



**ETHICS AND ANTI-CORRUPTION COMMISSION**

**SUBMISSIONS OF THE ETHICS AND ANTI-CORRUPTION COMMISSION (EACC) TO THE JOINT SELECT PARLIAMENTARY COMMITTEE ON MATTERS RELATING TO THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

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## **BACKGROUND**

The Joint Parliamentary Select Committee vide a letter Ref. No. JPSC/CORR/2016/26 dated 18<sup>th</sup> July, 2016, invited the Ethics and Anti-Corruption Commission (EACC) through its Secretary/ Chief Executive Officer invited the Commission to submit its representations on matters related to the Independent Electoral and Boundaries Commission (IEBC).

The Commission therefore submits its representations on the following broad thematic areas:

- i) Allegations against the Commissioners and Secretariat of the IEBC in respect to credibility, impartiality, integrity and independence;
- ii) Recommendations on the legal mechanisms or the vacation from office of the current Commissioners of IEBC and the Secretariat in a manner that does not violate the Constitution based on the findings in of (i) above;
- iii) Recommendations on the legal, policy and institutional reforms to strengthen the IEBC so as to ensure that the August, 2017 elections are free and fair and administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner; and
- iv) Recommendations on the legal, policy and institutional reforms to strengthen the electoral systems and processes so as to ensure that the August, 2017 elections are free and fair and administered in an impartial, efficient, simple, accurate, secure, accountable and transparent manner.

This report gives the representations of the Commission in respect to the above matters.

## **EXECUTIVE SUMMARY**

This is a summary of the representations and recommendations by Ethics and Anti-Corruption Commission (EACC) submitted to the Joint Parliamentary Select Committee on the matters relating to the Independent Electoral and Boundaries Commission (IEBC).

### **I. THEMATIC AREA 1**

#### **Allegations touching on credibility, impartiality, integrity and independence of the IEBC Commissioners and the Secretariat**

1. The Commission has received various reports touching on IEBC related to procurement of electoral materials and allegation of corruption touching on Commissioners and Secretariat staff.
2. Out of the 30 reports, received by the Commission against IEBC, the status is as follows;
  - a. Fourteen (14) reports that relate to Biometric Voter Registration (BVR), Electronic Voter Identification Devices (EVID), supply of Solar Lanterns and supply of ballot papers by Smith and Ouzman were consolidated and investigated under four files, namely BVR, EVID, Ballot Papers (Chickengate) and Solar Lanterns. Out of the four, two files, (Solar Lanterns and EVID) are pending in court; the file on Ballot Papers (Chickengate) has been forwarded to the Director of Public Prosecutions (DPP), while the file on BVR Kits is pending response on Mutual Legal Assistance (MLA).
  - b. Two (2) reports were referred to IEBC for action as the matters were within their mandate.
  - c. Fourteen (14) reports are undergoing internal evaluation/analysis at EACC.
3. Tables 1-5 on finalized investigations in court, Cases forwarded to the DPP, On-going investigations and Cases at the evaluation/analysis stage are provided under Thematic Area 1 in the main report. These tables provide details of the allegations, persons named, and their current status.
4. Regarding the completed investigations, there was no sufficient evidence to support any of the allegations against the current Commissioners of IEBC. However, investigations disclosed sufficient evidence pointing to criminal culpability on several members of the

Secretariat. The DPP concurred with the Commission's recommended charges; and nine (9) IEBC officials and two (2) suppliers have been charged in court.

5. The Commission notes that the investigations undertaken in respect to allegations against IEBC hinged on procurement of election materials and equipments. EACC observes that these procurements were hurriedly carried out prior to the 2013 elections and resulted in the contravention of applicable procurement laws, regulations and procedures. For instance, the procurement process of the BVR Kits was started in April, 2012. This timeline was too short to comply with the prescribed timelines in the procurement laws. The challenges encountered in this process due to the late procurement led the same to be taken over and executed as a Government to Government contract between Kenya and Canada.
6. It is recommended that as part of the efforts to strengthen the IEBC and the electoral process, appropriate policy, legal, institutional, administrative and other reforms be prioritized.
7. It is further recommended that the role of Commissioners and the Secretariat in matters of procurements be clearly defined.

## **II. THEMATIC AREA 2**

### **Vacation of office by the IEBC Commissioners and the Secretariat based on the findings in Thematic Area 1 above**

8. From concluded investigations on IEBC matters, EACC has not gathered sufficient evidence to warrant adverse recommendations against the Commissioners of IEBC. However, given that there are on-going investigations on allegations where some of the Commissioners have been mentioned, EACC may not pronounce itself on the matter of lawful vacation from office of the Commissioners.
9. In respect to the Secretariat, nine (9) officials have been charged in court. Further, EACC has recommended prosecution of (2) other IEBC officials in the Chickengate file which is under consideration by the DPP, while allegations involving several others are under investigations. In this regard, EACC recommends that due process of the law be followed and appropriate action taken against each individual officer found culpable.

### III. THEMATIC AREA 3

#### **Composition, Appointment, Terms of Service and Removal of IEBC Commissioners and Secretariat.**

10. Appointment of Commissioners- There is need for a transparent and an all-inclusive criterion for appointment of the selection panel.
11. There is need to have a leaner body of Commissioners at the helm of IEBC, and it is proposed that at least five is a good number. This is on the premise that general elections are held only once every five years.
12. There is need for a strong Secretariat that would have all the necessary competence and professionalism to manage the day to day operations of IEBC.
13. The IEBC should have adequate funding and resources, guaranteed throughout the years even in between elections to enable it put in place mechanisms for effective and efficient management of elections and by-elections wherever and whenever they occur.
14. Going by experience of EACC, if the electoral body is not stable, such as when Commissioners are removed from time to time, there is a possibility of the following consequences; Staff morale goes down, exit by staff, low self esteem/confidence of staff due to frequent bashing by the public, low public confidence in the institution, Strategic plans of the institutions risks not being implemented hence derailed progress of the institutions targets, and uncertainty over planned actions. It also renders the institution unattractive to competent staff as potential employees shy away from joining such a body.

#### ***Recommendations:***

- i. The IEBC should have between three to five Commissioners.*
- ii. An evaluation should be undertaken on the IEBC, with input from the Commissioners and staff of IEBC, by an appropriate expert to determine the appropriate/optimum staff levels through a detailed job analysis of the functions of the electoral body. The study will inform whether the Commissioners should serve on a part time or full time basis and their functions be clearly defined.*

#### **IV. THEMATIC AREA 4**

##### **Recommendations to strengthen the policy, legal and institutional framework so as to improve the electoral system and processes**

15. From the Commission's experience, out of the investigations carried out on IEBC, and going by several decisions by the Public Procurement Administrative Review Board and the Court, all point out at what can be termed as "rushed," "emergency", "induced/planned" procurements by IEBC under the guise of national/public interest. Decisions by the Public Procurement Administrative Review Board and the courts have expressed reservations on the hurried nature in which IEBC procured electoral materials and equipments in the run up to the 2013 general election (in Part 5.1 in the thematic area four of the main report where the import of the authorities have been highlighted)

These authorities include-

- i. Review No. 59, 61 and 62 of 2012: Avante International Technology Inc & Others Vs IEBC
- ii. Review No. 69 of 2012: Konnexions Systems Ltd Vs IEBC
- iii. High Court Judicial Review No. 451 of 2012; Republic vs IEBC *Ex-parte* Bidvest Paperplus Ltd (Lithotech Exports) & Others

16. From EACC experience, hurried procurements present conducive environment for malpractices and corruption. It has been established in the recent EACC Corruption Survey that about 46.1% of all corruption in the country is procurement related.

17. The Commission proposes the following measures;

- i. Conducting general elections is not an emergency and preparation for elections should be an exercise throughout the period between elections, rather than hurried preparations during the main election year.
- ii. Ideal procurement for electoral materials should commence latest two years before an election.
- iii. IEBC should submit comprehensive procurement plans and budget and share with relevant stakeholders such as Parliament and Treasury to ensure timely resource allocation and implementation.

- iv. Early procurement will also ensure that any resultant litigation is dealt with and disposed in good time for the services and goods delivery to be undertaken in time.
  - v. The early procurement also allows for testing of the materials and equipment, and gives room for any alternative interventions that may be required.
  - vi. To enable proper preparation and planning for elections, there is need for timely and adequate budgetary allocation by parliament and the National Treasury.
18. The Commission proposes a raft of legislative reforms which it feels would improve the electoral process and lead to more transparent elections as well as elected leaders with an acceptable level of integrity threshold. The following are some of the specific amendments to the various pieces of legislation;
- i. Amend section 13(2) of the Leadership and Integrity Act (LIA) to entrench mechanism for clearance/vetting of persons seeking election to public office to submit to EACC declaration form, certificate of good conduct, and tax clearance among others for purposes of determining suitability of the candidate.
  - ii. Amend section 46 of LIA to create additional offences and penalties for violation of chapter six of the constitution.
  - iii. Amend LIA to give effect to Article 103(1) (c), Article 194(1) (c) and Article 181(2) to provide for mechanism for removal from office of a Member of Parliament, County Assembly and Governors for violation of Chapter 6 of the constitution.
  - iv. Amend LIA to provide for suspension of state officers charged in court of law with unethical/ corruption related offences.
  - v. Amend Section 13(1) of the Elections Act to have political parties nominate their candidates at least sixty 60 days to the Election.
  - vi. Amend Section 46 of the Elections Act to require candidates to submit a self-declaration form as prescribed in the First Schedule to the Leadership and Integrity Act to the EACC at least 45 days before the election.



- vii. Amend the Election Act to require EACC, in consultation with other relevant bodies to conduct vetting and to provide IEBC with a report at least 30 days to the Election.
  - viii. Amend the Election Act to bar candidates who have been found guilty of corruption and economical crimes and violation of the Elections Act or other relevant laws by a court of law from contesting the subsequent elections.
19. The stakeholders in the electoral system, especially the law enforcement bodies, should come up with a mechanism for timely and continuous joint monitoring of the electoral process in a collaborative and coordinated manner.
  20. Voter registration is done continuously.
  21. IEBC should leverage on ICT to improve its processes, including enabling real time voting, transmission and tallying of results. The registration of voters can be integrated with other registration processes such as issuance of ID cards and PIN certificates. This will allow double verification.
  22. IEBC should consider devolution of electoral processes and systems.

## **1.0 INTRODUCTION**

The Joint Parliamentary Select Committee vide a letter Ref. No. JPSC/CORR/2016/26 dated 18<sup>th</sup> July 2016, invited the Ethics and Anti-Corruption Commission (EACC) through its Secretary/ Chief Executive Officer to submit its representations on matters related to the Independent Electoral and Boundaries Commission (IEBC). The Commission therefore makes its representations on the following four broad thematic areas:

1. Allegations against the Commissioners and Secretariat of the IEBC in respect to credibility, impartiality, integrity and independence;
2. Recommendations on the legal mechanisms for the vacation from office of the current Commissioners of IEBC and the Secretariat in a manner that does not violate the Constitution based on the findings in of (i) above;
3. Recommendations on the legal, policy and institutional reforms to strengthen the IEBC so as to ensure that the August, 2017 elections are free and fair and administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner;
4. Recommendations on the legal, policy and institutional reforms to strengthen the electoral systems and processes so as to ensure that the August, 2017 elections are free and fair and administered in an impartial, efficient, simple, accurate, secure, accountable and transparent manner.

### **1.1 Mandate of Ethics and Anti-Corruption Commission (EACC)**

EACC is established under Section 3 of the Ethics and Anti-Corruption Commission Act No. 22 of 2011 (EACC Act) pursuant to Article 79 of the Constitution with the mandate to combat and prevent corruption and unethical conduct in Kenya through law enforcement, public education and promotion of best practices and standards in ethics and integrity. EACC is mandated to enforce among other laws Chapter Six of the Constitution, Leadership and Integrity Act, 2012, Public Officer Ethics Act, 2003 and the Anti-Corruption and Economic Crimes Act, 2003.

Chapter Six of the Constitution and its enabling legislation envisages a paradigm shift in the management of public affairs by providing distinct governance structures and places heavy responsibilities on holders of public office. In particular, the Chapter seeks to achieve servant and transformational leadership by demanding high standards of integrity and ethical conduct for both state and public Officers. It is the mandate of EACC to ensure that all state and public officers uphold the highest standards of ethics and integrity as prescribed by the law.

## **1.2 Submissions of EACC on Matters Relating to IEBC**

The representations by EACC in this report are informed by its mandate and is premised on the following:

- i) Reports of corruption and/or unethical conduct received by the Commission
- ii) Results of investigations undertaken by EACC pursuant to the reports.
- iii) Results of interventions by EACC during monitoring of past electoral processes.
- iv) Surveys and researches by EACC on corruption and unethical conduct.
- v) EACC experiences.
- vi) Various public reports on electoral processes.

## 2.0 THEMATIC AREA 1

### **Allegations touching on credibility, impartiality, integrity and independence of the IEBC Commissioners and the Secretariat.**

The Independent Electoral and Boundaries Commission (IEBC) is a Commission established under Chapter 15 of the Constitution of Kenya 2010 (COK) and as such it is supposed to operate within the provisions of COK and various laws. The Commissioners and Secretariat are expected to be people of integrity and above reproach in view of the nature of responsibility they carry out.

Between the year 2007 and 2016, EACC has received various reports alleging corruption and unethical conduct touching IEBC, Commissioners, staff and the electoral process. These allegations range from procurement irregularities, abuse of office, bribery, dealing with suspect property, misappropriation of public funds and unethical conduct against officials, political parties and candidates.

Tables 1-5 below show the finalized investigations in court, Cases forwarded to the DPP, On-going investigations and Cases at the evaluation/analysis stage are provided under Thematic Area 1 in the main report. These tables provide details of the allegations, persons named, and their current status.

**2.1 Table 1: Finalized Investigations in Court**

No.	Nature of Case	Particulars of Allegation(s)	Status	Remarks
1.	EVID investigations	Allegation that the IEBC irregularly awarded the tender for supply of EVID (Electronic Voter Identification Devices) kits and accessories to a company known as Face Technologies during the	Investigations were completed, and the matter is pending before court where the following persons have been charged; 1. James Oswago	<i>Hearing has commenced, and the next hearing dates are 28<sup>th</sup> &amp; 29<sup>th</sup> September 2016.</i>

No.	Nature of Case	Particulars of Allegation(s)	Status	Remarks
		Financial Year 2012/13. <u>Persons Mentioned</u> 1. Issack Hassan 2. Thomas Letangule 3. Mohamed Alawi 4. James Oswago 5. Wilson Shollei 6. Edward Karisa	former CEO 2. Wilson Shollei former deputy CEO 3. Edward Karisa former Director Finance and procurement 4. Willy Kamanga former head of procurement  <u>Offences:</u> 1. <b>Abuse of office</b> contrary to sec 46 of ACECA 2. <b>Willful failure to            comply with the law            relating to            procurement</b> contrary to Section 45(2)(b) of ACECA	
2.	Solar Lantern Cases	Allegation that the Independent Electoral and Boundaries Commission (IEBC) irregularly awarded the tender for supply of solar lanterns to a company called M/s Solarmak Technologies Ltd under tender No. IEBC 01/2012-2013  <u>Persons Mentioned</u> 1. Issack Hassan 2. Thomas Letangule 3. Mohamed Alawi	Investigations were completed, and the matter is pending before court  5. Adan Katelo – Procurement Officer 6. Kennedy Ochaе – Stores Officer 7. Abdi Elema – Procurement Officer 8. Gabriel Mutunga – Procurement Officer 9. Willy Kamanga –	<i>Hearing has commenced, and the next hearing date will be on 1<sup>st</sup> August 2016.</i>

No.	Nature of Case	Particulars of Allegation(s)	Status	Remarks
		4. Willy Kamanga 5. Adan Katelo 6. Kennedy Ochaе 7. Abdi Elema 8. Gabriel Mutunga 9. Willy Kamanga	Procurement Manger 10. Ben Gethi – Supplier 11. Joyce Makena – Supplier 12. SolarMak Technologies  <u>Offences;</u> 1. <b>Conspiracy</b> to <b>commit an offence of corruption</b> contrary to Section 47 (a) (3) as read with Section 48 of the Anti-Corruption and Economic Crimes Act, 2. <b>Careless failure to comply with the law relating to procurement</b> contrary to Section 45(2) (b) as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003. 3. <b>Forgery</b> contrary to Section 349 as read together with Section 345 of the Penal code. 4. <b>Colluding to change a tender document</b> contrary to Section 42(1) (b) as read with Section 137 of the penal code.	

2.2 Table 2: Cases Forwarded to the DPP under Section 35 of ACECA

No.	Nature of Case	Particulars of Allegation(s)	Status/	Remarks
1.	Chickengate Investigations and IEBC Investigations.	<p>Alleged Bribery of IIEC/IEBC Officials by Smith &amp; Ouzman of UK in securing of printing of strategic electoral materials contracts. (Commonly called Chickengate)</p> <p><b><u>Persons Mentioned IIEC Case (Chickengate)</u></b></p> <ol style="list-style-type: none"> <li>1. Ahmed Issack Hassan</li> <li>2. Davies Kimutai Chirchir</li> <li>3. Kenneth Nyaundi</li> <li>4. James Oswago</li> <li>5. Kenneth Karani</li> <li>6. Gladys Boss Shollei</li> <li>7. Joseph Hamisi Dena</li> <li>8. Trevy James Oyombra</li> <li>9. Hamida Ali Ibrahim</li> </ol> <p><b><u>The following Persons in IEBC were mentioned in the Chickengate Case.</u></b></p> <ol style="list-style-type: none"> <li>1. Ahmed Issack</li> </ol>	<p>Investigations have been finalized and the file <b>submitted to the Director of Public Prosecutions (DPP)</b> with recommendations to charge;</p> <ol style="list-style-type: none"> <li>1. James Humphrey Obanda Oswago</li> <li>2. Trevy James Oyombra</li> <li>3. Hamida Ali Ibrahim</li> <li>4. Kenneth Karani</li> </ol> <p>The recommended charges subject to the concurrence by the DPP are;</p> <ol style="list-style-type: none"> <li>1. <b>Soliciting for a benefit</b> contrary to Section 39(3) (A) as Read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.</li> <li>2. <b>Receiving a benefit</b> contrary to Section 39(3) (A) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.</li> <li>3. In addition for Mr James Oswago; <b>wilful failure to comply with applicable procedures and guidelines relating to Procurement of</b></li> </ol>	Awaiting response from DPP.

- Hamida  
- Kibwona  
left

		Hassan 2. Thomas Letangule 3. Mohamed Alawi 4. James Oswago 5. Gladys Boss Shollei 6. Praxedes Tororei 7. Kenneth Karani	goods contrary to Section 45(2) (B) as read with Section 48 of the Anti-Corruption and Economic Crimes Act 2003.  The decision of the DPP is awaited.(The EACC letter forwarding the investigation file is DPP and a letter to the Attorney general are attached as <i>Appendix 1&amp;2</i> )	
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**NB: Prosecution in the United Kingdom related to Chickengate**

EACC investigations into the Chickengate Scandal are related to proceedings in Southwark Crown Court, United Kingdom, in the matter of Regina vs. Christopher Smith, Nicholas Smith, Timothy Forrester, Abdirahman Mohamed Omar and Smith and Ouzman Limited.

This case covered investigations into conduct of Smith and Ouzman Limited in four countries Kenya, Ghana, Mauritania and Somaliland. In the case of Kenya the indictments comprised of the first two counts, the first relating to activities of IIEC in the period 1<sup>st</sup> October 2008 to 31<sup>st</sup> December, 2010. The second count related to activities at the Kenya National Examination Council (KNEC) during the period 1<sup>st</sup> October, 2008 to 30<sup>th</sup> November, 2010. (See copy of indictment attached).

This was a trial by Jury and the defendants in the Kenyan case were Christopher Smith, Nicholas Smith and Smith and Ouzman Limited. The Jury returned a verdict of guilt against the defendants in the Kenyan case and the judge (Justice Higgins) proceeded to deliver a sentence against the natural persons while Mr. Recorder Andrew Mitchell QC passed sentence on the corporate entity (Smith and Ouzman Ltd) after a confiscation hearing.

Details of the judgment and copy of sentencing records may be accessed through the following links <http://www.sfo.gov.uk> or <http://www.cw.uk.org>



### 2.3 Table 3: Ongoing Investigations

No.	Nature of Case	Particulars of Allegation(s)	Status	Remarks
1.	BVR Cases	<p>Irregular procurement of 15,000 Biometric Voter Registration (BVR) kits by IEBC from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 billion.</p> <p><b><u>Persons Mentioned</u></b></p> <ol style="list-style-type: none"> <li>1. Issack Hassan</li> <li>2. Thomas Letangule</li> <li>3. Mohamed Alawi</li> <li>4. James Oswago</li> <li>5. Betty Sungura Nyabuto</li> <li>6. Dismas Ong'ondi</li> <li>7. Immaculate Kassait</li> <li>8. Bernard Nyachio</li> </ol>	<p>The procurement process was started by IEBC but was cancelled before award of the tender. This led to a government to government contract between Kenya and Canada.</p> <p>Most of the local aspects have been completed.</p> <p>EACC has submitted Mutual Legal Assistance (MLA) requests to Canada and France in order to obtain the pending international evidence.</p>	<p>Awaiting responses on Mutual Legal Assistance (MLA) from Canada and France.</p>

**2.4 Table 4: Cases at the Evaluation and Analysis Stage**

No.	Case Summary	Status
1.	<p>Report that the Mt. Elgon Constituency Elections Coordinator/Returning Officer, failed to publicly advertise bids for tender to transport IEBC materials for the 19th December, 2013 for Bungoma County Senatorial by-election.</p> <p><b>IEBC Staff Mentioned:-</b></p> <ul style="list-style-type: none"> <li>• Geoffrey Gitobu</li> </ul>	Undergoing evaluation/analysis
2.	<p>The Independent Electoral and Boundaries Commission (IEBC) allegedly bought 200 photocopier machines from M/s OTL Office Technologies Ltd through single sourcing.</p>	Undergoing evaluation/analysis
3.	<p>Allegations that a privately owned company supplied 30 pieces of 320GB External discs to IEBC in January 2013 through direct quotation.</p>	Undergoing evaluation/analysis
4.	<p>Allegation that the procurement of legal services for the presidential petitions by the Independent Electoral and Boundaries Commission (IEBC) in the March 2013 General Election was flawed and breached the Public Procurement and Disposal Act, 2005.</p>	Undergoing evaluation/analysis

5.	<p>Allegations that the Coordinator BUURI Constituency, Meru county for IEBC, has been amassing wealth through corrupt deals. During the previous elections she would hire cars and get food for the clerks and in the process inflate their costs.</p> <p><b>IEBC Staff Mentioned:-</b></p> <ul style="list-style-type: none"> <li>• Lucy Mbithe John</li> </ul>	Undergoing evaluation/analysis
6.	<p>The complainant reports that his company was awarded a tender by Independent Electoral and Boundaries Commission, Narok South Constituency during the general elections on 4th March 2013 through order No: NRK/IEBC/13/2012-2013. The complainant alleges that the Constituency Elections Coordinator (CEC), Narok South Constituency compelled him to make him a signatory to the account of the company and later used invoices of a different company to receive payment of Kshs. 3,068,400 without his knowledge.</p> <p><b>IEBC Staff Mentioned:-</b></p> <ul style="list-style-type: none"> <li>• Martin Mule Malonza</li> </ul>	Undergoing evaluation/analysis
7.	<p>The complainant reports that her company was awarded a tender by Independent Electoral and Boundaries Commission for provision of catering services during the general elections of 4th March, 2013 through LSO No. 0409248 for Kshs. 2,540,100. The company has not received payment to date but instead the payments were irregularly done to a company associated with the the Constituency Elections Coordinator (CEC), Narok South Region and his wife.</p> <p><b>IEBC Staff Mentioned:-</b></p> <ul style="list-style-type: none"> <li>• Martin Mule Malonza</li> </ul>	Undergoing evaluation/analysis

8.	Allegation that IEBC contracted and paid Equip Agencies Ltd. to supply 34,000 Universal Polling Kits (UPK) ahead of the 2013 general elections but, according to Auditor General only a fraction of the kits were delivered a year after the hotly contested polls.	Undergoing evaluation/analysis
9.	The Commission received a complaint forwarded by ODPP alleging a fraudulent IEBC interview process for the position of Director Voter Education.	Undergoing evaluation/analysis
10.	Allegations that IEBC used only one pick-up Reg. KBR107 G from Kampala International University to carry out voter verification exercise but records were fraudulently altered to read 4 vehicles.	Undergoing evaluation/analysis
11.	<p>Allegations that the IEBC Coordinator of Uriri Constituency in Migori County has been making payment to police officers for security services not rendered.</p> <p><b>IEBC Staff Mentioned:-</b></p> <ul style="list-style-type: none"> <li>• Jackton Nyonje</li> </ul>	Undergoing evaluation/analysis
12.	<p>Allegations that the IEBC Constituency Election coordinator In charge of Kieni Constituency embezzled funds meant for facilitation of voter registration. It is also alleged that he contracted his own transport company to offer transport services in a few areas within the constituency. He further allegedly influenced the awarding of transport services contract to another company owned by his wife and brother in-law.</p> <p><b>IEBC Staff Mentioned:-</b></p> <ul style="list-style-type: none"> <li>• William Ndungu</li> </ul>	Undergoing evaluation/analysis

13.	<p>Allegation that IEBC cleared a candidate to vie for the Lamu County Women Representative seat despite having dual citizenship. The letter was signed by IEBC's Director of Legal &amp; Public Affairs.</p> <p><b><i>IEBC Staff Mentioned:-</i></b></p> <ul style="list-style-type: none"> <li>• Praxedes C. Tororey</li> </ul>	Undergoing evaluation/analysis
14.	<p>Allegations of corruption in the award of tender by IEBC during the IEBC/Supply Branch Tender number SB/5/2012 – 2013. It alleged that the IEBC official in charge of the tender has accumulated unexplained wealth received through corruption proceeds.</p> <p><b><i>IEBC Staff Mentioned:-</i></b></p> <ul style="list-style-type: none"> <li>• Gabriel Mutunga</li> </ul>	Undergoing evaluation/analysis

## 2.5 Table 5: Cases Referred to other Agencies

S/No	Case Summary	Status
<p>1.</p> <p><i>Over Rating really contradiction</i></p>	<p>It is reported that Kajiado IEBC returning officer accepted the nomination papers of Josiah Taraya Kipkelian Kores in total disregard of the fact that he is not eligible to vie for the seat of the Governor as he does not have a valid degree certificate. The candidate is reported to hold a Bachelor's degree in Business Administration (BBA) obtained in 2010 from the Universidad Empresarial de Costa Rica.</p>	<p>This was a matter touching on the suitability of a candidate aspiring for the seat of governor and as such it was referred to IEBC which had the mandate under the Elections Act.</p>
<p>2.</p>	<p>A report that IEBC has been paying voter educators Kshs 1500 per day yet records in their offices and the information given to UNDP show that they are receiving Kshs 2500/- each per day. The complainant alleges that there are officials at IEBC pocketing Kshs 1000/- per day from each voter educator.</p>	<p>Referred to IEBC for administrative action. Under Section 5 of the Leadership and Integrity Act and Section 11(3) of the EACC Act the Commission is vested with the power to make such referrals to other agencies.</p>

### **3.0 THEMATIC AREA 2**

**Recommendations on the legal mechanisms or the vacation from office of the current Commissioners of IEBC and the Secretariat in a manner that does not violate the Constitution based on the findings in of (i) above;**

EACC is a creature of the COK and the Ethics and Anti-Corruption Commission Act. As such, EACC is bound to abide by COK and other laws in its operations and whenever requested to provide an advisory opinion.

In this regard EACC recognizes that IEBC is a constitutional Commission under Chapter 15 of COK. EACC accordingly is of the considered view that the removal of the Commissioners of the IEBC should be guided by the provisions of Article 251 of COK.

COK provides at Article 251:

*“(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—*

*(a) Serious violation of this Constitution or any other law, including a contravention of Chapter Six;*

*(b) Gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;*

*(c) Physical or mental incapacity to perform the functions of office;*

*(d) Incompetence; or*

*(e) Bankruptcy.*

*(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.*

*(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the president*

*(4) On receiving a petition under clause (3), the President—(a) may suspend the member or office holder pending the outcome of the complaint; and (b) shall appoint a tribunal in accordance with clause (5).*

*(5) The tribunal shall consist of—*

*(a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;*

*(b) at least two persons who are qualified to be appointed as High Court judges; and*

*(c) one other member who is qualified to assess the facts in respect of the particular ground for removal.*

*(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days”.*

As regards the Secretariat, there are allegations touching on some of the staff members of IEBC. EACC has, in cases where it has concluded investigations, made appropriate recommendations to the Office of the Director of Public Prosecutions for advice. This is in line with the provisions of Sections 35 of Anti-Corruption and Economic Crimes Act and 11 (1) (d) of the Ethics and Anti-Corruption Commission Act.

EACC notes that ODPP has accepted some of the recommendations to prosecute IEBC officials in terms of CR. 141/501/2013-ACC 16/2013(EVID) and CR. 141/520/3013-ACC 19/2013(Solar Lanterns) which are pending in court. This background therefore justifies the need for a mechanism to deal with integrity issues at the secretariat level as a way of restoring public confidence in the institution.

### **3.1 EACC EXPERIENCES.**

Frequent removal of Commissioners has the potential to destabilize institutions, loss of institutional memory and reduces efficiency and effectiveness in operations, negatively affects staff morale, possibility of legal challenges to some of the actions of the institution.



### ***Recommendations***

- 1. Having considered the allegations of corruption as captured in Thematic Area 1 EACC notes that there was no evidence obtained to support allegations raised against some of the Commissioners currently in office. As such the EACC has no tangible evidence upon which to recommend the removal of the Commissioners in accordance with the provisions of Article 251(1) (a-e) of COK (above).*
- 2. The establishment of rigorous internal disciplinary processes for staff found culpable of corruption and unethical conduct. Serious violations should be subjected to criminal proceedings.*

## **4.0 THEMATIC AREA 3**

### **Composition, Appointment, Terms of Service and Removal of IEBC Commissioners and Secretariat.**

The IEBC is established under Article 88 of the Constitution and is expressly recognized as one of the Constitutional Commissions in Article 248; therefore expressly subject to the provisions under Chapter Fifteen of the Constitution. This Chapter provides for the composition, manner of appointment, terms of service and removal from office of the Commissioners.

In terms of composition, it comprises of nine commissioners under an Executive Chairman; and a Secretariat headed by the Chief Electoral Officer (CEO) which manages the day to day running of the Commission. The Commissioners serve on full time basis.

The role of the Commissioners is to oversee the electoral process, which duties are not day to day operations but are more of policy directions. The magnitude of this mandate would in our view be adequately executed by a Commission of three to five members.

The issues that require consideration in this respect are-

1. In respect of the Commissioners, what is the optimum number that would-
  - Ensure efficiency and effectiveness in the discharge of its mandate?
  - Provide effective oversight over all the functions of the Commission?
  - Ensure effective representation of all interests in the country?
  - Not be burdensome to the taxpayer?
- 2 In respect of the Secretariat, what is the optimum number that would-
  - Ensure efficient and effective undertaking of all the technical, administrative and support functions of the organization?
  - Provide professional support in all the critical areas of operation?

On terms of service, including the process of removal for Commissioners and secretariat, the overriding consideration should be creating a balance between the need for appropriate security of tenure which is critical for ensuring and promoting

independence of the Commission and its staff; and the need for ensuring discipline, ethics and integrity from the staff.

### ***Recommendations***

1. *The IEBC should have a not more than five Commissioners.*
2. *Based on our experience we further recommend that Commissioners be engaged on a part time basis and their duties and obligations be clearly redefined.*
3. *An evaluation should be undertaken on the IEBC, with input from the Commissioners and staff of IEBC, by an appropriate expert to determine the appropriate/optimum staff levels through a detailed job analysis of the functions of the electoral body.*

#### **4.1 Additional Recommendations**

Parliament should ensure that the weight of the anti-corruption indicator under the Performance Contracting for MDAs is increased from the current 5% of the Total to 30% to facilitate more commitment by MDAs to mainstream anti-corruption measures

1. *EACC recommends that the IEBC to be under Performance Contracting.*
2. *EACC to do a general advisory on issues of corruption in Procurement in the electoral management system*
3. *IEBC should submit the annual procurement plan to EACC and thereafter submit quarterly reports of all Tenders/Contracts awarded providing information on the name of directors/proprietors, firms and the amount awarded*
4. *IEBC should set-up and operationalize structures and systems for corruption prevention which should include:-*
  - *Establishment of a Corruption Prevention Committee*
  - *Identification & training of LAOs*
  - *Conduct self CRA and submit to EACC*
  - *Train CPC members and undertake sensitization the Commissioners and Staff*

5. *In the long-term, a system review/examination of the Commission and election support system*

## **5.0 THEMATIC AREA 4**

### **Recommendations to strengthen legal policy and institutional framework so as to improve the electoral system and processes**

Article 88 of COK vests the overall mandate to conduct elections in Kenya with the Independent Electoral and Boundaries Commission (IEBC). Further the functions of the commission are laid out in Section 4 of IEBC Act, Act No. 9 of 2011. They include Registration of voters; maintenance & revision of voters registers; Direction and supervision of elections; Promotion of free and fair elections and voter education.

In order to improve the August 2017 elections and safeguard the integrity of future elections, specific institutional, policy and legal interventions are required. This is necessary in order to strengthen its capacity to execute the above roles. The interventions are listed below:

#### **5.1 TIMELY PROCUREMENTS FOR GENERAL ELECTIONS MATERIALS**

An area which IEBC should seriously consider is streamlining its procurement processes. Experience demonstrates that the electoral management body engages in what can be termed as “rushed” or “induced” or “emergency” procurements for essential items and equipment especially in the run up to an election. The reasons advanced for these rushed procurements have been on strict timelines and national/public interest. This has been clearly brought out in litigation arising out of procurements in the electoral process. The following is a synopsis of some of the decisions which are in the public domain.

##### **i) Public Procurement Administrative Review Board Review No. 59 of 2012 (consolidated with Reviews No. 61 and 62 of 2012). Avante International Technology Inc. & 2 Others Vs IEBC**

This review was instituted at the Public Procurement Administrative Review Board (PPARB) in relation to a tender for supply, delivery, installation, configuration, training, testing and commissioning of electronic voter identification devices (EVID) to be used for the 2013 general election. The PPARB analyzed the manner in which this

particular tender was handled, and came to the conclusion that it was fatally flawed. However, the Board had to deal with the thorny issue of whether to annul the same, bearing in mind that the elections were to be held only two months away. It therefore upheld the award, but expressed serious reservations on the process. It stated that-

*"It is clear to the Board that the Procuring Entity is acting with impunity and is waving the card of public interest as its defence in the various breaches of the procurement law. Although the Board in normal circumstances would have had no hesitation to annul this tender, to do so in this case will jeopardize the holding of the forthcoming general election"*

**ii) Public Procurement Administrative Review Board Review No. 69 of 2012.  
Konnexions Ltd Vs IEBC**

This dispute also arose out of a related tender for procurement of general election materials for the 2013 general election. In this case, however, the Board refused to indulge the IEBC despite the looming general election, on account of the seriousness of the flaws in the procurement for supply of Solar Lanterns. The Board stated as follows-

*"The Board has been accommodating the Procuring Entity recently, given the impending general elections and their sensitivity to the peace, security and international image to the country. However, in this case the Procuring Entity has completely stepped outside the norms expected of an institution which must not only be fair, but must also be seen to be so"*.

**iii) High Court Judicial Review No. 451 of 2012. Republic Vs PPARB and Others  
Ex-parte Avante International Technology Inc.**

This was a judicial review application filed to challenge the award of the tender by IEBC in the Avante case highlighted above. The applicant contended that, having found the procurement process to be flawed, the PPARB had no other alternative but to annul the tender process in its entirety. The High Court was also faced with the dilemma of whether to uphold the argument and grant the prayers. The Judge, while siding with prevailing public interest to refuse the orders, stated as follows-

*"I am in agreement with the Board that the Commission (IEBC) ought not to be allowed to create a crisis and rely on the same to justify illegalities and irregularities in the procurement process"*.

## **5.2 SHORTCOMINGS OF THE LEGAL FRAMEWORK**

Electoral laws are enacted to ensure free and fair election of representatives of the people. The Electoral process in Kenya is guided by the Constitution and other pieces of legislation namely; Elections Act, 2011, Political Parties Act, 2011 Election Campaign Financing Act, 2013 Leadership and Integrity Act, 2012 among others. Although the Constitution provides the basis of for the exercise of free and fair elections, facilitative legislation have inherent weaknesses that impact negatively on the electoral process and depart from the spirit of the Constitution. The following are some of the highlights of the weaknesses in the laws mentioned above.

### **5.2.1 The Elections Act, 2011**

The Election Act empowers the IEBC to receive nomination papers and declare candidates to stand for the Elections. One of the conditions is that any person aspiring for elective position should uphold moral and ethical standards. Section 46 of the Elections Act requires a person to submit to IEBC a self-declaration form provided for in the first schedule of the Leadership and Integrity Act, 2012. However, there is no provision for IEBC to vet and reject those candidates that have not met the moral and ethical requirements as set out under LIA.

To qualifications for election to State office, an aspirant must meet the requirements of Chapter Six of the Constitution. An Electoral Management Body (EMB) should determine compliance through verification and analysis of the self declaration forms. However, this is not done for various reasons including short timelines, lack of adequate capacity at IEBC and lack of legal framework for verification.

The Commission recommends that persons seeking elective offices should submit self declaration forms to EACC for analysis given that the Commission has an elaborate reports and case management system that stores data which can be used to determine the personal integrity of the individuals. The Commission occupies a central position in accessing useful information from other law enforcement agencies under the multi

agency forum platform that may be used to supplement any information that the Commission may hold.

EACC further recommends that the Leadership and Integrity Act (LIA) and the relevant electoral laws be amended to require candidates to seek and obtain integrity clearance from EACC as is the requirement for those seeking appointment to public office as provided in Section 12A of LIA.

### **5.2.2 Political Parties Act, 2011**

This Act gives effect to the constitutional provisions relating to political parties. The registration, regulation, and funding of political parties are provided for under Parts II and III of the Act. The Political Parties Act, regulates the conduct of political parties, the law does not place any responsibility on the part of political parties to ensure that their nominees comply with Chapter Six of the Constitution.

### **5.2.3 The Election Campaign Financing Act**

The law has provided for limits that an individual can contribute to the party for purposes of campaigns, there is no clear mechanism to check on the source of such contributions and auditing of party accounts. This role has been left to IEBC and the office of the Registrar of Political Parties (RPP) which lack capacity and resources to adequately carry out the mandate.

#### ***Recommendation***

*Strengthen the office of the Registrar of Political Parties to enable the office and IEBC to enforce the Election Campaign Financing Act.*

### **5.2.4 Codes of Conduct**

Codes of Conduct agreed between the parties are increasingly accepted in potentially tense situations as a practical basis for contributing to a peaceful election; in the long term, such codes may also help to develop confidence in the democratic process as a mechanism for implementing a representative government and effecting peaceful change. Despite the fact that parties sign codes of conduct, they are never enforced in



cases of breach. IEBC, RPP and the Political Parties Dispute Resolution Tribunal are supposed to enforce the same but the same is hardly done.

### ***Recommendation***

*Parties, IEBC and the Political Parties Dispute Resolution Tribunal to be empowered to effectively discharge their mandate of enforcing codes of conduct.*

#### **5.2.5 Voter Registration:**

Voter registration is the foundation and the absolute beginning point of the electoral cycle. A free and fair election is premised on transparent voter registration that seeks to promote universal suffrage. The Constitution of Kenya recognizes this by making it imperative that under Article 81 that the electoral system SHALL comply with “(d) universal suffrage based on the aspiration for fair representation and equality of vote;”

Article 82(1) requires that Parliament shall enact legislation to provide for “(c) the continuous registration of citizens as voters;” The Elections Act 2011 under Section 5(1) provides that registration of voters and revision of the register of voters under this Act shall be carried out at all times. Exceptions are provided for a short period during the general election or a by election. The reality is that this is not done.

The failure to conduct continuous voter registration adversely affects the electoral calendar, negatively impacts on perceptions as to whether elections are free and fair and provides an opportunity for electoral malpractices such as fraudulent transfer of voters and multiple registrations. Other potential risks with the voter register including inconsistent registration of names among others.

### ***Recommendations***

*The Commission therefore recommends that:*

- i) IEBC ensures continuous voter registration at the Regional, County and Sub county levels.*
- ii) Voter registers be continuously be made available for public verification.*

- iii) *Adequate, timely and continuous funding to IEBC to put in place the required infrastructure.*
- iv) *Establish online registration and verification of voters*
- v) *Implement a system that allows for registration of voters that is not tied to the polling station/area.*
- vi) *Integrate the voters card with national registration and KRA PIN for multiple validation*

### **5.2.6 VOTER EDUCATION**

The importance of voter education in the electoral process cannot be gainsaid. It is through voter education that voters are able to comprehend their important role in the electoral process and thus make informed choices. As such voter education should form an integral part of electoral process. Section 4(g) of the IEBC Act, No. 9 of 2011 mandates the IEBC to conduct voter education. While there is evidence of voter education by IEBC there is a need to scale up the efforts.

#### ***Recommendations***

*This can be done through:*

- *Anchoring the voter education within the National Civic Education Programme.*
- *Cascade the voter education programmes to the grass-roots.*
- *Entrench the voter education in the national education curriculum.*
- *Establish training partnerships with EACC, NCIC and other stakeholders.*

### **5.2.7 NOMINATION AND REGISTRATION OF CANDIDATES**

One of the biggest challenges faced by IEBC is the vetting of candidates at the electoral stage. This challenge is caused by the following factors:

1. Party hopping close to elections and thereby late submission of nomination papers
2. Submission of self-declaration documents to the IEBC rather than EACC

### ***Recommendations***

- *Amend to LIA to entrench mechanisms for vetting of persons seeking political leadership positions. The mechanisms should provide for vetting criteria for independent candidates and those nominated by political parties.*
- *Review the Political Parties Act (PPA) to require political parties to vet prospective candidates*
- *Develop appropriate frameworks that empower oversight bodies such as EACC to monitor the electoral process.*
- *Amend Section 13(1) of the Elections Act to have political parties nominate their candidates at least sixty 60 days to the Election.*
- *Amend Section 46 of the Elections Act to require candidates to submit a self-declaration form as prescribed in the First Schedule to the Leadership and Integrity Act to the EACC at least 45 days before the election.*
- *Amend the Election Act to require EACC, in consultation with other relevant bodies to conduct vetting and to provide IEBC with a report at least 30 days to the Election.*
- *Amend the Elections Act to bar candidates who have been found guilty of corruption and economic crimes and violation of the Elections Act or other relevant laws by a court of law from contesting the subsequent elections.*
- *Provide a procedure for the removal of elected officials who are found guilty of corruption and economic crimes and gross violation of Chapter Six of the Constitution, the Leadership and Integrity Act, the Elections Act, and any other legislation by a Court of law.*

### **5.2.8 CAMPAIGN MANAGEMENT**

- Strengthen intelligence capacity of law enforcement agencies to effectively deal with campaign malpractices
- Ensure security of interested party's especially vulnerable groups such as women, youth & Persons with Disabilities.

### 5.2.9 PUBLICITY AND MEDIA

The principle of equal access to the media is widely accepted in established democracies. Appropriate legal, policy, administrative and other mechanisms should be developed or strengthened to ensure political parties and candidates participating in elections are accorded fair and equitable terms of coverage; and time allocation by the media industry.

#### ***Recommendation***

*Media malpractices that may prejudice or give unfair advantage to some political parties or candidates should be prohibited and sanctions meted out against those who are in violation. This can be done through review of the regulatory framework for the media industry with a view to ensuring fairness and impartiality in the discharge of media business in relation to elections.*

### 5.2.10 USE OF ICT

Section 4(m) of IEBC Act, Act No. 9 of 2011 mandates the commission to ensure the use of appropriate technology and approaches in the performance of its functions. However this remains a challenge. The Commission needs to:

#### ***Recommendation***

- i) Implement an independent communication/inter-connectivity core infrastructure that primarily is used by the Commissions systems*
- ii) Provide redundancy with at least two (2) fail-over points of the ICT system*
- iii) Develop a centralized Integrated Voter Management and Voting system which can enable seamless transmission of real-time results from polling stations.*
- iv) Undertake comprehensive review of the ICT systems and its capability to manage the elections*
- v) Provide adequate measures to address vulnerabilities/viruses/malicious programmes from interfering with the system both at the node and the network level.*
- vi) IEBC to carryout ICT systems Audit*

*vii) Timely recruitment and training of polling clerks on use of the ICT systems and electronic devices used in the election*

### **5.2.11 VOTING PROCESS**

The balloting process is the most visible process in the entire electoral cycle. It is at this stage that most disputes arise. In order to ensure accountability and transparency in this critical process, it is therefore recommended as follows:

#### ***Recommendations:***

- *Ensure that all polling stations are accessible to all voters especially to vulnerable groups such as the elderly and Persons with Disabilities*
- *Provide a mechanism to accommodate various cultural limitations affecting the voting process*
- *Strictly enforce the relevant laws and regulations providing for various electoral offences and malpractices such as bribery of voters.*
- *Amend electoral laws to enhance the sanctions for electoral offences and malpractices*
- *Ensure seamless collaboration by all agencies involved in the electoral process including security agencies, election officials, observer groups, political parties and voters in order to ensure maximum security and safety during the voting process.*

### **5.2.12 TRANSMISSION AND DECLARATION OF ELECTION RESULTS**

Kenyans are today clamoring for transparency and accountability in the management of public affairs including administration of elections. Access to timely and accurate information is paramount to managing expectations in the electoral process. Increased access to technology and advanced ICT systems has a counter-productive effect if the information relayed is erroneous and inaccurate. Therefore, to ensure that the electorate gets verifiable, timely and accurate results, it is recommended that:

***Recommendations:***

- *IEBC ensures real-time tallying of votes*
- *Results are declared at the polling station and displayed in the tallying centre through a standard poster*
- *Ensure that the first level of declaration of results is at the polling stations*
- *Encrypt election data that is being transmitted over the ICT systems*

**5.2.13 ALLOCATION OF SPECIAL SEATS**

To ensure representation of all interests, the law provides for various special seats. In order to ensure electoral integrity at this stage EACC recommends that:

***Recommendations:***

- *Parties adhere to the provisions of the Elections Act relating to nomination of members for special seats.*
- *Nomination lists for special seats should be signed by at least three party officials and any subsequent amendments should be signed by the same three officials.*

**5.2.14 ELECTION OBSERVATION, MONITORING AND EVALUATION**

Under Section 4(h) of IEBC Act, 2011 the Commission is charged with the responsibility of facilitating the observation, monitoring and evaluation of elections;

***Recommendations:***

- *EACC staff to be accredited as election observers*
- *Build the capacity of election observers and other key actors in the election process through sensitization programmes.*
- *Ensure enforcement of sanctions provided in the law*
- *Implement a complaints reporting and feedback mechanism for the public and a toll-free hotline for the public during the campaign and elections period*
- *Put in place a Complaints register in all IEBC offices and publicize it's existence*

### 5.2.15 DISPUTE RESOLUTION (NOMINATION AND PETITIONS)

Disputes within and between political parties during the nomination process and determination of election results have in the past led to consequences such as the Post Election Violence of 2008. It is therefore necessary that dispute resolution mechanisms are strengthened. Some of the strategies that may be considered for implementation to ensure effective resolution of disputes include:

#### *Recommendations:*

- *Strengthening the dispute resolution mechanisms including the Political Parties Dispute Resolution Tribunal and the Office of the Registrar of Political Parties.*
- *Appoint a substantive Registrar of Political Parties.*
- *Proper storage of electoral material to ensure safety, integrity and preservation of all election records and information before, during and after the election.*

Dated at Nairobi this  
2016

28<sup>th</sup> July day of

*For. Stephen K. Kinisu*

PHILIP K. B. KINISU

CHAIRMAN



HALAKHE D. WAQO, ACI Arb

SECRETARY/CHIEF EXECUTIVE OFFICER

## **APPENDICES**

***APPENDIX 1: LETTER TO DIRECTOR OF PUBLIC PROSECUTION***

***APPENDIX 2: LETTER TO THE ATTORNEY GENERAL***

***APPENDIX 3: COPY OF THE INDICTMENT AT THE SOUTHWARK CROWN  
COURT***



***APPENDIX 1***  
***LETTER TO DIRECTOR OF PUBLIC***  
***PROSECUTION***





## ETHICS AND ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE (Valley Rd. / Jakaya Kikweté Rd. Junction) P.O. Box 61130 – 00200, NAIROBI, Kenya  
TEL.: 254 (020) 2717318 / 2720722, MOBILE: 0729 888881/2/3  
Fax: 254 (020) 2717473 Email: [eacc@integrity.go.ke](mailto:eacc@integrity.go.ke) Website: [www.eacc.go.ke](http://www.eacc.go.ke)

When replying please quote:

**Our Ref: EACC.6/27/2 VOL. X (162)**

**19<sup>th</sup> July 2016**

**Mr. Keriako Tobiko, CBS, S.Cc**  
Director of Public Prosecutions  
Office of the Director of Public Prosecutions  
NSSF Building, Block "A"  
P.O Box 30701-00100  
**NAIROBI**

Dear **Mr Tobiko,**

**RE: INQUIRY INTO ALLEGATIONS THAT NICHOLAS SMITH & CHRISTOPHER SMITH, THE DIRECTORS OF SMITH & OUZMAN LTD (S&O) A FIRM INCORPORATED IN THE UK, CORRUPTLY AGREED TO MAKE PAYMENTS AMOUNT TO APPROXIMATELY KSHS. 46 MILLION TO PUBLIC OFFICIALS AT THE THEN INTERIM INDEPENDENT ELECTROL COMMISSION (IIEC) THROUGH THEIR LOCAL AGENT TREVV OYOMBRA SO AS TO INFLUENCE AWARD OF PRINTING CONTRACTS TO THEIR FIM IN THE PERIOD RUNNING FROM MAY 2009 TO 31<sup>ST</sup> AUGUST, 2011.**

**EACC/FI/INQ/90/2014**

We enclose herewith a duplicate inquiry file together with our report and recommendations under Section 35 of the Anti-Corruption and Economic Crimes Act, 2003 as read with section 11.(1) (d) of the Ethics and Anti-Corruption Commission Act, 2011 for your consideration.

Yours

*Sincerely*

*Philip K. B. Kinisu*  
**PHILIP K. B. KINISU**  
**CHAIRMAN**

**HALAKHE D. WAQO, ACI Arb**  
**SECRETARY/CHIEF EXECUTIVE OFFICER**

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***APPENDIX 2***  
***LETTER TO THE ATTORNEY GENERAL***





## ETHICS AND ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE (Valley Rd. /Milimani Rd. Junction) P.O. Box 61130 -00200, NAIROBI, Kenya  
TEL.: 254 (020) 2717318/ 310722, MOBILE: 0729 888881/2/3  
Fax: 254 (020) 2719757 Email: eacc@integrity.go.ke Website: www.eacc.go.ke

When replying please quote:

Our Ref: EACC.6/25 VOL.IV (170)

Date: 25<sup>th</sup> July 2016

Hon. Prof. Githu Muigai, EGH, SC  
Attorney-General, Republic of Kenya  
State Law Office, Harambee Avenue  
P.O. Box 40112-00100  
**NAIROBI**



Dear *Hon Prof Muigai,*

**RE: REQUEST FOR INFORMATION BY THE JOINT PARLIAMENTARY SELECT COMMITTEE ON MATTERS RELATED TO THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

This is to inform you that EACC was summoned to appear before the Joint Parliamentary Select Committee on Matters Related to the Independent Electoral and Boundaries Commission (IEBC) on Wednesday 20<sup>th</sup> July, and subsequently on Monday 25<sup>th</sup> July 2016.

During our appearances, the Joint Parliamentary Committee requested the Commission to produce before it evidence acquired from the United Kingdom on the case touching on allegations of bribery against IEBC officials by the UK firm Smith & Ouzman ("Chickengate"). The Joint Chairs of the Committee stated that you informed the Committee that you received the evidence upon Mutual Legal Assistance (MLA) request submitted through your office as the Central Authority on the subject matter, and further, that you had no objection to the evidence being released to them as there were no legal implications or impediments to them accessing the evidence. It is on the strength of your aforesaid submissions that the Committee has insisted on release of the evidence to them.

We wish to urgently seek your advice on how to proceed with this request, taking into account the following-

1. We concluded investigations into the matter, and forwarded the investigation report to the Director of Public Prosecutions on 19<sup>th</sup> July 2016

in accordance with section 35 of the Anti-Corruption and Economic Crimes Act. Evidence received through the MLA is critical in this matter;


2. Disclosure of the evidence to another body at this stage will prejudice the rights of the suspects against whom we have recommended charges, and this may further prejudice any prosecution that may ensue should the DPP concur with our recommendations to charge;
3. Under Section 29(3) of the Ethics and Anti-Corruption Commission Act, the Commission is barred from giving information on a matter when it is at a deliberative stage;
4. When submitting the MLA request to the UK authorities, the Commission gave an undertaking (which is customary in all MLA requests) that any information and documents obtained pursuant to the request from the Competent Authority of the Government of the United Kingdom would only be used for purposes of the investigation by EACC, any prosecution arising out of the investigation and any connected criminal confiscation or civil recovery proceedings, full details whereof are well within your knowledge.
5. The Committee made reference to Article 35 of the Constitution on the right of access to information held by the state. However, the provision must be read alongside Article 31 in considering this matter, as the right to information is not absolute. The suspects are entitled to a fair investigation process and hearing, as further envisaged under Article 51.

The Commission is willing to share with the Committee all the evidence in its possession, however, these legal challenges must be addressed. Our investigation must fully respect the rights of the suspects.

We urgently require your advice on this issue, noting that we have been requested to furnish the information by Wednesday 27<sup>th</sup>, and appear again before the Joint Committee on Friday 29<sup>th</sup> July 2016.

Please treat this as most urgent.

Yours

*Sincerely*  


**HALAKHE D. WAQO, ACI Arb**  
**SECRETARY/CHIEF EXECUTIVE OFFICER**



**Copy to:**

**1. The Joint Chairs**

Joint Parliamentary Select Committee on  
Matters Relating to the Independent Electoral  
and Boundaries Commission (IEBC)

Parliament Buildings

P. O. Box 41842 - 00100

**NAIROBI.**

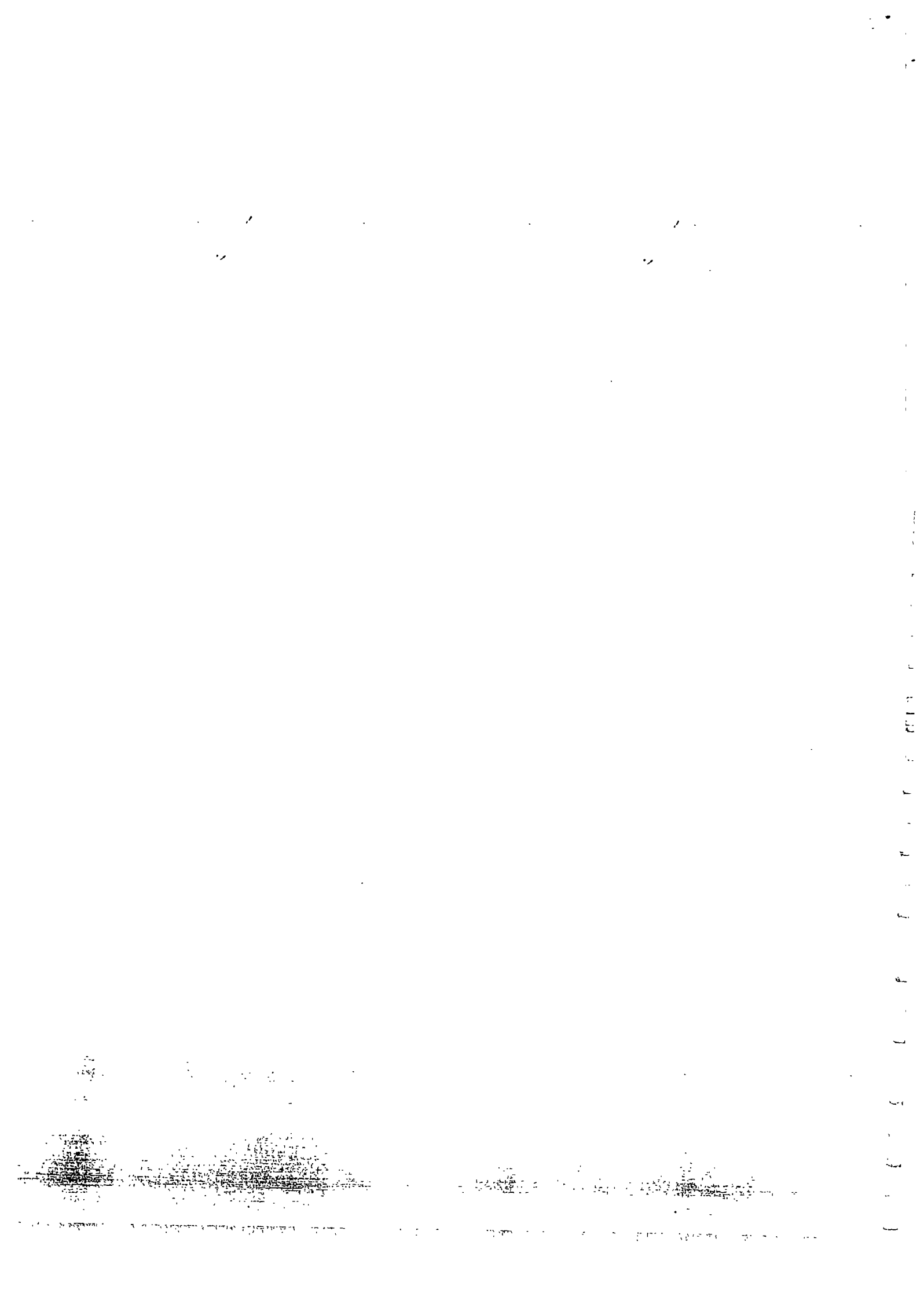
**2. Keriako Tobiko, CBS, S.C**

Director of Public Prosecutions

NSSF Building, Block A

P. O. Box 30701-00100

**NAIROBI**



***APPENDIX 3***  
***COPY OF THE INDICTMENT AT THE***  
***SOUTHWARK CROWN COURT***

THE QUEEN

- v -

CHRISTOPHER SMITH  
NICHOLAS SMITH  
TIMOTHY FORRESTER  
ABDIRAHMAN MOHAMED OMAR  
SMITH AND OUZMAN LIMITED

CHRISTOPHER SMITH, NICHOLAS SMITH, TIMOTHY FORRESTER, ABDIRAHMAN MOHAMED OMAR and SMITH AND OUZMAN LIMITED are charged with the following offences:

COUNT 1

**STATEMENT OF OFFENCE**

Corruptly agreeing to make payments, contrary to section 1(1) of the Prevention of Corruption Act 1906.

**PARTICULARS OF OFFENCE**

CHRISTOPHER SMITH, NICHOLAS SMITH and SMITH & OUZMAN LIMITED between the 1<sup>st</sup> October 2008 and the 31<sup>st</sup> December 2010, with Trevy James Oyombra, corruptly agreed to make payments to officials employed at the **Interim Independent Electoral Commission** of Kenya, as an inducement or reward for showing favour to Smith & Ouzman Limited in relation to the award of and payment for contracts to print materials for the Interim Independent Electoral Commission of Kenya.

## COUNT 2

### STATEMENT OF OFFENCE

Corruptly agreeing to make payments, contrary to section 1(1) of the Prevention of Corruption Act 1906.

### PARTICULARS OF OFFENCE

CHRISTOPHER SMITH, NICHOLAS SMITH and SMITH & OUZMAN LIMITED between the 1<sup>st</sup> October 2008 and the 30<sup>th</sup> November 2010, with Trevy James Oyombra, corruptly agreed to make payments to officials employed at the **Kenya National Examinations Council** in Kenya, as an inducement or reward for showing favour to Smith & Ouzman Limited in relation to the award of and payment for contracts to print materials for the Kenya National Examinations Council.

## COUNT 3

### STATEMENT OF OFFENCE

Corruptly agreeing to make payments, contrary to section 1(1) of the Prevention of Corruption Act 1906.

### PARTICULARS OF OFFENCE

CHRISTOPHER SMITH, NICHOLAS SMITH, TIMOTHY FORRESTER and SMITH & OUZMAN LIMITED between the 1<sup>st</sup> June 2008 and the 30<sup>th</sup> September 2009, with Ebenezer William Amarteifo and Elliot Agyare, corruptly agreed to make payments to officials employed at the **West African Examinations Council** in Ghana, as an inducement or reward for showing favour to Smith & Ouzman Limited in relation to the award of and payment for contracts to print materials for the West African Examinations Council.

## STATEMENT OF OFFENCE

Corruptly agreeing to make payments, contrary to section 1(1) of the Prevention of Corruption Act 1906.

### PARTICULARS OF OFFENCE

NICHOLAS SMITH, TIMOTHY FORRESTER and SMITH & OUZMAN LIMITED between the 1<sup>st</sup> November 2006 and the 31<sup>st</sup> July 2010, with Karim Reaich, corruptly agreed to make payments to officials employed at the **Ministry of the Interior** of Mauritania, including Mohamed El Hady Macina, as an inducement or reward for showing favour to Smith & Ouzman Limited in relation to the award of and payment for contracts to print election materials for the Mauritanian Ministry of the Interior.

COUNT 5

## STATEMENT OF OFFENCE

Corruptly agreeing to make payments, contrary to section 1(1) of the Prevention of Corruption Act 1906.

### PARTICULARS OF OFFENCE

NICHOLAS SMITH, TIMOTHY FORRESTER, ABDIRAHMAN MOHAMED OMAR and SMITH & OUZMAN LIMITED between the 1<sup>st</sup> December 2007 and the 30<sup>th</sup> September 2010, corruptly agreed to make payments to officials employed at the **National Electoral Commission** in Somaliland, as an inducement or reward for showing favour to Smith & Ouzman Limited in relation to the award of and payment for contracts to print materials for the National Electoral Commission of Somaliland.

.....  
Officer of the Court

- SAFRAN MORPHO a french Company  
got through US Canadian subsidiary

- Export CREDIT OR G-G - procedures

- BVR KITS

- Centralized AFIS

- SOLAR KITS

- Sufficient -

- secretariat - charged in court

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