

DETECTION, INVESTIGATION, PROSECUTION AND ADJUDICATION OF HIGH-PROFILE CORRUPTION IN MALAWI

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I. INTRODUCTION

The criminal justice system in Malawi involves a number of institutions playing different roles. On the one hand, there are institutions that are responsible for detection, investigation and prosecution of criminal offences. On the other hand, there is the judiciary, which is responsible for trying and adjudication of the cases which have been investigated and recommended for prosecution. One of the criminal offences of particular concern is corruption. In Malawi, the specialized body to lead the fight against corruption is the Anti-Corruption Bureau (ACB). It has powers to investigate and prosecute cases of suspected corruption. This institution was established in 1998 and derives its mandate from the *Corrupt Practices Act (2004)*.

This paper analyses the criminal justice response to and the current situation of high-profile corruption, effective measures and practical challenges to detecting, investigating and prosecuting high-profile corruption, effective measures and practical challenges to collecting and analysing electronic data and effective measures to overcome political interference and ensure the integrity of criminal justice authorities. All these factors will be analysed with reference to Malawi.

II. THE CRIMINAL JUSTICE RESPONSE TO AND THE CURRENT SITUATION OF HIGH-PROFILE CORRUPTION

A. Criminal Justice Response to High-Profile Corruption

Malawi is one of the developing countries in Africa where corruption is perceived to be high. It ranks 120 in the Corruption Perception Index of 2018. Corruption cases reported range from bribery involving small amounts of money to abuse of public office involving large-scale public procurement and misappropriation of funds.

One of the high-profile corruption cases which the ACB started investigating in 2013 and is still prosecuting is about misappropriation of public funds and abuse of public office by some senior as well as junior government officials. The case involved about MK21 billion (Twenty-One Billion Malawi Kwacha), which is about USD26.8 million at the current exchange rate. It was an allegation that the Malawi Government was losing huge sums of money through Integrated Financial Management Information System (IFMIS)¹ in the form of suspicious payments made to various companies that did not render any service to the Malawi Government.

The Malawi Government started making payments through IFMIS in 2005. For a payment to be processed, there were dedicated officers who had rights to access IFMIS to generate, post and approve the payments. This set up was in place at each government ministry, department or agency. In September 2013, some Information and Communication Technology (ICT) personnel who were centrally managing the system discovered that there were some deleted suspicious payments which were made to some private companies that had not rendered any service to the Malawi Government. This discovery was reported to the ACB and investigations into the matter were instituted.

Three law enforcement agencies were involved in investigating and prosecuting the matter. These were

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¹ According to Frank Mangwaya, who was the IFMIS Administrator and one of the witnesses in the case, IFMIS is a computer-based system which the Malawi Government used to generate and make payments. It is an integration of different components such as stock management, payments, procurement, revenue, human resource management and payroll among others.

the ACB, the Malawi Police Service and the Office of the Director of Public Prosecutions, but the ACB was the lead institution. Investigations, which were supported by a forensic audit, revealed that these suspicious payments were generated and made from four government ministries namely, the Ministry of Irrigation and Water Development, the Ministry of Local Government and Rural Development, the Ministry of Tourism, Wildlife and Culture, and the Office of President and Cabinet. The case was complex and involved a lot of people at different levels in the hierarchy of the ministries involved.

Electronic devices such as personal computers, laptops, tablets, routers, dongles, CDs/DVDs, external drives, USB, flash memory cards, and cell phones/smartphones, among others, were seized and analysed. However, the IFMIS system was still being used, and some of the suspects, who were not yet identified as potential suspects at that time, were still using the system and had an opportunity to destroy some evidence. The best practice was to immediately suspend all users of the system to ensure that the evidence was not tampered with, but the problem was that it would collapse operations of all government institutions as no payment would be processed. However, this could be resolved by having an alternative or back-up payment process which was already in place for use in case of IFMIS failure or in times such as these where there was a need to completely shut down the system to preserve evidence.

Several people were arrested and some top-ranking government officials such as the Principal Secretary in the Ministry of Tourism and Culture have already been prosecuted and convicted for various corruption and other related offences such as theft, fraud and money laundering.

None of the people investigated and prosecuted in the above case has immunity from arrest, detention or prosecution. In Malawi, it is only the Head of State who has immunity from arrest, detention and prosecution. He or she can only be tried once out of office. Members of Parliament (MPs) only have immunity from arrest, for less serious offences, when parliament is in session.

Corruption cases in Malawi are tried by the usual Magistrate and High Courts which try any other criminal offences. This poses serious challenges as some of the magistrates and High Court judges are not fully conversant with the *Corrupt Practices Act* that guides them in trying the corruption cases. It is therefore, recommended that Malawi should establish a special court to specifically handle corruption cases. This would enhance speedy prosecution of corruption cases and secure more convictions in the long run.

B. The Current Situation of High-Profile Corruption

Apart from the case mentioned above, the Anti-Corruption Bureau currently has three other high-profile cases in courts which are yet to be concluded. All the three cases involve large-scale procurement by government agencies. One case is about procurement of 100,000 metric tonnes of maize from Zambia by one of the state-owned companies. This procurement involves about MK15 billion (Fifteen Billion Malawi Kwacha), which is about USD19.1 million at the current exchange rate. The case was concluded in court but the ACB has appealed against the judgment as the court dismissed it, and the appeal is yet to be heard. The second case is about procurement of food rations by the Malawi Police Service. This case involves about MK3 billion (Three Billion Malawi Kwacha), which is about USD3.8 million at the current exchange rate. The third case is about misappropriation of government funds by the former President of Malawi, and it involves about MK4 billion (Four Billion Malawi Kwacha), which is about USD5 million at the current exchange rate. Then there is another case which is still under investigations. This case is about procurement of food rations by the Malawi Police Service, and it involves about MK2 billion (Two Billion Malawi Kwacha), which is about USD2.5 million at the current exchange rate.

III. EFFECTIVE MEASURES AND PRACTICAL CHALLENGES TO DETECTING, INVESTIGATING AND PROSECUTING HIGH-PROFILE CORRUPTION

A. Detection

Successful detection of high-profile corruption mainly depends on good mechanisms put in place to obtain information of corruption allegations from various sources. In Malawi, people can report allegations of corruption by coming in person to the ACB, writing letters, making phone calls and sending facsimiles (faxes) or e-mails. However, people feel encouraged to report when they feel that they will not be victimized for reporting suspected corruption in their society.

Article 33 of the *United Nations Convention Against Corruption* (UNCAC) compels each state party to provide for protection of reporting persons.² In compliance with this Article and as a measure of encouraging reporting, Section 51A of the *Corrupt Practices Act* of Malawi provides for protection of whistle-blowers and other informers by prosecuting those who victimize the whistle-blowers or any other informers. However, it has always been a challenge to prosecute these people, especially when one is reporting against someone who is senior to him/her. At the workplace, for instance, the superiors reported against may victimize the whistle-blowers indirectly by trying to find other reasons against them which may lead to their dismissal or other administrative actions. It is therefore proposed that the country should look for alternative remedies such as relocating the whistle-blowers to other countries with different identities once their identities have been known by the suspected persons. However, this requires adequate funds, which is a big problem in our country.

After receiving the reports of alleged corruption, investigations commence. In the course of investigations, investigators may also discover other corruption-related offences such as tax offences, money-laundering, theft or fraud. Where necessary, the ACB shares this information with relevant national authorities such as the Financial Intelligence Authority (FIA), the Malawi Revenue Authority (MRA) and the Malawi Police Service, among other agencies. The ACB also involves the commercial banks and other financial institutions, especially when there is need to get bank statements for suspected individuals. Where the ACB feels it can solely investigate these offences, it does so as provided for in Section 10(1) (e) of the *Corrupt Practices Act*.³ Where it feels other institutions such as the Malawi Police Service should also assist, the responsibility is also shared with them. This is what happened in the case study involving loss of funds by the Malawi Government referred to above.

B. Investigation and Prosecution

To successfully investigate and prosecute a case, it is important that witnesses and accomplices cooperate with the criminal justice authorities. However, most of the witnesses and accomplices cooperate when they feel that they are protected by law. Article 32 of UNCAC provides for protection of witnesses, experts and victims.⁴ In accordance with this Article, Section 51(A) of the *Corrupt Practices Act* also provides for protection of witnesses and experts by prosecuting those who victimize them for their testimony in court, as is the case with whistle-blowers mentioned above. However, for fear of persecution from those whom they testified against or their agents, some witnesses may choose to become hostile during court proceedings. For instance, in a certain case, a traditional leader (Village Headman) who reported against a senior traditional leader to whom he reports (Group Village Headman) as being corrupt in distribution of subsidised farm inputs, became hostile and disowned the witness statement which was recorded from him despite signing for it. The ACB is now prosecuting this traditional leader for giving false information to the ACB.

During investigations, there are also some instances which require the use of special advanced techniques such as undercover operations, electronic surveillance or interception of communications. However, the ACB does not have capacity to use such kind of investigative techniques. In addition, the constitutional right to privacy does not allow interception of communication. With availability of funds, it is the wish of the ACB to use such special investigative techniques where necessary and within the prevailing laws.

Where the case is transnational, there is need for international cooperation and mutual legal assistance. To facilitate this, Malawi is party to various international agreements, one of them being the *Southern Africa Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters*. Where there is no such agreement, embassies of the two countries involved are engaged if the two countries have diplomatic ties. In the case of the procurement of the 100,000 metric tonnes of maize from Zambia mentioned earlier,

² Article 33 of UNCAC states, "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."

³ Section 10(1) (e) states, "The functions of the Anti-Corruption Bureau shall be to investigate any offence under any written law disclosed in the case of investigating any alleged or suspected corrupt practice or offence under this Act."

⁴ Article 32 of UNCAC states, "Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them."

although mutual legal assistance was not obtained, the Police to Police cooperation was used to gather intelligence with the view to procure mutual legal assistance as both Malawi and Zambia are parties to the *SADC Protocol on Mutual Legal Assistance in Criminal Matters*.

IV. EFFECTIVE MEASURES AND PRACTICAL CHALLENGES TO COLLECTING AND ANALYSING ELECTRONIC DATA

A. The Current Situation of Electronic Evidence

The type of electronic evidence observed in cases involving high-profile individuals varies from case to case. In the case where the Malawi Government lost huge sums of money through suspicious payments to various companies, for instance, the electronic evidence gathered was the online payments generation and approvals in the IFMIS, telephone communication between accomplices, recovered e-mail communication, electronic financial transactions between accomplices and location of the accomplices using telephone service providers.

To gather the above-mentioned electronic evidence, electronic devices seized in most cases include cell phones/smartphone data, personal computers/laptops, tablets, routers, dongles, modems, CDs/DVDs, wireless network cards, external drives, USB, flash memory cards and digital cameras, among others. In the case study cited above, the electronic data that was collected by the ACB was analysed at the Malawi Police Service as the ACB did not have forensic equipment at that time. However, this had challenges as there was mistrust between the Police and the ACB on how the information was handled. Secondly, even the equipment at the Malawi Police Service did not have the capacity to extract data from all the gadgets seized and to analyse it. The best practice was to analyse the collected electronic data at the ACB as it would be handled by selected few individuals who could be trusted and trained to handle such sensitive information.

B. Effective Measures and Practical Challenges to Collecting and Analysing Electronic Evidence

For any investigator to effectively carry out a search and seizure operation, collect electronic evidence from a crime scene and analyse it, he/she has to be trained to do that task as electronic evidence can easily be altered or destroyed if not properly handled.⁵

When one is employed as an investigator at the Anti-Corruption Bureau in Malawi, he/she undergoes an intensive training in investigative skills for a period of about eight weeks. During this period, investigators are taught basic skills on how to conduct search and seizure operations, including at a crime scene where electronic evidence may be collected. Such basic skills include how to handle a computer/laptop at a crime scene when you find it switched on or off or how to handle a cell phone when seized from a potential witness or suspect. The training also covers basic skills on how to analyse data obtained from such electronic devices. The trainees are not however, trained on how to analyse complex electronic data which require some software and equipment which is not readily available at the time of training.

In 2016, the ACB, with funding from Irish Aid, procured forensic equipment and established a forensic laboratory at its head office in Lilongwe, the capital of the country. The forensic laboratory, which is referred to as a Forensic Data Unit (FDU), is where all electronic data collected from all the investigators across Malawi is analysed. The forensic equipment procured is a Universal Forensic Extraction Device (UFED) Touch 2 with its associated software, such as TD2, TD3, ENCASE and FTK. Two investigators have been specifically trained in forensic investigation to run the FDU, alongside with two other ICT personnel. All the other investigators from all three regional offices of the ACB submit their collected electronic devices to the FDU for analysis.

To ensure that there is effective collection of electronic evidence, all investigators are encouraged to be accompanied by any of the two investigators or ICT officers trained in forensic investigations whenever they are going for a search and seizure operation where electronic evidence is expected to be collected.

The FDU also serves other law enforcement agencies in the country, including the police, as their software licences have expired and they are unable to renew them. So far, the FDU has successfully analysed electronic data for ten (10) different cases from within the ACB and five (5) cases brought by the Malawi

⁵ US Department of Homeland Security, Presentation on Managing Static Digital Evidence.

Police Service. The most electronic devices brought for analysis are cell phones and computer/laptops.

The biggest challenge the ACB faces in running the FDU is renewing licences for its software as they are very expensive. The institution also wishes to train more investigators in forensic investigations but is failing to do so because the training is expensive as it has to be done outside the country, preferably in Kenya or South Africa. It is therefore recommended that, with the little resources available, the ACB should gradually train at least one or two investigators at each regional office to reduce dependency on the head office whenever the regional offices would like to collect and analyse electronic evidence.

V. EFFECTIVE MEASURES TO OVERCOME POLITICAL INTERFERENCE AND ENSURE THE INTEGRITY OF CRIMINAL JUSTICE AUTHORITIES

As indicated earlier, the Anti-Corruption Bureau (ACB) of Malawi is a Government Department, and it is created under Section 4 of the *Corrupt Practices Act*.⁶ Section 4(3), which provides for the independence of the ACB.⁷ Much as this section provides for the independence of the ACB, some believe that there is, to some extent, political interference in the manner the ACB operates as the Director and the Deputy Director of the institution are appointed by the President of the country as provided for in Section 5 and 7 of this Act.⁸ Section 5(1) provides for the appointment of the Director, while Section 7(1) provides for the appointment of the Deputy Director. Although the appointments of the two are subject to confirmation by the Public Appointments Committee of Parliament, some believe that these provisions have potential to compromise the independence of the ACB.

Additionally, Section 11(1) (a) of the *Corrupt Practices Act* also empowers the Director of the ACB to authorize in writing any officer of the ACB to conduct an inquiry or investigation into alleged or suspected offences under this Act. This implies that for any investigation to commence, the Director has to authorize that investigation. He/she has the discretion to either authorize the investigation or not. After authorization of investigation of some cases, there have been instances where the Director has ordered pending arrests of some high-profile political figures connected to the President, who is the appointing authority of the Director and the Deputy Director of ACB. This constitutes an obstruction of justice offence, but there is no law prohibiting the Director from doing such things. To overcome this challenge, it is recommended that the law should be amended such that the Director of the ACB and his/her deputy should be recruited on merit through interviews instead of being appointed by the President.

As already indicated, some cases are recommended for prosecution after investigations are completed. The ACB has its own prosecutors to prosecute corruption and other related cases. However, it does not have powers to prosecute without the direction of the Director of Public Prosecutions.⁹ Although the *Corrupt Practices Act* has a caveat to the Director of Public Prosecution's withholding consent, this has potential to compromise the independence of the ACB in prosecuting corruption cases as the consent may sometimes take unnecessarily long to be granted. This challenge can also be addressed by amending the law to allow the ACB to prosecute corruption cases without getting consent from the Director of Public Prosecutions.

When the consent is granted and the matter goes to court, the cases are heard by either Magistrates or High Court judges, depending on the nature of the matter. Every case starts in a Magistrate Court, but some may be committed to the High Court depending on the amounts of money involved and other factors.

Whether the matter is at a Magistrate Court or at the High Court, there may be political influence during adjudication of some cases, especially when they involve high-profile individuals connected to senior

⁶ Section 4 of the *Corrupt Practices Act* states, "There is hereby a body to be known as the Anti-Corruption Bureau which shall consist of the Director, the Deputy Director and such other officers of the Bureau, as may be appointed under Section 9."

⁷ Section 4(3) of the *Corrupt Practices Act* states, "The Bureau shall exercise its functions and powers independent of the direction or interference of any other person or authority."

⁸ Section 5(1) of the *Corrupt Practices Act* states, "The President shall, on such terms and conditions as he thinks fit, appoint the Director, and the appointment of any person as Director shall be subject to confirmation by the Public Appointments Committee."

⁹ Section 10(1) (f) of the *Corrupt Practices Act* states, "The functions of the Bureau shall be to, subject to the direction of the Director of Public Prosecutions, prosecute any offence under this Act."

government or political party officials. This is so because, in Malawi, the head of the judiciary (chief justice), Supreme Court and High Court judges are appointed by the president of the country. This challenge can be alleviated by removing presidential powers from the president to appoint the chief justice as well as the High Court and Supreme Court judges as these have influence and control over the magistrates who may preside over some cases involving high-profile individuals. The chief justice and the judges have to be appointed through promotion after attending interviews.

Since its establishment in 1998, the ACB has been regarded as an institution of high integrity. To ensure integrity of the investigators and prosecutors as well as all its employees, the institution rigorously vets candidates who succeed during interviews before being offered employment. However, there is no integrity testing conducted on these prospective employees.

Besides the vetting process, the investigators and prosecutors, just like any other employee of the ACB, are given a copy of the Code of Conduct and Standing Orders for the institution (referred to as Bureau Standing Orders) on the first day of their employment. Every employee of the ACB also declares his/her assets upon joining the institution and continues to do so at the beginning of every financial year.

To further ensure integrity of its employees, the ACB also offers a competitive remuneration package to its employees including the investigators and prosecutors, though it is not among the highest paying institutions in the country. The judges, on the other hand, have better remuneration packages as they have special conditions of service different from those of the ACB. It is therefore recommended that the ACB should start conducting integrity tests on its employees and lobby the Malawi Government to provide more funds to the institution to make it one of the highest paying employers in the country to strengthen the integrity of its employees.

VI. CONCLUSION

Malawi, just like many countries across the world, faces the challenge of high-profile corruption. The Anti-Corruption Bureau of Malawi detects, investigates and prosecutes such cases in the country's courts of law. However, adjudication of such cases may at times be affected by political influence as the country's president has powers to appoint the head of the judiciary and the head of the Anti-Corruption Bureau. Such challenges may be addressed by removing the presidential powers of making these appointments. This will ensure independence of the two institutions.