

**Refugee Review Tribunal
AUSTRALIA**

RRT RESEARCH RESPONSE

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This response was prepared by the Research & Information Services Section of the Refugee Review Tribunal (RRT) after researching publicly accessible information currently available to the RRT within time constraints. This response is not, and does not purport to be, conclusive as to the merit of any particular claim to refugee status or asylum. This research response may not, under any circumstance, be cited in a decision or any other document. Anyone wishing to use this information may only cite the primary source material contained herein.

Questions

- 1. Please provide any information on the protection of “whistle-blowers”, who expose corruption in the Kenyan government.**
- 2. Please provide any information on the treatment of supporters of the Kenyan opposition.**
- 3. Please provide any information on the treatment of those of Pokomo ethnicity.**

RESPONSE

- 1. Please provide any information on the protection of “whistle-blowers”, who expose corruption in the Kenyan government.**

Sources quoted below report that government corruption remains a problem in Kenya. *The Witness Protection Act* was passed in 2006, however, delays with implementation and weaknesses in the Act limit its effectiveness. Whistle-blowers in Kenya are at risk of violence and discrimination.

The information provided in response to this question has been organised into the following eight sections:

- Government Corruption;
- Kenya Anti-Corruption Commission;
- Whistleblower Reporting System;
- Witness Protection;
- Effectiveness of Witness Protection;
- *Freedom of Information Bill*;
- Other Laws;

- Examples of Whistle-Blowing.

Government Corruption

Transparency International Kenya's report *The Kenya Bribery Index 2008* launched on 17 July 2008 "revealed that of the total sample of 2,400 adult Kenyans, a full 2,088 (87 percent) were confronted with a bribery-demand situation in the previous year. Of those, 1,832 (88 percent) actually made a bribery payment." The police were viewed as the most corrupt organisation followed by the Ministry of Local Government and the Ministry of Lands. For more information please see the report which is included as Attachment 1 (Transparency International Kenya 2008, *The Kenya Bribery Index 2008*, 17 July <http://www.tikenya.org/documents/KenyaBriberyIndex08.pdf> – Accessed 11 December 2008 – Attachment 1).

According to Freedom House's report, *Freedom in the World 2008*, "Corruption continues to be a very serious problem threatening Kenya's nascent democracy." Freedom House continues:

The meager results to date from investigations such as the Goldenberg inquiry and the massive Anglo-Leasing scandal indicate the magnitude of the challenge of reducing corruption in Kenya and the failure of President Mwai Kibaki's administrations to do so (Freedom House 2008, *Freedom in the World 2008 – Kenya*, 2 July <http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7422> – Accessed 11 December 2008 – Attachment 2).

According to the US Department of State's *Country Reports on Human Rights Practices 2007*, the "law provides criminal penalties for official corruption; however, the government did not implement these laws effectively, and officials engaged in corrupt practices with impunity." The US Department of State continues:

Frequent press reports of incidents of government corruption fueled a widespread public perception that large-scale corruption up to the highest levels of the government and in parliament persisted, and that little official action had been taken against the most corrupt. The World Bank's Worldwide Governance Indicators reflected that corruption was a severe problem.

In July President Kibaki reappointed former finance minister David Mwiraria to a cabinet position. Mwiraria had resigned in February 2006 over allegations that he was involved in several of the so-called Anglo Leasing scandals in which the Treasury approved payments on suspect contracts. Former governance and ethics permanent secretary and "anticorruption czar," John Githongo, had revealed details of the massive Anglo Leasing scandal in January 2006 and provided evidence that Mwiraria tried to persuade him to call off his investigation. In February 2006 details of the Goldenberg scandal, which occurred in the 1990s, also were published. Both reports implicated a number of former and current government officials, renewing public frustration over corruption. Three ministers resigned following their inclusion in the reports, but the High Court declared one minister immune from prosecution based on protection from double jeopardy. In 2005 President Kibaki eliminated the position of permanent secretary for ethics and governance during restructuring of the cabinet.

...In September the findings of the Kroll Report were leaked. In 2003 the incoming Kibaki government had commissioned the Kroll Report, an investigation into stolen state assets. The report provided evidence indicating that former president Daniel arap Moi, his family, and his

associates stole more than \$30 million (two billion shillings) of state revenues. However, the government indicated it would not attempt to recover the assets, claiming a lack of substantial evidence in the report. It also blamed developed countries for allowing stolen money to be deposited in their banks. The public and media questioned the government's motives in light of the endorsement by former president Moi of President Kibaki's reelection bid.

The Kenya Times reported that in the past three years, the government fired 12 senior officials of county councils for graft (US Department of State 2008, *Country Reports on Human Rights Practices 2007 – Kenya*, 11 March, Section 3 Government Corruption and Transparency – Attachment 3).

An Immigration and Refugee Board of Canada response dated 13 September 2006 provides further information on government corruption in Kenya (Immigration and Refugee Board of Canada 2006, *KEN 101592.FE – Kenya: Corruption within the government and the police force (2002-August 2006)*, 13 September

http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=450493 – Accessed 11 December 2008 – Attachment 4).

Kenya Anti-Corruption Commission (KACC)

The Kenya Anti-Corruption Commission (KACC) was established on 2 May 2003 “to combat corruption and economic crimes through law enforcement prevention and public education.” KACC is mandated under Section 7 of the *Anti-Corruption and Economic Crimes Act 2003* to:

- investigate corrupt conduct and activities;
- prevent the occurrence of corrupt practices;
- advise public institutions on how to fight corruption;
- educate the public on the dangers of corruption;
- enlist public support in fighting corruption and economic crime;
- facilitate the recovery of ill-gotten wealth ('FAQs' 2008, Kenya Anti-Corruption Commission website <http://www.kacc.go.ke/default.asp?pageid=49> – Accessed 11 December 2008 – Attachment 5).

According to the US Department of State, in August 2007 “the NGO Name and Shame Corruption Network Campaign claimed that KACC had accomplished little, despite the millions of shillings the government provided.” The report continues:

On August 19, the NGO and the Center for Law and Research International (Clarion) issued a report that claimed the KACC failed to investigate and prosecute influential persons and criticized its failure to address the Goldenberg and Anglo Leasing scandals. The KACC director told the media he had forwarded 284 cases to the attorney general for prosecution. During President Kibaki's five-year tenure no top officials have been charged with corruption, despite numerous scandals (US Department of State 2008, *Country Reports on Human Rights Practices 2007 – Kenya*, 11 March, Section 3 Government Corruption and Transparency – Attachment 3).

According to Freedom House's report, *Freedom in the World 2008*, KACC “has made slow progress at best” with 32 successful convictions since 2003 (Freedom House 2008, *Freedom in the World 2008 – Kenya*, 2 July

<http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7422> – Accessed 11 December 2008 – Attachment 2).

The Global Integrity Report 2007 published in 30 January 2008 provides information on the strengths and weaknesses of a country's anti-corruption framework. Category IV of Kenya's score-card provides information on KACC. The score-card reports that KACC "has disappointed many". Global Integrity continues:

47b: In practice, the internal reporting mechanism for public sector corruption receives regular funding.

Score: 100

Comments:

References: KACC is very well funded. However, it has disappointed many who assumed the post-KANU government would fight tooth and nail against corruption; for to date, it has yet to bring a single high profile corruption case to conclusion, focusing instead of petty corruption among junior officers, for example. This has led many to demand that the government prune its resources and fund other more expedient activities. As for the departmental anticorruption initiatives, these are likely to be funded to the extent that the whole department receives regular funding.

...Peer Review Comments: The very fact that the Kenya Anti-Corruption Authority [KACA] is very well-funded means that its officers are resented by others in the civil service, especially the attorney general's office and the police, who are also fighting corruption but are paid a fraction of what the KACA staff gets. Attorney general officers are particularly keen to show KACA staff as incompetent, so they work extra hard to poke holes into any investigations done by KACA that they are required to prosecute, even going through the grammar of the reports in a very meticulous manner. The argument is that since they are paid so well, they should be perfect. So the differential pay brings disharmony rather than harmony among the various authorities needed to fight corruption.

47c: In practice, the internal reporting mechanism for public sector corruption acts on complaints within a reasonable time period.

Score: 50

Comments:

References: As noted in 47b, KACC has been ponderous in its work. Since 2003, it has obtained convictions in 28 cases only 2 of which involved persons above the rank of a police inspector. There have been 38 discharges and 20 acquittals. However, KACC might argue that its other work (capacity building, education, etc.) might be achieving objectives which do not have the same high profile as court cases.

...47d: In practice, when necessary, the internal reporting mechanism for public sector corruption initiates investigations.

Score: 100

Comments:

References: The mandates of both KACC and KNCHR require them to investigate, which they do with varied degrees of diligence. For example, that 20 out of KACC's 86 cases taken to court since 2003 should have been acquitted suggests weak preparation for court, or in turn, some extraneous pressure. KACC merely investigates and hands files to the Attorney General (AG) for prosecution. Yet throughout 2007, the AG has insisted that KACC evidence cannot stand a court trial; a claim given some substance in light of acquittals to date, even though the AG's position is also likely to be politicized.

Peer Review Comments: As mentioned earlier, the attorney general's office has an interest in showing the Kenya Anti-Corruption Authority as incompetent, as they resent the fact that KACA people have the same qualifications and in many cases are former colleagues who now earn multiples in salary. The attorney general officers have no interest in making KACA look good, so they will always insist that KACA evidence and investigations are shoddy and not able to stand up in court. KACA also has an interest in making it look like it is the attorney general's office that is the obstacle, so it may indeed be generating huge volumes of poorly investigated cases to justify its existence (Global Integrity 2008, 'Category IV Administration and Civil Service – Whistle-blowing Measure', *Global Integrity Report 2007 – Kenya*, 30 January <http://report.globalintegrity.org/Kenya/2007/scorecard/60> – Accessed 11 December 2008 – Attachment 6).

The report continues with Chapter VI of Kenya's score-card providing information on KACC. The score-card provides the following information on political interference in KACC's operations, powers of KACC and KACC's ability to independently investigate complaints:

72b: *In practice, the anti-corruption agency (or agencies) is protected from political interference.*

Score: 50

Comments:

References: That does not seem to be the case entirely. Despite the numerous corrupt incidents established by the CAG [Controller and Auditor General], for example, Kenya has only seen a single big case brought to conclusion (of the embezzlement by the chair and manager of the national AIDS fund). Part of the problem seems to be that corruption in the last decade or so has been perpetrated by key people across the political divide, meaning that prosecutions would also touch key people in the current government. Furthermore, a former Governance and Ethics permanent secretary living in self-exile in the UK allegedly recorded the KACC director pleading with him not to make further revelations on high corruption. Further, early 2007 saw the Justice and Constitutional Affairs minister threaten measures to clip the KACC director's wings, including reducing his salary and resources when it seemed KACC was determined to bring key people in the current government to task over the Anglo Leasing scandal. The KACC director seems to have consequently relented.

Peer Review Comments: It is more likely that the authority officers are friends of the people in the government and thus not eager to follow up on corruption. The compromise comes from the appointment of friendly officers as opposed to actively interfering with officers who want to work. If the officers choose to work, they probably will work unhindered, though maybe without cooperation from the government. But this has yet to be tested, as the current office has not aggressively tested the waters.

... 72h: *In practice, the anti-corruption agency (or agencies) has sufficient powers to carry out its mandate.*

Score: 75

Comments:

References: Section 7 empowers the Commission to investigate any matter that raises suspicion that corruption or an economic crime might have been committed. While these powers have been enough to enable the Commission to investigate many instances without hindrance, a former cabinet minister challenged the constitutionality of its powers, leading to a more than one year delay in KACC's work. A major problem for KACC is that it does not have prosecutorial powers, meaning it must hand over its investigative findings to the AG [Attorney General] who decides whether or not to prosecute.

Peer Review Comments: As pointed out, the mandate is very limited and inconsistent with the high profile and high salaries of the employees of the Kenya Anti-Corruption Commission. Corruption is fought not by investigation but by successful prosecution, so if one arm is underfunded, the others arm's efforts yield little.

72i: In practice, when necessary, the anti-corruption agency (or agencies) independently initiates investigations.

Score: 100

Comments:

References: Section 7 of the Anti Corruption and Economic Crimes Act directs KACC to investigate any matter raising suspicion that corruption or an economic crime might have been committed. However, public perception is that KACC has not been objective and aggressive in fulfilling its mandate, which is why perpetrators of grand corruption never get before the courts. Indeed, the KACC director is alleged to have advised a whistle-blower to back off allegations of grand corruption because the people being accused had suffered enough (Global Integrity 2008, 'Category VI Anti-Corruption and Rule of Law – Anti-Corruption Agency', *Global Integrity Report 2007 – Kenya*, 30 January <http://report.globalintegrity.org/Kenya/2007/scorecard/97> – Accessed 11 December 2008 – Attachment 7).

Whistleblower Reporting System

On 12 October 2006, KACC launched the “Secure and 100% anonymous Whistleblower Reporting System.” KACC notes that “there is a high probability that many people in Kenya and even abroad might be holding back information on suspected or actual corruption due to well-founded fears for their own personal safety and security in the event that they blow the whistle on their friends, colleagues, work-mates or superiors in the workplace.” The report provides the following information on the Whistleblower Reporting System:

Accordingly, the KACC has taken great care to ensure that the whistleblowing system is secure and world-class. The system is web-based and accessible to anyone anywhere in the world 24 hours a day, 365 days a year. The system will generate an auto-report number for every complaint submitted that enables the whistleblower to follow up on the complaint and to monitor its progress.

A further, special feature is the ability to create an anonymous post-box for future correspondence if a whistleblower so wishes. When combined with the facility open to whistleblowers to register using a pseudonym and their own password, a powerful system is created allowing whistleblowers to set up and establish their own alter egos for meaningful and sustained interaction and exchange of information with the Kenya Anti-Corruption Commission (Kenya Anti-Corruption Commission 2006, 'Official Launch of the Kenya Anti-Corruption Commission Whistleblower Reporting System', 12 October <http://www.kacc.go.ke/docs/Whistleblower%20Reporting%20System%20111006.pdf> – Accessed 11 December 2008 – Attachment 8).

An article dated 29 May 2008 in *The Nation* reports that some Government departments in Kenya have blocked access to KACC's website so that civil servants cannot report corruption at work. KACC's Public Relations Officer “confirmed that “some Government departments were involved” but said measures were being put in place to correct the situation.” The article continues:

Sources at Integrity Centre, the graft watchdog's headquarters in Nairobi, are blaming the problem on senior officials in "a few Government departments."

...The source revealed "senior officials" had instructed Information Technology (IT) experts in some ministries to be monitoring sites frequently browsed by their employees, and keep a record of employees visiting "forbidden web pages."

The Anti-Corruption Commission had managed to have its web pages networked to most Government websites to enable users to have easy access (Mukinda, Fred 2008, 'Kenya: Whistle Blowers' Computer Link Cut', *The Nation*, 29 May, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 9).

Witness Protection

An article dated 1 January 2007 in *The East African Standard* reports that President Kibaki signed *The Witness Protection Act* into law. *The Witness Protection Act* "provides for the protection of witnesses in criminal cases including whistle blowers by concealing their identities so as to shield them from victimisation." *The Witness Protection Act* "does not extend a blanket protection to cover witnesses appearing before all legal proceedings, even quasi-judicial ones like commissions of inquiry and parliamentary committees" (Ndegwa, Alex 2007, 'Kenya: Now Kibaki Assents to New Law On Witness Protection', *The East African Standard*, 1 January, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 10).

According to Global Integrity, Section 65 of *The Witness Protection Act* "offers protection from prosecution for informers and also requires that court proceedings ensure that informers are not compromised." Global Integrity continues:

The Witness Protection Act designed to take care of whistle-blowers provides that the attorney general can: (a) make arrangements necessary to allow the witness to establish a new identity or otherwise to protect the witness; (b) relocate the witness; (c) provide accommodation for the witness; (d) provide transport for the property of the witness; (e) provide reasonable financial assistance to the witness; (f) provide to the witness services in the nature of counseling and vocational training; (g) do anything else the attorney general considers necessary to ensure the witness's safety and welfare (Global Integrity 2008, 'Category VI Anti-Corruption and Rule of Law – Anti-Corruption Agency', *Global Integrity Report 2007 – Kenya*, 30 January <http://report.globalintegrity.org/Kenya/2007/scorecard/97> – Accessed 11 December 2008 – Attachment 7).

An article dated 2 July 2007 in *The Nation* reports that *The Witness Protection Act* was assented to on 30 December 2006 "but has not been implemented due to lack of guidelines." The article reports that a "special unit to protect witnesses who testify in sensitive cases will be set up at the Director of Public Prosecutions Office" (Ali, Abdulsamad 2007, 'Kenya: Govt to Shield Witnesses in Sensitive Cases', *The Nation*, 2 July, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 11).

An article dated 8 May 2008 in *The Nation* reports that from 1 July 2008 the "long-awaited Witness Protection Programme" will be implemented "after funds are allocated by the Minister for Finance". The programme will be run by the Witness Protection Unit under the Attorney General's Chambers in the State Law Office. According to the Attorney General, the programme is "very expensive" (Orlale, Odhiambo 2008, 'Kenya: Wako Launches

Programme to Protect Whistle Blowers', *The Nation*, 8 May, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 12).

Effectiveness of Witness Protection

An article by Advocate Haron M. Ndubi in the August 2006 edition of Transparency International Kenya's newsletter *ADILI* reports that *The Witness Protection Bill* is "fraught with weaknesses". The article provides details:

The Bill attempts to define a 'witness' for its purposes but does not in any way make mentions of whistle blower or its equivalent. In the nature of things, a whistle is blown before investigations, proceedings and determination may be made. Therefore, one can argue that the Bill does not provide nor contemplate whistle blowers unless and until they offer to testify in a judicial or quasi judicial process, especially within a criminal trial framework. Even more, the Bill considers that beneficiaries to the scheme would be those who testify on behalf of the state.

The bill is fraught with weaknesses against the Whistleblower.

These include: -

- (i) Whistleblowers regarding economic and non-criminal matters
- (ii) Reports made to persons other than law enforcement agencies.
- (iii) Whistleblowers testifying for the defense or persons other than accused

Besides the foregoing, the bill proposes a new framework of trials and expenditure of the public resources, which to implement will require the amendment of various other laws like the Evidence Act, Finance Act and Corruption and Economic Crimes Act.

The Bill also gives the Attorney General excessive discretion in the whole scheme; considering that most acts of high level corruption happen within the government. Therefore, whistleblowers may feel highly uncomfortable to be processed and managed by the AG who by virtue of his job would be a confidant to the schemes. Therefore the Bill should be providing for the establishment of a separate scheme and authority to manage it.

If the AG is left to manage whistleblowers by inter alia changing their identity and relocating them; it is absolutely possible that a whistle blower would be stifled and fail to testify or continue to raise their voice again.

The Bill also requires that a witness participant in the programme do sign a Memorandum Of Understanding (MOU) with the Attorney General. In case the witness participant does anything that in the opinion of the AG is against the MOU such participant would be removed by the AG discretionally. This defects the spirit of the protection of witnesses and especially whistleblowers.

Lastly, yet perhaps more importantly, the bill does not provide for economic support for whistleblowers that may find themselves without support or capacity to earn a living but without facing mortal danger. The bill could do well to borrow a leaf from the practice by the Kenya Revenue Authority which does grant monetary benefits to whistleblowers who help them recover unpaid taxes (Ndubi, Haron M. 2006, 'Munyakei's Right to Life was Violated: He Should be Compensated', *ADILI* 81, August, Transparency International Kenya website, p.5 <http://www.tikenya.org/documents/adili81.pdf> – Accessed 11 December 2008 – Attachment 13).

An article by Gabriel Mass of Fordham University in the August 2006 edition of *ADILI* reports on the problems associated with the Attorney General being the sole party with the authority to grant protection under *The Witness Protection Bill*:

Aside from the substantive shortcomings perhaps the most glaring weakness of this legislation is procedural: a complete lack of the institutionalised impartiality that is essential to ensure that whistleblower protections are implemented reliably and conscientiously to uphold the public interest. As currently drafted, the legislation presents a clear conflict of interest. The Attorney General is the sole party vested with authority to grant protections under the bill. Furthermore, the Attorney General has unilateral discretion to determine the extent and nature of the protections. The Attorney General cannot be expected to act as an impartial, unbiased referee for petitions requesting safeguards relating to allegations against the government. It is unreasonable and imprudent to design a system that relies entirely on the Attorney General's discretion to grant protection to whistleblowers who expose government impropriety. This would, of course, be particularly true should allegations be leveled against the Attorney General's office itself. Effective whistleblower legislation requires, above all, an independent body to receive process, investigate, and adjudicate requests for protection (Mass, Gabriel 2006, 'Whistleblower Protection Legislation: A Torch of Courage Illuminating a Sea of Darkness', *ADILI* 81, August, Transparency International Kenya website, p.5 <http://www.tikenya.org/documents/adili81.pdf> – Accessed 11 December 2008 – Attachment 14).

An article dated 22 August 2007 in *The East African Standard* reports that KACC “has admitted that it is toothless in reining in those who threaten witnesses.” According to KACC, *The Witness Protection Act* “is not enough to protect witnesses in graft cases.” KACC “says although the Witness Act prohibits harassment and intimidation of a person who testifies in a corruption case, it provides no penalties for those who violate the law, adding that KACC had no powers to arrest and prosecute the offenders.” KACC “believes that unless the current laws are repealed, whistleblowers would be in danger from those they would have reported on” (Kareithi, Amos 2007, 'Kenya: KACC Stands Up for Whistleblowers', *The East African Standard*, 22 August, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 15).

An article dated 6 July 2007 in *The East African Standard* questions the effectiveness of the *Witness Protection Act*:

Mungatana [Justice Assistant Minister] praised this law as one step towards protecting whistleblowers but added that it was inadequate because it does not even say how the money with which to relocate or compensate a witness will be obtained. Monari [lawyer], Kegoro [International Commission of Jurists Kenya] and Omar [Commissioner – Kenya National Commission on Human Rights], poked holes into this piece of legislation terming it a half-hearted solution. “The WPA starts protecting the witness after conviction instead of the first time of reporting. This is insufficient,” added Monari. The Act provides that among other things, a witness may acquire new identity, relocate, get accommodation, financial assistance, counselling, and vocational training services.

It also provides that the identity and location of a participant shall not be disclosed in legal proceedings yet it doesn't provide a penalty for those who harass witnesses or whistleblowers thus raising critical questions about its adequacy (Nyantino, Jason 2007, 'Whistle blower's law and access to information key in fighting corruption', *The Eastern African Standard*, 6 July, p.31, Business Keeper AG website http://www.business-keeper.de/pdf/eng/knowledgeinfo/press_review/2007/070706_Newspaper_pullout_standard.pdf – Accessed 11 December 2008 – Attachment 16).

According to Global Integrity, “Since the Act came into force, it is not clear the extent to which it has been applied to protect vulnerable whistleblowers” (Global Integrity 2008, ‘Category VI Anti-Corruption and Rule of Law – Anti-Corruption Agency’, *Global Integrity Report 2007 – Kenya*, 30 January <http://report.globalintegrity.org/Kenya/2007/scorecard/97> – Accessed 11 December 2008 – Attachment 7).

Global Integrity’s *Global Integrity Report* provides the following information on whether civil servants and private sector employees who report corruption are protected:

45b: In practice, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Score: 25

Comments:

References: While the law provides for such protection, instances that have hit the media suggest that protection is not wholesome. Former Ethics permanent secretary remains in (self) exile because he continues to fear for his life over his revelations concerning the Anglo Leasing scam in which the Government lost billions of shillings in payments for unfulfilled contracts.

During November 2007, an opposition presidential candidate alleged a plot to tamper with voter registers at the Electoral Commission of Kenya (ECK). Following ECK’s prompt denial of the allegations, one official however, remarked rather self incriminatingly that the moles in their midst would be identified and dealt with. However, the Kenya Anti Corruption Commission has established a website allowing anonymous whistle blowing.

...45d: In practice, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Score: 25

Comments:

References: Two Charterhouse Bank employees who exposed its money laundering activities remain in exile in the US fearing for their lives. While the Witness Protection Act promises extensive measures, such as identity switching and relocation, these are unlikely to be afforded in a poor country like Kenya. Furthermore, in a liberalized labor market context such as ours, it would be difficult to distinguish bona fide efficiency reforms in a company (that for instance retrench an officer) from actions that punish a whistleblower or other gadfly (Global Integrity 2008, ‘Category IV Administration and Civil Service – Whistle-blowing Measure’, *Global Integrity Report 2007 – Kenya*, 30 January <http://report.globalintegrity.org/Kenya/2007/scorecard/60> – Accessed 11 December 2008 – Attachment 6).

Freedom of Information Bill

According to *The East African Standard*, under *The Official Secrets Act (OSA)* “it is an offence punished by up to five years imprisonment, for a person to pass on any official document issued for his use alone to anyone not authorized to receive it, whether or not the information has any reference or effect on security of the state.” *The Standard* reports that one of the major criticisms of the OSA is “that it does not recognise the defence of public interest and that even disclosure of information already in the public domain is still a crime.” According to Mwalimu Mati from the Mars Group Kenya, “Corruption cannot be won when

we have the OSA because we all know that corruption thrives and flourishes in secrecy and that is why when David Munyakei exposed the Goldenberg scandal, he lost his job because of this law” (Nyantino, Jason 2007, ‘Access to information under the Draft Freedom of Information Bill 2007’, *The East African Standard*, 6 July, pp.31-32, Business Keeper AG website http://www.business-keeper.de/pdf/eng/knowledgeinfo/press_review/2007/070706_Newspaper_pullout_standard.pdf – Accessed 11 December 2008 – Attachment 17; and Nyantino, Jason 2007, ‘Whistle blower’s law and access to information key in fighting corruption’, *The Eastern African Standard*, 6 July, p.31, Business Keeper AG website http://www.business-keeper.de/pdf/eng/knowledgeinfo/press_review/2007/070706_Newspaper_pullout_standard.pdf – Accessed 11 December 2008 – Attachment 16).

An article dated 21 August 2008 in *The Nation* reports that the “Justice minister said Mr Githongo [see Examples of Whistle-Blowing], who returned from three years self-exile in London, would not be investigated over whether he broke the Official Secrets by leaking Government secrets over the Anglo Leasing saga” (Barasa, Lucas & Ogosia, Kenneth 2008, ‘Kenya: Pattni’s Graft Gang May Be Pardoned’, *The Nation*, 21 August, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 18).

An article in the August edition of *ADILI* reports that whistle-blower Munyakei [see Examples of Whistle-Blowing] “was dismissed from work for allegedly breaching the Official Secrets Act” (Ndubi, Haron M. 2006, ‘Munyakei’s Right to Life was Violated: He Should be Compensated’, *ADILI* 81, August, Transparency International Kenya website, p.3 <http://www.tkenya.org/documents/adili81.pdf> – Accessed 11 December 2008 – Attachment 13).

An article dated 28 September 2007 in *The East African Standard* reports that civil society is urging the Ninth Parliament of Kenya to pass *The Freedom of Information Bill* before its dissolution. The OSA would be repealed under the bill. According to the Freedom of Information Network led by Transparency International Kenya and the International Commission of Jurists, “Such secrecy, including that enshrined in the Official Secrets Act, continues to allow corruption to flourish”. An article dated 7 December 2008 in *The Nation* reports that the Kenyan Government plans to enact the *Freedom of Information Bill 2007* on 30 April 2009 (Ndegwa, Alex 2007, ‘Kenya: MPs Told to Pass Information Bill’, *The East African Standard*, 28 September, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 19; and Namunane, Bernard 2008, ‘Revealed: Action plan for poll violence report’, *The Nation*, 7 December <http://www.nation.co.ke/News/-/1056/499578/-/tm7r76/-/index.html> – Accessed 12 December 2008 – Attachment 20).

Other Laws

An article in the August 2006 edition of *ADILI* reports that Section 41 of *The Public Officer Ethics Act* states that “A person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.” The article notes that the “thrust of section 41 of the Act is to outlaw whistle blowing, while at the same time the rest of the Act purports to introduce and standardize the ethical code and standards of public officials” (Kichana, Philip 2006, ‘Kenyan Laws Cannot Protect Whistle Blowers’, *ADILI* 81, August, pp.2-3, Transparency International Kenya

website <http://www.tikenya.org/documents/adili81.pdf> – Accessed 11 December 2008 – Attachment 21).

An article in the August 2006 edition of *ADILI* reports that *The Anti Corruption and Economic Crimes Act* “provides protection for assistants, informers, witnesses and investigators.” The article notes that there are “two shortcomings: a) the Act does not define an “informer”; thereby making it difficult to determine whether it means the same thing as whistleblower, b) it limits reportage to the Kenya Anti Corruption Commission and yet there are more agencies...that fit the bill or that citizens might be more comfortable with” (Kichana, Philip 2006, ‘Kenyan Laws Cannot Protect Whistle Blowers’, *ADILI 81*, August, Transparency International Kenya website, p.3 <http://www.tikenya.org/documents/adili81.pdf> – Accessed 11 December 2008 – Attachment 21).

An article in the August 2006 edition of *ADILI* reports that *The Public Procurement and Disposal Act* “does not envisage whistle blowing and therefore makes no provision for it.” The article notes that this “is a grave omission, considering this is where the mega bucks, and mega and grand corruption reside” (Kichana, Philip 2006, ‘Kenyan Laws Cannot Protect Whistle Blowers’, *ADILI 81*, August, Transparency International Kenya website, p.3 <http://www.tikenya.org/documents/adili81.pdf> – Accessed 11 December 2008 – Attachment 21).

Examples of Whistle-Blowing

A number of examples of the treatment of whistle-blowers in Kenya were found amongst the sources. A selection follows below.

An article dated 22 August 2007 in *The East African Standard* reports on the treatment of whistle-blowers in Kenya:

There has been an outcry over the manner in which some witnesses in high-profile corruption cases have been treated as soon as they testified against the powerful suspects.

Some have lost their jobs while others have been demoted or transferred.

KACC is still trying to mend its image after its failure to take decisive action against the perpetrators of the multi-billion shilling Goldenberg and Anglo Leasing scandals.

Namachanja said whistleblowers were threatened with murder, violence or both.

Other witnesses, she added, risked being retaliated against by their employers, and this could lead to job dismissals, demotions, transfers and other forms of frustration, including ostracising and being discriminated against by co-workers and future employers (Kareithi, Amos 2007, ‘Kenya: KACC Stands Up for Whistleblowers’, *The East African Standard*, 22 August, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 15).

An article dated 18 July 2006 in *The Nation* reports on David Sadera Munyakei who “exposed Kenya’s biggest ever financial scandal involving SH158bn payouts to jewellery firm but died a poor and frustrated man having lost his job at Central Bank.” Munyakei, an Accounts Clerk at the Central Bank was “the man who blew the whistle” on the Goldenberg scandal which remains unresolved. Munyakei was charged with contravening the OSA,

denied bail and imprisoned. On September 1993 the case against him was withdrawn and he was set free. The Central Bank sacked him in September 1993 and his appeal was rejected. In 2003, the Goldenberg issue was re-opened and he traveled to Nairobi to give evidence. Justice and Constitutional Affairs Minister Murungi ordered Munyakei to report back to work but the “promise was never to be.” In January 2005, he was offered a job at the Office of the President with a basic salary of Sh8,000 but he turned it down. He died in July 2006. According to his wife, “They shunned him and left me the burden of taking care of him. If the Government had taken care of him, assisted him, he would not have died” (Namunane, Bernard 2006, ‘Kenya: Goldenberg Whistle Blower Dies’, *The Nation*, 18 July, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 22).

John Githongo, former Permanent Secretary for Ethics and Governance in the Office of President Kibaki left Kenya for exile in Britain in 2005 after receiving death threats. Githongo took with him “crucial papers relating to tens of millions in corrupt deals.” In 2006, Githongo testified for Kenya’s Parliamentary Public Accounts Committee in London. The Committee does not normally move outside the National Assembly building in Nairobi but Githongo “said he could not give his testimony in Kenya because of death threats.” The testimony on the Anglo Leasing scandal “directly implicated several government ministers in an alleged multi-million dollar scam.” In 2008 Kibaki returned to Kenya but left shortly after failing to secure an appointment with President Kibaki. Githongo is also the subject of a defamation case brought by former Internal Security Minister Murungaru who claims Githongo was a “fugitive of justice”. The Anglo-Leasing scandal remains unresolved (Keane, Fergal 2006, ‘A fearless Kenyan whistle-blower’, *BBC News*, 9 February <http://news.bbc.co.uk/2/hi/africa/4697612.stm> – Accessed 11 December 2008 – Attachment 23; Bamford, David 2006, ‘Graft evidence stuns Kenyan MPs’, *BBC News*, 11 February <http://news.bbc.co.uk/2/hi/africa/4704656.stm> – Accessed 11 December 2008 – Attachment 24; US Department of State 2008, *Country Reports on Human Rights Practices 2007 – Kenya*, 11 March, Section 3 Government Corruption and Transparency – Attachment 3; and ‘Githongo jets out silently after Kibaki snub’ 2008, *The Eastern Standard*, 28 August <http://www.eastandard.net/InsidePage.php?id=1143993593&cid=4> – Accessed 11 December 2008 – Attachment 25).

An article dated 2 March 2007 in *The East African Standard* reports that in 2003 Elias Njagi Kavanda was sacked from the Kenya Railways Corporation after investigating and exposing corruption. Kavanda and his family were “thrown out of the Government house they were living in.” Kavanda is “now a pauper and lives like a beggar.” The article notes that “some Government officials at the Office of the President to whom he had reported corrupt deals at the corporation leaked this information to his bosses leading to his dismissal” (Kinyungu, Cyrus 2007, ‘Kenya: Sacked for Blowing the Whistle on Graft’, *The East African Standard*, 2 March, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 26).

An article dated 8 April 2007 in *The East African Standard* reports that in 2003, 11 whistle-blowers from the Grand Regency Hotel “were sacked for volunteering information to the Kenya Anti-Corruption Commission (KACC) and writing statements against their employer.” The whistle-blowers were reinstated by the State-appointed Receiver Manager but on 11 January 2007 were physically ejected from their offices by “goons” and “locked up at the Central Police Station.” After an appeal, the Minister for Internal Security recommended “the reinstated employees be provided with police escort to resume work” but this “is yet to be effected” (Mathenge, Gakuu 2007, ‘Kenya: Sacked Whistleblowers Barred From Resuming

Jobs', *The East African Standard*, 8 April, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 27).

An article dated 23 March 2008 in *The East African Standard* reports that on 27 December 2007, “shortly before the presidential poll results were announced”, Mr Kipkemai arap Kirui “confessed anomalies were taking place at ECK [Electoral Commission of Kenya] offices at the Kenyatta International Conference Centre, Nairobi.” The article reports that “Kirui’s contacts in the police and NSIS [National Security Intelligence Service] had warned him that certain sections of the police were hunting him down and that his best hope was to leave the country.” With help from friends, Kirui left Kenya and is currently seeking refuge in Europe (Maiyo, Josh 2008, ‘Kenya: Election Fraud Whistle Blower on the Run’, *The East African Standard*, 23 March, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 28).

2. Please provide any information on the treatment of supporters of the Kenyan opposition.

No information on harassment, discrimination or violence against supporters of the Kenyan opposition was found amongst the sources consulted. Sources, quoted below, provide information on the coalition government in Kenya. The sources also report that there is currently no official opposition within the government of Kenya. The information provided in response to this question has been organised into the following two sections:

- Coalition Government; and
- Official Opposition.

Coalition Government

An article dated 28 February 2008 in *USA Today* reports that President Kibaki and Odinga “signed a power-sharing agreement...and shook hands after weeks of bitter negotiations on how to end the country’s deadly postelection crisis.” The article reports that the dispute over who won the election “set off street violence that killed more than 1,000 people”. Under the agreement, Odinga will be Prime Minister (‘Kenyan rivals sign power-sharing deal’ 2008, *USA Today*, 28 February http://www.usatoday.com/news/world/2008-02-28-kenya-elections_N.htm – Accessed 11 December 2008 – Attachment 29).

An article dated 29 February 2008 in *The Christian Science Monitor* sourced from *Reuters* provides information on the power-sharing deal in Kenya:

Its key points are:

- There will be a prime minister of the government of Kenya, with authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- The prime minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority.
- Each member of the coalition shall nominate one person from the National Assembly to be appointed a deputy prime minister.
- The cabinet will consist of the president, the vice president, the prime minister, the two deputy prime ministers and the other ministers. The removal of any minister of the coalition will be subject to consultation and concurrence in writing by the leaders.
- The prime minister and deputy prime ministers can only be removed if the National Assembly passes a motion of no confidence with a majority vote.

- The composition of the coalition government will at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
- The coalition will be dissolved if the Tenth Parliament is dissolved; or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
- The National Accord and Reconciliation Act shall be entrenched in the Constitution ('Text of Kenya power-sharing deal' 2008, *Christian Science Monitor*, source: *Reuters*, 29 February <http://www.csmonitor.com/2008/0229/p25s01-woaf.html> – Accessed 11 December 2008 – Attachment 30).

An article dated 7 September 2008 in *The Washington Post* reports that the power-sharing agreement “ended the immediate crisis” although “some observers say the compromise has played out only superficially, as members of the political elite have returned to petty backroom machinations at the expense of a country still divided by the crisis.” The article continues:

Although urging Kenyans to forget the past, Kibaki and Odinga have rewarded supporters with high-salary positions as ministers and assistant ministers, resulting in a 94-member cabinet that is the biggest and most expensive in Kenyan history. Parliament members, the highest paid on the continent, were sworn in and soon got down to the business of trying to resist an attempt to tax their pay of \$120,000 a year.

Meanwhile, Odinga and Vice President Kalonzo Musyoka have tussled over protocol issues such as who should speak first and their relative position in motorcades. A more recent spat involved who would qualify to use a proposed VIP lane alongside Nairobi's main thoroughfares.

“There has been a lot of childishness,” said Gitau Warigi, a political columnist with the Daily Nation newspaper. “But underneath there are major structural problems with how the top offices are relating to each other.”

For example, Odinga was tasked with “coordinating and supervising” government ministries. But the head of Kenya's civil service -- a presidential appointee who effectively did the job before -- has dismissed his authority. The two have issued competing orders, to the confusion of government workers (McCummen, Stephanie 2008, ‘In Kenya, Some Fear That Fissures Remain’ *Washington Post*, 7 September http://www.washingtonpost.com/wp-dyn/content/article/2008/09/06/AR2008090602666_pf.html – Accessed 11 December 2008 – Attachment 31).

An article dated 31 October 2008 in *The Nation* reports that seven months since the formation of the coalition government few of the promises made have been implemented. The article notes that the “message is that the grand coalition government is losing the public's trust and confidence, and this is likely to be disastrous in the near future.” The article continues:

Several promises were made, but few have been implemented.

The pledges include resettling the displaced people, a new constitution, job creation, dealing decisively with perpetrators of the post-election violence, reforming the Electoral Commission and reorganising the civil service.

...Not surprisingly, therefore, a new opinion poll released on Friday indicts politicians for failing to realise the Kenyan dream.

Satisfaction with the Government's performance in jumpstarting the economy, creating jobs, providing infrastructure and fighting corruption is at all-time low.

...Even in outside the opinion polls, there is great disappointment with the way our politicians are handling the Waki and Kriegler commission reports that seek to redress last year's election mess and the subsequent mayhem ('Kenya: Public is Fast Losing Faith in the Coalition' 2008, *The Nation*, 31 October, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 32).

Official Opposition

An article dated 8 May 2008 in *The East African Standard* reports that the Kenyan Parliament passed a motion seeking to formalise the "official opposition". Namwamba of the Orange Democratic Movement (ODM) moved the motion and can now introduce the *Official Opposition Bill*. Namwamba "warned that the official opposition is currently not "tenable" following the passage of the National Accord and Reconciliation Act" ('Kenya: House Passes to Formalise Opposition' 2008, *The East African Standard*, 8 May, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 33).

An article dated 23 August 2008 in *The Nation* provides details of the *Official Opposition Bill*. According to Namwamba, the "object of this Bill is to anchor the existence and functioning of the Parliamentary opposition in a statute law". Namwamba notes that "the Official Opposition, over the years, has functioned without legal backing." The article continues:

Indeed, the first part of the Bill aims at institutionalising the existence of the Official Opposition by providing for its formation, functioning, powers and privileges and performance benchmarks.

The section even contains a proposal that once a week, Parliament should set aside what they call the 'Opposition Day' during which the House will deliberate on issues that have been presented by the Official Opposition.

...But Mr Namwamba argues that the fears are misplaced. "How does the National Assembly function in a scenario where all major political parties are joined in Government?

Answering this question, through legislation, is critical because the Constitution, the Standing Orders and established customs of the National Assembly do not envisage a situation where Parliament functions without a formally recognised opposition," he argues.

Although Mr Namwamba and Ikolomani MP Bonny Khalwale expressed confidence that the Bill will sail through the House, they have cleverly included clauses that allay fears of the top leadership of the Grand Coalition.

Taking the current situation of the Grand Coalition Government where there is no opposition, they are proposing to form what they call as an 'extra-ordinary Opposition' made up MPs across the political divide.

...Mr Namwamba inserted clauses that prohibit it from transforming into a political party to ease the fears of some party leaders.

The MPs who voluntarily choose to join the Backbench Caucus are required to inform their political parties and the Speaker of the National Assembly in writing.

Members of the caucus will meet to elect their leader who under the provisions of the Act, will be the Official Opposition Leader (Namunane, Bernard 2008, 'Kenya: It's Daggers Drawn Over Opposition Bill', *The Nation*, 23 August, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 34).

An article dated 9 October 2008 in *The Nation* reports that the *National Assembly Parliamentary Opposition Bill Number 18* was read for the first time by ODM MP Namwamba and then “referred to the parliamentary committee on Administration of Justice and Constitutional Affairs chaired by Mandera Central legislator Mohamed Abdikadir for scrutiny before it is returned to members for debate.” The article notes that “current House Standing Orders” require an opposition party to “have at least 30 MPs for its leader to be recognised as the Official Opposition head” (Orlale, Odhiambo 2008, 'Kenya: Team to Discuss Opposition Bill', *The Nation*, 9 October, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 35).

No further information on the progress of the bill was found amongst the sources consulted.

3. Please provide any information on the treatment of those of the Pokomo ethnicity.

Limited information on the Pokomo in Kenya was found amongst the sources consulted. Sources, quoted below, provide information on ethnic violence between the Pokomo and the Oromo/Orma in Tana River in 1991, 1992, 1995, 2001 and 2002. The information provided in response to this question has been organised into the following three sections:

- Pokomo;
- Ethnic Groups in Kenya; and
- Ethnic Violence – Pokomo.

Pokomo

The Peoples of Africa: An Ethnohistorical Dictionary provides the following information on the Pokomo sourced from the 1981 *Historical Dictionary of Kenya* by Bethwell A. Ogot:

The Pokomos are a cluster of people living along the banks of the Tana River in Kenya, where they live as farmers raising plantains, sugarcane, rice, and maize. They are a mixed people, composed of subgroups with Bantu and Oromo roots. There are four main Pokomo subgroups, each with a separate dialect that is mutually intelligible with the others. The Lower Pokomo live from Kipini to Bubesa in the Salama region. The Upper Pokomos live between Matanama and Roka. The Welwans (also known as Malakotes) dwell between Roka and Garissa. The Munyo Yayas (Northern Pokomos or Korokoros) can be found from Garissa to Mbalambala. The Pokomo population exceeds 60,000 people (Olson, James Stuart 1996, 'Pokomo', *The Peoples of Africa: An Ethnohistorical Dictionary*, Greenwood Publishing Group, Westport, p.485 http://books.google.com/books?hl=en&id=VhuQlawC97sC&dq=%22peoples+of+africa%22+olson&printsec=frontcover&source=web&ots=zwb3wPRwgs&sig=VPt-vlprM2KiQA5G6JguQUUmDc4&sa=X&oi=book_result&resnum=1&ct=result – Accessed 11 December 2008 – Attachment 36).

According to *Ethnologue*, an encyclopedic reference work cataloging all of the world's 6,912 known living languages, there are 29,000 people who speak Lower Pokomo and 34,000 people who speak Upper Pokomo. Those who speak Lower Pokomo live in the Lower Tana River, Tana River District, Coast Province and those who speak Upper Pokomo live in the

Upper Tana River. Those who speak Lower Pokomo are Christian while those who speak Upper Pokomo are Muslim. Both groups are agriculturists and fishermen (Gordon, Raymond G., Jr. (ed.) 2005, 'Pokomo, Lower', *Ethnologue: Languages of the World*, 15th ed., SIL International, Texas http://www.ethnologue.com/show_language.asp?code=poj – Accessed 11 December 2008 – Attachment 37; and Gordon, Raymond G., Jr. (ed.) 2005, 'Pokomo, Upper', *Ethnologue: Languages of the World*, 15th ed., SIL International, Texas http://www.ethnologue.com/show_language.asp?code=pkb – Accessed 11 December 2008 – Attachment 38).

According to the 1989 population census of Kenya, there are 58,645 Pokomo in Kenya (29,276 male and 29,369 females) or 0.27% of the total population of Kenya is Pokomo (Makoloo, Maurice Odhiambo 2005, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, Minority Rights Group International, 13 April, p.12 – Attachment 39).

The attached map of Kenya shows the district of Tana River ('WFP Kenya – Field Offices 2007' 2007, UN Data Exchange Platform for the Horn of Africa website http://www.depha.org/images/WFP_Kenya_Operations_A4.pdf – Accessed 15 December 2008 – Attachment 40).

Ethnic Groups in Kenya

According to the US Department of State's *Country Reports on Human Rights Practices 2007*, the Kenyan "population is divided into more than 40 ethnic groups, among whom discrimination and occasional violence were frequent." The report continues:

Many factors contributed to interethnic conflicts: the proliferation of guns, the commercialization of traditional cattle rustling, the growth of a modern warrior/bandit culture (distinct from traditional culture), unresponsive local political leadership, diminished economic prospects for groups affected by a severe regional drought, political rivalries, and the inability of security forces to adequately quell violence. Conflict between land owners and squatters was particularly severe in Rift Valley and Coast provinces, while competition for water and pasturage was especially serious in the northern districts of Eastern Province and in North Eastern Province (US Department of State 2008, *Country Reports on Human Rights Practices 2007 – Kenya*, 11 March, Section 5 National/Racial/Ethnic Minorities – Attachment 3).

Ethnic Violence – Pokomo

Please note that the Oromo are also known as the Orma and formerly known as Galla.

A 2005 paper on ethnic violence in Kenya reports that ethnic violence occurred between the Pokomo and the Oromo in Tana River in 1991, 1992 and 1995 (Kimenyi, Mwangi S. & Ndung'u, Njuguna S. 2005, *Sporadic Ethnic Violence – Why Has Kenya Not Experienced a Full-Blown Civil War?*, Inter Region Economic, p.134 <http://www.irenkenya.com/reports/publications/ethnic%20violence%202005%20kimenyi%20ndungu.pdf> – Accessed 11 December 2008 – Attachment 41).

The US Department of State's *Country Reports on Human Rights Practices 2001* provides the following information on the ethnic violence that occurred between the Pokomo and Orma in Tana River during 2001:

Attacks and revenge counterattacks continued between ethnic groups throughout the country, resulting in an average of 50 to 75 deaths per month (see Section 1.a.). Significant conflict occurred between ethnic Pokots and Marakwets, between Pokots and Turkanas, between Turkanas and Samburus, between Maasais and Kisiis, between Orma and Pokomos, between Boranas and Somalis, and among various Somali clans. Many factors contributed to interethnic conflicts, including the proliferation of guns, the commercialization of traditional cattle rustling, the weakening of state authority, the emergence of local militia leaders, the development of a modern warrior/bandit culture (distinct from the traditional culture), irresponsible local political leadership, shrinking economic prospects for affected groups, a regional drought, and the inability or unwillingness of security forces to stem the violence.

...Clashes between the Orma and Pokomo communities in Tana River District in Coast Province also claimed many lives. Twenty schools were closed after 13 persons were killed in 2 weeks of fighting between the communities in March. It was unknown whether the schools had reopened by year's end. In mid-July five people reportedly were killed in fighting that started after Pokomo rivals stoned to death two Orma men (US Department of State 2002, *Country Reports on Human Rights Practices 2001 – Kenya*, 4 March, Section 5 National/Racial/Ethnic Minorities – Attachment 42).

A 2003 paper on the Tana River region reports that there are three major ethnic communities living in the Tana River region: Pokomo, Orma and two Somali sub-clans, the Wardei and the Galje'el. The paper provides the following information on ethnic violence between the Pokomo and the Orma and Wardei:

The empirical part of the paper focuses on Tana River region, a marginalized, poor and bandit-prone multi-ethnic region on the delta of Kenya's largest river. The region's proximity to Somalia, where the state has collapsed and warlords hold sway, has also exposed the region to the effects of cross-border flows of firearms, 'mercenaries' and bandits. Moreover, the World Bank has funded several projects in Tana River, but its funding, management policies and the overall impact of the investments have accentuated ethnic conflict within and between herders and farmers over water-points, pasture and farmlands.

...Suffice it to observe that raids, rustling, feuds, skirmishes and even protracted clan and ethnic wars within and between herding and farming communities are not uncommon in the semi-arid zones in Kenya. The Pokomo, Orma, and Somali of Tana River are no exception.

...The second wave of violence occurred in 2001–2002. It involved the Pokomo against a loose ethnic alliance of the Orma and another Somali clan, the Wardei. This spate of violence erupted on March 7, 2001 when Orma/Wardei youth vigilantes attacked the Pokomo after a baraza (public meeting), killing 10 people and injuring many others. A low intensity warfare where 'every day a person is killed, women frequently raped, and animals raided' in an orgy of ethnic attacks and counter-attacks ensued (Interviews 2001). By January 2002, an estimated 100 people had died, thousands injured and displaced and homes and property destroyed in the fighting.

...In fact, the 2001-2002 violence erupted against the background of a prolonged dry spell in the 2000-2001, which forced the pastoral Orma and Wardei to migrate to and overstay in dry season grazing areas on the Tana River banks. This put pressure on Pokomo farmers (Kagwanja, Peter Mwangi 2003, 'Globalizing Ethnicity, Localizing Citizenship: Globalization, Identity Politics and Violence in Kenya's Tana River Region', *Africa Development*, Vol. XXVIII, No. 1 & 2, pp.112, 133 & 141 – Attachment 43).

A 2005 paper on ethnic violence in Kenya reports that in 2001 "more than 50 people died in a single week of fighting between the Pokomo and Wardei tribes in Tana River district". The

report notes that the conflict between the Pokomo and the Orma and Wardei in Tana River centres on land and grazing rights. The report states that the “Orma and Wardei pastoralists accuse the Pokomo farmers of restricting their access to water points and grazing fields, while the Pokomo accuse the pastoralists of grazing on their farms and destroying their crops” (Kimenyi, Mwangi S. & Ndung’u, Njuguna S. 2005, *Sporadic Ethnic Violence – Why Has Kenya Not Experienced a Full-Blown Civil War?*, Inter Region Economic, pp.125 & 141 <http://www.irenkenya.com/reports/publications/ethnic%20violence%202005%20kimenyi%20ndungu.pdf> – Accessed 11 December 2008 – Attachment 41).

A 2003 paper on the Tana River region provides background information on land tenure in Kenya, the reason behind the ethnic violence in Tana River:

Towards the end of 1998, the government established the Land Review Commission, under the chairmanship of a former Attorney-General, Charles Njonjo. The Commission’s mandate was to collate views of Kenyans on the thorny issue of land and to make policy recommendations aimed at stabilizing and streamline land tenure across the country.

The Commission visited Tana River on March 7, 2001. The debate that ensued brought the Pokomo-Orma/Wardei differences on the land question to the open. Worse still, it sparked off the 2001–2002 spate of violence. From the outset, the Commission adopted liberal land policy that favoured a tenure system based on individual land ownership. This policy created a sharp split between the Pokomo and the Orma/Wardei. The Orma/Wardei virulently resisted the idea of land demarcation based on individual freehold. They accused the Government of fuelling ethnic conflict by imposing a liberal land tenure system on an area where land is communally owned without adequate consultation. ‘This problem,’ said an Orma civic leader, ‘has been started by the government.’ He continued to argue that:

‘The Pokomo, Wardei and Orma elected me in 1997 and our ancestors lived together harmoniously. It is this idea of land adjudication and the failure of the government to educate us on what it means which has caused this problem. They should tell us how many acres a herder with 3,000 heads of cattle will be given’ (Interview 2002a).

The Orma and Somali nomads argued that land adjudication would deprive them of access to water-points and grazing fields that are traditionally owned by the Pokomo. They insisted that the government should not interfere with the existing communal land regime, insisting that these should continue to be in the hands of elders who understand the traditional tenure system.

...The Orma were making reference to the communal land system that regulated not just land ownership, but also land use by both the Pokomo and the Orma. This communal system provided two sets of rights: On the one hand was the right of ownership that the Pokomo were entitled to, as the ‘indigenous’ people to the area by the virtue of having been there before the arrival of the Orma. On the other hand, there was the right of access which the Orma were entitled to, and which the Pokomo guaranteed and defended. Traditionally, the Pokomo and Orma observed specific customary rituals and practices that allowed the Orma herders to gain access to water-points and pasture on the banks of the Tana River, especially during dry season. After elders from the two communities performed these rituals the latter set of rights became accessible to the Orma. These customary practices defining these rights emerged over the years, revealing a long interactive and integrative history of the two communities.

On their part, the Pokomo supported lock stock and barrel land adjudication on the basis of the liberal idea of individual free hold. This was a way of dealing with what they viewed as manipulations of land ownership by the Orma. They also claimed that as the oldest inhabitants of the area, they were entitled to the land. To be sure, even before the Commission

visited Tana River, the Pokomo had registered their displeasure with what they viewed as the Orma elite's manipulation of land ownership. They charged that high-ranking Orma elite were exploiting their positions in the Moi State to legalize the Orma claims to, and settlement on, the land in the riverine areas of Garsen and Kipini, thus excluding the Pokomo. The Pokomo also claimed that the Orma had not only acted arrogantly and armed themselves against their hosts, they had also invited such Somali clans as the Wardei and Galje'el without consulting with Pokomo elders. This, they argued, contributed to population pressure, ethnic competition and conflict over land (Kagwanja, Peter Mwangi 2003, 'Globalizing Ethnicity, Localizing Citizenship: Globalization, Identity Politics and Violence in Kenya's Tana River Region', *Africa Development*, Vol. XXVIII, No. 1 & 2, pp.140-141, Council for the Development of Social Science Research in Africa website http://www.codesria.org/Links/Publications/ad1_03/kagwanja.pdf – Accessed 11 December 2008 – Attachment 43).

An article dated 7 August 2006 in *The East African* reports that the conflict between the Pokomo and Orma communities in Tana River, "ended only after the government decided to work with traditional institutions." The article continues:

In Tana River, conflict between the pastoralist Orma and the farming Pokomo communities ended only after the government decided to work with traditional institutions.

It took the coming together of the Gaza (for the Pokomo) and the Matadeda (for Orma) and the suspension of the land adjudication programme to restore peace after almost five years of conflict. The land adjudication had been started without consulting the two communities, who have different concepts of land tenure.

The agro-pastoral Pokomo believe in individual land ownership, while pastoralist Orma believe that the land belongs to the community, who have unlimited access for their animals (Oluoch, Fred 2006, 'Kenya: Conflicts Go Beyond Water and Pasture', *The East African*, 7 August, allAfrica.com website <http://allafrica.com/> – Accessed 11 December 2008 – Attachment 44).

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UK Home Office <http://www.homeoffice.gov.uk/>

US Department of State <http://www.state.gov/>

United Nations (UN)

UN Data Exchange Platform for the Horn of Africa <http://www.depha.org/>

UN Refugee Agency – Refworld <http://www.unhcr.org/cgi-bin/texis/vtx/rsd>

Non-Government Organisations

Amnesty International <http://www.amnesty.org/>

Council for the Development of Social Science Research in Africa <http://www.codesria.org/>
Ethnologue: Languages of the World <http://www.ethnologue.com/>

Freedom House <http://www.freedomhouse.org/>

Human Rights Watch <http://www.hrw.org/>

Inter Region Economic <http://www.irenkenya.com/>

Minorities at Risk <http://www.cidcm.umd.edu/mar/>

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FACTIVA (news database)

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ISYS (RRT Research & Information database, including Amnesty International, Human Rights Watch, US Department of State Reports)

RRT Library Catalogue

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