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The Fragility of the Independence of Anti-Corruption Institutions and the Impact it has on Realising the Right to the Highest Attainable Standard of Health: A Case Study of Kenya

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ABSTRACT

Globally, the fight against corruption has increasingly focused on and advocated for the creation of specialised, Independent Anti-Corruption Institutions (IACIs) that operate free from political interference. The argument is that only when anti-corruption institutions are independent can they provide oversight where the traditional judicial or executive branches may be compromised, and only then can they actively protect people's human rights. This research, using Kenya as its case study, investigates whether IACIs truly deliver on their promises or fall short of expectations, and how this affects the realisation of the right to the highest attainable standard of health. To do this, the paper identifies relevant IACIs within the Kenyan legal framework, examines factors that contribute to formal independence, and assesses whether this translates into promoting transparency, accountability, and good governance. It also examines both the successes and failures of IACIs in Kenya and their impact on the protection of the right to the highest attainable standard of health. This is done to determine whether the formal independence of IACIs alone translates into successful anti-corruption initiatives on the ground, or whether more is needed. The paper argues that establishing formal independence enhances their effectiveness in protecting the integrity of the health sector and realising the right to the highest attainable standard of health, and that IACIs significantly enhance this effectiveness. Currently, corruption in Kenya's health sector is among the highest in the country and is often cited as one of the most corrupt sectors. This corruption significantly undermines health service delivery, diverts scarce resources, threatens access to care, and contributes to poorer health outcomes, including maternal and child mortality. This research seeks to evaluate the effectiveness of independence under Kenya's legal framework and to offer recommendations to enhance anti-corruption measures and protect the right to the highest attainable standard of health.

Keywords: *Anti-Corruption Institutions, Constitution, Corruption, Institutional independence, Right to health*

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1. INTRODUCTION

Corruption is a common problem internationally. It is present in both developed and developing states.[1] However, in developing states like Kenya, corruption is widespread. Recent reports by the Ethics and Anti-Corruption Commission of Kenya highlight the fact that corruption has permeated nearly all sectors in Kenya.[2] So much so that Kenya ranks 121st among 180 countries, according to Transparency International's 2024 Corruption Perceptions Index (CPI).[3] The CPI ranks 180 countries, with one being the least corrupt and 180 the most corrupt.

Corruption is defined under Kenyan law to include bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust, or an offence involving dishonesty in connection with any tax rate or impost levied under any Act or under any written law relating to the elections of persons to public office.[4] Corruption also includes bid rigging, abuse of office, and dealing with suspect property.[5] It has been a persistent problem in Kenya since before independence. It has remained rampant even after independence and the establishment of the 1963 Constitution, which was often amended to create an authoritarian executive.[6] However, with the enactment of the current constitution, the government's opportunity to fight corruption was enhanced.[7] Key instruments for fighting corruption are the Independent Anti-Corruption Institutions (IACIs).[8] Importantly, the Constitution, for the first time in Kenya's history, introduced independent anti-corruption offices and

1 Mulochi E & Obura K (2024) "How Corruption Undermines Realization of the Right to Health: A Review of the Kenyan Landscape" *Rule of Law and Anti-Corruption Center Journal* 1-15 at 2.

2 Ethics and Anti-corruption Commission (2024) *National Ethics and Corruption Survey (NECS),* available at https://eacc.go.ke/en/default/wp-content/uploads/2025/08/NATIONAL-ETHICS-AND-CORRUPTION-SURVEY-2024.pdf (visited 20 April 2026).

3 Transparency International (2024) *Corruption Perceptions Index*, available at https://www.transparency.org/en/cpi/2024 (visited 13 May 2026).

4 Section 2 of the Anti-Corruption and Economic Crimes Act, Cap. 65.

5 Sections 44, 46 and 47 of the Anti-Corruption and Economic Crimes Act, Cap. 65.

6 Chacha BK & Mubari S A (2024) "From Imperial Power to Vulnerable Authority: A Historical Study of the Institution of the Presidency in Kenya" 3 *Kabarak Law Review* 1-33 at 14,19-20; Bwire B (2023) "Interrogating the Evolution of a Constitutionally-legitimised 'Big Man' Political Culture and its Influence on Political Participation by Kenyan youth" 23 *African Human Rights Law Journal* 256-277 at 258.

7 AfriCOG (2019) *State Capture inside Kenya's Inability to Fight Corruption* (May 2019) at 2, available at https://africog.org/wp-content/uploads/2019/05/STATE-CAPTURE.pdf (visited 20 April 2026).

8 Hlongwane P (2018) "The Anti-corruption Institutions in South Africa: A Panacea to Governance Ills?" 33(2) *Southern Africa Public Law* 1-24 at 2; Chetty J & Pillay P (2017) "Anti-Corruption Agencies a Comparative Study of South Africa and India" 9(8) *African Journal of Public Affairs* 105-120 at 106.

commissions.[9] Despite the Constitution's establishment of these key institutions, corruption cases are regularly reported in the press, highlighted in the Auditor-General (A-G)'s annual reports, and reported to the Ethics and Anti-Corruption Commission (EACC). Yet, these cases are rarely prosecuted to the full extent of the law.[10] In fact, only when a corruption scandal rouses public outrage are reports released about an investigation, and nothing beyond that.[11] If prosecutions do go forward, it is lower-level actors who are prosecuted, while principal figures in corruption often evade prosecution. Furthermore, even where a conviction follows an indictment, the stolen money is rarely recovered. If it is recovered, it remains unclear how the government allocates or utilises it.[12]

Therefore, the purpose of this research is to investigate whether and how the formal IACIs are firmly established in the Kenyan Constitution and relevant legislation, and to identify the barriers to the full prosecution of corruption in Kenya. The study examines the nexus between corruption and the right to the highest attainable standard of health, with particular focus on the role of IACIs in addressing this phenomenon. Specifically, it assesses the extent to which IACIs have contributed to anti-corruption efforts. It critically evaluates the institutional strengths and limitations that shape their effectiveness in safeguarding this fundamental right. The aim is to generate recommendations to support relevant IACIs in strengthening anti-corruption initiatives that advance the right to the highest attainable standard of health.

9 Chapter 15 of the Constitution of Kenya, 2010.

10 AfriCOG (2019) at 2; Kenya National Human Rights Commission (25 May 2023) "Press Statement: Nomination by President William Ruto of Mr Noordin Haji (DPP) to head the National Intelligence Service (NIS)", available at https://khrc.or.ke/press-release/press-statement-nomination-by-president-william-ruto-of-mr-noordin-haji-dpp-to-head-the-national-intelligence-service-nis/ (visited 20 May 2026).

11 AfriCOG (2019) at 2-3.

12 AfriCOG (2019) at 3.

2. THE LEGAL FRAMEWORK FOR THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH IN KENYA

Article 43(1)(a) and (2) of the Constitution of Kenya provide that every person has the right to the highest attainable standard of health, which covers the right to healthcare services, and even reproductive health care.[13] Moreover, it prohibits the denial of emergency medical treatment to any Kenyan.[14] Also, Articles 53-57 of the Constitution provide more concrete application of the right to health but specifically for different people groups, including persons with disabilities, children, youth, minorities and marginalised groups, and older members of society.

The Constitution also obligates the state to implement affirmative action programmes to ensure that minorities and marginalised groups have reasonable access to health services.[15] Thus, Kenyan citizens are entitled to enforce this right in the courts if their right to the highest attainable standard of health has been denied, violated or threatened. Additionally, the Constitution obligates the state to implement laws, policies, and other measures, including setting the necessary standards to achieve the progressive realisation of the right to health.[16]

In line with the Constitution, specific laws have been enacted to guarantee and protect the right to the highest attainable standard of health. These include the Social Health Insurance Act, the Digital Health Data Act, the Health Act, the Public Health Act, the Medical Practitioners and Dentists Act, and the Pharmacy and Poisons Act.[17]

Additionally, Article 2(6) of the Constitution provides that treaties and conventions ratified by Kenya become part of national law. In this regard, at the international level, Article 12 of the International Covenant on Economic, Social and Cultural Rights, to which Kenya is a state party, recognises and protects the right to the highest attainable standard of physical

13 Article 43(1) of the Constitution of Kenya, 2010.
14 Article 43(2) of the Constitution of Kenya, 2010.
15 Articles 53-57 of the Constitution of Kenya, 2010.
16 Article 21(2) of the Constitution of Kenya, 2010.
17 Act 16 of 2023; Act 15 of 2023; Cap 241; Cap 242; Cap 254; Cap 244.

and mental health.[18] Kenya has also ratified the African Charter on Human and Peoples' Rights, which recognises the right to health in Article 16.[19]

Regarding anti-corruption, Kenya has established a robust legal framework by ratifying key international instruments, notably the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.[20] At the domestic level, this framework is further reinforced by a series of legislative enactments, including the Anti-Corruption and Economic Crimes Act, the Bribery Act, and the Ethics and Anti-Corruption Commission Act (EACC Act).[21]

3. KENYA'S HEALTHCARE SECTOR AND INCIDENCES OF CORRUPTION

According to a 2025 report by the National Council for Population and Development, Kenya's health sector faces a persistent shortage of doctors and nurses, inadequate funding, and a limited stock of medicines.[22] Correspondingly, a 2025 report by the Kenya Human Rights Commission found a consistent shortage of medicines and medical supplies in health centres, forcing many Kenyans to seek alternative health care in private hospitals at exorbitant costs.[23] Kenya also has regional inequalities in access to healthcare services.[24]

18 International Convention on Economic Social and Cultural Rights, available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-andcultural-rights (visited 9 December 2025).

19 United Nations Treaty Collection, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&clang=_en (visited 9 December 2025); African Charter on Human and Peoples' Rights, available at https://au.int/en/treaties/african-charter-human-and-peoples-rights (visited 19 May 2026).

20 United Nations *Convention against Corruption (UNCAC) 2004*, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (visited 19 May 2026); African Union *African Union Convention on Preventing and Combating Corruption*, available at https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption (visited 19 May 2026).

21 Anti-Corruption and Economic Crimes, Cap 65; Anti-Bribery Act, Cap 79B; Ethics and Anti-Corruption Commission Act, Cap 7H.

22 National Council for Population and Development (NCPD) *Kenya Population Situation Analysis Report 2025, Abridged Version Population at the Centre of Development* at 17, available at https://ncpd.go.ke/wp-content/uploads/2026/02/PSA-Popular-Version.pdf (visited 20 May 2026).

23 Kenya National Commission on Human Rights (2025) *The State of Human Rights in Kenya: Assessing the Progress Made and Areas of Concern December 2024-December 2025* at 7, available at https://www.knchr.org/Portals/0/KNCHR%20State%20of%20Human%20Rights%20Report%202025%20-%20Dec%202024-Dec%202025%20-%20FINAL_1.pdf (visited 20 April 2026).

24 NCPD (2025) 17.

On 1 October 2024, Kenya transitioned to the Social Health Insurance system under the Social Health Insurance Act, 2023, which replaced the old National Hospital Insurance Fund system with the Social Health Insurance Fund (SHIF).[25] SHIF was placed under the Social Health Authority (SHA) to give effect to Article 43(l) (a) of the Constitution, which provides for the right to the highest attainable standard of health.[26] SHIF is run and managed by a new SHA established under the Social Health Insurance Act.[27] The A-G's 2025 audit of SHA revealed inadequate verification and a lack of oversight in the management of the SHIF.[28] The Departmental Committee on Health in 2025 also conducted a review of the SHA and found gaping operational and policy gaps.[29] It found a lack of clarity on the establishment and operationalisation of the Claims Management Office as is required under Section 35(1) of the Social Health Insurance Act.[30] Furthermore, this gap had led to inconsistencies in the "utilisation of funds, inefficiencies in the processing and management of claims, limited accountability, and irregular communication with health facilities".[31] The committee also established that there was heavy reliance on AI-driven claim processing and approvals without adequate human oversight, and that there were challenges with biometric verification. The committee also identified a lack of transparency in payment schedules and amounts, and the need to standardise payment systems to ensure consistent payment mechanisms across all facility types.[32] Lastly, the committee review found that the delay in

25 Langat E et al (2025) "Kenya's Path to Universal Health Coverage: Insights from Policy and Practice" 5 *SSM - Health Systems* at 2.

26 Social Health Insurance Act 16 of 2023.

27 Social Health Insurance Act 16 of 2023.

28 Office of the Auditor-General (11 February 2026) *Report of the Auditor-General on Social Health Insurance Fund for the Nine Months Period Ended 30 June 2025* at 40, available at https://libraryir.parliament.go.ke/bitstreams/065a3911-1c69-490a-8193-3e08e6f12828/download (visited 1 May 2026); Mburu P (10 March 2026) "Auditor-General exposes Shs 50bn SHA rip-off" *Daily Nation*, available at https://nation.africa/kenya/news/auditor-general-exposes-sh50bn-sha-rip-off-5385554#story (visited 21 May 2026).

29 Departmental Committee on Health (27 November 2025) *Report on the Assessment of Social Health Authority (sha), Utilization of Funds Disbursed Since Inception and Challenges Faced by Facilities* at 40, available at https://www.parliament.go.ke/sites/default/files/2025-12/Report%20of%20DC%20Health%20on%20the%20assessment%20of%20Social%20Health%20Authority%20%28SHA%29%20utilization%20of%20funds%20disbursed%20since%20inception%20and%20challenges%20faced%20by%20facilities.pdf (visited 19 May 2026);

30 Act 16 of 2023.

31 Office of the Auditor-General (2026) 41.

32 Office of the Auditor General (2026) 33.

the disbursement of payment had led to "significant accumulation of debt, disrupted service delivery, strained cash flow, and limited hospitals' operational capacity".[33] When corruption is introduced, it inflates already existing inequalities and barriers to accessing the right to the highest attainable standard of health.[34]

The healthcare sector in Kenya has long been riddled with corruption. That is why it comes as no surprise that the Ministry of Health ranks second among the most corrupt ministries in Kenya, according to a 2024 EACC report.[35] The EACC report further demonstrates that corruption is pervasive throughout all four phases of Kenya's health sector project management cycle: budgeting, commitment, verification, and payment.[36] The report found cost inflation, early project termination, and misappropriation of funds across all four stages.[37] This is extremely alarming, as decisions that touch on the health sector have life-or-death ramifications.

In 2025, one of the most notable corruption scandals in Kenya, which greatly impacted the right to the highest attainable standard of health, was linked to the rollout of a new Universal Health Coverage (UHC) programme. The UHC has been endorsed on the international stage as the most suitable mode of achieving universal access to affordable healthcare services, and Kenya has not been left behind.[38]

The introduction of the SHIF was sold on the promise that it would provide all Kenyans, especially the most vulnerable, with comprehensive health coverage that includes "preventive care, outpatient services, primary healthcare, and more specialised treatments, ensuring services are available before, during, and after illness".[39] The rollout of the SHIF

33 Departmental Committee on Health (2025) at 40; Langat et al (2025) at 2.

34 Office on Drugs and Crime Corruption and Financial Crime Branch "Health", available at https://www.unodc.org/corruption/en/learn/thematic-areas/health.html (visited 20 May 2026).

35 Ethics and Anti-corruption Commission (2024) *Corruption and Unethical Conduct in the Kenyan Healthcare Projects*, available at https://eacc.go.ke/en/default/wp-content/uploads/2025/08/NATIONAL-ETHICS-AND-CORRUPTION-SURVEY-2024.pdf (visited 21 May 2026); Ethics and Anti-corruption Commission (2023) *National Ethics and Corruption Survey*, available at https://eacc.go.ke/en/default/wp-content/uploads/2024/03/EACC-NATIONAL-SURVEY-REPORT-2023.pdf (visited 21 May 2026).

36 Ethics and Anti-corruption Commission (2024); Ethics and Anti-corruption Commission (2023).

37 Ethics and Anti-corruption Commission (2024).

38 Langat *et al* (2025) at 2.

39 Section 25(1) of the Social Health Insurance Act 16 of 2023.

began on 1 October 2024,[40] and it has brought more challenges than it has fulfilled its many promises.

The implementation was rushed, as the state failed to conduct a risk assessment before enforcement. As a result, the transition was riddled with technical hiccups, inefficient implementation and inadequate enforcement, which hampered the progress.[41] On the ground, it was reported that there was confusion about how it worked, and the coverage turned out to be even more limited than promised. Healthcare services remained in poor condition, as hospitals lacked proper facilities and adequate staffing, and care was often delayed.[42]

In February 2025, the A-G's 2024/2025 report flagged corruption in the procurement of the healthcare information technology digitisation system for SHIF.[43] It found that there was no accountability or transparency in the healthcare system's procurement, costing Kenyans a whopping KSh104bn.[44] The A-G, Nancy Gathungu, found that KSh104bn was paid into a system that the state does not own or control, and so *"SHIF system components, and intellectual property rights remain with a private consortium behind its development, and only the infrastructure is set to be transferred to the government".*[45] The A-G highlighted that the Kenyan government's lack of ownership posed a major risk to public funds and healthcare

40 Akinyi C (14 February 2025) "Soaring Healthcare Costs in Kenya Hinder Access to Vital Services" *International Commission of Jurists*, available at https://icj-kenya.org/news/soaring-healthcare-costs-in-kenya-hinder-access-to-vital-services (visited 22 May 2026).

41 Akinyi (2025).

42 The Observer (15 May 2025) "Kenya's shift to digital health: challenges and opportunities", *The Observer*, available at https://observer.ug/news/kenyas-shift-to-digital-health-challenges-and-opportunities (visited 21 May 2026); KBC Digital (14 March 2025) "Ombudsman's assessment confirms healthcare disruptions due to SHIF", available at https://www.kbc.co.ke/ombudsmans-assessment-confirms-healthcare-disruptions-due-to-shif/ (visited 21 May 2026); Otieno H (2024) "Stakeholders say Kenyans are not ready to transition to SHIF" *The Standard,* available at https://www.standardmedia.co.ke/health/health-science/article/2001503732/stakeholders-say-kenyans-are-not-ready-to-transition-to-shif (visited 21 May 2026).

43 Auditor-General (2025) *Report of the Auditor-General on National Government Ministries, Departments and Agencies for the Year 2023/24*, available at https://parliament.go.ke/node/23339 (visited 20 May 2026); KELIN (5 March 2025) *Auditor-General's Findings on the Social Health Authority (SHA): Corruption in the Health Sector is Murder,* available at https://www.kelinkenya.org/press-release-auditor-generals-findings-on-the-social-health-authority-sha-corruption-in-the-health-sector-is-murderss-release (visited 21 May 2026).

44 Auditor General (2025); KELIN (2025).

45 Auditor General (2025); KELIN (2025).

delivery.[46] The report also found that if any disputes arose, they would not be governed by Kenyan law but by the law of a jurisdiction outside Kenya.[47] Yet, the main contributors to this health fund are Kenyan employees. SHIF contributions involve a mandatory monthly deduction of 2.75% of an employee's gross salary, with a minimum contribution of KSh300 and no maximum cap for salaried individuals.[48] To date, no proper investigation has been initiated on the matter.

In addition, a recent KSh10.6bn corruption scandal surfaced in August 2025, revealing that the SHA was paying large sums to lower-level health facilities with limited service capacity and minimal bed space, and that the SHA chief executive officer (CEO), Dr. Abdi Mohamed, was allegedly involved.[49] Accusations also highlighted the existence of non-operational "ghost" hospitals receiving large payments. Legitimate hospitals providing essential healthcare services under the SHIF reportedly faced financial strain due to delayed or absent reimbursements for services rendered.[50] Consequently, while ghost hospitals made off with millions, real hospitals were left destitute with delayed or no payment.[51]

Ladnan Hospital, which is allegedly connected to the CEO of SHA, though a Level 4 hospital with a 50-bed capacity,[52] received at least KSh195m in payments since the Social

46 Kisia A (26 August 2025) "Metro Group denies SHA chair's ownership of Ladnan Hospital" *The Star*, available at https://www.the-star.co.ke/news/2025-08-26-metro-group-clears-air-on-ladnan-hospital-ownership (visited 20 May 2026).

47 Kisia (2025) www.the-star.co.ke.

48 Kisia (2025) www.the-star.co.ke.

49 Kisia (2025) www.the-star.co.ke.

50 Obadha V (28 August 2025) "SHA: A bleeding health insurance and government attempts to gain tenacity" *The Standard,* available at https://www.standardmedia.co.ke/health/health-science/article/2001527691/sha-scandal-ghost-hospitals-paid-billions-real-ones-denied-cash (visited 19 May 2026); Kahenda M (September 2025) "Revealed: How ghost hospitals are paid billions while real ones are denied cash" *The Standard,* available at https://www.standardmedia.co.ke/health/health-science/article/2001527691/sha-scandal-ghost-hospitals-paid-billions-real-ones-denied-cash (visited 20 May 2026); Lidigu L (22 August 2025) "Ghost hospital: SHA wired Sh20m to this thicket - and more suspect deals" *Daily Nation,* available at https://nation.africa/kenya/health/ghost-hospital-sha-wired-sh20m-to-this-thicket-and-more-suspect-deals-5162988 (visited 20 May 2026).

51 Kahenda (September 2025).

52 Ladnan Hospital, available at https://www.ladnan-hospital.com/about-us (visited 21 May 2026); Kenya Ministry of Health, available at https://kmhfl.health.go.ke/public/facilities/9ad84d59-f0b2-4c31-bfb7-8ad574ceab17 (visited 21 May 2026).

Health Authority began operations in October 2024, yet it is a low-level hospital.[53] Also, Nyandiwa Dispensary in West Kamagak Ward, Homa Bay County, which has been abandoned for the past 10 years, received KSh20m in August 2025.[54] Jumuia Hospital in Huruma was paid KSh87,062,778 in August 2025, more than the combined KSh80,543,356 paid to Kenyatta National Hospital (KNH) and Kenyatta University Teaching Referral and Research Hospital (KUTRRH). KNH received KSh70,182,629, while KUTRRH got KSh10,351,727 from SHA.[55] This claim appears highly unlikely, as Jumuia Hospital is designated as a Level 5 facility yet has a capacity of only 100 beds,[56] but was paid more than Kenyatta Hospital, which is not only a Level 6 hospital but is the biggest referral hospital in East and Central Africa with a capacity of 1 800 beds. Further, Kenyatta Hospital has 50 wards, 24 outpatient clinics, 26 theatres, 82 ICU beds, and an accident and emergency department.[57] The other hospital, KUTRRH, is a leading Public National Referral Hospital (Level 6) with a bed capacity of 650.[58]

Private hospitals have also been experiencing late payments from the SHA for services provided to Kenyans. As a result, the Rural and Urban Private Hospitals Association of Kenya, which represents private hospitals nationwide, announced that from 22 September 2025, they were suspending the use of SHA services in their hospitals over pending bills exceeding KSh10bn, which is likely to have dire effects on medical services.[59] The effect is that Kenyans with SHA medical cover will still be required to pay for hospital services if they want to access private hospitals.

There are hospitals which have closed down as a result of the corruption. When money is diverted to non-existent services or ghost hospitals, it reduces the resources

53 Kisia (2025) www.the-star.co.ke.
54 Lidigu (2025).
55 Lidigu (2025).
56 Jumuia Hospital, available at https://www.jumuiahospitals.org/jumuia-hospital-huruma (visited 21 May 2026).
57 The Kenyatta National Hospital, available at https://knh.or.ke/index.php/history (visited 20 May 2026).
58 Kenyatta University Teaching, Referral & Research Hospital, available at https://www.kutrrh.go.ke/ (visited 20 May2026).
59 Wanga B (23 September 2025) "More pain for patients under SHA as private hospitals continue to demand cash payment for services" *Citizen Digital*, available at https://www.citizen.digital/article/more-pain-for-patients-under-sha-as-private-hospitals-continue-to-demand-cash-payment-for-services-n370195 (visited 20 May 2026).

available for services provided in existing hospitals.[60] St Mary's Hospital Mumias, a primary healthcare Catholic Mission Hospital with a history spanning 117 years that served an underrepresented community, was forced to announce its closure in August 2025 as a result of a scandal involving delays in SHA claims worth KSh14m.[61] It had 745 beds and was a Level 4 hospital serving the county and providing a wide range of key medical services, yet it remains closed.[62]

The Health Cabinet Secretary (CS) responded to the scandal by stating that he had suspended 85 health facilities implicated in the fraudulent activities.[63] The CS further noted that,

> [t]he payment fraud was a result of corrupt practices that included submission of altered medical reports, illegal conversion of billing of outpatient to inpatient visits, submission of claims for ghost patients and upcoding, which involves billing for procedures that cost more than the procedure administered.[64]

Similarly, the Kenya Medical Practitioners and Dentists Council (KMPDC) also shut down 544 unlicensed health facilities after conducting investigations.[65] The CS further claimed that another 454 health facilities had their operating licenses revoked due to a range of violations, including "operating below required standards, employing unlicensed practitioners, and lacking critical infrastructure, posing a direct threat to patient health".[66] Additionally, according to the CS, in collaboration with the Kenya Medical Practitioners, Pharmacists and Dentists' Union, SHA had submitted 1 188 files, along with supporting evidence, to the

60 Departmental Committee on Health (November 2025) at 40.

61 Chamega A (29 August 2025) "Why St Mary's Hospital Mumias has closed after 117 years of service" *The Standard*, available at https://www.standardmedia.co.ke/western/article/2001528054/why-st-marys-hospital-mumias-has-closed-after-117-years-of-service (visited 20 May 2026); St. Mary's Mission Hospital Mumias, available at https://stmarysmissionhospitalmumias.org (visited 20 May 2026); Ministry of Health, https://kmhfl.health.go.ke/public/facilities/d74a348a-f4e4-472d-89af-9510fc82a5d9 (visited 20 May 2026).

62 Otenyo H & Obanyi B (9 October 2025) "Partial SHA payment stalls St Mary's reopening" *The Star*, available at https://www.the-star.co.ke/counties/nyanza/2025-10-09-bishop-obanyi-partial-sha-payment-stalls-st-marys-reopening (visited 20 May 2026).

63 Wanga (2025).

64 Wanga (2025).

65 Kinyanjui M (1 September 2025) "SHA fraud probe: Evidence submitted to DCI as 85 health facilities suspended" *Citizen Digital,* available at https://www.citizen.digital/article/sha-fraud-probe-evidence-submitted-to-dci-as-85-health-facilities-suspended-n368888 (visited 19 May 2026).

66 Kinyanjui (2025).

Directorate of Criminal Investigations (DCI) for further investigation.[67] These developments raise concerns about the integrity of the certification process, as numerous facilities operated without proper accreditation, received SHA payments, and faced no legal consequences despite formal revocations.

Corruption in SHA mirrors broader corruption in Kenya's health sector, where a lack of oversight mechanisms, opaque systems, and weak enforcement structures are rampant.[68] Corruption undermines the effectiveness, quality and accessibility of essential healthcare services. When money is diverted from the health sector for personal gain, it deprives communities of healthcare services and resources.[69] The result is the failure of states to protect the right to the highest attainable health.[70]

4. INDEPENDENT ANTI-CORRUPTION INSTITUTIONS IN KENYA

Kenya's history with independent institutions is connected to the five presidents that Kenya has had so far, and their persistent tendency to seek constitutional amendments or to circumvent inconvenient constitutional provisions. The history of Kenya indicates that the 1963 Kenyan Constitution was altered to create an executive with absolute powers by removing all checks and balances. The result is that independent institutions did not exist, either on paper or in practice, during the reign of Kenya's first two presidents.

Kenya's first president, Jomo Kenyatta, amended Kenya's first constitution 16 times during his 15-year reign.[71] The amendments served several purposes, mainly to consolidate

67 Kinyanjui (2025).

68 Mburu (2026). See also Office of the Auditor-General (2026).

69 Office on Drugs and Crime Corruption and Financial Crime Branch "Health", available at https://www.unodc.org/corruption/en/learn/thematic-areas/health.html (visited 20 May 2026).

70 Transparency International (2024) *Left Behind* at 5, available at https://files.transparencycdn.org/images/Left-Behind-Corruption-in-education-and-health-services-in-Africa_English.pdf (visited 21 May 2026).

71 Oruko I (24 August 2020) "Kenyatta and Moi made changes to suit their interests" *Daily Nation,* available at https://nation.africa/kenya/news/politics/kenyatta-and-moi-made-changes-to-suit-their-interests-1924188 (visited 19 May 2026); Khamadi S (16 March 2025) "Amendments of Kenya's First Constitution", available at https://www.monitor.co.ke/2015/03/16/amendments-in-kenyas-first-constitution (visited 19 May 2026); Kamau J (31 August 2025) "When the Constitution became personal: Kenyatta, Moi and the politics of power" *Daily Nation,* available at https://nation.africa/kenya/weekly-review/when-the-constitution-became-personal-kenyatta-moi-and-the-politics-of-power-5172972 (visited 20 May 2026).

and expand presidential power and centralise governance.[72] He was given increased discretion to make appointments, for example, judges and electoral commission members, without consultation. Also, parliament lost, or had reduced, oversight over certain appointments or emergency powers.[73]

During the 14-year presidency of Kenya's second president, Daniel Arap Moi, the constitution was amended 14 times.[74] The amendments eroded judicial/institutional independence. Among other things, they removed security of tenure for certain constitutional office holders, including judges, the Attorney General, and the A-G. This made these offices more vulnerable to executive control.[75] Both the Kenyatta and Moi eras were characterised by an authoritarian executive and a lack of independent institutions.

The election of President Mwai Kibaki was originally viewed as a significant milestone by proponents of multiparty democracy, constitutionalism, and good governance.[76] President Kibaki pledged to fast-track comprehensive reforms to promote transparency and accountability, and to enact a new constitution. However, these turned out to be more promise than action, and by the end of his first term in 2007, the Bomas constitutional review process had effectively lost momentum.[77] The post-election violence in 2007 highlighted the urgent need for a new constitution. This led to the adoption of the 2010 Constitution, which was approved by a widely supported referendum.[78] Consequently, for the first time, independent institutions were established under the Constitution.[79] These institutions are divided into three categories in the Constitution: independent offices, independent office-

72 Oruko (2020); Khamadi (2025); Kamau (2025).
73 Oruko (2020); Khamadi (2025); Kamau (2025).
74 Oruko (2020); Khamadi (2025); Kamau (2025).
75 Stacey R (October 2011) "Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-making Process" 3(4) *International Journal of Constitutional Law* 587-614 at 592.
76 Stacey (2011) at 592.
77 Stacey (2011) at 592. The Bomas review process refers to the constitutional review and constitution-making process that took place in Kenya between 2004 and 2005 at the Bomas Conference Centre. It was formally called the National Constitutional Conference but became popularly known as the Bomas review process. See more: CMI (2006), Kenya Constitutional Documents: A Comparative Analysis, available at https://peacemaker.un.org/sites/default/files/document/files/2022/07/kecomparisonof2005kenyaconstitutionaldocuments2006.pdf (visited 21 May 2026).
78 Stacey (2011) at 592.
79 Chapter 15 of the Constitution of Kenya, 2010.

holders, and constitutional commission office-holders or constitutional commissions. These include the A-G,[80] the Controller of Budget, the Director of Public Prosecutions (DPP), the Attorney General,[81] the Independent Electoral and Boundaries Commission, the National Police Service Commission, the Judicial Service Commission and the Kenya National Human Rights and Equality Commission.[82]

Just as Moi and Kenyatta were able to amend the 1963 Constitution as they pleased in a manner that served their own agendas, Mwai Kibaki, Uhuru Kenyatta, and even the current president, President William Ruto, have all attempted to amend the 2010 Constitution in an effort to push their own agendas and have failed. This speaks to the importance of the Constitution's provisions that set a high threshold for amendment.[83] Since its inception, there have been at least five attempts to amend the 2010 Constitution, all of which have failed.[84] The most recent attempt through the Kenya Amendment Bill, 2025, was blocked by the High Court of Kenya.[85]

Although the 2010 Constitution established several independent offices and commissions, this paper focuses specifically on IACIs.[86] This research specifically examines the A-G, the EACC, and the DPP as key players in the prosecution of corruption. Hence, reference to IACIs is to these institutions in general.

The independent office of the A-G is established under Articles 248 and 229 of the Kenyan Constitution, 2012. The role of the A-G is to audit and report on the accounts of any entity funded by public funds. This is done to evaluate whether public funds have been utilised lawfully and effectively.[87] The audits are done annually and are submitted to parliament or

80 Article 229 of the Constitution of Kenya, 2010.
81 Article 156 of the Constitution of Kenya, 2010.
82 Article 248 of the Constitution of Kenya, 2010.
83 Article 255 of the Constitution of Kenya, 2010.
84 *Katiba Institute & 4 others v Attorney-General & 3 others; Inuka Kenya ni Sisi & another* (Interested Parties) [2025] KEHC 12779 (KLR).
85 Kiplagat S (18 September 2025*)* "Court blocks Ruto from assenting Bill seeking to entrench three funds into the constitution" *Daily Nation,* available at https://nation.africa/kenya/news/politics/court-blocks-ruto-from-assenting-bill-seeking-to-entrench-three-funds-into-the-constitution--5197354 (visited 19 May 2026).
86 Chapter 15 of the Constitution of Kenya, 2010.
87 Article 229 (4), (6) & (7) of the Constitution of Kenya, 2010.

the relevant county assembly.[88] Moreover, the law requires that, three months after receiving the A-G's report, parliament or the county assembly take appropriate action.[89]

The office of the EACC is established in Section 79 of Chapter 15 of the Kenyan Constitution. Although it lacks prosecutorial powers, it can conduct investigations into corruption cases.[90] On the other hand, Article 157 of the Kenyan Constitution establishes the office of the DPP. The office was previously a department in the Attorney General's Office. It was delinked from the State Law Office in 2011, following the appointment of the DPP under the new constitutional dispensation.[91] The DPP has the power to: firstly, direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct.[92] Secondly, exercise "State powers of prosecution and may institute and undertake criminal proceedings against any person before any court, and in respect of any offence alleged to have been committed".[93] Lastly, "take over and continue any criminal proceedings commenced in any court that have been instituted or undertaken by another person or authority, with the permission of the person or authority".[94]

Moreover, at any stage before judgment is delivered, the DPP can discontinue any criminal proceedings instituted by him or her.[95] This leads to an acquittal of the defendant if the discontinuance took place after the close of the prosecution's case.[96] Nonetheless, the DPP's power to discontinue a case is limited to the permission of the court.[97] Further, the Constitution provides that the DPP has autonomy and hence does not require the consent of any person or authority to commence criminal proceedings or to exercise his or her powers or functions.[98] However, these powers must be exercised in the public interest, in the

88 Article 229(2) of the Constitution of Kenya, 2010.
89 Article 229(8) of the Constitution of Kenya, 2010.
90 Section 13(2) of Ethics and Anti-Corruption Commission Act, Cap 7H.
91 Office of Director of Public Prosecutions, available at https://odpp.go.ke (visited 11 December 2025).
92 Article 157(4) of the Constitution of Kenya, 2010.
93 Article 157(6) a of the Constitution of Kenya, 2010.
94 Article 157(6) b of the Constitution of Kenya, 2010.
95 Article 157(6) c of the Constitution of Kenya, 2010.
96 Article 157(7) of the Constitution of Kenya, 2010.
97 Article 157(8) of the Constitution of Kenya, 2010.
98 Article 157(10) of the Constitution of Kenya, 2010.

interests of the administration of justice, and to prevent and avoid abuse of the legal process.[99]

5. FORMAL INDEPENDENCE OF OVERSIGHT INSTITUTIONS UNDER KENYA'S LEGAL FRAMEWORK

In most countries, independent oversight institutions are established either in the country's constitution or by legislation or in both.[100]The provisions are often influenced by international norms[101] from bodies like the United Nations, the Commonwealth, the African Union, the International Ombudsman Association, and the International Organisation of Supreme Audit Institutions, among others.[102] These standards emphasise the appointment procedures and qualifications; security tenure; transparency and accountability; resource independence; and reporting and accountability.[103]

5.1 Appointment procedures and qualifications

For proficient performance of duties, members need to "demonstrate personal integrity, moral courage and a strong sense of public duty".[104] Appointments are required to promote diversity or recognition of specific minority populations.[105] Also, political neutrality is required to promote independence from partisan politics.[106] The promotion can be achieved through shared powers of government.[107] Under the Kenyan Constitution, members are identified and

99 Article 157(11) of the Constitution of Kenya, 2010.

100 Murphy J & De Vrieze F (WFD) (2020) *Guide for Parliaments Independent Oversight Institutions*, Westminster Foundation for Democracy, available athttps://www.wfd.org/sites/default/files/2021-12/WFD_Publication_IOI_Guide-for-Parliaments_web.pdf (visited 22 May 2026).

101 International Institute for Democracy and Electoral Assistance (IDEA) (2019) *Independent Regulatory and Oversight (Fourth-Branch) Institutions Constitution-Building Primer* No. 19 at 6-7, available at https://www.idea.int/sites/default/files/publications/independent-regulatory-and-oversight-institutions.pdf (visited 22 May 2026).

102 IDEA (2019) 6-7; OECD (2017) *The Governance of Regulators, Creating a Culture of Independence Practical Guidance against Undue Influence* at 3, available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/04/creating-a-culture-of-independence_g1g78a73/9789264274198-en.pdf (visited 22 May 2026).

103 IDEA (2019) at 21; OECD (2017) at 3 (visited 22 May 2026).

104 IDEA (2019) at 21; Murphy & De Vrieze (2020) at 10.

105 IDEA (2019) at 21-22.

106 IDEA (2019) at 21-22.

107 IDEA (2019) at 14.

recommended for appointment by the National Legislature, approved by the National Assembly, and appointed by the president.[108] However, the effectiveness of this approach is significantly limited when the president's party controls the legislature, thus exposing the fragility of formal independence.[109]

Neutrality can, however, be enhanced through independent commissions or councils responsible for appointments.[110] Although adopted by the Kenyan Constitution, granting independent commissions or councils the power to make appointments does not guarantee neutrality, but it serves as a countermeasure. The selection process needs to be carried out transparently, even where the qualifications for the appointment are not laid out in relevant law.[111]

5.2 Security of tenure

Members of independent institutions should have sufficient security of tenure and other guarantees to protect against arbitrary removal. This includes the provision of a fixed term and safeguarding them from unfair, impromptu or random changes to their salaries.[112] In addition, the law should provide a clear, specific procedure for their removal from office. As a result, "they can only be removed via a special process that may require cross-party support or the demonstration of wrongdoing or unfitness for continued service".[113] Giving a tribunal or independent advisory body the authority to remove a member of an independent institution can enhance independence,[114] ensuring that they are free from arbitrary political interference.

5.3 Resource independence

Independent institutions must have the necessary resources in terms of staff, finances and facilities. To ensure independence, the budget for oversight institutions should be discussed

108 Chapter 15 of the Constitution of Kenya, 2010.
109 IDEA (2019) at 27.
110 IDEA (2019) at 27-28.
111 IDEA (2019) at 27; Murphy & De Vrieze (2020) at 10.
112 IDEA (2019) at 21.
113 IDEA (2019) at 33-34
114 IDEA (2019) at 35; Murphy & De Vrieze (2020) at 10.

and approved by parliament and not the executive. Further, to enhance independence, oversight institutions should have operational autonomy in determining how to manage and use these resources.[115]

5.4 Mandate clarity

Constitutions often prescribe the powers, functions, responsibilities and duties of oversight institutions.[116]Their mandate should be clear and enhance freedom from undue interference in how they operate. These institutions are empowered to operate without seeking permission from parliament or the government.[117] They are required to have adequate powers to perform their intended functions,[118] and the right to determine their own subjects for enquiry within their mandate area.[119] They also need to have the autonomy to set their own priorities without external interference or pressure,[120] and be able to respond to requests from state institutions and members of the public.

5.5 Accountability and reporting

Although independent regulatory and oversight institutions should enjoy operational autonomy, especially from the executive branch, this should not prevent them from being held accountable.

> A direct relationship between independent oversight institutions and parliaments establishes an accountability chain that, on the one hand, strengthens the authority and legitimacy of independent oversight institutions, and, on the other hand, enhances parliament's ability to carry out its role effectively, especially in oversight, thereby reinforcing the democratic substance of governance.[121]

115 IDEA (2019) at 21.
116 IDEA (2019) at 35-36.
117 IDEA (2019) at 35-36.
118 IDEA (2019) at 36.
119 Murphy & De Vrieze (2020) at 10.
120 IDEA (2019) at 36-37.
121 Murphy & De Vrieze (2020) at 8.

Independent regulators and oversight institutions need to be publicly accountable by submitting reports about what they have done;[122] reporting to the parliament;[123] accounting for the allocation and use of their funds, as well as publishing publicly accessible operational and financial accounts.[124]

5.6 Application to Kenyan institutions

5.6.1 Auditor-General

The Office of the Auditor-General (OAG) operates independently of the executive and other authorities, with its independence reinforced by Article 249(1) of the 2010 Constitution. The requirements and role of the OAG are clearly defined in the Constitution.[125] The A-G is appointed by the president with the approval of the National Assembly, as outlined in Article 229(2), providing a system of checks and balances to reduce political influence in the appointment process. As regards security of tenure, the A-G serves a single non-renewable term of six years. Nonetheless, the A-G may only be removed through a tribunal on grounds of misconduct, incapacity, or bankruptcy.[126] Funding for the A-G is provided directly from the Consolidated Fund, guaranteed under Articles 229(6) and 251(1) (b), ensuring that financial resources are sufficient to maintain the office's independence and effectiveness. Regarding accountability, the A-G needs to submit audit reports to parliament or the relevant county assembly.[127] In addition, the reports must be publicly accessible to promote transparency. Despite this necessary oversight, the A-G retains full discretion in conducting audits, safeguarding objectivity and independence in evaluating public financial management.

5.6.2 Ethics and anti-corruption commission

The mandate of the EACC is derived from and is secured by the Constitution (Article 249(1)). This ensures that the commission can perform its mandate without interference from any

122 IDEA (2019) at 37.
123 Murphy & De Vrieze (2020) at 8.
124 IDEA (2019) at 37.
125 Articles 248 & 229 of the Constitution of Kenya, 2010.
126 Article 229(5) of the Constitution of Kenya, 2010.
127 Article 229(7) of the Constitution of Kenya, 2010.

person or authority. Appointments to the commission are made by the president, but parliament must give its approval.[128] Also, the members of the EACC enjoy security of tenure under Article 251(2), serving a six-year term, which is renewable once, and can only be removed through a tribunal on grounds of misconduct, incapacity, or bankruptcy. In addition, similar to the A-G, the EACC is funded from the Consolidated Fund, as guaranteed by Article 251(1) (b), ensuring that it has adequate financial resources to perform its functions. Like the A-G, the EACC must submit reports to parliament for accountability.[129] Here again, although the EACC is held accountable by parliament through reporting requirements, it retains full discretion in investigations and enforcement, preserving its autonomy in line with constitutional safeguards.

5.6.3 Director of Public Prosecutions

Established under Article 157(1) of the Constitution, the DPP operates independently and is not subject to interference or influence by any person.[130] The DPP's security of tenure is constitutionally entrenched under Articles 157(6) and 157(7) of the Constitution. The DPP holds office for a single term of five years, which is renewable once, and may not be removed except on the prescribed grounds of misconduct or incapacity. Removal is subject to a formal process that requires the establishment of a tribunal appointed by the president, thereby ensuring that the exercise of prosecutorial independence is insulated from arbitrary or politically motivated interference. The office is also funded from the Consolidated Fund as provided in Article 251(1) (b) to ensure its financial independence. Annual reports are submitted to parliament for accountability,[131] while prosecutorial matters remain autonomous. From the above analysis, it can be deduced that the A-G, the EACC and the DPP meet the standards of IACIs.

128 Article 251(1) (a) of the Constitution of Kenya, 2010.
129 Article 251(3) of the Constitution of Kenya, 2010.
130 Article 249(1) of the Constitution of Kenya, 2010.
131 Article 157(3) of the Constitution of Kenya, 2010

6. CONFLICT BETWEEN THE EACC AND THE DPP AND THE IMPACT ON THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH

The Constitution of Kenya provides comprehensive safeguards for formal independence of all three IACIs, including provisions for appointment, security of tenure, resource independence, mandate and requisite powers as well as accountability to parliament.[132] However, while the A-G regularly audits and reports on publicly funded entities and the EACC conducts follow-up investigations, an emerging pattern indicates that the DPP exercises prosecutorial discretion selectively, often refraining from pursuing high-profile cases involving the executive or its affiliates.[133] This has resulted in conflicts between the EACC and the DPP.[134] Significantly, Kenya's history shows a correlation between the fight against corruption and the exercise of prosecutorial authority.[135]

Recent developments highlight an alignment between the DPP and the executive.[136] Thus, within weeks of President Ruto's inauguration, the then DPP, Noordin Haji, withdrew criminal charges against several politicians aligned with the new president, including a corruption case involving Rigathi Gachagua linked to an estimated KSh7.3bn.[137] The DPP also withdrew over 25 000 criminal cases between 2021 and 2022,[138] claiming that the charges were based on fabricated evidence. However, no official report was made on how these conclusions were reached.[139] Among the other notable cases subjected to nolle prosequi were:

- Aisha Jumwa, CS in the Ministry of Public Service, Gender and Affirmative Action, was charged with the unlawful acquisition of KSh19m in public funds.[140]

132 Articles 248-254, 229; 157,158, 229 of the Constitution of Kenya, 2010.
133 Akinyi (2025); The Observer (2025); KBC Digital (2025); Otieno (2024).
134 Tenges O.M (10 September 2025) "EACC blames ODPP as 18 high-profile corruption cases withdrawn" *Citizen Digital*, available at https://www.citizen.digital/news/eacc-blames-odpp-as-18-high-profile-corruption-cases-withdrawn-n369448 (visited 20 May 2026).
135 Mungai M (2019) "Testing Alternatives: Private Prosecutions as a Useful Anti-Corruption Tool in Kenya" 4 *Kabarak Journal of Law and Ethics* 91-112 at 92.
136 AfriCOG (2019) at 35.
137 AfriCOG (2019) at 35.
138 AfriCOG (2019) at 35.
139 AfriCOG (2019) at 35.
140 Tenges (2025).

- Geoffrey Mwangi, the former CEO of the National Hospital Insurance Fund and co-accused persons, who faced charges relating to the misappropriation of KSh1.1bn.
- Wambui Mary, chairperson of the Communications Authority of Kenya, was implicated in a tax evasion scheme valued at KSh2.2bn.[141]

The systematic withdrawal of these prosecutions increased friction between the DPP and the EACC, raising concerns regarding prosecutorial independence and accountability in Kenya's anti-corruption framework.[142]

The appointment of Noordin Haji as head of the National Intelligence Service before his term as DPP ended raised concerns about the executive influence amid reports of presidential coordination of appointments with MPs.[143] This conduct may be construed as an indirect manifestation of the erosion of institutional independence within anti-corruption bodies, thereby illustrating that formal legal guarantees of independence do not, in themselves, preclude extra-legal mechanisms of influence. Moreover, the pattern of an IACI aligning with the executive seems to have continued even with the DPP Renson Ingonga, who replaced Noordin Haji.[144]

6.1 Implications for the right to the highest attainable standard of health

The DPP's failure to prosecute has undermined the enforcement of the right to the highest attainable standard of health. Apart from the most recent SHIF and SHA scandal already discussed,[145] there are high-profile corruption cases that remain unprosecuted. For example, the 2020 Kenya Medical Supplies Authority (KEMSA) COVID-19 corruption case involved about

141 Tenges (2025).
142 Tenges (2025).
143 Kenya National Human Rights Commission (2023); KTN News Kenya (25 August 2025) "Kenya's Parliament under fire after leaked WhatsApp messages reveal plans to oppress Kenyans", available at https://www.youtube.com/watch?v=FWM173WQJvQ (visited 20 May 2026).
144 Office of the Director of Public Prosecution, available at https://odpp.go.ke (visited 20 May 2026).
145 Office of the Director of Public Prosecution, available at https://odpp.go.ke.

US$2bn in aid and grants, with an estimated KSh7.8bn lost through misappropriation of funds meant for medical supplies. [146,147]

Similarly, KEMSA was implicated in the misappropriation of KSh3.7bn in public funds allocated to the procurement of insecticide-treated bed nets, a critical public health intervention to prevent malaria among millions of low-income households in Kenya.[148] As with preceding cases, no successful prosecution has been recorded.

In August 2025, the EACC publicly blamed the DPP for the withdrawal of 18 high-profile corruption cases from 15 counties since 2013, despite the DPP having submitted what it claimed were watertight investigations. Thus, on 10 September 2025, EACC urged parliament to consider amending the law to grant the Commission prosecutorial powers, arguing that doing so would lead to more consistent and successful outcomes in court.[149]

It is notable that the DPP's power to discontinue the prosecution of a case is not absolute and is subject to the court's permission.[150] The judge must consider whether the discretion was exercised judicially and in accordance with law.[151] In the case of *Director of Public Prosecutions v Mutua & Another*, the Court noted that the granting of permission is discretionary and must be based on grounds consistent with public interest and the administration of justice, while avoiding the abuse of the legal process.[152] Judicial precedent establishes that the DPP must show tangible reasons for the intended discontinuance and that the court has discretion to decline the application where such justification does not

146 Igunza E (24 September 2020) "Coronavirus corruption in Kenya: Officials and businesspeople targeted" *BBC,* available at https://www.bbc.com/news/world-africa-54278417 (visited 21 May 2026); Aketch A (18 May 2023) "A look at the latest scandal involving Kemsa" *Daily Nation,* available at https://nation.africa/kenya/news/explainers/a-look-at-the-latest-scandal-involving-kemsa-4238998 (visited 21 May 2026).

147 Tenges (2025).

148 Aketch (2023).

149 Tenges (2025).

150 Art 157(8) of the Constitution of Kenya, 2010.

151 *Director of Public Prosecutions v Mutua & Another [2025] KEMC 197 (KLR)* at para 34; *Republic v Weke & 6 others (Anti-Corruption and Economic Crimes* Revision E007 of 2024) [2024] KEHC 8388 (KLR) (10 July 2024).

152 *Director of Public Prosecutions v Mutua & Another* [2025] KEMC 197 (KLR) at para 39; *Republic v Arnold Aguvasu* [2019] eKLR at para 14; *Republic v Weke & 6 others (Anti-Corruption and Economic Crimes Revision* E007 of 2024) [2024] KEHC 8388 (KLR) (10 July 2024); *Wanjohi v Director of Public Prosecutions* (Petition E007 of 2025) [2025] KEHC 6854 (KLR); *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others* [2018] KECA 47 (KLR) at paras 30-13; *Director of Public Prosecutions v Kiptoo & Others* [2024] KEHC 16692 (High Court) at para 99.

suffice.[153] In the past, courts generally did not assess the substantive merits of the discontinuance request when determining whether to grant permission to the DPP; rather, they evaluated whether the DPP properly followed the constitutional or legal procedure.[154]

Recent jurisprudence reflects a paradigm shift in judicial approaches. For example, in the 2024 case of *Republic v Weke & 6 Others*.[155] The Court upheld the refusal to grant the DPP permission to discontinue the prosecution of a case, holding that "the power to initiate or withdraw cases can no longer be used whimsically and arbitrarily as a tool to oppress individuals or achieve goals other than those in the administration of justice".[156] In *Mulaa v Office of the Director of Public Prosecutions & another; Oparanya & 4 others* in 2025, the Court found that the DPP's withdrawal of corruption charges against Cooperatives and Micro, Small and Medium Enterprises CS Wycliffe Oparanya was unconstitutional. It held that the DPP's actions lacked transparency and accountability.[157] It further found that the DPP had acted irregularly and unconstitutionally by dropping the charges without consulting the EACC, which had investigated the matter and recommended prosecution.[158] This development highlights a change in jurisprudence and heightens judicial scrutiny of prosecutorial discretion.

The Office of the Director of Public Prosecutions Act also provides an avenue to hold the DPP accountable for the discontinuance of criminal prosecution.[159] The Act provides that:

> At any time, the President, the National Assembly or the Senate may require the Director to submit a report on a particular issue. Every report required from the Director under this section shall be published and publicised.[160]

153 *Director of Public Prosecutions v Mutua & Another* [2025] KEMC 197 (KLR) at para 34; *Republic v Weke & 6 others (Anti-Corruption and Economic Crimes* Revision E007 of 2024) [2024] KEHC 8388 (KLR) (10 July 2024).

154 This seems to be the general trend as is highlighted in a number of cases including: *Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others* [2018] KECA 47 (KLR) at para 25; *Director of Public Prosecutions v Kiptoo & 6 Others* (Criminal Revision E1550 of 2024) [2024] KEHC 16692 (KLR) (20 December 2024).

155 *Republic v Weke & 6 Others* (Anti-Corruption and Economic Crimes Revision E007 of 2024) [2024] KEHC 8388 (KLR) (10 July 2024) at paras 17-19.

156 Para 18 of the *Republic v Weke & 6 Others* (Anti-Corruption and Economic Crimes Revision E007 of 2024) [2024] KEHC 8388 (KLR) (10 July 2024).

157 *Mulaa v Office of the Director of Public Prosecutions & another; Oparanya & 4 others* (Interested Parties) [2025] KEHC 12596 (KLR) at paras 40-53.

158 *Mulaa v Office of the Director of Public Prosecutions & another; Oparanya & 4 others* (Interested Parties) [2025] KEHC 12596 (KLR) at paras 41-53.

159 Section 7(2) & (3) of the Office of the Director of Public Prosecutions Act, Cap. 6B.

160 Section 7(2) & (3) of the Office of the Director of Public Prosecutions Act, Cap. 6B.

Despite the many withdrawals by the DPP, neither the Assembly nor the Senate has pushed for the DPP to request the discontinuance of the thousands of corruption prosecutions. Article 157(12) of the Constitution gives parliament the power to enact legislation, conferring powers of prosecution on authorities like the EACC.[161] Though this avenue has not been pursued. Private prosecutions offer an alternative.[162] However, they are subject to strict judicial scrutiny[163] and high financial costs for initiating parties.[164]

To date, there has been no comprehensive investigation, prosecution or recovery of fraudulently acquired funds when it comes to the SHA corruption scandal of 2025 and 2026 already mentioned. Nonetheless, the DCI announced on 30 April 2026 that the proprietors and directors of 30 health facilities had been investigated, and that the matter was now before the DPP to determine whether to proceed with prosecution.[165] Further, the DCI also provided that 68 suspects and facilities had been charged, and 19 cases had been approved for prosecution.[166] However, there is no official document or report that is publicly accessible that can verify the hospital's proprietors and directors who are being investigated or have been charged. Also, the Health CS, Aden Duale, has stated that over 1 000 health facilities have been closed because of fraud,[167] but no publicly available information exists to verify this assertion. This consistent lack of transparency raises issues about adequate accountability. Further, if it is true that over 1 000 facilities have been shut down, there are no countermeasures in place to cushion the loss for Kenyans seeking medical services.

161 Article 157 (12) of the Constitution of Kenya, 2010.
162 Mungai (2019) at 94.
163 Section 2 (1) & 28 of the Office of the Director of Public Prosecutions Act, Cap. 6B 2013; Section 88(3) of the Criminal Procedure Code, Cap 75; Rule 4 of the Criminal Procedure (Plea Bargaining) Rules, 2018.
164 Johnson A (14 July 2025) "Private prosecution: a careful balancing act" *International Bar Association*, available at https://www.ibanet.org/Private-prosecutions-a-careful-balancing-act (visited 20 May 2026).
165 Chebet E (5 April 2026) "30 health facilities to be prosecuted over SHA fraud" *Citizen Digital,* https://citizen.digital/article/30-health-facilities-to-be-prosecuted-over-sha-fraud-n380249 (visited 21 May 2026).
166 Chebet (2026).
167 Gitonga A "Sh11bn lost to sha fraud as government closes 1118 health facilities" *The Standard*, https://www.standardmedia.co.ke/health/health-science/article/2001539610/sh11bn-lost-to-sha-fraud-as-government-closes-1118-health-facilities (visited 20 May 2026).

Also, as has been highlighted, just because a matter is investigated and brought before the DPP, or even prosecution is instituted, it does not mean that prosecution will be pursued to the full extent of the law, because the DPP has the authority to discontinue criminal proceedings.[168]

Notably, though, only the whistleblower, a deputy director for audit at the SHA who, in 2025, led to the uncovering of the alleged fraudulent medical billing scheme involving hospitals, has lost his job.[169] The CEO of SHA is still employed,[170] and despite calls for the health CS to resign, no disciplinary action has been taken.[171]

When corruption is not prosecuted, it continues to propagate more corruption. Indeed, the most recent audit by the A-G dated 11 February 2026, establishes that KSh50bn cannot be properly accounted for by SHA.[172]

7. CONCLUSION

This paper has demonstrated that the fight against corruption in Kenya's health sector faces two main challenges. The first is that Kenya has weak regulatory and enforcement systems. As has been demonstrated, SHA lacks adequate verification and payment standardised systems. It also fails to establish transparency and oversight mechanisms. There is also a lack of coordination between SHA and other key agencies like KMPDC, DHA, and county governments. This has resulted in fragmented decision-making and oversight.

The second is the limitation of formal independence. Although formal IACIs are guaranteed both constitutionally and legislatively, it does not automatically translate to independent institutions on the ground. While establishing formal IACIs is crucial for protecting human rights and ensuring government accountability, it is no guarantee of

168 Article 157(6) c of the Constitution of Kenya, 2010.

169 Shokanda H & Maina K (2 October 2025) "SHA whistleblower: DCI probe on Duale dossier starts" *Nation Daily*, https://nation.africa/kenya/health/sha-whistleblower-dci-probe-on-duale-dossier-starts-5214010 (visited 19 May 2026).

170 Kisia (2025).

171 Kahenda M (28 August 2025) "Calls mount for CS Duale to Resign over SHA Scam" *The Standard,* available at https://www.standardmedia.co.ke/national/article/2001527970/calls-mount-on-cs-duale-to-resign-over-sha-scam (visited 20 May 2026).

172 Mburu (2026). See also Office of the Auditor-General (2026).

effectiveness in the fight against corruption.[173] The Kenyan Constitution and relevant legislation have provided the A-G, the EACC and the DPP with constitutionally conferred authority to ensure independence to enhance the fight against corruption. However, the DPP, which is currently the only independent institution with prosecutorial powers, has proven selective in exercising them, and the law is unable to regulate the individual ambition of those who take up these key roles in IACIs. As a result, the very same provisions that are meant to protect the independence of an office that is key in strengthening the fight against corruption can end up being used to facilitate corruption by protecting offenders from prosecution.

The EACC should also be granted prosecutorial powers alongside the DPP. Kenya's parliament has the authority to enable this but has not taken up the initiative. Also, parliament, which has the power to hold the DPP accountable for decisions to discontinue cases, is proving reluctant to take action.[174] Therefore, the prosecution of corruption in the health sector or any other sector is left to the discretion of the independent office of the DPP. Nonetheless, as indicated, emerging jurisprudence shows that Kenya's courts' position may be changing towards embracing its role in providing judicial oversight over DPP's prosecutorial powers, especially where there is evidence of unconstitutionality, abuse of power, or procedural impropriety. How this will affect the prosecution of corruption in the health sector remains to be seen. This convergence between corruption in the health sector and the conflict between the EACC and the DPP illustrates the fragility of the concept and actualisation of independence of IACIs. It elucidates how formal independence can easily be undermined, either by a legislature that is not separate from the executive or by the personal ambitions and actions of individuals appointed to these independent offices. Further, it was shown how the fragile nature of formal independence can impact the protection of human rights, in this case, the right to the highest attainable standard of health in Kenya: "Without the right people, the right training, the right values and ethics, the right leadership and the right resources, constitutional design on its own will have only a limited impact."[175]

173 IDEA (2019) at 42.
174 Section 7 (2) & (3) of the Office of the Director of Public Prosecutions Act, Cap. 6B.
175 IDEA (2019) at 42.