دار نشر جامعة لوسيل
Lusail University Press

RESEARCH ARTICLE

How Corruption Undermines Realization of the Right to Health: A Review of the Kenyan Landscape*

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Submitted: 25 October 2023
Accepted: 07 March 2024

https://doi.org/10.70139/rolacc.2024.1.2

Cite this article as: Mulochi E., Obura, K., and Abuya, O. E. How Corruption Undermines Realization of the Right to Health: A Review of the Kenyan Landscape, Rule of Law and Anti-Corruption Center Journal, 2024:1, https://doi.org/10.70139/rolacc.2024.1.2

> "Health is wealth. No one can truly enjoy the other rights enshrined in the Constitution without being in good health. The right to health is the [source] of all rights. This is why the fight against corruption and its effect on the provision of healthcare services should be a priority."[1]

ABSTRACT

Corruption poses a significant challenge to good governance. Both the developed and developing states are grappling with this vice. It is, however, the latter states that are most affected. Studies have established that corruption is a hindrance to the realization of the right to health. Yet this is one of the rights provided for under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the African Charter on Human and People's Rights (ACHPR). The ICESCR and the ACHPR require state parties to adopt measures to ensure that persons within their territory enjoy this fundamental entitlement. Kenya is party to the ICESCR and the ACHPR. Its legal framework also recognizes this central right. Despite a robust legal regime, the realization of the right has been slowed down by corruption. So far, few studies have been carried out on corruption and its effects on the right to health. In addition, most of these studies are theoretical. The study draws on empirical research conducted at five Kenyan public hospitals. It also relies on desktop research of available literature to unravel the types of corruption in Kenya's health sector. The article argues that it is possible to realize the highest attainable health care envisaged by international, regional, and domestic laws if the identified forms of corruption are tackled head-on. By relying on empirical data, this study fills the gap, which theoretical studies have not managed to bridge. Its findings and conclusions are also likely to inform the implementation of anti-corruption laws in general and in the health sector in particular. Finally, this research forms an essential basis for further discourse in these areas.

Keywords: Forms of corruption; healthcare; Kenya; challenges; proposed solutions

* An overview of this paper was presented at the University of Nairobi Faculty of Law Seminar on 22 June 2023. Thanks are due to the participants of this session, Priscah Nyotah, Lucas Wauna, and the reviewers of this article for their constructive comments.

1 Interview with Issa (Jan. 9, 2023).

1. INTRODUCTION

Corruption is a common feature globally.[2] Both developed and developing states are grappling with this crisis.[3] It is, however, in the developing states that corruption is endemic.[4] Recent studies have established that the vice has permeated nearly all sectors of developing states.[5] In Kenya, the situation is no different.[6] Studies affirm that corruption is one of the factors affecting the realization of the right to health in Kenya.[7] Under international law, as reflected by the International Covenant on Economic, Social, and Cultural Rights (ICESCR), everyone is entitled to the right to health.[8] This obligation is reinforced at the regional level by the African Charter on Human and People's Rights (ACHPR).[9] Despite its membership to these treaties, it was not until 2010 that Kenya entrenched the right to health in its Constitution.[10] Including this right in the Constitution was a watershed moment, considering that it did not form part of the Bill of Rights in the pre-2010 Constitution. Ratification of the ICESCR and ACHPR was, however, not sufficient to promote the right to health because Kenya follows the dualist approach.[11] Hence, domestic legislation was required to implement the regional and international undertakings.[12]

Of importance is the actual realization of this right. Coming up with laws and policies that obligate the State with their implementation is commendable. Even so, what counts are the practical steps that a state has adopted towards realizing this basic right. The High Court of Kenya in *MMM vs Permanent Secretary, Ministry of Education & 2 Others* affirmed this position.[13] This is not to imply that measures designed to realize the right to healthcare services are not immune to challenges. On the contrary, diverse hurdles confront efforts to promote this fundamental right. Using Kenya as a case study, this article identifies and discusses one of the main challenges: corruption.

So far, several studies have been undertaken about Kenya's public healthcare sector.[14] The public healthcare sector is critical. It is through this path that the majority of individuals living in the country are able to access healthcare services. A review of the current literature shows that most of these works, thus far, are theoretical.[15] Unlike these studies, this article draws on fieldwork. To get a practical perspective, the authors interviewed relevant players in the healthcare sector. This approach is likely to give the reader a picture of the situation on the ground. It also forms the basis for further studies and discourse in this vital area.

The study reports the findings of fieldwork that the authors conducted at five public healthcare facilities, which are spread over five counties in Kenya. Data collection occurred between November 2022 and April 2023 (N=135). The researchers interviewed one hundred and six (106) health workers. Within the same period, they interviewed four judicial officers, three human rights officers, seven prosecutors, three investigators working with the Ethics and Anti-Corruption Commission (EACC) and five patients and seven caregivers. Table I below captures the total number of interviewees.

Table 1: Number of interviewees

No.	Occupation	Number interviewed
	Health workers	106
	Prosecutors	7
	Human rights officers	3
	Judicial officers	4
	Ethics officers	3
	Patients	5
	Caregivers	7
TOTAL		**135**

In order to appreciate the field data, tables II and III set out the categories of health workers that the authors conducted and the locations where the interviews happened.

Table 2: Categories of health workers

No.	Profession	Number
	Doctors	35
	Nurses	40
	Hospital administrators	5
	Laboratory technologists	5

2 A. Schram et al., *Corruption: A Cross-Country Comparison of Contagion and Conformism*, 193 J. Econ. Behav. & Org. 495 (2022).
3 United Nations Convention Against Corruption, *Foreword*, Oct. 31, 2003, 58/4 U.N.T.S. (2004).
4 Transparency International, *Corruption Perception Index* (Transparency International 2022).
5 H. Maiha et al., *Assessing the Effect of Corruption on Industrial Development in Nigeria: North-Eastern States in Focus*, 27:7 Afr. Scholars J. Bus. Dev. & Mgmt. Res. 73 (2022). D. Cornelius, *The Value of Ubuntu in the Fight Against Corruption in Zimbabwe: A Social Work Perspective*, 11:1 Afr. J. Soc. Work 48 (2021). D.I. Suntai et al., *Tackling Institutional Corruption Through Investigative Journalism*, 16:30 Glob. Media J. 1 (2018).
6 M. D'Arcy et al., *Devolution and Corruption in Kenya: Everyone's Turn to Eat*, 115:459 Afr. Aff. 246 (2016). J. Harrington et al., *Satire and the Politics of Corruption in Kenya*, 1:21 Soc. & Legal Stud. 2 (2013).
7 L. Nyawira et al., *Examining Health Sector Stakeholder Perceptions on the Efficiency of County Health Systems in Kenya*, 1:12 PLOS Global Public Health 10 (2021).
8 *International Covenant on Economic, Social and Cultural Rights, Article 12*, Dec. 16, 1966, 993 U.N.T.S. 3 (1980).
9 *African Charter on Human and People's Rights, Article 16*, June 27, 1981, 1520 U.N.T.S. 217 (1982).
10 *Constitution of Kenya* art. 43.
11 *Karen Njeri Kandie v. Alssane Ba & Another* [2015] eKLR. See also: *The Judicature Act*, ch. 8, § 3 (Laws of Kenya).
12 E. Abuya & D. Nyaoro, *Victims of Armed Conflict and Persecution in South Africa: Between A Rock and A Hard Place*, 32:1 Hastings Int'l & Comp. L. Rev. 3 (2009).
13 *[2013] eKLR* paragraph 4 (Per Justice Lenaola, as he then was).
14 See: P. Stiernstedt, *Some Things Are Rarely Discussed in Public – On the Discourse of Corruption in Healthcare*, 8:9 Int'l J. Health Pol'y & Manag. 560 (2019). S. Mostert et al., *Corruption in Health-Care Systems and Its Effect on Cancer Treatment in Africa*, 16 The Lancet Oncol. 394 (2015).
15 V. Forza et al., *A Review of the Literature on Corruption in Healthcare Organizations*, 15:4 Nurs. & Health Professions Faculty Research & Publ'ns 144 (2020). L. Kimathi, *Challenges of the Devolved Health Sector in Kenya: Teething Problems or Systemic Contradictions?*, 42:1 Africa Dev. 55 (2017). B. Masaba et al., *Devolution of Healthcare System in Kenya: Progress and Challenges*, 189 Pub. Health 135 (2020).

	Procurement officers	5
	Public Health officers	6
	Clinical officers	10
TOTAL		**106**

Table 3: Data collection sites

No.	Name of hospital	Location
	Hola Level 5 Hospital	Tana River County
	Kajiado General Hospital	Kajiado County
	Rift Valley General Hospital	Nakuru County
	Kakamega Country Referral Hospital	Kakamega County
	Kenyatta National Hospital	Nairobi City County

The study examined the experiences of interviewees with corruption in Kenya's healthcare sector. To ensure confidentiality, the article uses pseudonyms. From the sample size, it is apparent that these findings do not reflect the trend across the country. Even so, they provide valuable insights into corruption as a significant challenge facing healthcare systems. While international and domestic law guarantees everyone the right to health, the position on the ground is markedly different. In practice, there is serious violation of this right in Kenya. Simply put, a considerable difference exists between the law in books and actual practice. The paper has seven sections. Section two discusses the meaning of corruption. This discussion is important in order to appreciate the meaning of this term. In section three, the study highlights the various manifestations of corruption in the Kenyan healthcare sector. A discussion of how the identified forms of corruption affect the realization of the right to healthcare follows. Section five analyses the various strategies adopted to contain corruption in Kenya and their adequacy in dealing with the vice. Section six offers recommendations on how to overcome the challenges identified. In conclusion, the paper contends that, in order to succeed in the war against graft, countries have to take robust measures.

2. WHAT IS CORRUPTION?

Having been identified as the main issue that undermines the realization of the right to health, it is crucial to understand what corruption means in this context. Various authors and organizations have attempted to define this term.[16] There is, nonetheless, no single universally accepted definition of corruption. Without defining what corruption means, the 2004 United Nations Convention Against Corruption (UNCAC) lists, among other forms, bribery, embezzlement, and illicit enrichment, as acts of corruption.[17] Like the UNCAC, the African Union Convention on Preventing and Combating Corruption of 2003 (AUCPCC) provides that corruption encompasses, among other forms, bribery, illicit enrichment, concealment of the proceeds of corruption, and conspiracy to commit corrupt acts.[18] In Kenya, the Constitution and the Anti-Corruption and Economic Crimes Act (ACECA) does not define the term corruption. Nevertheless, several pieces of domestic law address this vice. The ACECA criminalizes actions, including secret inducement for advice, deceiving principal, conflict of interest, improper benefit to trustees for appointments, bid rigging, abuse of office, fraud, dealing with suspect property, and attempts or conspiracies.[19] Further, the Bribery Act outlaws the giving or receiving of a bribe.[20]

The common thread running through international, regional, and domestic legal instruments is that corruption entails the abuse of entrusted authority for one's private gain. Various commentators on corruption have made this point. According to Peter Annasi, corruption involves a violation of laid down rules by public servants or elected officials in pursuit of private gain.[21] Ken Obura contends that comprehending corruption as misuse of publicly entrusted authority or resources for private gain "is broad and open-ended enough to cover the limitless manifestations of corruption such as bribery, embezzlement, favouritism, bid rigging, and fraud".[22] Let us now review the forms of corruption in the health sector.

3. FORMS OF CORRUPTION IN KENYA'S HEALTHCARE SECTOR

At least six forms of corruption are identifiable in Kenya's healthcare sector. Field work identified the following forms of corruption: bribery and kickbacks, fraud, bid rigging, stealing of drugs, nepotism and favoritism, and absenteeism. A discussion of these typologies is necessary to show the different ways in which the vice manifests itself. This discussion also sets the foundation for evaluating the impact of graft on health rights. It also establishes a basis for reviewing the challenges that duty bearers encounter and their likely solutions.

3.1. Bribery and Kickbacks

According to *Black's Law Dictionary*, bribery means, "[t]he corrupt payment, receipt, or solicitation of a private favor for official action".[23] Courts in various jurisdictions have fleshed out

16 J. Mbaku, *International Law and the Fight against Bureaucratic Corruption in Africa*, 33 Ariz. J. Int'l & Comp. L. 663 (2016). O. Okolo et al., *Corruption in Nigeria: The Possible Way Out*, 14:7 Global J. Human-Soc. Sci. 31 (2014). X. Liu, *A Literature Review on the Definition of Corruption and Factors Affecting the Risk of Corruption*, 4 Open J. Soc. Sci. 171 (2016).

17 *United Nations Convention Against Corruption*, ch. III, Oct. 31, 2003, U.N.T.S. 58/4 (2004) (UNCAC).

18 *African Union Convention on Preventing and Combating Corruption*, art. 4, July 11, 2003, U.N.T.S. (2006) (AUCPCC).

19 *Anti-Corruption and Economic Crimes Act*, §§ 38-48.

20 *Bribery Act* No. 47 of 2016, §§ 5-6.

21 Anassi P, *Corruption in Africa: The Kenyan Experience* (Trafford Publishing 2004) 17.

22 K. Obura, *Towards a Corruption Free Kenya: Demystifying the Concept of Corruption for the Post-2010 Anti-Corruption Analysis* in *M Mbodenyi, Human Rights and Democratic Governance in Kenya: A Post 2007 Appraisal* (Pretoria University Law Press 2015) at 20.

23 *Black's Law Dictionary* (11th ed. 2019).

this term. In the Australian case of *Thiess vs TCN Channel Nine Pty Limited*,[24] the full court of the Bench of Appeal evaluated the boundaries of this vice:

> The word bribe and its derivates [such as bribery] is, we think susceptible in the ordinary usage of at least three deferring shades of meaning. One is that a bribe has been offered; another that it has been offered and accepted; the third that it has not only been offered and accepted but acted upon.[25]

In South Africa the Cape Provincial Division of the High Court in *Davies vs Donald*[26] similarly argued that:

> Any secret benefit given by one contracting party to the agent of another with the intention of influencing his mind in favour of the donor is a bribe.[27]

According to authors such as S. Dikmen *et al.*, bribery entails the payment of a benefit to influence one's decision or action.[28] Kickbacks, conversely, refer to the "money or gifts in lieu of any recommendations or purchase of any particular product or services".[29] Kickbacks are not only given in the form of cash but also in kind. For instance, a pharmaceutical company can influence a doctor to prescribe drugs manufactured by the company for the reward of a gift or a fully paid-up holiday trip abroad. While bribes influence one's action or decision, kickbacks are a reward to a party after acting in a manner desirable to the party paying the kickback.[30]

Sections 5(1) and 6(1) of Kenya's Bribery Act classify giving and receiving of a bribe as offences punishable by a prison term or a fine not exceeding Kshs 5,000,000 (US$34,000) or both.[31] Interviews with various respondents revealed that this vice is rampant in Kenya's healthcare sector. Tumaini, a judicial officer handling health-related corruption cases, and Hadija, a prosecution counsel, confirmed this state of affairs:

> I am handling one of the cases involving corruption at the national hospital public health insurer. Most of the accused persons have so much money and are stopping at nothing in their efforts to bribe my colleagues and me. We have been approached by former classmates, colleagues, fellow church members, and even relatives, sent by these people.[32]

> Anti-corruption cases are probably the most challenging cases to prosecute. For the ten years I have been a prosecutor, I have never experienced such pressure from accused persons. They use every channel to reach us, asking for favours. They have much money and do not mind using it to compromise the criminal justice system.[33]

At least three issues can be discerned from these narratives. Firstly, these experiences suggest that corruption occurs in Kenya's healthcare sector. Further, rather than let the law take its course, those implicated are leaving nothing to chance in their efforts to undermine efforts intended at holding them accountable. Additionally, some of those who are accused have a lot of resources, which they can deploy to scuttle their cases. In many ways this situation presents a bigger problem in the fight against graft. Considering that public officers in Kenya have modest earnings, the possibility is real that some could be compromised by the corrupt accused persons.

3.2. Fraud

Fraud refers to wrongful conduct aimed at making financial gain.[34] International agencies such as the United Nations Development Programme (UNDP) have defined this term in the context of healthcare as the pocketing of user fees by a service provider or the overcharging of a health insurance agency by a healthcare provider.[35] In a healthcare facility, fraud can take place when health workers divert elsewhere fees paid by a patient. This vice also occurs when the hospital management colludes with, say, a purchasing agent to inflate the cost of drugs and other essential medical supplies.[36]

As a form of corruption, fraud perpetrated by public health workers amounts to abuse of office for private gain. In Kenya, the ACECA criminalizes abuse of office.[37] This offence takes place when a person uses a public office to confer a benefit on himself or some other person.[38] When a health worker uses his or her office to divert patient payments for personal use, this practice could amount to fraud and, by extension, abuse of office. Field work confirmed the existence of fraud in Kenya's public healthcare sectors. In the words of Kipelian, a graduate nurse and unionist:

> Usually, healthcare personnel identify people insured by private healthcare insurers. Once they realize that a member of the public [insured] has an insurance cover running into millions of shillings, they collude with the said member of the public to feign admission to a healthcare facility. This is done with the agreement that the healthcare facility will lodge a claim with the insurance company in question. Once the company honours the claim, the funds are shared between

24 *Thiess vs TCN Channel Nine Pty Limited* (1992) QSCFC 4.
25 *Id.* at 34.
26 (1923) CPD 295.
27 *Id.* at 299-300.
28 S. Dikmen et al., *Fighting against Corruption and Bribery in Public Procurements during the Covid-19 Pandemic* (2022) ResearchGate 4.
29 H. Grover, *Tackling Kickbacks and Bribery in the Healthcare Sector* [2020] 20 Supremo Amicus, 1.
30 *Id.*
31 *Bribery Act* No. 47 of 2016, § 18(1)(a).
32 Interview with Tumaini (Mar. 22, 2023).
33 Interview with Hadija (Dec. 1, 2022).
34 *Concise Oxford English Dictionary* (12th ed. 2011).
35 United Nations Development Programme, *Fighting Corruption in the Health Sector: Methods, Tools and Good Practices* (United Nations 2011) 25.
36 *Id.*
37 § 46.
38 *Ann Wangechi Mugo and 6 Others vs Republic* [2002] eKLR (Per Justice Njuguna at paragraph 35).

> the healthcare personnel, primarily doctors, and the insured. It happens in both public and private healthcare facilities. It is, however, worse in private healthcare facilities. I know of many such cases. Some people are minting millions of shillings out of this. It also involves senior people working for the insurance companies that honour these fictitious claims.[39]

Under Article 10 of the Constitution and the Public Officer Ethics Act, medical personnel and other public servants must act ethically.[40] They are to serve with integrity and guard against using their office for personal enrichment.[41] Despite these legal requirements, evidence from the field shows that the practice is different. This form of corruption is, nonetheless, not limited to Kenya. Instead, it is a worldwide problem.[42] Research conducted in Liberia in 2011 suggests that up to US$4 billion was lost owing to fraudulent activities by accounting officers at the country's Ministry of Healthcare Services.[43] Annually, medical fraud costs the taxpayer $58.5 billion to $83.9 billion in the United States of America.[44] The effect of fraud on the provision of healthcare services is that funds meant for healthcare end up in individual pockets. Consequently, does this not compromise the right to healthcare?

3.3. Non-transparent tender and procurement processes/ bid rigging

Procurement is the process of obtaining supplies of something, especially for a government or an organization. In the healthcare context, it refers to the purchase of necessary medical supplies and services by the government. It is through procurement that healthcare facilities acquire medical supplies and equipment. They also contract out the construction and repair of healthcare facilities. Procurement is critical to the efficient running of any healthcare system. Therefore, the tendering and procurement processes in healthcare involve large sums of money.[45] The equipment rendering healthcare services to patients and medical supplies is not cheap.[46] The involvement of significant amounts of money and its complex nature makes the healthcare sector vulnerable to corruption.

Kenyan law requires state agencies to uphold fairness, equity, and transparency in procuring goods and services.[47] Further, any conduct tainted with corruption, coercion, conflict of interest, collusion, obtrusiveness, and fraudulence amounts to an offence.[48] When public entities enter a procurement contract and it emerges that the contract was influenced by unethical conduct, it should be terminated.[49] Judge Mwita of the Kenyan High Court in *Mugoye & Associates Advocates vs Kiambu County Assembly Speaker*[50] underlined that all State procurement processes must comply with the law and the law alone. Fieldwork painted a very different picture. In reality, as procurement practitioners in Kenya's healthcare sector revealed, the level of compliance is limited. Listen to the words of Liwalo and Zuri:

> I cannot lie to you that there is no corruption in procurement. Suppliers of pharmaceuticals reach out to members of the procurement committee and me for favours. Some committee members have been compromised by these suppliers given the large sums of money involved.[51]

> I am the secretary of the procurement committee at this facility. I see the law on procurement breached all the time we procure items. There is, nevertheless, little that I can do since the people involved are my bosses.[52]

From the views of Liwalo, a procurement officer at a public healthcare facility, it is apparent that it is not just the public sector that is corrupt, but the private sector as well. In reaching out to members of procurement committees with offers to ensure that their companies win bids to supply necessary items to public healthcare facilities, private companies facilitate corruption in these spaces. This results in a situation where suppliers who can compromise public officials end up winning bids even when they are not the best placed or qualified to supply the necessary items. The risk is that sub-standard items such as pharmaceuticals may be supplied to public healthcare facilities, placing the lives of patients in grave danger.

3.4. Stealing drugs and other medical supplies

Stealing refers to taking one's property illegally to keep it unlawfully. In Kenya section 268(1) of the Penal Code[53] describes stealing as taking what is not your own and without authorization from the owner of the said item or property. Stealing drugs and other medical supplies is one of the forms of corruption facing public healthcare facilities in several

39 Interview with Kipelian (Jan. 9, 2023).
40 *Constitution of Kenya* art. 10. *Public Officer Ethics Act* No. 4 of 2003, § 9.
41 *Leadership and Integrity Act* No. 19 of 2012, §§ 11 and 12.
42 T. Vian et al., *Whistleblowing as an Anti-Corruption Strategy in Health and Pharmaceutical Organizations in Low- and Middle-Income Countries: A Scoping Review*, 15 Global Health Action 1 (2022). C. Dean et al., *Causes and Challenges of Healthcare Fraud in the U.S.*, 4:14 Int'l J. of Bus. & Soc. Sci. 1 (2013). N. Ahadiat et al., *Healthcare Fraud and Abuse: An Investigation of the Nature and Most Common Schemes*, 10:3 J. Forensic & Investigative Acctg. 428 (2018).
43 United Nations Development Programme, *supra* note 35, at 24.
44 H. Shrank et al., *Waste in the U.S. Health Care System: Estimated Costs and Potential for Savings*, JAMA, 322:15, 1501 (2019).
45 H. Rousselle, *The Logical Underpinnings and Benefits of Pooled Pharmaceutical Procurement: A Pragmatic Role for Our Public Institutions?*, 75:9 Soc. Sci. & Med. 1572 (2012).
46 O. Tormusa, *The Impediments of Corruption on the Efficiency of Healthcare Service Delivery in Nigeria*, 12(1) Online J. Health Ethics 6 (2016).
47 *Constitution of Kenya* art. 227(1) (2010).
48 *Public Procurement and Asset Disposal Act* No. 33 of 2015, § 66.
49 *Id.*
50 [2018] eKLR at paragraph 22.
51 Interview with Liwalo (Nov. 14, 2022).
52 Interview with Zuri (Apr. 14, 2023).
53 Chapter 63 Laws of Kenya.

parts of the world.[54] Despite the strict penalties that the law prescribes, the situation remains precarious. One way stealing takes place is the diversion of the drugs, by health workers, to private chemists. Patients are then referred to these chemists to purchase the prescribed drugs.[55] In a study in four Kenyan districts, about one third (30%) of the people who visited public hospitals indicated that they did not get the prescribed drugs in the hospital pharmacy.[56] Curiously, some hospital staff advised them to purchase the medication from pharmacies located right outside the healthcare facilities.[57]

Similar results were posted elsewhere. In Uganda, researchers found that more than two-thirds of drugs meant for distribution in public healthcare facilities are stolen.[58] In Malawi, research by S. Muula established that stealing drugs and other medical supplies is primarily done by healthcare workers.[59] Pharmacy assistants and technicians working at public healthcare facilities in Malawi are the most notorious perpetrators of this corruption.[60] In Kenya, the EACC terms this form of corruption as the second most common after absenteeism by healthcare staff.[61]

Field data corroborates these findings. Mshindi, a caregiver, informed the researchers how he was referred to a pharmacy located outside of the healthcare facility whenever he wanted to purchase drugs for his parents. He suspected that some drugs were stolen from the public healthcare facility and taken to this particular pharmacy.

> There must be something about that particular pharmacy downtown. Or else, why is it that I am always referred there to buy medicine for my parents? I suspect it is owned by someone working at this hospital, or they always get a 'cut' from the owners[62].

Riziki, a High School student with an eye problem, made similar sentiments:

> I have been attending an eye clinic here. They rarely give me drugs. I am always sent to a pharmacy downtown. My parents have to get money to buy me the medicine. They [the clinical officers] always sent me to this pharmacy. I do not know why. They know why.[63]

When taking up roles in the health sector, doctors and other personnel do so upon swearing to serve selflessly and with integrity.[64] The act of stealing medicine and other supplies is worrying. Indeed, it violates their oath of office and Kenya's Penal Code.[65] The effects of this practice are grave. Firstly, it deprives patients of much-needed medicine. Secondly, it undermines their right to access healthcare services. Thirdly, once patients know that doctors and other medical personnel steal drugs, it negatively impacts on their relationship, yet they should always have a cordial connection.

3.5. Nepotism and favouritism in employment

Nepotism refers to treating relatives with preference in matters such as employment. Favouritism means extending advantages to one person to the detriment of another. Like other practices, these vices are a worldwide problem.[66] Experience shows that the healthcare sector is not immune to these wrongdoings. Nepotism and favouritism take place when family members and friends are employed, rewarded, or promoted without following the laid down procedures.[67] Nepotism and favouritism entail using power and connections, rather than performance and competence criteria, to confer benefits such as employment and promotion to certain people within an organization.[68]

Kenyan law outlaws favouritism and nepotism in Article 73(2) (b) of the Constitution. Further, Article 232(1)(i) of the Constitution provides that everyone should be accorded "adequate and equal opportunity in appointment, training, and advancement, at all levels of the public service".[69] Despite a robust legal framework, there are still cases of nepotism and favouritism in employment in the healthcare sector. Neema, a public health officer, made this point:

> Nearly all senior management staff in this facility hail from the current Governor's clan. He is in his final term, and it seems he is not leaving anything to chance in placing his people in strategic positions. Unfortunately, he is doing this in total disregard of one's qualifications and competence.[70]

Equally, Fadhili, a laboratory technologist at the same healthcare facility, observed that:

54 See: M. Bouchard et al., *Corruption in the Health Care Sector: A Barrier to Access of Orthopaedic Care and Medical Services in Uganda*, 12:15 BMC Int'l Health & Hum. Rts. 2 (2012). S. Chattopadhyay, *Corruption in Healthcare and Medicine: Why Should Physicians and Bioethicists Care and What Should They Do*, 10(3) Indian J. Med. Ethics 154 (2013). M. Dugato et al., *The Organized Theft of Medicines: A Study of the Methods for Stealing and Reselling Medicines and Medical Devices in the EU and Beyond*, Eur. J. Crim. Pol'y & Res. 1 (2023).

55 J. Chuma et al., *Barriers to Prompt and Effective Malaria Treatment among the Poorest Population in Kenya*, 9:144 Malaria J. 9 (2010).

56 *Id.*

57 *Id.*

58 M. Bouchard et al., *supra* note 54.

59 S. Muula et al., *How Are Health Professionals Earning Their Living in Malawi?*, 6:97 BMC Health Servs. Res. 6 (2006).

60 *Id.*

61 Ethics and Anti-corruption Commission, *Sectoral Perspectives on Corruption in Kenya: The Case of the Public Health Care Delivery* (EACC 2010) 18.

62 Interview with Mshindi (Nov. 25, 2022).

63 Interview with Riziki (Nov. 25, 2022).

64 K. Sritharan et al., *Medical Oaths and Declarations*, 323 BMJ 7327, 1440 (2001).

65 *Penal Code*, ch. 63, § 268(1) (Laws of Kenya).

66 M. Yavuz et al., *Nepotism Perception and Job Satisfaction in Healthcare Workers*, 21:5 Anatolian J. Psychiatry 469 (2020).

67 M. Bibi et al., *Does Organizational Politics in Public Sector Mediate the Impact of Recruitment and Selection on Employee Performance?*, 16:1 Market Forces Coll. Mgmt. Sci. 106 (2021).

68 M. Bibi et al., *Effect of Recruitment and Selection on Task Performance with the Mediating Role of Organization Politics: An Empirical Evidence from Public Sector Hospitals of Karachi*, 10:2 GMJACS 19 (2020). O. Oindo, *How African Kinship System Contributes to Corruption in Kenya*, 9 Open J. Soc. Sci. 21 (2021).

69 *Id.* Art. 232(1)(i).

70 Interview with Neema (Nov. 28, 2022).

> Sadly, meritocracy no longer counts here. It is people from the clan of the Governor and those of other influential personalities who are hired and placed in strategic positions. Some of them are juniors.[71]

Both Neema and Fadhili worked in the same healthcare facility. The fact that they are expressing similar concerns, even though we interviewed them separately, affirms the state of affairs at this facility. Several questions come to mind. First, are members of the Governor's clan the only ones who are qualified and competent to occupy senior positions in the County? Further, does having the majority of senior managers from the Governor's clan comply with the constitutional tenet of not having "decisions influenced by nepotism, favouritism, and other improper or corrupt practices?"[72] Moreover, does this state of affairs promote professionalism in service delivery or instill confidence and job satisfaction in other staff? The answers to these questions are in the negative.

3.6. Absenteeism

Absenteeism has been defined to mean "being frequently away from work, especially without good reasons".[73] This definition is somewhat narrow. In addition to the failure to report to duty, absenteeism includes reporting late and leaving work before the stipulated time. In other words, putting in less hours than those that the employment contract designated. Absenteeism also occurs when an employee is physically present at work but is occupied with other activities, not their designated task(s).

Various authors have identified absenteeism as a form of healthcare corruption, which is common in many African countries.[74] A study by USAID in Kenya established that, on average 30% of health workers in public healthcare facilities failed to report on duty.[75] The figures were much lower in the private sector. According to this research, 20% were absent.[76] This study also established that four out of ten public health workers in urban areas were usually absent from work.[77] According to W. Gichunge et al., the most pronounced form of absenteeism in Kenyan healthcare facilities is arriving late for work.[78] This ranges from between 30 minutes to three hours.[79] Some healthcare workers report on duty as late as 1:00 pm but still manage to take extended breaks in between and leave earlier than is expected.[80] Table four shows the counties with the highest absenteeism rate in the country.

Table 4: Counties with the highest absenteeism rate

No.	County	Absenteeism Rate
	Trans Nzoia	65%
	Siaya	52%
	Nyamira	50%
	Kilifi	50%

While absenteeism is prevalent in Kenya's healthcare sector, the Health Act requires healthcare providers to be at work "to provide health care, conscientiously and to the best of their knowledge".[81] It is not enough for the healthcare workers to be at work. The law expects them to be professional in their conduct. They should also discharge their duties with due diligence. Acting in a contrary manner is unethical and inimical to their calling to render professional services to patients. Similarly, the Public Officer Ethics Act (POEA) requires public officers to "observe official working hours and not be absent without proper authorization or reasonable cause".[82] This legislation acknowledges that situations necessitating the absence of a health worker may arise. In such situations one is required to first seek permission from their employer. Staying away from work, without authorization and reasonable cause, violates the law. It also amounts to corruption, as the Kenyan Court of Appeal underlined in *Rodgers Titus Wasike vs General East Africa Limited*.[83]

Regionally, the African Union Convention on Preventing and Combating Corruption (AUCPCC) encourages the adoption of measures that eliminate obstacles to the enjoyment of the right to healthcare.[84] Absenteeism of health workers is one such hurdle.[85] In inviting state parties to accord their people "the best attainable state of physical and mental health", the ACHPR calls on members "to take …necessary measures… to ensure that they receive medical attention when they are sick".[86] The "necessary measures" here include ensuring that those charged with providing medical attention are at work and serving when they are on duty.

Several factors account for absenteeism among healthcare workers. Many of these workers have more than one practice, hence their absence from public healthcare facilities.[87]

71 Interview with Fadhili (Nov. 28, 2022).
72 *Constitution of Kenya* art. 232(1)(i).
73 *Oxford Advanced Learner's Dictionary* (9th ed. 2015).
74 T. Tweheyo et al., *'I Have No Love for Such People Because They Leave Us to Suffer': A Qualitative Study of Health Workers' Responses and Institutional Adaptations to Absenteeism in Rural Uganda*, BMJ Global Health (2020), at 1. K. Yatich et al., *Assessment of Ethical Behavior on Organizational Performance*, 11:1 Afr. J. Bus. Mgmt. (2016), at 12.
75 United States Aid, *Assessing the Quality of Primary Healthcare in Kenya: Evidence from the Pet-Plus Survey* 2012 (United States Aid 2014), at 5.
76 *Id.*
77 *Id.*
78 W. Gichane et al., *Understanding Healthcare Provider Absenteeism in Kenya: A Qualitative Analysis*, 19:660 BMC Health Serv. Res. (2019), at 3.
79 *Id.*
80 *Id.* at 4.
81 *Health Act* No. 21 of 2017, § 12(2)(a).
82 *Public Officer Ethics Act* No. 4 of 2003, § 9(e).
83 [2020] eKLR (Per Nambuye JA, Koome JA & Warsame JA).
84 *African Union Convention on Preventing and Combating Corruption*, art. 2(4), July 11, 2003, U.N.T.S. (2006).
85 T. Fujii, *Regional Prevalence of Health Worker Absenteeism in Tanzania*, Health Econ. (2018), at 1.
86 *African Union Convention on Preventing and Combating Corruption*, *supra* note 84.
87 N. Mukasa et al., *Examining the Organizational Factors that Affect Health Workers' Attendance: Findings from Southwestern Uganda*, 34:2 Int'l J. Health Plann. & Mgmt. 2 (2019).

Doctor Hamisi attributed the absence of doctors from public healthcare facilities to what he termed "transfer of service".

> It is common knowledge that most doctors operate more than one practice to make ends meet. Nearly all the doctors working at this healthcare facility also work at some private healthcare facilities. In some cases, doctors collude with some patients who come to this healthcare facility to move to private healthcare facilities [transfer of service] from where they attend to them at a fee. Granted, they earn better at these private facilities. [Of grave concern] is they spent most of their time there; hence, their frequent absence from this hospital.[88]

All medical personnel are required to be on duty during their shift. Earning a salary while away from work without reasonable cause amounts to misconduct. In the context of the right under review, this practice will likely deprive patients the much-needed services. Eventually, it ends up violating their constitutional right to healthcare services. The desire to "make ends meet", according to Dr. Hamisi, is one of the reasons why these doctors abandon their duties at public hospitals and concentrate on attending to patients at private or other public healthcare facilities. The results of this practice are tragic to the right to health. The next section reviews this theme further.

4. COMPROMISING A FUNDAMENTAL RIGHT: EFFECTS OF CORRUPTION ON THE RIGHT TO HEALTHCARE

A discussion of the effects of corruption on the right to health is critical because it demonstrates what this vice does to this fundamental human right. In his thought-provoking foreword to the UNCAC, former Secretary General of the United Nations, the late Kofi Annan, described corruption as a plague whose effects on societies are corrosive. Annan's views are on point. As the analysis in the previous section demonstrates, corruption has a negative impact on the right to health. This vice also puts the livelihoods of patients and their careers at risk.

According to UNDP, about six percent (6%) of the annual global health spending is lost to fraud/corruption.[89] Considering that the World Health Organization (WHO) places global healthcare expenditure at US$4.7 trillion, what is lost to medical fraud, for instance, translates to US$260 billion annually.[90] In countries such as Liberia, auditing authorities established that up to US$4 billion had been lost owing to fraudulent activities by accounting officers at the country's Ministry of Healthcare Services.[91]

One of the institutions at the heart of Kenya's quest to attain universal health coverage (UHC) is the National Hospital Insurance Fund (NHIF). The NHIF covers about sixteen percent of Kenya's population, while private health insurers cover only one percent of Kenyans.[92] More than 50 years since the inception of NHIF, the majority of Kenyans are yet to be covered by this scheme.[93] It should therefore not be a surprise that Kenya's dream of realizing UHC by 2022 failed to materialize. Feeble accountability structures and fraud are some of the significant hurdles to NHIF's efficiency. Bahati, an orthopaedician, blamed the inefficiency at NHIF on fraud and other forms of corruption. He faulted the Fund for approving payment requests from private healthcare facilities faster than public healthcare facilities.

> They process payment to private healthcare facilities within 30 minutes. However, when it comes to public healthcare facilities, it takes forever. Claims from private facilities may be fraudulent. However, once lodged, they are paid.[94]

From the words of Bahati, a critical issue emerges. Unlike private healthcare facilities, which are mostly well-resourced and equipped, public healthcare facilities in Kenya are generally speaking deficient of financial and human resources.[95] It is, therefore, of grave concern that NHIF, which should be keen on promoting both private and public healthcare facilities, has a bias for private service providers to the detriment of their public counterparts. Kenya's Constitution in article 43(1)(a) guarantees "[e]very person…the right to the highest attainable standard of health". To realize this aspiration public healthcare facilities must be adequately resourced at all times.

Lack of transparency in the procurement process can result in the purchase of sub-standard equipment and medicine. The cost of the procured supplies is also likely to be high. Fieldwork established that the procurement of unnecessary supplies usually occurs.[96] The question to ask is whether sufficient funds are left to procure other critical medical supplies. Heri discussed this issue:

> The cost of failing to follow the law in procuring pharmaceuticals and non-pharmaceuticals is immense. It results in the purchase of items at inflated costs. Chances of substandard drugs finding their way into healthcare facilities are also high. Imagine the risk such substandard drugs pose to innocent members of the public visiting these facilities for services.[97]

Theft of drugs and other medical supplies results in their shortage at public healthcare facilities. Research conducted in the United States of America established that the shortage of drugs worsens the problem by increasing their cost.[98] This unlawful practice further weakens the healthcare system. Moreover, it has a damaging effect on the reputation of

88 Interview with Hamisi in Hola, Kenya (Nov. 14, 2022).
89 United Nations Development Programme, *supra* note 35, at 24.
90 *Id.*
91 *Id.*
92 E. Barasa et al., *Kenya National Hospital Insurance Fund Reforms: Implications and Lessons for Universal Health Coverage*, 4:4 Health Systems & Reform (2018), at 347.
93 O. Natalya, *Unlocking Access to Healthcare in Kenya: Avenues and Stumbling Blocks (2021)*, Brenthurst Foundation (Pty) Limited Discussion Paper 002, at 9.
94 Interview with Bahati (Nov. 28, 2022).
95 M. Gitobu, *Satisfaction with Delivery Services Offered under the Free Maternal Healthcare Policy in Kenyan Public Health Facilities*, J. Env't & Pub. Health (2018), at 2.
96 Interview with Heri (Nov. 25, 2022).
97 Interview with Heri, *supra* note 96.
98 A. Blackstone, *The Health and Economic Effects of Counterfeit Drugs*, 7:4 Am. Health & Drug Benefits 221 (2014).

healthcare professionals.[99] Eventually, members of the public could end up regarding healthcare professionals as individuals without integrity. Like any profession, the relationship between healthcare personnel and patients is built on trust. To have a situation where patients regard healthcare workers as thieves is undesirable. These perspectives could have a damaging long-term effect on the enjoyment of the right to health.

Studies have demonstrated that nepotism and favouritism breed a sense of dissatisfaction and disloyalty among workers who have no connection to influential persons in healthcare institutions.[100] These vices spawn divisions between employees with kinship ties and those without such ties to senior managers in the institution.[101] Employees related to senior managers believe they are there because of who they know. Put differently, their interests are well taken care of, regardless of how they perform. Hence, they believe they can do as they like. Such a divided workforce riddled with disloyalty and devoid of professionalism could undermine productivity. This affects the provision of healthcare services negatively. These were also the views of Fadhili, a laboratory technologist.

> The level of nepotism and clannism in this hospital is disturbing. Even though I was born and brought up in this county, I am considered an outsider because of the tribe. Some of us were hired on merit initially. A young lady who joined us recently is in charge of records. She now supervises people who are her seniors with many years of experience. She comes from the Governor's clan. I just came to work since I have to earn a living. The truth is that I am so discouraged. I have no reason toworkhard.[102]

Listening to Fadhili, it is apparent that there is a problem at the healthcare facility in question. His dissatisfaction with operations is rather apparent. Under such circumstances would a health worker be expected to render quality services? The response to this question must be in the negative. Unfortunately, the ultimate losers are the patients who visit this government facility.

The preceding section identified absenteeism as a form of corruption. This vice undermines the provision of healthcare services in the country. Its effects are wide. The absence of healthcare workers leaves those on duty overworked since they have to perform duties that should be carried out by their absent colleagues in addition to their work.[103] Additionally, one would end up performing tasks, which they are unqualified for.[104] The possibility of mistakes occurring remains high in such situations. At worst, a life/lives may be lost. Stress levels among overworked staff are also likely to rise.[105] Finally, informal payments undermine one's right of access to healthcare.[106] Those who are unable or unwilling to make these payments, according to Taratibu[107], a hospital administrator, are prohibited from accessing healthcare services. Under such circumstances there is a high risk of the loss of life.

5. CHALLENGES FACING THE FIGHT AGAINST CORRUPTION IN KENYA'S HEALTHCARE SECTOR

As the preceding analysis demonstrates, corruption drastically affects the realization of the right to health. To ensure that individuals enjoy this right at all times, this vice should be fought with full force. That said, the war against this vice is prone with difficulties. Identifying these challenges is important in the sense that it kick starts the conversation on developing strategies to combat the barriers of access to healthcare. Let us now review these hurdles.

5.1. Reluctance by Authorities to Enforce the Law Against Corruption

One of the reasons why corruption continues to take root in Kenya's healthcare sector is the reluctance by those in public authority to deal firmly with this vice.[108] Like in many states, corruption is outlawed in the country. Under Article 1(a) of UNCAC, Kenya undertook to adopt measures to fight corruption. A similar commitment is found within the AUCPCC.[109] At the domestic level, the ACECA spells out several measures to combat corruption. The preamble to this legislation is emphatic that the statute is aimed at, among other goals, the prevention and punishment of corruption. Under section 48, a person convicted of an attempt to commit corruption is liable to a fine of up to Kshs 1 million (about US$ 6,700). According to section 48 of the Bribery Act, anyone guilty of bribery is liable to a fine of up to Kshs 10 million (about US$ 66,700) or imprisonment for ten years. While sanctioning the removal of public servants charged with corruption from public office, Justice S. Manikumar of the High Court of Madras in India in *R. Ravichandran vs the Additional Commissioner of Police* contended: "[B]y allowing a government servant, facing serious charges of corruption or misappropriation or embezzlement, etc., to be retained in service, public interest would be affected."[110]

99 C. Omar et al., *Pilfering for Survival: How Health Workers Use Access to Drugs as a Coping Strategy*, 2:4 Human Resources For Health 4 (2004).
100 L. Nyawira et al., *Management of Human Resources for Health: Implications for Health Systems Efficiency in Kenya*, 22:1046 BMC Health Serv. Res. 10 (2022).
101 *Id.*
102 Interview with Fadhili, *supra* note 71.
103 S. Goodman et al., *Effects of Absenteeism on Individuals and Organizations*, Carnegie Mellon University 280 (1984).
104 See also: Gichane, *supra* note 78, at 2. M. Nyathi et al., *Working Conditions that Contribute to Absenteeism among Nurses in a Provincial Hospital in the Limpopo Province*, 31 Curationis 28 (2003).
105 See also: P. Sharma et al., *Occupational Stress among Staff Nurses: Controlling the Risk to Health*, 18:2 Indian J. Occup. Environ. Med. 52 (2014). M. Mosadeghrad et al., *A Study of Relationship between Job Stress, Quality of Working Life and Turnover Intention Among Hospital Employees*, 24 Health Servs. Manag. Res. 170 (2011).
106 O. Otieno et al., *Access to Primary Healthcare Services and Associated Factors in Urban Slums in Nairobi – Kenya*, 20 BMC Public Health 7 (2020). A. Aboutorabi et al., *Factors Affecting the Informal Payments in Public and Teaching Hospitals*, 30:315 Med. J. Islamic Republic Iran 1 (2016).
107 Interview with Taratibu (Nov. 28, 2022).
108 G. Otieno, *The Narc's Anti-Corruption Drive in Kenya*, 14:4 Afr. Sec. Stud. 69 (2005).
109 Article 2(1).
110 https://indiankanoon.org/doc/83803/ (last visited May 22, 2023).

There were several scandals in Kenya during the reign of the late President Daniel Arap Moi (1978-2002). The biggest of these scandals was Goldenberg, considering the amount of money involved, Kshs 27 billion (approximately US$1.8 million).[111] Highly placed government officials and the then Vice President were implicated in the scandal.[112] Mr. Kamlesh Pattni, a businessman and chairperson of Goldenberg International, allegedly conspired with Collins Owayo, Commissioner of Mines and Geology, and then Vice President, George Saitoti, to receive illegal payments. These payments were said to be compensation for exporting gold and diamonds contrary to the provisions of the Local Manufacturers (Export Compensation) Act.[113] With the help of senior government officials, Goldenberg International was paid millions of dollars from the public coffers in export compensation payments. [114] It later emerged that these exports were fictitious. In its report, the Bosire Commission, whose mandate was to inquire into the scandal, concluded that the prosecution of those implicated in this scandal was chaotic and partial.[115] Consequently, it recommended further investigations and proper prosecution of all those suspected to have defrauded taxpayers.[116] Regrettably, the Government failed to heed to this call.

In her seminal book "It is Our Turn to Eat", Michela Wrong shares the experience of John Githongo, a one-time Permanent Secretary (PS) of the Kenyan government.[117] Noteworthy, the Mwai Kibaki government, which Mr. Githongo served, came to power in 2002 on an anti-corruption platform. Mega corruption scandals such as the Goldenberg and Anglo-Leasing had made the previous Moi regime so unpopular that voters overwhelmingly voted the political party that he led, Kenya African National Union (KANU), out of office in the 2002 national polls. Riding on the goodwill enjoyed by the new regime, Mr. Kibaki put together a credible team of anti-corruption crusaders, who included Mr. Githongo, to help him fight corruption. The public were optimistic that the new regime would fight corruption with full force.

In his capacity as the Permanent Secretary for Ethics, Mr. Githongo routinely notified the President of acts of graft in his government.[118] Despite receiving credible information, President Kibaki failed to take any action.[119] Interestingly, there are claims that, on the contrary, he pleaded with Mr. Githongo to go slow in his quest to have those suspected of engaging in corrupt activities brought to book.[120] Was it a case of the country's CEO trying to shield his cronies from exposure even when there was apparent evidence of their involvement in corrupt activities? Although these claims are yet to be independently verified, an attitude such as this from the top leadership of the country does not augur well for the fight against graft. Arguably, such inaction could encourage corruption. It also undermines efforts to fight the vice.

During the field study, Heri, a hospital administrator, narrated how, despite credible evidence, the authorities, like Mr. Kibaki, failed to take legal action against a pharmacist who was suspected of stealing drugs from a public hospital.

> Drugs worth millions of shillings were found in his house. Upon arrest, he mentioned several of his colleagues who were part of the stealing. Surprisingly, no action has been taken against them to date. They are still at work.[121]

Doctor Hamisi shared similar views: "No legal action is taken against health workers who are locals of this county/state no matter how badly they conduct themselves."[122]

In the preamble to the Constitution Kenya commits itself to upholding the rule of law.[123] The National Anthem is also emphatic that justice should be the country's shield and defender at all times. Consequently, legal action must be taken against any person who violates the law. However, if what Wrong, Heri, and Hamisi expressed is anything to go by, there is a massive gap between the written law and practice. Failing to punish violations of the law could encourage lawlessness. This state of affairs, which undermines the realization of the right to health, is a recipe for disaster.

5.2. Inadequate Funding

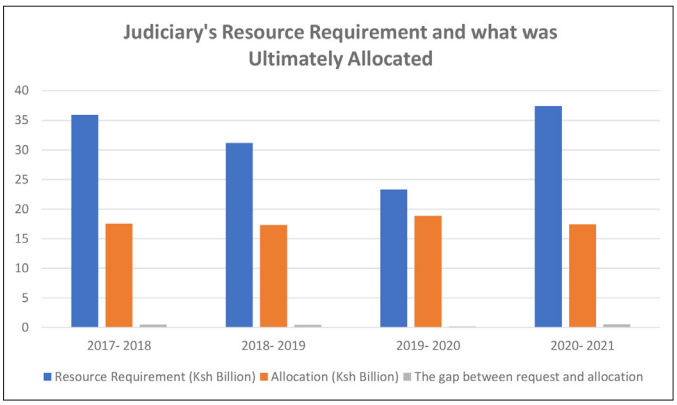
For any public institution to run effectively, funding is critical. Institutions that are well funded are likely to deliver on their mandate. Those denied resources have primarily performed dismally. This explains why allocating sufficient resources to institutions involved in the fight against corruption in the healthcare sector is critical.

5.2.1. Anti-Corruption Institutions

Among the institutions tasked with the fight against corruption are the Judiciary, the EACC, the Directorate of Criminal Investigations (DCI), and the Office of the Director of Public Prosecutions (ODPP). For the justice system to deliver on its mandate, it must be properly funded. Despite this crucial requirement, the system in Kenya suffers from inadequate

111 M. Mungai, *Testing Alternatives: Private Prosecutions as a Useful Anti-Corruption Tool in Kenya*, 4 Kabarak J.L. & Ethics 95 (2019).
112 J. Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 407 Conn. J. Int'l L. (1999), at 427.
113 *Id.*
114 *Id.*
115 Bosire Commission, *Report of the Judicial Commission of Inquiry into the Goldenberg Affair* (Bosire Commission Report 2005) 301.
116 *Id.*
117 M. Wrong, *It's Our Turn to Eat* (HarperCollins Publishers 2010) 173-74.
118 *Id.*
119 *Id.*
120 *Id.*
121 Interview with Heri, *supra* note 96.
122 Interview with Hamisi, *supra* note 88.
123 *Constitution of Kenya* 2010, preamble.

funding. In its 2022 State of the Judiciary Report, this arm of Government highlighted the issue of inadequate funding.[124] Yet Article 20(5) of the Constitution requires Government to allocate sufficient resources, which will ensure that all persons at all times enjoy this entitlement. Compared to the other two arms of government, the Kenyan Judiciary has had to put up with budgetary cuts and inadequate human resources.[125] In the financial year 2020-2021, of the Kshs 37.42 billion (US$250 million) the Judiciary requested, Parliament allocated under half of this amount – Kshs 17.42 billion (US$117 million).[126] This left the Judiciary with a resource deficit of about 53 percent.[127] The following bar graph shows the difference between what the Judiciary requested and what parliament allocated to this institution from 2017 to 2021.[128] These data affirm that the funding that the Judiciary received is hardly sufficient to meet its budgetary requirements.



Graph 1: Judiciary's resource requirement and allocation (2017 to 2021)

Further, inadequate funding and budgetary cuts could explain why the Judiciary, as of the financial year 2019-2020, operated with 55% of the required workforce.[129] The number of judges and magistrates fell far below the required number for the judiciary to operate efficiently. A direct consequence of these trends is an increase in the backlog of cases, including corruption-relatedcases.[130]

The failure to adequately fund the judiciary and other critical institutions in the justice system is contrary to the provisions of the law. In the case of the judiciary, the law provides for the establishing of the Judiciary Fund.[131] Article 173 of the Constitution declares that this fund is to be used in ensuring the judiciary effectively discharges its mandate.[132] On several occasions, Kenya's central government has decried the lack of adequate resources to explain its failure to fund the provision of socio-economic rights to its people.[133] Courts have, however, dismissed this claim. In *Mitubell Welfare Society vs The Attorney General & 2 Others,*[134] Justice Mumbi Ngugi (then of the High Court of Kenya) argued that:

> The argument that socio-economic rights cannot be claimed at this point [thirteen] years after the promulgation of the Constitution ignores the fact that no provision of the Constitution is intended to wait until the state feels ready to meet its constitutional obligations. Articles 21 and 43 require that there should be progressive realization of socio-economic rights, implying that the state must be seen to be taking steps, and I must add be seen to take steps towards realization of these rights.[135]

When the matter reached the Supreme Court of Kenya[136], it expressed the following sentiments:

> The right to accessible and adequate housing [or healthcare services], just like any other right under article 43, requires the State to take legislative, policy and other measures to achieve it.[137]

The views expressed by the highest court in Kenya are somewhat troubling. This position, which is consistent with the popular argument that socio-economic rights are to be realized progressively and subject to the availability of resources, should not be taken to imply that the national or county government can hide behind the lack of resources to shirk its responsibilities.[138] On the contrary, all levels of government must protect, promote, and preserve the fundamental right to healthcare. Article 21(2) of the Constitution requires the State to "...take legislative, policy, and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under article 43".[139]

124 The Kenya Judiciary, *State of the Judiciary and Administration of Justice: Annual Report 2021-2022* (The Kenya Judiciary 2022) 212.
125 *Id.*
126 Institute of Economic Affairs, *The Case Backlog Problem in Kenya's Judiciary and the Solutions* (Institute of Economic Affairs 2021) 1.
127 *Id.*
128 *Id.*
129 Institute of Economic Affairs, *supra* note 126.
130 *Id.*
131 *Constitution of Kenya* art. 173.
132 *Id.*
133 See for instance in MMM vs Permanent Secretary Ministry of Education & 2 Others [2013] eKLR, at paragraph 13, Satrose Ayuma and 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others [2013] eKLR, at paragraph 44, Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR at paragraph 8, Erick Githua Kiarie v Attorney General & 2 others [2016] eKLR, paragraph 20, Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR, at paragraph 31 (where the Government contended that even though it has the obligation to accord citizens socio-economic rights, the realization of these rights is subject to availability of resources).
134 *Mitubell Welfare Society vs The Attorney General & 2 Others [2011]* eKLR.
135 *Id.* at 10.
136 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021]* eKLR (Per Maraga CJ, Mwilu DCJ, Ibrahim SCJ, Wanjala SCJ & Ndung'u SCJ).
137 *Id.* at 43.
138 See also: D. Hannah, *A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-economic Rights in South Africa* (Studies in Poverty and Inequality Institute 2014) 6.
139 *Constitution of Kenya* 2010, art. 21(2).

Similarly, the EACC has also cited insufficient funding as a significant challenge to its efficiency in discharging its mandate.[140] In the financial year 2017-2018, the EACC requested an allocation of Kshs 2.9 billion (US$ 22.3 million) from the exchequer.[141] It was allocated Kshs 2.2 billion (US$ 17 million) leaving a deficit of more than Kshs 600 million (US$ 4.6 million).[142] Due to insufficient funding, the EACC has been unable to hire the required number of professionals such as electrical engineers, land surveyors, and investigators.[143]

5.2.2. Inadequate funding of the healthcare system

Proper funding of any healthcare system is critical to its efficiency.[144] According to the Abuja Declaration on Health Financing, African countries committed to increasing health financing to 15% of their annual budget to improve their healthcare sectors.[145] In Kenya, the allocation to the Ministry of Health has been about six percent of the government's annual budget.[146] Put differently, it is less than half of the target. As a result, the healthcare sector is still predominantly financed by private sources such as donors and out-of-pocket payments by patients and caregivers.[147] Yet the government is under a legal obligation to ensure that there are enough resources towards the provision of this right.[148] The sentiments of Dr. Jabali were apt in this regard:

> It is an open secret that the healthcare sector in this country is not properly funded. Things are so bad that sometimes we cannot purchase basic things like syringes and gloves. It is unfortunate.[149]

Like the judiciary, one of the consequences of this under-funding of the healthcare system is the sector's inability to pay salaries and employ enough personnel. With few doctors attending to patients, instances of absenteeism are bound to occur. Commenting on the issue of under-funding of this sector, Kibali, a human rights officer, argued:

> This has resulted in the sector having unmotivated staff due to delayed payment of salaries, poor salaries and employee incentives and under-resourced facilities (inadequate medical supplies and equipment). Consequently, patients opt to bribe to access services and limited resources. Healthcare staff also resort to unethical ways of making an extra shilling. This undermines the fight against corruption in the healthcare sector significantly.[150]

What emerges from Kibali's sentiments is that inadequate funding of healthcare systems is a pivotal contributor to corruption in the sector. Health workers who are not paid well are likely to resort to unethical ways of getting money.

5.3. Public attitude towards corruption and corrupt individuals

Some authors contend that individuals from a badly behaved group are most likely to misbehave.[151] According to this school of thought, societies that tolerate corruption, people have a stronger incentive to be corrupt since it is easier to find corrupt officials and escape punishment.[152] In the opinion of Justice Pendo, a Judge of the High Court of Kenya, the attitude of the public towards corruption is a significant contributor to its proliferation.[153] According to this Judicial Official, Kenyans are not angry enough with corruption and those implicated. Their attitude is always determined by who is involved.

> Kenyans have a strange attitude towards corruption. Whenever someone from their ethnic community is implicated in corruption, members of the accused person's community go on the offensive. They accuse everyone of being out to finish their community. This is commonly known as 'Mtu Wetu [our person] or 'our turn to eat' syndrome'. We have cases where Kenyans still go ahead and elect people convicted of corruption and even sentenced to a prison term to influential public offices. Remember the recent election of a member of Parliament convicted of corruption charges and sentenced to a prison term. This is something one hardly finds in societies with sound values. This kind of attitude undermines the fight against corruption in all sectors.[154]

Doctor Jabali agreed with these sentiments:

> We talk a lot about corruption and how it harms all sectors in our country. Nevertheless, the truth is that many Kenyans have no issue with corruption as long as it is benefitting them and their tribespeople…[155]

The views of Justice Pendo and Dr. Jabali raise critical issues. Firstly, it emerges that not every Kenyan is averse to corruption. As long as one or one's people are benefiting from it, many do

140 Ethics and Anti-Corruption Commission, *Strategic Plan 2023-2028* (Ethics and Anti-Corruption Commission 2023) 22.
141 *Id.* at 58.
142 *Id.*
143 Hannah, *supra* note 138.
144 World Health Organization, *World Health Report* (World Health Organization 2000) 40.
145 World Health Organization, *Abuja Declaration Ten Years on* (World Health Organization 2010) 1.
146 Ministry of Medical Services, *Strengthening Health Service Delivery: Report of the Taskforce Constituted to Address Health Sector Issues Raised by the Kenya Medical Practitioners, Pharmacists and Dentists Union* (Ministry of Medical Services 2012) 16.
147 *Id.*
148 *Constitution of Kenya*, *supra* note 139.
149 Interview with Jabali (Dec. 17, 2022).
150 Interview with Kibali (Jan. 9, 2023).
151 G. Roberta et al., *Individual Attitudes Towards Corruption: Do Social Effects Matter* (World Bank Policy Research Working Paper 2003) 3122, 2, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/3122 (last visited May 23, 2023).
152 J. Andvig et al., *How Corruption May Corrupt*, J. Econ. Behav. & Org. (1990), at 63.
153 Interview with Justice Pendo (Dec. 8, 2022).
154 *Id.*
155 Interview with Jabali, *supra* note 149.

not regard it as a problem. This is a worrying trend, considering that corruption, in its various forms, is an offence under Kenyan law.[156] Overlooking the vice because one is a beneficiary gravely undermines efforts to stamp it out. Further, electing people convicted of corrupt practices to public office amounts to sanctioning the vice contrary to the requirements of the UNCAC, AUCPCC, ACECA, and the Constitution. It sends a very wrong message – that there is nothing wrong with being corrupt. That even the corrupt can be elected to public office.

5.4. Complex and broad healthcare system

Much of what goes on in the healthcare system is shrouded in secrecy. The healthcare system ranks as one of the most complex and broad institutions. According to J. Braithwaite et al., healthcare systems are troublesome and expensive to run.[157] While on point, these views are somewhat incomplete. These authors fail to flesh out the troublesome nature of the system. How this factor impacts the right to health is also unclear. That said, unscrupulous healthcare workers and other vital stakeholders are known to take advantage of this complex regime to engage in unethical acts such as the waiver of bills. As I. Major has argued, the healthcare system is a complex multi-tier sector characterized by diverse competing interests.[158] One of the effects of this complexity is the difficulty of external observers such as patients and caregivers to comprehend what goes on in this space.[159]

Riziki, a human rights officer, underlined the complex nature of the Kenyan system:

> The healthcare sector in Kenya has a robust number of players ranging from state (both national and county) and private actors, all offering different but complimentary services. Each of these players is motivated by their own personal/corporate interests. The system's complexity and broadness has encouraged some actors to operate in silos hence making it difficult to hold all duty-bearers accountable. Where no one is held to account, chances of corruption flourishing are high. This is what is happening in Kenya's healthcare sector.[160]

Amani, an ethics officer working with the EACC, expressed analogous views.

It is almost impossible for patients and caregivers to comprehend what goes on in the healthcare system fully. This is due to the broadness and complexity of the system. Some significant people in this sector have taken advantage of this broadness and complexity to engage in corrupt activities with impunity.[161]

These observations highlight the challenges associated with the complexity of the healthcare system. Multiple competing interests, owing to the diverse parties involved, is a feature of this maze.[162] Each party involved is driven by their interests, some of which can be a recipe for corruption.

5.5. Ignorance/lack of awareness

Ignorance of one's right to healthcare is also a significant challenge to the fight against corruption in the healthcare sector. Article 43 of the Kenyan Constitution accords all persons the right to health. In addition, the country has developed the Kenya Health Policy (KHP) 2014-2030. It is also a signatory to the ICESCR. Article 12 of the ICESCR requires state parties to provide their people with adequate healthcare facilities. Under Article 2(5) of the Constitution, all the treaties that the country has ratified form part of the laws of Kenya. An appreciation of the legal framework critical if the right to healthcare services is to make sense and be enjoyed by users of public health facilities. Experience on the ground, however, demonstrates that these clientele have limited knowledge of health-related issues.[163] Some believe that being attended to by medical personnel in a public hospital is a favour, not an entitlement:

> Most rights holders view access to quality healthcare (especially from public healthcare facilities) as a privilege other than a right. This mindset has enabled corruption to flourish and go unchecked in most healthcare facilities and offices.[164]

When consumers of healthcare services are unaware that they have a right to healthcare services, some healthcare personnel can exploit them. Patients and caregivers who do not know that they are entitled to a free supply of drugs and other medical supplies, for instance, will most likely pay for them. This is what Fanaka, a caregiver, alluded to when she argued that:

> I have always wondered why I have to pay for everything whenever I take my ailing parents to hospital. I pay some money for their medical insurance (NHIF) monthly. However, every time I take them for their blood pressure and diabetes clinic, I pay some money. No one has ever answered the question as to why this is the case.[165]

From the above sentiments, it is apparent that unscrupulous healthcare workers take advantage of the ignorance of patients and caregivers to fleece them. It cannot be the case that a patient who pays for the NHIF still must pay for almost every service whenever s/he visits a public healthcare facility. This poses a challenge to the fight against corruption. Furthermore, it has a negative effect on accessing quality healthcare services.

156 *Anti-Corruption and Economic Crimes Act* No. 2 of 2003, §§ 40-47A.
157 J. Braithwaite et al., *Complexity Science in Healthcare: Aspirations, Approaches, Applications and Accomplishments* (Australian Institute of Health Innovation 2017) 2.
158 I. Major, *Two-Sided Information Asymmetry in the Healthcare Industry* (Springer 2019) at 178.
159 G. Thomas et al., *Considering Complexity in Healthcare Systems*, 44 J. Biomed. Informatics 945 (2011).
160 Interview with Riziki, *supra* note 63.
161 Interview with Amani (Jan. 9, 2023)
162 *Id.*
163 M. Godia et al., *Sexual Reproductive Health Service Provision to Young People in Kenya: Health Service Providers' Experiences*, 13:476 BMC Health Serv. Res. 7 (2013).
164 Interview with Riziki, *supra* note 63.
165 Interview with Fanaka (Nov. 25, 2022).

6. OVERCOMING CHALLENGES TO THE FIGHT AGAINST CORRUPTION IN KENYA'S HEALTHCARE SECTOR – SOME PROPOSALS

In *Robert Alai vs The Hon. Attorney General & Director of Public Prosecutions*,[166] Justice Chacha Mwita of the High Court of Kenya emphasized that to be beneficial, fundamental rights are to be enjoyed and not curtailed.[167] To ensure that this entitlement is enjoyed, both legal and non-legal measures should be taken to deal with corruption.[168] The role of independent institutions such as the ODPP in overcoming the government's reluctance to fight corruption in healthcare is essential. Once established, these institutions should operate independently. They should be subject to the Constitution and the Constitution alone in the discharge of their mandate.[169] Acts of political interference are likely to hamper their efficiency.[170] In order to discourage graft, all duty bearers must be on board. They must also pull in the same direction. Towards this end, the ODPP must prosecute all individuals suspected of having engaged in graft regardless of their status. At all times, the rule of law, which the Constitution guarantees in the preamble, must be upheld.[171]

Dealing firmly with those found guilty of corrupt practices has yielded results elsewhere. When Teh Cheang Wan, a Minister for National Development in Singapore's independent government, was accused of bribery, he tried approaching the then Prime Minister, Lee Kuan Yew, to have him interfere with the case and get him off the hook.[172] It is reported that the Prime Minister declined to meet the embattled minister until the investigations by the Corrupt Practices Investigations Bureau (CPIB) were concluded.[173] Later, the minister committed suicide out of the shame of being involved in corruption.[174] In another incident, Wee Toon Boon, a Minister of State, was found guilty of having improperly benefited from public office.[175] After being subjected to a court trial, he was convicted and sentenced to four years and six months in jail.[176] To stem incidents of corruption, Yew's government introduced a raft of legal measures in 1989. Primarily, it increased the maximum fine for corruption tenfold, that is, from US$10,000 to US$100,000.[177] Additionally, giving false information to the CPIB became an offence subject to imprisonment and a fine of up to US$10,000.[178] Further, courts were empowered to confiscate the benefits derived from corruption.[179] These measures contributed significantly to the reduction of corruption in the country.

There are several lessons developing states such as Kenya can learn from the Singapore example. In the first place, this case-study affirms the hypothesis that dealing firmly with corruption can ultimately yield positive results. Due to its firm stance against corruption, Singapore has since risen from a third-world country to one of the world's most advanced economies.[180] It, however, takes leadership to wage a successful battle against corruption. Further, the presence of strong and independent public institutions is a key weapon in the war against corruption.[181] For Singapore, a strong and independent CPIB was critical in checking corruption. This is instructive for Kenya. In keeping with the Constitution, the government is required to adequately fund anti-corruption agencies such as the EACC. To be able to deliver the goods, this agency has to be independent in all its dealings. This article identified inadequate resources as a barrier in the fight against corruption. To bridge this gap, the government has to allocate adequate funds. These resources can enable institutions such as the EACC to hire and retain competent personnel.[182] Once deployed, these officials can enhance the capacity of such agencies to combat corruption in, among other sectors, health. On the contrary, if it is starved of resources, it is quite unlikely that such institutions will fail to deliver on their legal mandates. From the findings of this study, the attitude of the public must be questioned. A 2021 report by the EACC posted very startling results. Almost 60% of the respondents who participated in the study regarded corruption as a norm.[183] Over one half (56%) of those sampled considered the process of reporting corruption to be too involving. Rather than file complaints with law enforcement officials, they opted to look the other way.[184] Sixty-two percent expressed fear that if they reported suspected incidents of corruption, they would be victimized.[185] Consequently, like those in the second category,

166 [2017] *eKLR*.
167 [2017] *eKLR* at paragraph 61.
168 E. Abuya, *Revisiting Liberalism and Post-Colonial Theory in the Context of Asylum Applications*, 24:2 Netherlands Q. Hum. Rts. 193 (2006).
169 *Constitution of Kenya* 2010, art. 160(1).
170 P. Hlongwane, *The Anti-Corruption Institutions in South Africa: A Panacea to Governance Ills?*, 33:2 Unisa Press 18 (2018).
171 *Constitution of Kenya* 2010, *supra* note 123.
172 See: K. Yew, *From Third World to First: Singapore and the Asian Economic Boom* (HarperCollins Publishers 2011).
173 *Id.* at 162.
174 *Id.*
175 *Id.* at 161.
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.*
180 L. Low, *Singapore Inc: A Success Story*, 10:1 S. Afr. J. Int'l Aff. 49 (2003).
181 E. Assiamah, *'Strong Personalities' and 'Strong Institutions' Mediated by a 'Strong Third Force': Thinking 'Systems' in Corruption Control*, Public Org. Rev. 1 (2017).
182 M. Hussein, *Combating Corruption in Malawi: An Assessment of the Enforcing Mechanisms*, Afr. Secur. Rev. 100 (2010).
183 Ethics and Anti-corruption Commission, *National Ethics and Corruption Survey* (EACC 2021) 31.
184 *Id.*
185 *Id.*

they chose against raising any concern. These data are quite disturbing. For the fight against corruption to succeed, the public has to take an active role. Acting indifferently or taking sides with the corrupt clearly undermines this battle. This kind of practice also allows the vice to continue thriving.

Training and retraining of healthcare workers on the importance of being ethical in discharging their duties is also a vital tool in the fight against corruption.[186] Trainers can be drawn from the institution itself and other relevant agencies such as the EACC, the judiciary, the ODPP, faith-based organizations, users of public health facilities, academic institutions and professional associations. You will recall the studies by USAID and Gichane, which focused on absenteeism in public hospitals. Doubtless, these works add to our understanding of the problem. However, they are limited in the sense that in their quest to propose avenues of dealing with this vice they do not give sufficient attention to the critical issue of inculcation of ethics as a preventative measure. Ethics are a vital weapon in this fight. In terms of coverage, the syllabus that trainers use has to draw the learner's attention to desirable standards of human behavior such as integrity and contentment, among other virtues.[187] It should also remind health workers of their legal obligations. As public servants, they should uphold values such as integrity, honesty, transparency, and accountability.[188] At the institutional level, workers who have exhibited such standards should be recognized, as a way towards encouraging other colleagues to follow suit and serve with integrity.

The last initiative involves demystifying the healthcare sector in order to make it more transparent and accessible to the public. Organizing "education days" and inviting members of the public to appraise a health facility as well as informing them of their rights and duties is likely to enhance their knowledge and understanding of the system. Via this route, the public can be encouraged to reject and report incidents of corruption.

7. CONCLUSION: REINFORCING THE RIGHT TO HEALTH

This study has analyzed the forms of corruption in Kenya's healthcare sector and their effect on the provision of these services. It has evaluated the challenges facing the fight against corruption in the sector. It has highlighted the depth of corruption in the sector. The common theme running through the study is that there is corruption in Kenya's healthcare sector. As the preceding section has demonstrated, this vice has negatively affected provision of this fundamental right. This is why the need to adopt measures to overcome the challenges facing the fight against this vice is urgent. Issa reminds us that "[h]ealth is wealth. No one can truly enjoy the other rights enshrined in the Constitution without being in good health."[189] Kenya's commitment to the establishment of a government based on, among others, values of human rights and the rule of law[190] should stir up all the key players in the healthcare sector and other relevant institutions to spare no effort in fighting corruption. Decisively dealing with the various forms of corruption discussed in this study is critical if the public are to enjoy the highest attainable standard of physical and mental health.

This is not to imply that stamping this vice out of the healthcare sector is without challenge. On the contrary, corruption will fight back.[191] Beneficiaries of this vice are unlikely to relent easily. However, considering the damage and loss caused to the country's healthcare sector, fighting it should be a key priority for all human rights defenders. If countries like Botswana, Singapore, and Hong Kong have managed to reduce corruption to an all-time low, other States can also do it. Robust measures and political goodwill are essential in this fight. If Kenya fails in the war against corruption, the enjoyment of the right to healthcare will continue to be a mirage for many patients.

However, this paper has its limitations. Firstly, the sample of 135 respondents that we interviewed is not exhaustive. Kenya comprises 47 counties, yet we undertook this research in 5 counties. Most of the respondents we interviewed live and work in the five counties. In Swahili, they say, "Palipo na moshi hapakosi moto" which, in English, translates to, "where there is smoke, there is fire." The data we collected from the field shows that there is corruption (fire) in the healthcare sector of the five Kenyan counties. At the same time, the secondary data we have used points to signs (smoke) of corruption in some of the other counties to which we did not extend our study.[192] Consequently, researchers interested in this area should extend their studies to the other 42 counties to establish whether the signs of corruption (smoke) alluded to above are not just allegations but proof of corruption (fire) in their healthcare sectors.

Disclosure of interest

The authors have no competing interests to declare.

186 BA Liang et al., Combating Healthcare Corruption and Fraud with Improved Global Health Governance, 3 BMC Int. Health Hum. Rights (2012). C. Rispel et al., *Exploring corruption in the South African health sector*, 248 Health Policy and Planning (2016), at 239.

187 H. Gildenhuys, *Ethics And Professionalism: The Battle Against Public Corruption* (African Sun Media 2004) 13.

188 *Constitution of Kenya*, *supra* note 40. *Public Officer Ethics Act* No. 4 of 2003, § 8.

189 *Supra* note 1.

190 *Id.* preamble.

191 See also: J.D. Akpan et al., *When You Fight Corruption, Corruption Will Fight Back, Who Will Win the War: Reviewing President Buhari Administration's Anti-Corruption War in Nigeria*, 5:1 Am. J. Public Policy Adm. 23 (2020).

192 W. Gichane et al., *Understanding Healthcare Provider Absenteeism in Kenya: A Qualitative Analysis*, 19:660 BMC Health Serv. Res (2019) at 3.