

***DISTRACTION & DESTRUCTION: OMBUDSMAN UNDER THREAT
OF ITS OWN FINDINGS***

BY

LEONARD NGALUMA*

A PRESENTATION MADE VIRTUALLY ON THE THEME **'THE
OMBUDSMAN UNDER THREAT'**

AT A WEBINAR OF THE AFRICAN OMBUDSMAN AND
RESEARCH CENTRE (AORC) HELD

ON

27TH OCTOBER 2020

*Mr. Leonard Ngaluma holds a Master of Business Administration Degree in Strategic Management (University of Nairobi) and has over 20 years' experience in public service. He is currently the Commission Secretary/ CEO of the Kenya Ombudsman Office, the Commission on Administrative Justice and acting CEO of the Secretariat of the African Ombudsman and Mediators Association (AOMA).

I. INTRODUCTION

The Ombudsman is one of the important governance institutions worldwide. It not only ensures good governance, but also provides citizens with a cheap, accessible, expeditious, objective and impartial platform for redress of their grievances against public institutions and officers. In deeply divided societies and post-conflict societies, the Ombudsman may play an additional responsibility of preventing conflicts and providing the platform for transitional justice. In appreciation of these responsibilities, the Ombudsman institutions in Africa have established the African Ombudsman and Mediators Association (AOMA) to advance the development of the Ombudsman institution in Africa in furtherance of good governance, the rule of law and human rights.

II. THE HISTORY AND DEVELOPMENT OF THE OMBUDSMAN IN AFRICA

In Africa, Tanzania was the first country to adopt the institution of the Ombudsman in 1966 through the establishment of the Permanent Commission of Enquiry. A continental surge thereafter followed, leading to establishment of the institution in over 44 countries. Indeed, the growth of the Ombudsman in Africa in the last five decades has been phenomenal. It is worth noting that while the Ombudsman has been christened differently in every country, it has retained the conventional mandate of public defender, albeit with some modifications, as symbolised by the official names in different countries. For example, it is known as the 'Public Protector' in South Africa, 'Mediator' in Francophone Africa, 'Commission on Administrative Justice' in Kenya, 'Inspector-General of Government' in Uganda, and 'Commission on Human Rights and Good Governance' in Tanzania, just to mention a few.

One of the striking features of the African Ombudsman was its modification to suit the circumstances of the particular African countries. This has sometimes been referred to as the 'New' or 'Second Generation' Ombudsman in comparison with the classical model that originated in Sweden. While the 'New Ombudsman' model was inspired by the classical model, it modified the concept to give the institution broader functions and powers to accord to the country-specific circumstances. In the context of Africa, Linda Reif states that the modification was necessitated by the fact that:¹

¹ L.C. Reif, (2004), *The Ombudsman, Good Governance, and the International Human Rights System*, Leiden: Martinus Nijhoff Publishers, 218-19.

Most post-independence states in Africa were military regimes or one-party states...a number of African states continue to suffer from recurrent civil conflict...as a result...African ombudsmen did not duplicate the classical ombudsman model, and adapted the concept to fit the political, legal, economic and social peculiarities of Africa.

Of significance was the expansion of the functions of the Ombudsman beyond the traditional mandate of addressing maladministration to include aspects such as protection of human rights, anti-corruption, enforcement of leadership and ethical codes, environmental protection and access to information.² In addition, the powers were enhanced beyond the conventional powers of the classical Ombudsman.

As an illustration, the Tanzanian Commission for Human Rights and Good Governance deals with both human rights and administrative justice; the Ghanaian Commission on Human Rights and Administrative Justice has a three-fold mandate of human rights, anti-corruption and administrative justice. In South Africa, the Public Protector deals with administrative justice and corruption as is the case with the Inspectorate of Government of Uganda who also enforces the Leadership Code. In Kenya, the Ombudsman ensures administrative justice in the public sector and is empowered to '*adjudicate*' on such matters and '*take remedial action.*' The power to take remedial action in Kenya is similar to that of the Public Protector of South Africa which has a novel quasi-judicial jurisdiction which is paramount in the redress of maladministration. Legally, it means that after carrying out inquiries, investigations or adjudication, the Ombudsman can give binding decisions and tangible remedies. The Ombudsman of Kenya is also empowered by the recently enacted Access to Information Act, 2016 to make binding decisions, which can only be appealed to the High Court by an aggrieved person. In Rwanda, the Ombudsman deals with anti-corruption and administrative justice and access to information while that of Ethiopia has an additional mandate of enforcing access to information.

An interesting point to note is the endowment of the Ombudsman with coercive powers such as powers to prosecute as is the case in Uganda and Rwanda. In Rwanda, the Ombudsman has powers of bailiffs and can request the Supreme Court to reconsider and review judgments rendered at the last instance by

² Reif, (No. 2 above) 271.

ordinary, commercial and military courts, in cases of injustices. These powers were hitherto known under the classical ombudsman. The modification of the Ombudsman in Africa with coercive powers was necessary since, as Hatchard has noted, it sought to replace the 'first generation Ombudsman model' with a more effective 'second generation model.'³ Unlike the classical model, the African Ombudsman is not necessarily a Parliamentary model; it does not rely on Parliament for its existence. It can also investigate all public officers, including Members of Parliament.

The strengthening of the Ombudsman in Africa was occasioned by the ineffectiveness of compliance through Parliamentary reporting due to (i) the nature of formation of Parliament in many African countries, (ii) the nature of work of the Ombudsman, especially where it also incorporates the anti-corruption mandate. In such cases, Parliamentarians would work towards making the office ineffective to their benefit. Reports would be received by Parliament and never be discussed or contents revealed, (iii) the politicisation of the Ombudsman decisions as the office checks public offices and the Government. The recommendations of the Ombudsman would, therefore, be swept to the back burner.

III. THREATS AND CHALLENGES

Despite the way various that African states have innovatively attempted to adopt the institution of the Ombudsman to their context to circumvent unique challenges, the Ombudsman in Africa continues to suffer from various problems that hinder the effectiveness of the institution. For example, it has been mooted that the main characteristic of the Ombudsman is the power to make recommendations to administrative agencies for action. In the context of the classical ombudsman, the implementation of the recommendations is based on reliance on the moral authority of the findings and recommendations, as opposed to using coercive powers of enforcement.⁴ This has failed to work effectively in Africa considering the political, economic and cultural environment in which the ombudsman operates. The African ombudsman still largely deals with issues of civil, political and cultural rights where impunity is pervasive. It is a

³ J. Hatchard, 'The Institution of the Ombudsman in Africa Revisited' 40(4) *International and Comparative Law Quarterly* 939.

⁴ See for example Kirkham, Richard. "Explaining the lack of enforcement power possessed by the ombudsman." *Journal of Social Welfare & Family Law* 30, no. 3 (2008): 253-263.

challenging scenario where in some extreme cases, court orders are defied with impunity, how then is it expected that ombudsman recommendations, without the force of law, can be implemented?

Yet an effective enforcement of the decisions and recommendations of the Ombudsman is absolutely critical to the effectiveness of the Ombudsman in Africa. Soft power of recommendations is not sufficient. The Ombudsman must be relevant and give hope to the citizens otherwise it may be considered as merely a 'lap dog' or 'toothless bulldog.' It is therefore imperative for the Ombudsman in Africa to circumvent the challenge of non-implementation of its decisions and recommendations. In particular, non-compliance is evident in relation to investigation reports that relate to maladministration, administrative injustices and leadership and integrity.

The challenge usually takes many forms, including defensiveness by public offices, evasive response, inordinate and deliberate delay to respond to issues raised and outright refusal to accept the results of the ombudsman investigations. It is not unusual to find a public body or officer challenging the mandate and powers of the ombudsman, politicising findings and recommendations, or seeking a favourable opinion of the Attorney-General on an investigated matter. In other instances, they would say that the ombudsman is not a court of law.

These factors usually determine the level of acceptability and implementation of the decisions of the Ombudsman. In some instances, there have been witnessed reprisals from the Ombudsman's findings in the form of budgetary cuts. Instigation of removal proceedings against individual ombudsman and abolition of the institution altogether are extremes but are not unheard of. How should the Ombudsman in Africa, and indeed elsewhere in the world, countenance these challenges?

- a) First, it is important to expressly provide for the quasi-judicial jurisdiction of the Ombudsman either in the Constitution or constitutive legislation. This is key since it provides legality and legitimacy to the processes and outcomes of exercise of this jurisdiction. The cases of Kenya and South Africa are appropriate in this regard.
- b) Second, the choice of matters for investigations is important. While the Ombudsman should be dynamic and bold to take up complex and topical

issues, it should nevertheless not admit matters that are expressly outside its ambit, or those whose solution may require other more appropriate mechanisms. For instance, the Ombudsman should be reluctant to take up political disputes whose solution may lie purely on political settlements. In such instances, the Ombudsman should consider the likely outcomes of such disputes before their admission. In such cases, the Advisory jurisdiction of the Ombudsman is more appropriate than the quasi-judicial jurisdiction.

- c) Third, the investigations should be credible, thorough, fair and objective if the final outcome is to be accepted and implemented. As aptly noted by Traore, 'the Ombudsman must conduct investigations seriously and be persuasive in seeking a response in light of the findings of such investigation.'⁵ This proposition further finds support from Brock who advises that 'it is important to note that authorities are more likely to implement Ombudsman recommendations when they can trust that the Ombudsman has been even-handed, relied on credible evidence and objective standards...'⁶ It is these qualities that ensure compliance with the findings and determinations.
- d) Fourth, the Ombudsman should avoid generalities in its findings and determinations upon conclusion of the investigations. General findings and determinations create ambiguity and excuses for non-implementation. Accordingly, the Ombudsman should try as much as possible to objectively review the evidence and circumstances and make specific, clear and realistic findings and determinations if compliance is to be attained.
- e) Fifth, a supportive judiciary is key to the effectiveness of the Ombudsman's quasi-judicial jurisdiction in terms of affirming the Ombudsman's powers to give binding decisions, and also sanctioning individuals who fail to comply with the determinations. A progressive judiciary also facilitates the growth and development of the Ombudsman as a complementary instrument of governance.

⁵ A.D. Traore, 'Crusaders Without a Sword: Insights and Challenges in Enforcing Ombudsman Decisions – The Case of Burkina Faso.' A presentation made during the Second Regional Colloquium of African Ombudsman Institutions on the theme 'Securing the Ombudsman as an Instrument of Governance in Africa held in Nairobi – Kenya from 19th to 22nd February 2015.

⁶ A. Brock, 'Crusaders Without a Sword: Insights and Challenges in Enforcing Ombudsman Decisions – The Case of Bermuda.' A presentation made during the Second Regional Colloquium of African Ombudsman Institutions on the theme 'Securing the Ombudsman as an Instrument of Governance in Africa held in Nairobi – Kenya from 19th to 22nd February 2015.

f) Sixth, political will plays a key role in the effectiveness of the Ombudsman's quasi-judicial jurisdiction. While the legal framework and stewardship of the Ombudsman are critical, political will facilitates the effectiveness of the Ombudsman and ensures full implementation of its decisions. In the context of the Ombudsman, political will entails not only compliance with its decisions, but also co-operation during the investigations. This ultimately engenders a culture of respect for the Ombudsman and the rule of law.

THE CASE OF KENYA: THE COMMISSION ON ADMINISTRATIVE JUSTICE CIRCUMVENTING CHALLENGES

a) Complaints Handling

Like other Ombudsman institutions, the Commission facilitates administrative justice through complaints handling and resolution. The Commission has devised various ways of ensuring co-operation and compliance with its recommendations and decisions in relation to complaints handling. The main mechanisms in this regard are:

■ Submission of Reports to Appropriate Agencies

Pursuant to section 42(1) of the Commission on Administrative Justice (CAJ) Act, upon conclusion of an inquiry or investigation, the Commission issues a report to the state organ, public office or organisation to which it relates for implementation. Further, the report may be submitted to any interested party for purposes of implementation.⁷ In submitting the report, the Commission gives a timeline for submission of a response by the relevant agency on the steps taken to implement its determinations. Through this process, a number of recommendations and decisions have been implemented by appropriate public agencies without further action from the Commission. This has been bolstered by the Commission's high standing in the Kenyan governance sphere.

⁷ Section 41(a) of the Act.

■ Notice to Show Cause

This is issued pursuant to sections 2 and 26 of the CAJ Act and Regulations 17 and 18 of the Commission on Administrative Justice Regulations, 2013 in cases where the respondent public agency or officer has failed to respond to an inquiry or investigation by the Commission and 28 days have passed since the initial communication. It may also be issued where they have failed to provide information on the action taken regarding a report of the Commission. The Notice has proved to be very effective as a compliance measure. Part of the Notice reads as follows:

NOW TAKE NOTICE that by means hereof, you are hereby required to show cause within **Fourteen (14) Days** from the date hereof, why your name should not be entered in the Register of Malfeasant Public Officers as an unresponsive Public Officer and unfit to serve in the Public Service, and for the Commission to further cite you as such in its Statutory Report, in accordance with Regulation 18(c) and (d) of the Commission on Administrative Justice Regulations

DO FURTHER TAKE NOTICE that the aforesaid is separate and independent of such further action as the Commission may take on the substantive complaint, including issuance of Summons with attendant consequences, and compulsion to attend and produce documents/give information or adjudicate as may be necessary.

■ Summons

Summons is issued where a public agency or officer has failed to respond to the Notice to Show Cause or co-operate with the Commission during investigations. This power is similar to that of the Court, disobedience of which would amount to contempt and attract penal sanctions.

b) Performance Contracting

The Commission is mandated to set up and strengthen complaints handling infrastructure in the public sector. To this end, the Commission plays a critical role in developing the capacity of public institutions and officers to handle public complaints. The Indicator, 'Resolution of Public Complaints' in Performance Contracting, requires all public institutions to promptly address and resolve public complaints lodged with and against them. In this respect, public institutions are

obligated to establish mechanisms of working with the Commission to address complaints they have received. Specifically, the Commission rates public institutions on compliance with the set guidelines under the Indicator. Under this system, public institutions are required to submit quarterly reports detailing complaints received and action taken. The Commission thereafter rates each institution and issues a certificate showing performance in percentage, which guides the overall national rating of the institution.

In order to enhance effectiveness, the Commission has reviewed the parameters (Guidelines) for the Indicator which aligned this function with its internal complaints handling function. One of the parameters in this regard is status report on the implementation of any recommendations and decisions of the Commission, the default of which attracts sanctions, including reduction of the overall score or non-certification. This mechanism has enhanced the level of compliance with recommendations or decisions of the Commission since certification of the Commission is key in the overall system of Performance Contracting.

c) Public Interest Litigation

As a State Organ, the Commission is empowered to bring any action before the court, whether Superior Courts or Subordinate Courts⁸ on any matter relating to administrative justice or constitutionalism. Such action should relate to the following:⁹

- matters of broad public interest
- matters raising substantial policy implications
- matters affecting public administration
- matters relating to administrative justice
- matters concerning leadership and integrity

Pursuant to this, the Commission has participated in 42 matters of public interest by initiating or joining on-going cases, either as a party, *amicus curiae* or interested party. Some of these matters have provided novel and new

⁸ The Superior Courts in Kenya are the Supreme Court, Court of Appeal, the High Court, Industrial Court, Environment and Land Court while the Subordinate Courts are the Magistrates Courts, Kadhis Courts, Courts Martial and any other Court or tribunals established by an Act of Parliament.

⁹ Regulation 34(2) of the Commission on Administrative Justice Regulations, 2013.

jurisprudence in administrative justice and the rule of law in Kenya and restated the place of the Ombudsman in Kenya's governance system. One such matter was a complaint where it was alleged that the Executive had failed to pay a police torture victim, KES. 7,122,915 (approx. US\$ 70,000) that had been awarded by the High Court. Upon receiving the complaint, the Commission successfully went to court to compel the Executive to comply with the court order.¹⁰ In the second matter, the Commission moved to court to challenge the eligibility of a Member of Parliament (MP) to serve in public office following his conviction of abuse of office in 2004. Article 99(2)(h) of the Constitution and Section 24(2)(h) of the Elections Act provide that a conviction of abuse of office is one of the grounds for disqualification for election as an MP. In this matter, the High Court found that the Independent Electoral and Boundaries Commission had indeed failed to perform its constitutional duty when it cleared the MP to stand for elections in 2013. However, the Court fell short of disqualifying the MP on account of its finding.

d) Reporting Mechanism

The Commission is required under Article 254 of the Constitution and 53 of the Act to report to Parliament and the President annually on the progress of its work. It is also required to report bi-annually on the complaints investigated and the remedial action taken.¹¹ Further, the Commission is required to issue special reports in appropriate cases, and publish periodic reports on the state of administrative justice in Kenya. Under Section 42(4) of the Act, the Commission is required to submit a report to the National Assembly in cases of failure by a public agency to implement its recommendations. The reporting mechanism exposes public institutions and offices who fail to comply with the decisions or recommendations of the Commission. The reporting mechanism is intended to enable Parliament and the President to determine appropriate action in cases of non-compliance with the Ombudsman's recommendations and decisions.

e) Citation Register

Citation Register is one of the innovative mechanisms developed by the Commission to ensure compliance and co-operation by public agencies and

¹⁰ Nairobi, Judicial Review Application No. 171 of 2014; *the Commission on Administrative Justice vs. the Principal Secretary, Ministry of Interior and Co-ordination of National Government & the Attorney General*.

¹¹ Article 59(2)(j) of the Constitution and Section 8(c) of the Act

officers. Under this mechanism, the Commission has developed a Register, akin to a 'Black Book' where names of unresponsive and malfeasant public agencies and officers are entered. The Commission has developed parameters for determining unresponsiveness and malfeasance which include failure to respond to inquiries by the Commission or implement any determination or recommendation of the Commission. Once the names are entered in the Register, for public institutions, they may be sanctioned by the Commission under the Performance Contracting system; while for public officers, they may face the possibility of being declared unfit to hold public office. The names in the Register are also published in the Annual Report as part of naming and shaming. The mechanism has been integrated in the Notice to Show Cause discussed above and has brought satisfactory outcomes.

f) Huduma Ombudsman Award

The Huduma Ombudsman Award is a scheme where outstanding and exemplary public agencies and officers are recognised and awarded. One of the parameters for determining the winners is responsiveness in relation to inquiries or investigations and compliance with the recommendations and decisions of the Commission. The Scheme has the effect of positively influencing actions by public agencies and officers thereby promoting good administration. So far the Commission has held the award a couple of times with the President of the Republic presiding. Moreover, the winners have been promoted for the exemplary work.

g) Inspections (Spot Checks)

The Commission conducts regular and impromptu inspections (spot checks) on selected public institutions to ascertain the veracity of the reports submitted under Performance Contracting and assess the standards of service delivery. Further, spot checks seek to establish whether public institutions maintain complaints register, accessible complaints offices or desks, feedback mechanisms and observe adherence to the service charter standards.

h) Use of Coercive Powers

Besides issuing summons and Notice to Show Cause, the Commission is endowed with coercive powers which have enhanced compliance with its

recommendations and decisions. These include investigative powers such as warrants of arrests for breach of summons or order of the Commission,¹² searches and inspections¹³ and production of relevant information¹⁴ among others. In addition, the power to adjudicate on matters of administrative injustice has strengthened the position of the Commission in ensuring compliance with its decisions.¹⁵ Further, the power to recommend appropriate remedial action, including penal action,¹⁶ and compensation¹⁷ has bolstered compliance with the recommendations and decisions of the Commission.

¹² Article 252(3)(a) of the Constitution, Section 28(2)(a) of the Act and Regulation 19(g) of CAJ Regulations.

¹³ Section 26(e) of the Act and Regulation 19(h) of CAJ Regulations.

¹⁴ Section 26(d) of the Act and Regulation 19(b) of CAJ Regulations.

¹⁵ Section 26(c) of the Act and Regulation 22(4)(a) of CAJ Regulations.

¹⁶ Section 52 of the Act and Regulation 18(b) of CAJ Regulations

¹⁷ Section 8(g) of the Act and Regulation 21(b) of CAJ Regulations