



# KENYAN LAWS CANNOT PROTECT WHISTLE BLOWERS

By Philip Kichana

Following the death, after more than a decade of unemployment and, misery of Mr. David Munyakei, human rights activists and governance enthusiasts have been left with many unanswered questions. For Mr. Munyakei was no ordinary Kenyan; indeed, he died a Kenyan hero—he raised the red flag against the monumental fraud that was Goldenberg. Munyakei returned later to testify at the Goldenberg Commission of Inquiry which completed its work in late 2005. After that revelation to the duo, his life thereafter ran downhill until his untimely death. Can today's David Munyakei find protection in the existing and proposed legislation, and can he or she survive the aftermath of whistle blowing?

There has been protection of whistleblowers in many jurisdictions for various reasons. Such protection has become imperative as global governance processes converge with national strategies to fight corruption and promote open governance. According to the Kenyan section of the International Commission of Jurists Freedom of Information Hand Book, the basic argument in favour of whistleblower protection states that: "The law should provide for the protection of "whistleblowers", that is individuals who disclose information in contravention of the law and or their employment contracts because they

believe that such disclosure is in public interest!"

This reasoning is compelling because in addition to the whistleblower breaching his or her contract of employment, it introduces two new elements: breach of the law and the rider that disclosure by the whistleblower is in the public interest. Accordingly if the Kenya Government was serious about its claim of openness to legitimate scrutiny it would let the official Secrets Act rank first among laws that whistle blower can justifiably breach and still have legal protection. From ICJ reasoning, the litmus test for protection is first, action in good faith and second, a belief that a reasonable person coming across such information would believe it, on the face of it to be true, and to contain evidence of wrongdoing.

## What protection is a whistleblower accorded under Kenyan law today?

Kenya was the first country to sign and ratify the United Nations Convention against Corruption that entered into force in mid December 2005. As a dualist state, Kenya requires all International Conventions it has ratified to be enacted into law by Parliament before they become law in the state. As matters stand today, the UN Convention is not law in Kenya but the government of Kenya bears a State

obligation to ensure the law is enacted. So far, the government has failed.

Article 13 of the Convention provides for the participation of society in the fight against corruption by making it possible for individuals within states parties to take an active part in fighting corruption through personal restraint or through reporting those who engage in corruption to the relevant authorities. Article 32 provides protection for witnesses, experts and victims of corruption: it is narrower because not all whistleblowers may qualify as witnesses in a court of law. Experts on their part are persons possessed of sufficient knowledge such as would permit them to give their opinion on the matter under consideration. Article 33 provides for the protection of whistleblowers proper acting in "good faith and on reasonable grounds" who report to the "competent authorities":

***....the official Secrets Act must rank first among laws that whistle blowers can justifiably breach and still have legal protection.....***



The late David Munyakel (right) together with other award winner Langat and Dr M. Bisic

File Photo

Although Kenya has signed the African Union Convention for Prevention and Combating Corruption, it is yet to ratify the same. The African Convention came into effect on August 5, 2006 in accordance with article 23(2) thereof after the People's Democratic Republic of Algeria deposited its instrument of ratification, and became the fifteenth country to do so, on July 6, 2006. What is Kenya doing about this development? Why does it not respond to the African Commission Convention with the same alacrity as it did with the UN Convention? Does this mean it is backsliding in its commitment to fighting corruption?

The African Commission Convention offers a double edged protection to whistleblowers. Among other things, it obliges states parties to protect whistle blowers of state frauds but also imposes heavy responsibilities.

Article 5(5-7) of the Convention deals with "Legislative and other measures". It states that parties shall; "adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities"; "adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals"; and "adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences"

It is clear that once Kenya ratifies and enacts the African Union Convention, it will be duty bound to enact legislation for the protection of whistleblowers and "informers". The introduction of "informers" is very vital because it has a lower threshold in definitional terms and may include a suspicion that things are not well or infiltration of certain circles by persons not necessarily employed there.

It is disconcerting that in a country that has vowed to end corruption as a way of life, and a government that preaches (as opposed to practicing) zero tolerance of corruption; the African Union Convention is yet to be ratified, and the resultant laws therefore not enacted.

#### Kenyan law

A critique of the Witness Protection Bill published by the Attorney General of Kenya on 15 May 2006 would be incomplete without reference to already existing anti-corruption laws namely-the Public Officer Ethics Act, the Anti-Corruption and Economic Crimes Act and the Public Procurement and Disposal Act and any protection they may offer to whistleblowers.

#### Public Officer Ethics Act

The Public Officer Ethics Act, Section 41 states as that: A person who, without lawful excuse, divulges information acquired in the course of acting under this Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both."

This is an exceedingly punitive provision passed by Parliament to punish public officials who disclose information they may come across pursuant to the Act. The information in question will no doubt have come to them by virtue of their employment. e.g. the Wealth Declaration Forms that disclose the income, assets and liabilities of senior government officials; others include using of public offices as collection centres for *harambees*, the practice of nepotism in public offices; misleading the public by senior government officers. The thrust of section 41 of the Act is to outlaw whistle blowing, while at the same time the rest of

the Act purports to introduce and standardize the ethical code and standards of public officials.

### Anti Corruption and Economic Crimes Act

Anti Corruption and Economic Crimes Act Part VIII provides for miscellaneous matters under the Act. Section 65 of the Act falls under that heading and provides protection for "informers." It states as follows:

65(1) "No action or proceeding, including disciplinary action, may be instituted or maintained against a person in respect of-

(a) assistance given by the person to the Commission or an investigator; or

(b) a disclosure of information made by the person to the Commission or an investigator.

65(2) subsection (1) does not apply with respect to a statement made by a person who did not believe it to be true.

65(3) In a prosecution for corruption or economic crime or a proceeding under this Act no witness shall be required to identify, or provide information that might lead to the identification of, a person who assisted or disclosed information to the Commission or investigator.

65(4) In a prosecution for corruption or economic crime or a proceeding under this Act, the court shall ensure that information that identifies or might lead to the identification of a person who assisted or disclosed information to the Commission or an investigator is removed or concealed from any documents to be produced or inspected in connection with the proceeding.

65(5) subsections (3) and (4) shall not apply to the extent determined by the court to be necessary to ensure justice is fully done.

The Anti Corruption and Economic Crimes Act thus comes closest to meeting the standard set in the African Union Convention. It provides protection for assistants, informers, witnesses and investigators. To assistants, informers and witnesses, the protection is subject to their own belief that the information is true. There are however two shortcomings: a) the Act does not define an "informer"; thereby

making it difficult to determine whether it means the same thing as whistleblower; b) it limits reportage to the Kenya Anti Corruption Commission and yet there are more agencies, e.g. the Kenya National Commission on Human Rights and the Kenya Police, among others, that fit the bill or that citizens might be more comfortable with.

### The Public Procurement and Disposal Act

The Public Procurement and Disposal Act does not envisage whistle blowing and therefore makes no provision for it. This is a grave omission, considering this is where the mega bucks, and mega and grand corruption reside.

### The Witness Protection Bill, 2006

The preamble to the Bill unequivocally states that it is an Act of Parliament for the protection of witnesses in criminal cases and other proceedings. Its main thrust is to establish and maintain a Witness Protection Programme. It nominally implies whistleblower protection in section 3(b) and (c). The two sub sections provide protection for "a person who has given or agreed to give evidence" in relation to an offence that has been committed, which must mean a criminal trial; and a person who has given evidence of "the possible commission of an offence" which we understand might cover whistleblowers. Although the Kenya Police is involved in Community Policing, it is unlikely that a present day Munyakei would record a statement with a law enforcement agency.

### Conclusion

It is our considered view that today's David Munyakei is an endangered person. There are possibilities that protection would be available under the Anti-Corruption and Economic Crimes Act. The possibility of such protection being actualized seems far fetched. The Act was enacted in mid 2003 and is yet to be applied in the direction of whistleblowers. It is difficult to believe having laid dormant till now that such protection will suddenly spring to life.

## THE FIVE WHY'S FOR WHISTLE BLOWER LEGISLATION

*Adapted from Transparency International-Kenya Advocacy Programme campaign on Access to Information and Whistle-Blower Protection*

Whistle-blower laws are meant to give people the incentive to disclose official wrong-doing that seriously harms the public good and to give them protection once they have done so. As a subset of the laws regulating access to information; it rests on the principle that there are times when to conceal information is more culpable than to release it. Fighting corruption therefore entails a double move: removing administrative darkness through transparency and sunshine laws and stanching fear by enacting laws to

protect journalists, guarantee access to information and give succour to whistle-blowers. There are five reasons why whistle-blower laws must be part of the arsenal of the anti-corruption fight in Kenya.

1. **Rewards ethical behaviour:** Whistle blower laws enforce and reward ethical behaviour. This rests on the proposition that ethical behaviour is good, both for the country and for business. A good whistle-blower protection

framework complements and reinforces the work of officers responsible for enforcing ethics in government and in the private sector. In Kenya, such a law would support the role of the Service Commissions, the bodies legally mandated to enforce the Public Officer Ethics Act.

2. **Complements the role of regulators:** Without whistle-blower protection, most wrong-doing must await eventual discovery by regulators. Given the fact that regulators are chronically under-resourced and under-funded, most wrong-doing will almost certainly go undetected unless it is particularly egregious.

3. **A form of early warning:** Whistle-blowing is a form of administrative or corporate early warning. Whistle-blowing has the potential to stymie a problem before it spirals out of control. For example, it is probable that if there had been effective whistle-blower law in place in Kenya in 1991, Goldenberg would not have burgeoned into the monstrous scandal that it eventually became.

4. **Enforces accountability:** Whistle-blower laws enforce public and private accountability. There are times,

both in government and in the private sector, when middle management is involved in serious wrongdoing. However top management may not know that this is happening. Unfortunately there are many such instances where the law requires guilty knowledge before directors and top management can be held accountable for such wrongdoing. By requiring and safeguarding internal information channels, whistle-blower laws make it more likely that junior employees will tell their bosses that illegalities are going on. Bosses cannot later plead ignorance.

5. **Reduces employee vulnerability:** The fear of reprisals is a major deterrent to whistle-blowing. Employees are socialised by bureaucratic strictures into a culture of mendacity; telling on their supervisors is considered snitching; internal rules and procedures reward and reinforce confidentiality and classification of information. An employee who breaches the lines of control risks reprisals by fellow workers and by the employer. In Kenya those who blew the whistle on Goldenberg and on Justice Ojuk were promptly dismissed from their jobs. They are still out of work today.

## MUNYAKEI'S RIGHT TO LIFE WAS VIOLATED: HE SHOULD BE COMPENSATED

By Haron M. Nubi, Advocate

In July 2006, Mr. David Sadera Munyakei died a desolate man leaving behind a young family – a widow and three daughters. Their life has nothing to show for Munyakei's heroism, save for the photographs he took in the myriad of high profile meetings, certificates of commendation, and trophies with no economic value to them. Only symbolic of the character of the man who saved the country from bleeding from the cancerous hole that was Goldenberg. Munyakei was dismissed from work for allegedly breaching the Official Secrets Act.

The Official Secrets Act, being the formal cause of Munyakei's termination of employment with Central Bank of Kenya (CBK), deals with the circumstances of individuals divulging "maps, plans, sketches," which are likely to prejudice the security of the state.

It is deeply inconceivable that by virtue of stopping the plunder of Kenya's resources Munyakei would have been prejudicing the security of the state. Therefore, two arguments emerge: -

(i) That David Munyakei's right to life was violated by the Central Bank of Kenya hence his entitlement to compensation and

(ii) That the Official Secrets Act, which was applied against him, was so maliciously used to the violation of his Constitutional Rights.

(iii) That the official Secret Act which was applied against him, was maliciously used to the violation of his Constitutional Rights.

A temptation may be made to argue that Munyakei's case was one of contrast hence the limitation of period of six years since he lost his job caught up with him or his estate. This argument is fallacious since it fails to recognize the case between some law and the constitution, the latter is supreme. Therefore, the Government of Kenya, being the constitutional trustee of public duty and the Central Bank of Kenya being a direct violator of David Munyakei's rights must compensate his estate.

In determining the amount of money that is payable in compensation, regard should be given to his career growth had he not been dismissed, until retirement. It must be remembered that David died of conditions that were consequences of the poverty he had been plunged into by the very violations of his Constitutional Rights.

### Flaws in our Laws

The Constitution of Kenya provides for the Fundamental Rights and Freedoms of the Individual. These rights and



freedoms include the Right of Life. The right of life in constitutional interpretations by the courts in Kenya has been held to mean life including livelihood. Thus, an act to deprive a person of her or his means of livelihood is indeed a violation of the right of life.

The Memorandum of Objects and Reasons, which is the *raison d'être* by the AG for the law, suggests that the Witness Protection Bill is to provide for 'a scheme for the protection of witnesses in criminal cases, Commissions of Inquiry and the like.'

The Bill attempts to define a 'witness' for its purposes but does not in any way make mentions of whistle blower or its equivalent. In the nature of things, a whistle is blown before investigations, proceedings and determination may be made. Therefore, one can argue that the Bill does not provide nor contemplate whistle blowers unless and until they offer to testify in a judicial or quasi judicial process, especially within a criminal trial framework. Even more, the Bill considers that beneficiaries to the scheme would be those who testify on behalf of the state.

The bill is fraught with weaknesses against the Whistleblower. These include: -

- (i) Whistleblowers regarding economic and non-criminal matters
- (ii) Reports made to persons other than law enforcement agencies.
- (iii) Whistleblowers testifying for the defense or persons other than accused

Besides the foregoing, the bill proposes a new framework of trials and expenditure of the public resources, which to implement will require the amendment of various other

laws like the Evidence Act, Finance Act and Corruption and Economic Crimes Act.

The Bill also gives the Attorney General excessive discretion in the whole scheme; considering that most acts of high level corruption happen within the government. Therefore, whistleblowers may feel highly uncomfortable to be processed and managed by the AG who by virtue of his job would be a confidant to the schemes. Therefore the Bill should be providing for the establishment of a separate scheme and authority to manage it.

If the AG is left to manage whistleblowers by *inter alia* changing their identity and relocating them; it is absolutely possible that a whistle blower would be stifled and fail to testify or continue to raise their voice again.

The Bill also requires that a witness participant in the programme do sign a Memorandum Of Understanding (MOU) with the Attorney General. In case the witness participant does anything that in the opinion of the AG is against the MOU such participant would be removed by the AG discretionally. This defects the spirit of the protection of witnesses and especially whistleblowers.

Lastly, yet perhaps more importantly, the bill does not provide for economic support for whistleblowers that may find themselves without support or capacity to earn a living but without facing mortal danger. The bill could do well to borrow a leaf from the practice by the Kenya Revenue Authority which does grant monetary benefits to whistleblowers who help them recover unpaid taxes. This kind of compensation provides an incentive as well as economic benefit. Such an arrangement would have taken care of Munyakei's family.



# Whistleblower Protection Legislation: A Torch of Courage Illuminating a Sea of Darkness

By Gabriel Mass-Fordham university (U.S.A)

The Kenyan government recently attempted to sell whistleblower protection to the public in the form of a much-publicized Witness Protection Bill, 2006. While the bill has been stalled since 2004, Attorney General Amos Wako recently attempted to move the legislation for consideration by Parliament. According to the Attorney General, the bill will “protect whistleblowers and will provide a solution to a myriad of cases of unsuccessful prosecution of such culprits.”<sup>1</sup> However, under close scrutiny, the bill’s purported whistleblower protections are revealed as shamelessly inadequate.

**A**side from the substantive shortcomings perhaps the most glaring weakness of this legislation is procedural: a complete lack of the institutionalised impartiality that is essential to ensure that whistleblower protections are implemented reliably and conscientiously to uphold the public interest. As currently drafted, the legislation presents a clear conflict of interest. The Attorney General is the sole party vested with authority to grant protections under the bill. Furthermore, the Attorney General has unilateral discretion to determine the extent and nature of the protections. The Attorney General cannot be expected to act as an impartial, unbiased referee for petitions requesting safeguards relating to allegations against the government. It is unreasonable and imprudent to design a system that relies entirely on the Attorney General’s discretion to grant protection to whistleblowers who expose government impropriety. This would, of course, be particularly true should allegations be leveled against the Attorney General’s office itself. Effective whistleblower legislation requires, above all, an independent body to receive process, investigate, and adjudicate requests for protection.

Corruption thrives in a climate of darkness and fear. This is precisely why comprehensive and effective whistleblower protection legislation is a cornerstone of any successful campaign against corruption. By encouraging individuals to come forward and expose corrupt practices, whistleblower legislation acts as a proverbial torch, casting light on the dark recesses of public and private institutions where corruption may flourish.

The critical importance of whistleblowing that justifies its status as a protected activity stems from its value as an “early warning” system for exposing corruption, thereby bolstering the efficacy of under-funded and often-beleaguered regulatory agencies.<sup>2</sup> Without whistleblowers, many instances of corruption would undoubtedly remain undiscovered due to limitations on the access to information and resources of agencies charged with rooting out wrongdoing. According to Universidad Nacional Autónoma de México (UNAM) report, approximately 30 countries have implemented some form of whistleblower protection legislation. Moreover, the UN Convention against Corruption, signed by 140 countries with Kenya as its first signatory, features embedded mandates concerning whistleblower protection. Article 33 of the Convention charges each treaty partner to “...consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in *good faith* and on *reasonable grounds* to the competent authorities any facts concerning offences established in accordance with this Convention.” The inclusion of whistleblower protection in the UN Convention signifies that the international community has recognized the value of such legislation in combating corruption.


Kenyans will not come forward to report complaints about malfeasance simply because a whistleblower law is enacted. Only if people are truly confident that the protections guaranteed by the legislation are substantive in nature will they be motivated to expose wrongdoing. Without a more transparent, independent adjudication process, potential whistleblowers will continue to be deterred. The Attorney General deserves

**.....What is the government going to do to protect Kenyans who are ready to defend.....**

to be commended for this initiative, but the government should stand reminded that this does not serve the critical functions of whistleblower protection legislation.

The late David Sadera Munyakei's act should have set a precedent for honoring those who risk exposing massive abuses of power in government. Yet when we look back at the kind of life Munyakei was reduced to, we can only think of one thing – the "shooting the messenger" mentality that has pervaded the political sphere in Kenya. When Transparency International awarded Munyakei with the Integrity Award in 2004, many, including Munyakei, were hopeful that justice might soon prevail in the form of com-

prehensive legislation to protect whistleblowers. Sadly, by the time of his death nothing much had been done in this regard.

What is the government going to do to protect Kenyans who are ready to defend their country against the evils of corruption and exploitation by unscrupulous public officials? In its current form, the Witness Protection Bill will never serve this purpose. When will the government hear the courageous voices of all the David Munyakeis? Is this government listening? 

1 *The People Daily* 6 July 2006.

2 The Kenyan section of the International Commission of Jurist, Freedom of Information Report.

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## Vox pop:

### **FOOLS GOLD, LOOTED GOLD OR LOOTED LIVES?**

David Munyakei brought to light the Goldenberg scam in 1993 and only then did this little known clerk become known to Kenyans. Those adversely mentioned started walking with their heads low as their political careers were threatened. When the Goldenberg Commission was set-up in 2004, the late Munyakei got an opportunity to narrate publicly what transpired. Two years later, the Goldenberg scandal is still on but on the corridors of justice. On 9<sup>th</sup> July 2006 the whistle blower dies and is later buried.

The late Munyakei died in poverty and had lost all the means to fend for his family. He had been scorned and teased for refusing to take about Ksh 2 million bribe to keep his mouth shut. A local media personality once argued that those who are vocal on corruption issues will forever remain poor. Like any other Kenyan am left wondering if Munyakei disgraced his country by saving the Central Bank from losing billions of shillings and possible collapse. This is where the hard, painful and tearful journey of keeping the inspiration of Munyakei begins; the whistle blower legislation and sustainability of those who suffered for his actions exposing the scam.

On Friday, 21<sup>st</sup> July, 2006 in Narok Town, Mung'are as it known by the locals, Munyakei was laid to rest. It was a somber mood, with very poor representation from the civil society and Government. Transparency International-Kenya (TI-K) was among the small crowd that was present, and being one of us it was not a problem. He was the Transparency International Integrity Award 2004 winner.


David Sadera Munyakei left behind three daughters

and a wife. They know no one but TI-K, and only hope that a lasting solution can come from this end. But what can a donor funded organization do? How much can TI-K do? Can TI-K educate and fend his family? Life has never been easy for his young family since he was sacked from the Central Bank, but is it right to let his children be robbed of education, the only hope that could change their lives for the better? Can a single handed individual take up all this? What consequences are there if the family is forgotten? Is the Civil Society Organizations (CSOs) blowing the whole issue out of proportion?

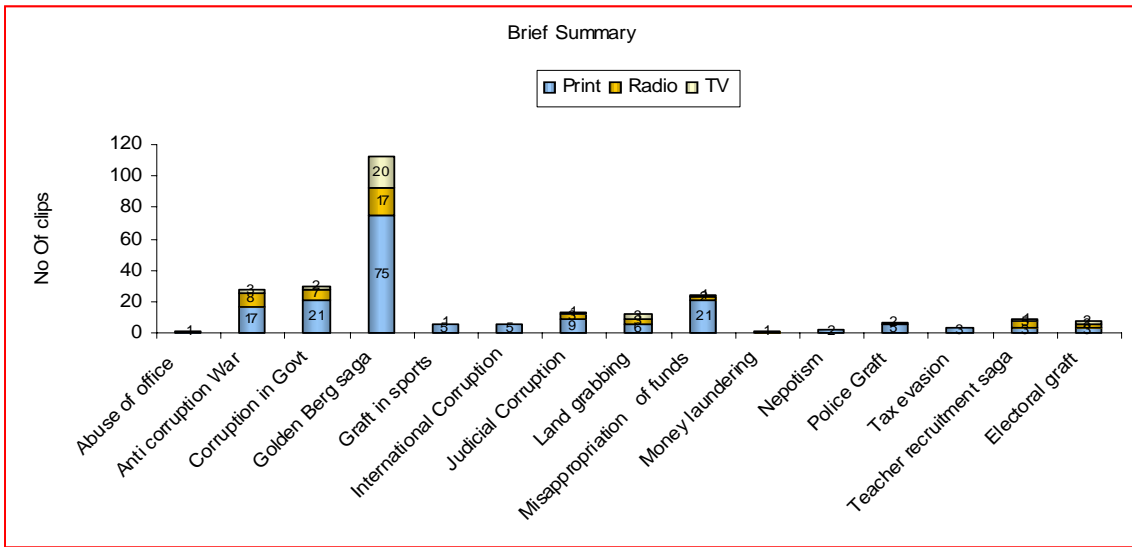
What was once thought to be the biggest scandal in Kenya leaves every one wondering if it was indeed a scandal, a rumour, the biggest joke, fools gold or looted gold?

#### **A cry for help**

In the next few weeks, stories surrounding the Goldenberg ruling and all associated will be stale and anyone referring to it suffers the risk of not getting a sound bite. What will the family suffer in return? the school girls might not be able to go back to school again, they might start adjusting on surviving on an empty stomach, walking on bare feet and adapting to the life their father might have led since he lost his job-chasing anything for their survival.

Do you think Munyakei would expose Goldenberg if he was to lived his life again? Can you dare blow the whistle and bite the hand that feedeth you? What would give you solace a legal backing protecting you, and your actions in protecting the public interest? Let us champion for Whistle Blower legislation in Kenya and avoid having young families lives get looted in the loot. 

# Adili Corruption Index August 2006



Compiled by Susan Lwembe

The print media is in the fore front in exposing corruption scandals. This is according to Transparency International-Kenya media monitoring. According to the daily media monitoring carried out in the first week of August, 120 corruption cases were reported in the media. Majority of these were in print media which had 67% compared to TV and Radio which had 14% and 19% respectively. Positive tonality in the fight against graft was mainly on the

success of corruption like prosecution of police and public servants involved in corruption, while negative was on the drawbacks experienced in the fight against graft. The acquittal of Prof George Saitoti saw Goldenberg saga get the highest amount of publicity in all mediums.

Media Monitoring is a segment of Transparency International-Kenya's Communication Programme that seek to monitor daily corruption related stories carried out in the media. TI-K has done this since 2001

### Media monitoring by Steadman

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