



THE COMMISSION ON ADMINISTRATIVE JUSTICE
“Office of the Ombudsman”

‘Hata Mnyonge ana Haki’

FINAL INVESTIGATIONS REPORT BY THE
OMBUDSMAN-KENYA

ON ALLEGED ABUSE OF POWER BY THE DIRECTOR,
KENYA INSTITUTE OF EDUCATION

NOVEMBER 2013

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Foreword

Upon receipt of an anonymous letter of complaint on 16th February, 2012, from ‘Concerned KIE Members of Staff’ raising nine allegations against the management of KIE and specifically, the Director, Dr. Lydia Nzomo, the Commission on Administrative Justice sought her response on the allegations *vide* letter Ref: CAJ/KIE/OB/272/2012-WO , dated 23rd April, 2012.

Dr. Lydia Nzomo gave her response on the nine allegations *vide* a letter dated 14th May, 2012. The Commission found five out the nine complaints satisfactorily responded to. The Chair CAJ on his discretion decided that four out of the nine allegations received be investigated independently by the CAJ investigators who undertook the investigations and submitted a draft report to the Chair.

Pursuant to Section 36 of the CAJ Act, the Commission sent the draft report to Dr. Nzomo *vide* a letter dated 19th July, 2013 to accord her a further opportunity to appear before the Commissioners and make presentations and any further responses she may have on the findings and proposed recommendations.

Dr. Nzomo and Mr. Kimotho, Senior Deputy Director - Media and Extension Services and who was also adversely mentioned in the draft report made their presentations before the Commissioners on the 24th July, 2013 at which Dr.Nzomo also produced before the Commissioners further documents which hitherto were not provided to the investigators.

The Commission Chair shared the responses, additional information and documents with the investigations team for consideration and incorporation in the final report. The preparation of this final report has therefore been informed by the investigators’ draft report, the presentations made by Dr. Nzomo and Mr. Kimotho and the rejoinder by the investigators upon analysis and evaluation of the responses and additional materials provided by the two senior officers.

After thorough investigations and interactions with Dr. Nzomo, Mr. Kimotho and others, the investigations team cleared Dr. Nzomo on three out of the allegations investigated and the Commission has made appropriate recommendations.

The Commission hereby presents the Final Report, having thoroughly investigated the allegations and followed every dictate of natural justice and fair administrative action.

Signed this day of November 2013.

**Cmmr. Otiende Amollo, EBS
Chairperson of the Commission on Administrative Justice
(Office of the Ombudsman)**

Preamble

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission on Administrative Justice (CAJ) has a mandate inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

After undertaking its investigations, the Commission is required by law, as stipulated under Section 42 of its constitutive Act, to prepare a report to the State organ, public office or organization to which the investigation relates. The draft report shall include the findings of the investigation, action the Commission considers to be taken and reasons whereof and recommendations the Commission deems appropriate.

Section 42 (4) states:

If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take the appropriate action.

Section 44 further states:

If after an investigation, the Commission is of the opinion that a person, an officer or employee of the state organ, public office or organization which was investigated under this act is guilty of misconduct; the Commission shall report the matter to the appropriate authority.

The report has seven Chapters as discussed hereunder:

Chapter 1: Introduction

Chapter 2: Investigations into allegations of malpractices relating to the 2006 Book Evaluation Team's Accommodation. (Case No. I)

Chapter 3: Investigations into allegations of nepotism and favoritism through the recruitment of relatives (Case No. II)

Chapter 4: Investigations into allegations of Bribery in the issuance of a Tender to drill a borehole for the Kenya Institute of Education (Case No. III)

Chapter 5: Investigations into the allegations of depletion of the KIE's Reserve Account (Case No. IV)

Chapter 6: Unresponsive official conduct and discourtesy by Mr. John Kimotho
- Senior Deputy Director, Media and Extension Services

Chapter 7: General and Consequential Observations

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Acronyms

CAJ	Commission on Administrative Justice
EACC	Ethics and Anti-Corruption Commission
ICT	Information and Communication Technology
KES	Kenya Shillings
KICD	Kenya Institute of Curriculum Development
KIE	Kenya Institute of Education
LPO	Local Purchase Order
SAO	Senior Administrative Officer
TSC	Teachers Service Commission
WRMA	Water Resources Management Authority

Executive Summary

This investigation was prompted by a review of an anonymous letter of complaint received by CAJ on 16th February 2012, from ‘Concerned KIE Members of Staff’ raising allegations against the management of KIE and specifically, the Director, Dr. Lydia Nzomo. A total of nine major allegations were raised in the undated letter. The complainants had raised the allegations with various other government investigative agencies and apparently no action had been taken to remedy the problems in spite of the persistent whistle blowing efforts by the complainants.

The CAJ, in cognizance of the above position and in line with its mandate, undertook preliminary investigations into the allegations raised, and made a decision to investigate four matters out of the nine raised issues. The four are:

- Allegations of abuse of power with respect to drilling of a borehole
- Allegations of malpractices relating to the 2006 Book Evaluation Team’s Accommodation
- Misuse of Reserve Account funds
- Allegations of nepotism and favoritism through the recruitment of relatives

The process of undertaking investigations into the said allegations included holding interviews with members of staff of the Kenya Institute of Education (KIE), now known as Kenya Institute of Curriculum Development- KICD), including the director, Dr. Lydia Nzomo, being the respondent. In addition, service providers, of KIE as well as relevant government officials were also interviewed. Further, CAJ obtained documents from the various government and private sources necessary for its investigations.

The objectives of the investigations were:

- i. To conduct preliminary investigations to verify the allegations raised against the Director and management of KIE.
- ii. To conduct in-depth investigations and establish the facts of the matter.
- iii. To give direction on appropriate action that needs to be undertaken to settle the complaint or obtain relief.
- iv. To give appropriate recommendations to relevant government agencies on matters arising from the investigations.
- v. To give advisories to government for change of policy where possible or on measures to be undertaken.

The CAJ investigators compiled the draft report and forwarded it to the CAJ Commissioners. Pursuant to Section 36 of the CAJ Act, the Commissioners accorded an opportunity to the person(s) against whom adverse findings and recommendations had been made in the draft report to make representations before the Commissioners regarding the findings and recommendations.

The said meeting took place on 24th July 2013, where the Director, KIE, Dr. Lydia Nzomo made her presentation before the CAJ Commissioners and Commission Secretary. Mr. John Kimotho, Senior Deputy Director, Media and Extension Services also appeared before the Commissioners and made presentations. The Commission was yet to invite him.

Following is the output of the investigations:

- i. A detailed report on investigations undertaken and findings thereon
- ii. Policy, legal and other recommendations with action points to government agencies

Summary of findings

Investigations into allegations of Malpractices relating to the 2006 Book Evaluation Team's Accommodation

There was no evidence confirming that the Director, KIE, Dr. Lydia Nzomo received a bribe of KES 1 Million shillings from the management of Sun N Sand hotel in order to transfer the Book Evaluators from Hotel Le Soilel. However, investigations indicate that proper records and books of accounts were not maintained in the whole exercise of the 2006 Book Evaluation exercise.

For instance, the total amount payable to Mombasa Beach Hotel according to available Local Purchase Order (LPO) was KES. 17,550,000 for 150 participants KIE paid a 50% down payment (KES 8,775,000) to Mombasa Beach Hotel, however, evidence supporting the final payment (50% balance) could not be availed by both KIE and Mombasa Beach Hotel. Lack of proper financial records creates a lacuna for mismanagement of public funds.

By failing to maintain or cause to maintain proper financial records and books of account, in case of the Book Evaluation exercise, Dr. Nzomo is in contravention of Article 197, 198 and 199 of the Public Finance Management Act, 2012.

It is worth noting that while in her response to CAJ Commissioners, Dr. Nzomo conceded that in 2006, the year in which the book evaluation exercise is under scrutiny, the Institute did not have proper accounting and procurement structures. She however averred that since 2009, the institute has put in place measures and established mechanisms that allow the culture of transparency and accountability. Despite these responses, CAJ reiterates that KIE has still not put in place the proper establishment of its fiscal structures. This is premised, for instance, on the report by the office of the Auditor General for the year ended 30th June 2011 which discloses financial malpractices and gross financial impropriety, for example, long outstanding receivable balances which have been outstanding for over 6 years, and imprests totaling to KES 3, 596,553, car loans totaling to KES 227,906 and other advances of KES 704, 159 relate to staff who have since left the service. The report also indicates that KIE did not avail documents and records required by the auditors to conduct the audit exercise.

Recommendations

- i. The office of the Auditor General to undertake an audit of the books of accounts of the KIE in order to ascertain the actual amount of payment made to Mombasa Beach Hotel, as no evidence was submitted to proof the 50% final payment by KIE. During her presentations to the Commissioners, Dr. Nzomo confirmed this position and restated the fact that the Institute is currently reconciling their records with Mombasa Beach Hotel.

General Recommendations to KIE

- ii. KIE management should adhere to the principles laid out under Chapter 12 of the Constitution on Public Finance.
- iii. KIE to observe sound financial management practices, as per the Public Finance Management Act, 2012.
- iv. KIE to keep proper records and books of accounts and undertaking due diligence prior to awarding of tenders in line with the Public Procurement and Disposal Act, 2005.
- v. KIE needs to entrench a culture of transparency, accountability and participation on all aspects of management and in particular probity in financial management. For instance, Dr. Nzomo usurped the powers of the Tender Committee in awarding the contract to Mombasa Beach Hotel which was the second lowest bidder to accommodate the Book Evaluation participants when Hotel Le Soilel wrote to indicate its inability to accommodate the 120 participants.
- vi. KIE should put in place structured mechanisms that would allow internal scrutiny of its procurement and tendering processes to ensure openness in their transactions.

Investigations into allegations of abuse of office, nepotism and favoritism by the Director, KIE through the recruitment of relatives

Investigations by the CAJ team revealed that Dr. Nzomo selectively and unprocedurally recruited two of her siblings; Mrs. Mercy Kaembe Mwangi (sister) and Mr. Charles Mwambia Anampiu, (brother) at KIE without due regard to the provisions relating to conflict of interest relating to recruitment processes in the Public Service.

Although there is no hard evidence that Mr. Anampiu's transfer from TSC to KIE was instigated by Dr. Nzomo, CAJ made an adverse inference that she must have been involved otherwise it could not have been by coincidence that Dr. Nzomo moved to KIE in 2004, her sister Mercy Kaembe in 2004 and Mr. Anampiu in 2005.

In addition, the Director recruited other members of staff from her district of birth through unprocedural processes. This confirms the allegation of abuse of office, nepotism and favoritism through the recruitment of relatives.

Dr. Lydia Nzomo, in recruiting her brother and sister at KIE, breached Section 12 (1), (3), (4), (5) and (6) of the Public Officer Ethics Act 2003 and, Section G1-Rules of Conduct as provided

for in the Public Officer's Code of Regulations, 2006.

Further, Dr. Nzomo was evasive by failing to disclose to CAJ having recruited her relatives at KIE thus fell short of providing misleading/false information to the Commission in her response to CAJ's letter of inquiry.

Dr. Nzomo wrote asking TSC to remove Mr. Charles Anampiu and others from the TSC payroll.

During the interview with the investigators, both Mr. Charles Mwambia Anampiu and Mrs. Mercy Kaembe Mwangi, brother and sister to Dr. Nzomo, lied to the investigator by denying to be Dr. Nzomo's brother and sister respectively.

Mr. John Kimotho, Senior Deputy Director Media, who also participated in the recruitment of some of the staff mentioned in the allegations, denied knowledge of the recruitment of Dr. Nzomo's relatives in the Institute. Mr. Kimotho also told the CAJ Commissioners during his presentation before them that he honestly did not know that Dr. Nzomo's brother and sister were employees of KIE. He further informed the Commissioners that he was in the panel that interviewed Mr. Charles Anampiu in 2008 and that Dr. Nzomo did not disclose to the panel that Mr. Anampiu was her brother.

Recommendations:

- i. CAJ to strongly reprimand Dr. Nzomo and demand that she writes a letter of apology to the Chairman of the KICD Council for irregularly recruiting her sister and brother to the Institute hence practicing nepotism and favoritism and failing to disclose conflict of interest in the recruitment process.
- ii. CAJ recommends to the KICD Council that both Mr. Charles Anampiu and Mrs. Mercy Kaembe be retired on public interest as their recruitment to KIE was irregular and improper in the first instance.
- iii. CAJ shall liaise with the DPP for the prosecution of Mr. Charles Anampiu under Section 52 of the CAJ Act on account of misleading and providing false information to CAJ in his written statement that the relationship between him and Dr. Lydia Nzomo was that of employer-employee and that the rest of the staff were workmates.
- iv. The KIE to undertake a conscious and deliberate decision not to effect recruitment of members of staff from certain ethnic communities, as the KIE staff ethnic distribution presents manifest imbalance in the regional distribution of the employees as shown by the list provided to the Commissioners on 24th July 2013.

Investigations into allegations of bribery in the issuance of a tender to drill a borehole for the Kenya Institute of Education

The procedure of awarding the tender to Agro Irrigation and Pump Services Limited to drill a borehole and install a water pump at KIE was done in accordance with the provisions of the Public

While the complainants alleged that the cost of drilling the borehole was KES 5 Million, CAJ investigators established that the project cost KIE KES. 2,859,413.75, which included KES 1,918,570.25 for the drilling of the borehole and KES. 940,843.50 for installing a water pump.

Therefore, the allegation that KIE spent KES 5 Million on this project is unfounded. There was no evidence to support the allegation that Dr. Nzomo received a bribe in order to issue a Local Purchase Order.

Recommendations

The Water Resources Management Authority to ensure proper documentation in the processing and renewal of permits. The CAJ team observed that the authority often ‘cut and pastes’ contents from previous permits while processing new ones, leading to mistakes on the face of the permits.

Investigations on the allegations of depletion of the KIE’s Reserve Account

The CAJ team noted lack of proper records on the roll-overs for the Fixed Deposit Accounts. The progression on each Fixed Deposit Account as it was rolled over upon maturity is not known. There is therefore uncertainty in so far as the accrued interests and the initial deposit amounts are concerned.

The fact that KIE ran so many Fixed Deposit Accounts besides other normal accounts has in itself compromised prudent financial management practices. Such operation may create not only opportunities for impropriety but confusion when it comes to tracking and monitoring. Further, these accounts were being run without the express authority of the KIE Council.

While there is no direct evidence that the Director, KIE benefited from the “reserve accounts” the practices are indeed in breach of the Public Finance Management Act, 2012 as the said accounts were being opened without the express consent of the KIE Council.

In the cause of Dr. Nzomo’s interaction with the Commissioners she insisted that she does not need the approval of the Finance Committee nor the KIE Council in order to open Fixed Deposit Accounts but Legal Notice No. 105 of 1976, Part VI Section 18 (2) (c) gives powers to the Finance and General Purpose Committee *to consider and authorize any financial transactions or development proposals on behalf of the Council.*

Conclusions

The CAJ team noted that KIE held many Fixed Deposit Accounts with different commercial banks besides other normal accounts. This in itself compromised prudent financial management practices. The Fixed Deposit Accounts held large amounts of money invested for periods ranging from three to six months at different interest rates. A close scrutiny of documents on the Fixed Deposits recovered from KIE indicated that the various Fixed Deposits matured at different times and some were rolled over time and again while others were called off.

There are no proper records on the roll-overs for the Fixed Deposit Accounts. The progression on each Fixed Deposit Account as it was rolled over upon maturity is not known. There is therefore uncertainty in so far as the accrued interests and the initial deposit amounts are concerned. Such operation may create not only opportunities for impropriety but confusion when it comes to tracking and monitoring. Further, these accounts were being run without the express authority of the KIE Council.

While there is no direct evidence that the Director, KIE benefited from the “reserve accounts” the practices are indeed in breach of the Public Finance Management Act, 2012 as the said accounts were being opened without the express consent of the KIE Council.

CAJ investigators sought information on the Fixed Deposit Accounts which was not forthcoming, but upon perusal of the documents Dr. Nzomo submitted during her presentation to the Commissioners and the disclosures, it is worth noting that the Fixed Deposit of KES 4,922,864.50 at the Continental Credit Finance was deposited in 1983 long before Dr. Nzomo and Mr. Kimotho went to KIE.

The Director, Dr. Nzomo however, knowing/unknowingly failed to observe Article 197, 198 and 199 of the Public Finance Management Act, 2012 in opening Fixed Deposit Accounts with various commercial banks without authority of the Council.

Recommendations

- i. The Office of the Auditor General to undertake an audit on all the Fixed Deposit Accounts held by KIE to ascertain that there was no mismanagement of public funds held in such accounts.
- ii. KIE Director to confirm whether KIE had a Tax Exemption Letter on Fixed Deposit Accounts.
- iii. The Director, KIE to confirm whether such Fixed Deposits Investments were subject to Withholding Tax if KIE had a Tax Exemption Letter.
- iv. KIE Director and the various commercial banks where KIE had Fixed Deposit Accounts should provide proof that Withholding Tax charged by the various commercial banks on Fixed Deposit transactions were actually remitted to Kenya Revenue Authority.
- v. KIE should put more effort to recover the Ksh. 4,922,864.50 held in Continental Credit Finance which went under receivership.
- vi. The Director, KIE should seek proper authorization from KIE Council to invest in Fixed Deposit Accounts.
- vii. The Director should regularly disclose all Bank Accounts to the KIE Council

Report on unresponsive official conduct and discourtesy of Mr. John Kimotho Senior Deputy Director, Media and Extension Services

While undertaking its investigations, the CAJ investigative team requested for information and documentation from KIE, through its administrative head, the Director, Dr. Nzomo. However, due to her busy schedule and travels, Dr. Nzomo delegated the role of liaising with the CAJ investigative team to her deputy, Mr. John Kimotho, the Senior Deputy Director, Media and

Extension Services. Mr. Kimotho was therefore, duly and properly instructed to work closely with the investigative team on behalf of the Director, KIE. However, the experience of the investigative team, as shall be discussed in this Chapter, demonstrates utter discourtesy to the investigators and disregard to the requests for information and documentation by the investigative team, amounting to unresponsive official conduct, by the said Mr. Kimotho.

Recommendation

The KICD Council to cause a caution to be served upon Mr. John Kimotho for his unresponsive official conduct and discourtesy displayed upon the CAJ team.

General and Consequential Observations

During its investigations, the investigative team took note of some pertinent issues relating to the Kenya Institute of Education. Following are some of the general and consequential observations that the investigative team would re-emphasize;

1. CAJ emphasizes the need for KICD to entrench the culture of transparency and accountability in all its fiscal transactions, including procurement and tendering processes and staff recruitment. All the operations of the institute should be within the laid out laws and regulations.
2. Investigations also revealed that Dr. Nzomo invited senior officers from the Criminal Investigations Department with '*a view of establishing the authors of the malicious letters and the motive behind their circulation*', The CAJ team noted that there was no official complaint as the matter was not entered into an Occurrence Book in a police station as is the case in all complaints lodged with police. It is the CAJ's view that engaging the CID officers was solely intended to intimidate and gag the complainants/whistleblowers. This act in itself is improper conduct on the part of the Director and amounts to abuse of power.
3. The KICD Council should initiate the process of recruiting a Director in conformity with the provisions of **Section 14** and **15** of the Kenya Institute of Curriculum Development Act, 2013, which requires that the appointment of a Director to be done by the Council through a competitive, fair and open process. Further, the Director is to hold office for a term not exceeding five years and shall be eligible for re-appointment for one further term.
4. In the course of its investigations, Mr. Charles Anampiu knowingly and willfully misled the Commission. CAJ will therefore, institute his prosecution in accordance with **Section 52** of the Commission on Administrative Justice Act, 2011, which offence carries a penalty of a fine not exceeding five hundred thousand shillings and or to imprisonment for a term not exceeding two years or to both.

CHAPTER 1

1.1 Introduction

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The CAJ has a mandate *inter-alia*, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.¹ Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Government authorities and to compel production of such information. The Commission is also mandated to inquire into systemic issues within Governmental bodies, and make recommendations and advisories aimed at improving public service and the administration of justice.

In pursuant to the aforesaid mandate, the Commission undertook investigations into allegations of mismanagement and maladministration raised by some anonymous complainants, alleging to be members of staff of KIE. The complaint was in form of an undated letter received at the Commission on 16th February 2012. (*Exhibit E1*). From the various correspondences, it is noted that the complainants had raised the allegations with various other government investigative agencies and apparently no action had been taken to remedy the problems in spite of the persistent whistle blowing efforts by the complainants.

Further, the mandate to investigate the allegations against the management of KIE (now known as the Kenya Institute of Curriculum Development- KICD) was based on the fact that KIE is a government body. For purposes of this draft report, reference shall be made to KIE as at the time of receipt of the complaint, the institution had not changed its name to KICD. Following is a brief history of the establishment of the KIE.

1.1.1 Brief History on the Establishment of the KIE

The Kenya Institute of Curriculum Development (KICD), which, until in January 2013, was known as the Kenya Institute of Education (KIE), is a body corporate mandated to deal with matters pertaining to curriculum development for academic institutions. In 1976, the Kenya Institute of Education Order, (hereinafter referred to as the 1976 KIE Order) was passed *vide* the powers conferred upon the Minister of Education under Section 23 (2) of the Education Act (Chapter 211 of the Laws of Kenya). The Education Act has since been repealed by the Basic Education Act, No. 14 of 2013.

In 2010, KIE was established as a State Corporation through Legal Notice no. 120 of 2010, under the State Corporations Act, Chapter 446 of the Laws of Kenya. However, in 2012, a Bill was introduced in Parliament, the Kenya Institute of Development Bill, 2012, which revoked Legal Notice no.120 of 2010. This led to the passing of the Kenya Institute of Curriculum Development Act (No. 4 of 2013) (with its commencement date on 25th January 2013), establishing the Kenya Institute of Curriculum Development; as a body corporate with a governing Council.

1.2 Summary of Issues under Investigation

Following is a list of issues that were raised by the Complainants in the anonymous letter:

- (i) Corruption with respect to:
 - The E-content library
 - Insurance services
 - Internet Services
 - Renovation of Library and Print Sections
 - Supply of goods to NACECE Resource Centre
 - Drilling of a borehole
 - Staff Badges, cars and visitor's passes
 - Calendars
 - Outsourcing of printing services
 - Civil works
- (ii) Allegations of malpractices relating to the 2006 Book Evaluation Team's Accommodation
- (iii) Misuse of Reserve Account funds
- (iv) Abuse of office by employment of relatives
- (v) Selective application of mandatory retirement age- Ref: Mr. Isaiah Nyamudhe
- (vi) Non-payment of service gratuity to staff
- (vii) Denial to join union membership
- (viii) Frustration in the signing of Recognition Agreements
- (ix) Entrenchment of tribalism

Upon receipt of the anonymous complaint on 16th February 2012, (*Exhibit E1*) the Commission undertook preliminary investigations into the allegations. A letter dated 23rd April 2012 (*Exhibit E2*) and referenced CAJ/ KIE/OB/272/2012-WO was written to the Director, KIE Dr. Lydia N. Nzomo informing her of the allegations and requesting her to give her response on the matters raised within twenty one days. Her response is contained in a letter dated 14th May 2012 (*Exhibit E3*). The Chair of the Commission also wrote to Dr. Nzomo informing her of the decision by the Commission not to investigate certain allegations, and further requesting for better particulars relating to matters to be investigated. This was *vide* a letter dated 7th March, 2013 (*Exhibit E4*). This was followed by a letter from the Director, Research and Investigations to Dr. Nzomo requesting to be furnished with a list of documents and information. (*Exhibit E5*).

Analysis of the response from Dr. Nzomo narrowed the scope of investigations to the following four allegations:

- (i) Allegations of abuse of office with respect to drilling of a borehole
- (ii) Allegations of malpractices relating to the 2006 Book Evaluation Team's Accommodation
- (iii) Misuse of Reserve Account funds
- (iv) Abuse of office by employment of relatives and destruction of professionalism

CAJ decided not to investigate the other five allegations based on the fact that there exists adequate remedial mechanisms in other government institutions to deal with the matters in line with Section 34 of the CAJ Act, 2011 on the discretion not to investigate.

1.3 Investigative Process

The Commission undertook the investigations on the four issues pursuant to Section 8 of the CAJ Act, 2011. The investigative process was as follows:

- (i) The Commission notified the Director, KIE, Dr. Lydia Nzomo of the intention to conduct Investigations relating to the allegations leveled against her and the management of KIE in line with Section 37 of the CAJ Act, 2011
- (ii) The investigative team interviewed various identified staff of KIE, service providers and some identified government officials in line with Section 26 (f) and 39 (1) (b) of the CAJ Act, 2011.
- (iii) The team visited various establishments and sites of interest to the investigations.
- (iv) The investigators recovered documents relevant to the matters under investigations pursuant to Section 28 (2) (b) of the CAJ Act, 2011 and other laws.
- (v) The investigative team analyzed and evaluated evidence gathered.
- (vi) The investigative report was then compiled.

CHAPTER 2

Case No. 1: Investigations into allegations of malpractices relating to the 2006 Book Evaluation Team's Accommodation

2.1 Malpractices in the 2006 Book Evaluation Accommodation

KIE organizes book evaluation workshops to evaluate textbooks by various authors for various subjects in the teaching curriculum for primary and secondary education. In the year 2006, the exercise involved two hundred and seventy (270) book evaluators. They were drawn from various schools in Kenya.

The complainants alleged that Hotel Le Soleil at the North Coast was evaluated and awarded the contract to offer accommodation to the Institute's Book evaluation team in 2006. However this contract was not honored after the Director unilaterally transferred the Book Evaluation team to Sun "N" Sand Hotel. They further alleged that the Director, KIE, later visited the Hotel in December 2006 and was paid Ksh. 1 million- for taking the evaluation team to that hotel. As a result of the Director's unilateral action, they further claim that Hotel Le Soleil has gone to court to seek compensation of KSH. 12 Million.

In a written response by the Director of KIE to CAJ dated 14th May 2012, (*Exhibit E3*) she gave an account of the circumstances relating to the Book Evaluation accommodation, and stated that the Book Evaluators had initially been booked at the Hotel Le Soilel. However, due to the poor conditions of the hotel rooms, as documented by the Evaluators, they were transferred to Sun N Sand Beach Hotel. Sun N Sand Beach Hotel had also been evaluated by the Tender Committee and found suitable.

2.1.1 Issues List

From the above allegations, the following issues were isolated for further interrogation:

- (i) That the Director of KIE, Dr. Lydia Nzomo acted contrary to the Public Procurement regulations with respect to the tendering process by unilaterally transferring the Book Evaluation Team from Hotel Le Soilel to Sun "N" Sand hotel.
- (ii) That Dr. Lydia Nzomo improperly received financial benefits of KES I Million from Sun N Sand Beach Hotel.
- (iii) Whether the complaint was filed in Court by Hotel Le Soilel, and if so, progress and/or outcome of the same.

2.1.2 Investigative Process

Pursuant to Section 8 of the CAJ Act, 2011, the Commission on Administrative Justice sought to investigate the said allegations of abuse of power in the unilateral transfer of the Book Evaluation Team from Hotel Le Soilel to Sun N Sand Beach Hotel by Dr. Lydia Nzomo.

The following investigative process was undertaken to establish the veracity of the above allegations:

- CAJ notified the Director, KIE, Dr. Lydia Nzomo of the intention to conduct investigations relating to the above allegations.
- The investigations team interviewed a number of staff at KIE including the Director, Dr. Lydia Nzomo, Senior Deputy Director Media, the finance officer, and two former procurement officers. Others interviewed include the staff of Mombasa Beach Hotel, Sun N Sand Beach Hotel and former employees of the Hotel Le Soilel.
- Visited three hotels; namely, Mombasa Beach Hotel, Sun “N” Sand Hotel and Hotel Le Soilel (changed ownership, now North Coast Hotel).
- Recovered relevant documents to the matter pursuant to Section 28 (b) of the CAJ Act. The recovered documents include;
 - Tender committee minutes on book evaluation accommodation – (*Exhibit A1*)
 - Letters of offer to Mombasa Beach Hotel dated 25th April 2006– (*Exhibit A2*)
 - Payment vouchers as proof of payment to Hotel Le Soilel, Mombasa Beach Hotel and Sun “N” Sand Hotels - (*Exhibit A3, A4 and A5 (i) & (ii)*)
 - Bank statements of KIE accounts evidencing payments and non-payments to the hotels – (*Exhibit A6*)
 - A copy of a letter from Sun “N” Sand dated 6th June 2006 asking for payment for 135 participants (*Exhibit A7*)
 - Letter to Mombasa Beach Hotel from KIE requesting for quotations dated 11 April 2006 - (*Exhibit A8*)
 - Letter to KIE from Sun N Sand Hotel Account-Manager dated 24th April 2006, indicating inadequate capacity to accommodate the team - (*Exhibit A9*)
 - Handwritten summary by the Deputy Independent Administrator on the complaints on the poor conditions at Hotel Le Soilel by the Book Evaluators dated 30th April 2006- (*Exhibit A10*)
 - Invoice from Sun N Sand Hotel dated 6th June 2006 totaling to KES.14,200,000 detailing the number of persons accommodated and cost for each person- (*Exhibit A11*)
 - Local Purchase Orders numbers 15140, 14856 and 15139 for Mombasa Beach Hotel, Sun N Sand and Hotel Le Soilel respectively (*Exhibit A12, A13 & A14*)
 - The Cheque Movement Register (*Exhibit A15*)
 - Cheque counter-foil (*Exhibit A16*)

2.2 The Normative Framework

The allegations of abuse of office and corruption as raised by the complainants, if true, would amount to serious breach of professional ethics and code of conduct by the KIE Director, in her capacity as a public officer. The legal framework relating to obligations of public officers are anchored in domestic, regional as well as international instruments. On the national front, the same is provided under the Constitution of Kenya, 2010 specifically Chapter Twelve, Article 201 on Principles that guide all aspects of public finance and Chapter Thirteen, Article 232 on Values and Principles of Public Service; and further operationalized through the Public Officers Ethics Act, 2003, Ethics and Anti-Corruption Act, 2011, Ethics and Economic Crimes Act, 2011, Public Finance Management Act, 2012, Public Procurement and Disposal Act, 2005, the Penal Code and other laws.

The law requires that for any public procuring entity to get value for money, there should be due diligence in regard to the process. Undertaking market survey is important in order to afford competitive bidding processes as well as ascertaining quality and capacity of bidding entities for goods and services provision in order to inform decision-making.

Regulation 16 (7) of the Public Procurement and Disposal Regulations, 2006¹ states:

A financial evaluation committee established in accordance with paragraph (2) shall be responsible for-[...] performing the evaluation with all due diligence and within a period of five days from the time of completion of the technical evaluation.

Section 27 and 28 of the CAJ Act empowers the Commission to request for the production of documents or information that may assist in an investigation from a public officer or institution. Section 52 of the CAJ Act applies in the event that the Commission believes that the person or institution summoned to provide such information or documents willfully fails to do so.

It is incumbent on public officers entrusted with the management of public funds to exercise prudent management of public resources, including maintaining proper records and books of accounts. The Public Finance Management Act, 2012 stipulates offences of financial misconduct. The Act states:

197. (1) A public officer employed by the national government or a national government entity commits an offence of financial misconduct if, without lawful authority, the officer-

¹ Of the Public Procurement and Disposal Act, 2005

(k) fails to provide any information in the officer's possession, or under the officer's control, in relation to the financial management, financial performance, or banking activities of that government or entity or in relation to the management or control of an asset or liability of that government or entity when required to do so, except where such refusal or failure is required or authorized by this Act or any other written law;

(l) fails to keep proper records or conceals, or wrongfully destroys, information that is required to be recorded;

The penalties for the offences are provided under Section 199 of the Act. An excerpt of this provision states;

[...] a person who is found guilty of committing an offence under this Act for which no other punishment is given, that person is liable on conviction to a term of imprisonment not exceeding five years or to a fine not exceeding ten million shillings, or to both.

2.3 Analysis

2.3.1 Unilateral Transfer of the Book Evaluation Team

The anonymous complaint stated that the KIE Director, Dr. Lydia Nzomo, unilaterally transferred the Book Evaluation team from Hotel Le Soilel to Sun N Sand Hotel. The complainants allege that the transfer was done un-procedurally and contrary to procurement regulations, and was motivated by a financial benefit to the KIE Director.

The CAJ team undertook extensive investigations into the allegations and established that different hotels were requested to submit quotations to provide accommodation for 270 evaluators between 23rd April 2006 and 23rd May 2006.

Responses were received from Mombasa Beach Hotel, Hotel Le Soilel, Sun N Sand Hotel and Sai Rock Hotel, as documented in the Minutes of the Quotation Opening Meeting dated 19th April 2006. (*Exhibit A1*).

Confirmed Minutes of the Quotation opening meeting of 19th April 2006 indicate the following as the outcome of the Tender Committee evaluation process

S/No.	Service Provider (Hotel)	Marks allocated
1.	Mombasa Beach	80%
2.	Le Soilel	84%
3.	Sun N Sand	88%
4.	Sai Rock	68%

Out of the evaluation, it is noted that none of the evaluated hotels had capacity to accommodate the 270 participants. The Tender Committee allocated 120 participants to Hotel Le Soilel at a cost of Kshs.3, 600/- per person per day and 150 participants to Sun N Sand at Kshs. 3, 900/- per person per day all full board.

The Tender Committee recommended payment of 50% deposit to the hotels instead of the requested 75%. (*See Exhibit A1 page 4, Min 3/2006*).

According to a letter dated 24th April 2006 signed by the Sun N Sand Account-Manager- Sales, one Benson Ogot to KIE, hotel Sun N Sand did not have the capacity to accommodate the 150 participants on the specified dates, and could only accommodate the group from 01st May 2006.

It is also noted that following the communication from Sun N Sand, the Director, KIE made a unilateral decision to award the tender to Mombasa Beach Hotel. (See letter from Sun N Sands with handwritten comments by the Director, KIE – *Exhibit A9*).

A payment voucher number 0250 dated 14th August 2006 for KES.1,296,000.00 indicates that KIE paid Hotel Le Soilel for 120 participants for three days accommodation for the period between 27th and 29th April 2006. (*See Exhibit A3*).

In addition, 135 persons were accommodated at Sun N Sand Hotel against a total number of 120 persons earlier accommodated at Hotel Le Soilel in line with the recommendations of the Tender Committee. Where the extra 15 persons came from has not yet been explained.

Upon scrutiny of the two payment vouchers to Sun N Sand (*Exhibits A5 (i) and A5 (ii)*) the investigative team noted that KIE was billed for accommodation of 135 participants from 29th April to 8th June, 2006 for a total of KES 14,200,000. However, upon perusal of the list of participants contained in the invoice number 1228 prepared by Sun N Sand Hotel, it is noted that there are 15 more additional participants making the total to 285 against the 270 participants as awarded by the tender committee. The additional 15 participants attracted a bill of KES 2,398,500. Sun “N” Sand wrote to the Director KIE requesting payment of KES. 14,200.000 being the cost of accommodation for 135 participants. (*Exhibit A7*).

Similarly, a close examination of payments made to Mombasa Beach Hotel indicates that there was no proper record of room accommodation for the Book Evaluators during the period 27th April to 27th May 2006. Consequently, it is not known for how many people and services the deposit of KES 8,775,000 was utilized. CAJ investigators demanded for receipt of payment for the KES 8,775,000 and both Mombasa Beach Hotel and KIE were unable to produce the receipt.

2.4 Receipt of financial benefits (KES 1 Million) by the Director, Dr. Lydia Nzomo

2.4.1 Payments effected to Le Soilel, Sun and Sand and Mombasa Beach Hotels

The anonymous complainants alleged that the KIE Director, Dr. Nzomo received financial benefit amounting to KES 1 Million as a ‘kickback’ out of the payments meant to Sun N Sand. According to the complainants, the transfer of the Book Evaluators from Hotel Le Soilel to Sun N Sand Hotel was unlawful and intended to obtain a financial benefit. They further alleged that Dr. Nzomo visited Sun N Sand Beach Hotel later on in December 2006 and was paid KES. 1 million- for taking the evaluation team to the hotel that year.

Following is a tabulation of the payments made with respect to the three hotels:

Name hotel	No of persons accommodated	Total no. of days	Charges per night (FB)	Amount as per LPO	Amount as per Pro forma invoice	Down payment (50%)	Final payment	Total payment
Le Soleil Hotel	120	3	3,600	12,960,000	12,960,000	-	1,296,000	1,296,000
Mombasa Beach Hotel	150	30	3,900	17,550,000	17,569,500	8,775,000	Vouchers cannot be found	-
Sun 'N' Sand Beach Hotel	135	41	3,900	14,200,000	-	7,100,000	7,038,260	14,138,260
Total commitment as per LPOs				44,710,000				

From the table above, it is noted that KIE paid Mombasa Beach Hotel KES 8,775,000 as 50% down- payment. There was no evidence of payment of the remaining 50%. The KIE officials interviewed, including the Director, Finance Officer and the Procurement Officer could not give explanations for the unaccounted amount. Equally, Mombasa Beach Hotel could not provide evidence of having received the remaining 50%.

While KIE paid Hotel Le Soilel KES 1,296,000 for the Book Evaluators who were accommodated there, Cheque Movement Register for April 2006, (*Exhibit A15*) indicates that a Cheque number 406 for KES. 5, 586, 206.90 (*See cheque counter foil marked as Exhibit A16*) had been written in favor of Hotel Le Soilel on 28/4/2006. The said cheque was collected and signed for by Mr. J. Koveti the then Officer-in-charge Supplies, KIE as indicated in the Cheque Movement Register (*Exhibit A15*). The cheque is not reflected in the Bank Statements (*Exhibit A6*) obtained from KIE and its whereabouts could not be established.

The CAJ did not pursue the statement that Hotel Le Soilel filed a petition in court against the KIE due to cancellation of the contract between KIE and the hotel. It is worth noting that Section 30 (c) of the Commission on Administrative Act limits the jurisdiction of the Commission in matters pending before any court or judicial tribunal.

2.5 Findings

Following is a summary of findings on the allegations stated by the complainants with respect to the alleged malpractices relating to the Book Evaluation team.

The CAJ investigative team ascertained that:

- (i) KIE committed a total of KES 44,710,000 for the Book Evaluation exercise for the year 2006 as indicated by available Local Purchase Orders (*Exhibits A12, A13 and A14*) for Mombasa Beach Hotel, Sun N Sand and Hotel Le Soilel respectively.
An interview with the Finance officer Mombasa Beach Hotel and a close examination of recovered documents at KIE did not yield payment vouchers indicating the final payment made to Mombasa Beach Hotel hence the total amount paid to the hotel cannot be verified.
- (ii) The number of persons accommodated at Le Soilel was 120 persons while those transferred to Sun and Sand was 135. The discrepancy in the number of evaluators accommodated has not been explained. Failure to provide explanation for this should be interrogated further. The extra 15 pax i.e. $(135-120=15)$ translates to KES. 2398500 $(15*3900*41)$.

Dr. Lydia Nzomo unilaterally awarded the tender to the next best bidder, Mombasa Beach Hotel once Sun N Sand intimated that they did not have the capacity to accommodate the participants on the specified dates is in breach of the Public Procurement and Disposal Act, 2005. Any changes or alterations to the decision made regarding the awarding of tenders ought to be made by the Tender Committee. The fact that Dr. Nzomo took it upon herself to make this decision unilaterally amounts to usurping the role and powers of the Tender Committee.

From Cheque Movement Register, (*Exhibits A15*) it is revealed that payment by Cheque (No.000406) worth Ksh.5,586,206 was written in favor of Hotel Le Soilel. There is no trace of the cheque and it could not be established whether it was paid out and to whom. While KIE insists that the cheque was cancelled, there is no documentary evidence to support that eventuality.

The fact that Hotel Le Soilel was found not meet the expected standards thus the complaints by the participants could have been avoided had the KIE Tender Committee undertaken due diligence before awarding the contract by conducting market survey. The omission to undertake due diligence amounts to a breach of the provisions of the Public Procurement and Disposal Act, 2005.

There was *no* evidence to support the allegations that the KIE Director, Dr. Nzomo illegally received a financial benefit of KES. 1 Million from Sun N Sand Beach Hotel. CAJ did not come across any evidence in respect of the allegation.

2.6 Conclusions

There was no evidence confirming that the Director, KIE, Dr. Lydia Nzomo received a bribe of KES 1 Million shillings from the management of Sun N Sand hotel in order to transfer the Book Evaluators from Hotel Le Soilel. However, investigations indicate that proper records and book of accounts were not maintained in the whole exercise of the 2006 Book Evaluation exercise.

For instance, the total amount payable to Mombasa Beach Hotel according to available LPO was KES. 17,550,000.00 for 150 participants. KIE paid a 50% down payment (KES 8,775,000) to Mombasa Beach Hotel, however, evidence supporting the final payment (50% balance) could not be availed by both KIE and Mombasa Beach Hotel. Lack of proper financial records creates a lacuna for mismanagement of public funds.

The fact that Dr. Lydia Nzomo unilaterally awarded the tender to the next best bidder, Mombasa Beach Hotel once Sun N Sand intimated that they did not have the capacity to accommodate the participants on the specified dates amounted to usurping the role and powers of the Tender Committee, hence being in breach of the Public Procurement and Disposal Act, 2005.

However, from the findings, it appears that the alleged unilateral decision by the Director, KIE, Dr. Nzomo to change hotels from Hotel Le Soilel to Sun N Sands was not premeditated or planned. The complaints raised by the Book Evaluators prompted the quick action by the Director.

It is also not clear how Sun N Sand Hotel managed to get room accommodation for 135 Book Evaluators on the 29th of April 2006 yet in its letter dated 24th April 2006 the hotel had informed KIE that it was fully booked up to the 1st of May 2006. This change of position on the part of the hotel may have been prompted by the fact that the Hotel was receiving a business in excess 14 million. It is however not clear whether the hotel may have reciprocated by offering financial benefit to the Director, KIE.

The Book Evaluation exercise, which is an annual KIE event, lacks transparency. Besides the cost of accommodation for the Book Evaluation team, the issue of transportation, out of pocket and other expenses need to be clearly budgeted for and the information made available.

By failing to maintain or cause to maintain proper financial records and books of account, in the case the Book Evaluation exercise, Dr. Nzomo is in contravention of the provisions of Article 201 (d) of the Constitution of Kenya (Chapter 12) and Articles 197, 198 and 199 of the Public Finance Management Act, 2012.

On the part of KIE, the failure to furnish CAJ with documents to support the final payment of KES 8,794,500.00, amounts to a violation of Section 197 of the Public Finance Management Act.

It is worth noting that while in her response to CAJ Commissioners, Dr. Nzomo conceded that in 2006, the year in which the book evaluation exercise is under scrutiny, the Institute did not have proper accounting and procurement structures. She however averred that since 2009, the institute has put in place measures and established mechanisms that allow the culture of transparency and accountability.

Despite these responses, CAJ reiterates that KIE has still not put in place the proper establishment of its fiscal structures. This is premised, for instance, on the report by the office of the Auditor General for the year ended 30th June 2011 discloses financial malpractices and reveals gross financial impropriety, for example, long outstanding receivable balances which have been outstanding for over 6 years, and imprests totaling to KES 3, 596,553, car loans totaling to KES 227,906 and other advances of KES 704, 159 relate to staff who have since left the service.

2.7 Recommendations

Recommendations to the Auditor General / Kenya National Audit Office

- (i) To undertake an audit of the books of accounts of the KIE in order to ascertain the actual amount of payment made to Mombasa Beach Hotel, as no evidence was obtained to prove the 50% final payment by KIE.
- (ii) To carry out an audit on the Book Evaluation exercise to determine possible mismanagement of public funds.
- (iii) To carry out an audit of the KIE “reserve accounts”.

Recommendations to KIE (currently KICD)

- (i) KIE management should adhere to the principles laid out under Chapter 12 of the Constitution on Public Finance.
- (ii) KIE to observe sound financial management practices, as per the Public Finance Management Act, 2012.
- (iii) KIE to keep proper records and books of accounts and undertaking due diligence prior to awarding of tenders in line with the Public Procurement and Disposal Act, 2005.
- (iv) KIE needs to entrench a culture of transparency, accountability and participation on all aspects of management and in particular probity in financial management.
- (v) KIE should put in place structured mechanisms that would allow internal scrutiny of its procurement and tendering processes to ensure openness in their transactions.

CHAPTER 3

Case No. 2: Investigations into allegations of abuse of office, nepotism and favoritism by the Director, KIE through the recruitment of relatives

3.1 Abuse of office, nepotism and favoritism by the Director, through recruitment of relatives at KIE

The second allegation to be investigated by the Commission on Administrative Justice at KIE is that Dr. Lydia Nzomo, Director KIE used her position to employ her relatives and kinsmen without following procedures thus abusing her office and destroying professionalism.

Among the alleged relatives employed at KIE by the Director are: Mr. Mwamba Anampiu who is alleged to be her brother, Mercy Kaembe, alleged to be a sister and Mr. Titus Gitonga, who is alleged to be a nephew. Other alleged relatives include Mr. Reuben Nthamburi, Mr. Benson Kinoti and Ms. Rebecca Nkirote.

3.2 Investigative Process

Following the letter of notification to the Director KIE, on the intended investigations, the Directorate of Research and Investigations commenced independent investigations into the allegations. The following documents were recovered:

Staff personal files for senior, middle and lower staff categories mentioned

- (i) KIE Human Resource Manual
- (ii) KIE Staff Establishment (*Exhibit B1*)
- (iii) Copies of job advertisements (*Exhibit B2*)
- (iv) Council Minutes showing authority to employ (*Exhibit B3*)
- (v) Letter from Teacher Service Commission (*Exhibit B4*)

The investigative team formally interviewed 11 KIE members of staff and 2 former employees of KIE. CAJ also held interviews and obtained information from officials at the Teachers Service Commission and National Registration Bureau.

3.3 Normative Framework

The allegations contained in the complaint relate to matters of abuse of office, conflict of interest and nepotism. These practices are prohibited in various laws as discussed herein

The Constitution of Kenya, 2010 provides under Article 232 (1) and (2);

232. (1) The values and principles of public service include—

(a) High standards of professional ethics;

(e) Accountability for administrative acts;

(g) Subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya's diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

(2) The values and principles of public service apply to public service in—

(a) all State organs in both levels of government; and

(b) all State corporations

The Public Officer Ethics Act, 2003, prohibits the practice of nepotism and favoritism by public officers as provided under Section 17.

Further, the Act makes provisions relating to conflict of interest, by stating under Section 12;

12. (1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.

(3) A public officer whose personal interests conflict with his official duties shall -

(l) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and

(m) refrain from participating in any deliberations with respect to the matter

(4) Notwithstanding any directions to the contrary under subsection

(3)(a), a public officer shall not award a contract, or influence the award of a contract to-

- (l) himself;
 - (m) a spouse or relative;
 - (n) a business associate; or
 - (o) a corporation, partnership or other body in which the officer has an interest.
- (5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.
- (6) In this section, “personal interest” includes the interest of a spouse, relative or business associate.

The above provisions have been restated by the Code of Regulations, 2006 for Public officers under Section G 1- Rules of Conduct.

3.4 Analysis

Analysis of the collected data yielded the following findings regarding the allegations of abuse of office and destruction of professionalism leveled against Dr. Nzomo:

3.4.1 Employment of Relatives / Kinsmen

Charles Mwambia Anampiu: An in-depth analysis of available data indicates that Mr. Charles Mwambia Anampiu is a brother to Dr. Lydia N. Nzomo. Their parents (father and mother) bear the same names. They also share family, clan, District of origin, Division, Location, Sub-Location and village (*Exhibit B13*).

Mr. Charles Anampiu was formerly a TSC staff No. 258890 teaching at Miathene Secondary School, situated within Miathene Sub-location, Meru North District. (*see transfer letter (Exhibit B5)*). Mr. Anampiu in an interview with CAJ investigators on 19th March, 2013 stated that having visited KIE and secured employment, he thereafter applied for a transfer from TSC sometime in May 2005.

It is however worth noting that there was no vacancy advertisement for any position suitable for Mr. Anampiu at the time. Mr. Anampiu confirmed that he presumed that there was a vacancy for him before applying for transfer. He further confirmed to the CAJ investigative team that he did not undergo an interview process.

Investigations revealed that the Teachers Service Commission (TSC) does not transfer staff to other ministries/departments/agencies. TSC vide letter Ref. no. TSC/DDFS/VOL.1/178 dated 25th March 2013 (*Exhibit B4*) confirmed that it did not transfer Mr. Charles Anampiu to KIE.

In addition, in the letter from the TSC dated 8th March 2005 (*Exhibit B5*) on the transfer of the post primary teachers and addressed to Mr. Anampiu, it did not indicate who initiated the transfer. The letter simply states, (‘...it has been decided that you be transferred from Miathene Secondary School....’).

From the tone of the letter, it can be deduced that the decision to transfer was not at the instance or initiation of TSC, as claimed by Dr. Nzomo and Mr. Anampiu, and that such transfers were not co-ordinated by TSC.

On the contrary, the CAJ team established that it was Dr. Nzomo who wrote to TSC requesting TSC to remove Mr. Anampiu and others from TSC payroll to KIE. (See letter Ref. KIE/CON/A/5/1/Vol. V/37 of 13th October, 2008. (*Exhibit B6*))

Mr. Anampiu was employed as a Curriculum Developer at KIE but a perusal of his personal file reveals that there is no appointment letter spelling out the terms and conditions of service except for a Pay Change Advice number EB/58/8/05 dated 24th June, 2005. (*Exhibit B8*)

Mr. Anampiu later in the year 2008, applied for the position of Chief Curriculum Development Officer, and was hired. This is a middle-management position at KIE.

Mrs. Mercy Kaembe Mwangi: The CAJ investigative team established that Mrs. Kaembe is a sister to Dr. Lydia N. Nzomo. As is the case with Mr. Charles Anampiu, her parents (father and mother) bear the same names. They also share family, clan, District of origin, Division, Location, Sub- Location and village. (*Exhibit B13*)

Mrs. Kaembe informed the investigation team that she walked into KIE and was employed as a casual in the Catering Section 1st September 2004. Her hand written job application letter dated 20/8/2004 bears comments by the KIE Senior Administrative Officer (SAO) approving her application for employment. She had not attached her CPE Certificate hence the comment by the SAO. ‘Please note that this application is processed pending the CPE Certificate’. Barely a month after securing a contract with KIE, Mercy’s employment was formalized *vide* an internal Memo from the Chief Administration Officer to the Director, KIE, dated 15th November 2004. (see application letter for Mercy Kaembe – marked as Exhibit B9 internal memo marked as *Exhibit B10*)

It is worth noting that there was no vacancy advertisement for the kitchen attendant job at KIE at the time. Mrs. Kaembe’s application letter was not officially received at the Institute as it did not bear the official stamp. Coincidentally, the Director, KIE, Dr. Lydia Nzomo had joined the institute at the same time, that is; September 2004. Mrs. Kaembe is still an employee of KIE currently serving as a Kitchen Attendant 11- Job Group “E”. The recruitment process in this case was unprocedural.

Patrick Muriuki Mung’ania: Investigations revealed that Mr. Mung’ania shares with Dr. Lydia N. Nzomo; District of origin, Division, Location, Sub- Location and Village. Mr. Mung’ania was previously working in Nairobi as a Mechanic. In an interview with the investigative team, Mr.

Mung'ania said; "I walked into KIE and was employed as a casual Kitchen Attendant". He later did a certificate in Food and Beverage Service at Intraglobal Training Institute in 2008.

Mr. Mung'ania applied for employment as Subordinate staff on 22nd October, 2010 and the Director requested for the processing of his employment the same day. (*see letter dated 22nd October, 2010 marked Exhibit B11*). It is worth noting that his letter of appointment reference- KIE/CON/A/2/1388 (*Exhibit B12*) bears the same date as the application letter. Further he was offered a Senior Subordinate Staff scale KIE "4" whereas he had applied for a subordinate staff position.

Additionally it is noted that there was no vacancy advertisement by KIE for the two positions. Mr. Mung'ania's application letter bears a stamp acknowledging receipt dated 22nd November 2010 and yet he had already been offered a higher position than what he had applied for vide the appointment letter dated 22nd October, 2010, one month prior. Similarly the appointment process for Mr. Mung'ania is unprocedural.

Titus Gitonga: The CAJ investigative team established that Mr. Gitonga shares with Dr. Nzomo; District of origin, Division, Location, Sub- Location and Village. He informed the investigators that he walked into KIE and applied for a casual position in July 2006 and his application was approved by the Director KIE on 22nd August, 2006.

In September 2006 Mr. Gitonga applied for a clerical officer job using a 2005 K.C.S.E Certificate, from St. Luke's Secondary School, Meru. He was appointed in September 2006 as Clerical Officer while there was no vacancy advertisement at KIE for a Clerical Officer position. He is currently Senior Support staff deployed at the Director's Office. The appointment was also unprocedural.

Rebecca Nkirote Nkanata: Analysis of available data did not establish direct relationship between Ms. Nkanata and the Director, KIE. However, the investigative team established that Ms. Nkanata was not competitively employed by KIE. During the interview with the CAJ team on 19th March 2013, Ms. Nkanata said that she walked into KIE looking for any job as a volunteer in the year 2008. She was offered a casual job in the Library and worked in this position up to August 2008.

On 16th June 2008 she again applied for an unspecified job at KIE and on 4th August, 2008 she was subjected to a suitability interview by Mr. Michael Muriuki and Mr. Kimotho (Senior Deputy Director Media & E learning Services, KIE) who recommended her suitability for employment citing her skills as needed in the area of e-resources within media section.(*see suitability report marked Exhibit B14*).

CAJ investigators established that, Ms. Nkanata has no relevant qualifications for the position and has been working in the Library as a librarian ever since she was employed. She does not have skills in media and e-resources as purported by Mr. Kimotho during an interview with CAJ investigators.

While Mr. Kimotho recommended her recruitment in the Media and E-learning Department, Ms. Nkanata was redeployed in the library on 1st September 2008, *vide* letter reference number KIE/A/2/1324/2 (*marked as Exhibit B15*) as Librarian.

The appointment of Ms. Nkanata to the library division was contrary to the KIE establishment of two (2) employees in the library division resulting in variance of +2. (*See KIE staff establishment page 14 of Exhibit marked B1*). Currently she is a Librarian Grade III at KIE and not in the media and e-learning section as purported by Mr. Kimotho. This is another case of unprocedural recruitment.

Benson Kinoti Gichuru: The CAJ team, through interviews and data analysis did not establish any direct relationship between Mr. Kinoti and the Director, KIE except that he comes from the same District of Birth with the Director. Mr. Kinoti informed the investigators that he walked into KIE and applied for internship in ICT in 2005. He was accepted as an intern and later worked for 2 months as unpaid volunteer after the internship. On 2nd February 2006, he applied for the job of ICT Officer at KIE (*see Exhibit marked B16*). On 7th April, 2006 the Director asked for advice from Curriculum Evaluators regarding the application (*see Exhibit marked B16*). On 12th April 2006, Reuben Thamburi (who is Head of ICT/e-content) and another staff namely Johnson Wachira, interviewed him and wrote a suitability report recommending him to be employed

In April 2006 was employed again as a casual in the ICT department among two others. On 27th April, 2006 Mr. Kinoti was offered employment as IT Officer Job Group “J” through letter reference number KIE/CON/A/3/5/ (120). Following a letter from the Principal Administrative Officer dated 6th July 2006, advising the Director that the IT Officer position did not exist within KIEs establishment (the Director changed the designation of the officer to Engineering Technician III *vide* letter reference number KIE/A/2/1303/10 dated 31st July 2006. Again this position was not competitively advertised by KIE. There was no job vacancy or job opening at KIE during the time in which Benson Kinoti was appointed.

3.5 Findings

Following are the findings in regard to the allegations of abuse of office and destruction of professionalism by the Director KIE through employment of relatives.

- (i) Investigations by the CAJ team revealed that Dr. Nzomo selectively and unprocedurally recruited two of her siblings; Mrs. Mercy Kaembe Mwangi (sister) and Mr. Charles Mwambia Anampiu, (brother) at KIE without due regard to the provisions relating to conflict of interest in recruitment processes in the Public Service.
- (ii) Dr. Nzomo’s response to CAJ’s preliminary inquiry letter asking her to confirm whether she had employed her relatives to the Institute responded *vide* a letter reference number KIE/CON/A/3/45/16 dated 14th May 2012 (*Exhibit E3*) where she deliberately omitted to

disclose having recruited her relatives and kinsmen at KIE and was evasive in her response. She stated in the said response:

*On allegation that I have misused my office to employ my friends, relatives and clan's men and women [...] I wish to state that the **allegation is false** since staff recruitment is in the Institute is carried out competitively.*

Dr. Nzomo also stated that Mr. Anampiu and other staff were transferred to KIE by their employer, the Teachers Service Commission. However, the CAJ team confirmed from TSC that TSC does not transfer staff to other public institutions. The investigators also confirmed that Dr. Nzomo actually wrote to Teachers Service Commission to seek the removal of some the employees from TSC payroll without initiating a competitive process. Such TSC employees include Reuben Nthamburi Muguku - TSC No. 335753 (**Exhibit B19**) and Charles Anampiu Mwambia TSC No. 258890 (**Exhibit B20**).

- (iii) It may be inferred that Dr. Nzomo by implication, initiated the transfers as indicated in her letter to TSC to have the employees removed from TSC payrolls *vide* letter reference numbers KIE/ CON/A/5/1/VOLV/37 and KIE/CON/A/5/1/VOL.V/30 (**Exhibits B21 and B22**) dated 13th October 2008 and 18th April 2008 respectively.
- (iv) It was also established that Dr. Nzomo recruited Mr. Titus Gitonga who comes from the same Village, Sub-location, Location and District as the Director. Mr. Gitonga serves as a subordinate staff in the Director's office. Additionally it was established that Mr. Patrick Muriuki Mung'ania comes from the same Division as the Director.
- (v) The CAJ team established that all the above persons walked in to KIE and got employed as disclosed during interviews. This "walk-in" pattern applied to all the persons mentioned in the allegations and in spite of the fact that no vacancies were advertised, they all got employed.
- (vi) A close scrutiny of some of the personal files recovered by the CAJ team, it was observed that files had been tampered with through insertions and alteration of facts. For instance, hand written application letters for the alleged relatives of the Director had been inserted in their personal files. Additionally, CAJ team noted falsification of Council Minutes pertaining to the recruitment of some of the staff.
- (vii) The Director appointed Mr. Benson Kinoti to the position of ICT Officer Job Group "J", a nonexistent position within the KIE establishment and when advised by the Principal Administrative Officer, she changed the position to Engineering Technician III in an apparent attempt to secure a position for Mr. Kinoti at KIE.

It is also noted that senior officers were used by the Director to regularize the appointment of some of the above staff through two member suitability interview committees and or seeking their approval and recommendations on the applications.

3.6 Conclusion

It is clear that from the above, through an act of omission, Dr. Nzomo failed to disclose the existing relations of her brother and sister to the Commission, and instead, opted to be evasive was an attempt to mislead the Commission. She instead, averred that the allegation is false as recruitment at KIE is carried out competitively. It is worth noting that Dr. Nzomo had the opportunity to disclose the existing relations to the Commission but she instead became evasive in her response so as not to disclose the truth.

Dr. Nzomo reiterated this position in her response to the Commissioners, by stating that she did not fail to disclose information to CAJ, and instead reiterated her earlier assertion by stating that the recruitment was competitive and transparent. She conceded that her response to CAJ was general and not misleading.

The investigations however reveal that Mrs. Kaembe's recruitment was not in any way competitive, as she had undue advantage of being recruited as part of the 'pool of applicants who had served as casuals' at the Institute. The process of recruiting her in the first place as a casual was not in any way transparent, and she did not possess the requisite qualifications to be employed at the institute.

Dr. Nzomo also conceded before the Commissioners in her response by reconfirming that her sister, Mrs. Kaembe did not formally apply to the Institute nor was her recruitment as a casual undertaken competitively.

It is worth pointing out the double coincidence that Dr. Nzomo's brother and sister were 'transparently and competitively' recruited at the Institute shortly after she joined the institute. As reconfirmed and conceded by Dr. Nzomo, her sister, Mrs. Kaembe applied and got the casual job on 1st September 2004, the same month that Dr. Nzomo started working at KIE and secured a permanent job barely one month after. This coincidence invites an adverse finding that Dr. Nzomo influenced the employment of her brother and sister at the Institute.

The Director, KIE, Dr. Lydia Nzomo, in recruiting her brother and sister at KIE, therefore breached Sections 12 (3), (4) and (6) on conflict of interest as well as Section 17 on nepotism and favoritism of the Public Officer Ethics Act 2003 and Section G1-Rules of Conduct as provided for in the Public Officer's Code of Regulations, 2006.

Investigations revealed that Dr. Nzomo employed her biological brother and sister at KIE. This therefore confirms the allegation that the director abused power through the recruitment of her relatives and kinsmen at KIE. In addition, she recruited other members of staff from her district of birth.

Dr. Nzomo, having worked with the Teachers Service Commission for 23 years and having served as a Staffing Officer, ought to have known the recruitment procedures in public offices and especially conflict of interest in relation to recruitment of relatives.

Dr. Nzomo also gave false information to the effect that her brother Mr. Charles Anampiu and other staff were transferred to KIE by their employer TSC while it is confirmed that she is the one who sought their transfer from TSC and even wrote asking TSC to remove them from the TSC payroll.

During the interview with the investigators, both Mr. Charles Mwambia Anampiu and Mrs. Mercy Kaembe Mwangi, brother and sister to Dr. Nzomo, gave false information and misled the Commission by denying being Dr. Nzomo's brother and sister respectively. The provisions of Section 40 of the CAJ Act on giving false evidence to the Commission, read together with Section 52 become applicable. It is an offence under Section 52 (b) and (d) of the CAJ Act, 2011 for any person to submit false information or knowingly misrepresent or mislead the Commission.

Mr. John Kimotho, Senior Deputy Director Media, who also participated in the recruitment of some of the staff mentioned in the allegations, denied knowledge of the recruitment of Dr. Nzomo's relatives in the Institute. He reconfirmed this fact during a meeting with the CAJ Commissioners where he stated that he had no knowledge of the existing relations. In as much as the CAJ investigators did not find fault in the subsequent interview process for Mr. Anampiu for the position of Chief Curriculum Developer, it is worth noting that the fact that no disclosure was made on the existing relations between the Director and the interviewee automatically rendered the recruitment process irregular.

It was therefore incumbent upon both Dr. Nzomo and Mr. Anampiu to disclose this fact to the interviewing panel, which they failed to do. From the foregoing, the KICD Council, under its mandate in the recruitment of staff as provided under Section 25 of the KICD Act, 2013, needs to interrogate the recruitment process of Mr. Anampiu and Mrs. Kaembe.

Mr. Kimotho also provided misleading information by providing altered KIE council minutes to the CAJ investigators.

Further, in order to analyze the recruitment and staffing at KIE, the investigation team had requested to prepare KIE and submit to the Commission a staff audit report indicating ethnicity, regional and gender balance, and position held and qualifications of the KIE staff. In the meeting with CAJ Commissioners, the staff ethnic distribution was furnished to the Commission.

However, analysis of the same discloses the non-compliance with the Constitutional provisions with respect of ethnic and regional representation in line with the provisions of Article 232 (1) (i), the Public Officer and Ethics Act, 2003 and the National Commission and Integration Commission, 2008. To demonstrate this, the staff ethnic distribution summary indicates that out of the 429 members of staff, 167 come from the Kikuyu community, 59 from the Luhya community while only 1 comes from the Maasai community. Out of the 42 ethnic communities represented in Kenya, only 11 communities have some form of representation at the Institute.

3.7 Recommendations

- i. CAJ to strongly reprimand Dr. Nzomo and demand that she writes a letter of apology to the Chairman of the KICD Council for irregularly recruiting her sister and brother to the Institute hence practicing nepotism and favoritism and failing to disclose conflict of interest in the recruitment process.
- ii. CAJ recommends to the KICD Council that both Mr. Charles Anampiu and Mrs. Mercy Kaembe be retired on public interest as their recruitment to KIE was irregular and improper in the first instance.
- iii. CAJ shall liaise with the DPP for the prosecution of Mr. Charles Anampiu under Section 52 of the CAJ Act on account of misleading and providing false information to CAJ in his written statement that the relationship between him and Dr. Lydiah Nzomo was that of employer-employee and that the rest of the staff were workmates.
- iv. The KIE to undertake a conscious and deliberate decision not to effect recruitment of members of staff from certain ethnic communities, as the KIE staff ethnic distribution presents manifest imbalance in the regional distribution of the employees as shown by the list provided to the Commissioners on 24th July 2013.

CHAPTER 4

Case No. 3: Investigations into allegations of bribery in the issuance of a tender to drill a borehole for the Kenya Institute of Education

4.1. Bribery in the issuance of a tender to drill a borehole at KIE

The third allegation under investigation by CAJ relates to the award of a tender to Agro Irrigation and Pump Services Limited for drilling of a borehole at KIE at an overall cost of KES 5 Million. The complainant further alleges that the contractor had to bribe the Director, KIE to facilitate the issuance of the LPO, a rampant practice at KIE.

In a letter dated 14th May 2012, (*Exhibit E3*) the Director responded to CAJ's enquiry on the allegations with the following statement:

I deny this allegation which is laced with lies and malice. The supplier moved to site on the basis of a contract signed between Agro Irrigation and Pump Services Limited and KIE. After the work was completed, the supplier submitted an invoice and the LPO was prepared to facilitate payment.

4.2. Issue(s) List

Following are the issues that were identified with respect to the allegations of bribery with respect to the drilling of the borehole:

- (i) That the Director, KIE received a bribe from the contractor in order to issue the LPO to the service provider with respect to the drilling of a borehole.

4.2.1 Creeping Issues

- (i) The Director, KIE was issued with two Permits by the Water Resources Management Authority to drill boreholes in Machakos and at KIE, Nairobi.
- (ii) That the Director, KIE was issued with two permits to drill boreholes in two plots bearing different Land Registration numbers.

4.3. Investigative Process

In pursuant to the functions of CAJ relating to the investigations, as provided under Section 8 (a) and (b) and the powers vested upon the Commission thereon in accordance with Section 26 and 27 of its Act, an investigation team undertook an inquiry into the complaint received. The following process was employed in undertaking its investigations:

- (i) Notification to the Director, KIE of the intention to undertake investigations into the above allegations.
- (ii) Recovery of documents related to the borehole from the KIE. Some of the documents recovered include; tender documents, contracts, authorization letters, Permits and extension of authorization.
- (iii) Recovery of documents related to the borehole from the Agro-Irrigation and Pump Services Limited.
- (iv) Interviews with the Sales Director and staff of Agro-Irrigation and Pump Services Limited, with respect to the drilling of the borehole.
- (v) Recovery of information relating to concerns of issuance of two permits over the same transaction through an interview with a Water Engineer formerly the Regional Manager, Athi River Region, and a written report from the Engineer.
- (vi) Recovery of documents from Water Resource Management Authority, regional office in Machakos.
- (vii) Interview with the Deputy Regional Manager, Water Resource Management Authority, Machakos.

4.4. Normative Framework

The allegations leveled against the Director, KIE in this particular issue if confirmed, would amount to a breach of legal provisions, as contained in the laws discussed below:

The Public Finance Management Act, 2012 provides under Section 198:

198. (1) A public officer commits an offence if that officer—
- (a) takes possession of public funds or assets without lawful authority;
 - (b) misappropriates public funds or assets;
 - (c) conceals information on public finances to obtain a financial benefit either for the officer or another person; or
 - (d) engages in a corrupt act.
- (2) In this section, “corrupt act” includes soliciting or receiving an inducement.

The Public Officers and Ethics Act, 2003 further states under section 11. (1) that:

A public officer shall not use his office to improperly enrich himself or others.

The mandate of CAJ to investigate this allegation is derived from Section 8 of the Commission on Administrative Justice Act, 2011, with respect to the function of investigating complaints on abuse of power by public officers. The provision states:

The functions of the Commission shall be to—

(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

4.5 Analysis and Findings

4.5.1 The contract to drill the borehole at KIE

The investigations confirmed that KIE expressed interest in drilling of a borehole and installation of a pump sometime in January 2001, many years before the said project was actually undertaken. The CAJ investigation team was furnished with copies of the initial correspondences with the Ministry of Roads and Public Works initiating the process of drilling of a borehole. The borehole was finally drilled sometime in 2007.

The tender for the drilling of the borehole at KIE was awarded procedurally. KIE involved the Ministry of Water and Irrigation in the process as required by law; following which Agro Irrigation and Pump Services was awarded the tender, *vide* a letter from KIE dated December 1, 2006.

A contract for the drilling of a borehole dated 8th January 2007 was drawn between KIE and Agro Irrigation and Pump Services Limited at a contract price of KES 2, 110, 427.25. However, upon completion of the drilling exercise, Agro Irrigation and Pump Services Limited invoiced KIE for KES 1,918,570.25 based on the Bills of Quantities.

Further, the CAJ team also obtained information indicating that Agro Irrigation and Pump Services Limited was also competitively awarded a contract to install a water pump after drilling the borehole, at a cost of KES 940, 843.50.

4.5.2 Payment of the borehole drilling and allegations of bribery

The payment for the drilling of the borehole and installation of the water pump is evidenced by the payment vouchers, the Local Purchase Orders and receipts for sums of KES 1,918,570.25 and KES. 940, 843.50 respectively. (*Exhibits C1 and C2*).

Further, the team was furnished with copies of receipts for the permit renewal dated 24/11/08 and for water user fee, dated 19/08/09 amounting to KES 7,500 each, which provide further evidence of drilling of the borehole and use of the water by KIE. From the foregoing, the total amount used by KIE for the drilling of the borehole and the installation of the pump was KES. 2, 859,413.75.



Photos of the borehole drilled at the KIE, Nairobi

4.5.3 Two permits issued to the Director, KIE for the drilling of boreholes in Machakos

In the course of its investigations, CAJ investigators noted that there was reference to two permits in the correspondences between the Water Resources Management Authority and the Director, KIE. One of the permit's reference number WRMA/ACB/4404 refers to extension of authority given to KIE Director to sink a borehole in Machakos District. The other permit reference number WRMA/ ACB/554 refers to renewal of authority given to the Director, KIE to sink a borehole at KIE. Whereas the borehole was to be drilled at the KIE premises in Ngara, along Murang'a road, reference to the drilling of a borehole in Machakos was a matter that needed clarification. The said permits had been signed by Engineer Joseph Kinyua on behalf of the Water Resource Management Authority.

In an interview with the said engineer to clarify the issues, he stated that from their records, no borehole was sunk in Machakos under that authorization permit number WRMA/ACB/4404. Mr. Kinyua clarified that the covering letter for Extension of Time Limit dated 23rd February 2007 erroneously made reference to File WRMA/ACB/554 which was earlier on issued to Ukokolani community water project under Machakos region. He attributed the error to copying and pasting of permits and extensions and confirmed that this was not the first case he has come across of the tying errors. This fact was also confirmed by Mr. Dinesh of Agro Irrigation and Pump Services Limited.

In the process of studying documents collected from WRMA, Machakos, the CAJ team noted that KIE Director had been issued with a Permit Reference number WD/WAB/13391 to sink a borehole in an unsurveyed plot in Machakos. The team interviewed the Deputy Regional Manager, WRMA and Engineer Kinyua who again confirmed that it was also a typing error.

4.5.4 Permit issued to KIE Director to drill borehole on parcel of land L.R. No. 209/9670 and L.R. No. 209/8756

The CAJ team discovered that WRMA had issued the Director, KIE with two permits to drill water on two parcels of land referenced as L.R No. 209/9670 or L.R.No.209/8756. The team sought to clarify the ownership of the two parcels of land and was able to establish from the Chief Land Registrar, Ministry of Lands *vide* letter dated 25th April 2013 that the land in question, belongs to the Kenya Institute of Education and its Land Reference Number was changed from L.R No. 209/8756 to 209/9670. (*Exhibit C3*)

4.6 Conclusions

The procedure of awarding the tender to Agro Irrigation and Pump Services Limited to drill a borehole and install a water pump at KIE was done in accordance with the provisions of the Public Procurement and Disposal Act, 2005.

While the complainants alleged that the cost of drilling the borehole was KES 5 Million, CAJ Investigators established that the project cost KIE KES. 2, 859,413.75, which included KES 1,918,570.25 for the drilling of the borehole and KES. 940, 843. 50 for installing a water pump. Therefore, the allegation that KIE spent KES 5 Million on this project is unfounded. There was no evidence to support the allegation that Dr. Nzomo received a bribe in order to issue an LPO.

In the course of the investigations, CAJ team noticed that there were no two permits issued to KIE Director, Dr. Nzomo to drill a borehole at KIE with reference numbers - WRMA/ACB/4404 and WRMA/ACB/554. Investigations revealed that issuance of the two permits was occasioned by a change of reference numbers when processing of water drilling authorization permits was transferred from the Department of Water, Ministry of Water, Nairobi to WRMA headquarters based in Machakos.

Similarly, the permit issued to the Director KIE authorizing her to drill a borehole in Machakos was a typographical error. Instead, the permit was issued to drill a borehole at KIE in Nairobi. The Ministry of Lands changed KIE's Land Registration number from L.R. No. 209/8756 to 209/9670 and therefore the parcel of land on which the borehole was sunk rightly belongs to KIE. This puts to rest the creeping issue that there could have been another borehole sunk in the name of KIE at a different parcel of land.

4.7 Recommendations

- (i) The Water Resources Management Authority to ensure proper documentation in the processing of its permits and renewals. The CAJ team observed that the authority often 'cut and pastes' previous permits while processing new ones, leading to mistakes on the face of the permits.

CHAPTER 5

Case No. 4: Investigations into the allegations of depletion of the KIE's Reserve Account

5.1 Depletion of KIE's Reserve Account

The fourth allegation investigated by CAJ investigators is that Dr. Lydia Nzomo, Director KIE severely depleted KIE's financial reserves.

5.2 Issue(s) List

- (i) That the KIE Director, Dr. Lydia Nzomo depleted the 'reserve account' funds of KIE.

5.3 Investigative Process

Following is the investigative process that the CAJ team adopted:

- (i) Notification to the Director, KIE of the intended investigation into the above allegation.
- (ii) Conducting of interviews with the following:
 - (a) The Finance Officer
 - (b) Senior Deputy Director Media - KIE (Signatory)
 - (c) Director KIE
- (iii) Recovery of various documents touching on the "reserve account" including council minutes and bank letters.

5.4 Normative Framework

The management of public finance is provided for in Chapter 12 of the Constitution of Kenya, 2010. Under Article 201 (d) it obligates institutions to manage public money in a prudent and responsible way, while (e) stipulates that financial management shall be responsible, and fiscal reporting shall be clear.

The Public Finance Management Act, 2012, spells out the offences relating to financial misconduct by public officers. Of relevance in this matter is the allegation of opening of bank accounts by KIE without lawful authority.

- 197. (1) A public officer employed by the national government or a national government entity commits an offence of financial misconduct if, without lawful authority, the officer—*

- (a) issues public government securities, or varies their terms and conditions;*
- (b) opens a bank account in the name of the government;*
- (g) fails to pay into a government bank account any public money entrusted to the officer or received by the officer for or on behalf of that government or that entity;*
- (h) incurs expenditure or makes a commitment on behalf of that government or entity;*
- (i) incurs wasteful expenditure on behalf of that government or entity;*
- (k) fails to provide any information in the officer's possession, or under the officer's control, in relation to the financial management, financial performance, or banking activities of that government or entity or in relation to the management or control of an asset or liability of that government or entity when required to do so, except where such refusal or failure is required or authorised by this Act or any other written law;*
- (l) fails to keep proper records or conceals, or wrongfully destroys, information that is required to be recorded;*
- (o) for the purpose of procuring for the public officer or any other person or organisation—*
 - (i) makes improper payment of public money belonging to or entrusted to that government or entity; or*
 - (ii) makes improper use of any public property of that government or entity; or*
- (p) fails to remit revenue received contrary to the provisions of sections 76(2) and 158(2) of this Act.*

198. (1) *A public officer commits an offence if that officer*

- (a) takes possession of public funds or assets without lawful authority;*
- (b) misappropriates public funds or assets;*
- (c) conceals information on public finances to obtain a financial benefit either for the officer or another person; or*
- (d) engages in a corrupt act.*

(2) In this section, "corrupt act" includes soliciting or receiving an inducement.

199. *Except as otherwise provided by this Act, a person who is found guilty of committing an offence under this Act for which no other punishment is given, that person is liable on conviction to a term of imprisonment not exceeding five years or to a fine not exceeding ten million shillings, or to both.*

Further Section 331(1) of the Penal Code provides that:

Any person who being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by him or entrusted to his care, or of any balance of money or property in his possession or under his control, is guilty of a felony.

5.5 Analysis and Findings

During the investigations, it was established that before 2008, KIE was operating as an institution under the Ministry of Education. KIE was funded through government allocations from exchequer as well as grants and donations and therefore, Government of Kenya financial regulations were applicable to the institute.

On 23rd April, 2013, Dr. Nzomo the Director, KIE, informed CAJ investigators that KIE received funds from Treasury through Ministry of Education for planned activities for each financial year. When funds were not utilized during any financial year, KIE would retain the funds at the end of the financial year as savings referred to as “reserve funds”. She further said that the “reserve funds” were never factored in the subsequent KIE’s budget and that the institute relied on Legal Notice No.105 of 1976 (*Exhibit D3*) to retain money beyond a financial year.

However, according to Part IV, Section 15 (1) of the Legal Notice no. 105 of 1976 (*Exhibit D3*) provided for carrying forward unexpended balance of grant in the accounts of the Institute from one year to the next and that such funds may be expended as the Council would determine, or put into account of the Institute. It is worth noting that this provision covered balances limited to grants and not funds allocated by exchequer for planned activities.

KIE used the above provision to place- unexpended funds beyond a financial year in form of “reserve funds”. Such funds were placed in numerous Fixed Deposit Accounts with various commercial banks. It was noted that KIE had eight (8) such Fixed Deposit Accounts with Kenya Commercial Bank with a total deposit of KES. 39,723,830.60, out of which KIE would have earned KES. 1,254,940.77 interest within a period of 6 months ending 3rd June 2006. In addition, the Institute had 14 Bank Accounts in several Commercial banks by January 2006.

According to Minute FGPC/25/2006: KIE Bank Accounts, of the Finance and General Purposes Committee meeting held on 31st January, 2006, the Committee had raised a concern that the Institute had other accounts whose account numbers had not been provided/indicated in the list of accounts. (*see number II (i) on page 9 of the Minutes marked as Exhibit D1*).

CAJ investigators noted that the Director, Dr. Nzomo and Mr. John Kimotho, a Senior Deputy Director Media were the only ones handling the Fixed Deposit Accounts.(*see Exhibit marked as D2*).

It is worth noting that the Director, KIE through a letter dated 19th April, 2013 indicated that KIE Council had not given her and the management team authority to open Fixed Deposit Accounts but they were doing it as income generation.

Since 2007, the institute has rolled over the said accounts and opened (re-opened) twelve (12) Fixed Deposit Accounts, eleven with Cooperative Bank and one with KCB. The Institute had a fixed deposit of KES 4,922,864.50 at Continental Credit Finance which went under receivership.

Further, KIE is tax exempted and therefore is not expected to pay any form on tax on the deposits. It is noted that Cooperative Bank has been withholding tax at the rate 15% on interest earned on Fixed Deposits. It is not clear whether such moneys would be paid to KRA (*Refer to I (e) on page 8 of Min. FGPC/25/2006: KIE Bank Accounts - Exhibit D1*).

5.6 Conclusions

The CAJ team noted that KIE held over eight Fixed Deposit Accounts with different commercial banks besides other normal accounts. This in itself compromised prudent financial management practices.

The Fixed Deposit Accounts held large amounts of money invested for periods ranging from three to six months at different interest rates. A close scrutiny of documents on the Fixed Deposits recovered from KIE indicated that the various Fixed Deposits matured at different times and some were rolled over time and again while others were called off. There are no proper records on the roll-overs for the Fixed Deposit Accounts. The progression on each Fixed Deposit Account as it was rolled over upon maturity is not known. There is therefore uncertainty in so far as the accrued interests and the initial deposit amounts are concerned. Such operation may create not only opportunities for impropriety but confusion when it comes to tracking and monitoring. Further, these accounts were being run without the express authority of the KIE Council.

In the meeting with CAJ Commissioners, Dr. Nzomo restated her earlier position by insisting that she does not need Council approval to invest funds into fixed deposits. She further stated that the Finance and General Purposes Committee does not need to approve such transactions since they are not engaged on a full-time basis. Dr. Nzomo however conceded that the use of remaining grant must be approved by the Council. It is however worth noting that during the transactions in issue, 1976 KIE Order - Legal Notice Number 105 was in force. Under Order 18 (2) (c) the Committee is mandated to '*consider and authorize any financial transactions...*' on behalf of the Council. Under the present Act, KICD Act, 2013, the power to make decisions relating to fiscal transactions, includes the determination of provisions for capital, recurrent and for reserves of the Institute and the opening of bank accounts for the funds of the Institute.

While there is no direct evidence that the Director, KIE benefited from the “reserve accounts” the practices are indeed in breach of the Public Finance Management Act, 2012 as the said accounts were being opened without the express consent of the KIE Council. In the case of the Fixed Deposit with Continental Credit Finance, which is under receivership, KIE lost KES. 4,922,864.50.

While undertaking its investigations into the deposits made to Continental Credit Finance, the investigative team requested, on many occasions to be furnished with supporting documentation by KIE management, but the same was not forthcoming. It is regrettable that this information was only furnished to CAJ during the meeting with CAJ Commissioners.

In the responses by Dr. Nzomo and Mr. Kimotho, they both stated that KIE made the deposits to Continental Credit Finance in 1983, and the bank went under receivership in 1986, and the two were not in employment in the Institute at the time.

However, KIE has been following up the matter with the Receiver Manager, P.Thoithi Kanyuira. Evidence has been adduced by KIE to support this information. It should further be noted that the Director, Dr. Nzomo and John Kimotho ran the Fixed Deposit Accounts without the authority of the KIE Council.

5.7 Recommendations

- i. The Office of the Auditor General to undertake an audit on all the Fixed Deposit Accounts held by KIE to ascertain that there was no mismanagement of public funds held in such accounts.
- ii. KIE Director to confirm whether KIE had a Tax Exemption Letter on Fixed Deposit Accounts.
- iii. The Director, KIE to confirm whether such Fixed Deposits Investments were subject to Withholding Tax if KIE had a Tax Exemption Letter.
- iv. KIE Director and the various commercial banks where KIE had Fixed Deposit Accounts should provide proof that Withholding Tax charged by the various commercial banks on Fixed Deposit transactions was actually remitted to Kenya Revenue Authority.
- v. KIE should put more effort to recover the Ksh. 4,922,864.50 held in Continental Credit Finance which went under receivership.
- vi. The Director, KIE should seek proper authorization from KIE Council to invest in Fixed Deposit Accounts.

CHAPTER 6

Report on unresponsive official conduct and discourtesy of Mr. John Kimotho - Senior Deputy Director, Media and Extension Services

6.1 Role of Mr. John Kimotho in the investigations

While undertaking its investigations, the CAJ investigative team requested for information and documentation from KIE, through its administrative head, the Director, Dr. Nzomo. However, due to her busy schedule and travels, Dr. Nzomo delegated the role of liaising with the CAJ investigative team to her deputy, Mr. John Kimotho, the Senior Deputy Director, Media and Extension Services. Mr. Kimotho was therefore, duly and properly instructed to work closely with the investigative team on behalf of the Director, KIE.

However, the experience of the investigative team, as shall be discussed in this Chapter, demonstrates utter discourtesy to the investigators and disregard to the requests for information and documentation by the investigative team, amounting to unresponsive official conduct, by the said Mr. Kimotho.

6.2 Normative Framework

The Commission on Administrative Act, 2011, contains provisions relating to matters of unresponsiveness of public officers, delay and discourtesy of public officers while engaging with the Commission.

Section 8 of the Act stipulates the functions of the Commission, which include, investigation into unresponsive official conduct within the public sector, and inquire into allegations of misbehavior, discourtesy and inefficiency within the public service.

Further, **Section 26, 27** and **28** of the CAJ Act provide for the general powers of the Commission, which include, obtaining any information it considers relevant, including the requisition of reports, records, documents and any information from any person or government authority, as well as compel production of such information.

The CAJ Act also has provisions relating to persons giving false and misleading information or statement to the Commission. Section 28 (3) provides for the same while Section 40 provides that the same may subject such a person to civil and criminal proceedings. Further, Section 52 (b) and (d) discusses the related offences:

52. A person who -

(b) *submits false or misleading information;*

(d) *misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act, commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.*

6.3 Incidences of unresponsive official conduct

In its interactions with Mr. Kimotho, the investigative team faced many challenges due to the unresponsive treatment toward the requests and question posed to him. The team, on various occasions, through visits, telephone calls, requested for information from Mr. Kimotho, but the same either delayed or was not forthcoming. He would furnish the team with information in piecemeal, despite making promises that he would furnish all requested information. This necessitated the investigators to engage the KIE Director, expressing frustration in the slow pace at which information requested from KIE was being furnished to the Commission.

Further, it is worth mentioning that in several correspondences from the anonymous complainants, they have adversely mentioned Mr. Kimotho, stating that he has been taking upon himself the role of coaching witnesses who present themselves to the various investigative agencies.

6.4 Incidences of discourtesy by Mr. John Kimotho

While engaging with Mr. Kimotho, either through face to face interactions or through telephone conversations, Mr. Kimotho occasionally displayed total disregard to common rules of courtesy. Mr. Kimotho would respond emotionally upon being engaged by the team.

During the interview with CAJ investigators on 12th April, 2013, Mr. Kimotho told the investigators that they (CAJ) did not have powers to question him as the only agencies with investigative powers were the police and the Ethics and Anti-corruption Commissions.

On 16th April, 2013 when conducted by the Director Research and Investigations requesting him to forward the documents he had been asked to provide to CAJ during the interview on 12th August, 2013, Mr. Kimotho told the Director Research and Investigations that he had travelled to Mombasa on official duty and that the Director Research and Investigations should stop bothering him and instead talk to the Director KIE, after all the Director Research and Investigations was not his (Mr. Kimotho's) supervisor.

Another incident took place as the investigations were being concluded on 24th July 2013, where a team from CAJ visited Mr. Kimotho to serve him with a notice to attend a meeting before the

Commissioners. During the visit, Mr. Kimotho made outbursts in anger to the CAJ officers and stated that he had no faith in the Commission and that the Commission would not succeed in its endeavors.

6.5 Conclusion

From the official interactions of the CAJ investigators with Mr. Kimotho, the team could be sum up his conduct as being unresponsive and discourteous in his official conduct. Reflecting on the treatment accorded to the CAJ team of investigators, it would not come as a surprise if the same treatment is accorded to clients and other public officers who require his services. In conclusion, Mr. Kimotho's conduct needs to be further interrogated as it may amount to maladministration, discourtesy and unresponsive official conduct.

6.6 Recommendation

The KICD Council to cause a caution to be served upon Mr. John Kimotho for his unresponsive official conduct and discourtesy displayed upon the CAJ team.

CHAPTER 7

General and Consequential Observations

During its investigations, the investigative team took note of some pertinent issues relating to the Kenya Institute of Education. Following are some of the general and consequential observations that the investigative team would re-emphasize;

- i. CAJ emphasizes the need for KICD to entrench the culture of transparency and accountability in all its fiscal transactions, including procurement and tendering processes and staff recruitment. All the operations of the institute should be within the laid out laws and regulations.
- ii. Investigations also revealed that Dr. Nzomo invited senior officers from the Criminal Investigations Department with '*a view of establishing the authors of the malicious letters and the motive behind their circulation*', The CAJ team noted that there was no official complaint as the matter was not entered into an Occurrence Book in a police station as is the case in all complaints lodged with police. It is the CAJ's view that engaging the CID officers was solely intended to intimidate and gag the complainants/whistleblowers. This act in itself is improper conduct on the part of the Director, Dr. Nzomo and amounts to abuse of power.
- iii. The KICD Council should initiate the process of recruiting a Director in conformity with the provisions of **Section 14** and **15** of the Kenya Institute of Curriculum Development Act, 2013, which requires that the appointment of a Director to be done by the Council through a competitive, fair and open process. Further, the Director is to hold office for a term not exceeding five years and shall be eligible for re-appointment for one further term.
- iv. In the course of its investigations, Mr. Charles Anampiu knowingly and willfully misled and gave false information to the Commission. CAJ will therefore, institute his prosecution in accordance with **Section 52** of the Commission on Administrative Justice Act, 2011, which offence carries a penalty of a fine not exceeding five hundred thousand shillings and or to imprisonment for a term not exceeding two years or to both.