

# ENHANCING SYNERGIES: THE MULTI-AGENCY EXPERIENCE IN FIGHTING CORRUPTION IN KENYA

Caroline Nyaga\*

## I. INTRODUCTION

During the Second State of the Nation Address to Parliament<sup>1</sup>, the President took an unprecedented move by tabling a confidential report on corruption cases under investigation by the Ethics and Anti-Corruption Commission (EACC) and directed all the Public and State Officers implicated in graft to step aside pending the outcome of the ongoing investigations. He further directed the Office of the Attorney General & Department of Justice to undertake a thorough review of the legal, policy and institutional framework for fighting corruption in Kenya. A Task Force<sup>2</sup> was formed to oversee the whole process and it drew its membership from all Ministries, Departments and Agencies charged with fighting corruption in Kenya including the enforcement, investigative and prosecutorial agencies.<sup>3</sup> One notable recommendation that arose was the lack of proper coordination among agencies and duplication of efforts by various agencies thus making the investigation and prosecution of corruption cases an uphill task due to lack of a coordinated framework for reporting corruption, information gathering, intelligence sharing, cooperation in investigations, prosecutions joint trainings, among other areas.

Despite the myriad of laws in place to combat corruption, Kenya still ranks highly in the *Corruption Perception Index*.<sup>4</sup> The Task Force recommended institutional collaboration and partnerships among agencies to enhance the fight against corruption.

## II. LEGAL FRAMEWORK FOR ASSET RECOVERY IN KENYA

The *Proceeds of Crime and Anti-Money Laundering Act* (POCAML) is the main legislation that provides for the offence of money laundering and introduces measures for combating the offence, the identification, tracing, freezing, seizure and confiscation of the proceeds of crime. It establishes the Assets Recovery Agency<sup>5</sup> and the Financial Reporting Centre. Others include the *Mutual Legal Assistance Act of 2011* that governs the mutual legal assistance to be given and received by Kenya in investigations, prosecutions and judicial proceedings in relation to criminal matters. The Attorney General's Office acts as the Central Authority. *The Foreign Judgements (Reciprocal Enforcement) Act, 2012*, also makes provisions in Kenya for the enforcement of judgements given in countries outside Kenya which accord reciprocal treatment to judgements given in Kenya. Others include: *The Anti-Corruption and Economic Crimes Act, 2003*; *the Anti-*

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\* State Counsel at the Office of the Attorney General & Department of Justice, Kenya. She serves in the Legal Affairs Division, Anti-corruption, Ethics and Integrity Section.

<sup>1</sup> This was on 26<sup>th</sup> March 2015. (Art 132 (1)(c) of the Constitution of Kenya, 2010 requires the President to, annually, give a State of the Nation Address on all the measures taken and the progress achieved in the realization of the national values referred in Article 10.)

<sup>2</sup> *Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015)*, see Gazette Notice No. 2118 of 30<sup>th</sup> March 2015.

<sup>3</sup> The exercise culminated in the *Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015)*. (The Task Force gave various recommendations for various agencies including the Asset Recovery Agency, Financial Reporting Centre and others and most have been implementing them as part of their work plans. When coming up with the recommendations, the Task Force considered: (i) The UNCAC Country Review Report (ii) The Draft National Ethics and Anti-Corruption Policy (iii) Memoranda from member institutions, public organizations, civil society organizations and select individuals.)

<sup>4</sup> The 2016 Transparency International Corruption Perception Index ranks Kenya at No. 145/176 [www.transparency.org](http://www.transparency.org)

<sup>5</sup> The ARA is an autonomous body whose mandate is to identify, freeze and seize assets which are proceeds of crime and to combat money laundering. The EACC also has a department that recovers assets. The Agency was also established in further fulfilment of the national obligations under UNCAC.

*Counterfeit Act, 2008; the Counter-Trafficking Persons Act, 2010; the Prevention of Organized Crimes Act, 2010, the Prevention of Terrorism Act, 2010, the Wildlife Conservation and Management Act No. 47 of 2013, The Penal Code, Cap 63 Laws of Kenya.*<sup>6</sup>

In the asset recovery chain, the agencies involved face various challenges ranging from: complexities of cases; inadequacy of capacity especially if the same involves recovering assets stashed in other jurisdictions, lack of witnesses to support applications therefore implying that they are not sustainable before court, the time frame for processing Mutual Legal Assistance requests is sometimes protracted and thus the requirement for interagency cooperation.

The punishments under Kenyan Law for corrupt practices include:

- Imprisonment
- Hefty Fines
- Debarment from holding public office
- Compensation orders on conviction
- Forfeiture of unexplained assets.

### III. THE FRAMEWORK FOR COOPERATION

In regard to asset recovery and prior to the Task Force undertaking its assignment, there were various fragmented avenues of institutional collaboration between agencies, for instance:

#### **A. The Office of the Director of Public Prosecution (ODPP) Vs. The Ethics and Anti-Corruption Commission Collaboration (EACC)**

The ODPP is mandated to prosecute all criminal cases while EACC is the main enforcement agency on matters of corruption. In order to achieve success in the investigation and prosecution of these cases, the two have to worked together. This has been achieved through joint trainings of investigators and prosecutors, joint forms and prosecution-guided investigations. Through this initiative, the Guidelines for the Investigation of corruption and Economic Crimes and the Guidelines for the Prosecution of Corruption and Economic Crimes have been developed and implemented by both agencies.

#### **B. The Financial Reporting Centre (FRC)**

The Proceeds of Crime and Anti-Money Laundering Act also establishes the FRC<sup>7</sup> whose main objective is to assist in the identification of the proceeds of crime and the combating of money laundering and the financing of terrorism. It is mandated<sup>8</sup> to:

- Make information collected by it available to investigating authorities, supervisory bodies and any other bodies relevant to facilitate the administration and enforcement of the laws of Kenya;
- Exchange information with similar bodies in other countries regarding money laundering activities and related offences;
- Ensure compliance with international standards and best practice in anti-money-laundering measures.

The FRC collaborates by assisting in the tracing of illicit financial flows relating to corruption and liaising with sister agencies outside the country on sharing of information related to corruption investigations. It has concluded MOUs with the Central Bank of Kenya, the Insurance Regulatory Authority and the Capital

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<sup>6</sup> All these pieces of Legislation can be accessed from [www.kenyalaw.org](http://www.kenyalaw.org).

<sup>7</sup> Section 23 of the POCAMLA.

<sup>8</sup> Receive and analyze: reports of unusual or suspicious transactions submitted by reporting institutions; cash transactions made by reporting institutions; cash declaration forms received from border points: Disseminating of reports received to appropriate law enforcement authorities or other supervisory bodies for further handling: Make information collected by it available to investigating authorities, supervisory bodies and any other bodies relevant to facilitate the administration and enforcement of the laws of Kenya; undertaking inspection and supervision of Reporting Institutions to ensure compliance with AML/CFT reporting obligations as prescribed in POCAMLA: facilitating exchange of information on money laundering activities with other financial intelligence units in other countries: Developing AML/CFT Regulations to provide guidance to support implementation of the Act: Developing AML/CFT training programmes for Reporting Institutions.

Markets Authority.

### **C. Anti-Money-Laundering and Combating of Financing of Terrorism Round Table Meeting**

This forum brings together financial sector stakeholders with the aim of creating awareness on anti-money-laundering issues. It also trains reporting entities, law enforcement authorities and personnel in the FRC on anti-money-laundering issues. The Round table is now a national forum for information sharing, developing common approaches to issues and promoting desirable policies as well as standards. It draws membership from: the Ethics and Anti-Corruption Commission; Office of the Attorney General & Department of Justice; Office of the Director of Public Prosecutions; National Intelligence Service; Kenya Revenue Authority; Central Bank of Kenya; Asset Recovery Agency; Insurance Regulatory Authority; Directorate of Criminal Investigations; Banks; Mobile Money Service Providers.<sup>9</sup>

### **D. The Birth of the Multi-Agency Team (MAT)**

The Multi-Agency Team is not anchored in law and was born out of a Presidential directive in November 2015. This was around the same time the Task Force submitted its Report to the President who directed that the recommendations be implemented fully. It had been noted that the lack of synergy and inter-agency cooperation among law enforcement agencies was compromising the fight against corruption, economic crimes and other related crimes. The areas of focus are:

- Corruption
- Economic crimes
- Other organized crimes
- Cartels and syndicates

The essence of the MAT is to ensure that corrupt individuals have no leeway to escape when caught. All agencies go for the culprit simultaneously, for instance: the DCI and EACC will conduct the investigations, the police would arrest, the KRA will go after taxes and revenue, the ARA/EACC will trace, identify, freeze and preserve or recover assets. Therefore, this would corner the culprits and ensure they cannot run.

#### 1. The Composition and Mandate of MAT

It is worth noting that the country has faced serious challenges with corruption whereby assets and money are stashed abroad. During the Third State of the Nation Address<sup>10</sup>, the President reported that the Government has invested in preventive measures as well as tracking, seizing and confiscating the proceeds of corruption. A total of Kshs. 1.6 billion was allocated to the multi-agency institutional framework to support its operations. The membership comprises the following institutions:

- Ethics and Anti-Corruption Commission
- Office of the Director of Public Prosecutions
- Directorate of Criminal Investigations
- National Intelligence Service
- Financial Reporting Centre
- Asset Recovery Agency
- Kenya Revenue Authority
- Office of the President

#### 2. Terms of Reference

The terms of reference of the multi-agency team are:

- To enhance cooperation, coordination and collaboration among the agencies
- To engage other relevant agencies in order to enhance the effectiveness of the graft war
- To identify resource needs for each agency and lobby for the same
- To develop effective communication strategies for awareness creation on the gains and achievements made in the fight against corruption.

<sup>9</sup> Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya (2015).

<sup>10</sup> The Third State of the Nation Address made by the Parliament in March 2016.

3. The Benefits of the Multi-Agency Team<sup>11</sup>

The Multi-Agency Team has accomplished the following since its inception. They include:

- Better coordination, cooperation and collaboration among agencies. There have been joint trainings to increase the capacities of officers handling corruption-related cases.
- Joint investigations and operations among the agencies therefore pooled resources, synergy and avoidance of duplication of efforts. The MAT has undertaken joint sting operations through which contraband cargo has been seized in Mombasa.
- Real time information gathering and intelligence sharing.
- Co-option of other agencies on an as needed basis into the MAT, for instance Kenya Wildlife Services, National Transport and Safety Authority, the National Land Commission, among others. There are times when the agencies lend resources (human capacities) to each other as needed.
- Replication of the MAT collaboration in the counties
- Engaging other stakeholders to enhance the fight against corruption including the Judiciary, Parliament, donors and foreign missions.
- Simultaneous actions, for instance: prosecution, civil proceeding, administrative action, asset recovery, protection and freezing

In March 2017, the President reported that approximately 3 billion shillings had been recovered or preserved<sup>12</sup>. The positive result of this is that the MAT has managed to marshal up resource allocations and increased their visibility. Further, the MAT enjoys support and good will from the Government, donors and international agencies.

So far, the MAT has been in charge of some of the following major cases and investigations:

S/No.	Case Details/Particulars	Outcome/Status
a)	<b>NYS:</b> Investigation into allegation of embezzlement of funds in excess of <b>Kshs 1.5 billion</b>	<ul style="list-style-type: none"> <li>● Assets, movable and immovable properties, worth <b>Kshs. 421 million</b> were either recovered/frozen/seized as proceeds of crime.</li> <li>● Various applications to vary or discharge preservation orders defended before various courts.</li> <li>● <b>26 suspects charged</b> in court in predicate offence of stealing, attempted stealing, conspiracy, tampering with a public officer.</li> <li>● <b>11 suspects have been charged</b> with money laundering.</li> </ul>
b)	<b>Nairobi City County:</b> Investigation against the former Finance Director and others	<ul style="list-style-type: none"> <li>● Assets worth <b>Kshs. 1.3 billion</b> were frozen</li> <li>● The suspect charged in court</li> </ul>
c)	<b>Eastleigh Mall Ltd:</b> Investigations into tax evasion in excess of Kshs. 386 million	<ul style="list-style-type: none"> <li>● Company charged in court for tax evasion, along with <b>8 directors:</b></li> </ul>
d)	Contraband Goods: 194 containers were seized at Mombasa Port, made up of: <ul style="list-style-type: none"> <li>- 75 containers of sugar</li> <li>- 69 containers of ethanol</li> </ul>	<ul style="list-style-type: none"> <li>● 127 containers were destroyed, made up of: <ul style="list-style-type: none"> <li>- 18 containers of sugar</li> <li>- 59 containers of ethanol</li> <li>- 50 containers of rice</li> </ul> </li> <li>● Estimated Customs value of the destroyed goods: 214 million</li> <li>● 67 containers are under investigation and prosecution,</li> </ul>

<sup>11</sup> These achievements were reported by MAT during the *National Governance and Accountability Summit* at the State House, Nairobi on 18<sup>th</sup> October 2016

<sup>12</sup> This was reported during the Annual State of the Nation Address in March 2017, <http://www.the-star.co.ke/news/2017/03/15>

	<p>- 50 containers of rice Estimated Customs value: 359 million Estimated tax amount: 517 million</p>	<p>made up of: - 57 containers of sugar - 10 containers of ethanol</p> <ul style="list-style-type: none"> <li>● 2 suspects charged with respect to 5 containers of sugar:</li> <li>● Accused out on bond. <b>11 suspects charged</b> with respect to 5 containers of ethanol:</li> </ul>
e)	<p><b>National Youth Development Fund:</b> CEO of the Youth Enterprise Development Fund in collusion with Board Members schemed to defraud Kshs. 181 million</p>	<ul style="list-style-type: none"> <li>● <b>4 Persons Charged:</b></li> <li>● Charges: unlawful disposal of public property through unlawful payment</li> <li>● Case is still before court</li> </ul>
f)	<p><b>Tax evasion on Imported Motor Vehicles:</b>  Impounded high value motor vehicles which were allegedly stolen/improperly registered</p>	<ul style="list-style-type: none"> <li>● 121 registration number withdrawn</li> <li>● <b>5 Suspects charged</b></li> <li>● All accused out on bond.</li> <li>● <b>Warrants obtained for 3 suspects,</b></li> </ul>
g)	<p><b>Theft of containers in the port</b> - 124 containers removed from the port without payment of taxes</p>	<ul style="list-style-type: none"> <li>● Loss of <b>121 containers</b> under investigation.</li> <li>● <b>16 suspects</b> charged (3 stolen containers):</li> </ul>
h)	<p><b>Fuel Adulteration:</b> Sale of adulterated fuel without licenses.</p>	<ul style="list-style-type: none"> <li>● Rampant in Eldoret, Malaba and Nakuru</li> <li>● <b>12 suspects charged</b> in Court in Nakuru on 2nd September, 2016.</li> <li>● All accused out on bond. Warrants obtained for 1 suspect.</li> </ul>
j)	<p><b>Imperial Bank Case:</b> <i>W. E. Tilley</i> case where the directors fraudulently withdrew funds contrary to the banking regulations.</p>	<ul style="list-style-type: none"> <li>● <b>5 Suspects charged:</b> Suspect charged with: conspiracy to defraud, fraudulent accounting by officers, stealing, money Laundering</li> </ul>
k)	<p><b>Eurobond:</b> Allegations that not all the moneys realized through the Eurobond issue could be accounted for, and that payments were made from an offshore account without authorization.</p>	<ul style="list-style-type: none"> <li>● The investigations by EACC did not establish any wrong doing, and a recommendation was made for closure of the file.</li> <li>● The DPP concurred with EACC recommendation for closure and advised that the matter be referred to the Kenya National Audit Office.</li> </ul>
l)	<p><b>Tatu City:</b> Fraudulent change and/or transfer of shares, shareholding and directorship in Purple Saturn properties and forgeries.</p>	<ul style="list-style-type: none"> <li>● Joint investigation team (EACC, DCI and DPP) formed</li> <li>● The matter is still under investigation</li> </ul>
m)	<p><b>Wildlife Crime</b></p> <p><b>Feisal case:</b> Feisal and others were charged with dealing with pieces of elephant tusks.</p>	<ul style="list-style-type: none"> <li>● Convicted with jail term of <b>20 years</b> and fined <b>Kshs. 20 million</b></li> </ul>

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		<b><i>Thailand Ivory Case:</i></b> Case no. 1132 of 2015 where a consignment of 511 pieces of ivory weighing 3127kg said to have originated from Kenya and confiscated in Thailand	<ul style="list-style-type: none"> <li>● <b>10 Persons charged: -</b></li> <li>● Case Pending Before Mombasa Court Mutual Legal Assistance is ongoing</li> </ul>
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MAT has enhanced the institutional arrangement and administrative actions geared towards streamlining and enhancing the fight against corruption and other organized crimes. These include:

- i. Development of CBK guidelines on large cash transactions: The Central Bank of Kenya issued additional guidelines in respect of large cash transactions to tighten compliance with the POCAMLA.<sup>13</sup>
- ii. Establishment of a High Court Division on Anti-Corruption and Economic Crimes: The Chief Justice established the Anti-Corruption and Economic Crimes Division to expedite the hearing and conclusion of cases.<sup>14</sup>
- iii. Appointment of additional special magistrates: an additional 13 special magistrates were appointed to specifically deal with corruption and economic crimes cases. They ensure the cases are heard on a daily basis.
- iv. Prosecution guided investigations: The ODPP has assigned special prosecution counsel to specifically deal with corruption and economic crime cases. The Prosecutors liaise with investigators thus shortening the period that would be spent in reviewing the investigation reports before a decision on whether or not to prosecute.
- v. Establishment of a specialized prosecution unit for corruption offences in the ODPP.
- vi. Establishment of a centralized government data platform: MAT is overseeing a project to establish a centralized data platform held by all government agencies; spearheaded by the National Intelligence Service.
- vii. Establishment of County MAT teams: the MAT initiative is replicated in all the 47 counties and these teams have been trained and their capacities built.
- viii. Vetting of officers under MAT: The vetting process is continuous and all officers under MAT are vetted to ensure they are people of integrity.
- ix. MAT has also contributed to the development of legislation that touch on anti-corruption matters including:
  - a. Ethics and Anti-Corruption Laws Amendment Act, 2016, resulting in the number of Commissioners being enhanced from 3 to 5.
  - b. Draft Anti-Corruption Laws (Amendments) Bill, which operationalizes the proposals made by the Task Force as well as recommendations of the 1st Cycle Review of Kenya under UNCAC. Most notably, it proposes amendments to the POCAMLA to allow the FRC to take administrative action; levy civil monetary penalties and clarify the operational independence of the FRC.<sup>15</sup>
  - c. The Whistleblower Protection Bill: this will be overarching legislation that provides for the procedure of disclosure of information relating to improper conduct in the public and private sectors as well as for the protection of persons who make such disclosure against victimization.
  - d. Computer and Cyber Crimes Bill, 2016: Stipulates the need to tame abuse of web-based systems, reduce or eliminate cybercrimes arising from increased use of new technology. It also seeks to protect online cash transactions.
  - e. Bribery Act: this Act outlines stringent measures to check graft between the public and private

<sup>13</sup> Customers are required to declare names of beneficiaries of cash withdrawals above Kshs 1million and justify why such large transactions cannot be done using electronic transfer channels. The CBK Banking Circular No. 1 of 2016 'Additional Guidelines on Large Cash Transactions' is available on [https://www.centralbank.go.ke/uploads/banking\\_circulars/](https://www.centralbank.go.ke/uploads/banking_circulars/).

<sup>14</sup> See Gazette Notice No. 136 of 11<sup>th</sup> December 2015.

<sup>15</sup> This is now catered for by Section 4 of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017.



sector. It criminalizes both the offering and receiving of bribes by any person including local or foreign entities.

#### **IV. CONCLUSION AND RECOMMENDATIONS**

The MAT has been largely successful in recovering assets as outlined above. However, the biggest challenge facing it is the lack of legal anchorage in law and thus the legality of some MAT joint operations are challenged by culprits. There is need to anchor MAT in law to protect it from any external influences like change of Government. Sometimes, individual institutions face capacity constraints. It is recommended that there be continuous funding for the MAT to be enhanced. The capacity of officers under MAT agencies need to be built continuously through training and cooperation with other similar bodies. Moreover, there needs to be a central depository for data including cases, and other resources not only on asset recovery, but also economic crimes and corruption-related cases. All in all, it is a great step towards eradicating corruption and needs to be borrowed as a best practice for states that do not have such initiatives.