The Legal 500 Country Comparative Guides

Kenya: Bribery & Corruption

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

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

Article 10 of the Constitution of Kenya (2010), which is the supreme law of the Republic, provides for Kenya’s national values and principles of governance which binds all State organs, State officers, public offices and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or make or implement public policy decisions. The national values and principles of governance include; good governance, integrity, transparency and accountability.

There are various legislations governing bribery and corruption in Kenya. These include; the Anti-Corruption and Economic Crimes Act, the Ethics and Anti-Corruption Commission Act, the Public Procurement and Disposals Act, the Penal Code, the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, the Leadership and Integrity Act as well as the most recent one being the Bribery Act. The Bribery Act governs the prevention, investigation and punishment of bribery.

Pursuant to Article 2 (5) and 2(6) of the Constitution, the general rules of international law form part of the laws of Kenya and any treaty or convention ratified by Kenya forms parts of the laws of Kenya. These conventions including the United Nations Convention against Corruption and the International Code of Conduct for Public Officials which Kenya has ratified form part of the domestic law in Kenya.

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

The Ethics and Anti-Corruption Commission (EACC) which is established under the Ethics and Anti-Corruption Act, Act No. 22 of 2011 has the jurisdiction to conduct investigations on bribery either on its own volition or upon a complaint made by any person. Following an investigation, EACC is to report to the Director of Public Prosecutions (DPP) on the outcome of its investigations. The report is to include any recommendation that EACC may have that a person be prosecuted for corruption or economic crime.

3. How is bribery defined?

Bribery is not defined expressly under the Bribery Act, Act No. 47 of 2016. However, the meaning can be deduced from Part II of the Act, which gives general bribery offences: receiving or giving a financial or other advantage to another person, who knows or believes that the acceptance of the financial or other advantage would itself constitute the improper performance of the relevant function or activity. In addition, the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003 defines corruption to also among other things mean bribery.
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?

The Bribery Act is applicable to the public, public officers and private entities. The law does not distinguish between bribery of a public official and bribery of private persons per se and therefore there are is no separate definitions for bribery of a public official and bribery of a private person. A legal obligation is placed on state officers, public officers and persons holding a position of authority in a public or private entity to report within 24 hours, any knowledge or suspicion of instances of bribery, to EACC. Failure to report this is an offence. Article 260 of the Kenyan Constitution defines ‘public officer’ to mean any state officer or any person, other than a state officer who holds a public office. ‘Public office’ on the other hand is defined as an office in the national government, county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.

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

The EACC may institute civil proceedings against any individual. The EACC may also negotiate and enter a settlement with any person against whom it intends to bring or has brought a civil claim. Pursuant to section 56B of the Anti-Corruption and Economic Crimes Act, EACC may tender an undertaking in writing not to institute criminal proceedings against a person who has given a full and true disclosure of all material facts relating to past corrupt conduct and economic crime by himself or others; and has voluntarily paid, deposited or refunded all property he acquired through corruption or economic crime; and has paid for all losses occasioned by his corruption conduct to pubic property. Such a settlement or undertaking is to be registered in court.

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. If the convicted person is a State officer or a public officer, such person shall be barred from holding public office. If a director of a company is convicted of bribery, such director 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 (10) years. If the convicted person 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 a period of not more than ten (10) years. 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 (10) years after conviction. A person other than a natural person convicted of bribery, shall be disqualified from transacting business with the national or county government for period of ten (10) years after such conviction.

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

Under the Bribery Act, an individual found guilty of giving or receiving a bribe or knowingly assisting a person or a private entity to give or receive a bribe is liable upon conviction for a
term of imprisonment not exceeding ten years; or to a fine not exceeding five million kenya shillings or both; such person shall also 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 which fine shall be equal to five times the amount of benefit or loss.

Any other person found guilty of giving or receiving bribes or if the person performs services for or on behalf of that other person as an agent, employee, or in any other capacity which offence takes place outside Kenya shall be liable on conviction to a fine not exceeding five million shillings. A private entity that fails to prevent a bribery activity is liable on conviction to a fine. The fine payable shall be determined by the court and shall not only seek to mete out punishment for the offence committed but also seek to deter similar offences being committed by the same or other private entities.

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

There is no law that places any restrictions on hospitality, travel and entertainment expenses. In addition, there are no specific regulations restricting such expenses for foreign public officials.

8. **Are political contributions regulated?**

Yes, political contributions are regulated under the Election Campaign Financing Act and the Political Parties Act. Contribution is defined to mean ‘monetary and non-monetary contributions including loans, donations, grants, gifts, property, services provided to a candidate or political party, and money spent on behalf of a candidate, political party or referendum committee in paying any expenses incurred directly or indirectly but does not include volunteer services’.

The Independent Electoral and Boundaries Commission, which is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament, is required at least twelve months before a general election, by a notice in the Gazette to prescribe limits on contributions, contributions from a single source; loan forming part of a contribution and paid-up media coverage which a candidate, political party or referendum committee may receive during the expenditure period. A candidate, a political party or a referendum committee shall not receive any contribution or donation, in cash or in kind from the State, a State institution or agency or any other public resource.

The political parties fund is established under the Political Parties Act and one of the sources of the funds is voluntary contributions and donations from any lawful source. A political party commits an offence if it receives funds from a non-citizen. No person or organization shall, in
any one year, contribute to a political party an amount, whether in cash or in kind exceeding five per cent of the total expenditure of the political party unless the same is being made by any founding member of the political party as his contribution to the initial assets of the party within the first year of its existence.

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

The Bribery Act defines ‘advantage’ to include any facilitation payment made to expedite or secure performance by another person. A person commits the offence of giving or receiving 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.

10. **Are there any defences available?**

The Proceeds of Crimes and Anti-Money Laundering (Amendment) Act affords protection where actions are exercised in good faith. A suit, prosecution or other legal proceedings is not to be brought against any reporting institution or Government entity, or any officer, partner or employee or any other person in respect of anything done by or on behalf of that person with due diligence and in good faith, in the exercise of any power or the performance of any function or the exercise of any obligation under the Act.

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

A public or private entity is required under the Bribery Act to put in place procedures appropriate to its size and the scale and to the nature of its operations for the prevention of bribery and corruption. In the event that the private entity fails to put in place the procedures and the failure was committed with the consent or connivance of a director or senior officer of the entity, the said director or senior officer commits an offence under the Act. The Cabinet Secretary being responsible for matters relating to justice is required, in consultation with the EACC, to publish guidelines to assist private and public entities in the preparation of these procedures. No such guidelines have been issued since the Bribery Act came into effect in January, 2017. EACC may also provide assistance as may be necessary to any private or public entity or any other person in the implementation of procedures issued under the Bribery Act.

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

Both individuals and private and public entities may be held liable for bribery.

13. **Has the government published any guidance advising how to comply with anti-**
corruption and bribery laws in your jurisdiction? If so, what are the elements of an effective corporate compliance program?

The Government has not published any guidelines at present advising how to comply with anti-corruption and bribery laws in Kenya.

14. Does the law provide protection to whistle-blowers?

Yes, the law affords protection to whistle blowers. Whistle-blowers, informants and witnesses in a complaint or a case of bribery are protected under section 21 of the Bribery Act. A person who demotes, admonishes or dismisses from employment a whistle-blower or witness is guilty of an offence and is liable upon conviction to a fine not exceeding one million Kenyan shillings or to imprisonment for a term not exceeding one year or both. Whistle-blowers for purposes of bribery cases are entitled to protection to such extent as may be determined by the Witness Protection Agency. It is also an offence to knowingly or negligently discloses information about the whistle-blowers. Section 65 of the Anti-Corruption and Economic Crimes Act is clear that no action or proceeding including disciplinary action may be instituted against any person in respect of assistance given by that person to EACC.

15. How common are government authority investigations into allegations of bribery?

The Kenya Government has declared war on corruption. It is very common for Government authorities to conduct investigations into allegations of bribery. Recently, there has been a rise in the number of investigations undertaken by the EACC, most being high profile cases of bribery and corruption with a lot of public interest.

16. What are the recent trends in investigations and enforcement in your jurisdiction?

The recent trends in investigations have been mostly in the public sector. This year we have had a governor being arrested over suspected Kenya shillings 84 million fraud in his county; two officials from the Kenya Revenue Authority (KRA) arrested by detectives from the Directorate of Criminal Investigations over graft allegations; investigations into alleged multi-billion-shilling fraud in the Aror and Kimwarer dams involving the dubious payments made to some company yet construction works are yet to start. Despite investigations, arrest and charging of high-profile individuals even in the government, none of the individuals have been prosecuted.

17. Is there a process of judicial review for challenging government authority action and decisions?

Article 47 of the Constitution of Kenya entitles every person to the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In order to give effect to this Article, Parliament passed the Fair Administrative Action Act, 2015 (FAA Act). The FAA Act defines administrative action” to include “powers, functions and duties
exercised by authorities or quasi-judicial tribunals” or “any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates’. Any person who is aggrieved by an administrative decision may apply for review of the decision to a court or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 9 of the FAA Act provides for the procedure for judicial review and section 8 is clear that an application for the review of an administrative action or an appeal under the FAA Act shall be determined within ninety days of filing the application.

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

There have not been any recent proposed legislative amendments that affect the bribery and anti-corruption laws. However, the National Government on 19th January 2018, issued a Draft Medium-Term Policy Statement, which championed “the Big Four Agenda”. The Big Four Agenda proposes entrenchment of structural reforms with the Government continuing to strengthen various institutions that are mandated to fight corruption in the Country, implement reforms on good governance and enhance the capacity to recover corruptly acquired assets. It is expected that in achieving the Government’s policies under the Big Four Agenda, several enabling-laws are likely to be proposed in line with the Kenyan Anti-Corruption agency’s strategic plan to lobby for strengthening of policy, legal and regulatory framework by reviewing and proposing new laws, amendments and regulations; and particularly the national ethics and anticorruption policy which the Agency has sought to finalize. The Anti-Corruption Agency has published its Strategic Plan 2018-2023 and proposed a strategy for law reform indicating the intention to enact new regulations each year from 2019 to 2023.

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


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.

There is no concept of legal privilege which is specific to lawyer-led investigations. The Evidence Act provides legal privilege to advocates only in relation to communication made to an advocate in the course and for the purpose of his employment as such advocate. Such privilege does not cover communication made in furtherance of an illegal purpose or where the advocate observes any fact showing that a crime or fraud has been committed since the commencement of his employment. Section 27 of the Anti-Corruption and Economic Crimes Act is clear that EACC may not seek disclosure of information protected by advocate-client privilege.
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?**

The government has made considerable effort to tackle bribery and corruption but has failed immensely when such offences are committed by high ranking government officials. It appears that such officials are “immune” to prosecution for bribery and corruption offences. In the global Corruption Perception Index (CPI) 2018 released by Transparency International earlier this year, Kenya has scored 27 out of the possible 100 putting it at position 144 out of 180. The report indicates that Sub-Saharan Africa is the lowest scoring region on the index and that it has failed to translate its anti-corruption commitments into any real progress.

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

Organizations are very serious about preventing bribery and corruption. In the recent past we have seen Banks and other institutions at the forefront of complying with corruption related legislation. Other organisations have engagement terms which provide for anti-bribery and anti-corruption policies. However, the payment of ‘facilitation fees’ is still rampant in many organizations.

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

Political interference. Most of the culprits have connections in high offices and eventually investigations and or cases collapse along the way. Investigation officers are known to sabotage the entire process of investigation which trickles down to a unsuccessful prosecution when they fail and or refuse to complete investigation, produce investigation reports or even appear as witnesses in court. Judicial officers may also compromise the prosecution of cases when they take bribes to render favourable decisions.

24. **What do you consider will be the most significant corruption-related challenges posed to businesses in your jurisdiction over the next 18 months?**

Bribing of public officials for business favours within the National Government and County Government; and abuse of office by Public officials.

25. **How would you improve the legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption?**

Kenya has a robust legal framework and process for preventing, investigating and prosecuting cases of bribery and corruption. There are multi-agencies dealing with investigation and prosecution of bribery and corruption. The major challenge is in enforcement of the legal framework. Investigating, prosecuting and Judicial officers need to
be trained on these areas to ensure that culprits are punished for their crimes.