We believe that the recommendations made in the preceding paragraphs will, if implemented, contribute to a large extent in the detection and prevention of corruption in the Judiciary. However, as pointed out in chapter two, corruption may be perceived or actual. Although we indicated at the outset that our concern in this report was with actual corruption, we nonetheless consider it expedient to make a few recommendations on how to address perceived corruption.

**7:7:0 THE PROBLEM OF PERCEIVED CORRUPTION**

We pointed out in chapter two that perceived corruption is a phenomenon whereby one feels some corruption must have taken place in the judicial system due to a misplaced or lost file, a hearing has taken place in chambers, where there is delay in the hearing or determination of cases, where there is a misunderstanding of the rules or the process, or there exists "pop in" litigants and/or self-appointed brokers within the court corridors and precincts.

**7:7:1 We have in the breath dealing with strategies to prevent actual corruption also dealt with some of the measures to address perceived corruption. Such measures included computerization of Court Registries and automation of proceedings, expansion of Courts and increase in the number of judicial officers, expediting the hearing and conclusion of cases and public education on the procedures and processes of the Court. In addition to those measures, we would recommend the following:-**

- (i) There is need for a strong public relations office in the Judiciary. Such office should be decentralized to respond effectively to some of the complaints and to offer meaningful public education;**
- (ii) In so far as possible and appropriate, all hearings and delivery of rulings and judgments should take place in open Court; and**
- (iii) There should be instituted adequate measures of crowd control in the court corridors and precincts.**

**7:8:0** Those, then, are our recommendations for the detection and prevention of corruption in the Judiciary. Although we do not claim that those recommendations are exhaustive, we think they deserve prompt attention at least as a point of departure.

## CHAPTER EIGHT

### 8:1:0 OTHER MATTERS

8:1:1 In this chapter we intend to comment on some matters that were not strictly covered by our terms of reference but which were brought to our attention during our hearings all over the country. Much as we feel they may not be strictly relevant to corruption concerns, we nonetheless find them to be indirectly relevant and we raise them herein in the belief that if they are attended to, our Judiciary may more effectively carry out its major duty of doing justice to the people of Kenya.

8:1:2 We have condensed these matters into two categories:-  
(a) **Matters that require legal reform; and**  
(b) **Administrative matters.**

### 8:1:3 Legal Reform Matters

During our sittings, we had opportunity to receive views orally and in writing from prisoners who were serving sentences and those who were in remand prison awaiting trial. We received a very detailed presentation from Industrial Area Remand. One of the pertinent issues they raised which is not covered in our other chapters is the need to have in place legal provisions to enable a High Court Judge to take over a parheard criminal hearing where the presiding Judge had ceased to exercise his

judicial functions as a Judge. As the law stands now such cases are declared mistrials and they have to be heard *de novo* whether they had reached judgment stage or not.

8:1:4 We do agree that situations have arisen where accused persons particularly those charged with murder cases have suffered as a result of lack of legal provisions to take care of such cases. We do recommend that provisions should be made to take care of such situations akin to Section 200 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya.

8:1:5 There was also a very strong proposal that the power of the Attorney-General to enter *nolle prosequi* in criminal cases at any stage be curtailed as this was being abused and it has in some cases become a fertile ground for corruption. We received several complaints in the course of our hearings that it was being abused by State Counsels particularly in murder cases.

We do agree with those views. To curb the abuse of the power of *nolle prosequi* we would recommend that the instruments be personally signed by the Attorney General.

8:1:6 We also received views on the high incidents of corruption and inconsistent decisions in the Court of Appeal. It was the general feeling that a Supreme Court should be established to set high standards.

8:1:7 We agree and recommend the establishment of the Supreme Court which would have appellate jurisdiction over the Court of Appeal.

8:1:8 There was also a lot of concern among some members of public



who felt that rich people are able to manipulate the law so that criminal cases against them are not being prosecuted to finality as a result of abuse of the provisions allowing constitutional references and other forms of Judicial review such as prohibition under the Civil Procedure Act, Cap 21 Laws of Kenya.

**8:1:9 We recommend that amendments to the relevant laws be made with a view to reducing such references to the High Court in criminal cases. Alternatively, such applications should be disposed off with speed to avoid undue delay in these matters.**

#### **8:1:10 Administrative Matters**

We received several recommendations touching on purely administrative issues which if properly addressed would go a long way in expediting the administration of justice in our courts. These were as follows:

- (i) Every one-magistrate court should be manned by a Senior Resident Magistrate in order to ensure that the court has jurisdiction to deal with all criminal cases in the area. There were serious complaints received from Marsabit and Moyale Districts of Eastern Province as well as from North Eastern Province on this issue, where a Senior Resident Magistrate has to travel often from Garissa all the way to Wajir and Mandera to handle capital robbery cases. This causes unnecessary delay in disposal of such cases.

**We agree with this proposal and recommend that such courts be manned by officers of the cadre of Senior Resident Magistrate and above.**

- (ii) We were also told that many of the outstation courts have no official transport and they rely heavily on the police and Provincial/District administration when they want to visit scenes or conduct mobile courts. This in some cases compromises the administration of justice as the magistrates in such stations may find it difficult to remain independent in their decisions in such circumstances.
- (iii) At some stations we were told that difficulties arose with regard to refunding deposited cash bail as the same was held at the District Treasury. This situation could be abused by some officers and could lead to perceived corruption on the part of the courts when the accused persons go to court to receive back their cash bail.

**We would therefore recommend that as much as possible all courts should be made self reliant. They should have their own motor vehicles and sufficient money for transport operations. They should also be delinked from the District Treasuries, to enable them take full control of their finances.**

- (iv) The Committee also received presentations from many stations to the effect that the chain of command was not very clear. They were not sure whether their problems are supposed to be addressed by the Registrar High Court, or by the Chief Court Administrator.

In our view, there is need to clearly define the duties of the Registrar and those of the Chief Court Administrator. We propose that the office of the Registrar should deal with all matters pertaining to Judges and Magistrates. The office of the Chief Court Administrator should be left to deal with paralegal matters and other day-to-day administrative matters affecting courts.

8:1:11 The Committee noted that some of those administrative issues had been addressed in the "Kwach Report".

Our final recommendation, therefore, is that the recommendations in the "Kwach Report" should be implemented in full.





