



## Access to information in Kenya



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**By Peter Gathu and Henry Kahindi** outside of Government.

Access to information is fundamental in a society that is governed by the rule of law. For the reason that governments hold information in trust in behalf of citizens, it follows that citizens have the right of access to the information held by the State.

Access to timely and accurate information provides individuals with the knowledge required to participate effectively in the democratic processes in any democratic society. Access to information fosters openness and transparency in decision-making.

An informed public is also likely to be vigilant against corruption within and

Kenyans have in the recent past been denied access to information and have for long been excluded from decision making processes in public affairs.

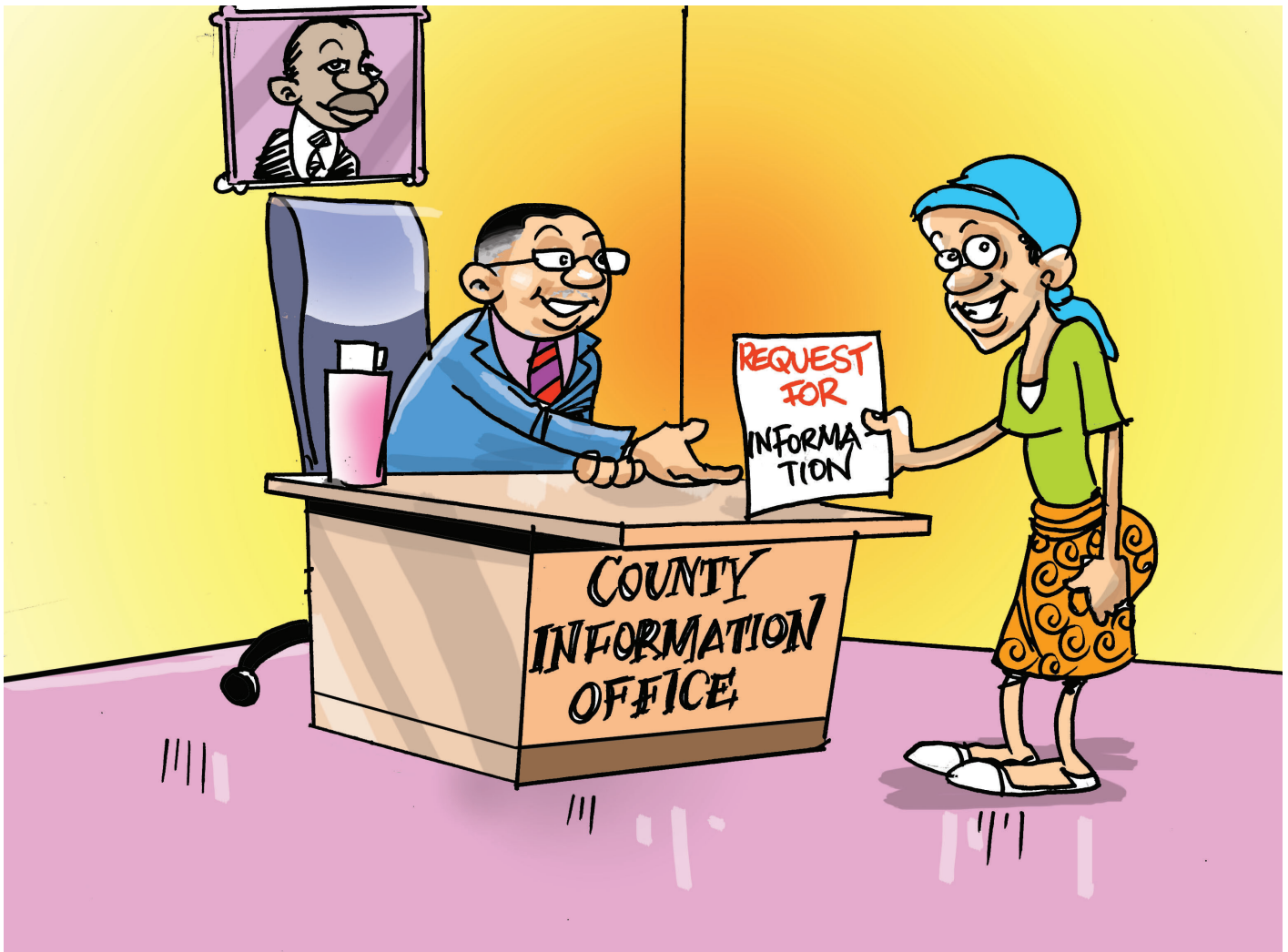
This has consequently led to a disillusioned citizenry who have even christened two categories of people as the 'wananchi' and 'wenyenchi', with the latter benefitting to the detriment of the former, as citizens feel completely left in the dark.

However, under the Constitution of Kenya, 2010, access to information is a right to be enjoyed by all Kenyans.

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The African Charter on Human and Peoples' Rights, African Union Convention on Preventing and Combating Corruption, African Charter on the Values and Principles of Public Service and Administration and the African Union Youth Charter. The Universal Declaration was the first instrument to codify the right to information. Article 19 provides that, everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 19 of the ICCPR.

# Access to information in Kenya



## The right of access to information

The right of access to information is provided for in several international and regional legal instruments to which Kenya is subject by way of ratification.

Ratification of these regional and international instruments places an obligation on Kenya to take positive measures to ensure that the rights in the said legal instruments are implemented and are accessed in the country.

For instance, the right to access of

information is internationally affirmed

under the Universal Declaration of Human Rights (UDHR) and further under the International Covenant on Civil and Political Rights (ICCPR). Because these treaties and conventions have been ratified by Kenya, they form part of the Kenyan law by virtue of Article 2(6) of the Constitution.

Article 35 of the Constitution and Section 96 of the County Government Act, 2012 provide for the right to access of information. Article 35(1) particularly guarantees all Kenyan citizens the right to

access any information held by the

state or information held by another person and required for the exercise or protection of any right or fundamental freedom.

Despite the fact that the right to access to information is guaranteed in the Constitution, there are still challenges as far as actualising the right is concerned. Efforts to develop and pass an implementing law have not borne fruit until August 2015 when the Access to Information Bill, 2015, sponsored by Hon. Priscilla Nyokabi, underwent the first reading at the National Assembly.

The Bill has been published and the next step is first reading.

Private entities would also be covered if they are "in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right."

An Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes

## The Access to Information Bill 2015

The Access to Information Bill, 2015 proposes to cover public bodies or information held by another person and required for the exercise or protection of any right or fundamental freedom.

It also applies to private entities that receive public resources and benefits, utilise public funds, engage in public functions, provide public services or have exclusive contracts to exploit natural resources.

## Application for access to information

There are no forms to be used in the application of access to information in the laws currently in operation. Section 8 of the Access to Information Bill, 2015 provides an opportunity for public entities to design them.

The request can be submitted in writing either in Kiswahili or English, in the event that the applicant is unable to read and write, or due to disability, the applicant is allowed to make oral requests.

The receiving officer is required to put down the oral request in writing and make two copies where one will be handed to the applicant. The request should be straight forward, specifying the information needed and capturing the exact particulars.

## Duration for processing access to information requests

The Access to Information Bill, 2015 gives a maximum time of 21 days to process access to information requests. The County Government Act, 2012 stipulates that each county government agency should designate an office for accessing information but

the Access to Information Bill, 2015 places such duties on the office of the Chief Executive Officer of any public entity. The proposed law gives the Chief Executive Officer leeway to delegate this duty.

## Proactive disclosure of information

The Access to Information Bill, 2015 makes it mandatory for all public entities to disclose information about the organisation, what it does, the employees of the organisation, the salary scales among other bits of information about the entity.

The bill also places an obligation on public agencies to explain their actions, policies or decisions to

**“Access to information is fundamental in a society that is governed by the rule of law.”**

citizens if they seek such explanations.

Among the bill's provisions for proactive disclosure of information is a requirement that government publishes all relevant facts while formulating important policies which affect the public, in the best interests of natural justice and promotion of democratic principles. This provision ensures inclusivity of citizens in all

forms of government.

## Redress in the event of delay/non-provision of information

In the event that a public entity receives a citizen's request but delays in providing the information, a person may seek redress from the High Court.

This is on grounds that it has been granted the original jurisdiction to hear matters concerning violation of rights. The Bill could be a progressive piece of legislation upon enactment as it will enforce the realization of this right as it sets out penalties and jail terms for public officers who inhibit its realization.

Similarly, when dissatisfied, appeals may be made to the existing Commission on Administrative Justice (Ombudsman), which would be able to conduct investigations including through the use of subpoenas. Its decisions would be binding.

In conclusion, the protection and promotion of this right has taken varying approaches driven by different impetuses including legislative developments such as this Bill.

There is no doubt that when enacted, the Bill will aid the realization of this right even at the county level. The media and the citizens should also exercise their right to know so as to create a demand and hold the government accountable.

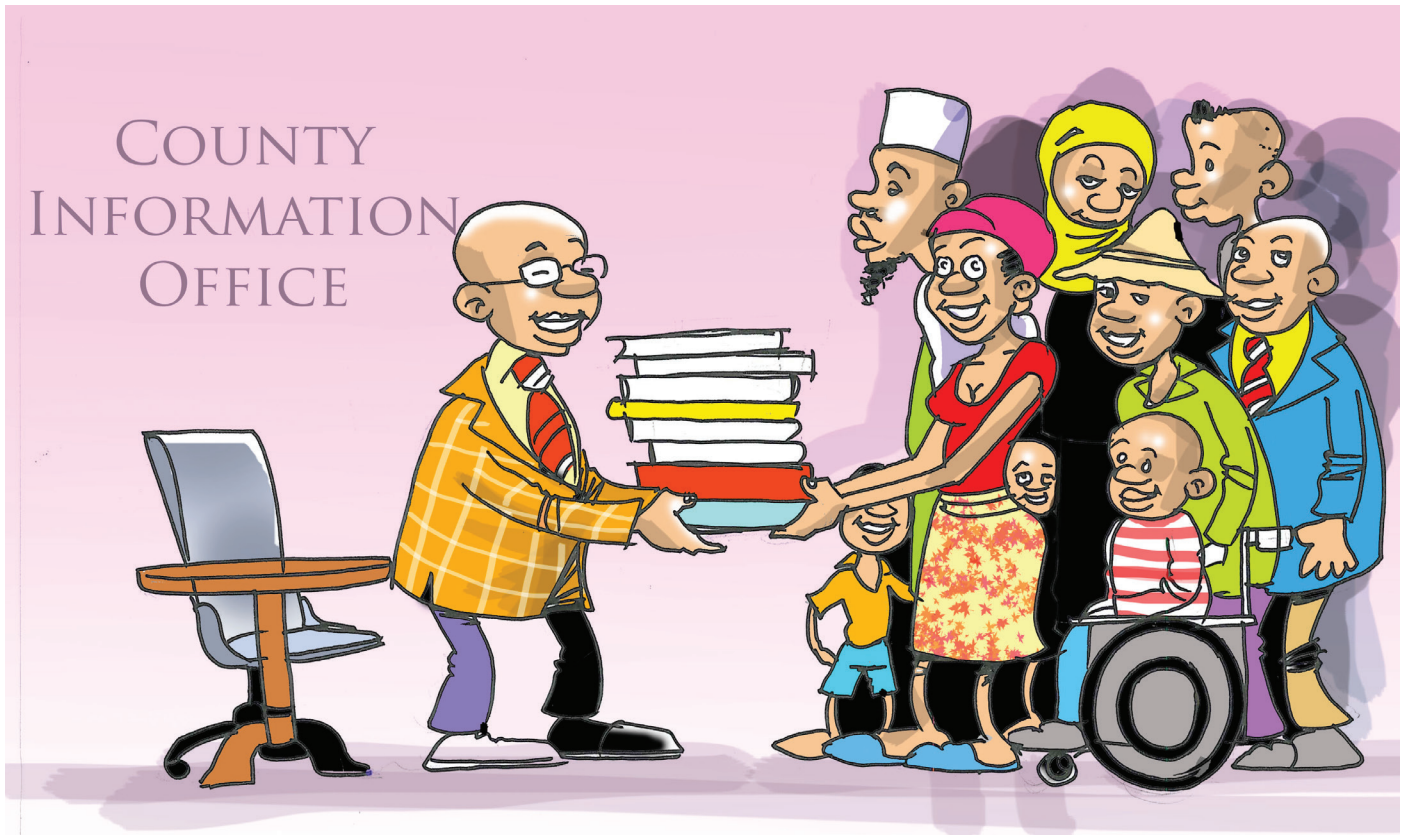
*Peter Gathu is a volunteer at ALAC Mombasa and Law student, Henry Kahindi is a volunteer at ALAC Mombasa and political science student*

Section 9(1) of the Bill. Where the information sought concerns the life or liberty of a person, the information shall be provided within forty-eight hours of receipt of the application or not later than fifteen working days where the application is complex or relates to a large volume of information.

Section 96(2) of the County Government Act.

This is by dint of Article 165 (3) (b) of the constitution.

Sections 9(5) and 18 of the Bill.



By Jackie Warui

The free flow of information and ideas lies at the heart of the very notion of democracy.

In the absence of respect for the right of access to information, human rights abuses take place in secret, it becomes difficult to exercise the right to free and fair elections, and there is no way to expose corrupt, inefficient government and private entities.

The right to freedom of information includes the right to seek, receive and impart information and ideas.

Central to the guarantee in practice of free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public.

These bodies hold a lot of information. If this information is held in secret,

the right to access to information, guaranteed under international law as well as most constitutions is not respected.

### Constitutional framework for access to information

The clamour for an elaborate access to information framework had been ongoing prior to the promulgation of the Constitution of Kenya, 2010.

The 1964 Constitution provided for the right to hold and receive information and ideas without interference from the State.

This right was however limited on grounds of national security, safety and health.

The Freedom of Information Bill, 2007, sponsored by Prof. Anyang' Nyong'o, the then Member of Parliament for Kisumu Rural

was tabled in parliament in 2007. However, the bill was not passed. The Constitution of Kenya 2010 brought a more liberal approach and provides for the right of access to information under Article 35.

Every citizen has the right to access information held by the State and held by another person and required for the exercise or protection of another right. This right is not absolute and can be limited only to the extent that the limitation is reasonable and justifiable in a democratic society.

### Legal barriers to access of information in Kenya

Up until now, the enjoyment of the right to access information has also been limited by other laws such as the Official Secrets Act, the Service Commissions Act, National Assembly

# needs the Access to Information Act sooner

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Powers and Privileges Act among others.

These laws were enacted under the guise of protecting national security, public policy and public interest which are often cited by public officers in refusal to disclose certain information.

Significantly, the situation is complicated by the lack of an elaborate framework to define the threshold when information can be accessed or denied. Reliance on such factors should be accompanied by proof of their existence which is not done in most cases as there are no legal requirements governing access to information in Kenya.

Moreover, the lack of clear procedures on disclosure of information or how a request for it can be made limits access to information.

### Article 35 of the Constitution of Kenya 2010

Can Article 35 be implemented as it is? One would say that the implementation of Article 35 can be a matter of interpretations by the courts.

However, this may be subject to varying interpretations on a case to case basis. For instance, the judiciary has recognised the import of the right but has also not been expansive with its interpretations of the right of access to information.

In **Peter M. Kariuki vs. AG** the court acknowledged the importance of the right to information in determining appropriate damages for the petitioner. However, in **Famy Care Limited vs. Public Procurement Administrative Review Board & Another**, the court ruled that Article 35 only applies to Kenyan citizens and not to foreigners and further that the right of access to information can only be enforced by natural citizens and not legal persons .

In **Kenya Society for the Mentally Handicapped (KSMH) vs. the AG**, the court held that “coercive orders of the court should only be used to enforce

“Central to the guarantee in practice of free flow of information and ideas is the principle that public bodies hold information not for themselves but on behalf of the public.”

Article 35 where a request has been made to the state or its agency and such request is denied”.

These interpretations are contrary to the internationally established principle of maximum disclosure, which establishes the obligation of public bodies to disclose information and the corresponding right of every member of the public to receive this information.

This principle further stipulates that everyone present in the territory of a country should benefit from this right.

### The Access to Information Bill, 2015

Kenyan’s desire for access to information is overdue. The Constitution of Kenya 2010 provides for the right to access of information.

However, this right is yet to be effectively implemented and realised. There is need for an elaborate legal framework defining the thresholds of who can access information, when they can access that information, where and how information can be accessed when required. The tabling of the Access to Information Bill, 2015 in Parliament by a private member is a great step towards realizing the right of access to information.

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# Access to information law vital in helping Kenyans in pushing for accountability

Despite the Constitution of Kenya 2010 providing for the right to access to information, Kenya still does not have an access to information law five years after the promulgation of the Constitution.

TI-Kenya's **Anne Wagacha** spoke to Henry Maina, Director ARTICLE 19 Eastern Africa about access to information in Kenya.



**The Access to information law is vital in ensuring transparency and accountability in the management of public affairs. In very simple terms, explain how that works?**

The Kenyan Constitution clearly provides for Access to Information for its citizens in more than one article (Article 10, Article 33, Article 35, and Article 260).

However, there is a challenge. While the constitution provides for Access to Information, public servants, state officials and people who work in corporations that undertake public functions have no clarity on what they can do to help citizens actualize the constitutional provisions.

Citizens also do not know how to get the information. The 'how-process' is what an access to information law would seek to tell Kenyans. That this set of information held by state bodies, (i) would be made available to the public without requesting, (ii) Would not be made available without a request, but, may be made available upon request after fulfilling its classification.

Overall, we then begin to see that the law has two functions:

1. Legitimate public servants who are able to do their work well. This way the citizens get to know who this public servant is and can relate to their public service with a lot of ease. If you are a public servant who



is responsive enough, then you are validated by your consumer. This then becomes an easier way of performance monitoring than any other process. So while most people tend to look at this law as a law that would be used to hold corrupt people into account, most of the time we overlook that this is also a tool that every working public officer can use to validated what they do.

2. Increasingly, public service is not in one point. Dispersal has allowed too many different actors. These people hold information in trust. The citizen is the Principal, and all these (the public officers) are agents. And this is what the constitution expects. In our old bureaucratic orientation, the citizen was seen to be to be the agent and the information holders the principles, meaning they will be the ones deciding which information may be given to their agents (the citizens), and which information may not be given to their agents, because they serve the bigger interest.

This is a shift, an Access to Information law would be helping us, re-affirming that citizens are the

principals and the public servants are the agents.

Anytime public interest issues are to be raised, they are best raised by the principals, who are the citizens. But then, of course, many other people say the bigger role is to hold public servants to account and to put some sunshine in the closets of how public service is run, which is a hard sell.

A good example how the access to information law law can be useful to the citizen, is after the post-election violence, Kenya has Internally Displaced Persons (IDPs). The government begins a process of profiling IDPs and this information has been given to the provincial administration.

However, you have been displaced, you are no longer where you used to live, where your chief knew you. You are in a region where you are not known. They (the chiefs) pass this information that they are registering IDPs to people they know and it's those documented IDPs who will be compensated. So the IDP, who did not flee to a camp, never got to know of the registration of IDPs. When they asked

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why they were not being paid, they are labelled as imposters. Who then do you run to, to validate that you are an IDP? Access to information would have helped this IDP.

Once the right to access to information is realized through an enforceable law, then it's instrumental.

### Should all government information be accessible to the citizens? If not, what information remains restricted from the public and why?

All information should be open to the public, unless prejudicial to a protected interest. This means, all information is out there, it is only small aspects of that information made public that will be taken back, that is the premise.

### What is this information that is out there that needs to be pulled in to get a framework through which it may be accessed?

- Information that is substantially likely to affect national security.
- Information that is substantially likely to affect the national economy.
- Information that is substantially likely to affect law enforcement.
- Information that is received/given in confidence.
- Information that is classified.

### When a citizen is trying to access information from a government office, what are the steps they should follow in order to get this information?

The government officer must throw an active disclosure process. Make as much information available to the public. They could do this by posting reports/information on their websites, official government publications, departmental reports circulation, government gazette or reports submitted to Parliament.

Another way is lodging a formal request. This would largely be guided by a comprehensive legal framework. That is why we need the law.

### In a situation where the public officers are not forthcoming with the information requested by a citizen, what is the next best step for the citizen to take?

To seek an administrative review as the first step, complain to the boss. Make a complaint to the boss. Secondly, you are entitled to apply to the high court seeking a redress that your right to information has been violated. Thirdly, make a substantive complaint to the Commission of Administrative Justice.

### Is there a success story in the African continent where access to information has contributed to good governance, accountability and transparency?

Not that there would be a squeaky clean country anywhere just because a country passes the Access to Information Law, however, it has contributed to how certain countries are rated.

We see that countries which are less corrupt tend to have stronger regimes. Again, in Africa this hasn't been too long, so there are no comparative studies.

The first country to pass the access to information law was South Africa in the year 2000. It is only this year - 1st September that Burkina Faso passed their access to information law. Out of the 55 countries in Africa, only 16 have passed access to information laws. In processes of reformation of states, most countries have tended to pass access to information laws. These countries are: Mozambique, Uganda, Ethiopia, Rwanda, South Sudan, Liberia, Nigeria, Niger, Tunisia, Guinea-Conakry, Angola, Cote D'ivoire, Sierra Leone, S. Africa, Zimbabwe and Burkina Faso.

As a continent, we still have a long way to go.

*The interviewer is a Communications Intern at Transparency International Kenya*

“Ensuring disclosure of – and access to – information can empower people and institutions to prevent and fight corruption. But it’s a two-way process. Governments must proactively release information about what they do. And we must utilise this information to make full use of our rights. We all have a valuable role to play.” - Transparency International

# TI-Kenya conducts civic education forums and legal aid clinics in Kajiado

Transparency International Kenya through the Advocacy and Legal Advisory Centre, Nairobi conducted three public forums in Maili Tisa, Ibissil and Kajiado town in Kajiado County between the 3rd to 5th September, 2015.

The public forums were held to sensitise residents about the structure of the devolved government, the role of each elected leader under the devolved system and the strategies that communities can employ to engage their elected representatives.

Participants also got to learn about civilian oversight, corruption and anti-corruption strategies, the role of elected leaders under the devolved system, and reporting of corruption, maladministration and human rights abuses.

These public forums and legal aid



Participants at the public forum in Kajiado

PHOTO: TI-Kenya

clinics activities are part of the Kaa Chonjo project by TI-Kenya, an initiative to support civilian oversight in Kenya. The project is funded by the

German Development Corporation (GIZ) and The Finnish people through the Ministry of Foreign Affairs of Finland.

# TI-Kenya conducts civic education forums and legal aid clinics in Nandi and Uasin Gishu Counties

Transparency International Kenya through the Advocacy and Legal Advisory Centre, Eldoret held public forums and mobile aid clinics in Chagaiwa Uasin Gishu County and Kaiboi, Nandi County on Corruption and Anti-Corruption strategies on 11th and 12th Sep 2015.

The public forums and legal aid clinics were conducted to build the capacity of residents to recognize and fight corruption in their respective areas.

The residents of Chagaiwa Uasin Gishu County and Kaiboi, Nandi County were given information on monitoring public expenditure and participating in county government processes such as budget making and legislation.

These public forums and legal aid clinics activities are part of the Kaa Chonjo project, an initiative to support civilian oversight in Kenya.

The project is funded by the German Development Corporation (GIZ) and The Finnish people through the Ministry of Foreign Affairs of Finland.



ALAC Eldoret Programme Officer Isaiah Mbiti addressing member of the public at the public forum

PHOTO: TI-Kenya



# 34 residents of Nairobi County benefit from free legal assistance on corruption related cases



A citizen asks a question during the public forum in Sinai, Nairobi County  
PHOTO: TI-Kenya

Transparency International Kenya through the Advocacy and Legal Advisory Centre and partner state agencies teamed up to conduct public education forums in Sinai and Mbotela in Nairobi County on the 8th and 9th of October 2015.

The public forums were organised to educate residents of Sinai and Mbotela about the structure of the devolved government as well as to give them information on corruption and anti-corruption strategies.

The forums also included sessions to inform the participants about the roles of The Ethics and Anti-Corruption Commission (EACC), The Kenya National Commission on Human Rights (KNCHR), The National Cohesion and Integration Commission (NCIC) The Commission on Administrative Justice (CAJ), and The National Anti-

Corruption Campaign Steering Committee (NACCSC),

Alongside these public forums, Transparency International Kenya held 4 legal aid clinics at Sinai and Mbotela shopping Centers. In total, the public forums and legal aid clinics reached 264 people. A total of 34 cases were reported to the legal aid lawyers present at the events.

These public forums and legal aid clinics activities are part of the Kaa Chonjo project, an initiative to support civilian oversight in Kenya. The project is funded by the German Development Corporation (GIZ) and The Finnish people through the Ministry of Foreign Affairs of Finland.

Advocacy and Legal Advisory Centres are walk-in, call-in or mail in centres where a citizen can obtain free and confidential advice on corruption cases.

Transparency International Kenya runs four Advocacy and Legal Advisory Centres in Eldoret (serving the North Rift region), Kisumu (Nyanza and Western Kenya), Mombasa (Coast region) and Nairobi (also serving parts of Central and Eastern Kenya, and Kajiado).

Advocacy and Legal Advisory Centres work with like-minded organisations and citizens' groups to empower citizens to actively participate in the fight against corruption in Kenya



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# Transparency International Kenya holds forum on whistleblower protection in Kenya



Transparency International Kenya conducted a public forum to spur conversation about the need for a whistleblower protection mechanism in Kenya on Thursday, 8th October 2015.

The forum, held in Nairobi, was

attended by citizens as well as experts from the Office of the Ombudsman, the Witness Protection Agency, the Independent Electoral and Boundaries Commission, the Parliamentary Service Commission, the Public Service Commission, the Ethics and Anti-Corruption Commission, the

Independent Policing Oversight Authority and Kenya National Commission on Human Rights, Strathmore University, University of Nairobi, Moi University and the Society for International Development, among others.




The discussion provided Transparency International Kenya with the opportunity to listen to the views of experts and citizens on the way forward on the issue of a whistleblower protection as a means of increasing corruption reporting in Kenya.

These views will be used to fine tune a proposed whistleblower protection policy and bill that will be used to lobby Kenya's parliament.

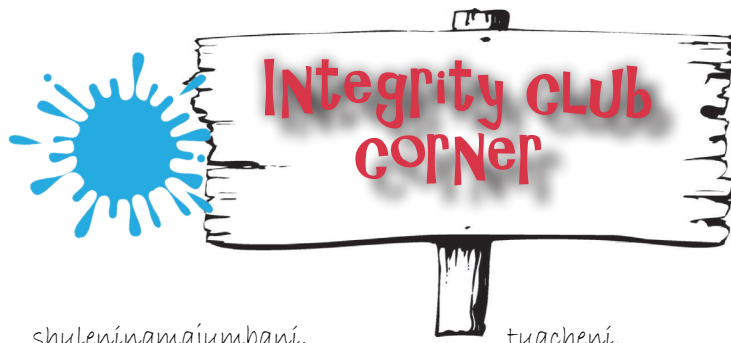
This was an activity under the Mtetezi ni mimi na wewe! project that Transparency International Kenya is implementing with financial support from URAIA

## Press room



-  Members of Parliament are not above the law - A press statement on The Parliamentary Powers and Privileges Bill, 2014 passed by the national assembly
-  #BeyondThe60Days: More needs to be done to spur momentum against corruption in Kenya - A press statement to call for action on the 'list of shame'
-  Act now to save Kenya! - A press statement on emerging corruption issues in Kenya

For more press materials from Transparency International Kenya, visit [www.tikenya.org/index.php/press-releases](http://www.tikenya.org/index.php/press-releases)



## Ufisadi

A Swahili poem by N'kweli Riziki Maku



Ufisadi mi nanena,  
tunaufanyianini,  
Twafundi shanawana,

shuleninamajumbani,  
Jambohili linafana, Kanisani ta  
kazini,  
ufisadihu' jamani, naombasi'  
tuacheni.

Twafanyamengilakini, Kun'  
hajakuelezana,  
Mambo mengiyakwanini, mbonasi'  
twaulizana,  
Mwayafanyianini,  
sikwaninitwatesana,  
ufisadihu' jamani, naombasi'  
tuacheni.

Kana kwambanimadeni,  
nyinyikupilishana,  
Sisikwanihatuoni, mambo  
hayatwafanyana,  
Mwakananamaini,  
vichwanavyokuvikuna,  
ufisadihu' jamani, naombasi'

tuacheni.  
unayafanyianini,  
kamawewehuyawezi,  
Kwanilazimajamani,  
mankuwakamawezi,  
Mnafukuzanandani,  
nanjetenakwawazazi,  
ufisadihu' jamani, naombasi'  
tuacheni.

Tumechokaasilani,  
langumwishoninanena,  
Kazisisitwakosana, ufisadi  
'tutukana,  
Hatutakiasilani, wazee ma  
hatawana,  
ufisadihu' jamani, naombasi'  
tuacheni.

**The writer is a student and a member of the integrity club at Golini Secondary School, Kwale County**

## My profession and how I will fight corruption in that profession

An Essay by David Kenyambi

I would like to be a doctor after finishing my studies. I took to this profession because I have identified myself with the plight of many poor people dying out of ordinary diseases due to lack of immediate medication.

They lack immediate medication as a result of many unnecessary procedures placed to enable them acquire medical services. I would like to make a difference in how things are done.

Corruption is the misuse of public office for personal gain. It involves doing things contrary to the code of conduct expected. Many people lose what is rightfully theirs due to unscrupulous people who don't care about well being of others. It leads to misery and poverty among many people while few people prosper. It affects people who depend on the integrity of these institutions.

In health centers, corruption has taken root in various departments. For instance, certain institutions, patients have to pay 'consultation fee' in order to talk to the medical

personnel. This proves difficult to the low class people who cannot afford the fee. As a result they end up dying mercilessly in their own care. Secondly, drugs which are intended to be given for free to patient in public hospitals are instead paid for. The price paid does not go to the Government but to the pockets of ruthless medical personnel.

Thirdly, there is class stratification in the sense that the high class person receives fast medical attention compared to the poor. Lastly, there is mistreatment of patients in the hospitals by doctors and nurses who don't adhere to code of conduct of their profession. These create a lot of sufferings since patients entrust their care to doctors and nurses who are their final hope. This is against their expectation and as a result loses hope in life.

In the fight against corruption, it all begins with me. As a doctor I will abolish consultation fees in order to give everyone a chance to access my service. I will ensure that drugs intended to be given to patients for free are done so. These will only be possible by educating people to make them aware of what is theirs. In case

they are denied what is theirs, and then they will have to report to the authorities concerned.

In addition, I will ensure that everyone receives my service after following right procedures as this will reduce class stratification. I will treat everyone equally regardless of their class, age or health status. I will lead by example for others to follow suit. In case there is anyone going against the code of conduct, I will talk to him or her at individual level but if that behavior persists, I will report to the authorities concerned.

In conclusion, the fight against corruption is no joke. When you fight corruption it fights back. Therefore, we have to join hands together and say NO to corruption. We will do so by not giving or receiving bribes, reporting any act of corruption to the relevant authorities. We will also succeed in fight against corruption if we all unite since, 'united we stand, divided we fall.'

**The writer is a student and a member of the integrity club at TransNzoia Mixed Secondary School, TransNzoia County**



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