



**COUNTRY  
COMPARATIVE  
GUIDES 2023**

# **The Legal 500 Country Comparative Guides**

## **Kenya**

### **BRIBERY & CORRUPTION**

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This country-specific Q&A provides an overview of bribery & corruption laws and regulations applicable in Kenya.

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## KENYA

# BRIBERY & CORRUPTION



### 1. What is the legal framework (legislation/regulations) governing bribery and corruption in your jurisdiction?

Kenya has a robust legal framework to govern bribery and corruption, the foundation being the Constitution of Kenya (2010). The Constitution binds all persons including State Organs and public to uphold national values which include good governance, integrity, transparency and accountability.<sup>1</sup>

Other pieces of legislation governing bribery and corruption are:

1. The Bribery Act 2016
2. The Penal Code, Cap 63
3. Anti-Corruption and Economic Crimes Act, 2003; There is an Anti-Corruption and Economic Crimes (Amendment) Bill, 2021
4. The Proceeds of Crime and Anti-Money Laundering Act, 2009
5. The Access to Information Act, 2016

There is a higher threshold set for public officers and state organs as they are also governed by:

1. The Public Officer Ethics Act, 2003
2. The Public Finance Management Act, 2012
3. The Leadership and Integrity Act, 2012
4. Election and Campaign Financing Act, 2013
5. The Public Procurement and Disposals Act, 2015
6. The Public Service Commission Act, 2017

Footnotes:

- 1 . Article 10 of the Constitution, 2010

### 2. Which authorities have jurisdiction to investigate and prosecute bribery in your jurisdiction?

The main authorities responsible for investigating bribery are the Ethics and Anti-Corruption Commission

(EACC), The Office of the Director of Public Prosecutions (ODPP) and the High Court. Other agencies such as the Asset Recovery Agency (ARA) also play a role in investigating and recovering proceeds of crime.

### 3. How is 'bribery' (or its equivalent) defined?

Bribery is defined under Part II of the Bribery Act 2016. The definition is split into giving a bribe and receiving a bribe.

#### 5. Giving a Bribe

1. A person commits the offence of giving a bribe if the person offers, promises or gives a financial or other advantage to another person, who knows or believes the acceptance of the financial or other advantage would itself constitute the improper performance of the relevant function or activity."
2. It does not matter that whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned, or whether the advantage is offered, promised or given by a person directly or through a third party.

#### 6. Receiving a bribe

(1) A person commits the offence of receiving a bribe if

—

1. the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person;
2. the recipient of the bribe requests

- for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.
3. in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence."

#### 4. Does the law distinguish between bribery of a public official and bribery of private persons? If so, how is 'public official' defined? Are there different definitions for bribery of a public official and bribery of a private person?

No, the Bribery does not distinguish between bribery of a public official and bribery of a private person. The Bribery Act construes any function or activity that relates to bribery to include:<sup>2</sup>

1. any function of a public nature;
2. any function carried out by a state officer or public officer, pursuant to his or her duties;
3. any function carried out by a foreign public official, pursuant to his or her duties;
4. any activity connected with a business;
5. any activity performed in the course of a person's employment, and
6. any activity performed by or on behalf of a body of persons whether corporate or otherwise;

(b) it meets one or more of the following conditions —

1. that the person performing the function or activity is expected to perform it in good faith;
2. that the person performing the function or activity is expected to perform it impartially; and
3. that the person performing the function or activity is in a position of trust by virtue of performing it.

The Public Officer and Ethics Act (POEA) applies only to public officials.

The POEA defines a public official as any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following<sup>3</sup>—

1. the Government or any department, service or undertaking of the Government;
2. the National Assembly or the Parliamentary Service;
3. a local authority;
4. any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;
5. a co-operative society established under the Co-operative Societies Act (No. 12 of 1997);
6. a public university.

Footnotes:

2. Section 7 of the Bribery Act

3. Section 2 of the POEA

#### 5. What are the civil consequences of bribery in your jurisdiction?

The penalties for a bribery conviction are set out in the Bribery Act as follows:

An individual found guilty of a bribery offence they may be liable to a fine of up to KES 5,000,000. The individual may also be liable to an additional mandatory fine if the person received a quantifiable benefit or any other person suffered a quantifiable loss. The mandatory fine shall be equal to five times the amount of benefit or loss<sup>4</sup>.

The court may order confiscation of property.<sup>5</sup>

If the convicted person is a state officer or public officer, such person shall be barred from holding public office.<sup>6</sup>

If the convicted person is a director of a company, such person shall be disqualified from holding the position of director in that company or any other company in Kenya for a period of 10 years.<sup>7</sup>

If the person convicted is a partner in a firm, such person shall be disqualified from serving as a partner in that or any other firm in Kenya for 10 years.<sup>8</sup>

A person convicted for an offense involving bribery shall be disqualified from being elected or appointed to hold a state office or a public office for a period of 10 years after conviction.<sup>9</sup>

A person other than a natural person, convicted of bribery shall be disqualified from transacting business with the national or county government for a period of 0 years after conviction.<sup>10</sup>

Footnotes:

4. Bribery Act, Section 18
5. Bribery Act, Section 18 (7)
6. Bribery Act, Section 18 (8)
7. Bribery Act, Section 18 (9)
8. Bribery Act, Section 18 (10)
9. Bribery Act, Section 18 (11)
10. Bribery Act, Section 18 (12)

## 6. What are the criminal consequences of bribery in your jurisdiction?

A person convicted of a bribery offence is liable to imprisonment for a term not exceeding ten years and/ or a be liable to pay a fine of up to KES 5,000,000.<sup>11</sup>

Footnotes:

11. Bribery Act, Section 18 (1) (a)

## 7. Does the law place any restrictions on hospitality, travel and entertainment expenses? Are there specific regulations restricting such expenses for foreign public officials? Are there specific monetary limits?

There are no specific regulations restricting hospitality, travel and entertainment expenses for either local and foreign public officials.

However, the law places restrictions on hospitality, travel and entertainment under the POEA. The POEA provides a Code of Conduct and Ethics for judicial service officers, Kenya-Anti Corruption Commission staff, the Controller and Auditor General, Commissioners of the Teachers Service Commission and the members, officers and employees of Public Universities. The above-mentioned

persons are not allowed to accept gifts of monetary value or non-monetary gifts or benefits such as hospitality from any person that may have an interest that may be affected by their official duties. In particular, the maximum value that a non-monetary gift to a public officer may have without it being deemed a gift to the public officer's organisation is Kenya Shillings 20,000/-<sup>12</sup>.

Footnotes:

12. The Public Officer Ethics Regulations 2003, Regulation

## 8. Are political contributions regulated? If so, please provide details.

Yes, political contributions in Kenya are regulated under the Election Campaigning Finance Act, 2013 (ECFA). The Independent Electoral and Boundaries Commission makes rules to regulate election campaign financing at least 12 months to the election. The ECFA provides that no contribution from a single source shall exceed 20% of the total contributions received, except where the contribution is from a candidate's campaign financing account, from a political party or a referendum committee's campaign financing account.<sup>13</sup>

Anonymous contributions and contributions from an illegal source are not allowed.<sup>14</sup> Political Contributions or donations in cash or kind from the state, any state institution or agency or any public resource are also prohibited.<sup>15</sup> Additionally, a candidate or political party who receives a contribution is required issue a receipt for any contribution exceeding KES 20,000.<sup>16</sup>

Footnotes:

13. Section 12(2) of the Election Campaign Finance Act
14. Section 13 of the Election Campaign Finance Act
15. Section 14 of the Election Campaign Finance Act
16. Section 16 of the Election Campaign Finance Act

## 9. Are facilitation payments regulated? If not, what is the general approach to such payments?

Yes, facilitation payments are regulated and they are considered a bribe. The Bribery Act of 2016 defines an advantage to include, "any facilitation payment made to expedite or secure performance by another person".<sup>17</sup>

Footnotes:

17. Section 2(f), Bribery Act No. 47 of 2016

## 10. Are there any defences available to the bribery and corruption offences in your jurisdiction?

Entrapment is an absolute defence in bribery cases where an accused person can prove the same (this is where an investigation officer leads a suspect to incriminate himself or do something with a goal of arresting them for the act)

In Mohammed Koriow Nur -vs- The Attorney General [2011] eKLR the Court stated that:

"...entrapment is a complete defence and it does not matter that the evidence against the person is overwhelming or that his guilt was undisputed. The court must refuse to convict an entrapped person not because his conduct falls outside the proscription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of the State to bring about the evidence cannot be countenanced."<sup>18</sup>

Footnotes:

18. Mohammed Koriow Nur -vs- The Attorney General [2011] eKLR

## 11. Are compliance programs a mitigating factor to reduce/eliminate liability for bribery offences in your jurisdiction?

No, compliance programs are not a mitigating factor to reduce/ eliminate liability for bribery offence. However, the Bribery Act places an obligation on every organisation whether private or public to develop anti-bribery programs which shall be written.<sup>19</sup>

The guiding principles when developing a compliance program include:<sup>20</sup>

Bribery and corruption risk assessment and management of the entity;<sup>21</sup>

The entity's communication and training processes;<sup>22</sup>

The entity's internal mechanisms for reporting acts of bribery and corruption;<sup>23</sup>

The entity's mechanisms for the protection of whistle blowers, informants and witnesses;<sup>24</sup> and

The entity's compliance, monitoring and review mechanism<sup>25</sup>

Footnotes:

19. Section 9 of the Bribery Act

20. The Bribery Regulation 2022

21. Section 13, Bribery Regulation

22. Section 13, Bribery Regulation

23. Section 13, Bribery Regulation

24. Section 13, Bribery Regulation

25. Section 13, Bribery Regulation

## 12. Who may be held liable for bribery? Only individuals, or also corporate entities?

Under the Bribery Act both individuals and corporate entities can be held liable for their bribery and corruption acts.

For individuals the law provides that a person commits the offence of giving a bribe if the person offers, promises or gives a financial or other advantage to another person, who knows or believes the acceptance of the financial or other advantage would itself constitute the improper performance of a relevant function or activity.<sup>26</sup> The penalty for a person found guilty of bribery is imprisonment for a term not exceeding ten years, or to a fine not exceeding five million shillings, or both.<sup>27</sup> Additionally, a person may be liable to an additional mandatory fine if, as a result of the conduct constituting the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.<sup>28</sup> The law provides that the mandatory fine shall be equal to five times the amount of the benefit or loss and if the conduct that constituted the offence resulted in both a benefit and loss it shall be equal to five times the sum of the amount of the benefit and the amount of the loss.<sup>29</sup> A person who is convicted of an offence involving bribery shall be disqualified from being elected or appointed to hold a state office or a public office for a period of not more than ten years after conviction.<sup>30</sup>

The Bribery Act defines a private entity to include a body which is incorporated under the laws of Kenya and which carries on business within or outside Kenya and any other body corporate however established which carries on business, or part of business, in Kenya.<sup>31</sup> Where a director or senior officer of a private entity knowingly assists a person or a private entity to give or receive a bribe such private entity shall be deemed to have committed the offence.<sup>32</sup> Additionally, for bribery by a

private entity or a partnership, it must be proved that the offence was committed with the consent or the connivance of a senior officer of the private entity or the partnership or a person acting in that capacity.<sup>33</sup> A private entity found guilty of bribery liable to a fine or imprisonment. The court may order the convicted person or private entity, or in appropriate cases, a public body, to pay back the amount or value of any advantage received by him to the Government.<sup>34</sup> The court may order the confiscation of any property acquired as a result of the advantage received by the convicted person or private entity.<sup>35</sup> If the convicted person is a director of a company, such person shall be disqualified from holding the position of director in that or any other company in Kenya for a period of not more than ten years.<sup>36</sup>

Footnotes:

- 26. Section 5, Bribery Act of Kenya
- 27. Section 18(1a), Bribery Act of Kenya
- 28. Section 18(1b), Bribery Act of Kenya
- 29. Section 18(2), Bribery Act of Kenya
- 30. Section 18(11), Bribery Act of Kenya
- 31. Section 2, Bribery Act of Kenya
- 32. Section 13, Bribery Act of Kenya
- 33. Section 16, Bribery Act of Kenya
- 34. Section 18(6), Bribery Act of Kenya
- 35. Section 18(7), Bribery Act of Kenya
- 36. Section 18(9), Bribery Act of Kenya

### **13. Has the government published any guidance advising how to comply with anti-corruption and bribery laws in your jurisdiction?**

Yes, on the 7<sup>th</sup> of October 2021 the Government issued the 'Guidelines to Assist Public and Private Entities in the Preparation of Procedures for the Prevention of Bribery and Corruption.'<sup>37</sup> The guidelines were issued pursuant to the Bribery Act which mandates the Attorney General in consultation with the Ethics and Anti-Corruption Commission to publish guidelines to assist private and public entities in the preparation of procedures required to combat bribery.<sup>38</sup>

Footnotes:

- 37. [http://kenyalaw.org/kenya\\_gazette/gazette/volume/MjQ3MQ-/](http://kenyalaw.org/kenya_gazette/gazette/volume/MjQ3MQ-/) Vol.CXXIII-No.215/ Vol. CXXIII—No. 215 NAIROBI, 22nd October, 2021 Kenya Gazette.

38. Section 12 (1) of the Bribery Act

### **14. Does the law in your jurisdiction provide protection to whistle-blowers?**

Yes, the law provides protection to whistle blowers. The Bribery Act provides the following protections:

A whistle blower, informant or a witness in a complaint or a case of bribery shall not be intimidated or harassed for providing information to law enforcement institutions or giving testimony in a court of law.<sup>39</sup>

A person who demotes, admonishes, dismisses from employment, transfers to unfavourable working areas or otherwise harasses and intimidates a whistle blower or a witness shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both.<sup>40</sup>

A whistle blower or a witness shall be entitled to protection of such extent as may be determined by the Witness Protection Agency.<sup>41</sup>

Every law enforcement agency shall put in place reasonable mechanisms to protect the identity of informants and witnesses.<sup>42</sup>

Any person who knowingly or negligently discloses the information of informants and witnesses and a result of which those informants are harassed or intimidated commits an offence and shall be liable upon conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both.<sup>43</sup>

Additionally, the Anti-Corruption and Economic Crimes Act provides whistle blower protections against retaliatory actions by their employers as follows: -

No action or proceeding, including a disciplinary action, may be instituted or maintained against a person in respect of—

- (a) assistance given by the person to the Commission or an investigator;<sup>44</sup> or
- (b) a disclosure of information made by the person to the



Commission or an investigator.<sup>45</sup>

Subsection (1) does not apply with respect to a statement made by a person who did not believe it to be true.<sup>46</sup>

In a prosecution for corruption or economic crime or a proceeding under this Act, no witness shall be required to identify, or provide information that might lead to the identification of, a person who assisted or disclosed information to the Commission or an investigator.<sup>47</sup>

In a prosecution for corruption or economic crime or a proceeding under this Act, the Court shall ensure that information that identifies or might lead to the identification of a person who assisted or disclosed information to the Commission or an investigator is removed or concealed from any documents to be produced or inspected in connection with the proceeding.<sup>48</sup>

Footnotes: 39 Section 21(1) of the Bribery Act 40 Section 21 (2) of the Bribery Act 41 Section 21 (3) of the Bribery Act 42 Section 21 (4) of the Bribery Act 43 Section 21 (5) of the Bribery Act 44 Section 65, Anti-Corruption and Economic Crimes Act 45 Section 65, Anti- Corruption and Economic Crimes Act 46 Section 65, Anti- Corruption and Economic Crimes Act 47 Section 65, Anti- Corruption and Economic Crimes Act 48 Section 65, Anti- Corruption and Economic Crimes Act

### **15. How common are government authority investigations into allegations of bribery? How effective are they in leading to prosecutions of individuals and corporates?**

The EACC undertakes investigations of numerous allegations of bribery and makes recommendation to the ODPP for prosecution. A report from the EACC shows that we have achieved 293 convictions between 2003- 2019, which is relatively low.<sup>49</sup> However, the prosecution of bribery offences in the private sector is quite low.

Footnotes:

49. <https://eacc.go.ke/default/wp-content/uploads/2019/12/Convictions-since-2003.pdf>

### **16. What are the recent and emerging trends in investigations and enforcement in your jurisdiction? Has the Covid-19**

### **pandemic had any ongoing impact and, if so, what?**

The COVID-19 Pandemic temporarily slowed down the pace of investigations and prosecution of cases in general not only bribery and corruption cases.

### **17. Is there a process of judicial review for challenging government authority action and decisions? If so, please describe key features of this process and remedy.**

Yes, government authority actions and decisions are subject to judicial review. The law provides that a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.<sup>50</sup>

An administrative decision is flawed if it is:

illegal<sup>51</sup>

irrational<sup>52</sup>

procedural impropriety<sup>53</sup>

The remedies available for a judicial review process are:

An order of Certiorari

An order of Mandamus

An order of Prohibition<sup>54</sup>

Footnotes:

50. Section 9 of the Fair Administrative Act

51. Article 47, Constitution of Kenya 2010

52. Article 47, Constitution of Kenya 2010

53. Article 47, Constitution of Kenya 2010

54. Part VI, Section 8, Law Reform Act, Cap 26

### **18. Are there any planned developments or reforms of bribery and anti-corruption laws in your jurisdiction?**

Yes, there has been a push to amend the legislation with the intention of increasing private sector prosecutions. Additionally, proposals have been made to amend some provisions of the Anti-Corruption and Economic Crimes

Act 2003 to effectively combat corruption and economic crimes in the modern day. There is also a move to introduce penalties in the Leadership and Integrity Act.

## **19. To which international anti-corruption conventions is your country party?**

Kenya is a party to the following conventions:

1. The United Nations Convention Against Corruption, ratified on 9<sup>th</sup> December 2003.
2. The United Nations Convention against Transnational Organised Crime, ratified on 5<sup>th</sup> January 2005.
3. The African Union Convention on Preventing and Combating Corruption which was ratified on 3<sup>rd</sup> February 2007.

Kenya is also a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

## **20. Do you have a concept of legal privilege in your jurisdiction which applies to lawyer-led investigations? If so, please provide details on the extent of that protection.**

The legal framework does not encompass the concept of lawyer-led investigations. However, legal privilege is recognised in Kenya under the Evidence Act which provides that communications between a lawyer and their client are privileged.<sup>55</sup> Nevertheless, client-advocate privilege is not protected in the case of an act or omission that amounts to illegality, fraud, or when a crime is committed or suspected to have been committed.

Footnotes:

55. Section 134 of the Evidence Act, Cap 80

## **21. How much importance does your government place on tackling bribery and corruption? How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?**

Bribery and Corruption cases are rampant in Kenya and every political regime has been vocal in its efforts to fight corruption, enforce the anti-bribery and anti-corruption law and show its commitment to strengthen

its institutions to fight corruption. However, in as much as the legal framework is robust and the enforcement agencies have been empowered, there is laxity in enforcement of these laws and corruption is at an all-time high. For example, the prosecution of corruption cases is slow-paced and often times the cases are withdrawn before a verdict is reached.

How do you think your jurisdiction's approach to anti-bribery and corruption compares on an international scale?

In terms of enforcement and prosecution, Kenya is still lagging behind in its war against bribery and corruption and enforcement of its laws.

## **22. Generally how serious are organisations in your country about preventing bribery and corruption?**

There is still a lot of work to be done to prevent bribery and corruption in both the private and public sectors. However, the EACC is committed to preventing bribery and corruption. In 2018 the EACC launched the National Integrity Academy which provides specialized ethics, integrity, Leadership, Good Governance and Anti-Corruption training to both the public and private sector institutions in the country and the region.

## **23. What are the biggest challenges enforcement agencies/regulators face when investigating and prosecuting cases of bribery and corruption in your jurisdiction?**

The biggest challenge is slow prosecution of cases and government interference especially in high value cases involving politicians.

## **24. What are the biggest challenges businesses face when investigating bribery and corruption issues?**

Despite the law providing protections to whistleblowers and witnesses, one of the biggest challenges in investigation is lack of cooperation from individuals/witnesses for fear of victimisation and retaliation.

## **25. What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction**



### over the next 18 months?

Timely prosecution of cases and enforcement of laws.

### 26. How would you improve the legal framework and process for preventing, investigating and prosecuting cases of

### bribery and corruption?

At the moment, the legal framework is robust and requires little to no improvements, however, there should be more focus on training institutions to combat and prevent corruption. More resources should also be allocated to the Judiciary which would enable timely prosecution of cases.

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