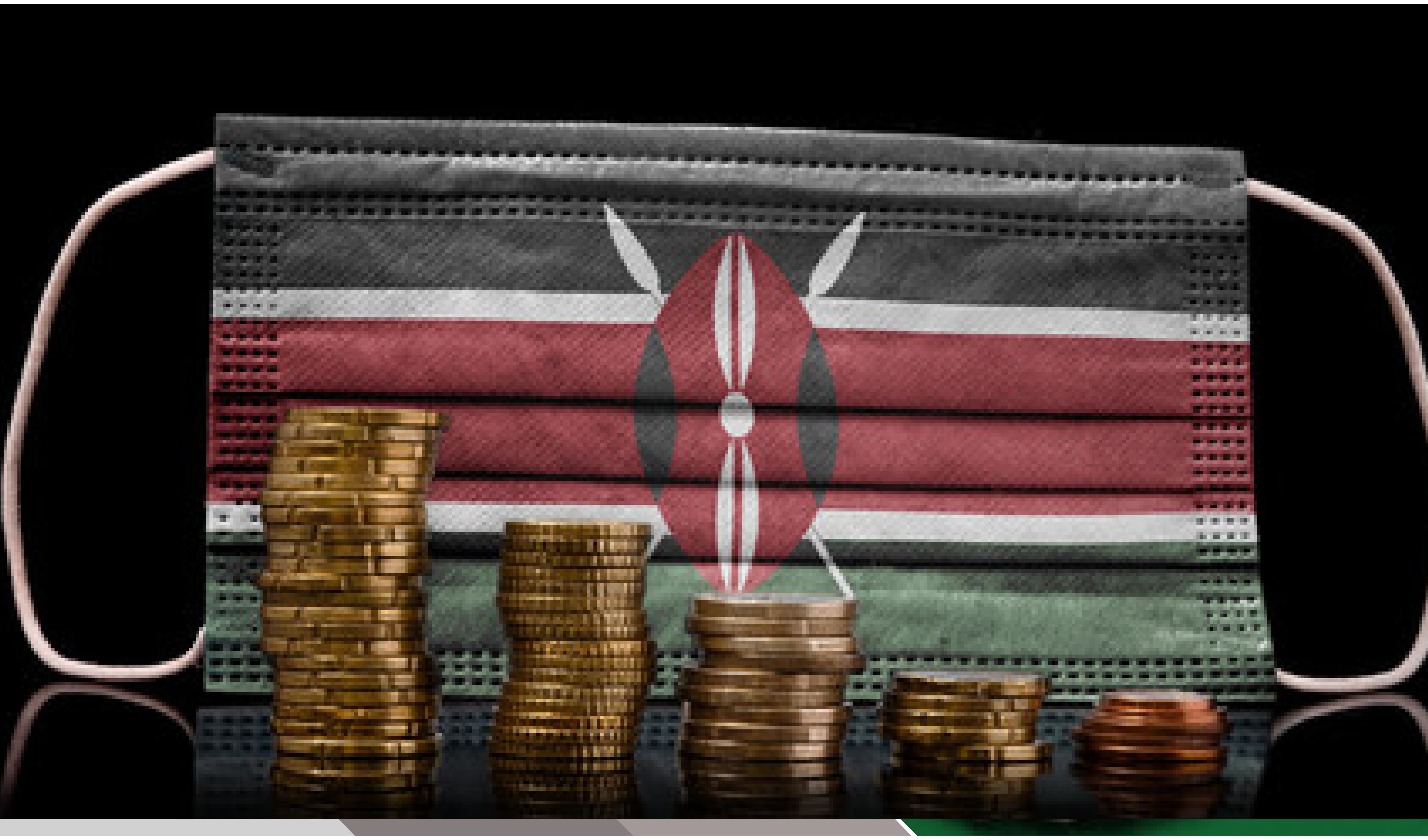
Pamoja Tutetee Haki

KENYA HUMAN RIGHTS COMMISSION

PUBLIC FINANCE MISMANAGEMENT DURING EMERGENCIES

A CASE OF THE CORONA VIRUS DISEASE 2019 (COVID-19)



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LIST OF ABBREVIATIONS

AfDB	African Development Bank
AFRICOG	Africa Centre for Open Governance
ATI	Access to Information
BAC	Budget and Appropriation Committee
BBC	British Broadcasting Cooperation
CBEF	County Budget and Economic Forum
CBK	Central Bank of Kenya
CGTN	China Global Television Network
CIDP	County Integrated Development Plan
CoK	Constitution of Kenya
CPAIC	County Public Accounts and Investments Committee
CRA	Commission of Revenue Allocation
EACC	Ethics and Anti-Corruption Commission
GDP	Gross Domestic Product
IBEC	Intergovernmental Budget and Economic Council
IEA	Institute of Economic Affairs
IFMIS	Integrated Financial Management Information System
IMFA	International Monetary Fund
KEMSA	Kenya Medical Supplies Authority
KENAO	Kenya National Audit Office
KENHA	Kenya National Highway Authority
KERRA	Kenya Rural Roads Authority
KHRC	Kenya Human Rights Commission
KURA	Kenya Urban Roads Authority
MCA	Member of County Assembly

MPs	Members of Parliament
NGO	Non-Governmental Organization
NYS	National Youth Service
OAG	Office of the Auditor General
OCOB	Office of the Controller of Budget
ODM	Orange Democratic Movement
PAA	Public Audit Act
PAC	Public Accounts Committee
PBO	Parliamentary Budget Office
PIC	Public Investment Committee
PFM	Public Finance Management
PPADB	Public Procurement and Asset Disposal Board
SGR	Standard Gauge Railway
SDG	Sustainable Development Goals
SID	**S**ociety for International Development
SRC	Salaries and Remuneration Commission
TI-K	Transparency International-Kenya
IDEA	International Institute for Democracy and Electoral Assistance

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Executive Summary

This study examined public finance mismanagement in emergencies such as the novel coronavirus (COVID-19) and how that influences politics in Kenya. This study also sought to establish and demonstrate the putative notion that the mismanagement of public finances in Kenya is both a systemic and structural problem; provide an assessment and a determination of the extent to which politics lends impetus to perennial mismanagement of public finances in Kenya; provide a critique of the legal, policy and institutional reforms within the public finance management eco-system in Kenya, and make proposals on how such reforms can be deepened and strengthened given the structure of the state and the unending malignant politics; the role played by both mainstream and digital media in documenting analyzing, reporting and exposing the mismanagement of public finances during emergencies such as the COVID-19 period in Kenya; demonstrate the need for deeper political discussions aimed at promoting effective and efficient public finance management in Kenya beyond COVID-19; and an assessment of the nexus between public finance mismanagement and elections in Kenya and, proposes tangible administrative, political and policy recommendations.

The available data establishes that, despite a robust policy and legal framework in Kenya, obtaining public finance management space is characterized by a legacy of sustained maladministration that has occasioned the loss of billions of tax 'payers' money since independence. A fair share of the mismanaged billions are traceable or linked to the 'country's crises and emergencies, with the latest being COVID-19 pandemic. Notably, accountability measures are often relaxed on policy and legal frameworks during emergencies to expedite the procurements of goods and services to effectively respond to the situation at hand or a challenge occasioned by the emergency. Significant noting is that, emergencies engender additional factors which, in the absence of oversight, tend to compound the problem. The dearth of accountability is a key nuisance of public finance governance in Kenya which has propagated imprudence among state officers and has advanced cynicism among the citizens.

The study also establishes that, mismanagement of public finance in Kenya is generally prompted by the design of the political system, which has stalked the country virtually since independence.

State offices are predicated as the nerve centers of the Republic and carry the highest level of responsibility in the management of state affairs in terms of public finance management. However, many state officeholders have used these offices to enrich themselves or satisfy their political agenda. Consequently, this has inflated the cost of election campaign financing and created a plethora of public finance mismanagement opportunities in Kenya. Despicably, every succeeding regime in Kenya is littered with its unique public finance mismanagement issues.

The study similarly establishes that, notwithstanding the watertight constitutional and legal provisions on effective public finance management, loss and mismanagement of public resources continue to rock the country. The annual Auditor General reports have continued to query the public finance expenditure of unaccounted colossal amounts, with attempts to address these queries in subsequent financial years being frustrated yielding to little or no fruits.

The study reveals that whereas media continues to face various challenges, they play a significant role in enhancing the transparency and accountability of funds released to address emergencies such as the COVID-19 pandemic.

Arising from these observations, the study makes the following recommendations that will, if adopted by relevant actors enhance the effectiveness of public finance management during emergencies in Kenya.

a) Parliamentary committees (ad hoc/standing) should ensure that oversight 'committees' reports are readily available and accessible to different stakeholders. The reports should be developed within the context of the right to access information as provided for under Article 35 of the Constitution of Kenya.This will go a long way in promoting transparency and accountability during emergencies.

b) Parliament needs to devise public participation mechanisms that will allow stakeholders to comprehensively participate in oversight and legislative roles during emergencies.
c) Parliament should also ensure that laws and policies introducing public finance measures during emergencies are time-bound and do not lose out on transparency and accountability measures.
d) The executive departments both at National and County level should publish monthly reports on implementation of policy and legal frameworks, including data analysis on budget execution and performance.
e) Procuring entities should make public all details related to procurement contracts linked to emergency spending in comprehensible and accessible formats and platforms.
f) Civil Society Organizations (CSOs) in partnership with relevant government Ministries, Departments and Agencies (MDAs), both at National and County level, should develop programs and strategies to promote meaningful public participation in the management of public resources during emergencies.
g) The media should promote accurate reporting of public finance mismanagement in partnership with CSOs, parliament and other relevant institutions.
h) The Electoral Management Body should ensure that all elections during emergencies should be framed within the rule of law.

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1.0. Background

The philosophy of governance that the Constitution of Kenya 2010 assumes, informs the architecture and design of public finance management. This philosophy is premised on the principles of solidarity, insurance and the equitable sharing of resources. The adoption of this philosophy was guided by the fact that Kenya had a history of extreme disparities in infrastructure development and incomes due to inequalities in the financial resource endowments and sharing. This public finance philosophy and architectural framework allowed the country to equalize and remedy the non-egalitarian approach to development in Kenya.

The Constitution of Kenya therefore, provides four elements of the state's financial power to the two levels of government and institutions; namely: the power to raise and collect revenue, the power to spend revenue, the power to control revenue, and the power to audit revenue. To perform all the functions allocated to each level of government, the Constitution assigns the power to spend the revenues raised by the national government to both levels of government to promote equitable development across the country. The power for making recommendations on how revenue raised nationally shall be equitably shared between the National and County levels of government is assigned to the Commission on Revenue Allocation (CRA), whilst the power to control revenue is given to the Controller of Budget (COB) and the power for audit of public funds to the office of the Auditor General (OAG) . The dispersion of public finance management responsibilities in the Constitution is predicated upon the assumption that it increases accountability in public finance management.

Article 201 of the Constitution of Kenya sets out the principles of public finance management which are to be observed by both the National government and County governments in public finance management. The principles include: prudent and responsible utilization of financial resources, openness, accountability, public participation and clear fiscal reporting. However, emergencies such as the COVID-19 pandemic tested the limit of 'Kenya's public finance management architecture.

The pandemic which emerged mid-stream of 2019/2020 financial year, led to the reorganization of budget priorities by governments to provide the much-needed resources to address the pandemic. Subsequently, the National Assembly developed emergency procurement guidelines which were done within a reduced public participation context.

In execution of the adopted response mechanisms, allegation of mismanagement of public funds worth Kes. 43. 6 billion at Kenya Medical Supply Authority (KEMSA) and misappropriation in various county governments emerged. Against this backdrop, this study sought to examine public finance mismanagement in times of emergencies such as the novel COVID -19 and how politics contribute to public finance mismanagement in Kenya.

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2.0. Political Context of Public Finance Mismanagenent in Kenya during Emergencies

Public finance is the driving engine of any economy. In the context of a system, finance affords the 'oxygen' through which any 'circulation 'system' is rendered possible. In an increasingly complex eco-system, public finance regulation has evolved to keep pace. 'Kenya's system, like in the rest of democratic systems, is anchored on three key pillars, upon which its stability rests, or at least should rest namely; political, economic and social pillars. 'Kenya's aspirations with regard to each of these three pillars are succinctly captured and articulated in the Vision 2030, the 'country's premier aspirational developmental blueprint. The political pillar aspires for 'a democratic political system that is issue based, people-centered, result-oriented and accountable to the public.'[1] Economic pillar on the other hand sets out to sustain 'an average economic growth rate of 10 percent per annum and sustaining the same until 2030.'[2] Finally, the social pillar seeks to 'engender just, cohesive and equitable social development in a clean and secure environment.'[3] Collectively, the three pillars stand in concert to establish 'a globally competitive and prosperous country with a high quality of life by 2030.'[4] The running theme across all the three pillars is delivery to the public with part of the key anchors to successful delivery being accountability.

The Constitution of Kenya, 2010 (CoK, 2010), lays ground for a robust management for the 'country's public finance. Chapter twelve (12) of the Constitution, titled 'Public 'Finance' makes provisions for prudent and efficient governance of the 'country's public finance. The intentions and aspirations for public finance management are appropriately captured under the principles and framework of public finance which, among others, provide that "*…there shall be openness and accountability, including public participation in financial matters.'*[5] Further, it provides that 'public money shall be used in a prudent and responsible way.'[6]

Despite the robust legal provisions, the public finance management space has been characterized by a legacy of sustained mismanagement of public resources that has occasioned the loss of tax payers money. Since independence a fair share of the mismanaged public funds are traceable or linked to the 'country's crises and emergencies, with the latest being COVID-19 pandemic.

The lamentable situation has a political context, which conceivably can neither be characterized as inadvertent nor incidental. In an eco-system where politics have been more commercialized than professionalized, the lucrative nature of the contracts incentivizes the politicians to 'invest' just about anything and everything with the hope that successful capture of the state power would accord them the space to recoup their investment through deliberate manipulation of procurement systems. Not only do politicians seek to recoup the 'investment' made toward securing state power and make additional 'return on investment', but they also seek to spare more to secure their interests in subsequent regimes that follow. The political context is perhaps best captured by President Uhuru Kenyatta in his speech on 20th October, 2020 during Mashujaa Day, where he noted that:

> *"Our political practice has been such that resources and opportunities go to those occupying positions of power. And that is why elections are so divisive and emotive.[7]"*

Kenya being an ethnically diverse country, the possibility and hope of access to opportunities has historically been pegged on one's own ethnic control of state power. The chief motivation for the control of state by the leading political elite is to control resources, hardly for public benefit but more for themselves. John Githongo, the former Permanent Secretary for Governance and Ethics in Mwai 'Kibaki's regime, could not have put it any better, he noted that

> *"Elites generally compete for power in Kenya so they can ""eat""; development is extracurricular…... Competition, especially for lucrative public works contracts, is fiercest and most intense as the size of the pie shrinks and the elite fragments. "*

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[1]http://vision2030.go.ke/political-pillar/ : Accessed on 22nd October, 2020
[2]http://vision2030.go.ke/economic-pillar/ : Accessed on 22nd October, 2020
[3]http://vision2030.go.ke/social-pillar/ : Accessed on 22nd October, 2020
[4]http://vision2030.go.ke/about-vision-2030/ : Accessed on 22nd October, 2020
[5]Ibid.
[6]Ibid.
[7]https://nation.africa/kenya/news/uhuru-s-full-mashujaa-day-speech--2485552 : Accessed on 22nd October 2020

Kenya being an ethnically diverse country, the possibility and hope of access to opportunities has historically been pegged on one's own ethnic control of state power. The chief motivation for the control of state by the leading political elite is to control resources, hardly for public benefit but more for themselves. John Githongo, the former Permanent Secretary for Governance and Ethics in Mwai 'Kibaki's regime, could not have put it any better, he noted that

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As pointed out by Githongo, the most enticing and incentivizing of the government resources are domiciled in the procurement chambers. It is exactly within the foregoing political context that public finance mismanagement happens during emergencies such as the COVID-19 pandemic, except that emergencies engender additional factors that tend to compound the problem in the absence of robust oversight. The sense of urgency generated by any emergency has the real potential for successful masking of circumvention of laid out procurement rules and public finance management systems. More often, persons of influence have leveraged on distracted focus by the public to service their insatiable appetite for public funds.

An additional avenue has been the use of direct non-competitive procurement to allow for swift management of the target emergency. As highlighted in the Special Audit Report by the Auditor General, the COVID-19 emergency response seems not to have been spared by the scourge of public finance mismanagement. Domiciled at the Kenya Medical Supplies Agency (KEMSA), the largely procurement driven sleaze may have led to loss of millions, if not billions, of money. The report noted that KEMSA's 'budgetary management process for capital budgets did not comply with the Public Finance Management Act, 2012.'[9] Among other aspects, irregular issuance of commitment letters, and 'possible fraud where companies that had been in existence for less than one year, were awarded contracts amounting to over Kes.1.25 billion to supply goods and services.'[10] Acknowledging the tendency to circumvent rules, the Auditor General emphasized that 'Accountability in the use and management of public resources is not set aside because there is an emergency.'[11]

The unhealthy fusion between politics and business is the bane in Kenya's sustained desire to conquer the fight against the mismanagement of public funds. Ethic and Anti Corruption Commission (EACC) acknowledges that 'where private companies owned, either directly or by proxy, by public officers and doing business with the government represent one of the biggest …hurdle in the fight against corruption.' According to EACC (2020, pp: 20 -27), over 504 corruption and economic crimes cases are pending before court. Among these, 116 are cases investigated by the commission and prosecuted by the Director of Public Prosecution in the financial year 2019/2020. In 2020 alone, over 53 top-level state officers were under investigation and 42 prosecuted in court, (EACC, 2020 report).

The EACC, 2020 report cite slow judicial processes caused by frivolous judicial review applications and appeals by state officers mentioned in those corruption cases, weak legal and policy framework and politicization of the fight against corruption as reasons for delay in the completion and closure of cases and low conviction rates. High ranking and influential politicians constitute the main part, of entrepreneurs who do business with the government, either directly or through proxies. The report goes ahead to show the extant gargantuan task that still remains if the war against public finance mismanagement is to be won.

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[8]https://www.theelephant.info/op-eds/2020/01/30/kenya-and-corruption-the-temporary-end-of-truth/ : Accessed on 22nd October, 2020

[9]http://www.parliament.go.ke/auditor-general-presents-damning-special-audit-report-kemsa-senate-committee : Accessed on 22nd October, 2020

[10]Ibid

[11]Ibid

[12]https://eacc.go.ke/default/wp-content/uploads/2018/09/Evaluation-of-corruption-in-the-public-procurement.pdf

3.0. A Critique of the Legal, Policy and Institutional Frameworks within the Public Finance Eco-system in Kenya

Historically, public finance management policy, legal and institutional framework has undergone a tortuous path by the different regimes in Kenya. According to Njeru (2012,p.2), one of Jomo Kenyatta's initial actions was to initiate a Constitutional amendment to abolish the position of prime minister and create the position of a strong presidency that led the budget process, with more powers. The public finance infrastructure was designed to give the executive and the presidency maximum control of public finance. Things were not any different during President Moi's regime with Parliament now allowed to approve taxes, rates and expenditure proposals, only as a formality because the executive made all the decisions regarding public finance. The all-powerful executive turned public finance into a political tool, a carrot and stick for wooing different regions.

Kibaki's regime registered some progress in public finance management albeit with some resistance from the executive. The 10th Parliament enacted Fiscal Management Act of 2009 which also established a Parliamentary Budget Office (PBO). Many of the good reforms in the Fiscal Management Act, 2009 are also articulated into the Constitution of Kenya 2010. The public finance management provisions in the Constitution of Kenya were significantly influenced by the need to correct past executive excesses and mismanagement of public funds by the previous regimes.

The first two years after the promulgation of the Constitution of Kenya 2010, witnessed far-reaching governance, Constitutional, legal and political reforms to create a more democratic and accountable state. Some of the significant changes witnessed during this time were radical reforms in the public finance management domain. Accordingly, Kenya made progress in enacting prerequisite legislations and polices to augment transparency and other national values and principles for effective public finance management. Among these policy and legal milestones, is the establishment of the Office of the Auditor General as an independent office under Article 248(3) of the Constitution of Kenya with the responsibility of carrying out audit for the public entities at both levels of government. The other significant milestone by the Constitution of Kenya 2010 is the extension of the role of the Controller of Budget to monitor budget execution and report on a quarterly basis to Parliament. Interestingly, the most significant public finance reform is the reduction of the role of the executive through National Treasury which is reduced to development of Budget Policy Statement (BPS) and regulations. Parliament took an active role in public finance management which is a complete departure from the 1963 Constitution, which had initially given distinctive mandates to the Finance Minister, leaving the legislature to deal specifically with budget approval and oversight matters.

Further, the Constitution of Kenya 2010 provides a clear set of principles that spell out the role of public finance in promoting an equitable society, public participation in the budget process and transparent financial reporting. Therefore, public participation on financial matters is not a choice in the current constitutional dispensation but a critical mandatory requirement as enshrined in the current Constitution and public finance management laws. To bolster the implementation of public finance in Kenya, the following legal framework has also been put in place, the Public Finance Management regulations, 2015 the Public Procurement and Asset Disposal Act, 2015, Public Audit Act, 2015, Commission on Revenue Allocation Act, 2011, Salaries and Remuneration Commission Act, 2011, and Central Bank Act, 2016. On the other hand, the country has also put in place institutions and offices under the law and the Constitution with public finance mandate such as Parliament – both National Assembly and Senate, Parliamentary Budget Office established in 2007 and strengthened Fiscal Management Act 2009, County Assemblies, National Treasury, County Treasuries (47), Commission on Revenue Allocation established in 2011, Controller of Budget office established in 2012, Auditor General's office strengthened through the Public Audit Act in 2015, Cabinet Secretary/County Executive Member for Finance and Intergovernmental Institution-Inter-governmental Budget and Economic Forum (IBEC) established under section 187 of the Public Finance Management Act, 2012.

Nonetheless, the current public finance management legal and institutional framework faces a fair share of challenges. One key challenge that the PFM sphere faces is the calculation of the percentage of Revenue Allocation to counties from the shareable revenue. Article 203(2) provides that for every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall not be less than fifteen percent of all revenue collected by the national government and shall be calculated based on the most recent audited accounts of revenue received as approved by the national assembly.

Notably, Counties have continuously been starved of resources to support implementation of its functions due to the loopholes within the law. For many year, division of revenue (DoR) has been done using out dated audited accounts thus depriving county governments of its rightful share of revenue in the DoR process. This is further exacerbated by the failure to meet set revenue targets by the national government resulting in: intermittent remittances to the counties by the national government, revenue sufficiency for Counties versus the remaining budget for the National Government, Jurisdictional / institutional conflicts between Senate, National Assembly, National Treasury and Commission of Revenue Allocation (CRA) on who has the ultimate say on the provisions of Division of Revenue Act and County Allocation of Revenue Act, inequity in the allocation, and limited financing of and Transfer of functions.

The other notable strand of challenge is in planning, budgeting, execution and reporting that has continuously been marred by inadequate public participation in key public finance management decisions at both levels of government with counties weakening and not strengthening their county budget and economic forums (CBEF), abuse of power by legislative assemblies, delayed audit reports, lack of capacity of county assembly committees engaged in public finance oversight, low absorption of development funds, underperformance in local revenue collections and increased wage Bill.

The legal and institutional challenges for public finance management is the architectural design of the Commission on Revenue Allocation (CRA) which provides that CRA will only share their views on revenue allocation criteria as recommendations to both Parliament and National Treasury. The coining of their powers and responsibilities on revenue sharing has created an opportunity for annual conflicts between the Senate, National Assembly and National Treasury. CRA's professional views remain just recommendations which Parliament and National Treasury have a discretion to abide with or not. Similarly, the Auditor General's report contain very good expertise recommendations but these opinions are still subjected to Public Accounts Committee review which most often dilute the value of the annual audit recommendations. On the other hand, the Auditor General's Report is a highly technical and voluminous report that is not easy to comprehend by non-technical persons, majority of whom are members of Public Accounts Committee who are expected to review and approve OAG report.

In addition, public participation remains a key aspect in the accountability of PFM in both levels of government. Whereas, National and County laws such as the Public Finance Management Act 2012, County Government Act, 2012, Urban Areas and Cities Act, 2012 and Intergovernmental Relations Act, 2012 provides for public participation platforms, authorities in both levels of government are yet to actualize these platforms hence reduced accountability mechanisms that leads to public finance mismanagement.

These capacity, legal and institutional challenges pose a direct and serious threat to public finance management in Kenya. The modern stage of public finance management is complicated by the presence of such phenomena and pandemics such as COVID-19; global economic crisis; terrorism; and new technologies. There is continuous need to improve the efficiency of public finance management, increase transparency of the budget process, and enhance accountability of these processes. To may be achieved through steering of institutions and capacity building of PFM stakeholders, civic awareness and engagement as a way of increasing accountability at both levels of government and ensuring enhanced comity within the sphere of intergovernmental and institutional relations.

4.0. Mismanagement of Public Finance in Kenya - Is it Systemic or a Structural Problem?

The foundation of mismanagement of public resources in Kenya is connected to a societal state of being where the elementary institutions that underprop and back the rule of law and good governance have been deliberately weakened. The pattern of weakening independent or accountability institutions in Kenya runs across different regimes. It is important to note that, excessive executive and legislative authority has had detrimental economic results, particularly in public finance management. Recent studies by Acemoglu and Robinson, 2012 suggest that sustainable economic progress requires institutional constraints on the authority of the chief executive and the legislature.

According to Mueller, (2008), "weakening of public finance management have been systematically applied as Kenya's institutions outside of the executive were weakened in favor of personalized presidential power and a centralized presidency that reached a crescendo under the Presidency of Daniel Arap Moi". It is a perfect case, where individuals outweigh institutions in Kenya. According to Hope (2014, pp.494-495), the advent of wanton pitiable institutional governance, a stratosphere of impunity to the rule of law, low self-esteem and feeling of uselessness immensely contributed to an environment that enabled corruption to thrive and reach devastating levels. The consequential outcome is the fact that virtuous governance and, public accountability became seriously deficient. Evidently, the dearth of accountability is a key nuisance of public finance governance in Kenya which has propagated imprudence among public and state officers and has advanced cynicism among the citizens.

The consolidated and personalized presidential supremacy that emerged under both President Jomo Kenyatta and Daniel Moi ensued what can only be characterized as the total exercise of all power attached to national sovereignty contrary to provisions of the current Constitution of Kenya 2010. According to Bach, (2011), this occasioned supremacy of the State over the citizens and, in turn, to the dominance of predatory forms of neopatrimonialism with its throttlehold on the social, economic and political pedals of power, through which mismanagement of public resources thrived for it was through this throttlehold that all decision-making occurred and patronage was dispensed. Khadiagala (2009, p.128) contends that, "under Moi, economic mismanagement, corruption, and wanton destruction of national resources became rampant".

Consequently, there existed no distinction between public and private interests and government officials simply plundered the Treasury and appropriated state assets to self and cronies. Accordingly, this kind of plundering was popularized in the Kenya vernacular 'it is our turn to eat', which means devouring public resources (Hope, 2014, p.495). Consequently, the expansion of public service bureaucracy thrived and corrupt behavior cascaded down to the society through subsequent governments.

Aside from personalized presidential power complemented by the debilitated institutions of governance, there are other factors which have contributed to the mismanagement of public finance in Kenya. One of the notable factors is the systemic bribery which has enhanced rent-seeking opportunities by state officers. According to Otieno (2005, p.76), the bribery culture in Kenya has taken over parliament, one of the public finance oversight institution and "accusations of bribery within parliament abound". Additionally, another factor that has contributed to systemic mismanagement of public funds is continuous expansion of the size of the public sector officialdom platform for illicit gain and enrichment at the expense of taxpayers.

It is evident that the rampant public finance mismanagement did not receive adequate attention during Moi's administration. While there were some improvements at the beginning of Kibaki's presidency, the Goldenberg and the Anglo to remained widespread. These instances (Goldenberg and the Anglo-Leasing scandals) involved state officers engaging in fraudulent activities to benefit a few elite individuals. Many of Kibaki's early progressive stances in curbing public finance mismanagement were weakened substantially over time because those in power continued to benefit from the state-of-affairs and the competition amongst the political elites further influenced officials to constrain their anti-corruption efforts.

Under the Jubilee administration which operates in the new dispensation of the 2010 constitution, many cases of insurmountable public finance mismanagement have been recorded. For instance, it is not clear how the proceeds of Eurobond were utilized. Article 206(1) of the Constitution provides that all national revenue must be paid into a Consolidated Fund, except for money reasonably excluded from the fund by an Act of Parliament. The questions on the accountability of proceeds from the Eurobond remain unanswered today. Further, the National Youth Service (NYS) and Youth Fund scandals are among other public finance mismanagement associated with the Jubilee administration. Further, the Jubilee administration has demonstrated limited transparency and accountability in the borrowing and utilization of funds from external sources.

The deliberate weakening of Kenya's oversight/accountability structures and mechanism is primarily to blame for the wanton public finance mismanagement. For instance, the mandate of the Senate Committee on County Public Accounts Investment (CPAIC) is by law limited to only the national revenues allocated to counties. A considerable chunk of own county funds/revenue does not fall under the mandate of Senate CPAIC, thereby reducing the accountability of such funds. Also, important to note is the intrinsic culture of political or distributive interests of committee members in the work of oversight committees at both levels of government which often hinders the objectivity of the committees' work occasioning public finance mismanagement in Kenya. Partisan positions taken by legislators at both levels of government result in the tendency to dismiss even critical public finance issues offhand. This lack of objectivity and failure to be faithful to the law has greatly affected the legislature's oversight function over the PFM. Finally, lack of oversight capacity and individual committee members' incompetence have also contributed to poor quality of oversight regarding the public audit report. These challenges are systematic as they are engrained in Kenya's legal, policy, and institutional frameworks.

It is also important to underscore other existing structural anomalies that hinder effective public finance management, such as the conflictual relationships between the National Assembly and the Senate, particularly on enacting the annual Division of Revenue Act. The deliberate budget cuts to the Judiciary intends to cripple its functions, and perennial disregard of expert opinion and recommendation by Parliament, Commission on Revenue Allocation (CRA), Controller of Budget (OCOB) and Auditor General (OAG) among others on PFM matters. Further, the current composition of the Intergovernmental Budget and Economic Council (IBEC) is also exclusive to deliberately ward off accountability.

In Parliament, the composition and leadership of committees have become cut throat competition that political party leadership loyalty and deep pocket remain the priority qualification for nomination to key PFM oversight committees. Parliamentary Committee members have also been reported to have been bribed so as to influence their voting behavior in the house. During the debate on the Tobacco Control Bill 2004 for example, there was outcry as Parliamentarians were feted at a coastal resort by companies with vested interests ostensibly to discuss the Bill. In December 2009, a former Minister is reported to have alleged that there is massive corruption in Parliament and that "money changes hands during voting on crucial Bills and in other operations in the august House". The former Minister graphically described Parliament as an "auction house where the highest bidder won crucial battles, even if not in the interest of Kenyans"[13]. Media reports earlier in the same year (May 2009) support this claim.

Theoretically, Kenya's case presents a huge disparity between what is provided for in the laws on public finance management and the actual practice. Accordingly, the Critical Legal Theory would be ideal in explaining the disparity between public finance laws and the practice on public finance management. Key tenets of the Critical Legal Theory posits that the law as codified seeks to look out for the interest and comfort of its drafters instead of the disadvantaged in the society. The theory also assumes that law is just an instrument of oppression by the wealthy.

[13]The Standard, 29th December 2009. MPs corrupt at expense of Kenyans,

This theory demonstrates the policy, legal and institutional framework challenges in promoting public finance management in Kenya. This perhaps explains why strong accountability and transparency policies and laws face vicious and stiff opposition in and outside parliament and whenever such legislation passes through parliament, their progressive provisions are always diluted or watered down. Evidently, when COVID-19 scandals were unmasked, the perpetrators were legislators who by implication took advantage of the less accountable emergency procurement laws and regulations enacted by themselves for personal gains. This explains why mismanagement of public finances in Kenya is both a systemic and structural problem in Kenya.

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5.0. Does Politics Lend Impetus to Perenial Mismanagement of Public Finances in Kenya?

It is safe to argue that one of Kenya's biggest tragedy and the longest running pain and burden is the commercialization, rather than professionalization, of politics. Since independence, the country has been a captive of entrenched and vicious commercial and pecuniary interest that use state patronage as their basis for sustenance. Convinced that the most reassuring way to sustain their interest is through state patronage, the group has thus far spared no effort to engineer friendly structures and processes to feed the desired end. The plight has been enduring as partly manifested in the tension packed electoral cycles. In 2016, Dr. Mutunga described Kenya as 'a bandit country run by ruthless cartels.'[14] He captured the magnitude of the problem by explaining their virtual omnipresence in every sector of Kenya's governance.

Elections are an important part of democratic governance. They provide for a just, participatory and moral framework for the peaceful transfer of power. However, how Kenyan body politics have been shaped, requires that one must have a formidable financial war chest to participate in politics effectively. Hence, those harbouring political interest apply all 'means' to stay afloat in politics. The influence of money in politics has also been engrained in the minds of the electorate. This state of affairs has always created a handful of overnight 'millionaires' and extreme income inequalities that has festered social discontent and keep alive the vicious cycle of public finance mismanagement. The rebirth of competitive elections in early 1990s, in an eco-system already controlled by an entrenched 'cartel' of beneficiaries of status quo and who also were most dreadful of life outside of the confines of state structures, engineered ways to maliciously capture the electoral system. Unable to freeze time in favor of a non-competitive electoral defined system, the elites resorted to capturing the very systems and infrastructure responsible for the management of elections. Besides, they have played part in raising the cost of elections exponentially (thanks to the huge amounts, mostly acquired irregularly), to shape the outcome of the electoral processes. What should otherwise be an unpredictable exercise in a functioning democracy has become a highly predictable process. Kenya is somewhat stuck in a cycle of 'elections as investment' whereby interested parties finance expensive elections in the hope of recouping their cost upon capturing power and in the process secure more for future 'investment' in elections. Justice Mutunga eloquently captures the nexus between elections and appetite for corruption:

> *…Guys are saying: we just had expensive elections where we spent Kes.10 billion (US$100m). We have to get it from somewhere. Or we have to think about the election in 2017 and we need a war chest. So you have all that stealing. We have become a bandit economy.*[15]

Dr. Willy Mutunga's assertion is further corroborated by the Africa Centre for Open Governance (Africog) in a report titled 'State Capture: Inside Kenya's Inability to Fight Corruption', Africog examines how deliberate manipulation of the state renders it difficult, if not impossible, to slay the malignant cancer that is corruption. Africog aptly defines state capture as 'the repurposing of state institutions for private profiteering.'[16] The report notes that Kenya's complex web of state capture assumes a dual design. On the one hand is a group of state bureaucrats often 'allowed to accumulate, concentrate and exercise power in completely unaccountable ways, often behind the shield of presidential privilege, state security or defense procurement.'[17] On the other hand, is a cartel of 'local businessmen allied to political insiders.'[18] Whichever the design of capture, quite clear is the convergence of interest: Extraction of state. With the oxygen pump feeding the clique being the state's controllers, it becomes clear why any effort to fight the vice comes to a naught.

Kenya's fifty-eight years' history is littered with over twenty cases of mega corruption scandals that hardly know any form of conclusion, let alone satisfactory convictions. Hardly does any generation come and pass without hearing cases of mega corruption scandals. The late President Moi's regime was most synonymous with the infamous Goldenberg scandal; Mwai Kibaki's is memorably associated with the Anglo Leasing scandal with Uhuru Kenyatta's flying the National Cereals and Produce Board (NCPB) maize scandal, Afya House scandal, Galana and Mwea Irrigation Scheme scandal, Evans Kidero Foundation scandal, Chicken Gate scandal, the Standard Gauge Railway (SGR) scandal, Eurobond and National Youth Services (NYS)

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[14]https://www.standardmedia.co.ke/kenya/article/2000187930/kenya-in-grip-of-mafia-style-cartels-says-cj-willy-mutunga
[15]Ibid.
[16]https://africog.org/wp-content/uploads/2019/05/STATE-CAPTURE.pdf : Accessed on 22nd October, 2020
[17]Ibid.
[18]Ibid.

I & II mega scams among several others. It is thus beyond dispute that politics incentivizes mismanagement of public funds in the country and that those involved in mismanagement of public funds end up in elective or appointive politics as a cushion against investigation and prosecution.

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6.0. The Link between Public Finance Mismanagement and Elections in Kenya

Shulika et al (2014:197) observes that money plays a central role in skewing election results in favor of those who control greater wealth – public or private. Consequently, the success or otherwise of election campaigns depends heavily on the financial resources of the competing candidates or their political parties. This view is further illustrated by Akech (2011:344) who avers that, senior public servants responsible for public finance mismanagement often get into elective politics to protect themselves from accountability. This is what, Maina (2019) refers to as a coterie of favoured officials who are allowed to accumulate, concentrate and exercise power in completely unaccountable ways, often behind the shield of presidential privilege, state security or defense procurement.

Notably, public finance mismanagement by state officers essentially has to do with how potential election candidates and political parties raise money, what they spend it on and how they recoup it or repay themselves once elected into office. Evidently, there are certain risks that come with political financing including uneven playing field in election contests, unequal access to elective offices, co-opted politicians who need to be accountable to their financiers and tainted politics in which politicians accept money from illegal sources. Other drivers include- abuse of state resources for partisan political purposes and acceptance of support both in cash and in kind in exchange for political favors in the event of election to office.[19] Important to note is that these drivers have a direct bearing on whether elections meet the principles of a free and fair election as it means politics is a preserve of a few unscrupulous wealthy individuals not committed to democratic principles.

Further,'opportunities' for the greed of public finance may occasion authoritarian leaders to deliberately undermine democratic institutions and processes. This exploitation can come in the form of sabotaging key electoral management bodies such as the Independent Electoral and Boundaries Commission (IEBC) to eventually occasion changes in the outcome of any elections and electoral processes contrary to the wishes of the public and the constitution.

[19]'Financing Politics: A Global View', Michael Pinto-Duschinsky, Journal of Democracy, Vol.13, Oct. 2002

7.0. The Role of the Media in Reporting Mismangement of Public Finances during the COVID-19 Pandemic

The management of the public finances during the COVID-19 pandemic has not been unimpeachable. The mainly economic and social disruption occasioned by the pandemic invited interventions; both local and international. Internationally, some financial institutions variously intervened by offering financial facilities to cushion the country from adverse effects of the pandemic. In early May, the International Monetary Fund (IMF) 'approved the disbursement of US$739 million to be drawn under the Rapid Credit Facility to support the authorities' response to the COVID-19 pandemic.'[20] At around the same time, the World Bank extended a loan facility worth US$1 billion 'to support (Kenya's) budget and cushion the economy from the vagaries of the COVID-19.'[21] The African Development Bank (AfDB) on its side extended an '€188 million loan to support the Government of Kenya's efforts to respond to the COVID-19 pandemic and mitigate the related economic, health and social impacts.'[22] Locally, the Government unveiled an economic stimulus program worth Kes.53.7 billion, including 'Kes.3 billion as seed capital for the SME Credit Guarantee Scheme.'

But even as pecuniary related interventions were being put in place, with billions of shillings injected to these interventions from both local and international sources, concerns were emerging on how well the money was being utilized. Mainstream and digital media platforms played a complementary role in voicing and airing out some of the emerging concerns. As early as April 2020, media reports emerged of perceived mismanagement of the COVID-19 related funds. Attracting the attention of Kenyans were the emerging reports that 'Kes.4 million was spent on "tea and snacks for varied teams in the ministry of health (MOH)" as well as Kes. 9 million used for "printing of travelers forms, quarantine forms and discharge forms," while the ministry had spent Kes.6.5million to acquire printing paper and toners.'[23] As the reports were finding their way into both mainstream media and digital media, particularly social media sites, were leading the conversation with an avalanche of information. For some time 'hashtag #Money Heist … trend(ed) on Twitter'[24] regarding the outrageous expenditure lines.

The documentation of the mismanagement of public funds was fairly robust on both the mainstream and digital media channels. Reports were covered by both local and international media channels; print, visual and even audio. Following the reports that the donations made by the Chinese investor billionaire Jack Ma were missing, the international media channel, France 24 captured the news, reporting that '*Equipment packages donated to Kenya by Chinese billionaire Jack Ma are unaccounted for. An estimated $400 million in funds have gone missing in Kenya during the COVID-19 response.*'[25] Other international media channels noted to have covered and documented reports include the British Broadcasting Corporation (BBC) and China Global Television Network (CGTN).

A host of local mainstream media platforms were involved in documentation and reporting. Beyond direct coverage of the mismanagement as sourced and processed, media platforms-both mainstream and digital- played an indirect role by according various stakeholders and actors in the public accountability sector to report on cases of public finance mismanagement. Such actors include Civil Society Organizations (CSOs), Non-Governmental Organizations (NGOs), trade unions and the private sector. For instance, on 23rd August, 2020, a group of 26 non-state actors, including the Kenya Human Rights Commission (KHRC) and Transparency International-Kenya (TI-Kenya), issued a joint press statement in which they noted with great concern the 'misappropriation of public funds meant to procure protective gear, and for cushioning vulnerable Kenyans against the impacts of the pandemic for instance the 'Kazi Mtaani' programme.'[26]

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[20] https://www.imf.org/en/News/Articles/2020/05/06/pr20208-kenya-imf-executive-board-approves-us-million-disbursement-address-impact-covid-19-pandemic :Accessed on 22nd October, 2020

[21] https://www.the-star.co.ke/business/kenya/2020-05-21-world-bank-approves-sh106-billion-loan-for-kenya/ : Accessed on 22nd October, 2020

[22] https://www.afdb.org/en/news-and-events/press-releases/kenya-eu188m-african-development-bank-loan-boost-covid-19-response-35735 : Accessed on 22nd October, 2020

[23] https://nairobinews.nation.co.ke/featured/sh-4-million-tea-and-mandazi-rip-off-that-has-angered-kenyans : Accessed on 22nd October, 2020

[24] https://www.bbc.com/news/world-africa-52540076 : Accessed on 22nd October, 2020

[25] https://www.france24.com/en/africa/20200903-kenya-jack-ma-covid-19 : Accessed on 22nd October, 2020

[26] https://tikenya.org/wp-content/uploads/2020/08/Joint-Statement-on-COVID-19-Response-Accountability-Final-23rd-August.pdf : Accessed on 22nd October, 2020

Beyond documenting and reporting, an attempt at analysis has been made in some instances and by some media platforms. Of the analysis-oriented reports, perhaps none is as outstanding as the 'COVID-19 Millionaires', an investigative expose by one of the local media houses regarding the 'multi-billion shillings scandal at the Kenya Medical Supplies Authority (KEMSA).' The expose, which first aired in August 2020 sought to provide a detailed and profoundly analyzed reportage on how the country was swindled of millions of COVID-19 related funds via carefully and deliberately orchestrated schemes. Not long after, some of the entities implicated in the expose moved to court to challenge the expose. In a successful application, the High Court ordered the responsible media house to pull down the expose 'from their social media platforms 'pending the hearing of a libel case against them.'[27] High Court's decision notwithstanding, the expose ignited public interest, one which prompted action by various duty-bearers, including the President who instructed relevant agencies to investigate the matter and bring to book any person found culpable of the theft and misappropriation. Among the entities that swung into action was the Office of the Auditor General (OAG), whose report implicated KEMSA for the wrong doing. In addition, parliament demanded action, with some members of parliament calling on 'the Health Ministry and the National Treasury to explain how they have spent money meant to mitigate the effects of the COVID-19 pandemic.'[28]

Important to note is that, despite effort made by the various media channels in championing the struggle against public finance mismanagement, challenges still remain which inhibit effectiveness of media. Access to Information (ATI) about public finance mismanagement by the media remains a challenge to many media outlets. Whereas Kenya has enacted an Access to Information law, the ATI regime remains foreign to many public or state officers, making it hard for the media to access information regarding mismanagement of public finance. The other legal regime lacking in Kenya and could have supported reporting on public finance mismanagement is a Whistleblower Protection law. According to Transparency International Kenya Bribery index findings in 2014- 2016, Kenyans do not report public finance mismanagement for fear of reprisal and victimization. This has also become a key reason why Kenya's media face challenges in accessing information on public finance mismanagement. The political bias by key media houses and the likelihood to favor certain politicians who either own or whom their owners are supporting pose as a challenge to effective reporting on public finance mismanagement. The other crucial challenge by the media in reporting public finance mismanagement is lack and/or limited capacity by journalists to effective understanding of the technical issues around public finance mismanagement. One other notable challenge is the staying power to sustain focus and shine spotlight on various corruption related scandals until they conclusively command the attention of relevant duty bearers. More often, focus remains ephemeral and the shift to cover emerging events/issues almost always confines such cases to the public's forgotten yard. There is generally the absence of political will and commitment from the government to follow through corruption cases, often due to complicity by some individuals in the same government. The result being such cases forming part of the ever piling cases whose conclusive determination never comes, but whose consequences last to haunt generations to come.

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[27]https://www.the-star.co.ke/news/2020-09-23-nmg-ordered-to-pull-down-covid-millionaires-investigative-story/ : Accessed on 22nd October, 2020

[28]https://www.the-star.co.ke/news/2020-08-05-mps-now-demand-expenditure-of-covid-19-funds-after-expos/ : Accessed on 22nd October, 2020

8.0. Politics and Public Finance Management beyond COVID-19

The appetite for public resources by the elite is insatiable unless upended by radical interventions, probably in the shape of a national-scale rebellious zeitgeist keen to reclaim the country for the people. The COVID-19 pandemic, just like all the other tragedies and emergencies before, have demonstrated the need, perhaps an urgent need, to explore all conceivable avenues to disrupt what has been a painful norm in our country's public finance (mis)management. The current President of United States, Joe Biden, noted during his tenure as the Vice President that:

> "*Corruption is a cancer, a cancer that eats away at a citizen's faith in democracy, diminishes the instinct for innovation and creativity; already-tight national budgets, crowding out important national investments. It wastes the talent of entire generations. It scares away investments and jobs. And most importantly it denies the people their dignity. It saps the collective strength and resolve of a nation. Corruption is just another form of tyranny.*" [29]

The public finance mismanagement problem is largely political. As noted by Africog, 'politics and corruption have always been intimates in Kenya since independence and thus the solution is political. '[30] However, the fundamental question is how. The genesis must be deliberated on how to professionalize politics and free it from the sheer disruptive commercialization. There is an urgent need to turn politics into a course for public service rather than an ecosystem for private profiteering. The implications of public finance mismanagement are far-reaching as they destroy not just the political fabric but also the economic and social fabrics.

[29]https://nation.africa/kenya/blogs-opinion/opinion/kimeu-the-price-kenyans-pay-for-corruption-61544 : Accessed on 23rd October, 2020
[30]https://africog.org/wp-content/uploads/2019/05/STATE-CAPTURE.pdf : Accessed on 22nd October, 2020

9.0. Conclusion and Recommendations

The study examined public finance mismanagement during emergencies such as the novel COVID -19 and how that informs politics in Kenya. Preliminary findings reveal that, despite the robust legal frameworks, the public finance management space has been characterized by a legacy of sustained mismanagement that has occasioned loss of billions of public money since independence. A fair share of the mismanaged resources are traceable or linked to the country's crises and emergencies, including the latest COVID-19 pandemic.

Every succeeding regime is littered with public finance mismanagement of its kind. Dearth of accountability is a key nuisance of public finance governance in Kenya which has propagated imprudence among state officers and has advanced cynicism among the citizens.

Despite the water tight Constitutional and legal provisions on effective public finance management, loss and mismanagement of public resources continue to rock the Republic of Kenya. The Auditor-General reports have continued to query the loss of public funds and misappropriation of colossal amounts annually. However, there has not been tangible action by relevant authorities to address the outstanding issues.

Arising from these observations, the study makes recommendations to enhance effective public finance management during emergencies such as COVID-19.

(a) Parliament

- Parliamentary committees (ad hoc/standing) should ensure that oversight 'committees' reports are readily available and accessible to different stakeholders. The reports should be developed within the context of the right to access information as provided for under Article 35 of the Constitution of Kenya.This will go a long way in promoting transparency and accountability during emergencies.
- Parliament needs to devise public participation mechanisms that will allow stakeholders to comprehensively participate in oversight and legislative roles during emergencies.
- Parliament should also ensure that laws and policies introducing public finance measures during emergencies are time-bound and do not lose out on transparency and accountability measures.

(b) Executive (Implementing Ministries)

- The executive departments both at National and County level should publish monthly reports on implementation of policy and legal frameworks, including data analysis on budget execution and performance.
- Procuring entities should make public all details related to procurement contracts linked to emergency spending in comprehensible and accessible formats and platforms.

(c) Civil Society Organizations (CSOs)

- Civil Society Organizations (CSOs) in partnership with relevant government Ministries, Departments and Agencies (MDAs), both at National and County level, should develop programs and strategies to promote meaningful public participation in the management of public resources during emergencies.
- Work with parliament to advocate and push for enactment of a whistleblowers protection law.

(d) Media

- The media should promote accurate reporting of public finance mismanagement in partnership with CSOs, parliament and other relevant institutions.

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https://nation.africa/kenya/blogs-opinion/opinion/kimeu-the-price-kenyans-pay-for-corruption- 6154**4**

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