

The Ombudsman

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PUBLIC SERVICE

A quest for transformation



CAJ Director of Compliance and Risk Ismael Maaruf with participants during training.

The Ombudsman has established his role as a defender of the people in the context of administrative justice and generally in the fight against impunity in the country. A lot of this has been achieved through handling complaints filed or taken up on Commission's own accord, often compelling public officers and institutions to right administrative wrongs. But this is not all the Commission is doing to address maladministration, administrative injustices and other forms of impunity within the province of administrative justice in the country. In this edition of *The Ombudsman*, Director in charge of Compliance and Risk **Ismael Maaruf** takes us through the role of the Commission in performance contracting and how it augments efforts not only to fight impunity but also reform the public service.

Performance contracting a tool for service delivery improvement

Performance contracting was prompted by the perception that the performance of the public sector consistently fell below the expectations of the public. In 2004, the Government of Kenya introduced performance contracting in the public sector through Legal Notice No. 93.

In the context of Kenya's public service, a performance contract is a written agreement between the Government (acting as the owner of public agency) and the management of the agency, wherein quantifiable targets are clearly specified

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Access to Information Bill gets Presidential Assent

By Edward Opany

Kenyans can now access information from public and selected private entities after the President assented to access to information law. The Access to Information Act, 2016 now gives effect to Article 35 of the Constitution which, inter alia, accords every citizen a right to access information held by the State, and information held by another person and required for the exercise or protection on any right to fundamental freedom. The act also places an obligation on public agencies to explain their actions, policies, or decisions to citizens if they seek such explanations.

A member of the public may make a request for information in writing either in Kiswahili or English and in the event that he or she is unable to



read and write, or due to disability, he or she is allowed to make oral requests.

The mandate of the Commission in respect to the new law includes complaints handling; consideration of reports from public bodies on implementation of the Act; and monitoring Kenya's implementation

of international obligations relating to access to information among others.

The law is long overdue considering Kenya is a signatory to the African Charter on Human and People's Rights which provides for the right to access to information. Kenya ratified the Charter in 1992.

Man Seeks Ombudsman's Help to have Telco Release Information

The first complaint relating to access to information has been filed with the Commission. Gravel Mwambala has filed a complaint seeking to have Safaricom Limited to release data pertaining to his registered mobile phone number.

Mwambala is seeking information from the mobile service provider to present it to police as evidence against a crime he is alleged to have been involved in on 22nd July 2013. He argues that on the said day he was being attended to at a hospital



Gravel Mwambala at CAJ offices.

at Gongoni in Malindi, a different location from that of the alleged crime. The information he is seeking from Safaricom would verify his exact location on that day.

This case is a demonstration of the import of the Access to Information Act, 2016. The new law provides for access to information and obligates public and private entities to, among other things, facilitate access and publication of information held by them; and publication of information of any contract entered into and policies affecting the public.

for a period of one financial year and performance measured against agreed targets. The performance contract specifies the mutual performance obligations, intentions and the responsibilities of the two parties, and addresses economic, social and other tasks to be discharged for economic or other gains. Further, it organises and defines tasks that management should perform systematically, purposefully and with reasonable probability of achieving results. The tasks also assist in developing points of view, concepts and approaches to determine what should be done and how to go about doing it.

Through performance contracting, public institutions focus on promoting efficiency, transparency and cost-effective utilisation of tax payers' money. Performance contracting is, therefore, intended to shift the culture in public service from process-based to results-based management in order to impact on the quality of service delivery. Importantly, it makes public service to be citizen-centered.

At the onset, only a handful of state corporations participated in process. The Government then made a decision to extend its coverage to all Ministries, Departments and Agencies (MDAs) following the benefits attained by participating public institutions through improved service delivery, administrative and financial performance.

The Role of the Ombudsman in Performance Contracting

The Office of the Ombudsman is a lead agency in the Performance Contracting Framework. The Ombudsman performs a key role in improving public services through monitoring and evaluating

implementation of the indicator "Resolution of public complaints".

Within the performance contracting framework, the Commission requires public institutions to establish complaints-handling system, and create a dedicated desk or office to handle complaints. Public institutions are also required to develop and display a complaints handling policy and procedures and appoint complaints handling committee members. Other requirements include developing and implementing a citizen service delivery charter; receiving and resolving complaints; and maintaining a complaints register. Public agencies are required to create awareness on the complaints handling system and citizen service delivery charters; and conduct capacity building for top management, complaints handling officers and staff on their obligations with respect to the Indicator.

Public institutions are required to submit quarterly reports on complaints handled detailing the number resolved and action taken as well as demonstrating how they have satisfied the requirements of the

indicator. The Commission has put in place infrastructure to strengthen the capacity of public institutions through training to enable them attain compliance. Between 2012 and 2015, the Commission trained 11,902 public officers in an array of public bodies.

Year	No. of Officers Trained
2012	2,665
2013	2,267
2014	2,762
2015	4,208

Within the Indicator framework, public institutions reported handling 73,228 complaints in 2015 out of which 69,940 were resolved. In 2014, public institutions handled 48,538 out of which 40,910 were resolved.

The focus of the Commission in performance contracting in the last four years has been on national government institutions. The Commission is now training its sights on the devolved system of government and has already developed an engagement framework for training.



CAJ and select officers from MDAs during a past training.

Ombudsman's submissions on IEBC

The Ombudsman was one of the few organisations invited to present recommendations to the Joint Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission.

The formation of the Committee brought to an end anti-IEBC protests by Coalition for Reforms and Democracy (CORD). CORD pushed electoral reforms and based its protests on alleged bias of the electoral body.

Below is a summary of recommendations made to the Joint Parliamentary Select Committee.

- Commissioners to voluntarily exit office in the interest of the country and for the greater public good. Since this would not be on account of removal as per Article 251 of the Constitution, their full benefits would be secured as if they had served their full term.
- The appointment of new Commissioners should be conducted by a broad based multi-agency panel rather than political parties for impartiality and professionalism.
- The next members of IEBC be treated as transitional with the same membership of Nine. Out of the Nine members, Three or Four should be non-Kenyans, one of whom should be the Chairperson.
- (As the election date cannot be altered as it will affect the term of office of the President and would require a referendum) and in light of the limited time to the 2017 General Elections, the process of appointment of new Commissioners should be



fast tracked, preferably within 60 days once the current Commissioners vacate office.

- All the proceedings and deliberations of IEBC should be recorded verbatim. This will infuse objectivity and transparency.
- IEBC should ensure that political parties conduct transparent and competitive nominations since the same has the potential of raising tension and instability.
- IEBC should fully operationalise and strictly enforce the elections law, including campaign financing in accordance with Article 88 of the Constitution and Section 4 of IEBC Act.
- There should be a multi-agency team comprising the Ethics and Anti-Corruption Commission, Commission on Administrative Justice, Public Procurement Oversight Authority, Independent Electoral and Boundaries Commission and the Office of the Auditor General to conduct post-elections audit and evaluation with the main objective of improving the quality of elections.

- IEBC to delegate mandate relating to settlement of disputes arising from nominations by political parties to enable it to supervise nominations by parties and also reduce confusion and conflicts as was witnessed just before the last General Elections in 2013.
- Vetting of staff members or any person who has previously worked for IEBC, and who has been adversely mentioned in any official report should be fast-tracked to determine their suitability.
- In relation to the period for determining presidential election petitions, an extension from 14 to 30 days is not necessary.
- The law (Leadership and Integrity Act & the Elections Act) should be amended to allow for a multi-agency vetting of candidates for elective positions.
- The appointment of a substantive Registrar of Political Parties be done as a matter of urgency.
- Where there is an election petition wherein it had been found that the winning candidate was not declared as such, the court should be empowered to declare such person duly elected without having fresh elections.
- The Supreme Court should solely deal with the Presidential Election Petition while petitions for other positions should terminate at the Court of Appeal.

The Commission had earlier in January 2016 issued an advisory opinion regarding succession planning in state and public offices including IEBC and the Judiciary as a way of ensuring free, fair and credible elections in 2017.

Embracing diversity: Ombudsman hailed

The Commission on Administrative Justice is the most diverse commission. This is according to a survey by the National Cohesion and Integration Commission (NCIC). The survey on ethnic diversity found that the main ethnic groups dominated commissions with only 19.59 per cent of the positions taken by minority groups.

This is no mean achievement for the Commission bearing in mind that many state corporations have failed to meet the constitutional requirements that demand that public agencies

reflect the face of Kenya.

The announcement came hot in the heels of a debacle witnessed at Moi University following the appointment of Prof Laban Ayiro as Vice Chancellor at an acting capacity. Some politicians from the region including two governors and 10 MPs stormed the university seeking the reversal of the appointment. Prof Ayiro's only problem was that he was an "outsider".

The politics of insider versus outsider is not a new phenomenon in Kenya. Tribalism is entrenched in our society, and has dominated public discourse

for a long time. It is a recurrent theme in literature including Michela Wrong's *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower* which explores the matter more overtly.

The Constitution of Kenya sets the standard requiring public entities to reflect the regional and ethnic diversity of the people of Kenya. Diversity is embodied in our national values and principles of governance, but very few public entities have satisfied these requirements. It is for this reason that emerging top in the entire list of Commissions is such a big deal.

To vet or not to vet political aspirants?

The Commission on July 21st 2016 made a raft of proposals to the Joint Parliamentary Select Committee on Matters Relating to the Independent Electoral and Boundaries Commission (IEBC) at the request of the Committee. Among the many proposals was a recommendation to form a multi-agency team to vet political aspirants.

The Ombudsman recommended amendment of the law (Leadership and Integrity Act, and the Elections Act) to allow for a multi-agency vetting of candidates for elective positions. The Commission noted the team could comprise IEBC, Ethics and Anti-Corruption Commission (EACC), Office of the Director of Public Prosecutions (ODPP), Kenya Revenue Authority, CAJ, and the National Police Service.

The question of vetting political aspirants is not new, and neither is it flattering. Whereas aspirants are not open to the idea, the relevant public agencies have in the past shied away from this responsibility. This was well demonstrated in the run up to the 2013 General Election.

In December 2012, the Ombudsman recommended to the Independent Electoral and Boundaries Commission (IEBC) to bar some 36 Kenyans who had been found culpable of malfeasance as being unsuitable to hold public office – elective or appointive. The IEBC, however, did not implement the recommendations. Consequently, one of the 36 individuals was elected Member of Parliament for Embakasi Central, something the Ombudsman would later challenge in court (*Commission on Administrative Justice v John Ndirangu Kariuki & Independent Electoral and Boundaries Commission* [2016] eKLR). Others who were in that list include Senator Mike Sonko and Hon. Ferdinand Waititu. Daniel Wambura who is currently the Administrative Secretary in the Office of the Deputy President and who was recently interviewed for the position of Chief Justice was also in the list by virtue of having served as a Commissioner at the defunct Electoral Commission of Kenya.

An idea had been mooted under the auspices of the Chairs' Forum, in late 2012, to have a three-prong vetting process. At the first level was

to be EACC, CAJ and ODPP. The second level was to have IEBC, and the Courts were to be at the final level to give candidates who would have been dissatisfied with the vetting an opportunity to seek recourse.

A number of hurdles stand in the way of vetting political aspirants. It is an open secret the idea is not entertained in some quarters, and there has been contestation regarding jurisdiction. EACC for instance claimed it was the only body with the express constitutional mandate to enforce Chapter Six of the Constitution on leadership and integrity. Former Law Society of Kenya Chairman Eric Mutua had also insisted that constitutional commissions had no mandate to vet political aspirants.

A number of agencies including EACC and NCIC have signaled they will be vetting those who intend to run for political seats ahead of the 2017 General Election. Meanwhile we wait to see if the recommendation of the Commission was rejected *ab initio* by the Committee.

Success stories

Eileen Tirop Vs Teachers Service Commission - CAJ/TSC/013/1025/2016

The Commission has assisted a teacher to have her hardship allowance restored. Eileen Tirop, a teacher at Ngeny Koiborot Secondary School in Kericho County, filed a complaint against the Teachers' Service Commission (TSC) for the arbitrarily stopping her hardship allowance. Following inquiries by the Commission, TSC acknowledged that the complainants allowance was erroneously removed from the payroll, but delayed in rectifying the same. They reinstated the allowance and all outstanding payments a month after the inquiry.

Moses K. Boretor Vs Department Of Pensions - HUD/ELD/M. IGC/062/2/15

The complainant, a retired assistant chief, alleged delay by the Department of Pensions to process his pension dues. The Commission made an inquiry vide a letter dated 27th January 2016 and received a response dated 20th February 2016 indicating that the complainant's commuted pension gratuity and monthly pension arrears up to 31st December 2015 had been paid. The complainant on 15th March 2016 confirmed receipt of his pension dues.

Robert Maritim Vs HELB - HUD/NKR/ HELB/013/13/15

The complainant alleged that the Higher Education Loans Board (HELB) had delayed in disbursing a HELB loan of Sh40,000 to his campus account to offset his fee arrears. The Commission inquired about the same vide a letter dated 27th January 2016. HELB responded in a letter dated 10th February 2016 indicating that the complainant had qualified for the loan but it could not be disbursed as the complainant had failed to furnish the Board with a letter declaring he was unemployed. Accordingly, the Commission requested the complainant to present the said letter (on declaration of unemployment) which was forwarded to HELB. The complainant gave feedback on email on 13th April 2016 that the loan was finally disbursed to his campus account and the same had reflected on the students' portal.

Monica Cherono Vs National Registration Bureau CAJ/ELD/M. IMM/003/2/15

The complainant alleged that she applied for a National Identity card three times at the National Registration Bureau at Kesses Sub-County in Uasin Gishu County. The Commission picked up

the matter with the Bureau vide a letter dated 9th December 2015, and reminders dated 18th February 2016 and 23rd May 2016. The Bureau finally responded in a letter dated 27th May 2016 from the Director of National Registration Bureau indicating that the complainants ID had been processed and sent to Kesses office for collection. The complainant confirmed receiving the ID.

Nickson Nyongesa Barasa Vs KNEC - HUD/NKR/ KNEC/013/20/16

The complainant alleged inordinate delay in relation to a request he made to the Kenya National Examination Council (KNEC) to issue him with a rectified KCSE Certificate. Nickson Nyongesa who sat the KCSE examination in 2011 said he was issued with a KCSE Certificate which did not bear his passport photograph. He applied for issuance of a rectified certificate but KNEC took too long prompting him to file a complaint with the Commission. After inquiries by the Commission KNEC in a letter dated 8th June 2016 indicated they liaised with the complainant and he was issued with an error-free Certificate. The complainant affirmed the position when contacted on phone.

Compiled by Samatha A. Kodhek

OUTREACH

Public officers trained on complaints handling

The Commission has from July to September 2016 trained 192 public officers on complaints handling. The Officers who included county commanders, top managers and ethics officers were drawn from four institutions, namely: National Police Service, Kenya Airports Authority, Karatina University and Kenya Rural Roads Authority.

Ombudsman gives advisory services at ASK Mombasa Show

The CAJ Mombasa Branch Office pitched tent at the Mombasa show ground which took place from 24th to 28th August 2016. The Commission was able to engage about 2,600 members of the public who made inquiries and picked information, education and communication materials. The activity which was aimed at educating the public on the mandate of the Commission, receiving complaints as well as increasing visibility of the Mombasa Branch Office saw 10 people file complaints. The Commission also gave advisory services and referred 200 people to various institutions for further assistance.

Huduma Mashinani

Huduma Huduma Mashinani, an initiative that employs existing community structures in informal settlements, is back. The Commission was in September 2016 able to create awareness on its mandate to about 7,200 members of public in Kangemi, Mukuru Kwa Reuben, Kawangware and Kibera. The Commission has six Ombudsman Committee members from each of the four areas who assist in setting up meetings with area residents, and direct them to file complaints with the Commission.



Members of the public collect IEC materials in Kawangware.

CORRIDORS OF JUSTICE

The Commission has a number of matters active in Court including the following.

Evans Arthur Mukolwe vs CAJ; Nairobi High Court Civil Case No. 182 of 2013

A civil suit filed by Evans Arthur Mukolwe claiming defamation. He is in the list of 36 deemed unsuitable to hold public office the Commission forwarded to the Independent Electoral and Boundaries Commission in December 2012.

CAJ vs John Ndirangu Kariuki & Another; Nairobi Civil Appeal No. 257 of 2014

An appeal by IEBC arising out of Nairobi High Court Petition No. 408 of 2013. The Court had ruled that IEBC had erred in failing to consider the question of qualification of Hon. John Ndirangu to run for public office.

Michael Maina vs CAJ; Nakuru High Court Petition No. 54 of 2014

This is a petition by Michael Maina challenging a decision of Commission regarding a complaint he had lodged.

Prof. Paul Musili Wambua vs. Attorney General & Others; Nairobi Civil Appeal

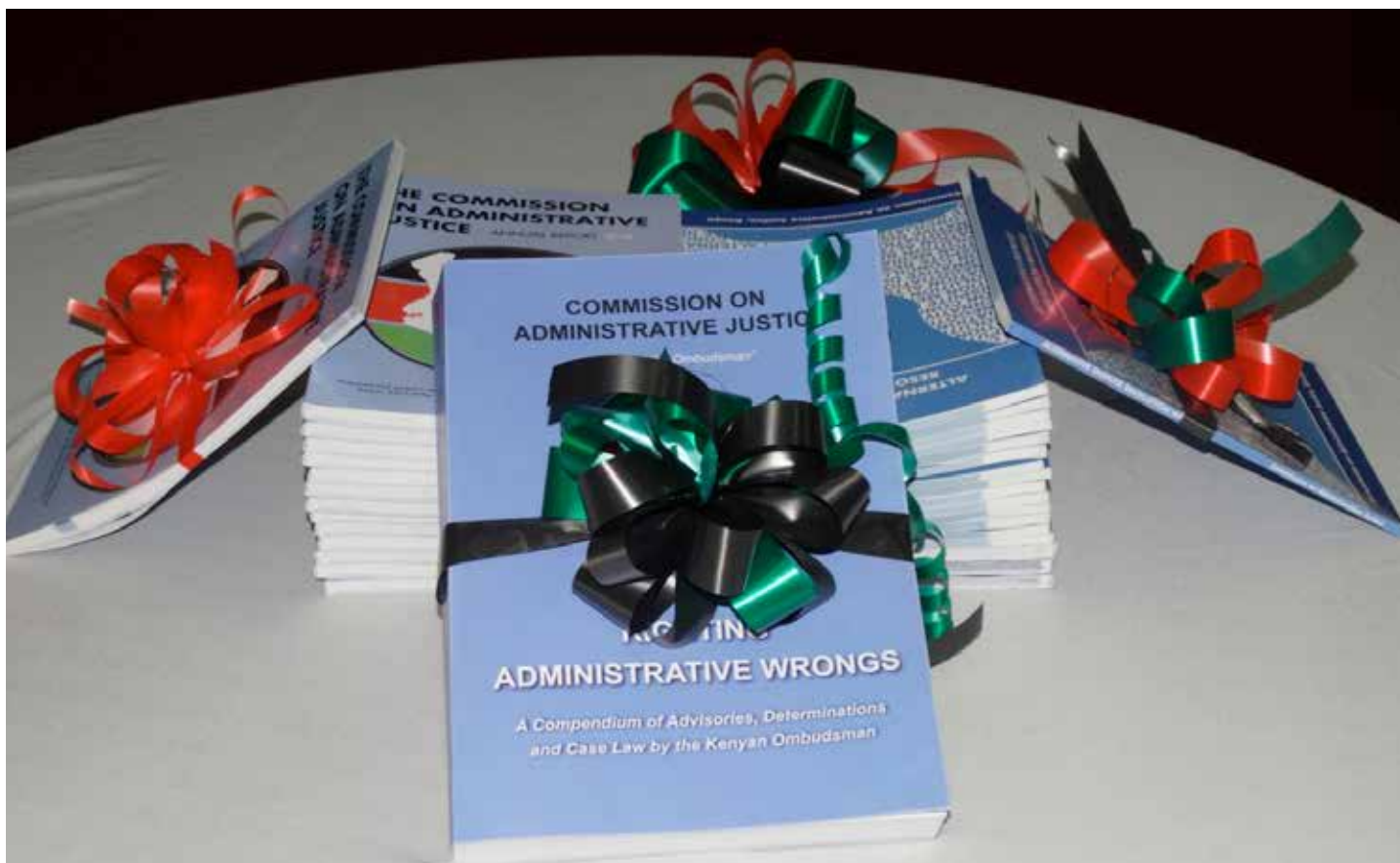
This is an appeal by Prof. Paul Musili arising out of Nairobi High Court Petition No. 542 of 2013 which the Court had dismissed. The Commission is an interested party in the case in which the petitioner is seeking the interpretation of the Court as to whether a public lecturer can hold another remunerative position. Prof. Wambua served as Chair, Vetting Board and at the same time Associate Dean at the University of Nairobi.

Compiled by Winnie Tallam

PICTORIAL



Speaker of the Senate Hon. Ekwee Ethuro and CAJ Commissioners during the launch of Compendium of Advisory Opinions, Determinations and Court Decisions ; Annual Report 2015 , and ADR Manual at CAJ offices on 13th July 2016.



CAJ publications launched.



CAJ Vice Chair Dr Regina Mwatha and Director, Finance and Administration Dan karomo with a delegation from Liberia's Independent National Commission on Human Right (INCHR). INCHR representatives were in Kenya for a study tour.



CAJ Chair Dr Otiende Amollo with Vice Chair Dr Regina Mwatha and National Land Commission Vice Chair Abigael Mbagaya during the launch of Eastleigh Market Investigation Report on 8th August 2016.



CAJ Vice Chair Dr Regina Mwatha with Director, Compliance and Risk Ismail Maaruf and officers of the Commission during a workshop to develop an engagement framework on training for counties.



CAJ Chair Dr Otiende Amollo with Secretary General of the Kenya Union of Civil Servants Mr Tom Odege (left), and Deputy County Commissioner of Meru Central Samuel Kamiti the winner of Huduma Award 2015 in the Individual Category during the African Public Service Day. Kimiti exhibited some of his innovations.