

THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003 EXPLAINED



ETHICS AND ANTI-CORRUPTION COMMISSION



On the Frontline against Corruption

THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003 EXPLAINED

A Manual for Public Officers and Members of the Public



ETHICS AND ANTI-CORRUPTION COMMISSION

**© A publication of Ethics and Anti-Corruption Commission
Directorate of Preventive Services**

Disclaimer

The opinions and illustrations in this publication do not purport to be final/judicial interpretations of the Anti-Corruption and Economic Crimes Act, 2003. All efforts have been made to simplify the Act for general readership. However, this Guide, on its own, is not a substitute for the Anti-Corruption and Economic Crimes Act, 2003. Users of the Guide are therefore encouraged to read the Act as well. All characters and “cases” featuring in this Manual are imaginary and are used solely for purposes of illustration.

© Ethics and Anti-Corruption Commission
Directorate of Preventive Services



TABLE OF CONTENTS

FOREWORD.....	vi
1. BACKGROUND.....	1
2. THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003.....	2
3. CORRUPTION OFFENSES.....	5
a) Bribery.....	6
b) Fraud	7
c) Embezzlement or misappropriation of public funds.....	7
d) Breach of trust.....	8
e) An offence involving dishonesty in relation to taxes.....	9
f) An offence involving dishonesty under any written law relating to elections of persons to public office.....	9
Corruption Offences Described in Part V of the Act.....	10
a) Bribery Involving Agents (section 39).....	10
b) Secret Inducements for Advice (section 40).....	12
c) Deceiving the Principal (section 41).....	13
d) Conflicts of Interest (section 42).....	14
e) Improper benefits to Trustees for appointment (section 43).....	15
f) Bid rigging (section 44).....	16
g) Abuse of Office (section 46).....	17
h) Dealing with Suspect Property (section 47).....	18
i) Attempts and Conspiracies.....	19
5. ECONOMIC CRIMES.....	20
6. PENALTIES FOR OFFENCES UNDER THE ACT.....	22
7. UNEXPLAINED ASSETS.....	25
8. APPOINTMENT OF A RECEIVER.....	25
9. OUT OF COURT SETTLEMENT.....	26
10. PROTECTION OF INFORMERS.....	26
11. THE APPLICATION OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT BEYOND THE BORDERS OF KENYA.....	26
12. EFFECT OF REPEAL OF THE PREVENTION OF CORRUPTION ACT.....	27
13. CONCLUSION.....	27



FOREWORD

The Anti-Corruption and Economic Crimes Act, 2003 was enacted by Parliament to provide a legal framework to guide the fight against corruption and economic crimes in Kenya. The Act provides for a number of strategies to be employed in the fight against corruption. These include investigation, prosecution, prevention, education, and asset recovery.

Investigating and prosecuting perpetrators of corruption is important, but in the long run, corruption will only be defeated through comprehensive prevention and public education strategies and programmes. These will reduce and eliminate opportunities for corruption and inspire behavioral change in our society.

The Ethics and Anti-Corruption Commission believes that Kenyans can most effectively join in the war against corruption if they know what corruption is and the law that makes it a criminal offence. The Commission has therefore developed this Guide to explain fully the contents of the law on corruption. The Guide highlights key provisions of the Act, which will assist public officers and the public understand the stipulations in the law on corruption, and engender appropriate behavior and attitude change towards a corruption free nation. The Guide may also serve as an aid in the development and teaching of short courses for officers in public and private bodies, civil society and religious organizations, and the public in general. Preventing and fighting corruption is the duty and responsibility of every Kenyan.

As I commend this Guide to the readership of all the Kenyan people, I wish to encourage users of the Guide to read other key anti-corruption laws that have come into force. These include Ethics and Anti-Corruption Commission Act 2011, the Leadership and Integrity Act 2012, the Public Finance Management Act 2012 and the Proceeds of Crime and Anti-Money Laundering Act 2009.

Irene Keino, MBS
Vice Chairperson- Ethics and Anti-Corruption Commission.





1. BACKGROUND

There has been growing public awareness of the consequences of corruption, its negative and destructive effects on the economy and development, and the need to eliminate it. In seeking to address corruption, Parliament passed the Anti-Corruption and Economic Crimes Act 2003 and the Public Officer Ethics Act 2003. These Acts came into effect on 2nd May 2003. It is important to set out the background of past anti-corruption efforts that led to the enactment of the Acts.

Corruption as a problem in Kenya dates back to the colonial times. In 1956, the Prevention of Corruption Act, chapter 65 of the Laws of Kenya, was passed by the British colonial authorities in an effort to provide a legal framework for combating public corruption. It provided for the punishment of bribery involving holders of public office. The Act was amended in 1991 to provide stiffer penalties for those convicted of corruption. In 1993, an anti-corruption squad was administratively established in the police force to spearhead the fight against corruption.

In 1997, the Prevention of Corruption Act was amended to establish the Kenya Anti-Corruption Authority (KACA). KACA was disbanded in the year 2000 after it was declared unconstitutional by the High Court. This decision was on the basis, among others, that the powers of KACA to prosecute went against Section 26 of the then Constitution which had then preserved powers of prosecution on the Attorney General. After the disbandment of KACA, the Anti-Corruption Police Unit was formed administratively to continue the fight against corruption.

In December 2002, a new government was voted into power, and one of its main pledges was to address the runaway corruption which had existed under the previous regimes. Among the initiatives the government put in place was enactment of new laws to establish a legal and institutional anti-corruption framework. Principal among the new laws enacted under the new regime was the Anti-Corruption and Economic Crimes Act, 2003 which established the Kenya Anti-Corruption Commission (KACC) as the main legal body with the mandate to fight corruption in Kenya. The Act came into effect in May 2003. Apart from establishing KACC, the Act provided for the various offences of corruption, the investigation and penalties for such offences. It also established the special magistrates to preside over corruption cases.

In August 2010, a new constitution was promulgated in Kenya, which made far reaching changes on governance, leadership, integrity in the anti-corruption regime. Article 79 of the Constitution required Parliament to enact legislation to establish an independent body to ensure compliance with and enforcement of Chapter Six of the Constitution. Pursuant to this Article, Parliament enacted the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 which came into effect on 5th September 2011. The Act amended the Anti-Corruption and Economic Crimes Act



by repealing the provisions establishing Kenya Anti-Corruption Commission and its Advisory Board, while retaining all other provisions relating to corruption offences and economic crimes, their investigation and prosecution. Being the successor institution to the Kenya Anti-Corruption Commission, the Ethics and Anti-Corruption Commission is mandated to implement the provisions of the Anti-Corruption and Economic Crimes Act.

2. THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003

The Act makes the following key provisions in the investigation and punishment of corruption and economic crimes;

- (A) establishment of Special Magistrates
- (B) Investigation of corruption
- (C) Definition of corruption offences and the applicable penalties
- (D) Compensation and recovery of improper benefits
- (E) Procedures for recovery of unexplained assets

A. SPECIAL MAGISTRATES

Section 3 of the Act requires the Chief Justice to appoint Special Magistrates to hear cases of corruption, economic crimes and related offences in their areas of jurisdiction. Special Magistrates are authorized to, as far as possible; hear cases on a day-to-day basis until completion. They may mete out any punishment authorized by law. The reason behind the establishment of Special Magistrates courts is to ensure the speedy hearing and conclusion of cases and punishment of offenders found guilty of corruption, economic crime and related offences.

B. INVESTIGATIONS

The Commission may investigate any matter raising suspicion of corrupt conduct or economic crime or conduct of any person that is conducive to corruption or economic crime. It may also investigate any loss or damage to public property, and institute cases in court for the recovery of such property or for compensation for loss or damage.

Powers with Regard to Investigations

The Act empowers a duly appointed investigator to conduct investigations on behalf of the Commission. In the conduct of an investigation, the investigator has the same powers, privileges and immunities of a police officer which include powers to arrest, charge and detain suspects. In addition, the Act confers the following powers to the Commission:



ACECA Explained

- Require a person suspected of corruption or economic crime to provide a written statement in relation to any of his/ her property specified by the Commission, the time of acquisition and how much was paid for the property.
- With a court order, require someone related to a person suspected of corruption or economic crime to provide a written statement in relation to any property specified by the Commission, stating how the property was acquired and what consideration, if any, was paid.
- With a court order and notice to the affected parties, require any person to provide any information or documents in the person's possession that relate to a person suspected of corruption or economic crime.
- Require any person to produce specified records in his possession, and provide any other explanations and information within his knowledge relating to the records.

A person who neglects or fails to comply with any of these requirements commits an offence and may, if found guilty, be fined up to Sh. 300,000/= or be jailed for up to three (3) years or both.

Further, in the course of investigations, the Commission has power to:

- Enter and search any premises with a warrant.
- Require a person to produce for examination, any property in the person's possession, being the property of a person suspected of corruption or economic crime.
- Apply *ex parte* (without the presence of the other party) in court for an order requiring a person to surrender his travel documents to the Commission.

The Act forbids anyone from disclosing the details of an investigation, including the identity of the person being investigated, without permission from the Commission or as required by law. It also criminalizes the impersonation of an investigator. Any person who disobeys these provisions commits an offence and may, if found guilty, be fined up to Sh. 300,000/= or jailed for up to three (3) years or both.

Under section 66 of the Act, it is an offence for any person to:

- Block, hinder, physically attack or threaten a person acting under the Act; or
- Deceive or knowingly mislead the Commission or a person acting under the Act; or
- Destroy, modify, conceal or remove documents, records or evidence that the person believes, or has reason to believe may be relevant to an investigation under the Act; or



ACECA Explained

- Make false claims to the Commission or a person acting under the Act commits an offence and may, if found guilty, be fined up to Sh. 500,000/= or be jailed up to five (5) years or both.

Duties in Respect of Investigations

The Act imposes certain duties and responsibilities on the Commission and the Director of Public Prosecutions with regard to investigations.

- Following an investigation, the Commission is required to report the results of the investigation to the Director of Public Prosecutions. The report shall include any recommendation the Commission may have for the prosecution of a person for corruption or economic crime.
- The Commission has a legal duty to prepare Quarterly Reports setting out the number of reports made to the Director of Public Prosecutions, and recommendations made for the prosecution of any persons for corruption or economic crime. These Reports shall indicate whether the recommendations were accepted or not. The Commission is required to give a copy of each Quarterly report to the Director of Public Prosecutions who shall present it to Parliament. These Quarterly Reports are published by the Commission in the Kenya Gazette.
- The Act requires the Commission to prepare an Annual Report, which shall describe the activities of the Commission. It shall also include information contained in the Quarterly Reports for that year. This report shall be presented to the Minister in charge of integrity issues who shall then present it to Parliament.
- The Director of Public Prosecutions is required to prepare an Annual Report on cases relating to corruption and economic crime. The annual report shall include a summary of the steps taken in each case and the status of each case at the end of the year. It shall also indicate if a recommendation of the Commission to prosecute a person for corruption or economic crime was not accepted and why it was not accepted. The Director of Public Prosecutions shall present each Annual Report to Parliament.

(ii) Asset Recovery and Compensation

Under the Act, the Commission is empowered to investigate the extent of liability for the loss of or damage to any public property and; 'to institute civil proceedings against any person for the recovery of such property or for compensation; and to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya.



Explanation: Where a person receives a salary or benefit he is not entitled to or where a person unlawfully acquires a public property, the Commission shall investigate with a view to recovering such benefit or property.

4. CORRUPTION OFFENCES AND PENALTIES

Definition of Corruption

The Anti-Corruption and Economic Crimes Act explains corruption by setting out what constitutes corruption. Section 2 of the Act lays out the general parameters of what constitutes corruption to include:

Bribery



Abuse of Office



Fraud



Embezzlement or misappropriation of public funds



ACECA Explained

- Breach of trust
- An offence involving dishonesty-
 - in relation to taxes, or
 - under any written law relating to elections of persons to public office.

The offences under section 39-44, 46 and 47A of the Act are:

- Bribery involving Agents
- Secret inducements for advice
- Deceiving the principal
- Conflicts of interest
- Improper benefits to trustees for appointment
- Bid rigging
- Dealing with suspect property.
- Attempts and Conspiracies

We shall consider them in greater detail below:

(a) Bribery

Bribery occurs when a person dishonestly gives or receives a benefit as an inducement or reward for doing or omitting to do what one is already under duty to do or omit to do.

Illustration:

Juma is a Traffic Police Officer. Some of his responsibilities involve keeping general good order on the roads by ensuring that drivers obey traffic rules. Mkakamavu is a matatu driver plying one of the city routes. Mkakamavu's vehicle is in urgent need of repairs. The tyres are worn out, the headlights and indicators do not work and the exhaust pipe produces a lot of smoke amongst other things. The vehicle is not only a danger to Mkakamavu and the passengers he ferries, but to other road users as well.

Juma, with other police officers, has mounted a road block on the route that Mkakamavu uses. He regularly stops Mkakamavu at the roadblock and makes half-hearted attempts to warn him of grave consequences if Mkakamavu does not remove his vehicle from the road. Mkakamavu's response is usually to hand over his driving license with some money



inside for Juma. Juma then waves the vehicle by and takes no further action.

Juma commits the offence of receiving a bribe while Mkakamavu commits the offence of offering a bribe.

(b) Fraud

This refers to a situation where a person intentionally makes a false statement or manipulates information in order to confer a benefit to oneself or other person(s) through dishonesty, deceit or trickery.

Illustration:

Atieno and Omari are public officers in one of the government departments. They work as Procurement Officer and Accountant respectively. They have come up with a plan to enrich themselves. Atieno will usually claim to buy certain goods for the department. In actual fact, these goods are never purchased. Omari then approves payment for these goods despite knowing that they were never bought. He also manipulates the department's accounting books to ensure that their plan is not discovered. The money received from the department for these imaginary goods is shared between Atieno and Omari. This plan has been in place for the past two months.



Atieno and Omari commit fraud.

(c) Embezzlement or Misappropriation of Public Funds

Embezzlement refers to the dishonest acquisition and conversion of public funds or resources to one's use. Misappropriation, on the other hand, is the misallocation or wrongful use by a public officer of public funds placed under his/her care.

Illustration:

Ben is a Chief Executive Officer of one of the parastatals in the country. About two months ago, he decided to put up a huge and expensive family home in one of the high-class residential areas in Nairobi. Unable to meet the cost of building

ACECA Explained

the house from his personal funds, Ben decides to use some of the parastatal's money for the project. He feels secure in his job and hopes to quietly repay this money to the parastatal over the next three years.

Further, in a bid to meet his other urgent financial commitments, Ben has made many trips locally and abroad, supposedly for official business, using public funds meant for media and publicity, but in reality the purpose was for getting large cash advances (imprest). He has been unable to properly account for these imprests.



Ben embezzles public funds when he uses some of the parastatal's money to put up a family home.

He misappropriates funds when he uses public funds meant for media and publicity for unjustified trips.

(d) Breach of Trust

The public service is a public trust. Authority assigned to a public officer must be exercised in a manner that promotes integrity and the best interest of the people. Public service must also demonstrate respect for the people and bring dignity and honour to the public office. Members of the public expect public officer to render selfless service based solely on the public interest. This demonstrated by honesty in the execution of public duties, accountability to the public in decision making, discipline and commitment in service to the people. Therefore, a public officer should do his or her best to discharge these duties in line with the Constitution. When a public officer does anything that is contrary to these expectations, he or she commits a breach of trust.

Illustration:

Kamau is a senior officer in the Ministry of Lands and Housing. He is involved in a programme where the government is disposing off a number of its houses which it does not need. Part of his duties under the programme is to ensure that all applications made meet the set criteria, one of which is that the applicant must be a civil servant. In the course of performing his duties, Kamau receives an application from Zainabu, who is a senior employee of a local bank. Kamau and Zainabu are



ACECA Explained

close friends. Kamau passes the application and fast tracks it through the remaining processes, including an erroneous certification that Zainabu has paid the set price for the particular house applied for. In the process, the government loses revenue expected to have accrued from the sale.

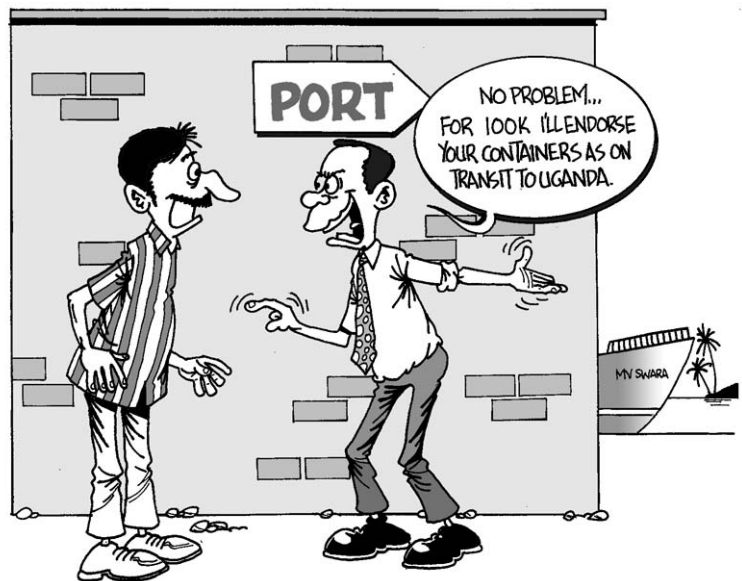
Kamau has breached the trust bestowed upon him by virtue of his public office, and therefore commits an offence.

(e) An Offence involving Dishonesty in relation to Taxes

This occurs when a person denies the government revenue by evading or assisting someone to evade payment of any taxes and levies due to the government.

Illustration:

Patel is in the export and import business. He is based in Mombasa. He brings into the country three (3) container loads of motor vehicle spare parts. At the port of entry he declares that the containers have rice in transit to Uganda. Behind the scenes, Patel has “seen” Otoy, a Revenue Officer, who is meant to ensure that these goods transit to Uganda through Malaba. Otoy assures Patel that for some KSh. 100,000, he will have the documents endorsed that the three containers have transited to Uganda when in fact they do not leave the country and are sold locally. Had the goods been declared for local use, they would have attracted duty of KSh. 4.5 Million.



1. Patel commits the offence of fraudulently failing to pay tax.
2. Otoy is guilty of the offence of Abuse of Office.
3. Otoy is also guilty of the offence of Breach of Trust.

(f) An Offence involving Dishonesty under any Written Law relating to Elections of Persons to Public Office.

A person commits this offence when he/she does anything that causes an election not to be free and fair. There are many ways he/she could do so; for example, printing of fake voters' register or ballots, giving false information so as to be registered as a voter, destroying ballot papers or boxes or voters' cards without good reason,

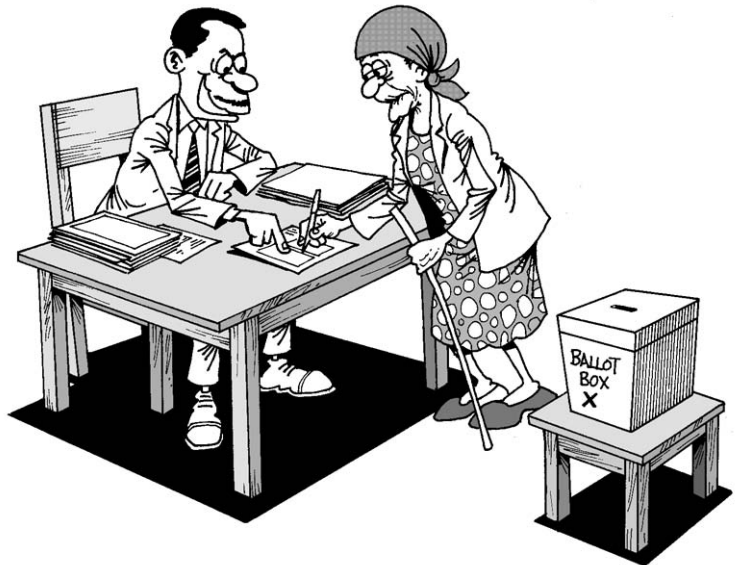


ACECA Explained

preventing a person from voting without good reason or any of the other offences provided for in the Elections Act, 2011.

Illustration:

Andrew has recently been appointed a Polling Clerk for elections of the Councillor of Usijali Ward. Among the candidates running for election is Andrew's cousin and very good friend Jimmy. It is clear that Jimmy is unlikely to win, as he is not popular. Jimmy approaches Andrew with a request for assistance in order to win. During the election, which is by secret ballot, Andrew advises unsuspecting voters who he thinks are likely to vote for candidates other than Jimmy to mark their ballots in such a manner that they must be declared "spoilt" votes. As a result, Jimmy is elected as the councillor of Usijali Ward.



Andrew and Jimmy commit the offence of dishonesty relating to elections of persons to public office contrary to the Elections Act, 2011.

CORRUPTION OFFENCES DESCRIBED IN PART V OF THE ACT

(a) Bribery involving Agents (section 39)

An agent is a person who in any capacity is employed by or acts for or on behalf of another person or organization called the principal. The employment or actions may be either in the public or private sector. Public officers are agents of the government. The offence of bribery involving agents occurs where a bribe is given, solicited, offered or received in relation to the work of an agent. A bribe is any benefit that is intended to corruptly induce the decision of the agent, or is a reward for the decision of the agent.

The offence is also committed by a person who agrees to give, solicit, offer or receive a benefit. The benefit may be a gift, a loan, a fee or a reward. It may also be an appointment, a service, a favour, a promise or any other advantage. It may be in cash, in kind or even as a form of hospitality for example a complimentary ticket to a hotel or entertainment spot. Bribes have different terminologies in Kenya. They include "TKK", "chai", "grease", "oil" "asoya", "ihaki" "soda" "lunch" and "fare" .



Illustrations:

1. Alex has failed to pay his electricity bill. The disconnection technician, Mkataji, who has come to disconnect the supply finds Inda, the house help and informs her of his mission. Inda immediately calls Alex who tells her to ask Mkataji to wait. In a split moment Alex arrives and negotiates with Mkataji to accept KSh. 300 to postpone the disconnection. Mkataji insists on KSh. 500 which he is given . He allows Alex three extra days of illegal supply of electricity.



Alex has committed the offences of bribery involving agents by offering and giving a bribe .

Mkataji committed the offences of soliciting and receiving a bribe.



2. Mary has had a very stressful day. She has had several meetings in the course of the morning and is running late for yet another meeting with one of her company’s clients. To her dismay, she cannot find parking space anywhere near the venue of her meeting. She decides to park directly under a “No Parking” sign at a side road near the building where the meeting is to be held. As Mary leaves the meeting later that

afternoon, the sight of Kausha, a City Council officer, clamping her car, confronts her. She rushes to Kausha and pleads for forgiveness. Mary quickly produces a KSh. 500 note and gives it to Kausha who then removes his clamp, gives her a warning and walks away.

Mary committed the offence of giving a bribe.

Kausha committed the offence of receiving a bribe.

3. Jacob has learnt of a vacancy for the position of Office Assistant at Maua Flowers Company. He pays the company a visit and talks with the Recruitment Manager, Mwandikaji. Mwandikaji informs Jacob that the position is highly competitive; in fact, the area Member of Parliament has sent a short list already. He informs Jacob that

ACECA Explained

“hapa, kimeumana!” (things are tough!). Jacob also explains how he has suffered with his sister, Apisi, and would do anything to assist her. Mwandikaji accepts to offer Apisi the job after Jacob promises to give an equivalent of one month’s salary of KSh. 40,000 in two installments once Apisi begins work.

Jacob is guilty of offering and agreeing to give a bribe.

Mwandikaji commits the offence of agreeing to receive a bribe.



(b) Secret Inducements for Advice (section 40)

This offence occurs where a benefit is solicited, offered, given or received in relation to giving advice to another person where the benefit is intended to be a secret from the person to be advised. The giving of advice includes the giving of information. Advice in this case refers to an opinion given by someone with expert knowledge or skill in a particular area. This advice is usually requested for by a person who may wish to rely on it to make a decision.

Illustrations:



1. Ekuru is employed as a State Counsel in one of the Provincial State Law Offices. A criminal investigation file is forwarded to him by the local Provincial Criminal Investigation Officer (PCIO) for perusal and advice. After perusal of the file, he comes to the conclusion that a charge of murder would be appropriate. Before he gives the advice, a relative of the suspect visits him and offers to give him Kshs 7,000. He readily accepts the same and advises that the suspect should be charged with manslaughter, a lesser offence to murder.

Ekuru commits the offence of secret inducement for advice.



ACECA Explained

2. Chotara approaches Pesa Nyingi Commercial Bank, with which he has an account, for a loan of Ksh. 500,000/= to enable him expand his business. He offers his land, which has an estimated value of about Ksh. 350,000/=, as security for the loan. He soon learns that the Bank has asked Kerich, a land valuer, to conduct a valuation of the property. Chotara desperately needs the loan and so, unknown to the Bank, he approaches and persuades Kerich to state that the land is worth Ksh. 600,000/=. In return, Chotara offers Kerich Ksh. 50,000/= "as something small". Relying on the valuation report prepared by Kerich, the Bank approves the loan requested by Chotara.



Chotara and Kerich commit the offence of secret inducement for advice.

(c) Deceiving the Principal (section 41)

An agent, who to the disadvantage of his principal makes a statement to his principal which he knows to be false or misleading in any significant respect, is guilty of an offence. Further, an agent who, to the disadvantage of his principal, uses or gives his principal a document, which he knows, contains anything that is false or misleading is guilty of an offence. A statement or document is false if it is objectively untrue. It is misleading if it appears to be true, but in fact conceals the true position, and if relied upon, leads to a wrong conclusion.

Illustrations:

1. Chweya frequently absents himself from work during the month on grounds that he is going to consult his doctor while in reality he goes to attend to a new business he has established in town. At the end of month, he receives a salary for a full month's work on the understanding by the government that he has faithfully been on duty the entire month.



Chweya commits the offence of deceiving the principal.



ACECA Explained

2. Omera is a public officer in charge of procurement at a local authority. He receives goods from Kaimati, a supplier of stationery, that are sub-standard and cannot be used by the local authority. They are also fewer in number than what was ordered. Instead of rejecting the goods, Omera proceeds to approve them despite these shortcomings and makes recommendations that they be paid for in full. In exchange, Kaimati gives Omera a percentage of the payment he has received.

Omera commit the offence of deceiving the principal.

(d) Conflict of Interest (section 42)

An agent is guilty of an offence if he has a direct or indirect private interest in a decision that his principal is to make, and knowing or having reason to believe that the principal is unaware of the interest, fails to disclose it and votes or participates in the actions of his principal in relation to the decision.



Illustrations:

1. A committee of a government department is considering a tender for the servicing of the department's motor vehicles. James, a public officer in the department and a member of the committee considering the tender, owns a garage, which has put in a bid for the tender. James does not disclose these facts to the committee and enthusiastically participates in the committee's deliberations on the bids.



James commits the offence of conflicts of interest.

2. Kora is a businesswoman specializing in pharmaceutical products. Recently, Asprin Co. Ltd advertised a tender to procure various pharmaceutical products. Her brother Moset works in the same company as a Procurement Officer. Kora buys the Tender documents and asks her brother to prepare the Tender Bids for her, which he agrees and also



promises to talk to the Tender Committee. Moset prepares the Bids and places them in the Tender box one early morning.

Moset commits an offence of conflict of interest and bid rigging.

(e) Improper Benefits to Trustees for Appointment (section 43)

A trustee is a person appointed by someone to take care of his/ her property for the benefit of a third party over a given period of time. The third party is usually referred to as the “Beneficiary”. In most cases, the trustee has no personal interest in the property. Trustees include persons appointed in wills as executors of properties of deceased individuals, or persons appointed by courts as administrators or supervisors of properties belonging to people who are deceased.

The law prohibits the giving, offering, receiving or soliciting of bribes to influence or reward the appointment of a person as a trustee.

Illustrations:

1. Ian is a manager of one of the banks in the city. The bank loaned Yote Ya Wezekana Factory KShs.700,000 five years ago. Yote ya Wezekana Factory used its assets as security for the loan and was to repay the loan in installments. The bank and the factory agreed that the bank would have the right to appoint a receiver-manager should the factory experience difficulties in repaying the loan. The work of the receiver-manager would be to supervise the operations of the factory until the factory paid the loan in full.

In recent months, the factory has been unable to pay its loan installments to the bank, and the bank is now considering appointing a receiver-manager to run the affairs of Yote ya Wezekana Factory. Kinio approaches Ian and requests him to recommend him to the Board of Directors of the bank as the receiver-manager for the factory. He promises Ian a ‘substantial reward’ for his assistance. Ian agrees, and following his recommendation, Kinio is appointed as the bank’s receiver-manager for Yote Ya Wezekana Factory. The bank’s Board of Directors is, however, not informed of the ‘substantial reward’ that was promised to Ian by Kinio.

Kinio and Ian commit the offence of improper benefits to trustees for appointment.

2. Mzee Wamafua, a wealthy man in town, dies without a will. The court thereafter appoints the Office of the Public Trustee as administrator of Mzee Wamafua’s property. Muriat, a lawyer working in the Office of the Public Trustee, approaches his boss with a request to supervise the distribution of Mzee Wamafua’s properties. He gives his boss several thousand shillings to influence the decision in his favour.



ACECA Explained

The result of this is that Muriat is appointed trustee over the property of the late Mzee Wamafua. The family is, however, not informed of the transaction between Muriat and his boss.

Muriat and his supervisor commit the offence of improper benefits to trustee for appointment.



(f) Bid Rigging (section 44)

This refers to a benefit that is given or received for:

- Not submitting a tender, proposal, quotation or bid; or
- Withdrawing or changing a tender, proposal, quotation or bid; or
- Submitting a tender, proposal, quotation or bid with a specified price or with any specified inclusions or exclusions.

The benefit may be an inducement (given before the act requested is done), or reward (given after the act required is done).

A person is guilty of an offence if the person:

- Receives or agrees to receive;
- Solicits, or agrees to solicit;
- Gives or agrees to give;
- Offers or agrees to offer such a benefit for any of the purposes described above.

Illustrations:

1. A government department floats a tender for the supply of vehicles, machinery and fuel. Tom, a supplier in the City, puts in his bid. In the course of his duties, Cain, a Procurement officer in the department, comes across certain confidential information regarding the tender. The information he comes across includes bid evaluation criteria and the procurement budget allocated. This information has not been disclosed to any of the suppliers who have tendered. Cain approaches Tom with the information and



ACECA Explained

promises to disclose it to him in exchange for money. Tom agrees and readily parts with the money. Tom thereafter withdraws his earlier bid and puts in a new one based on the new information he has received.

Cain and Tom commit the offence of bid rigging.

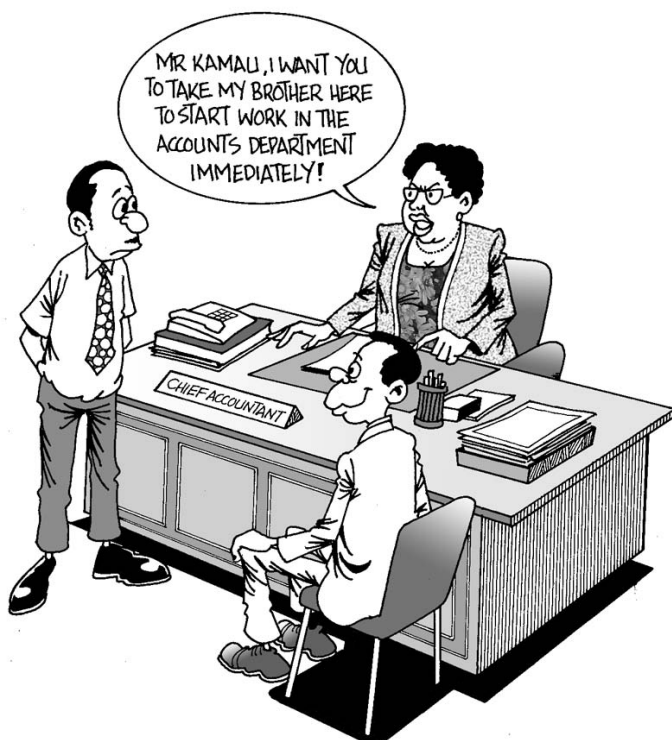
2. A local Authority wants to urgently procure chemicals for purifying water. The Procurement Officer, Mr. Mutembezi, embarks on the job of getting probable suppliers. He requests for quotations from three companies namely Home Chemicals, Nyumbani Chemicals and Gaa Chemicals. Mutembezi delivers the quotations to the three companies who are the sole distributors of the purifying chemicals in the region. The three companies hold consultations at which they agree that Nyumbani Chemicals will not bid, Home Chemicals will bid with an inflated price, and Gaa Chemicals will bid with a slightly lower price than Home Chemicals. They agree that in the next round of quotations the order will be reversed so that Gaa Chemicals will not bid. They proceed as agreed and the Local Authority awards Gaa the tender to supply the chemicals.

Gaa, Home and Nyumbani Chemicals commit the offence of bid rigging.

(g) Abuse of Office (section 46)

A person is guilty of an offence if he/she uses his/her office to improperly award a benefit to him/herself or another person.

Illustrations:



1. Evelyn is a Senior Human Resource Officer of Arid Lands Authority, a parastatal under the Ministry of Lands. The Authority has advertised several jobs. Evelyn's brother, Allan, has applied for one of the positions. Allan graduated from College two years ago and has been idling at home. Evelyn receives the application letters and destroys all the letters from applicants who have better grades than Allan. She then recommends that Allan be given the job as he is the best suited applicant. Allan gets the job.

Evelyn commits the offence of abuse of office.



ACECA Explained

2. Mr. Nyasore is the Chief Executive Officer of a State Corporation. The terms of his employment require that he gets the approval of the Board of Directors before investing the funds of the State Corporation. But he proceeds to invest KSh. 50 million into an indigenously owned bank, Kibanda Bank, without the approval of the Board. Kibanda Bank collapses and money is lost. In the meantime, the bank had also advanced Mr. Nyasore an interest-free loan of KSh. 15 million.

Mr. Nyasore commits the offence of abuse of office.

(h) Dealing with Suspect Property (section 47)

A person is guilty of an offence if he handles property that he believes or has reason to believe was acquired through corruption. Handling of such property includes hiding, receiving, using, concealing, or entering into any form of transaction relating to that property.

Illustrations:

1. Peter and Joe are good friends. Peter is a senior officer in the Physical Planning Department in the ministry of lands, while Joe is a businessman. Sometimes last year, Peter approached Joe and informed him that; while demarcating and surveying land for the town's stadium, the departments' officials had managed to exclude a parcel of about half an acre which is now not appearing in the title of the stadium. In fact, they had already processed title documents for it. He requests Joe to provide his particulars so that the land is registered in his name, after which they will dispose of it by way of sale and share the proceeds with the team involved in the plan. Joe readily agrees, is registered as owner and the group is now looking for a buyer for the land.



Joe has committed the offence of dealing with suspect property.

2. Dr. Haraka Haraka graduated from a local University 3 years ago. He likes living a highflier life. He recently opened several retail chemists in town. The Medical Superintendent of the local hospital is his close friend, who equally likes to be seen as a man of means. Patients attending the local hospital are unable to find drugs and are routinely referred to Dr. Haraka's chemists, which sells drugs at abnormally



low prices. During a routine inspection by drug inspectors, a large consignment of assorted drugs clearly marked GOK are found in several of his chemists.

Dr. Haraka Haraka commits the offence of dealing in suspect property.

(i) Attempts and Conspiracies (section 47A)

A person who attempts to commit an offence involving corruption or economic crime is guilty of an offence. This offence is committed if the person, with the intention of committing the offence, does or omits to do something designed to its fulfillment but does not fulfill the intention to such an extent as to commit the offence.

A person who conspires with another to commit an offence involving corruption or economic crime is guilty of an offence.

This section also makes it an offence for a person to incite another into any conduct of such a nature that if it were done, an offence of corruption or economic crime would thereby be committed.

Illustration:

Mary is employed as a Revenue Officer at the Mpakani Ports Authority. Part of her duties is to approve the declarations of goods imported into the country to determine the import duty payable to the government. Kamau is a motor vehicle dealer and has imported vehicle spare parts for which after full declaration should pay the sum of Kshs 850,000 as import duty. Mary negotiates with Kamau to under-declare the imported goods with the effect that he would only pay Kshs. 100,000. They agree to share the balance amounting to Kshs 750,000.

- a) If Mary and Kamau are arrested before implementing this deal, both will be guilty of conspiring to commit an offence involving corruption. They will also be guilty of conspiring to commit an economic crime.
- b) If Mary and Kamau have partly acted towards achieving this goal before they are arrested, they will be guilty of attempting to commit an offence involving corruption and economic crime.

5. ECONOMIC CRIMES

An economic crime is any act or omission by any person that results in loss of public property/resources. The Act defines economic crimes as:

- a) An offence under section 45, that is:
- Illegal acquisition, mortgage, and disposal of public property, service or benefit.
 - Unlawful damage to public property;
 - Failure to pay taxes, fees, levies or charges that are payable to a public body;
 - Causing or obtaining the non-payment of taxes, fees, levies, or charges that are due to a public body.
- b) An offence involving dishonesty under any written law providing for the maintenance or protection of public revenue. Accordingly, a person is guilty of an economic crime if he illegally:-
- i. Acquires public property, a public service or benefit;
 - ii. Mortgages, charges or disposes of any public property;
 - iii. Damages public property. This includes making a computer or any other electronic machinery to operate in a way that results in a loss to public revenue or service;
 - iv. Fails to pay any taxes, fees, levies or charges as required by law.

Further, an officer or person who is in charge of public revenue or public property commits an economic crime if he: -

- Illegally makes payment or excessive payment from public revenues for:
 - (a) Sub-standard or defective goods;
 - (b) Goods not supplied or not supplied in full; or
 - (c) Services not rendered or not adequately rendered.
- Fails to follow laws or applicable procedures on:
 - (a) Procurement;
 - (b) Allocation, Sale Or Disposal Of Property;
 - (c) Tendering Of Contracts;
 - (d) Management Of Funds; Or
 - (e) Incurring Expenditure.
- Engages in a project without prior planning.

Illustrations:

1. Zefu is a public officer in one of the Government ministries. In the course of her duties she discovers that the ministry owns land in Kilgoris that has been lying idle



ACECA Explained

for many years. With Ole Miyo, a friend who works at the Ministry of Lands, she arranges for the piece of land to be registered in her name. No sooner is this done than Zefu finds a buyer for it and sells the property.

Zefu and Ole Miyo commit an economic crime in respect to:

- *Unlawful acquisition of public property*
- *Disposal of public property*
- *Failure to comply with applicable procedures on allocation, sale and disposal of public property.*



2. Chumbo is a driver working with one of the government's departments. Recently, the Ministry bought several vehicles, one of which was allocated to the department. The vehicle was then assigned to Chumbo by the Head of Department. Chumbo has been driving the vehicle recklessly without due regard to its condition. He has also failed to alert the Transport Officer when the vehicle is in need of repair or due for service. Within just a few months since it was given to the department, the vehicle has been reduced to a shell and now lies in the yard awaiting major repairs.

Chumbo has committed an economic crime in respect to damage to public property.

4. Martin works as a procurement officer with one of the government departments. Recently, it has come to light that he has neglected laid down purchasing procedures in discharging his duties. This has resulted in the department often receiving and paying for defective goods, and for goods and services not supplied in full or at all.

Martin commits an economic crime of willful failure to comply with laid down laws and applicable procedures on procurement.

5. Mr. Utatu of Upili Ward within Metameta County has lobbied with fellow Ward Representatives and the County Clerk, to have a road in his Ward tarmacked. Elections are forthcoming and similar projects will be undertaken in other wards to favour the Ward Representative's re-election. There are no plans to tarmac such a road but the County authorities go ahead to approve the tender. A contractor, Pole Pole Engineering, is identified and awarded the tender whereupon he moves to the site and embarks on the job. Shortly, the contractor forwards the first Completion Certificate for payment of KSh. 10 million to the County Treasurer, Mr. Adili, who refuses to approve the payment because it was not among the planned projects in



ACECA Explained

that financial year. Pole Pole Engineers sue the County for breach of contract. The Court awards the contractor KSh. 20 million for the breach of contract inclusive of costs and interest. The County incurs a loss of KSh. 20 million for engaging in an unplanned project.

The County Clerk commits an economic crime of engaging in a project without proper planning.

6. PENALTIES FOR OFFENCES UNDER THE ACT

A person found guilty and convicted of a corruption offence or economic crime shall be liable to:

- (a) A fine of up to one million shillings or imprisonment for up to ten years, or to both; and
- (b) An additional compulsory fine if, as a result of the conduct that constituted the offence, the person received a gain, or any other person suffered a loss that can be quantified.

The compulsory fine shall be equal to two times the amount of the gain or loss described above. If the conduct that constituted the offence resulted in both a gain and a loss, the compulsory fine shall be equal to two times the sum of the gain and the loss.

• **Legal Responsibility for Loss**

A person who commits an offence of corruption or economic crime is responsible to anyone who suffers a loss. Such a person would be required to pay in full with interest for the loss suffered. Where the corrupt conduct resulted in a loss to a public institution, the public institution or the Ethics and Anti-Corruption Commission, on behalf of the public institution, may institute a case in court for compensation. However, a person who participated in the corrupt conduct will not have a right to payment for any loss he may have suffered.

• **Administrative Action**

Section 62- 64 of the Act provide for administrative action to be taken against a Public Officer facing charges of corruption and economic crime.

A public officer shall be suspended, on half pay, upon being charged with a corruption offence or economic crime. The suspension will be from the date of the charge until either the case is discontinued or the public officer is acquitted of the charge. The



ACECA Explained

public officer will, however, continue to receive the full amount of any allowances due to him. Under the Act, the government may, however, exercise any power under any law to suspend the officer without pay or dismiss him altogether in accordance with the terms and conditions of employment.

Upon being found guilty of a corruption offence or economic crime, the Public Officer shall be suspended without pay from the date of the conviction pending the outcome of any appeal that he may make. The public officer ceases to be suspended if the appeal is successful. However, should the appeal be unsuccessful or the period during which the public officer should appeal lapse without an appeal being made, the public officer shall be dismissed from service. A person convicted of corruption or economic crime shall be disqualified from being elected or appointed as a public officer for a period of ten years after the conviction. At least once a year, the Ethics and Anti-Corruption Commission shall publish the names of all persons who have been disqualified in the Kenya Gazette.

Illustration:

Muhonja is the officer in charge of the Procurement Unit in a State Corporation. The Corporation has invited tenders for the supply of tonners for use in both its national and county offices. Mkora, a businessman dealing with such supplies approaches Muhonja with a proposal to make a “deal” that would see both of them enrich themselves from this proposed procurement. The total budget for such tonners is about KSh 3,000,000.

The agreement is that Muhonja would help Mkora to win the tender by advising him on the lowest price to quote upon checking how other interested bidders have quoted. Mkora would then not supply the tonners but Muhonja would arrange for preparation of all the relevant documentation to purport that the tonners were actually delivered and entered into the State Corporation’s stock. For this effort, Mkora would give Muhonja Kshs 300,000 as ‘facilitation fees.’ Muhonja would then facilitate prompt payment for the ‘goods supplied’ amounting to Kshs 2,900,000, which would be shared equally between the two.

This ‘deal’ proceeds as planned and payment is made. Muhonja and Mkora share the amount as agreed. However, the scandal is unearthed and both of them are



arrested and arraigned in court. They are found guilty of economic crimes and each fined Kshs1,000,000 in addition to ten years jail term.

Computation of the Mandatory Additional Fine

Muhonja and Mkora received benefits that could be quantified. They also caused loss to the institution that could be quantified. Each received a benefit of Kshs.1,450,000. Muhonja received a further benefit of Kshs. 300,000 in form the ‘facilitation fees’. Each of the two has also caused the institution a loss of Kshs, 1,450,000.

Consequently, each of them will pay an additional mandatory fine equal to two times the sum of benefit received and loss caused as follows.

Muhonja (Kshs 1,450,000 + 300,000 + 1450,000) x 2 = 6,400,000

Mkora (Kshs 1,450,000 + 1450,000) x 2 = 5,800,000

Administrative Action

Muhonja, being a public officer, was also subject to administrative action for her role in the deal. Upon being charged with the offence, Muhonja was suspended on half pay awaiting the outcome of the case. Upon conviction, she remained suspended but with no pay pending appeal. She lost the appeal against the conviction and sentence and was thereafter dismissed from public service. In addition, she was disqualified from holding public office in Kenya for a period of ten years. The Ethics and Anti-Corruption Commission has since published Muhonja’s disqualification in the Kenya Gazette. It is now public knowledge Muhonja’s corrupt and cannot be trusted with public office.



Defences

In respect of corruption offences and economic crimes, it is not acceptable as a defence that the receiving, soliciting, giving or offering of any benefit is common practice in any business, office, profession or calling. It is also not acceptable that the act or omission was not within one’s power or that he did not intend to do the wrongful act or omission or that the wrongful act or omission did not actually happen.

7. UNEXPLAINED ASSETS

Unexplained assets are properties that a person suspected of corruption has, and is unable to adequately account for despite being given a reasonable chance by the Ethics and Anti-Corruption Commission to do so. Where a public officer has amassed properties that are well beyond the capacity of his income or means of livelihood, he will be called upon to explain the difference.

Section 55 of the Act gives the Commission power to institute a case in Court for the surrender of unexplained assets to the State. The case can be brought against a person if: -

- After an investigation, the Commission is satisfied that the person has unexplained assets, and
- The person has been given a reasonable chance to explain the difference between the assets and his known legitimate sources of income, and
- The Commission is not satisfied by the explanation.

The Court will give the person another chance to explain the difference between his assets, financial responsibilities, and his known legitimate sources of income. Where the Court is also not satisfied that the person has a reasonable explanation for the difference, it may order that he repays to the Government the value of the excess assets.

The Commission can make an application to court for an order to protect any suspect property and prohibit the sale or other dealings in the property on suspicion that the property was acquired corruptly

8. APPOINTMENT OF A RECEIVER (section 56A)

The Commission may seek permission from the court to appoint a receiver for any property suspected to have been acquired through corrupt conduct.

The receiver has powers of management, control and possession of the property for which he is appointed.

When the person with the control or custody of the property is notified of the appointment of a receiver, he should not act in any manner inconsistent with the instructions of the receiver.

A person who contravenes this requirement is liable to a fine not exceeding two million shillings (Kshs 2,000,000) or imprisonment for a term not exceeding ten (10) years or to both for a first offence, and to imprisonment for a term not exceeding



ten (10) years without the option of a fine for a subsequent offence in respect of the same property.

9. OUT OF COURT SETTLEMENT (section 56B)

The Commission can negotiate and enter into a settlement with a person suspected to have corruptly acquired property if the person voluntarily meets in full the following:

- i. Gives a full and true disclosure of all material facts relating to past conduct and economic crime,
- ii. Pays or refunds all the property he had acquired through corrupt conduct and
- iii. Pays for all losses occasioned by his corrupt conduct.

10. PROTECTION OF INFORMERS

Preventing and fighting corruption is every Kenyan's responsibility. Section 65 of the Act provides for the protection of persons who may assist the Ethics and Anti-Corruption Commission or an investigator with information or investigation of corruption offences or economic crime. No action, including disciplinary action, may be taken against an informer for his or her assistance as long as the person believes the information to be true at the time of giving it.

In prosecutions for corruption or economic crime under the Act, witnesses shall not be required to give any information that might reveal the identity of informers or provide information that might lead to their identification. Courts will also ensure that information that identifies or might lead to the identification of an informer is excluded from the documents to be produced or scrutinized in Court, unless, in the interest of justice, it is absolutely necessary to reveal their identities.

11. THE APPLICATION OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT BEYOND THE BORDERS OF KENYA

Under Section 67 of the Act, a Kenyan citizen may be brought before Kenyan courts for corruption offences and economic crimes committed in a foreign country if the conduct in question would amount to corruption within Kenya.

12. EFFECT OF REPEAL OF THE PREVENTION OF CORRUPTION ACT

Section 71 of the Act provides that the Anti-Corruption and Economic Crimes Act shall apply to offences committed under the Prevention of Corruption Act (Chapter 65 of the Laws of Kenya), now no longer in force. Thus, a person who committed a corruption offence under the Prevention of Corruption Act before 2nd May 2003 may be taken to court and prosecuted under that Act.

13. CONCLUSION

The Anti-Corruption and Economic Crimes Act 2003 creates a number of corruption and economic crime offences and provides for their punishment. It is important that members of the public are made aware of what type of conduct constitutes corruption or an economic crime under this law. Such knowledge will help the people to avoid the consequences of the old-age statement to the effect that **IGNORANCE OF THE LAW IS NO DEFENCE**.

This Guide aims to sensitize Kenyans about the many faces of corruption so that with this knowledge, they can cultivate and internalize a corruption intolerant culture.