

Kenya's Economic Crimes: Can a conditional Amnesty be meaningful?

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When a Kenyan Cabinet minister suggested in early 2007 that perpetrators of corruption be pardoned if they confessed their guilt and returned the spoils, there was surprisingly little public reaction. This was perhaps taken with a pinch of salt given that Kenyan politicians are good at talking but then doing nothing. But when former anti-corruption chief John Githongo ([accused by some of behaving like a drama queen and self-appointed high priest](#)), made a similar statement in mid August 2008, his view made headlines that drew sharp reactions. One opinion piece employed the headline, "[Kenya to become a Looters' Paradise.](#)" Githongo, who fled to Britain in 2005, claiming he feared for his life after accusing senior members of President Mwai Kibaki's government of massive looting, had observed that past inquiries to establish culpability in Kenya had not only delayed justice but often made accountability much more difficult. As the government's permanent secretary for ethics and governance, he exposed the notorious Anglo-Leasing scandal, which involved state contracts worth more than \$1bn being secretly awarded to phantom firms. The exposure forced the resignation from Cabinet of several ministers closely associated with President Kibaki, including Chris Murungaru, David Mwiraria and Kiraitu Murungi, although the last two were later reinstated, after inquiries failed to find them guilty. Interestingly, Githongo's amnesty call received support from the then Justice and Constitutional Affairs Minister, Martha Karua, who observed that granting amnesty was the only sure way for the government to win the war against corruption. Karua promised to have the Cabinet approve laws to grant amnesty in exchange for the stolen wealth. Previously considered a member of Kibaki's inner circle, Karua resigned in April 2009, before the amnesty law could see the light of the day, citing frustrations in discharging her duties. The question that emerges is: what are the prospects for corruption prosecutions in Kenya? This paper argues that while corruption is one of the most significant contributors to structural inequalities, extreme levels of poverty, and the decayed state of Kenya's economy, there are a number legal and political constraints that make prosecutions unproductive. Instead, the country should consider using conditional amnesty to recover the stolen property and public funds.

In the course of debates on the amnesty-for-economic crimes proposal, members of civil society accused those behind the call of disingenuity and being motivated by vested political interests. [Mwalimu Mati of Mars Group Kenya](#), an anti-corruption pressure organisation, opposed the proposal, arguing that the Kenyan government had consulted no one about abandoning its duty to investigate and prosecute crimes

of corruption. He maintained that by supporting Githongo's proposal, the government was acting as if “Kenyans had nothing to do with decisions on their own resources which were stolen from them.” Mati argued that the amnesty provision would give economic criminals and looters of public funds “a get-out-of-jail-free card while hungry chicken thieves continue to be automatically sent to jail to pay for their petty crimes”. Writing in the *Business Daily* newspaper, [Jim Onyango](#) likewise observed that the plan to offer amnesty to the architects of past corruption could wipe out the taxpayers’ hopes of recovering more than KSh200 billion (about 2,909,937,160 USD) lost to plunderers in the past two decades. Githongo’s suggestion was also dismissed by another columnist as laughable: “If I steal a mobile phone but could be let off the hook if I make restitution, then we make a mockery of the judicial system. Theft has to be punished no matter what.”

While prosecuting perpetrators of past economic crimes remains appealing to the majority of Kenyans, several past and present factors pose monumental challenges to this strategy. Many of the cases involving influential individuals have often ended up in acquittals due to technicalities or insufficient evidence, as evidence is normally destroyed or corrupted beforehand. Indeed many past cases of grand corruption in Kenya remain unresolved, with little to show from the myriad of government anti-corruption initiatives. This is certainly not a problem unique to Kenya: in most developing countries with weak institutions, attempts to use the judiciary and ordinary criminal law to fight large-scale corruption have often failed due to procedural technicalities employed by defence lawyers, lethargic prosecutions, and ingratiating judicial systems.

In Kenya, the problem is illustrated by one of the Commissions of Inquiry set up by the Kibaki administration to investigate the ‘Goldenberg scandal’, a case in which the Moi government lost billions of Kenyan shillings through compensation for faked export of gold. The Commission’s inquiry was held in public, and uncovered the intricate web surrounding the looting of public funds from the Central Bank of Kenya. However, in the [report](#), Commission Chairman Justice Samuel Bosire observed that while massive sums of money had been siphoned out of the country by the Goldenberg scheme, the Commission was unable to trace it.

In 2003, the Kenyan government sought recourse to asset-tracing and recovery of looted funds and spent well over Ksh 20m (approximately 273, 973 USD) to track the stolen billions in foreign accounts, with little success. Apparently, those who stashed this money in offshore accounts were not only able to hire the best defence lawyers around, but actually frustrated the tracking effort by using third parties to

transfer the money to other accounts once they realised they were being followed. The difficulties in pursuing investigations were compounded by foreign banking laws, which in some cases impeded investigations. [Albert Mumma](#), a lawyer, argues that assets allegedly acquired by means of corruption can only be confiscated in Kenya, once a myriad of legal processes has been followed, and that the state needs to prove beyond doubt that the cash or property concerned was obtained through graft. He adds, "This would take a long, long time to prove. He adds, "We would be sitting in court hearings for years." In a similar vein, [Patrick Kiage](#) has argued that during Kibaki's time in power, there has been no flood of cases dealing with the past economic crimes being filed in the Criminal Division because there is just "not enough time or resources to re-open files long-closed or open new ones in pursuit of trails long cold and dead." To him, were the Kibaki's Government to pursue many of the past economic crimes through criminal proceedings, the government "may long have been shunted out of power before the first batch of cases is complete." Indeed, it would be just as difficult to trace illegally acquired money deposited in Kenyan banks, as there is currently no law that supersedes the confidentiality clause binding these banks to their customers. In addition, legislation is required to define how to treat persons who unknowingly bought property from those who obtained it through graft, as this would certainly invite possible costly lawsuits.

So while members of the civil society continue to rightly accuse the Kenyan government of lacking political will and commitment to uproot graft in the country, there is also need to appreciate the inherent difficulties in pursuing the prosecutorial approach against perpetrators of economic crimes. While corruption has been endemic and even threatens to tear apart the entire country's socio-economic and political fabric, there is a need for prudent and pragmatic measures that would promote both accountability and social reconstruction. Eventually, the overriding consideration should be to secure the stolen assets. This is where the amnesty suggestion can be meaningfully applied. A similar approach was adopted this April 2008 in Kazakstan, allowing those who wanted to come clean to put their money in special accounts, which would then not be subject to penalty or taxation. Kazakh officials said [some 500 million USD was brought in while the law was in effect](#).

How can the provision of conditional amnesty in Kenya be meaningfully and creatively applied to recover stolen property or public funds and under what conditions? One suggestion would be to carry out detailed investigations in order to gather sufficient information about those past corrupt practices and, if possible, freeze the related accounts and assets. Subsequently, with a damaging dossier, it would be imperative to ask the suspected corrupt individual to voluntarily return the money and receive amnesty or be

prosecuted. This way, corrupt individuals are more likely to cooperate. The amnesty provision can therefore be used as a leverage or credible threat to have individuals cooperate in the repatriation of stolen national assets. Those who fail to cooperate should then be threatened with prosecutions and such other measures like prohibition from holding of public office.

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