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CORRUPTION IN KENYA DURING THE COVID-19 PANDEMIC AND THE RIGHT TO HEALTH: LESSONS LEARNT AND FUTURE PROSPECTS

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ABSTRACT

Kenya has made positive strides in fighting corruption through signing and ratifying the United Nations Convention Against Corruption and the African Union Convention on Prevention and Combating Corruption. These Conventions oblige Kenya to take measures to prevent and criminalise corruption and related offences. In addition, Kenya has enacted vast anti-corruption laws and established independent agencies like: the Ethics and Anti-Corruption Commission, the Office of the Director of Public Prosecutions and the Directorate of Criminal Investigations. These agencies play a role in investigating and prosecuting allegations of corruption with the aim of preventing and punishing corruption, and enforcing the anti-corruption laws. Despite these extensive anti-corruption laws, the Kenya public health sector experienced wanton corruption during the COVID-19 pandemic. Billions of public monies meant for purchasing proper medical equipment for public hospitals, procuring medication and providing Personal Protective Equipment for medical personnel were stolen by corrupt public officials in the Kenya Medical Supplies Authority. This article aims to first examine the legislative efforts which Kenya has taken to prevent and punish corruption. Secondly, to discuss how corruption during the COVID-19 pandemic impacted on the realisation of the right to health. Lastly, to highlight the lessons learnt and future prospects. This article argues that corruption during the COVID-19 pandemic negatively affected the access and enjoyment of the right to health in Kenya.

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1. INTRODUCTION

Corruption is the misuse of entrusted power or authority for selfish gain.¹ This is a global menace, which affects developed and developing nations alike.² Corruption in Kenya can be traced back to the pre-independence era.³ Subsequently, post-independence ruling regimes are tainted by corrupt dealings. Consequently, after Kenya attained independence in the year 1963, corruption was witnessed in the Jomo Kenyatta regime;⁴ the Daniel Arap Moi regime was infamous for the Goldenberg corruption scandal; while the Anglo-Leasing and Finance corruption scandal engulfed the Mwai Kibaki regime.⁵ The outgoing President Uhuru Kenyatta's regime has also experienced corruption scandals.⁶ It is noteworthy, that Kenya has taken positive strides to prevent and fight corruption through signing and ratifying international and regional anti-corruption legislation and enacting various domestic anti-corruption laws. The objectives of this article are: first, to highlight the legislative efforts which Kenya has taken to prevent and punish corruption. Secondly, to discuss how corruption during the COVID-19 pandemic impacted on the realisation of the right to health. This paper is divided into five sections. The first part highlights the legislative measures which Kenya has taken to fight corruption at international and regional levels. The second part discusses corruption in Kenya during the COVID-19 pandemic and its impact on the right to health. The third part examines COVID-19 corruption and its impact on the right to health. The fourth part addresses the lessons learnt and future prospects. The last part makes concluding remarks.

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- 1 Anassi P (2004) *Corruption in Africa The Kenyan Experience* Trafford Publishing at 17. See also, Transparency International (2020) "The Global Coalition against corruption. The ignored pandemic behind Covid-19", available at <https://www.transparency.org/en/> (visited 10 September 2021).
 - 2 Mezoui O (26 February 2021) "The Pandemic Showed Us that Corruption is a Global Problem. What next?" *Global Policy*, available at <https://www.globalpolicyjournal.com/blog/26/02/2021/pandemic-showed-us-corruption-global-problem-what-next> (visited 10 September 2021).
 - 3 Kemboi K (2012) "Criminal Justice System Response to the Problem of Corruption in Kenya", available at https://www.unafei.or.jp/publications/pdf/RS_No92/No92_19PA_Kemboi.pdf (visited 9 October 2021).
 - 4 Mohir C (17 October 1975) "Corruption and Repression Mar the Success of Kenya" *The New York Times*, available at <https://www.nytimes.com/1975/10/17/archives/corruption-and-repression-mar-the-success-of-kenya-kenyas-success.html> (visited 10 September 2021).
 - 5 Bachelard J (2010) "The Anglo-Leasing Corruption Scandal in Kenya: The Politics of International and Domestic Pressures and Counter-Pressures" 37 *Review of African Political Economy* 187 – 200 at 186. See also Mwangi O (2008) "Political Corruption, Party Financing and Democracy in Kenya" 46(2) *The Journal of Modern African Studies* 267 – 285 at 272.
 - 6 Fitzgibbon W (3 October 2021) "As Kenyan President Mounted Anti-Corruption Comeback, His Family's Secret Fortune Expanded Offshore", available at <https://www.icij.org/investigations/pandora-papers/kenya-uhuru-kenyatta-family-offshore-wealth/> (visited 10 September 2021).

The Corruption Perception Index (CPI) is a tool designed by experts to measure public sector corruption levels in a country. A country's level of public sector corruption is measured from a score of 0-100.⁷ A zero score indicates that the country assessed has very high levels of public sector corruption, while a one hundred score indicates that a country has the least levels of corruption. In the year 2020, Kenya scored 31/100 which indicates that corruption in the Kenyan public sector was high.⁸ Studies conducted indicate that high levels of corruption negatively impact the realisation of socio-economic and cultural rights.⁹ This article argues that corruption during the coronavirus pandemic negatively affected access to the right to health in Kenya. The next section highlights the legislative efforts which Kenya has taken to fight corruption at the international and regional levels.

2. LEGISLATIVE MEASURES TAKEN BY KENYA TO FIGHT CORRUPTION AT THE INTERNATIONAL AND REGIONAL LEVELS

As discussed in the previous section, corruption in the public sector in Kenya ranks highly. It is commendable that Kenya has enacted vast anti-corruption laws with the aim of curbing corruption in the public sector. This section addresses the first objective of the article through highlighting the domestic legislative anti-corruption measures which Kenya has taken at the international and regional levels in order to fight corruption.

2.1 International measures

The United Nations Convention Against Corruption (UNCAC) aims to strengthen the measures to prevent, criminalise and fight corruption. The UNCAC also promotes cross border cooperation in fighting corruption and urges state parties to ensure the proper management of public property.¹⁰ Kenya was the first country in the world to sign and ratify the UNCAC.¹¹ Consequently,

7 Transparency International (2020a) "Countries", available at <https://www.transparency.org/en/countries/kenya> (visited 10 October 2021). Transparency International (2020b) "The Global Coalition Against Corruption. The Ignored Pandemic Behind Covid-19", available at <https://www.transparency.org/en/> (visited 10 September 2021).

8 Ibid.

9 Lichuma, CO (2018) "Economic Wrongs and Social Rights: Analyzing the Impact of Systemic Corruption on Realization of Economic and Social Rights in Kenya and the Potential Redress Offered by the Optional Protocol to the International Covenant on Economic, Social Rights and Cultural Rights" 5 *The Transnational Human Rights Review* 63 – 93 at 65.

10 Art 1 of UNCAC.

11 Kenya Law "United Nations Convention Against Corruption", available at

the UNCAC forms part of Kenyan law in accordance with the Constitution.¹² As such, Kenya has enacted various anti-corruption laws to prevent and punish corruption, these are: the Bribery Act 47 of 2016 (Bribery Act); the Ethics and Anti-Corruption Commission Act 22 of 2011 (EACC Act); the Anti-Corruption and Economic Crimes Act 3 of 2003 (ACECA); the Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 (PCAML); the Leadership and Integrity Act 19 of 2012 (LIA); the Public Procurement and Disposal Act 33 of 2015 (PPDA); and the Public Officer Ethics Act ,Chapter 183 (POEA).

While the UNCAC does not explicitly define corruption, it urges state parties to adopt legislation that proscribes certain acts when committed intentionally. As a state party to the UNCAC, Kenya enacted the ACECA, which defines corruption to include bribery, fraud, embezzlement, abuse of office, breach of trust, tax related offences and election related offences.¹³ The UNCAC urges states to criminalise the bribing of national and foreign public officials,¹⁴ bribery in the private sector,¹⁵ embezzlement or misappropriation of public property,¹⁶ embezzlement in the private sector,¹⁷ abuse of function,¹⁸ illicit enrichment,¹⁹ laundering of proceeds of crime²⁰ and obstruction of justice.²¹ Kenya has fulfilled its obligation as a state party to UNCAC through criminalising these corrupt practices by enacting domestic legislation which proscribes against bribery,²² embezzlement,²³ abuse of function,²⁴ obstruction of justice²⁵ and improper enrichment of public officials.²⁶

Article 5(2) of the UNCAC obliges state parties to establish and promote practices that prevent corruption. State parties are also tasked to evaluate their legislation with the aim of determining

<http://kenyalaw.org/treaties/treaties/129/United-Nations-Convention-against-Corruption> (visited 14 July 2022).

12 Art 2(5) and (6) of the Kenyan Constitution.

13 Sec 2 of the ACECA.

14 Arts 15 and 16 of the UNCAC.

15 Art 21 of the UNCAC.

16 Art 17 of the UNCAC.

17 Art 22 of the UNCAC.

18 Art 19 of the UNCAC.

19 Art 20 of the UNCAC.

20 Art 23 of the UNCAC.

21 Art 25 of the UNCAC.

22 Sec 39 of the ACECA. See sections 5, 6, 7 and 8 of the Bribery Act.

23 Sec 45 of the ACECA.

24 Sec 46 of the ACECA.

25 Sec 66 of the ACECA.

26 Sec 11 of the POEA.

whether the domestic legislation is adequate to fight corruption.²⁷ In addition, state parties are required to have anti-corruption agencies with the aim of fighting corruption.²⁸ The EACC Act establishes the Ethics and Anti-Corruption Commission (EACC) with the mandate of preventing and fighting corruption.²⁹ Other independent agencies like the Office of the Attorney General and Department of Justice (OAG and DOJ), Office of the Director of Public Prosecutions (ODPP), Asset Recovery Agency (ARA) and the National Police Service through the Directorate of Criminal Investigations are government bodies established with the aim of reporting, investigating, prosecuting and punishing corruption. The OAG, DOJ and the ODPP have the mandate of enforcing the anti-corruption laws. In the year 2016, the ODPP reported the highest conviction of anti-corruption cases.³⁰ Nonetheless, various challenges undermine the work of the EACC for instance, the lengthy period of time taken to investigate and prosecute corruption allegations. While the presumption of innocence should be upheld in allowing persons accused of corruption to vie for these positions if they wish until the corruption proceedings are heard and determined by a competent court of law, the EACC, OAG, DOJ and ODPP should hasten the proceedings to avoid persons who may be found guilty of corruption from vying for political seats because this would defeat the purpose of the anti-corruption laws at the domestic, regional and international levels. The Anti-Corruption and Economic Crimes (Amendment Bill) 2019 (ACEC Amendment Bill) was tabled before the National Assembly for discussion, this Bill introduces individual liability for persons convicted of corruption and economic crimes, and disqualifies corrupt officials from running for elective posts or being appointed to any posts, ten years after conviction.³¹ Furthermore, the ACEC Amendment Bill requires the EACC to publish yearly the names of persons disqualified for these crimes in the Kenyan gazette.³²

The UNCAC also obligates state parties to develop procurement systems that are transparent to prevent corruption.³³ In fulfilling this obligation, Kenya has enacted the PPADA which aims to provide for procurement procedures and asset disposal. One of the highlights of the UNCAC is the provision of recovery of stolen public assets. States are encouraged to enact domestic legislation which aims to recover stolen public assets acquired through corruption and to

27 Art 5(2) of the UNCAC.

28 Art 5(4) of the UNCAC.

29 Sec 3(1) of the EACC.

30 The Office of Director of Public Prosecutions (2014) "The ODPP Registers the Highest Conviction Rate Ever in Kenya", available at <https://www.odpp.go.ke/the-odpp-registers-the-highest-conviction-rate-ever-in-kenya/> (visited 14 July 2022).

31 Sec 50A of the ACEC (Amendment Bill) 2019.

32 Sec 64 of the ACEC (Amendment Bill) 2019.

33 Art 9(1)(a) of the UNCAC.

cooperate with each other in investigating, freezing, confiscation and recovering property acquired through corruption.³⁴ Kenya has fulfilled this obligation through enacting the PCAMLA which establishes the Assets Recovery Agency.³⁵

2.2 Regional measures

Regionally, Kenya has ratified the African Union Convention on Prevention and Combating Corruption (AUCPCC). The AUCPCC defines corruption as the proscribed acts, activities and offences in the Convention.³⁶ Similarly, the ACECA adopts a universally recognised definition of corruption and broadens the scope of actions that would be regarded as criminal, thus making these acts corrupt.³⁷ These include: fraud, embezzlement of public funds, abuse of office, breach of trust and any offence related to dishonesty involving tax matters or rate and dishonesty relating to electing of persons to a public office.³⁸ The AUCPCC aims to promote mechanisms to prevent, detect and punish corruption in the private and public sectors.³⁹ As discussed earlier in section 2.1 Kenya has taken legislative measures to prevent fraud,⁴⁰ the embezzlement of public funds,⁴¹ improper enrichment⁴² and abuse of office.⁴³ Article 6 of the AUCPCC urges state parties to develop legislative measures to criminalise the conversion or transfer of property if the property is acquired from the proceeds of corruption for the purpose of concealing or disguising the origin of the property.⁴⁴ Kenya complies with this provision by prohibiting the transfer or disposal of property acquired through corruption.⁴⁵

Article 7(1) of the AUCPCC recommends that in order to prevent corruption and related offences, state parties have to ensure that public officials declare their wealth before and after time of office stops.⁴⁶ Kenya has fulfilled this obligation through enacting the POEA Act which requires

34 Chap V of the UNCAC

35 Sec 53 of the PCAML.

36 Art 2 of the AUCPCC.

37 Sec 2 of the ACECA.

38 Sec 2(1) of the ACECA.

39 Art 2 of the AUCPCC.

40 Sec 2 of the ACECA.

41 Sec 34 of the ACECA.

42 Sec 11 of the POEA.

43 Sec 46 of the ACECA.

44 Art 6(a) of the AUCPCC.

45 Sec 56 of the PCAML.

46 Art 7 of the AUCPCC.

public officials to declare their income, assets and liabilities.⁴⁷ Article 8 of the AUCPCC recognises illicit enrichment as a form of corruption.⁴⁸

The AUCPCC obliges state parties to adopt legislative measures that will enable the enforcement agencies to search, seize, identify or freeze proceeds of corruption pending final judgment.⁴⁹ Kenya has complied with this provision through enacting the PCAML.⁵⁰ The next section discusses the corruption in Kenya during the coronavirus outbreak and its impact on access to the right to health.

3. CORRUPTION IN KENYA DURING THE COVID-19 PANDEMIC AND ITS IMPACT ON ACCESS TO THE RIGHT TO HEALTH

This section discusses corruption in Kenya during the COVID-19 pandemic and how it affected access to the right to health. The Ministry of Health (MoH) is mandated to provide affordable, quality healthcare to all Kenyans.⁵¹ While the Kenya Medical Supplies Authority (KEMSA) is a state corporation under the MoH mandated to procure, distribute and supply medical supplies to public healthcare facilities in Kenya.⁵² Therefore, in line with its mandate, the KEMSA was in charge of procuring COVID-19 related equipment during the COVID-19 pandemic.

Research shows that most Kenyans have experienced some form of corruption when seeking medical services in the MoH.⁵³ Corruption in the Kenyan health sector is mainly experienced in the procurement of medication and medical supplies, payment of services, manipulation of tenders, inflation of prices and the hoarding of supplies.⁵⁴ Corruption in the public sector results in the shortage of medication and lack of medical equipment which lowers the quality of the medical services offered.⁵⁵ Corruption in the health sector reduces access to health by increasing the cost of healthcare leading to the procurement of counterfeit medication.⁵⁶

47 Sec 26 of the POEA.

48 Art 8(1) of the AUCPCC.

49 Art 16(1) (a) of the AUCPCC.

50 Sec 106 of the PCAML.

51 Republic of Kenya “Ministry of Health”, available at <https://www.health.go.ke/about-us/about-the-ministry/> (visited 10 September 2021).

52 Sec 4(1) of the KEMSA.

53 Kenya Anti-Corruption Commission (2010) “Sectoral Perspectives on Corruption in Kenya: Public Health Care Delivery”, available at <https://eacc.go.ke/default/document/sectoral-perspectives-on-corruption-in-kenya-public-health-care-delivery/> (visited 10 September 2021).

54 Ibid.

55 Ibid.

56 Transparency International “Corruption Perceptions Index 2019”, available at

3.1 Corruption during the COVID-19 pandemic

On 11 March 2020, the World Health Organization (WHO) declared COVID-19 a global health pandemic;⁵⁷ a day later, Kenya recorded its first COVID-19 patient.⁵⁸ The Kenyan government put into place mechanisms to prevent the spread of the COVID-19 disease. These measures included: travel restrictions, sanitising hands or washing them regularly with soap and water, maintaining a 1.5 meter distance between persons in public spaces, working remotely and maintaining good respiratory hygiene.⁵⁹ In response to the COVID-19 global health pandemic, the Kenyan government set aside funds of KES 2.7 billion for COVID-19 testing and treatment.⁶⁰ While the international community responded by granting Kenya foreign aid, donations and technical support to fight the pandemic, Kenya was meant to do this through buying the necessary medical equipment and hiring medical personnel.⁶¹

The fight against COVID-19 corruption was weakened when KEMSA awarded tenders worth millions of shillings to business persons and fictitious companies which were politically connected but had no experience or qualification of supplying specialised medical equipment.⁶² These

<https://tikenya.org/corruption-perceptions-index-2019/> (visited 10 September 2021). See also Kenya Anti-Corruption Commission (2010).

- 57 World Health Organization (2020) “WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 –11 March 2020”, available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (visited 10 September 2021).
- 58 Ministry of Health (13 March 2020) “First Case of Coronavirus Disease Confirmed in Kenya”, available at <https://www.health.go.ke/first-case-of-coronavirus-disease-confirmed-in-kenya/> (visited 10 September 2021).
- 59 Wasike A (15 March 2020) “Coronavirus: Kenya Shuts Schools as New Cases Confirmed” *Anadolu Agency*, available at <https://www.aa.com.tr/en/africa/coronavirus-kenya-shuts-schools-as-new-cases-confirmed/1767139> (visited 10 September 2021).
- 60 Owino B (2 July 2020) “Kenya’s Covid-19 Budget Funding for Health and Welfare” *Development Initiatives*, available at <https://devinit.org/resources/kenyas-covid-19-budget-funding-for-health-and-welfare/> (visited 10 September 2021).
- 61 Mutai E (2 October 2020) “MPs Ask Kinoti to Probe Stolen Jack Ma Donations” *Business Daily*, available at <https://www.businessdailyafrica.com/bd/economy/mps-ask-kinoti-to-probe-stolen-jack-ma-donations-2454814> (visited 10 September 2021). See also, Africa Research Bulletin Policy and Practice (2020) “Kenya Coronavirus Graft Scandal” 2311, available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-6346.2020.09663.x> (visited 12 September 2021).
- 62 Igunza E (24 September 2020) “Coronavirus Corruption in Kenya: Officials and Businesspeople Targeted” *BBC*, available at <https://www.bbc.com/news/world-africa-54278417> (visited 12 September 2021). See also Oduor M (25 May 2020) “Africa’s Covid-19 Corruption that Outweighs Pandemic” *Africa News*, available at <https://www.africanews.com/2021/05/25/africa-s-covid-19-corruption-that-outweighs-pandemic/> (visited 12 September 2021).

companies had been formed a few weeks before the first COVID-19 case was reported in Kenya.⁶³ The businessmen and fictitious companies supplied COVID-19 related equipment at inflated prices.⁶⁴ An audit conducted by Transparency International on KEMSA showed that the companies who had been awarded the tenders were newly established hence had no history of supplying medical supplies and lacked expertise in supplying the required facilities.⁶⁵ The audit also showed that the suppliers sold the medical equipment to KEMSA at an overpriced rate.⁶⁶ But these companies had been in operation for less than a year and had received massive tenders resulting in procurement fraud and collusion.⁶⁷ To worsen the situation, the foreign aid was stolen and misappropriated by some KEMSA officials⁶⁸ and over USD 400M was stolen in the first six months of the COVID-19 pandemic.⁶⁹ As at the time of writing this article, the EACC had lodged an investigation into the allegations of irregular procurement of COVID-19 commodities by KEMSA officials.⁷⁰

63 Gichana PN (5 February 2021) ‘Fighting a pandemic in a money-first-lives-later society: A call for transparency in Kenya’ European University Institute, available at <https://euiideas.eu.eu/2021/02/05/fighting-a-pandemic-in-a-money-first-lives-later-society-a-call-for-transparency-in-kenya/> (visited 12 September 2021).

64 Ibid.

65 Mutai (2 October 2020).

66 Transparency International Kenya (2020c) “Tracking COVID-19 : A Report on Transparency and Accountability in Governments Response to the COVID-19 Pandemic”, available at <https://tikenya.org/wp-content/uploads/2021/01/SPAIS-REPORT.pdf> (visited 10 September 2021). See also, Malalo H (24 September 2020) “Kenya Anti-Graft Agency Slams Procurement of COVID-19 equipment” *Reuters*, available at <https://www.reuters.com/article/us-kenya-corruption-idUSKCN26F3CC> (visited 10 September 2021).

67 Transparency International Kenya (2020c).

68 Mutai (2 October 2020). See also Wasike A (21 August 2020) “Kenya: Crackdown on Demo Over ‘Theft’ of Covid-19 Funds” *Anadolu Agency*, available at <https://www.aa.com.tr/en/africa/kenya-crackdown-on-demo-over-theft-of-covid-19-funds/1949336> (visited 22 August 2022).

69 Gul M (13 December 2020) “Corruption Medical Mystery” *Development and Cooperation*, available at <https://www.dandc.eu/en/article/thefts-covid-19-medical-supplies-highlight-kenyas-corruption-problem> (visited 12 September 2021). The Trust Project (1 March 2021) “Procurement corruption darkens Africa’s COVID-19 fight”, available at <https://www.scidev.net/sub-saharan-africa/procurement-corruption-darkens-africas-covid-19-fight/> (visited 10 September 2021). See also Mureithi C (13 May 2021) “A Billion-Dollar Covid-19 Deal Linked to Kenya Attracted the Attention of US Regulators” *Quartz Africa*, available at <https://qz.com/africa/2007682/billion-dollar-covid-19-deal-linked-to-kenya-attracts-sec-review/> (visited 10 September 2021).

70 The Ethics and Anti-Corruption Commission “The 3rd quarterly report covering the period from 1st July to 30th September 2020”, available at <http://www.parliament.go.ke/sites/default/files/2021-02/The%20third%20Quarterly%20report%20convering%20the%20period%20from%201st%20july%20to%2030th%20September%202020%20from%20Ethics%20and%20Anti%20-%20Corruption%20Commission.pdf> (visited 10 October 2021).

Therefore, the corruption during the COVID-19 pandemic resulted in the lack of adequate PPE and proper medical supplies and equipment to fight the coronavirus disease. The frontline health workers, medical and healthcare practitioners were provided with defective PPE, forcing them to attend to COVID-19 patients without proper protective gear.⁷¹ This resulted in COVID-19 related deaths among the healthcare practitioners and patients due to lack of medical equipment to fight the disease. Also, the public hospitals were poorly stocked and lacked the proper equipment to fight the COVID-19 disease.⁷² The next sub-section examines the impact of the corruption experienced during COVID-19 on the right to health in Kenya.

3.2 The impact of COVID-19 corruption on access to the right to health in Kenya

Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESR) recognises that everyone has the right to enjoy the ‘highest attainable standard of physical and mental health’. This includes the right to access health facilities and be protected from epidemic diseases.⁷³ This right to health should be accessible and available.⁷⁴ As a state party to the ICESR, Kenya has an obligation to protect, fulfil and respect the right to health.⁷⁵ Being a state party to the ICESR requires Kenya to take steps to ensure that it uses its resources to achieve full realisation of the rights in the ICESR which include the right to health.⁷⁶ Domestically, the Constitution of Kenya provides every person with the right to the highest attainable standard of health.⁷⁷

Therefore, Kenya has an obligation to ensure that it uses available resources to fulfil the realisation of right to health and other socio-economic rights in a non-discriminatory manner.⁷⁸ Although developing countries like Kenya, are unable to fully realise the enjoyment of the right to health and other socio-economic rights due to inadequate resources, Kenya has an obligation

71 Africa Research Bulletin Policy and Practice (2020).

72 Mutai (2 October 2020).

73 Office of the United Nations High Commissioner for Human Rights (2008) “Frequently Asked Questions on Economic Social and Cultural Rights Factsheet No 33”, available at <https://www.refworld.org/docid/499176e62.html> (visited 8 September 2021).

74 United Nations Human Rights Office of the High Commissioner “OCHR and the right to health”, available at <https://www.ohchr.org/EN/Issues/ESCR/Pages/Health.aspx> (visited 8 September 2021).

75 Ibid.

76 Art 2(1) of the ICESR

77 Art 45 of the Constitution of Kenya.

78 Art 2(2) of the ICESR.

to show that it is making an effort to improve the enjoyment of these rights.⁷⁹ The wanton corruption witnessed in the public health sector during the COVID-19 pandemic indicates that Kenya did not make adequate efforts to ensure the realisation of the right to health.

The Committee to the ICESR notes that for the right to health to be realised it ought to be affordable and of good quality, this means that the health facilities should have equipment, skilled medical personnel and adequate sanitation.⁸⁰ The right to health was undermined by KEMSA public officials when the foreign aid and donations meant to combat COVID-19 were misappropriated resulting in poorly stocked hospitals without the capacity to sufficiently fight the COVID-19 disease thus reducing access to the right to health. Respecting means that the state should not do anything that will interfere with the realisation of human rights. Therefore, Kenya has an obligation to protect the human rights of persons including the right to health by preventing their violation. Lastly, Kenya, has the obligation of ensuring the realisation of the right to health. Progressive realisation means that states should take steps in accordance with their resources to ensure full realisation of economic and social rights.⁸¹ Therefore, these obligations will be implemented over time and will take time to be fully realised. One of the minimum core obligations for the realisation of the right to health is the provision of essential drugs.⁸² Therefore, during the COVID-19 pandemic which was characterised by corruption which undermined the right to health, Kenya was unable to fulfil its obligations of realising, respecting and fulfilling the right to health. The next section discusses the lessons learned during the COVID-19 pandemic and future prospects.

4. LESSONS LEARNT AND FUTURE PROSPECTS

This section highlights lessons learnt and the future prospects for Kenya in order to strengthen the fight against corruption and improve access to the right to health. The lessons learnt are that first, while Kenya has enacted various anti-corruption laws as earlier discussed in section 2.1, which aim to fight corruption in the public sector through prescribing acts which would amount to corruption, proscribing the penalties for the commission of these crimes and establishing

79 Office of the United Nations High Commissioner for Human Rights (2008).

80 United Nations Economic and Social Council (11 August 2000) Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No 14, UN Doc E/C.12/2000/4, para 3, available at <https://undocs.org/E/C.12/2000/4> (visited 8 September 2021).

81 Office of the United Nations High Commissioner for Human Rights (2008).

82 Ibid.

independent bodies to curb corruption.⁸³ In spite of all the anti-corruption legislation that Kenya has enacted, there was wanton corruption in the public health sector which largely affected the enjoyment of the right to health. Therefore, corruption in the public health sector during the COVID-19 pandemic can be attributed to the lack of transparency and accountability in the procurement process and in the decisions taken by corrupt KEMSA officials in the public health sector. Additionally, the non-implementation of the vast anti-corruption laws.

Secondly, corruption is deeply entrenched in the Kenyan public health sector. The absence of convictions of corrupt public officials through the years has resulted in wanton corruption in the public health sector during the COVID-19 pandemic, where billions of dollars meant to fight the COVID-19 disease were misappropriated and the donations of equipment meant for use during COVID-19 were stolen. This negatively affected the realisation of the right to health because public hospitals lacked genuine PPE, medication and proper equipment to deal with the COVID-19 disease. This in turn increased COVID-19 related diseases and deaths.

The corruption in the public health sector shows that Kenya did not fully fulfil its obligation in the ICESR which requires it to use available resources to ensure the realisation of socio-economic rights including the right to attainable standard of health. The corruption which occurred in the Kenyan public health sector during the COVID-19 pandemic resulted in the misuse of public funds for private gain by the KEMSA officials.

Finally, it is worth noting that, the EACC is undertaking investigations to inquire into the irregular procurement of COVID-19 commodities by KEMSA officials, while this is a positive step towards fighting corruption by public officials. It is of importance to note that, the functioning of the EACC is undermined by the long periods of time taken for investigating a matter and prosecuting it. Therefore, persons charged with corruption allegations can take advantage of the delay in the corruption proceedings and vie for elective positions. While it is important to respect the presumption of innocence of these persons charged with committing corruption until they are proven guilty by a court of law, corruption proceedings should be determined expeditiously in order to avoid corrupt individuals from occupying public offices and to allow acquitted persons to exercise their right to vie for a political seat.

With these lessons in mind, Kenya could take steps to ensure prevent corruption in future. While the current anti-corruption laws aim to prevent and punish corruption as earlier indicated, the EACC and other independent bodies like the DOJ, ODPP should work together as a way of

83 Sec 11(d) of the EACC.

strengthening anti-corruption measures. In addition the ODPP and the judiciary should collaborate further to ensure that corruption investigations, proceedings and convictions are expedited in order to ensure that culpable persons are convicted. This will act as a deterrent to others and do away with impunity witnessed through the wanton corruption in the Kenyan public sector.

It is noteworthy that, Kenya has enacted the ACEC (Amendment) Act, 2019 with the objective to ensure the conviction of persons who commit economic crimes and it also bars those convicted from vying for elective posts for ten years after their conviction. In order to effectively fight and prevent corruption this Bill should be passed into law and fully implemented together with the existing anti-corruption legislative framework in order to prosecute and punish corrupt officials. In doing this Kenya will fulfil its obligations of promoting, protecting and respecting socio-economic rights including the right to health and improving its access to all.

Lastly, transparency and accountability should be upheld in procurement processes, this can be done through publishing, updating and sharing information regarding tenders, the bidders and the decision of the procurement should be publicised as they happen, on the government websites and newspapers.

5. CONCLUSION

Kenya has ratified the UNCAC, the AUCPCC and enacted vast anti-corruption laws which prescribe corrupt offences and proscribe the penalties for the commission of corruption. In spite of all these efforts geared towards the prevention and punishment of corruption and related offences, Kenya's public health experienced corruption during the COVID-19 pandemic. As a developing country, Kenya has a minimum core obligation to ensure that it fulfils its obligation of ensuring access to the right to health. Due to the wanton corruption during the COVID-19 pandemic, Kenya was unable to fully fulfil its obligations of respecting, promoting and fulfilling the enjoyment of the right to health. Consequently, the misappropriation of public funds meant by public officials during the COVID-19 pandemic negatively impacted individuals' access to the right to health.