



Will polygraph tests work in the fight against corruption?

By Judith A. Kanyoko

The 2018 Madaraka Day celebrations took place in the wake of multi-billion corruption scandals in Kenya. In a bid to perhaps restore confidence in his administration, President Uhuru Kenyatta promised that as an initial step, all heads of procurement and accounts in government ministries, departments and agencies would undergo fresh vetting, including polygraph testing to determine their integrity and suitability and that those who failed the vetting would stand suspended. A polygraph test, commonly known as a lie detector is a test for recording of several involuntary physiological changes including blood pressure, skin resistivity, pulse rate, respiration, and perspiration under the presumption that these changes will intensify when the subject lies.

The question that arises is whether the use of the test ends at the vetting stage thus making it a means of determining the credibility of government employees or whether the same will be used as a basis of preferring charges and eventually as evidence in a court of law. In any criminal proceedings, the rights of the complainant have to be balanced with the rights of the accused person, hence, the presumption of innocence. What then is the legality of polygraph testing in the Kenyan scenario?

Generally, polygraph test results are inadmissible. To date, scientists remain divided on the reliability of polygraph tests. The reasons given include the belief that a person's physiological activities may be influenced by other factors such as stress, illness or environment and not necessarily, whether they are being truthful or not. Another reason is the ability of a person to 'fool' the test.



Courts around the world have been reluctant in admitting polygraph tests as evidence. The US Supreme court in the case of **U.S. v. Scheffer** ruled that the exclusion of lie detector test results did not violate the right of accused to present a defense. The Supreme Court of Canada **R. v. Béland** was of the view that evidence of polygraph results was inadmissible in criminal trials because it offended rules of evidence, was unnecessary, and complicated the trial process.

In Kenya, the use of polygraph tests may not serve its purpose. Firstly, testimony in court may require long and detailed explanations as opposed to 'true and 'false' answers. This may be more detrimental since it will not allow the judicial officer to get a full picture of the case and thus arrive at a reasonable conclusion. Secondly, the interpretation of the test will also require an expert witness, who is to interpret the results of the test. One of the reasons given by the Canadian Supreme Court in deciding the admissibility of polygraph test evidence was that it would require an expert to interpret the results. This, the court deemed unnecessary since the polygraph test's main use was to determine the credibility of the witness, which can be determined by the judicial officer. Thirdly, Kenya has a long history of abuse of accused persons while in custody, which is more likely to occur in administering the test.



As a matter of Human Rights, an accused person has the right to refuse to give self-incriminating evidence, to remain silent and not to testify during the proceedings. Subjecting a public officer to a polygraph test offends these rights in that, if the accused person 'fails' the test, the results obtained could be used in obtaining a conviction. On the other hand, refusal to take the test may be construed as 'guilty' conduct by the accused.

Be that as it may, the constitution excludes evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights if the admission of that evidence would render the trial unfair, or would be detrimental to the administration of justice. Consequently, polygraph test results would be excluded from the onset.

If we wish to increase their credibility, such tests should be taken voluntarily and even then, the subject should be allowed to be guided by his lawyer and measures put in place to ensure that the subject is not coerced into giving consent. The use of polygraph tests should be under rigorous standards and safeguards. As it is now, polygraph tests remain just a means of interrogation by the police and may not add any value in determining the case.