



Kenya - Global bribery offenses guide

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Por James Kamau

1) What is the legal framework governing bribery in Kenya?

The Bribery Act, No.47 of 2016 (Bribery Act) is the key piece of legislation in Kenya governing bribery. It commenced on January 13, 2017.

Supporting legislation governing the offense includes the Anti-Corruption and Economic Crimes Act, No.3 of 2003 (AECA) which provides for the prevention, investigation and punishment of corruption and economic crimes (which include bribery). The Ethics and Anti-Corruption Commission Act, 2011 (EACC) establishes the Ethics and Anti-Corruption Commission which enforces claims arising from bribery offenses in the public sector. This mandate has been expanded by the Bribery Act to cover the private sector. Other supporting legislation includes the Public Officers Ethics Act, 2013 which provides for a Code of Conduct and Ethics for public officers and imposes an obligation to file wealth financial declarations and the Leadership and Integrity Act, 2012 that operationalizes the Constitutional Provisions on National Values and Principles of Governance.

Any matters under investigation or prosecution prior to the enactment of the Bribery Act will be treated as though instituted under the Bribery Act under Section 27.

2) What constitutes a bribe?

The Bribery Act defines a bribe as an act of giving or receiving offers, promises or a financial or other advantage where the person knows or believes that the giving or acceptance of the financial or other advantage would itself constitute the improper performance of a relevant function or activity (Section 5 and 6, Bribery Act).

The term "advantage" is widely defined to include any favor, or advantage of any description whatsoever, including money, gift, reward, loan, any office, employment or contract.

"Function or activity" is interpreted by the Bribery Act to mean any function of a public nature, any function carried out by a state officer or public officer pursuant to their duties, any function carried out by a foreign public official pursuant to their duties, any activity connected with a business, any activity performed in the course of a person's employment and any activity performed by or on behalf of a body of persons whether corporate or otherwise (Section 7, Bribery Act).

The above functions and activities must meet one or more of the conditions that the person performing the function or activity is (i) expected to do so in good faith, (ii) expected to do so impartially and (iii) is in a position of trust by virtue of performing it.

3) What are the principal offenses under this legislative framework?

- Giving a bribe (Bribery Act, Section 5)

- Receiving a bribe (Bribery Act, Section 6)
- Bribery of foreign public officials (Bribery Act, Section 8)
- Failure of a private entity to put in place procedures for the prevention of bribery (Bribery Act, Section 9)
- Failure of a private entity to prevent bribery by a person associated with it (Bribery Act, Section 10)
- Assisting a person or a private entity to give a bribe (Section 13, Bribery Act)
- Reference to an associated person in the Act shall mean a person who performs services on behalf of another person as an agent, employee or in any other capacity (Section 11, Bribery Act).

4) What is the jurisdictional reach of the legal framework?

The Bribery Act applies to the conduct of citizens of Kenya, public and private entities within Kenya as well as activities done outside Kenya (Section 15, Bribery Act).

5) Who may be liable for bribery? (public officials, private individuals, legal entities etc.)

The scope of the Bribery Act is extensive and covers functions and activities to which a bribe relates performed by state officers, public officers, foreign public officials, private individuals, private and public entities and partnerships (Sections 7, 16 and 17, Bribery Act).

Additionally, private entities can be held liable for failing to put in place procedures for the prevention of bribery (Section 9, Bribery Act).

For bribery by a private entity or a partnership, it must be proved that the offense was committed with the consent or the connivance of a senior officer of the private entity or the partnership or a person acting in that capacity (Section 16 Bribery Act).

6) Can a parent company be liable for its subsidiary's involvement in bribery?

Yes, a parent company is liable for its subsidiary's involvement in bribery. This is in line with the duty of a company to prevent bribery as a result of the actions of a "person associated with the company" (Section 10 Bribery Act). The law defines an associated person as one who performs services on behalf of another as an agent, employee or in any other capacity (Section 11 Bribery Act).

This would mean that a subsidiary would fall under the interpretation of an associated person under the Bribery Act if the action by the subsidiary gave a financial or other advantage to the parent company.

7) Are facilitation payments (i.e. small payments to speed up routine governmental action) considered bribes?

Yes, facilitation payments are considered bribes provided they meet the criteria. The Bribery Act defines an advantage within the meaning of a bribe to mean, among other actions, any facilitation payment made to expedite or secure performance by another person. Kenyan jurisprudence also supports the same position.

8) Does the legal framework restrict political and charitable contributions?

There is no express prohibition under the Kenyan legal framework on bribery for political and charitable contributions.

However, donations, whether in cash or kind, in support of any political parties or candidates, perceived as an attempt to gain an improper business advantage would fall under the Bribery Act. Political contributions are generally allowed, provided they are not used to gain improper/unfair advantage.

Charitable support and donations are acceptable whether they be in-kind, services, or direct financial contributions. However, people must ensure that charitable contributions do not constitute a bribe under the Bribery Act.

An act may still constitute a bribe where a public or a private entity has failed to put in place procedures for the prevention of bribery (Section 9 Bribery Act) and where a private entity has failed to prevent bribery (Section 10 Bribery Act).

9) Does the legal framework place restrictions on corporate hospitality?

The Kenyan legal regime on bribery makes no express provisions regarding corporate hospitality.

Whether corporate hospitality amounts to a bribe would be assessed based on whether there is sufficient evidence to show that it was given with intent of inducing conduct that amounts to a breach of an expectation that a person will act in good faith, impartially or in accordance with a position of trust. This would need to be assessed on a case-by-case basis and to ascertain if sufficient evidence can be adduced to prove an infringement of the provisions under the Bribery Act.

10) Are there any defenses for bribery offenses?

There are no specific statutory defenses under the Bribery Act.

However, the Kenyan Penal Code (Chapter 63, Laws of Kenya) provides a defense where one is compelled to do an act by threats of being killed or subjected to grievous bodily harm if the person refuses to perform the act (Section 16 Penal Code).

11) What are the key regulatory or enforcement bodies with regard to bribery?

The main enforcement body with regard to bribery is the Ethics and Anti-corruption Commission (EACC) (Section 14, Bribery Act). The EACC has the primary mandate of receiving and investigating bribery claims and recommending to the Director of Public Prosecutions (DPP) the prosecution of any acts of bribery (Section 11, EACC Act and Section 35, AECA).

The Directorate of Criminal Investigations (DCI) established under the National Police Service Act, No. 11A of 2011 (NPSA) (Section 28, NPSA) also have wide investigative powers as they are the department principally responsible for criminal investigations.

The Anti-Corruption and Economic Crimes Court established through Gazette Notice 10263 of 2016 is specifically tasked to hear and decide upon cases pertaining to bribery.

The Asset Recovery Agency (ARA) is established under the Proceeds of Crime and Anti-Money Laundering Act, (Chapter 59B) (POCAMLA) and is tasked with assisting, among others, in criminal and civil forfeiture of property.

12) What are the legal consequences of being found guilty of bribery offenses?

The general penalty where there is no express penalty in the Bribery Act is a fine not exceeding KES5 million or an imprisonment for a term not exceeding ten years or both.

Where one is found guilty of giving, receiving or assisting to give and/or receive a bribe, the offender shall be liable upon conviction to an imprisonment term not exceeding ten years or to a fine not exceeding KES5 million or both. An additional fine may be imposed if as a consequence of the conduct, a person received a quantifiable benefit or any other person suffered a loss. This additional fine shall be equal to five times the benefit or loss or five times the sum of both benefit and loss where both occurred.

Where a private entity is found guilty of failing to prevent bribery, they shall be liable upon conviction to a fine and may additionally require the entity (including public entities) to pay back the value of any advantage received.

Kenyan courts may order the confiscation of the property acquired as a result of an advantage received by a convicted person or a private entity.

State officers or public officers convicted shall be barred from holding public office. Also, any person convicted of the offense shall be disqualified from election or appointment to hold a state or public office for a period of not more than ten years after conviction.

Where the convicted person is a director of a company or a partner at a firm, the person shall be disqualified from holding the position of director or partner in that company or firm and any other company or partnership in Kenya for not more than ten years.

Any person other than a natural person who is convicted of bribery shall be disqualified from transacting business with the national or county governments in Kenya for a period of ten years after conviction (Section 18 Bribery Act).

13) Are deferred prosecution agreements (DPAs) or other similar settlement mechanisms available?

There is no express provision in the Kenyan legal framework that provides for DPAs. However, the EACC can issue an undertaking not to issue criminal proceedings against a person who has given full disclosure of all material facts relating to past corrupt conduct and economic crimes (including bribery) and has voluntarily paid or refunded all the property acquired through the corruption or economic crime as well as paying for all the losses associated with the same. The undertaking shall be registered in court (Section 56B, AECA).

The Kenyan legal regime also allows for plea agreements where the accused person or entity may plead guilty to a bribery offense in exchange for a lesser/more lenient charge. The discussion shall be with the prosecutor (Section 137A, Criminal Procedure Code, Chapter 75, Laws of Kenya).

The Witness Protection Act, 2006, provides for the protection of witnesses in criminal cases and other proceedings and mandates law enforcement agencies to put in place reasonable mechanisms for the protection of identities of informants and witnesses.

Summary provided by Iseme Kamau & Maema Advocates, a member of DLA Piper Africa, a Swiss Verein whose members are comprised of independent law firms in Africa working with DLA Piper.

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