E-COMMERCE IN KENYA: THE CASE FOR CONSUMER PROTECTION

A Thesis Submitted in Partial Fulfilment of the Requirements for the Degree of Master of Laws (LL.M)

BY

MUTISO IMELDA NDANU

G62/69855/2013

PREPARED UNDER THE SUPERVISION OF

MR. STEPHEN KIPTINNESS

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

JULY 2016
DECLARATION

I, MUTISO IMELDA NDANU, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

SIGNED:..........................................

MUTISO IMELDA NDANU

This thesis has been submitted with my approval as the University Supervisor.

SIGNED:..........................................

MR. STEPHEN KIPTINNESS

SCHOOL OF LAW, UNIVERSITY OF NAIROBI
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Lastly, I wish to thank my parents for the gift of education, my siblings and friends for their continued support and encouragement that has remained invaluable and unwavering throughout the programme. May the Almighty God bless you all.
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<th>Description</th>
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<tbody>
<tr>
<td>B2B</td>
<td>Business to Business</td>
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<td>B2C</td>
<td>Business to Customer</td>
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<td>B2G</td>
<td>Business to Government</td>
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<td>C2B</td>
<td>Consumer to Business</td>
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<td>C2C</td>
<td>Consumer to Consumer</td>
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<td>CPA</td>
<td>Consumer Protection Act, Kenya</td>
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<td>EAC</td>
<td>East African Community</td>
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<td>E-Business</td>
<td>Electronic Business</td>
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<td>ECT</td>
<td>Electronic Communications and Transactions</td>
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<td>E-commerce</td>
<td>Electronic Commerce</td>
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<td>E-consumer</td>
<td>Consumer in electronic commerce</td>
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<td>E-consumer protection</td>
<td>Consumer protection in electronic commerce</td>
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<td>EDI</td>
<td>Electronic Data Interchange</td>
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<td>EU</td>
<td>European Union</td>
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<td>FTC</td>
<td>Federal Trade Commission</td>
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<td>ICT</td>
<td>Information and Communication Technology</td>
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<td>KEBS</td>
<td>Kenya Bureau of Standards</td>
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<td>KICA</td>
<td>Kenya Information and Communications Act</td>
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<td>KIF</td>
<td>Kenya Information and Communication Technology Federation</td>
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<tr>
<td>KSHS</td>
<td>Kenya Shillings</td>
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<tr>
<td>MENA</td>
<td>Middle East and North Africa</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<tr>
<td>UAE</td>
<td>United Arab Emirates</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>USD</td>
<td>United States Dollars</td>
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CHAPTER ONE: BACKGROUND TO THE STUDY

1.0 INTRODUCTION

In 2008, various players in the ICT sector agitated for a comprehensive legal framework on e-commerce in Kenya and proposed recommendations on the Information and Communications Bill, 2008, and the Electronic Transactions Bill, 2007. The legislative framework finally recognised e-commerce and made substantive provision for it when Parliament amended the Kenya Information and Communications Act (KICA), Cap 411A in 2009, and the (then) Minister for Information and Communications in consultation with the Communications Commission of Kenya made the Kenya Communications (Electronic Transactions) Regulations 2009, which came into force in 2010. It has therefore been only 7 years since the legislative framework gave attention to e-commerce (as at 2017).

On 14th March 2013, the Consumer Protection Act (CPA) No. 46 of 2012 came into force. The CPA intervened in the substantially unregulated area of consumer protection that was initially covered in Part VI of the Competition Act of 2010. The CPA came into play in order to fortify consumer rights in the Constitution of Kenya 2010.

The CPA is a gain in Kenya, for the role it plays strengthening the protection of consumers under the law. Apart from outlining provisions to protect the ‘weaker side’ of contracts, the Act also mandates consumer representation on all regulatory bodies, and directs the respective appointing authorities to place due regard to accredited consumer organisations and the Kenya Consumers

Protection Advisory Committee in making such appointments. According to CPA, a ‘consumer’ is:

“(a) a person to whom particular goods or services are marketed in the ordinary course of the supplier’s business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of (the) Act;

(c) a user of particular goods or a recipient or beneficiary of particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods and services; and

(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of (the) Act.”

The definition of a consumer is relevant to this study because it highlights the focus point of the legislation and regulation of e-commerce from a user perspective. The definition under the Act includes both the primary consumer, being the purchaser or recipient, and the secondary consumer, being the end-user.

While e-commerce was introduced in Kenya’s legislative framework in 2009, consumer protection was generally provided for in 2010, and the consumer protection regulations were introduced in 2010 to incorporate KICA’s introduction of e-commerce, the enactment of the CPA in 2012 brought certainty with regard to certain types of transactions in e-commerce. However, there are still aspects of e-commerce that pose a potential danger to consumers in Kenya. Protections for remote and internet transactions are not well articulated in the legal

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3Consumer Protection Act 2012 s 94.
4ibid 2.
framework for consumer protection in Kenya, with consumers being left exposed to detriment due to this inadequate shielding.

This study analyses the existing provisions in the CPA which revolutionised Kenya’s consumer protection law; and KICA and Kenya Communications (Electronic Transactions) Regulations on e-commerce; against a backdrop of best practices, arguing that the protection of e-consumers under the existing legislative and regulatory framework is inadequate.

Chapter One introduces the study, and contains an overview of the background to the study, its objectives and answers it seeks to uncover. The chapter also includes the theoretical framework and literature review of works on e-commerce and especially e-consumer protection in Kenya. The relevance of this study is highlighted in that while there is a body of knowledge on e-consumer protection in other countries, Kenya still has much to be desired in the scholarly works on the issue. This justifies the current study as it argues that there is a need to further regulate e-commerce to adequately provide for consumer protection.

Chapter Two explores the concept of e-commerce and highlights the challenges that arise from e-commerce. The chapter also highlights the challenges that arise from e-commerce. This study focuses on the challenge of (1) information disclosure and verification, (2) data and payment security, (3) jurisdiction, (4) redress and (5) privacy; (6) fraud and (7) insufficient opportunity to inspect goods on delivery. Identification of these challenges sets the stage for an identification of the key areas that may be addressed in the e-consumer protection legislative or regulatory framework. This assertion is made on the premise that for the legislation to best address the issue, it is important to identify the areas which are most vulnerable.
Chapter Three examines the current consumer protection law in Kenya, the extent to which it covers e-commerce, and problems arising in the implementation of consumer protection law in e-commerce transactions in Kenya. The chapter presents the findings from the primary research involving e-consumers and stakeholders in the e-consumer protection sphere. It outlines the perspectives of e-commerce, e-consumer protection, the challenges facing e-consumer protection in Kenya, and most importantly gives recommendations on how to improve e-consumer protection in the country.

Chapter Four examines the position of e-commerce in consumer protection law in the US, UK and South Africa. It presents the best practices in incorporation of e-commerce provisions in consumer protection law in these countries. A comparative study of the e-consumer protection provisions is important because from it, Kenya may learn how to improve the current e-commerce and consumer protection laws to achieve better protection for e-consumers.

Chapter Five summarises the problem this study sought to address, gives a summary of the findings of the entire study, draws conclusions from the findings and proposes recommendations on how to improve the e-consumer protection framework. Recommendations drawn from this study include consolidation of e-commerce law to provide for matters including a clear definition of e-commerce and dispute resolution mechanisms; focusing on implementation of the existing e-consumer protection laws; and public education of e-consumer protection.
1.1 BACKGROUND

E-commerce is a global phenomenon. All across the world, technological advances in the field of ICT has led to an increase in the number of businesses using the internet to sell goods and offer services to their clients. Total global e-commerce was zero in 1995, was estimated at USD 26 billion in 1997, and predicted to reach USD 330 billion in 2001 – 2002 and USD 1 trillion in 2003 – 2005. These estimated have been and continue to be greatly surpassed. In the US alone, the US Department of Commerce reports that in 2000, e-commerce accounted for over USD 1 trillion, which was an increase of more than 12% from the 1999 values. In 2017, there are an estimated 1.61 billion e-commerce users globally, which represents 22% penetration, transacting a total of close to USD 2 trillion.

Businesses all across the globe have created online front-end services to their traditional businesses, several new products and services are innovated through the internet, and more aspects of enterprises including delivery of goods and services are handled using online media. Online presence of a business increases its reach, and diversifies a business’ customer base, extending it from the traditional face-to-face consumers to consumers who transact from a distance using the internet as a platform.

Across the world, various issues have emerged as a result of the burgeoning impact of the internet. In Gutnick v Dow Jones & Co Inc. [2001] VSC 305 an Australia based businessman

sought remedies for defamatory statements posted on a website; in **Berezovsky v Michaels [2000] 2 All ER 986; [2000] 1 WLR 1004.** jurisdiction was a major discussion point in the libel case featuring the Russian plaintiff who was described in an online magazine as having links with organised crime in Russia. In **Macquarie Bank Ltd v Berg Unreported, Supreme Court of NSW, Simpson J, 2.6.199** a company in Australia sought to challenge the actions of a grieved ex-employee who wrote on a website based in an undisclosed location in the US. These cases present the issue of jurisdiction in e-commerce, where courts would be faced with the determination of which law would apply where parties to most internet interactions are based in different jurisdictions. They also illustrate one of the avenues available for consumers in remote and internet transactions, to gain redress in a situation where their rights are violated: filing a court case. However, as it emerges in these two cases, this protection is inadequate, as the consumers may still find jurisdictional hurdles that may be difficult to overcome, in an international transaction.

Jurisdictional issues have further been presented in US cases such as **Zippo Manufacturing Co v Zippo Dot Com, Inc., 952 F Supp 1119 (WD Pa 1997). Cybersell, Inc. v Cybersell, Inc, 130 F3d 414 (9th Cir 1997).** and **CompuServe, Inc. v Patterson, 89 F3d 1257 (6th Cir 1996)** where the location of the server maintaining the website where the subject matter of the dispute arose, was considered the proper legal jurisdiction of the case. In the earlier US case of **Yahoo! Inc. v La Ligue Contre Le Racisme et L’Antisemitisme, 169 F Supp 2d 1181 (ND Cal, 2001)** the court’s view was that in applying jurisdiction rules in determining which forum to bring an internet-related dispute, ‘reasonableness’ must be applied’. This also shows the impact that remote and internet transactions have on the rights of a consumer to present a dispute before the courts in the consumer’s home country. Courts would have to question whether the consumer
can indeed have the rights fulfilled through the courts of that particular jurisdiction. This has an impact on the consumer because it determines the legal jurisdiction to which the consumer directs any dispute relating to the consumer contract. It problematizes the rights of the consumer to have redress.

An increase in the number of transactions conducted over the internet also raises issues in the handling of consumer protection issues. The nature of an online transaction is that the consumer purchases goods or services while in one location, from a business in another location. The consumer may require the goods or services to be delivered to the customer’s location or to a third location, for example a gift delivered to a third party. The consumer may not have adequate opportunity to examine the goods, query about their condition, or try out the goods or services to decide whether the goods are acceptable. In addition, the consumer must be protected from false advertising, where the business owners may misrepresent critical aspects of the goods and services and manipulate the consumer through offering different goods or services from those offered. The impact of remote and internet transactions is also illustrated here, because the consumer would need an allowance of time to examine the goods or services, even where these goods or services originated from a location that is physically distant.

The journey toward recognition of rights and fundamental freedoms in different countries has been a long one. In the US, for example, cases such as Brown v Board of Education 347 US 483 (1954) heralded the civil rights movement and the drive for better conditions for all, where the lawyers have been described as some of the early consumer lawyers who represented their client’s interests. In Kenya, through the Constitution of Kenya 2010, the people of Kenya provided for the right to privacy, including the right not to have information relating to their family or private affairs unnecessarily required or revealed, or the privacy of their
communications infringed;\(^9\) the right to access to information held by the State, and information held by another person and required for the exercise or protection of any right or fundamental freedom;\(^{10}\) the right, either individually or in association with others, to acquire and own property, including intellectual property;\(^{11}\) and most important to this study, consumer rights to goods and services of reasonable quality; to the information necessary for them to gain full benefit from goods and services; to the protection of their health, safety, and economic interests; and to compensation for loss or injury arising from defects in goods or services.\(^{12}\) The constitutional protection of consumer rights in Kenya applies to goods and services offered by public entities and private persons.\(^{13}\) 

To demonstrate the importance of consumer rights to the development of Kenya’s economy, the Constitution provides that issues of consumer protection, including standards for social security and professional pension plans are the preserve of the National Government.\(^{14}\) In recognition of the need for regulation of trade, and especially in the context of consumer protection for this study, the county governments are charged with trade development and regulation including fair trade practices.\(^{15}\) 

Kenya has a nascent consumer protection legal framework. The CPA was enacted pursuant to Article 46 of the Constitution of Kenya 2010 to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions, and to provide for connected and incidental matters. In 2012, the CPA came into force, placing the focus squarely on consumers

\(^{9}\)Constitution of Kenya (n 2).
\(^{10}\)ibid art 35.
\(^{11}\)ibid art 40.
\(^{12}\)ibid art 46.
\(^{13}\)ibid.
\(^{14}\)ibid sch 4.
\(^{15}\)ibid.
and enlarging the scope of consumer protection in Kenya. The CPA provides for various aspects of the internet age, for example providing for ‘internet agreements’, ‘internet gaming sites’ and ‘remote agreements’. On the regional level, the East African Community (EAC) Electronic Transactions Bill of 2014 marks a development in the area of commerce, with introduction of e-commerce considerations into the law. These e-commerce considerations are the same aspects which this study argues should be embraced in the CPA for e-consumers to be adequately protected.

The CPA establishes the Kenya Consumers Protection Advisory Committee with functions including advising the Cabinet Secretary and ensuring relevant action on all aspects relating to consumer protection; formulation of policy relating the Act and legislative proposals in the interest of consumers and the modification, consolidation or updating of legislation providing protection to consumers in the areas covered under, or related to this Act; creating or facilitating the establishment of conflict resolution mechanisms on consumer issues; monitoring and keeping under review the trading and business practices relating to the supply of goods and services to consumers; monitoring the working and enforcement of laws that directly or indirectly affect the consumer; drawing up and reviewing consumer protection directives and minimum service standards for submission to the Cabinet Secretary.

With the realisation that internet and remote transactions have an impact on consumer protection and inclusion of specific clauses relating to internet-based transactions, Kenya has made steps in the right direction. However, the provision on e-commerce is not adequately made. There are ambiguities in the law relating to the distinction between day-to-day e-commerce transactions

\[\text{16Consumer Protection Act (n 3).}\]
\[\text{17ibid 90.}\]
that are instantaneous and the formal internet-based agreements where parties carry out negotiations, sign contracts using e-signatures, and facilitate delivery of the agreements to the respective parties.

While the law prescribes mechanisms such as delivery of a copy of the internet agreement or remote agreement to the consumer, the complexity of e-commerce challenges the practicality of such measures. For example, where a simple click of a button commits the consumer to purchasing an item on an online shop, would the shop proprietor reasonably be expected to deliver a copy of the agreement to the consumer? Further, if the manifestation of an online transaction occurs through a pay-per-click transaction, would there need to be multiple contract copies delivered to the consumer?

The above are only a few of the challenges arising from e-commerce. This study argues that there is a need to further regulate e-commerce to adequately provide for consumer protection.

1.2 STATEMENT OF THE PROBLEM

Global trade is moving from the conventional ways of doing business and ICT is fast being embraced in this platform. Kenya is not an exception in this paradigm shift. E-commerce is being promoted in both private and public sector. It is emerging as the most popular form of transacting, where customers can view products, make queries and order online. If the item arrives and it is not what you are looking for, what recourse does the consumer have in law? While this may be straightforward in face-to-face transactions, where the customer has an opportunity to examine the goods or sample the services, in online transactions the consumer may be more disadvantaged.
Consumer protection law seeks to protect buyers of goods and services who are generally recognised to have inferior bargaining powers to those of the sellers.\textsuperscript{18} The law assumes that the consumer does not have a good comprehension of the impact of the contract, the meaning of the consumer’s obligations under the agreement, the pecuniary impact of the advertisement viewed or sales agent visit; and in addition the consumer cannot view or sample the goods or service before ordering, especially for long distance agreements.\textsuperscript{19}

While there is an existing framework for e-commerce in Kenya, the effectiveness of the laws can only be found out in an analysis of the nexus between the laws in place with regard to the concept of e-commerce and consumer protection, to evaluate if Kenya has adequately provided for e-consumer protection. While there is a CPA in place and the law provides for e-commerce, this does not mean that e-consumer protection is guaranteed.\textsuperscript{20} If the laws do not adequately provide for e-consumer protection, the result is legal uncertainty on the rules to be applied when determining the extent of a consumer’s protections when an online transaction is in question, thus undermining confidence in internet transactions and hampering trade.\textsuperscript{21}

An example of legal uncertainty in Kenya would be on how to deal with a failed transaction through an online website such as OLX, a company that provides an interactive platform for buyers to view products and transact with sellers. The options available to a buyer of a product that is faulty may be unclear if the status of the three parties to the transaction are not well

defined. A number of legal issues would arise from such a transaction: for a default of the seller, would OLX be held liable for providing the platform through which the seller breached the contract?; in order to pursue the consumer’s rights, would the consumer seek recourse against both OLX and the seller?; assuming the OLX website has a disclaimer that OLX should not be held liable for any information provided by the seller, would the law still impose a duty of care on the company requiring the site to verify details provided by the seller? Without an analysis of whether the provisions in the law adequately secure the rights of consumers in e-commerce in Kenya, consumers will still be disadvantaged despite the legal framework being in place, because online shop owners may still exploit the existing legislation and regulation to take advantage of consumers; therefore the consumers would not be secure under the law. The result is that they risk infringement of their rights, and the loss and damage that flows from such infringement.

1.3 HYPOTHESES
The following are the hypotheses made in this study:

a) Consumer protection law in Kenya does not adequately provide for e-commerce. This means that e-consumers are not adequately protected under the law.

b) Consumers are disadvantaged by the inadequate provision for e-commerce in consumer protection law in Kenya. This means that while there is some provision for e-commerce in consumer protection law in Kenya, the e-consumers are still exposed to detriment under the current consumer protection law in Kenya.
1.4 RESEARCH QUESTIONS

This study seeks to answer the following research questions:

a) Does consumer protection law in Kenya adequately protect e-consumers?

b) How can e-consumers be better protected under consumer protection law in Kenya?

1.5 THEORETICAL FRAMEWORK

An analysis of the theoretical support for e-consumer protection is important. It is only when the causes and consequences of consumer protection in e-consumer protection are understood, and when studies on consumer behaviour in general are performed, can we understand why e-consumers do what they do; and therefore, creating a means for regulators to understand how to protect them.\(^2\) The natural law theory and liberalist legal theory form the foundation for the theoretical framework of this study. The problem identified in this study is that there is no legal certainty where the law does not provide adequate protection for e-consumers. The underlying theory is that the rights of consumers are founded in natural law, and must be incorporated in the man-made laws, where the law should, according to liberalist legal theory, provide a guide to human behaviour to steer private relationships such as e-contracts.

Natural law theory influences this study, in that it places moral obligations upon parties of e-commerce transactions to ensure that the consumer’s rights are upheld. E-consumer protection is backed by the constitutional provision enshrining the Bill of Rights. While on one hand, the Classical and Scholastic schools of natural law consider that the origin of the law is a Divine Source which predetermines the existence of order of beings, Contemporary natural law theorists

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trace the origins of legal rules to human reason, or human rationality.\textsuperscript{23} The unifying factor is that behind all the legal rules, there are basic concepts that must be preserved and should not be derogated from even when human beings enact laws.\textsuperscript{24}

Jacques Maritain, a key figure in the UNESCO Committee involved in writing the Universal Declaration of Human Rights, viewed that while natural law cannot be directly enforced like positive law, it forms the basis for normative rules.\textsuperscript{25} Maritain’s work was based on Aquinas’, and the main strand of thought is that the rights of man originate from natural law, not from duties as a social animal.\textsuperscript{26} Maritain argued in favour of promotion of the basic human rights which form a distinct part of the concept of human dignity, categorised into the right to life; the right to general personal freedom; the right to free enjoyment of family; the right to intellectual and religious freedom; and the right of property ownership.\textsuperscript{27} While consumer rights do not form part of the basic rights, their origin may be traced to the theories explaining the overarching motivations of preserving the position of consumers disadvantaged due to human frailties, where the rights are safeguarded over and above any legislation.

John Finnis, a twentieth century contemporary natural law scholar, building on the Scholastic views of Aristotle and Aquinas, states that to protect the human society, and in support of human needs to exist within that society, the law offers the preservation required.\textsuperscript{28} Borrowing from this line of thought, e-consumer protection law has its justification in preserving the operation of

\textsuperscript{23}John Finnis, \textit{Natural Law and Natural Rights} (Oxford University Press 1980) 135.
\textsuperscript{24}Thomas Aquinas, \textit{Summa Theologica} (Burns & Oates 1947).
\textsuperscript{25}Andrew Woodcock, ‘Jacques Maritain, Natural Law and the Universal Declaration of Human Rights’ \textit{8 Journal of the History of International Law} 245.
\textsuperscript{26}Charles A Fecher, \textit{The Philosophy of Jacques Maritain} (The Newman Press 1953) 200.
\textsuperscript{27}Joseph W Evans and Leo R Ward, \textit{The Social and Political Philosophy of Jacques Maritain: Selected Readings} (Charles Scribner’s Sons 1955) 51.
\textsuperscript{28}John Finnis (n 36) 135.
contracts in e-commerce. The law creates a balance between the interests of the consumer and of the sellers, allowing both parties to exist without one overpowering the other.

Liberalist legal theory supports the protection of fundamental rights and freedoms of the individual, and Hart’s liberalism forms a basis for this argument in suggesting promotion of tolerance of the views of every individual, and that for all to live in harmony, there is need for the people to commit to ‘lasting moral values such as the protection of fundamental freedoms’.\(^29\) It is the basis of liberalism, though, that each individual should determine his or her own moral values, and it is not up to the government or other body to determine one’s thinking, thus advocating for preservation of the freedom of religion, freedom of expression, freedom of association or freedom of conscience.\(^30\) As such, according to Hart, ‘law is not simply a set of commands backed by sanctions, but is instead a set of guides for behaviour’, where these guides are offered to steer private relations such as the contracts.\(^31\)

This study is not rooted in positive legal theory, which suggests that law derives its legitimacy from legislative processes. Instead, this study views that the human-made law should embrace the principles of morality dictated in natural law. This study therefore takes the approach that consumer rights must be covered in human-made law for the law to be valid.


\(^{30}\) ibid.

1.6 LITERATURE REVIEW

There is a substantial amount of literature on EDI and its advantages in business, with Emmelhainz highlighting that EDI speeds up transactions;\(^2\) Srinivasan, Kekre, and Mukhopadhyay noting that EDI reduces errors in transactions, which may otherwise be made through human mistake;\(^3\) and Mukhopadhyay, Kekre, and Kalathur touting the benefits of lower operating costs for businesses, which would not have to expend large amounts on travel and additional staff costs.\(^4\) A European Consumer Centres Network report notes that a study on e-commerce in Europe revealed that 66% of online shoppers reported that they are turning to e-commerce for lower prices, 50% to save time, and 47% for reasons related to the varied choices of goods and services.\(^5\)

Consumer protection has also received scholarly attention across the globe. Howells traces the developments of consumer protection in Europe from a state of little regulation to the current maximal harmonisation of consumer protection laws among EU states; and concludes that while streamlining of rule in consumer protection may be beneficial in some areas such as providing a cooling-off period within which the consumer of a product delivered in a distance transaction may lodge a complaint, while others which are based on the individual country’s specific experience should be left to be determined by the state itself.\(^6\) Spletter examines the significance

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\(^3\) K Srinivasan, S Kekre and T Mukhopadhyay, ‘Impact of Electronic Data Interchange Technology on JIT Shipments’ 40 Management Science 1291.


of trust marks in e-commerce, explaining that while there is low interest in the creation of trust marks in the interest of consumers, these marks may make a significant contribution to the development of B2C e-commerce.  

Czigler poses the question whether e-consumer protection in the US is the ‘same jungle as in Europe’; focuses on the protections afforded to e-consumers in the US at state and federal level, and Europe; and concludes that for persons considering which of the two jurisdictions to apply, there are both advantages and disadvantages, so it is not possible to state that one is superior to the other.  

Czigler refers to a number of cases supporting the origin of e-consumer protection in the US and Europe. In *Lumley v Wagner [1852] EWHC (Ch) J96*, a case where an opera singer was contracted to perform in one opera theatre but chose to sing in another, thereby breaching the contract, an injunction was awarded to prohibit her from performing in another theatre in the UK, but the court could not order specific performance because it could not force her to appear at the theatre and sing.  

Injunctions, however, apply with strict rules and only where there is no equitable relief that can be granted. As Czigler notes, in ‘e-consumer law, it is clear that in this general regard, the exceptional rules on injunction cannot be applied’ because in most e-commerce contracts the consumer may receive damages, specific performance, or other similar remedy.  

Budnitz presents an analysis of the consumer protection law in the US, drawing from its origins as early as 1960s in the case of *Brown v Board of Education 347 US 483 (1954)* to present, where e-commerce influences the considerations to be taken when dealing with consumer

40 Tamas Dezso Czigler (n 51).
The paper concludes that in the US, and in a situation that many countries across the world may hope to adopt, ‘there will continue to be organizations as well as individual lawyers who will use the legal system to push back those who try to abuse the marketplace, prod regulators to enforce the law more aggressively, persuade judges and juries to find predatory businesses liable, and pull legislators toward more effective consumer protection laws.’

Debusseré contributes to the comparison of the US and EU in a paper on the jurisdictional issues involved in e-consumer protection; highlights the position in the US where the law makes a distinction between active websites where the parties interact directly through the website, interactive websites which create a platform for parties to interact, and passive websites where the website owner does not take part in the activities of the parties; and mentions that in the EU there is no such distinction between the ‘active’ and ‘passive’ consumer.

With reference to India and Japan, Neelekanta’s study shows that as a result of the internet and globalisation, consumers are bombarded with information of different goods and services from all across the world where each producer or service provider claims to be the best; with the large budgets on advertising, consumers are left confused on who to rely on; and as a result there is a need for effective consumer organisations to work with governments and the consumers themselves to develop the capacity of these organisations and empower them to carry out their roles.

42 ibid 1207.
Literature on the subject shows that there is a dire need for consumer protection in e-commerce transactions. Gatt conducts an empirical study on e-consumers and finds that consumers don’t read the terms and conditions of e-commerce transactions where 90% of consumers never read the whole agreement; 64% of e-consumers always click ‘I agree’, and 55% of consumers do not believe that by clicking ‘I agree’ on a website they are entering into legally binding contracts.\(^{45}\)

This protection extends to data privacy, where Solove and Hartzog, in one of the few scholarly studies on the US information privacy law, state that there is no meaningful body of case law on the subject, and shows though a look at the development of privacy policy regulation in the US, that the FTC and not contract law, dominates enforcement of companies’ privacy policies due to consumer protection considerations.\(^{46}\)

The need for consumer protection has been further stressed by Sovern who studies the tendency by firms to increase consumer transaction costs through ways such as obscuring transaction terms, using small print, and omitting important terms in the written contract; explains why firms use such practices to their benefit; and urges lawmakers to prohibit such practices of increasing consumer transaction costs, in the interest of protecting the consumers.\(^{47}\)

In different cultures and countries, there are varying levels of requirements for stringent government intervention in consumer protection issues. Gupta, Iyer and Weisskirch study the cultural differences between India and the US and show that the willingness to disclose specific types of personal information


and protective measures taken by consumers to protect themselves differ due to cultural considerations.\textsuperscript{48}

On an international level, as at 2003, while there was a growing body of literature on online consumer research, it was still ‘relatively fragmented with contradictory results’, and very few of them had attempted to create a systematic review to create a coherent framework for the area.\textsuperscript{49}

Considering that the internet boom took place only at the turn of the century at around year 2000, this was presumably an acceptable state at the time.

By 2005, the Working Group on Internet Governance stated that there was still no global standards to address the issue of e-consumer protection, meaning that e-consumers had limited means of enforcing their rights; and even where these rights were recognised in legislation of the few countries which had already adopted the e-commerce developments, the special nature of these transactions still rendered it difficult for e-consumers to adequately find protection under the law.\textsuperscript{50} Recommendations for further development of e-consumer protection law included tailoring the laws to ‘fully and practically’ encompass challenges faced by e-consumers; collaboration between states to produce international e-consumer protection standards; and to continually assess innovations and technology that may have significant impact on e-consumer protection to enable inclusion in the legal framework.\textsuperscript{51}

The Organisation for Economic Cooperation and Development (OECD), in a follow-up paper to the Seoul Ministerial Declaration for the Future of the Internet Economy investigates the


\textsuperscript{51}ibid.
mechanisms for enhancing consumer trust in e-commerce transactions; and proposes reforms to address e-commerce challenges such as clarification of consumer’s rights and obligations in e-commerce in the legal frameworks, enhancing consumer’s access to information on the e-commerce transactions, developing effective tools of combating hidden unauthorised charges and other fraudulent commercial practices, increase of access of e-consumers to goods and services from different geographical regions; defining confines of consumer privacy in e-commerce transactions, and providing adequate e-commerce dispute resolution mechanisms.\textsuperscript{52}

Consumers International carries out a global survey of consumer organisations; and shows that while there has been good progress in consumer protection, there are still large gaps, for example where only 61% of the countries surveyed have a Consumer Protection Act.\textsuperscript{53} This study is also insightful in that it states that while many countries may have the legislative framework in place, failure to enforce the law is a glaring weakness in many countries across the world; some countries fail to keep up with developments in consumer behaviour and technological advancements; and consumer education coupled with enhanced focus on access to redress mechanisms for consumers are possible solutions to some of the consumer protection problems.\textsuperscript{54}

Skouma illustrates this implementation challenge with a study on the e-commerce regulation in Greece; and add to the research on the area in highlighting another downfall as the lack of interest by consumers to pursue enforcement mechanisms to the end, reporting that most consumers would stop at the point of lodging an informal complaint at the consumer protection

\textsuperscript{52}OECD, ‘Empowering and Protecting Consumers in the Internet Economy’ (OECD 2013) 216.
\textsuperscript{53}Consumers International (n 20).
\textsuperscript{54}ibid.
organisation and not pursue the matter further to the courts or amicable settlement. Al Adwan studies online deceptive advertising and argues for an e-consumer protection framework to prevent cyber-consumers from being duped by unscrupulous e-commerce parties, putting forward that the most effective approach to dealing with the challenges of e-commerce is through state-backed sanctions in an interventionist approach.

Svantesson and Clarke propose a model for evaluation of e-consumer protection law, to establish whether it adequately carries out its role in ensuring the consumers benefit; where the 4 areas of importance in an e-consumer protection framework are (1) access to appropriate information for the consumer to determine if the transaction is beneficial or not; (2) ability to enter into the contract on fair terms, considering the consumer cannot negotiate the terms since the e-business has predetermined the transaction guidelines and requirements; (3) protection of personal data when the consumer enters into the transaction; (4) access to adequate dispute resolution mechanisms if the customer has any grievance arising from the e-commerce transaction.

Chen contributes to the e-consumer protection discourse in a study which states that the challenge of regulation of e-commerce is exacerbated by the nature of the internet which makes it difficult to establish the jurisdiction of the dispute resolution body, or the domicile of the contracting parties; and concludes that the only way that a business may avoid liability from foreign jurisdictions in its business operations is from taking the business completely offline, otherwise by virtue of an online presence, all businesses are exposed to legal liability for

transactions with consumers in other jurisdictions.\textsuperscript{58} Farah examines the jurisdictional rules in e-commerce law in the EU and finds that the EU policy on jurisdiction of e-commerce transactions is based on the fairness theory, whereby since consumers have a weak bargaining position, and therefore the establishment of the jurisdictional rules should favour fair allocation of jurisdiction.\textsuperscript{59}

Literature on the EU discusses consumer protection in e-commerce based on contract law through Directive 97/7/EC on the Protection of Consumers in respect of Distance Contracts, some provisions of Directive 2000/31/EC on e-commerce and general Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.\textsuperscript{60} While the EU has a greater focus on private enforcement than state enforcement, placing consumer protection in e-commerce a civil rather than criminal matter, the EU system is increasingly acknowledging the importance of government regulation and supervision of the market to secure consumer’s rights.\textsuperscript{61}

Jörg Binding and Kai Purnhagen present an all-inclusive outline of the regulations on e-commerce consumer protection in China and the EU by evaluating the different approaches towards consumer protection in e-commerce, and concluding that consumer protection in e-


commerce may be achieved by different means and different systems. In order to mitigate the risks presented through e-commerce, consumers may be protected through the use of government regulation, supervision and enforcement; self- or co-regulation; technology; prudent behaviour; and market surveillance. Jörg Binding and Kai Purnhagen’s comparative analysis on China and EU approaches to consumer protection in e-commerce offer important insight into this research from an international perspective.

China commits consumer protection to state policy, and this is not left in the hands of the citizens. While China has in the past 10 years (from 2011) issued 30 laws on internet regulation, it is still difficult for consumers to receive compensation for personal or property damage occasioned by online businesses. This is because these businesses conceal their true identities, the sellers place the blame on other intermediaries e.g. website owners, and the complex nature of online transactions poses a challenge toward accurate assignment of liability. As a result, while the laws are in place by the letter, the enforcement of these laws poses a challenge toward the effective protection of consumers through e-commerce consumer protection legislation.

Australia has also received attention with regard to academic research in the area of consumer protection in e-commerce. Ha conducts a similar study as the present one but with a different geographical focus. With specific reference to Australia, Ha identifies a number of issues in consumer protection, examines the state of legislation and non-regulatory framework on

63ibid.
65Jörg Binding and Kai Purnhagen (n 75) 190.
66ibid.
consumer protection in e-commerce, and evaluates the framework’s effectiveness in addressing consumer protection in e-commerce.\(^6\) Ha’s study is important to the present one because it is similar in the aims it seeks to achieve, with its objectives to (1) identify five issues in e-consumer protection, (2) examine the current regulatory and non-regulatory framework of e-consumer protection, (3) evaluate this current framework, using Victoria (Australia) as a case study, and (4) recommend how e-consumer protection can be enhanced.\(^6\) With a similar approach, the present study examines the above, but with reference to Kenya.

In a further exploratory study in 2013, Ha and McGregor analyse the status of e-consumer protection governance, described as ‘a relatively new area of research, especially in Australia; (where) both the literature and empirical studies on this topic are currently unavailable’.\(^6\) The study employs the use of an e-survey and interviews to provide both a quantitative and qualitative approach to the issue, with a focus on the six roles of consumer organizations in the e-consumer protection e-governance process: (1) observing compliance of online shop owners with regulations and guidelines; (2) presenting an avenue for dispute resolution of e-consumer disagreements; (3) cooperating with other interested parties to facilitate e-consumer education and training to recognise and deal with risks associated with e-commerce; (4) collaborating with other interested parties in identifying and sanctioning defaulting online shop owners; (5) addressing consumer protection and competition issues in the country’s policy framework; and (6) publishing relevant e-consumer protection information to facilitate public awareness.\(^7\)

\(^{6}\)Huong Ha, ‘Security and Privacy in E-Consumer Protection in Victoria, Australia’, *Trust Management V, 5th IFIP WG 11.11 International Conference, IFIPTM 2011* (2011).

\(^{6}\)ibid.


\(^{7}\)ibid.
In the MENA region, in a study on Jordan, Alhusban contends that the existing Jordanian regulatory frameworks inadequately provide for e-consumer protection, especially because of the focus of Jordanian legislation on the parties’ freedom of contract; where in reality the e-consumer is disadvantaged due to the imbalance in bargaining power and the laws must therefore seek to protect them.\(^{71}\) Alhusban’s empirical study investigates the correlation between consumer protection and e-commerce, and concludes that there is a strong positive relationship between the mechanisms employed in e-consumer protection and individuals’ disposition to buying items over the internet.\(^{72}\)

With a focus on the UAE, AlGhafri examines the legal and regulatory framework of consumer protection; investigates the adequacy of the consumer protection administrative bodies in discharging their duties; compares the Sharia law and UK law; suggests the need for reform of the UAE consumer protection law based on experience of the UK; proposes effective implementation of the consumer protection legal and administrative law to address the challenges; and urges that consumer protection NGOs be given a larger role in supporting the government in realising consumer protection in the member states.\(^{73}\) In Egypt, Saad forms a basis for the discussion of e-consumer protection through investigating the foundations of e-consumer protection, explaining the use of e-signatures in execution of e-commerce contracts, and highlighting the challenge facing e-commerce such as security and privacy.\(^{74}\)

On the regional front, Ndonga assesses the barriers prohibiting the take-up of e-commerce in Africa, concluding that the three main digital divide impediments are inadequate ICT

\(^{72}\)ibid.
infrastructure, low levels of ICT knowledge and the risk of cybercrime. While consumer protection is not mentioned in Ndonga’s study, risks such as cybercrime are in many jurisdictions a challenge for the governments in ensuring that the citizens are protected; thereby making it a consumer protection issue. Neither does Ndonga’s study discuss the CPA or whether the provisions in the CPA adequately cover e-consumer protection issues. There is therefore a gap in the available literature on the CPA and the extent of provision for e-consumer protection.

In a study on developing countries including some African countries, Humphrey and others identify other challenges to e-commerce, stating that (1) e-commerce is not a priority to many developing countries and it hardly contributes to opening up these countries to the global markets; (2) poor ICT, transport, legal, institutional, and trust infrastructure cripple e-commerce; (3) there is insufficient awareness on e-commerce, and a need for training and capacity building, and (4) e-commerce does not prove more beneficial to the firms in developing countries than other forms of business. However, the study by Humphrey and others does not address the issues surrounding legal provision for e-consumer protection under the CPA. While their study offers a valuable insight into the issues surrounding e-commerce, it leaves a gap in literature where it does not particularly address e-consumer protection.

South Africa has consumer protection regulations which govern e-commerce. Helge Huffmann examines the regulations in South Africa that sellers must adhere to when operating online shops, and compares South Africa’s position with the related regulations in Germany. The study analyses the provisions in Chapters 7 and 8 of the Electronic Communications and

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Transactions (ECT) Act 25 of 2002 on consumer protection concerning online-based shops and service providers, and the application of the regulation in practice.\textsuperscript{78} Helge concludes that the ECT Act is an important step toward regulation of e-commerce in South Africa in general, and the mandatory provisions on consumer protection in e-commerce are important in promoting confidence among consumers, and in ensuring predictability of businesses concerning the minimum legal requirements for operating their e-businesses.\textsuperscript{79} The South Africa literature is important to this study because it shows that there is a developing interest in e-consumer protection in Africa.

Erasmus studies consumer protection in international electronic contracts in a comparative analysis of the legal position of e-consumer protection in South Africa and the UK; finds that the failure to provide for e-consumer protection in the law led to legal uncertainty; notes that South Africa’s Consumer Protection Act was ‘written in favour of the consumer’; and concludes that while both countries have the appropriate legislation in place, similar challenges are experienced in the scope of enforcement due to failure to implement the regulations and directives in their entirety.\textsuperscript{80} Similarly, Fitzroy considers the impact of South Africa’s Consumer Protection Act and notes that while the Act has displayed the significant gains the country has experienced in championing the rights of consumers, many terms introduced are transplanted from other legal jurisdictions, and it would take time and money for South Africa’s firms to adapt their policies to the law.\textsuperscript{81}

\textsuperscript{78}Ibid 1.
\textsuperscript{79}Ibid 65.
\textsuperscript{80}C Erasmus, ‘Consumer Protection in International Electronic Contracts’ (Masters Mini-Dissertation, North-West University 2011).
Mdluli further analyses South Africa’s law on e-consumer protection, tracing the origin on e-consumer protection in South Africa; critiquing the Electronic Transactions and Communications Act 25 of 2002, Consumer Protection Act 68 of 2008 and the Protection of Personal Information Act 4 of 2013 in relation to protection of personal information; and concluding that while ‘South Africa’s legislative regime does offer relief or protection to online consumers, and notwithstanding that there is a need for streamlining and refinement, the three statues also conform to international instruments or directives on consumer protection and electronic commerce.’

Plückhahn considers data protection in the e-consumer protection field, comparing the position in South Africa to that in the EU; using the concept of user confidence in the e-consumer protection law to measure the effectiveness of the e-consumer protection law; and finding that to consumers, the most important aspect of e-consumer protection is data protection, where the users of various e-commerce mechanisms are generally mostly concerned with how data collected about them in the course of dealings with other parties over electronic relations is shared.

The United Nations Conference on Trade and Development (UNCTAD) Division on Technology and Logistics examines the frameworks for e-commerce in Africa with an aim of assessing the status of cyber-legislation in the EAC; discusses the need for coordination of cyber-legislation in the region; and offers lessons to other countries based on the implementation of reforms

specifically in Burundi, Kenya, Rwanda, Tanzania and Uganda. This study offers direction in the area of consumer protection laws, but the aspect of consumer protection is afforded only a small section in the discussion of each country. Resto examines the consumer protection framework in the telecommunications industry in Tanzania taking the Tanzania Communications Regulatory Authority as a case study; finds that due to the loopholes in telecommunications law in Tanzania as at 2011 there was room for telecommunication companies to take advantage of consumers; and proposed that the Tanzania government increase international cooperation efforts to protect e-consumers.

There is already substantive academic research on the facilitating and militating factors on the adoption and usage of e-commerce in Kenya. With a focus on Kenya, Oseko studies the concept of international e-commerce in Kenya, presenting an appraisal of the policy, legal and regulatory frameworks as at 2010. Magutu, Ongeri and Mwangi look at a case study of banks in Kenya and the effects of e-commerce in their business processes; and conclude that commercial banks in Kenya have formalized policy on e-commerce and internal business process management. From a tax perspective, Watako focuses on the application of Kenyan VAT law to e-commerce and finds that the cross-border nature of e-commerce poses significant threats to tax compliance; aspects of withholding tax have been upheld by Kenya’s courts in Stanbic Bank.

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of Kenya v Kenya Revenue Authority.\textsuperscript{89} but tracing taxable transactions made over the internet is a ‘daunting challenge’.\textsuperscript{90}

In conclusion, from the literature reviewed, certain e-commerce challenges were observed, which will be further addressed under Chapter Two which discusses e-commerce and its challenges. While the present body of knowledge discusses the concept of e-commerce and the developments in the legislative framework, it does not give specific attention to the consumer protection provisions. Further, Kenya has been neglected as a geographical focus on the issues relating to e-consumer protection. There is insignificant literature on the effect of e-commerce on consumer protection law in Kenya. There is also insignificant focus on the CPA, which is the main law in consideration in this study. This study is therefore relevant in the field of legal research, as it is a pioneer insight into the impact of e-commerce on consumer protection law in the country.

1.7 OBJECTIVES OF THE RESEARCH

The main objective of this research was to examine the provisions of consumer protection and e-commerce provisions in existing law in Kenya. The study argues that to keep current with the global trends in technology, Kenya requires a review of the existing framework to evaluate if e-consumers are adequately protected; and offers recommendations on how the law may further provide for e-consumer protection.

The specific objectives were:

\textsuperscript{89}Stanbic Bank of Kenya v Kenya Revenue Authority [2009] eKLR.
a) To analyse the consumer protection issues arising from current state of e-commerce in Kenya;

b) To assess the extent to which consumer protection law in Kenya addresses the issues arising from e-commerce in Kenya;

c) To give recommendations on adaptations of consumer protection law in Kenya to adequately cover e-commerce transactions in Kenya.

1.8 RESEARCH METHODOLOGY

This research focused on the legislative and regulatory framework on e-commerce and consumer protection in Kenya. This was prepared on the basis of both desktop research, and quantitative research methods through the use of a questionnaire. The desktop research involved analysis of primary texts such as constitutions, legislation, regulations, rules, and case law. The study also employed the use of secondary texts including books, articles, and law journals.

In addition, a structured questionnaire collected views of representatives of the public bodies and non-governmental organisations dealing with e-consumer protection. This quantitative method was used to study the social aspects of the study, to establish whether there is a causal relationship between regulation of e-commerce and consumer participation in e-commerce transactions.\(^9\) It was developed based on the examination of the best practices on e-consumer protection mechanisms in the US, UK and South Africa, and sought the views of stakeholders on whether the recommendations on change of Kenya’s e-consumer protection laws would be justified and applicable in Kenya.

1.9 LIMITATIONS OF THE STUDY

This study was limited to desktop research and closed-ended questionnaires distributed to respondents from Nairobi County, within the Republic of Kenya. The desktop research concentrated on only three other countries: the US, UK and South Africa. There are other countries which have made developments in e-consumer protection in the world, but these were not considered. However, the three countries studied are representative of the leaders in e-commerce, with South Africa taken to provide an African perspective on the study.

Secondly, the closed-ended questionnaires took into account the views of respondents in Nairobi County. The views of members of public bodies and consumer protection organisations residing and working in other counties were not be considered. However, since Nairobi County represents the capital of Kenya, the findings are taken to be those of Kenyans across the country.
CHAPTER TWO: E-COMMERCE AND ITS CHALLENGES

2.0 INTRODUCTION

This chapter explores the concept of e-commerce. Electronic commerce (‘e-commerce’) is defined in various ways by various authors. It is not limited to internet, and includes all business transactions which take place using electronic systems, including Electronic Data Interchange (‘EDI’). The chapter also highlights the challenges that arise from e-commerce. This study focuses on the challenge of (1) information disclosure and verification, (2) data and payment security, (3) jurisdiction, (4) redress and (5) privacy; (6) fraud and (7) insufficient opportunity to inspect goods on delivery. This discussion is important to the study because it presents the conceptual framework within which regulation of e-consumer protection operates. In understanding what constitutes e-commerce and the challenges facing it, the stage is set for an enquiry into the ways in which these issues may be addressed in regulation.

2.1 E-COMMERCE

Electronic commerce (‘e-commerce’) is defined in various ways by various authors. Patricia Buckley defines it as ‘business processes which shift transactions to the Internet or some other non-proprietary, Web-based system’ and ‘a means of conducting transactions that, prior to the evolution of the Internet as a business tool in 1995, would have been completed in more traditional ways – by telephone, mail, facsimile, proprietary electronic data interchange systems,
or face-to-face contact’. In the UK case of **Godfrey v Demon Internet Ltd [2001] QB 201**, Moorland J categorises internet technology as either ‘e-mail, Usenet or the World Wide Web.’ Helge Huffmann argues that the Buckley definition is actually a definition of internet commerce, and offers Roger Clarke as the ‘pure definition’ of e-commerce:  

“...the conduct of commerce in goods and services, with the assistance of telecommunications and telecommunications-based tools.”

E-commerce is further been defined as ‘the use of electronic communications and digital information processing technology in business transactions to create, transform, and redefine relationships for value creation between or among organizations, and between organizations and individuals.’ In Kenya, e-commerce has been defined as ‘a method of trading that replaces paper-based documentation by a mutually binding electronic protocol between buyers and sellers’. However, the CPA does not provide a definition of e-commerce or e-consumer.

E-commerce is not limited to internet, and includes all business transactions which take place using electronic systems, including Electronic Data Interchange (‘EDI’). EDI is defined as ‘the electronic exchange of information between two business concerns (trading partners), in a specific, predetermined format’ where ‘(t)he exchange occurs in basic units called transactions, which typically relate to standard business documents, such as healthcare claims or remittance advices’. It has also been defined as ‘the direct computer-to-computer exchange of standard

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93Helge Huffmann (n 90) 2.
95KIF Advocacy Project (n 1).
97Wyoming Health Department, ‘Electronic Data Interchange (EDI)’, General Provider Information (Wyoming Health Department 2012).
formatted business transactions between one or more mutually agreeable business partners. EDI is a process where batches of files are sent from one trading partner (the sender) and another trading partner (the receiver) where through the back and forth transmission of information, both trading partners become either a sender or receiver at different points in time of their relationship.

EDI files contain information relating to the commercial transaction, for example the sender’s address, telephone number, description of the type of document, prices, quantities and total value of the transaction. Since there are numerous types of transactions which may be carried out through EDI, various standards have been developed for universal application to streamline the processes. Some standards are industry specific, such as those created specifically for the insurance, finance or automobile industry; while there have been efforts to create more international standards which may be adopted across the board for organisations performing different functions.

The following table shows some examples of EDI standards, arranged in terms of those which are inter-industrial, industry-oriented, national and international:

<table>
<thead>
<tr>
<th>National</th>
<th>International</th>
</tr>
</thead>
</table>

98 US Department of Housing and Urban Development, ‘Implementing EDI at HUD’ (Housing and Urban Development) s 1.
100 Data Interchange PLC, ‘Electronic Data Interchange’ 6 – 7.
<table>
<thead>
<tr>
<th>Category</th>
<th>Inter-Industrial</th>
<th>Industry-Oriented</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Inter-Industrial</strong></td>
<td><strong>ANSI X.12: American National Standards Institute</strong></td>
<td><strong>EDIFACT: Electronic Data Interchange for Administration, Commerce and Transport, developed by the UN to standardise EDI across different industries and on an international scale</strong></td>
</tr>
<tr>
<td></td>
<td>X.12, used by different industries in the USA</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>TRADACOMS – Trading Data Communications Standards</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Industry-Oriented</strong></td>
<td><strong>VDA: Verband der Deutschen Automobilindustrie</strong> (Association of German Automobile Producers) used by German automobile producers</td>
<td><strong>ODETTE: Organization for Data Exchange by Tele transmission in Europe</strong></td>
</tr>
<tr>
<td></td>
<td><strong>SEDAS: Standardregelungen einheitlicher Datenaustausch-Systeme</strong> (Standard Rules of Uniform Data Interchange Systems)</td>
<td><strong>RINET: Reinsurance and Insurance Network, an international reinsurance and insurance community closed user-group</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>SWIFT: Society for Worldwide Interbank Financial Telecommunication, an international banking community’s closed user group</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>SITA: Société Internationale de Télécommunications Aéronautiques, used by the airline industry in Europe.</strong></td>
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</tbody>
</table>

*Table 1: Examples of EDI standards*
In various texts, another term that would arise and begs a definition is ‘e-business’. Laundon and Traver make a distinction between e-commerce and e-business, stating that while e-business refers to the activities of the business to operate its internal functions using technology, e-commerce involves interaction of the business with outsiders – where B2B transactions are between two or more businesses, while B2C transactions are between the business and customers. In Kenya, the CPA provides the definition of an ‘internet agreement’ as ‘a consumer agreement formed by text-based internet communications’ whereby a ‘consumer agreement’ is defined as ‘an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment’. Further, the Act defines a ‘remote agreement’ as a consumer agreement entered into when the consumer and supplier are not present together. However, the CPA does not make reference to either e-business or the different categories of e-commerce discussed in the next paragraph.

There are 5 e-commerce models: (1) Business to Business (B2B) which involves e-commerce activities between businesses usually carried out through EDI; (2) Business to Consumer (B2C) where the e-commerce retailer focuses on the consumer in a merchant model or brokerage model; (3) Consumer to Business (C2B) where the consumer determines the price of goods or services and the focus shifts from the business selling, to the consumer buying; (4) Consumer to Consumer (C2C) which operates in a similar manner to an auction where consumers may interact directly with each other in a person-to-person model; and Business to Government (B2G) where

103Consumer Protection Act (n 3).
government bodies interact directly with the citizens through availing government goods and services over an electronic system.\textsuperscript{104}

There are 4 main categories of e-commerce transactions which occur in everyday life: (1) direct marketing, selling, and services; (2) electronic banking; (3) secure distribution of information; and (4) value-chain trading and corporate purchasing.\textsuperscript{105}

Direct marketing, selling and offer of services may take place on websites that create a platform where prospective buyers and sellers of various commodities can meet virtually. In some instances, the actual sale does not take place on such sites as they are simply meeting grounds for the parties to the transactions. The actual transactions occur in a manner and place agreed on by the parties to the transaction. These sites act as brokerage sites, and operate as third parties to the e-commerce transactions by offering the platform but neither selling the goods nor endorsing the products and services sold. Examples of websites involved in direct marketing and selling of goods and services are OLX (www.olx.co.ke), Ebay (www.ebay.com), Kilimall (www.kilimall.co.ke), Jumia Kenya (www.jumia.co.ke) and Amazon (www.amazon.com).

Electronic banking involves all banking transactions that take place via electronic means as opposed to via physical means. This should be distinguished from internet banking which is a form of electronic banking.\textsuperscript{106} On one hand electronic banking includes a large number of banking services including telegraphic transfers, use of debit and credit cards as well as mobile and internet banking, while on the other hand internet banking is defined as ‘the use of the Internet as a remote delivery channel for banking services’ including traditional banking

\textsuperscript{104} Ritendra Goel, \textit{E-Commerce} (New Age Publishers 2007).
\textsuperscript{105} ibid.
processes like ‘opening a deposit account or transferring funds among different accounts…electronic bill presentment and payment (allowing customers to receive and pay bills on a bank’s Web site)’. Secure distribution of information is another facet of e-commerce. Data may also be the subject matter of e-commerce transactions, where this data alongside processed information constituting digital products such as music files need to be sold on a secure platform to prevent third parties other than the consumer from obtaining access. Lastly, value-chain trading and corporate purchasing are a category of e-commerce transactions of importance. A ‘value chain’ is a sequence of activities termed as ‘value activities’, which every business performs to design, produce, market, deliver and support its product. Value-chain trading and corporate purchasing in e-commerce refers to the set of systems used especially by businesses to manage their internal business functions including procurement.

2.2 CHALLENGES ARISING FROM E-COMMERCE

E-commerce is fraught with new challenges, especially since it is involved with development of new technology and concepts which the law must consistently adapt to. A number of the challenges arising from e-commerce are discussed below.

The most prominent challenges arising from e-commerce are (1) information disclosure and verification, (2) data and payment security, (3) jurisdiction, (4) redress and (5) privacy. E-

110Huong Ha (n 80).
commerce also faces challenges in the area of (6) fraud and (7) insufficient opportunity to inspect goods on delivery. Another challenge that faces e-commerce is lack of consumer trust which and ability of the common *mwananchi* (‘Wanjiku’) to trade on e-commerce platforms due to fear of technology which is rooted in low education levels.

### 2.2.1 Information disclosure and verification

While e-consumers are required to provide personal information over the internet to individuals they do not know, there is an information asymmetry associated with online transactions where retailers provide insufficient information on their products and services.\(^{111}\)

The information asymmetry may be exploited by operators of e-commerce sites to incorporate hidden charges to transactions to influence the decision-making of potential customers who opt in to the transaction without knowledge of the full implications of the process.\(^{112}\) For example, on websites which allow consumer to purchase goods to be delivered to the consumer’s premises, transportation charges are levied, including shipping costs.\(^{113}\) On some websites, the costs of the transaction are not totalled at the first instance to allow a consumer to properly factor in the entire price.

In the banking sector, banks are required to duly inform their customers of the charges that apply to credit cards failure to which the borrower will not be liable to pay the applicable fees.\(^{114}\)

Banks and other lenders are required to provide borrowers with an initial disclosure

\[\text{\footnotesize\textsuperscript{i11}ibid.}\]
\[\text{\footnotesize\textsuperscript{i12}Ritendra Goel (n 117).}\]
\[\text{\footnotesize\textsuperscript{i13}ibid.}\]
\[\text{\footnotesize\textsuperscript{i14}Consumer Protection Act (n 3).}\]
However, when one purchases goods online, the applicable charges are rarely consolidated into one statement thus exposing the consumer to lawful but improperly disclosed charges.

Shipping charges generally do not include import duty applicable in a country. A consumer purchasing electronics from the United States of America would only be made fully aware of import duty when they are informed that their goods are being held at a bonded warehouse until they fully pay the applicable taxes. The buyer would then have a fixed timeframe within which the taxes are to be paid, having in mind situations where the consumer was not fully aware of the particulars of what was included in payments made to the supplier.

### 2.2.2 Data and payment security

Data and payment security issues arise in a number of categories, including (1) confidentiality of information, where the e-commerce network environment still requires the same levels (if not higher levels) of commercial confidentiality; (2) integrity of information and prevention of tampering with data and information through fraud or error; (3) validity of information including information relating to prices and identity of parties to e-commerce transactions; (4) non-repudiation of information where parties can be prevented from denying the role played in a transaction, especially in the face of situations where there is no physical evidence of commitment; (5) authenticity of the transaction status; and (6) reliability of the system.

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115 ibid 64.
116 Customs and Excise Act s 36.
supporting the e-commerce transactions to prevent failures of the network through hardware failures, software errors, malignant software including viruses and natural disasters.\textsuperscript{117}

With the information shared and stored on databases worldwide, there are concerns of theft and unauthorised sharing of information, coupled with the danger of misuse of credit information collected in online payments.\textsuperscript{118} On a global level, there have been a series of cases where hackers infiltrate electronic systems, and seize important data and payment information of a business, causing concern among e-consumers who use the services of the particular business.\textsuperscript{119}

Consumer fraud is defined as ‘a form of economic crime that involves deception of the victim with the promise of goods, services or other benefits that are non-existent or are grossly misrepresented’.\textsuperscript{120} The nature of e-commerce allows the perpetration of consumer fraud due to a number of reasons including ‘anonymity and easy access, the lack of risk awareness, the lack of cyber-security skills and the complex legal prosecution process for low value cross-border transactions’.\textsuperscript{121}

This involves the intentional and unlawful alteration of facts so as to deceive another.\textsuperscript{122} In e-commerce, fraud occurs in a number of ways, including identity fraud such as bank where persons use a consumer’s personal information to impersonate the consumer in banking transactions; theft of cash and goods through various mechanisms including spread of viruses created to automatically transfer funds from unsuspecting consumers; procurement fraud

\textsuperscript{118}Huong Ha (n 80).
\textsuperscript{119}Ritendra Goel (n 117).
\textsuperscript{120}K Holtfreter, MD Reisig and TG Blomberg, ‘Consumer Fraud Victimization: An Empirical Study’ [2005] Thomas Law Review.
\textsuperscript{121}Malin Gustavsson and Ann-Marie Johansson, ‘Consumer Trust in E-Commerce’ (Dissertation, Kristianstad University 2006).
\textsuperscript{122}Black Henry Campbell, ‘Fraud’. 
including duplication of purchase order files and creation of fictitious vendor accounts on procurement systems; and electronic funds transfer fraud.¹²³

In Kenya, data and payment security issues have come to the limelight on a number of occasions. One such data security issue that recently surfaced concerned a claim that the Government of Kenya’s main procurement tool, Integrated Financial Management Information System (IFMIS), was compromised when Adan Harakhe, the National Your Service Deputy Director reported to the police that his password had been stolen.¹²⁴ Such a theft could easily result in the award of tenders to unsuitable candidates or the inflation of accepted tenders. Such an occurrence reduces public confidence in electronic means of conducting business as the government, the body that is supposed to protect consumers, as it could be a victim of fraud.

Consumer trust is essential for the development of e-commerce.¹²⁵ Incidences of fraud create fear among potential e-consumers, where for example, sites where fraudulent traders pose as legitimate retailers steal money in online transactions may be avoided by the consumers, leading to loss of business to genuine traders.¹²⁶

¹²⁵Malin Gustavsson and Ann-Marie Johansson (n 134).
2.2.3 Jurisdiction

Jurisdictional issues arise where the parties to an e-commerce transaction are based in different countries leading to the interaction between different legal systems and their differing treatment of e-commerce matters.\(^{127}\) The nature of e-commerce is that it is an international phenomenon, and the lack of a unified legal framework in all the countries involved in the transaction poses challenges in regulation and enforcement.\(^ {128}\) Courts consider matters of territorial jurisdiction meaning the laws of the country where the parties to the transaction originate, subject matter jurisdiction, meaning the laws concerning the country where the transaction itself occurred, as well as pecuniary jurisdiction meaning the value of the matter which the parties to the transaction are disputing.\(^ {129}\) While these 3 components of jurisdiction are considered for traditional transactions, the territorial jurisdiction is a pertinent issue because the electronic mechanisms through which e-commerce takes place is borderless, and therefore does not have any defined territory.\(^ {130}\)

Jurisdiction is important to the government because of differing application of tax laws depending on which country is established as the deserving country to collect the revenue.\(^ {131}\) For example, a U.S. Treasury Department study states that:

"...new technologies, particularly communications technologies including the Internet, have effectively eliminated national borders on the information highway. As a result, cross-border..."


\(^{128}\)Huong Ha (n 80).

\(^{129}\)Lee A Bygrave and Dan Svantesson (n 140).

\(^{130}\)Sachin Mishra, ‘Determining Jurisdiction over E-Commerce Disputes in India’ Manupatra

transactions may run the risk that countries will claim inconsistent taxing jurisdictions, and that taxpayers will be subject to quixotic taxation."\(^{132}\)

To address these concerns, revenue authorities have called for a global tax policy to deal with matters concerning the jurisdiction of cross-border transactions, a matter which concerns e-commerce transactions due to their international nature.\(^{133}\)

Jurisdictional issues arising in e-commerce also relate to situations where an activity which is legal in one jurisdiction is illegal in another jurisdiction, bringing to the fore the question of which country is best placed according to the law, to determine the matter.\(^{134}\) In **Minnesota v Granite Gates Resorts 569 NW2d 715 (Mn. App. Ct. 1997)**, the subject activity was online gambling, where the defendants through the internet, engaged in gambling activities with residents of Minnesota. While gambling was not an offense in certain jurisdictions, in Minnesota where it is a crime, the court in Minnesota assuming jurisdiction of the matter found the defendants at fault. The court stated:

"*Through their Internet advertising, defendants have demonstrated a clear intent to solicit business from markets that include Minnesota and, as a result, have had multiple contracts with Minnesota residents, including at least one successful solicitation. The cause of action here arises from the same advertisements that constitute appellants’ contacts with the state and implicates Minnesota’s strong interest in maintaining enforceability of its consumer protection laws.*"

\(^{134}\)Ibid.
2.2.4 Redress

Redress for e-consumers may be difficult to obtain, and e-consumers at times do not succeed in pursuing compensation where there is a breach of the contract with the retailer or other service provider. E-consumers seeking compensation, refunds or replacement for goods or services of unacceptable quality may be reluctant to do so especially due to the distance between the e-consumer and the shop, and the costs involved in returning the goods.\textsuperscript{135} While in a traditional commercial contract the e-consumers may turn to the national courts, ‘the difficulty of utilising traditional dispute resolution methods in low-value cross-border disputes has led to interest in low-cost, cross-jurisdictional dispute resolution methods’.\textsuperscript{136}

Where the parties are far away from each other, especially for cross-border transactions that may involve parties from different continents, resolving a dispute arising from the e-commerce transaction may be expensive if the parties seek to rely on traditional dispute resolution mechanisms such as litigation, where the cost of hiring lawyers and traveling to the country whose courts have jurisdiction to handle the matter may be high.\textsuperscript{137} This is coupled by the fact that the subject matter of an e-commerce transaction may be an item such as a book or DVD valued at Kshs 1000. On many occasions, then, the cost of resolution of such disputes by

\textsuperscript{135}Huong Ha (n 80).
litigation is not proportionate to the amount of compensation the e-consumer would be seeking.\textsuperscript{138}

While there is a global trend toward alternative dispute resolution (ADR) for cross-border transactions, 41\% of disgruntled e-consumers who raise issue with their international e-commerce transaction through a formal dispute resolution process are not satisfied with the way in which their complaints were handled, and while most of these individuals do not pursue the matter further, only 6\% of them turn to alternative dispute resolution as a redress mechanism.\textsuperscript{139} This shows that a large number of disgruntled e-consumers do not succeed with the available redress mechanisms.

There is an increasing interest in Online Dispute Resolution (ODR), a dispute resolution mechanism where ‘information communication technologies (ICT) or “online technology” (is) applied to dispute resolution (other than litigation) in the courts, and includes arbitration’.\textsuperscript{140} However, ODR has not developed in Kenya to the point of offering a reliable dispute resolution avenue for e-consumers. Therefore, it does not offer a concrete solution to the challenge that redress for e-consumers with a dispute arising from e-commerce.

\textbf{2.2.5 Privacy}

E-consumers are apprehensive about the disclosure of their private information shared with the unauthorised individuals, including where email addresses shared during online transactions may

\textsuperscript{138} ibid.


\textsuperscript{140} J. Hornle (n 150).
be obtained by spammers, or passwords skimmed to access the e-consumer’s email account.\textsuperscript{141} In many instances, when a consumer makes a payment or otherwise engages in e-commerce transactions, the consumer is required to give a substantial amount of personal information which may then be sold to companies that require this information, such as targeted marketing campaign companies.\textsuperscript{142}

Privacy is an important subject of debate in e-commerce because if the consumers are not comfortable with engaging in e-commerce transactions because of a lack of trust for the e-commerce system due to privacy issues, many potential consumers will shy away and fail to benefit from the advantages of e-commerce.\textsuperscript{143}

\subsection{2.2.6 Insufficient opportunity to inspect goods on delivery}

The nature of e-commerce renders it difficult for a consumer to inspect goods purchased before accepting them, especially if the goods are delivered by an independent contractor. To illustrate this predicament in the Kenyan context, where a consumer purchases an item from an online website and the same is delivered by the Postal Corporation of Kenya to the consumer, the courier would in an ideal situation afford the consumer an opportunity to inspect the computer before being deemed to have accepted it. Certain aspects of the computer, such as its battery life, cannot be tested within a short period.

Further, the internal policies of companies offering e-commerce services may at times frustrate efforts to realise consumer rights, especially where a customer argues an insufficient opportunity

\begin{itemize}
\item \textsuperscript{141} Huong Ha (n 80).
\item \textsuperscript{142} Ritendra Goel (n 117).
\item \textsuperscript{143} Sarah Andrews, ‘Public Comment on Barriers to Electronic Commerce’, \textit{Laws or Regulations Posing Barriers to Electronic Commerce} (US Department of Commerce – Office of the General Counsel, Electronic Privacy Information Center (EPIC)).
\end{itemize}
to inspect goods on delivery, but the company’s internal policy does not adequately provide for reprieve for the consumer. In **Consumer Federation of Kenya v Fones Express Ltd (2014) Unreported**, the plaintiff had purchased a mobile phone and two computers from the defendant company. The defendant refused to replace the faulty products thus the matter was reported to the Consumer Federation of Kenya (COFEK). The unsatisfied consumer needed to seek the support of COFEK because the plaintiff’s internal procedure did not sufficiently address the concerns of the consumer.

Traders of electronics with physical trading grounds tend to offer warranties of between six months and two years (in the case of Samsung products). The practice for such traders is that they allow products to be returned and repaired within the warranty period if they are faulty. The law of sale of goods provide for a right of the buyer to have reasonable opportunity to inspect the goods.\(^{144}\) This brings into question what a ‘reasonable opportunity is’. It is argued that some types of goods such as electronics or clothes may require that the consumer uses the goods for a while to ascertain if there are inherent problems. The reasonableness may therefore vary, where for food the period may be a matter of minutes, while for a laptop with a faulty battery, inspection at the time of delivery may not reveal the underlying problem with the item.

### 2.3 CONCLUSION

This chapter has discussed e-commerce and its various components. E-commerce is defined in various ways by various authors, including ‘business processes which shift transactions to the Internet or some other non-proprietary, Web-based system’; ‘...the conduct of commerce in goods and services, with the assistance of telecommunications and telecommunications-based

\(^{144}\)Sale of Goods Act s 35(1).
tools’; ‘the use of electronic communications and digital information processing technology in business transactions to create, transform, and redefine relationships for value creation between or among organizations, and between organizations and individuals; and ‘a method of trading that replaces paper-based documentation by a mutually binding electronic protocol between buyers and sellers’. E-commerce is not limited to internet, and includes all business transactions which take place using electronic systems, including Electronic Data Interchange (‘EDI’).

There are 5 e-commerce models: (1) Business to Business (B2B) which involves e-commerce activities between businesses usually carried out through EDI; (2) Business to Consumer (B2C) where the e-commerce retailer focuses on the consumer in a merchant model or brokerage model; (3) Consumer to Business (C2B) where the consumer determines the price of goods or services and the focus shifts from the business selling, to the consumer buying; (4) Consumer to Consumer (C2C) which operates in a similar manner to an auction where consumers may interact directly with each other in a person-to-person model; and Business to Government (B2G) where government bodies interact directly with the citizens through availing government goods and services over an electronic system. There are 4 main categories of e-commerce transactions which occur in everyday life: (1) direct marketing, selling, and services; (2) electronic banking; (3) secure distribution of information; and (4) value-chain trading and corporate purchasing.

This chapter has also presented the challenges facing e-commerce in Kenya, which impinge on the impact of e-consumer protection. E-consumer protection issues arising by virtue of the nature of e-commerce include (1) information disclosure and verification, (2) data and payment security, (3) jurisdiction, (4) redress, (5) privacy, (6) fraud and (7) insufficient opportunity to inspect goods on delivery. These challenges are underscored by insufficient awareness of the consumer populace of e-consumer protection in the field. With little knowledge about
technology and its workings, the common *mwananchi* is disadvantaged because they do not know how to adequately address situations where unscrupulous individuals seek to take advantage of the e-consumers. With insufficient consumer education on the area, this puts e-consumers at a disadvantage and this ultimately affects efforts at e-consumer protection. These challenges inhibit the growth of e-commerce, and present matters for resolution to ensure e-consumer protection is enhanced. The next chapter discusses e-consumer protection in Kenya. It draws from this chapter which has explained the nature and challenges of e-commerce, advancing the argument that e-consumers should increasingly come into the protection of consumer law.
CHAPTER THREE: E-CONSUMER PROTECTION IN KENYA

3.0 INTRODUCTION

This chapter examines the primary research findings, the current consumer protection law in Kenya, the extent to which it covers e-commerce, and problems arising in the implementation of consumer protection law in e-commerce transactions in Kenya.

3.1 CONSTITUTION OF KENYA, 2010

The Constitution of Kenya is the most authoritative source of consumer protection law in Kenya. However, e-commerce is not directly referred to in the Constitution of Kenya, 2010. While the Constitution does not give detailed provisions of e-consumer protection, it outlines the general rights of consumers and the ways in which these rights can be enforced and protected.

The Constitution of Kenya of 1963 did not cater for consumer protection rights despite the fact that it was the overarching law in a time when transactions were nonetheless being conducted electronically. An increase in the buying options available to consumers exposes them to numerous risks such as lack of recourse in the event that goods purchased online are of poor quality or false advertising. The Constitution of Kenya of 2010 is therefore a progressive constitution as it provides for the compensation of victims of defective goods among other rights.

146 ibid.
147 ibid.
The Constitution provides that consumers have the right (1) to goods and services of reasonable quality; (2) to the information necessary for them to gain full benefit from goods and services; (3) to the protection of their health, safety, and economic interests; and (4) to compensation for loss or injury arising from defects in goods or services.\textsuperscript{148} It further provides that Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.\textsuperscript{149} This provision for the rights of consumers in Kenya applies to goods and services offered by public entities or private persons.\textsuperscript{150} These rights are enforceable through litigation in the High Court of Kenya as well as any subordinate court given the jurisdiction. Further, technology is recognised as a form of property, where the Constitution provides puts the State under an obligation to recognise technology as it is important in the development of this country.\textsuperscript{151}

Consumer rights as enshrined in the Constitution mainly take effect through legislation such as the Sale of Goods Act and the Consumer Protection Act.\textsuperscript{152} However, the enforcement of these rights is mainly impeded by the ignorance of a large number of Kenyans, and as consumers are tasked with learning about their rights, mere knowledge of their rights is not deemed to be sufficient, and consumers are in addition required to take steps to avoid infringement of their rights.\textsuperscript{153} This turns out to be a high standard for each Kenyan consumer to achieve, and simple actions such as checking the expiry dates on goods before purchasing as well as analysing

\textsuperscript{148}Constitution of Kenya (n 2).
\textsuperscript{149}ibid art 46(2).
\textsuperscript{150}ibid art 46(3).
\textsuperscript{151}ibid art 11(2)(b).
\textsuperscript{152}PLO Lumumba, Morris Kiwinda Mbondenyi and Steve O Odero (eds), \textit{The Constitution of Kenya: Contemporary Readings}.
\textsuperscript{153}ibid.
whether the quality and quantity of goods corresponds to the price charged, are largely ignored by the majority of Kenyans.


3.2 KENYA INFORMATION AND COMMUNICATIONS ACT

The Kenya Information and Communications Act of 2009, as amended by the Kenya Information and Communications (Amendment) Act of 2013 is the main legislation that provides for e-commerce. The Act recognises the existence and formation of contracts by electronic means through ways including providing a definition for an electronic signature.\textsuperscript{154} Apart from ground breaking provisions acknowledging the internet revolution and the advent of e-commerce transactions, the Act provides for the establishment of the main regulatory body in e-consumer protection: the Communications Authority of Kenya.

The Communications Authority of Kenya as established by the Kenya Information and Communications (Amendment) Act in 2009 took over the mandate of the former regulator: the Communications Commission of Kenya. Since its establishment, the Communications Authority of Kenya has been involved in major projects such as the Digital Migration, a project that involved ensuring that all television signal transmission is done through a digital based network in an effort to comply with the international deadline for switching off analogue transmission.\textsuperscript{155} One of the proposed benefits of this activity in relation to e-consumer protection is the resultant

\textsuperscript{154}Kenya Information and Communications Act 2009 s 2.

release of transmission spectrum which could contribute to improved internet connectivity for e-consumers.\textsuperscript{156}

The Communications Authority of Kenya is mandated to promote public confidence in electronic transactions, ensuring the use of reliable electronic records to facilitate electronic transactions among other functions including (1) facilitating electronic transactions by ensuring the use of reliable electronic records; (2) facilitating electronic commerce and eliminating barriers to electronic commerce such as those resulting from uncertainties over writing and signature requirements; (3) promoting public confidence in the integrity and reliability of electronic records and electronic transactions; (4) fostering the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium; (5) promoting and facilitating efficient delivery of public sector services by means of reliable electronic records; and (6) developing sound frameworks to minimize the incidence of forged electronic records and fraud in electronic commerce and other electronic transactions.\textsuperscript{157}

Electronic transactions are bolstered by the Act where it provides that written records include electronic records. The shortfall of this Act is that it mainly deals with the telecommunications aspect as opposed to the relationship between the producer and consumer. Matters such as jurisdiction with regard to online based businesses with servers abroad are not addressed. Implied contract terms and the protection of consumers of e-commerce are also not adequately addressed. In addition, the sections of this Act relating to e-consumer protection have not formed


\textsuperscript{157}KICA Act (n 167).
the subject of much litigation as the Communications Authority has dispute resolution mechanisms in force which handle such matters which would otherwise fall under the jurisdiction of the courts.

The Communications Authority of Kenya has the power the pass regulations. The Fair Competition and Equality of Treatment Regulations were developed by the Authority to regulate competition and prevent and deal with situations where businesses abuse their dominance in any sector of the economy. The dominance regulations have been largely associated with the assessment of whether companies such as Safaricom Limited have been abusing dominant position in the telecommunications industry.158

The functions of the Communications Authority include (1) licensing players in the communications industry; (2) managing frequency spectrum within the country; (3) making provisions of the growth of e-commerce; (4) regulating communication equipment used in Kenya; (5) protecting consumer rights in the industries it regulates; (6) regulation of competition to ensure only fair trade practices are used; and (7) ensuring that those granted licenses adhere to the conditions for granting the licenses.

In order to fulfil its function of protecting consumer rights in communications industry, the Communications Authority has the power to resolve disputes between consumers and service providers as provided for under the Kenya Information and Communications (Consumer Protection) Regulations of 2010.159 A consumer who has a dispute with a licensee must notify the parties and the Authority of the dispute within 60 days of its occurrence, and it is important

159Kenya Information and Communications (Consumer Protection) Regulations 2010 s 3.
to note that the Authority should not focus on the technicalities of the process of dispute resolution.\textsuperscript{160} This is a positive aspect from a consumer’s perspective because it does not place rules of procedure on a high pedestal to the possible detriment of the consumer who may not be well represented by legal counsel. The scope of the Kenya Information and Communications (Consumer Protection) Regulations of 2010 is limited to disputes the consumer may have with the licensees of the Communications Authority. The Act and regulations are silent on disputes between consumers and e-commerce suppliers. This leads to the inference that such disputes are not placed before the Communications Authority.

While the mandate of the Communications Authority of Kenya is clear according to the Act, the Authority however has inadequate remedies with regard to internet agreements, and enforcement of contractual obligations of online based businesses whose servers are outside the country has not been achieved due to lack of proper networking with similar agencies in other countries.\textsuperscript{161} The establishing does not provide for specific technical aspects such as proper listing of the internet-based businesses that the legislation regulates.\textsuperscript{162} The Act only regulates licensees with the main tool of enforcement being the revocation or threat of revocation of licenses; and thus social media platforms and search engines are not adequately provided for, and such businesses can thus be easily be used to commit crimes.\textsuperscript{163}

\textsuperscript{160}ibid 4, 7.
\textsuperscript{161}Rebecca Mackinnon and others, ‘Fostering Freedom Online: The Role of Internet Intermediaries’ (UNESCO 2013).
\textsuperscript{162}ibid.
\textsuperscript{163}ibid.
3.3 THE SALE OF GOODS ACT

The Sale of Goods Act is the main law in Kenya that regulates the sale of goods. Under the Act, a contract of sale arises whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price\(^\text{164}\). Such contract of sale maybe absolute or conditional.

The Act differentiates between a contract of sale and an agreement to sell in that where the transfer of the property in the goods is to take place a future time or subject to some condition thereafter to be fulfilled, the contract is an agreement to sell. While the Sale of Goods Act does not make direct reference to e-commerce transactions, it can be implied that a standard e-commerce transaction may indeed be more of an agreement to sell than a contract for sale where the consumer has to verify the goods supplied in the contract prior to offering the consideration for the same or accepting the goods son supplied.

The Sale of Goods Act further outlines the formalities for the contract of sale. Such contract is required to be in writing where the value of the goods in the transaction amounts to tow hundred shillings or more\(^\text{165}\). It is notable that the Sale of Goods Act does not define the contracts that may be construed to be in writing. In such circumstances it may be debatable whether contracts entered into by telephone, mail, facsimile, proprietary electronic data interchange systems may be considered as fulfilling the requirement for contracts required to be in writing. Failure of the Act to provide for e-commerce transactions ousts e-commerce contracts from the application of the Act. The e-consumer is therefore not adequately provided for under the Sale of Goods Act.

\(^{164}\) ibid 3(1).
\(^{165}\) Ibid 6(1).
3.4 CONSUMER PROTECTION ACT, 2012

The Consumer Protection Act of 2012 is the main law in Kenya governing consumer protection, and it seeks to protect consumers from unfair trade practices such as false representation, unconscionable representation; and to assist the consumer in areas such as renegotiation of price using possession of goods among other practices. The Act part also provides for rescission of an agreement and rights that accrue to ensure *restitutio in integrum*.

The Act tasks various bodies to deal with safeguarding of consumers from unfair, anticompetitive and unlawful tactics of traders. For example, the Act provides that the Communications Authority of Kenya is responsible for implementation of disclosure of information in internet agreements.166

There is little litigation based on this Act in relation to e-consumer protection, and most of the problems it envisages may be resolved by an administrative body: the Consumer Protection Tribunal.

One of the hallmarks of the Consumer Protection Act is its provision for class action suits.167 These are suits instituted by one aggrieved party on behalf of many others to prevent a multiplicity of suits. Multiple suits on the same subject matter by different litigants usually results in financial strain on the litigant pursuing the individual suit, consumption of valuable court time to hear and determine the same issues, and the silent suffering of those who cannot individually procure the services of an advocate. The Act states:

“4. Class proceedings

166Consumer Protection Act (n 3).
167ibid 4(1).
(1) A consumer may commence a proceeding on behalf of a class of persons or may become a member of such class of persons in a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or other agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

(2) When a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

(3) A settlement or decision that results from the procedure agreed to under subsection (2) shall be binding on the parties."168

Such disputes can be resolved using alternative means such as arbitration. Decisions arrived at using alternative forms of dispute resolution are accorded the same force of law as a judgment. This is an important tool in cases where a defect is detected in products that are produced in large scale. Without this explicit provision in the Act, consumers had to rely on the Civil Procedure Rules provisions for multiple plaintiffs.

The Kenya Consumers Protection Advisory Committee, established under the Act, came into operation in December, 2013.169 Its functions include (1) advising the Cabinet Secretary on all aspects of consumer protection; (2) creating and amending regulations to protect the rights of consumers; (3) linking with similar organisations, locally and abroad in furtherance of the objectives of the committee; (4) promoting education of consumers on their rights; (5) facilitating the institution of dispute resolution mechanisms and diverting complaints to the

168ibid.
169Consumer Protection Act (n 3).
relevant bodies to deal with them; (6) constantly reviewing laws and business practices to assess the need for new or amended regulations; and (7) assessing the enforcement of consumer protection laws. The Committee aims to take consumer protection to a notch higher than the Kenya Bureau of Standards especially concerning provision of goods within the country.

3.5 COMPETITION ACT, 2010

The Competition Act is an Act put in place to promote and safeguard competition in the national economy, to protect consumers from unfair and misleading market conduct, and to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal. Under the Act, a ‘consumer’ ‘includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale’. Put concisely, a consumer is a person who purchases goods for household use, and not for commercial purposes. The Act establishes the Competition Authority of Kenya, a body tasked with promoting the creation of consumer bodies, recognising the consumer bodies as the voice of consumers when appearing before the Authority, and availing information to consumers of their rights and the obligations of persons under the Act.

170 ibid 90.
172 Competition Act 2010, Preamble.
173 ibid 2.
174 ibid 9.
Part VI of the Competition Act deals with consumer welfare, and seeks to protect the consumer from unscrupulous traders. This Part creates offences against persons including offences for false or misleading representations, unconscionable conduct disregarding the relatively lower bargaining power of a consumer, trade in goods that do not meet the safety standards and unsafe goods, and failure to give proper information to consumers.\textsuperscript{175} The Competition Authority of Kenya works hand in hand with the Kenya Bureau of Standards (KEBS) to ascertain the standards of products are set and adhered to.\textsuperscript{176} All these are safeguards to ensure consumer welfare in the business environment.

The Competition Act does not make direct reference to e-commerce transactions. However, where there are disputes arising between a consumer and an e-supplier based on any of the matters covered by the Authority including misleading representations, then the Authority exercises its control. An e-consumer may lodge a complaint against an e-supplier, to the Competition Authority, any party aggrieved by the decision of the Authority may appeal to the Competition Tribunal established under section 71 of the Act, and the Authority may appeal a decision of the Tribunal to the High Court.\textsuperscript{177} Failure for the Act to provide for e-consumers negates the possibility of addressing the salient issues of e-consumer protection such as geographical distance between the parties, or even insufficient information of the supplier leaving the consumer at a loss of who to raise the dispute against. The e-consumer is therefore not adequately provided for under the Competition Act.

\textsuperscript{175}ibid 55, 56.
\textsuperscript{176}ibid 87.
\textsuperscript{177}ibid 73 – 77.
3.6 EAST AFRICAN COMMUNITY ELECTRONIC TRANSACTIONS BILL OF 2014

The East African Community Electronic Transactions Bill of 2014 is an Act of the EAC to provide for the use, security, facilitation and regulation of electronic transactions and to encourage the use of e-Government services.178

The Bill provides the definition of a ‘consumer’ as a natural person who enters or intends to enter into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier.179 According to the Bill, an ‘electronic transaction’ includes the sale or purchase of goods or services whether between businesses, individuals or governments or other public or private organisations, conducted over computer mediated networks whether the payment or delivery of the goods or services is made on or off line.180 Further, the Bill provides for both commercial and non-commercial transactions, where it states that a ‘transaction’ includes a transaction of a commercial or non-commercial nature, including providing information and e-Government services.181

The purpose of the Bill is to provide a legal and regulatory framework for the EAC to (1) enable and facilitate electronic communication and transactions; (2) address the legal and operational barriers to electronic transactions; (3) promote technology neutrality in applying legislation to electronic communications and transactions; (4) provide legal certainty and public confidence in the use of electronic communications and transactions; (5) promote e-Government services through electronic communications and transactions with the Government, public and statutory

178Electronic Transactions Bill 2014 Preamble.
179ibid clause 2.
180ibid clause 2.
181ibid clause 2.
bodies; (6) ensure that electronic transactions in the Community conform to the best practices by international standards; (7) encourage investment and innovation in information communications and technology to promote electronic transactions; (8) develop a safe, secure and effective environment for the consumer, business and the governments of the Partner States to conduct and use electronic transactions; (9) promote the development of electronic transactions that are responsive to the needs of users and consumers; (10) promote public confidence in the integrity and reliability of electronic records, electronic signatures and electronic commerce; (11) reduce the cost of doing business in the Community; and (12) foster economic and social prosperity in the Community through the information communication technology sector.

Part V of the Bill deals with e-consumer protection. It provides for provision of adequate information by suppliers or sellers in e-commerce transactions, to ensure that when the consumer is engaged in the transaction the person is fully apprised of details including the full name and legal status of the supplier, contact information and characteristics of the goods or services being offered.\textsuperscript{182} Other pertinent information that must be supplied by the supplier or seller include the refund policy in the event that the consumer is not satisfied with the goods or services offered, as well as any alternative dispute resolution mechanism offered in case of a dispute.\textsuperscript{183} The Bill further provides for the procedure to be followed where an e-consumer intends to cancel the transaction after receipt of the goods or services.\textsuperscript{184}

While the Bill contains important provisions that would increase the legislative and regulatory provision for e-consumer protection in Kenya, it has not yet been passed as an Act of the EAC.

\textsuperscript{182} ibid clause 40.
\textsuperscript{183} ibid clause 40.
\textsuperscript{184} ibid clause 41.
Further, even after enactment, Kenya would still require to pass legislation and regulations to bring the national provisions in line with the regional requirements.

3.7 PRIMARY RESEARCH FINDINGS

The primary research was divided into two parts. The first part involved distribution of questionnaires among consumers of e-commerce transactions. The second part involved distribution of questionnaires and collection of responses from selected stakeholders in e-consumer protection, namely e-commerce transaction providers and government bodies. The responses from both parts are discussed below.

3.7.1 Consumer Research Findings

Members of the public were selected to take part in this study as consumers of e-commerce transactions. The researcher identified 40 respondents using the random sampling technique. All of the consumer respondents were in Nairobi County, Kenya.

The decision to sample responses from Nairobi was arrived because (1) Nairobi County has the highest literacy levels in the country, therefore the chances of the respondent being knowledgeable of the workings of e-commerce are high; (2) the potential respondents were estimated to be between the ages of 18 and 35, constituting members of the youth community. It is assumed that the youth are the most conversant with e-commerce and its operation; (3) it was assumed that most of the respondents live in Nairobi County, the home of Nairobi City, the capital city of the Republic of Kenya.

The researcher selected Nairobi County for two reasons. First, as the hub of commerce in Kenya, the city has the highest levels of e-commerce consumption making it the most suitable area of
study. Secondly, many e-commerce businesses which the consumers engage with are based in Nairobi County. The findings cannot be generalised to the rest of consumers in the country. There was a 100% response rate, with 40 questionnaires distributed and 40 questionnaires filled in. The questionnaire was in English. Respondents were not paid. All respondents were over 18 years old and provided written consent to participating in the study. The responses were tabulated using Microsoft Excel, the data broken down using a calculator and interpreted by the researcher below.

What is e-commerce?

There are 5 e-commerce models: (1) Business to Business (B2B); (2) Business to Consumer (B2C); (3) Consumer to Business (C2B); (4) Consumer to Consumer (C2C); and Business to Government (B2G). There are 4 main categories of e-commerce transactions which occur in everyday life: (1) direct marketing, selling, and services; (2) electronic banking; (3) secure distribution of information; and (4) value-chain trading and corporate purchasing. The B2B model of e-commerce had a 42.5% reference rate as 17 respondents mentioned ‘business’ in their responses, while 15 respondents (37.5%) referred to ‘trade’ or ‘buying and selling of goods’, terms which relate to B2C e-commerce. No respondents referred to C2B, C2C or B2G e-commerce models.

The ‘trade’ and ‘buying and selling of goods’ responses are interpreted to mean that 37.5% of the respondents consider that e-commerce refers to the direct marking and selling of goods and services. 3 respondents (7.5%) brought up electronic banking and transfer of funds as a category

\[\text{185Ritendra Goel (n 117).}\]

\[\text{186ibid.}\]
of day-to-day e-commerce transactions. Only 1 (2.5%) of the respondents made reference to ecommerce in terms of distribution of information. 24 respondents (60%) wrote that e-commerce involves trade using ‘electronic’ means while 24 respondents (60%) made reference to the terms ‘internet’ or ‘online’ in explaining the meaning of e-commerce. 5 (12.5%) of the respondents stated that e-commerce includes ‘mobile’ transactions.

**Examples of e-commerce transactions in Kenya**

38 respondents (95%) stated that they knew examples of e-commerce transactions in Kenya. Of these responses, only 8 (20%) made reference to actual examples of e-commerce transactions including ‘buying clothes through various platforms’; ‘paying school fees using the credit card’; ‘electronic markets’; ‘electronic air ticketing’; ‘automatic teller machines’; and ‘electronic data interchange (EDI). However, most of the examples given were the e-commerce suppliers or online platforms for trade, service provision or electronic banking and not e-commerce transactions. The suppliers and online platforms mentioned include OLX, Jumia-Kenya, SokoFreshi, Sokopepe, Sokohuru, N-Soko, Rupu, Bid-or-Buy, Amazon, e-Bay, Bata online, Safaricom online, Sportpesa, Essayshark, e-Soko, Alibaba, Closet49, Kaymu and Jovago. Mobile money transfer and electronic banking platforms mentioned are Mpesa, Airtel Money, yu-Cash, Chase Bank online banking.

**Participation in e-commerce transactions as a customer/consumer**

33 respondents (82.5%) stated that they have been involved in e-commerce transactions before as a customer/consumer. While 5 of the respondents (12.5%) stated that they had never been involved in e-commerce transactions before as a customer/consumer, 1 respondent (2.5%)
admitted that s/he did not know whether or not s/he had been an e-consumer. To understand these responses, the types of e-commerce transactions mentioned by the respondents in their conceptualisation of e-commerce are important. All 6 of these respondents (100%) considered that e-commerce involves online business or consumer transactions such as buying goods online. With this in mind, they viewed that they had never used internet sites to transact. This is a limited view of e-commerce however. It is assumed that if the respondents had known that e-commerce includes use of an ATM or mobile banking, then there would have been a 100% positive response.

15 respondents (37.5%) stated that they read the terms and conditions of the e-commerce transaction they participated in, while 17 respondents (42.5%) admitted they did not read the terms and conditions. 24 respondents (60%) considered clicking on the tab “I agree” on the website concludes a legally binding contract, while 7 of the respondents (17.5%) believed that clicking on the tab “I agree” involves entering into a legally binding contract. Only 1 (2.5%) of the respondents admitted that s/he did not know if this involved entering into a legally binding contract.

29 respondents (72.5%) stated that they never had an incident with products/services acquired through an electronic commerce transaction while 9 (22.5%) of the respondents had an incident. Among those who had a previous incident, only 3 (33%) of them did something about it like file a complaint. Concerning resolution of the dispute, one of the respondent states: “The company I was transacting with communicated back to my complaint; which was a delayed delivery. The product was delivered at a later date.” Another respondent states that “It was never resolved”, while the third states that “Delaying tactics were employed to discourage me from following up on the issue thus it was never resolved at the end.” This points to limited awareness of the
dispute resolution mechanisms available to e-consumers. All 3 of those who did something about the incident with the e-commerce transaction (100%) were dissatisfied.

*Challenges associated with e-commerce in Kenya*

The most prominent challenges arising from e-commerce discussed in this study are (1) information disclosure and verification, (2) data and payment security, (3) jurisdiction, (4) redress and (5) privacy.\(^\text{187}\) E-commerce also faces challenges in the area of (6) fraud and (7) insufficient opportunity to inspect goods on delivery. Some of the responses given are mentioned below.

(1) information disclosure and verification: a respondent stated that ‘there are inadequate ways of protecting information given by consumers’; (2) data and payment security: another respondent mentioned that ‘security in the online platform (profiling and safety)’ pose a challenge to e-commerce; (3) no respondent raised ‘jurisdiction’ as a challenge facing e-commerce in Kenya; (4) redress: one respondent stated that there is ‘no complaint system’ for e-commerce transactions. (5) privacy was not an issue according to the consumers who took part in this study; (6) fraud: responses on fraud are that ‘the consumer may be prone to exploitation by fraudulent individuals…thereby depriving him/her of their money/goods of monies worth’; and ‘acquiring of goods through this form of transactions is not instant and one may run or face the risk of getting conned’. (7) on the challenge of insufficient opportunity to inspect goods on delivery, a respondent stated that ‘the seller can easily deliver goods with latent defects without the buyer easily identifying/noticing’.

\(^{187}\text{Huong Ha (n 80).}\)
One of the challenges referred to by the consumers that was not provided for as the main challenges facing e-commerce in Kenya is that there are limited levels of information about e-commerce, e-commerce law, and dispute resolution mechanisms. One respondent termed this as: ‘lack of knowledge by most people that these are legally binding agreements that can be enforced against them’. 10 respondents (25%) considered this a challenge. Other challenges presented include that (1) e-commerce is impersonal (2) there are delays in delivery, contrasted against a direct purchase of goods or services where delivery is instantaneous; (3) ‘the law governing e-commerce in Kenya is limited and non-existent in some areas’; (4) ‘lack of internet accessibility in the rural areas’; and ‘the internet access is mainly used by people in urban areas’.

E-consumer protection law in Kenya

22 respondents (55%) were aware of a law that protects consumers in e-commerce transactions in Kenya, and 17 respondents (42.5%) admitted that they were not aware of the existence of such a law. Of the respondents who knew of the existence of e-consumer protection provisions under Kenyan law, only 6 (27.27%) of them considered that e-consumers are well protected by the law while 13 (59%) of them viewed that e-consumers are inadequately protected under the law. Some of the responses from those who opined that e-consumers are well protected under the law are:

a. ‘Yes, they are well protected because if one party defaults you can go to the police with evidence of the transaction and they can actually track it to find out who is at fault’

b. ‘The Kenyan Constitution 2010 under Article 46 protects the consumers against unscrupulous online traders’
c. ‘The Constitution of Kenya is key in this discussion. Electronic payment and proof thereof also are covered in the Kenya Information and Communication Act. The Consumer Protection Act is informative but needs to cover other instances in the development of the law on Sale of Goods.’

Some of the responses from those who considered that e-consumers are not well protected are:

a. ‘There is a law, but most individual don't know of its existence, or chose not to seek legal redress, as they fear it will be time consuming and cumbersome’.

b. ‘There is an insufficiency of infrastructure to enable everyone to access e-commerce networks and to prevent unscrupulous dealings. Many innocent persons have been the object of conmen and the law has no safeguards or ways of tracking or limiting them. The law should aim for greater public awareness and put in place safeguards that make it possible to hamper and capture and prosecute predators.’

c. ‘Poor implementation of the existing law; Lack of penal measures to discourage fraud; Limited access to justice’

d. ‘Article 46 of the Constitution and the Consumer Protection Act; Article 46 sets out the general purpose and intent of the Consumer Protection Act - does not exactly address the e-commerce transactions hence having the buyer/purchaser at the mercy of the seller’

e. ‘There is a law, but most individual don't know of its existence, or chose not to seek legal redress, as they fear it will be time consuming and cumbersome’

**Recommendations**

The recommendations drawn from the questionnaire responses include:
(1) Enacting a law dealing with e-commerce specifically; with a clear definition of the nature of e-commerce transactions, parties involved, rights and obligations arising, remedies available, and clear mechanisms handling of complaints and disputes;

(2) Creation of an authority that deals with e-commerce transactions, to track all those who are dealing in it and licensing them;

(3) Creation of an online platform that identifies online companies that are reliable so prevent from fraudulent organisations and may be a regulatory body to regulate the conduct and terms of carrying on business;

(4) Educate the public at large about e-commerce and involve them in the legislation process so that they are aware

(5) Improvement of enforcement mechanisms on laws dealing with consumer protection

(6) Better and quick network connections

Much emphasis was put on raising awareness of consumers on e-consumer protection. One respondent suggested ‘an awareness campaign on any e-commerce law that may exist or be brought into existence to have an informed citizenry’. Another comments, and rightly so, that ‘the consumer is the most important person when it comes to the trade business therefore his protection should be made paramount’.

Conclusions

A majority of the consumers had a general idea of what constitutes e-commerce. However, since most of the responses included references to online trade over the internet, it may be concluded that there is limited knowledge of what e-commerce entails. Everyday uses of e-commerce including use of ATMs were ignored. Mobile banking and the use of mobile platforms for
payment of bills and purchase of goods received little attention in the definition of e-commerce. If the consumers do not appreciate that they are engaging in an e-commerce transaction then they are less likely to appreciate the fact that they need protection in such transactions. The challenges as identified in the secondary research are confirmed in the primary research. Consumers included issues such as fraud, data and payment security and insufficient opportunity to inspect goods as the main challenges to e-commerce. Recommendations identified consolidation of e-commerce law to provide for matters including a clear definition of e-commerce and dispute resolution mechanisms; focusing on implementation of the existing e-consumer protection laws; and public education of e-consumer protection.

### 3.7.2 Stakeholder Research Findings

The researcher used a purposive sampling method and specifically sought out respondents from organisations that have a part to play in the regulation of e-consumer protection in the country. The findings cannot be generalised to the rest of consumers in Kenya. The researcher emailed the questionnaire to the respondent and made follow-up calls to ensure return of the filled in questionnaire. The response rate was 100%, with 4 questionnaires sent and 4 questionnaires received. The questionnaire was in English. No payment was made to respondents. All respondents were over 18 years old and provided written consent to participating in the study.

The four respondents represented (1) Lamudi, an online platform for property advertising, purchase and lease; (2) ICT Authority, a government body created to deal with matters concerning Information Communication and Technology issues; (3) Safaricom, a leading telecommunication service provider and owner of the Mpesa service, a mobile platform for
money transfer and payment of bills and purchase of goods and services; and (4) Consumer Federation of Kenya (COFEK), a non-governmental consumer body.

The Lamudi representative defined e-commerce as ‘any transactions (business transactions) through electronic media such as mobile phones, desktop devices authorising the transfer of funds from one person to another’; the ICT Authority representative stated that e-commerce refers to ‘commercial transactions concluded over the internet’; the Safaricom representative referred to ‘Business transactions conducted via the web - seller meets the customer on the web and payment is also done online’; while the COFEK representative defined it as ‘the process of buying and selling of goods and services online’. 3 of the respondents (75%) made reference to transactions using online platforms, or the internet. The responses mirrored those of the consumers, where there was a predominance of reference to trade transactions over the internet. This is, yet again, a limited appreciation of the types of e-commerce transactions that exist.

All the four respondents (100%) stated that they knew examples of e-commerce transactions in Kenya. In similar fashion as the consumers, the stakeholders provided names of e-commerce platforms and owners as examples of e-commerce as opposed to the type of e-commerce transactions they provide. The responses included Mpesa, payments through Paypal or Pesapal, Bank Transfers (EFT, RTGS), Jumia, OLX, Safaricom Online Shop, Amazon.com, Kaymu and Cheki.co.ke.

Two (50%) of the respondents considered that clicking ‘I agree’ on a website in which a consumer is transacting is entering into a legally binding contract with the seller. This left two (50%) of the respondents who did not consider that clicking ‘I agree’ on a website in which a consumer is transacting is entering into a legally binding contract with the seller. This response
shows that the respondents who answered in the negative may not be fully aware of the legal elements of e-commerce to identify when an e-contract is entered into.

Two respondents (50%) admitted ever having an incident with a product or service acquired or sold through an e-commerce transaction. Of these respondents, only one (50%) did something about it, and the resolution of the complaint resulted in a refund of the amount paid. This respondent was satisfied with the resolution of the complaint.

Challenges identified by stakeholders include (1) fraud; (2) lack of a direct complaint reporting and resolution mechanism; and long length of time before resolution of complaints; (3) e-commerce is not widely embraced, hence there are doubts whether it is even a legally binding means of conducting business (4) expensive internet services; (5) inadequate information about services offered; (6) lack of trust between consumers and the service providers; and poor regulation including on safeguarding consumers’ information.

Two (50%) of the respondents were aware of the existence of a law that protects the consumer in e-commerce transactions in Kenya. Both of these respondents (100%) considered that the consumer is not well protected in e-commerce transactions. Important issues raised with the law are that (1) there is no strict procedure on licensing (of e-commerce suppliers); and (2) consumers are not aware of how they are protected and therefore implementation becomes a problem. Recommendations suggested include changes to provide for (1) dispute resolution mechanisms for e-consumers; (2) publicising the law so that the wide population becomes aware of it. To conclude, two stakeholder representative’s views are stated below:

a. ‘Great uptake of e-commerce globally. Kenya should maximize on the opportunity for technological advancement in line with global trends and standards’;
b. ‘As more people gain access to the internet and as businesses look for more efficient and effective ways of reaching customers, e-commerce will inevitably become a big thing. There is need, therefore, to ensure we have a robust legal mechanism to handle all issues that may be encountered. It is also good that the masses be sensitised on the existence or inexistence of such laws’.

3.8 CONCLUSION: E-CONSUMER PROTECTION IN KENYA

There are laws on e-consumer protection in Kenya. The Constitution, the Consumer Protection Act, and the Kenya Information and Communications Act provide for e-consumer protection in the country. The East Africa Community Transactions Bill proposes certain aspect of e-consumer protection to the East Africa Community legal framework. However, these laws make little reference to e-commerce. Without clear definitions of e-commerce with examples of the type of transactions that are involved in e-commerce, the e-consumers are at a disadvantage. This is because they would not know that they are engaging in an e-commerce transaction in the first place, to know the relevant provisions to rely on in the law.

The conception of e-commerce among Kenyans is limited to online trade. There is little reference to electronic banking and information and data sharing. While most consumers and stakeholders refer to the B2C and B2B models of e-commerce, the other models which are indeed used were not mentioned. Further, there are few of the respondents who knew about the law on e-consumer protection and the dispute resolution mechanisms available to them. All these point to the fact that while the law on e-consumer protection is present, there is need for more deliberate efforts at legislating on the subject, and public awareness on e-consumer protection.
CHAPTER FOUR: E-CONSUMER PROTECTION IN THE US, UK AND SOUTH AFRICA

4.0 INTRODUCTION

This chapter examines the position of e-commerce in consumer protection law in the US, UK and South Africa. It presents the best practices in incorporation of e-commerce provisions in consumer protection law in these countries. A comparative study of the e-consumer protection provisions is important because from it, Kenya may learn how to improve the current e-commerce and consumer protection laws to achieve better protection for e-consumers. The US, UK and South Africa markets have similar problems with the e-consumer protection frameworks but have more developed systems than Kenya does, making them ideal to benchmark in this study making a case for enhanced e-consumer protection regulation. This study did not consider the legal frameworks in other countries in Europe, Australia, South America or Africa because they did not provide suitable benchmarking frameworks for this study.

4.1 THE UNITED STATES OF AMERICA (US)

The United States of America is used as a country of study in this thesis due to the reliance of many consumers on e-commerce as well as its detailed consumer protection legislation. The concept of consumer protection has been discussed in the US from as far back as 1914 when the main consumer protection body came into existence. This section highlights the provisions on e-consumer protection in the Electronic Signatures in Global and National Commerce (ESIGN) Act of 2000, the Electronic Fund Transactions Act (EFTA) of 1978 and the Federal Trade
Commission Act of 1914. This section concludes that consumer protection laws in the US strongly advocate for consumers to be fully informed of terms in contracts that are generally hidden in other jurisdictions; and that the support of innovation by laws encourages further innovation due to its legal recognition and protection.

4.1.1 Electronic Signatures in Global and National Commerce (ESIGN) Act of 2000

The Electronic Signatures in Global and National Commerce (ESIGN) Act of 30th June 2000 is an Act of the US Congress enacted to facilitate the use of electronic records and signatures in interstate or foreign commerce.\textsuperscript{188} The Act provides that a signature, contract, or other record relating to an e-commerce transaction has legal effect, validity, and enforceability even though it is not in physical but rather, in electronic form.\textsuperscript{189} A ‘transaction’ as envisioned under the ESIGN Act is an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including the sale, lease, exchange, licensing, or other disposition of personal property, including goods and intangibles, services, and real property.\textsuperscript{190} Under the Act an ‘electronic signature’ means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.\textsuperscript{191} The contract resulting from this e-commerce transaction gains its effect, validity and enforceability of the same standing as a physical contract, from the Act.\textsuperscript{192}

\textsuperscript{188} Electronic Signatures in Global and National Commerce Act 2000 (US Code).
\textsuperscript{189} ibid 101.
\textsuperscript{190} ibid 106.
\textsuperscript{191} ibid.
\textsuperscript{192} ibid 101.
The Act provides that electronic records are a substitute to physical records. It states that the term ‘electronic record’ means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.\textsuperscript{193} It provides that the term ‘electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.\textsuperscript{194}

Under the ESIGN Act, subject to the consent of consumers, if a person is required to provide information by physical means, provision of this information by electronic means is deemed to have the same place in law. This ‘information’ that may be transmitted by either physical or electronic means includes data, text, images, sounds, codes, computer programs, software, or databases.\textsuperscript{195}

The impact of e-consumer protection is observed in the ESIGN Act. The Act provides a definition of a ‘consumer’ as an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.\textsuperscript{196}

\textbf{4.1.2 The Electronic Fund Transactions Act (EFTA) of 1978}

Electronic transactions in the US are mainly governed by the Electronic Fund Transactions Act (EFTA) of 1978. The Act was established primarily to protect the interests and rights of consumers as opposed to a general regulation of electronic transactions. E-consumers in the US normally use debit or credit cards to make payments. The discourse surrounding e-consumer

\textsuperscript{193}ibid 106.
\textsuperscript{194}ibid.
\textsuperscript{195}ibid.
\textsuperscript{196}ibid.
protection in the US according to this section therefore centres around protection of e-consumers when interacting with banks, and in the use of debit and credit cards.

Disclosure of fees is a key highlight of the Act. For example, operators of ATM machines are required by the Act to disclose to consumers if they charge a fee for use of the ATM, and the amount of the fee should be displayed in easily understandable writing and positioned in a manner that makes it conspicuous.\textsuperscript{197} The information on ATM fees must be disclosed prior to the use of the ATM to allow the consumer to make an informed decision.\textsuperscript{198}

Where an e-consumer arranges with a bank for a pre-authorised transfer of funds, the Act allows the e-consumer to issue a “Stop Transaction Order” to the bank to cancel the transaction.\textsuperscript{199} While some banks may permit the consumer to make an oral Stop Transaction Order, others may require that this order be in writing.\textsuperscript{200} In the event that the order is made orally despite the existence of a rule requiring written orders, the bank is under a legal obligation to inform the consumer of the requirement to issue written instructions.\textsuperscript{201}

E-consumer protection is associated from preventing exposure of e-consumers to security risks. Where there is theft of e-consumer’s information, there may be unauthorised transactions performed using the e-consumer’s details. The Act provides that in the event that a consumer’s credit card or debit card is lost or stolen, the consumer can benefit from limited financial liability for unauthorised transactions.\textsuperscript{202} There is an expectation that the consumer be reasonable and report the matter to the relevant financial institution to minimize on losses attributable to the bank or credit card provider.

\textsuperscript{197}Electronic Fund Transfer Act 1978 s 205(16).
\textsuperscript{198}ibid.
\textsuperscript{199}ibid 205(10) (c) (1).
\textsuperscript{200}ibid.
\textsuperscript{201}ibid.
\textsuperscript{202}ibid 205(6).
Moreover, to protect e-consumers and to ensure that they are always updated on the use of their personal details which may be fraudulently accessed by third parties after the e-consumer’s legitimate transactions, banks and credit card providers are required to issue period statements to their clients at least every quarter; where a consumer did an EFT transaction, the consumer must be issued with a statement for the monthly cycle in which the EFT occurred; and further such a statement must contain the dates of all transactions, the amounts transferred, applicable fees, names of payees or payers and the account numbers of the accounts involved in the transactions.203

4.1.3 The Federal Trade Commission Act of 1914

The Federal Trade Commission (FTC) Act establishes the Federal Trade Commission (FTC). The FTC is the main institution in the US that deals with e-consumer protection. The FTC is charged with addressing unfair trade practices and preventing anti-competitive behaviour in accordance with section 5(a) of the Federal Trade Commission Act which prohibits deception and other unfair trade practices in business. Other statutes such as the Fair Credit Billing Act give it powers and responsibilities.

The Act empowers the Commission to bring a civil suit against any person (legal or human) for false advertising: when it is aimed at misinforming consumers so as to purchase a product.204 Advertising that can be declared unlawful if it is likely to misinform consumers irrespective of intention. The institution of civil suits is not restricted to persons directly responsible for the advertising. Parties may be enjoined to the suit if the court reasonably believes that doing so

203 ibid 205(9) (b).
would be in the interest of justice. This may include media companies that air the advertisements. All persons involved in advertising to entice e-consumers to carry out transactions are thus tasked with ensuring that the correct message gets to the e-consumer.

The Federal Trade Commission (FTC) may make rules concerning unfair trade practices and while so doing must publish the proposed regulations in the Federal Register and invite the views of persons likely to be affected by the proposed legislation.\textsuperscript{205} This procedure in rule-making allows public participation and awareness, and especially gives e-consumers the opportunity to have their voice heard.

\textbf{Conclusion}

Consumer protection laws in the US strongly advocate for consumers to be fully informed of terms in contracts that are generally hidden in other jurisdictions. The support of innovation by laws encourages further innovation due to its legal recognition and protection.

\textsuperscript{205}ibid 18; Charles L Howard, \textit{The Organizational Ombudsman: Origins, Roles, and Operations : A Legal Guide} (American Bar Association 2010).
4.2 THE UNITED KINGDOM (UK)

The UK is rated as the country with the highest portion of its Gross Domestic Product (GDP) attributable to internet trade.\(^{206}\) It also has a rich legislative framework developed over centuries which Kenya continues to learn from as a member of the Commonwealth. The UK has, unlike Kenya, consolidated its consumer protection laws into a single statute. This makes the UK an ideal point of reference for the comparative analysis on e-consumer protection laws. E-commerce is regulated by the Department of Trade and Industry (DTI). Within the DTI is a body called the Communication and Information Industries Directorate which is mandated with policy making as well as regulation within the telecommunication industry.

This section presents an overview of the e-consumer protection provisions in the Electronic Commerce (EC Directive) Regulations 2002 and the Consumer Rights Act, 2015. It concludes that while e-commerce and Consumer Protection laws in the UK are rather clear with regard to applicable laws in cross border transactions thus creating a sense of predictability for both consumers and internet service providers, consumers need to assess the laws of the country of registration of the service provider to know if they would have a valid cause of action in a European court.

4.2.1 Electronic Commerce (EC Directive) Regulations 2002

The UK is a member of the EU, and therefore is subject to the Directives issued by the European Council, which are legal acts of the EU requiring internal implementation through regulations, by the member states. The main law dealing with e-commerce in the United Kingdom is the

\(^{206}\)David Dean and others, ‘The Internet Economy in the G-20’ (Boston Consulting Group 2012).

When construing the laws applicable to a service provider of cross border internet based services, the EC Directive considers the laws of the member state in which the service provider is established.\(^\text{207}\) The applicable law on e-commerce is therefore that of the particular member state in which the service provider is established and this law provides the jurisdiction of the court in handling the matter.

In all e-commerce transaction, relevant information including the name and geographical address of the service provider, details of anybody that exercises supervisory powers over it and trade registers to which the service provider is registered to, must be provided in an easily, directly and permanent manner.\(^\text{208}\)

\subsection{4.2.2 Consumer Rights Act, 2015}

The statute governing consumer protection in the UK is the Consumer Rights Act, 2015 which came into force on 27\(^{th}\) May, 2015.

The Act introduces an implied term to all contracts for the sale of goods (whether physical contracts or e-contracts) all goods sold must be of satisfactory quality.\(^\text{209}\) In determining whether the goods are of satisfactory quality, the fitness for purpose, appearance and finish, freedom from minor defect, safety and durability of the goods are taken into account.\(^\text{210}\) Where a consumer

\(^{208}\)ibid 6.
\(^{209}\)Consumer Rights Act 2015 s 9.
\(^{210}\)ibid 9(3).
rejects the goods thereby treating the contract as repudiated, the Act provides that the consumer has a right to a refund.\textsuperscript{211}

When a consumer is entitled to a refund, the seller must make that refund using the same means of payment the consumer used to purchase the goods unless otherwise agreed.\textsuperscript{212} This creates certainty in terms of mode of payment and reduces the chances of the mode of payment of a refund being the subject matter of litigation. A refund made in this manner has the benefit of creating a situation of true *Restituto in Integrum*. For example, where an e-consumer purchases a faulty table and pays using a credit card, in the event of a refund the e-consumer will be refunded by a reversal of the credit card transaction, unless otherwise agreed. Without the reversal, the consumer’s credit card statement would reflect a purchase (despite the refund) to which interest would accrue thus increasing the consumer’s financial burden.

The seller is liable for costs incurred by the e-consumer in returning rejected goods.\textsuperscript{213} This however, does not include the cost of personally returning them to the point where possession was obtained.

E-consumers may contract for material that is only contained in digital form. Digital content refers to products that can be delivered in soft-copy, via the internet, compact disc (CD) or digital versatile disc (DVD).\textsuperscript{214} Free content that is bundled with goods or services paid for is covered by this Act.\textsuperscript{215} This guarantees a consumer rights to quality digital content which is delivered free as a bonus to an existing contract. This covers situations where digital content dealers deliver substandard digital content due to the fact that it is free.

\begin{flushleft}
\textsuperscript{211}ibid 20(5), 20(7) (a), 45. \\
\textsuperscript{212}ibid 20(16). \\
\textsuperscript{213}ibid 20(8). \\
\textsuperscript{214}ibid 33. \\
\textsuperscript{215}ibid 33(2).
\end{flushleft}
The Act provides that digital content must be of good quality, just as is the requirement for physical goods. In addition, fitness for purpose is not limited to fitness with regard to the purpose for which the digital content is normally supplied. All contracts for the supply of digital content are treated as contracts for specialised material requiring a high standard of quality. Similarly, the rules concerning supply of digital content correspond to the rules of supply of physical goods.

In The UK, e-consumer protection under contracts for the provision of services is codified in the Consumer Rights Act creating certainty in the enforcement and protection of these rights. Estoppel is recognised and enforceable even in the event of oral statements made before or after entering into a contract for the supply of services.

4.2.3 Conclusion: Summary of the UK legal and institutional framework

E-commerce and Consumer Protection laws in the UK are rather clear with regard to applicable laws in cross border transactions thus creating a sense of predictability for both consumers and internet service providers. Consumers need to assess the laws of the country of registration of the service provider to know if they would have a valid cause of action in a European court.

\footnotesize{ibid 35.} 
\footnotesize{ibid 39(2).} 
\footnotesize{ibid 48.} 
\footnotesize{ibid 50(1).}
4.3 **SOUTH AFRICA**

South Africa has e-consumer protection provisions in the legislative instruments governing electronic communications and transactions, and further has such provisions embedded in the consumer protection laws. The country has had substantive e-consumer protection laws in place from as early as 2002. The laws in South Africa influential in this discourse on e-consumer protection are the Electronic Communications and Transactions Act No. 25 of 2002, the Consumer Protection Act, No. 68 of 2008. This section concludes that the implementation of a national e-commerce policy is a great step in preparing the country for electronically based trade and can be used as a benchmark to assess the government’s progress in the realisation of e-commerce goals. Further, the recognition of the validity of electronic signatures makes online trade quicker and more efficient as there need not be physical transfer of contractual documents. Furthermore, South African legislation tries to do away with discriminatory practices in business by directly addressing the issue.

4.3.1 **Electronic Communications and Transactions Act No. 25 of 2002**

The primary law governing e-commerce in South Africa is the Electronic Communications and Transactions Act No. 25 of 2002.

The Act required the relevant Minister to come up with an E-Strategy with the aim of stating and elaborating the country’s plan on (1) electronic transactions strategy on a regional, national and international level; (2) programmes meant to promote universal access and human resource development; (3) programmes to prepare readiness of the republic for electronic transactions; (4) how existing government initiatives can be used to achieve the objectives of the E-Strategy; (5)
promoting South Africa as a preferred provider of electronic transactions; (6) the objectives of
the E-Strategy, how and when they shall be achieved.\textsuperscript{220}

A plan such as the E-strategy is crucial in the realisation of a country’s goals as it can be used to
anticipate challenges in the improvement of e-commerce in South Africa. The challenges can be
accordingly avoided or managed as they come along. Knee-jerk reactions in a country’s policy
making is prevented. Public confidence in the government’s actions may be improved by making
such strategies because a national plan creates standards against which a government can be
evaluated.

Data messages are defined as including information generated and communicated
electronically.\textsuperscript{221} Data messages are not prejudiced when construing the contents of a written
contract.\textsuperscript{222} The Act permits the use of electronic means to form an agreement in so far as the
parties to the agreement have access to the data message and the contents of the data message
can reasonably be construed to forming part or the whole of the agreement.\textsuperscript{223} This gives validity
at a statute level, to contracts made over the internet or other forms of electronic communication.
This improves public confidence in the purchase of goods electronically.

One of the main worries consumers of online products have is the validity and enforceability of
online transactions. Under the Act, signing of a written contract can also be done by way of
advanced electronic signature which would be given the same force of law as a handwritten
signature by the party to the agreement.\textsuperscript{224}

\textsuperscript{220} Electronic Communications and Transactions Act 2002 s 5.
\textsuperscript{221} ibid 1.
\textsuperscript{222} ibid 11.
\textsuperscript{223} ibid 11(3).
\textsuperscript{224} ibid 13(4).
The Act stipulates the time at which a party to a contract is deemed to have received information used in the performance or conclusion of a contract thus creating certainty as to the time a party fulfils their contractual obligations.\textsuperscript{225} In \textit{Byrne v Van Tienhoven (1880), 5 CPD 344} the court held that determining whether a party has effectively communicated is of importance when a court is tasked with determining whether a party validly accepted the terms of a contract. The “postal rule” is used with regard to offer and acceptance by post. Progression has been exhibited by Section 23 of the Act as the increasing prevalence of use of the internet to facilitate part or entire transactions cannot be ignored by any government intent on improving its trade on a global scale.

Suppliers offering their products online must provide information about the physical premises of the business and means of communicating with the business.\textsuperscript{226} Additional information requirements include whether the supplier is a member of a self-regulatory or accreditation body and the contact information of that body if applicable.\textsuperscript{227} Various avenues to have concerns addressed are resultantly created as consumers can approach those bodies in the event that the supplier does not address their concerns.\textsuperscript{228} Also, suppliers may be penalised by accreditation bodies by reduction of their rating or revoking of their accreditation.\textsuperscript{229}

Traders are required to inform their consumers of a physical address where they will receive legal documents.\textsuperscript{230} One of the benefits of this to consumers is that there is certainty as to how to serve a supplier with a demand letter and Notice to Attend Court when the e-consumer intends to

\textsuperscript{225}ibid 23.  
\textsuperscript{226}ibid 42. 
\textsuperscript{227}ibid. 
\textsuperscript{228}ibid. 
\textsuperscript{229}ibid. 
\textsuperscript{230}ibid.
institute legal proceedings. This is to avoid situations where the litigant found it difficult to serve the adverse party as that party had not availed an address of service.

4.3.2 Consumer Protection Act, No. 68 of 2008

The main law dealing with consumer protection in South Africa is the Consumer Protection Act, No. 68 of 2008. The Act was assented to by the President of the Republic of South Africa through Gazette Notice No. 467 on 29th April 2008. This was much earlier than the relevant laws in the UK (2015) and Kenya (2012).

The Act has tackled major issues that have plagued retail trade that have previously been lawful due to the use of disclaimers by sellers. With regard to e-consumer protection, the Act provides for non-discrimination in trade by outlining circumstances in which discrimination occurs in trade and prohibits them. The Act prohibits unfair marketing practices such as unfairly charging different categories differently and denying certain categories of persons from accessing goods and services provided by the trader.\(^{231}\) This provision is in line with Article 9 of the Constitution of South Africa which deals with discrimination. From a trader’s perspective, it can be viewed as a restriction of their rights as traders or forcefully being made to trade. It prohibits the unfair preferential treatment of persons from particular communities or classes through better pricing, availing higher quality goods, or restricting availability of products in certain areas. If incorporated in Kenyan law, it would complement efforts to realise the rights enshrined in Article 27 of the Constitution of Kenya, 2010.

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\(^{231}\)Consumer Protection Act 2008 s 8.
E-consumers are protected from Bait marketing is advertising goods at a particular price in a manner that misleads consumers on the availability of the goods at that price.\textsuperscript{232} This deals with the detriment to consumers that arises when they purchase the relevant goods at a price higher than the price stated during marketing due to lower availability than was inferred from the advertisements. Sellers are required to, when marketing goods at a particular price, inform consumers about the availability of the product. Producers and sellers use phrases such as “offer is subject to the availability of stocks” to inform consumers that the supply of the goods is limited in time and quantity.

Negative Option Marketing is a way of imposing a new contract or amendments to existing contractual terms if a consumer does not expressly decline the amendments or new contract.\textsuperscript{233} It goes against the requirements for consent, one of the fundamental requirements of a contract, as this provision prevents sellers from preying on ignorant customers by making them think that the seller has the right to amend existing contractual terms.\textsuperscript{234}

In South Africa, the National Consumer Commission is tasked with prohibiting unfair trade practices, providing standards for consumer information, promoting responsible consumer behaviour among other tasks.\textsuperscript{235} The National Consumer Commission has the power to prescribe subsidiary legislation to regarding but not limited to methods of alternative dispute resolution between sellers and consumers, methods of communicating with consumers and use of plain language in documents.\textsuperscript{236} The functions of The Commission include: (1) promotion of alternative forms of dispute resolution; (2) receiving complaints and dealing with them.

\textsuperscript{232}ibid 30.
\textsuperscript{233}ibid 31.
\textsuperscript{234}ibid.
\textsuperscript{235}ibid 85.
\textsuperscript{236}ibid 93(1).
appropriately; (3) monitoring the market for unfair trade practices as well as monitoring the effectiveness of enforcement mechanisms set out in the Act; (4) investigating allegations of violation of the Act; (5) issuing compliance notices; (6) reporting to the Competition Authority concerns of possible violations of the Competition Act of South Africa; (7) referring matters to the Tribunal established by the Act (8) referring possible criminal Acts to the National Prosecuting Authority.\textsuperscript{237} However, while one of its functions is the promotion of alternative dispute resolutions, the Commission does not have the power to adjudicate between conflicting parties hence its promotion of alternative dispute resolutions.

4.3.3 Conclusion: Summary of the South Africa legal and institutional framework

The implementation of a national e-commerce policy is a great step in preparing the country for electronically based trade and can be used as a benchmark to assess the government’s progress in the realisation of e-commerce goals. The recognition of the validity of electronic signatures makes online trade quicker and more efficient as there need not be physical transfer of contractual documents. Furthermore, South African legislation tries to do away with discriminatory practices in business by directly addressing the issue.

4.4 CONCLUSION ON E-CONSUMER PROTECTION IN THE US, UK AND SOUTH AFRICA

In the US, the main laws forming the legal framework on e-consumer protection are the Electronic Signatures in Global and National Commerce (ESIGN) Act of 2000, the Electronic Fund Transactions Act (EFTA) of 1978 and the Federal Trade Commission Act of 1914.

\textsuperscript{237}ibid 99.
Consumer protection laws in the US strongly advocate for consumers to be fully informed of terms in contracts that are generally hidden in other jurisdictions; and the support of innovation by the laws in the US encourages further innovation due to its legal recognition and protection.

The UK has, unlike Kenya, consolidated its consumer protection laws into a single statute. E-commerce is regulated by the Department of Trade and Industry (DTI). Within the DTI is a body called the Communication and Information Industries Directorate which is mandated with policy making as well as regulation within the telecommunication industry. The main provisions on e-consumer protection in the UK law derive from the Electronic Commerce (EC Directive) Regulations 2002 and the Consumer Rights Act, 2015. While e-commerce and Consumer Protection laws in the UK are rather clear with regard to applicable laws in cross border transactions thus creating a sense of predictability for both consumers and internet service providers, consumers need to assess the laws of the country of registration of the service provider to know if they would have a valid cause of action in a European court.

South Africa has e-consumer protection provisions in the legislative instruments governing electronic communications and transactions, and further in the consumer protection laws. The main e-consumer protection provisions are found in the Electronic Communications and Transactions Act No. 25 of 2002, and the Consumer Protection Act, No. 68 of 2008. South Africa e-consumer protection law provides for a national e-commerce policy. This is a great step in preparing the country for electronically based trade and can be used as a benchmark to assess the government’s progress in the realisation of e-commerce goals.
CHAPTER FIVE: SUMMARY OF FINDINGS, REVISITING THE PROBLEM, CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

This chapter provides the conclusions of this study based on the research questions. It seeks to provide a summary of the responses to the research questions based on the study conducted. The chapter also gives recommendations based on the findings of the study. It suggests amendments to the existing legal framework in Kenya concerning e-consumer protection.

5.1 REVISITING THE PROBLEM

While there is an existing framework for e-commerce in Kenya, this study sought to analyse the effectiveness of the laws to evaluate if Kenya has adequately provided for e-consumer protection. While there is a CPA in place and the law provides for e-commerce, it was hypothesised that the laws do not adequately provide for e-consumer protection, and the result is legal uncertainty on the rules to be applied when determining the extent of a consumer’s protections when an online transaction is in question, thus undermining confidence in internet transactions and hampering trade.

An example of legal uncertainty used in this study is in how to handle an e-consumer dispute. Without an analysis of whether the provisions in the law adequately secure the rights of consumers in e-commerce in Kenya, this study argued that consumers will still be disadvantaged despite the legal framework being in place, because online shop owners may still exploit the existing legislation and regulation to take advantage of consumers; therefore the consumers
would not be secure under the law. The result is that they risk infringement of their rights, and
the loss and damage that flows from such infringement.

5.2 SUMMARY OF FINDINGS
A majority of the consumers had a general idea of what constitutes e-commerce. However, since
most of the responses included references to online trade over the internet, it may be concluded
that there is limited knowledge of what e-commerce entails. Everyday uses of e-commerce
including use of ATMs were ignored. Mobile banking and the use of mobile platforms for
payment of bills and purchase of goods received little attention in the definition of e-commerce.
If the consumers do not appreciate that they are engaging in an e-commerce transaction then they
are less likely to appreciate the fact that they need protection in such transactions. The challenges
as identified in the secondary research are confirmed in the primary research. Consumers
included issues such as fraud, data and payment security and insufficient opportunity to inspect
goods as the main challenges to e-commerce.
Challenges facing e-commerce generally and by relation, e-consumer protection include (1)
fraud; (2) lack of a direct complaint reporting and resolution mechanism; and long length of time
before resolution of complaints; (3) e-commerce is not widely embraced, hence there are doubts
whether it is even a legally binding means of conducting business (4) expensive internet services;
(5) inadequate information about services offered; (6) lack of trust between consumers and the
service providers; and poor regulation including on safeguarding consumers’ information. These
challenges must be kept in mind as areas of interest during formation of e-consumer protection
regulation.
5.3 CONCLUSIONS

This study sought to answer the question of how the consumer protection laws in Kenya address the issues arising from e-commerce. It also sought to respond to the question of how the consumer protection law in Kenya can be adapted to adequately cover e-commerce transactions in the country. This study was based on the following hypotheses:

a. Consumer protection law in Kenya does not adequately provide for e-commerce

b. Consumers are disadvantaged by the inadequate provision for e-commerce in consumer protection law in Kenya

The conclusions drawn from the study on the hypotheses are highlighted below.

5.3.1 Conclusion on Hypothesis 1

Hypothesis 1 states that consumer protection law in Kenya does not adequately provide for e-commerce.

For Kenya’s consumer protection law to adequately provide for e-commerce, the challenge areas arising from e-commerce in relation to consumers must be addressed. From the primary and secondary research, it emerged that the e-commerce provisions in Kenya’s legislation are scattered in different pieces of legislation. This makes it difficult for consumers to have a clear picture of how they are protected in e-commerce transactions. In the absence of a centralised e-consumer protection regime, and in the light of low levels of e-consumer protection public education provisions in the legislation, e-consumer protection is not adequately addressed in the Kenyan legal framework.

This hypothesis was proved.
5.3.2 Conclusion on Hypothesis 2

Hypothesis 2 states that consumers are disadvantaged by the inadequate provision for e-commerce in consumer protection law in Kenya.

E-commerce is a new area in the area of consumer protection. To begin with, Kenya’s consumer protection legal framework has been in place for only 3 years (from 2012 to 2015). Without a comprehensive legislative regime to govern the area, consumers are disadvantaged because they would have no legislative basis for claims in e-consumer dispute resolution. While e-consumers could still pursue a claim under general contract or tort law, in the absence of legislation on areas such as jurisdiction, the dispute resolution tribunal would grapple with the legal basis on which to make certain decisions.

This hypothesis, therefore, was proved.
5.4 RECOMMENDATIONS

This section provides the recommendations to the industry on ensuring that e-consumers are better protected under the law than they are at present. The main recommendations drawn from this study are:

a. Consolidating existing laws dealing with e-commerce specifically; with a clear definition of the nature of e-commerce transactions, parties involved, rights and obligations arising, remedies available, and clear mechanisms handling of complaints and disputes; this consolidation should also include further provision on the operation of e-commerce, to allow for greater protection for e-consumers to be embedded in the legal framework.

b. Creation of an authority that deals with e-commerce transactions, to track all those who are dealing in it and licensing them;

c. Creation of an online platform that identifies online companies that are reliable so prevent from fraudulent organisations and may be a regulatory body to regulate the conduct and terms of carrying on business;

d. Education of the public at large about e-commerce and involve them in the legislation process so that they are aware

e. Improvement of enforcement mechanisms on laws dealing with consumer protection

f. Better and quick network connections

Other recommendations based on the findings of this study are discussed below.
5.4.1 Regulations regarding limited liability for lost cards

In Kenya, consumer liability in instances where their debit or credit cards are stolen should be limited to improve public confidence in electronic payment methods. To mitigate such losses, banks can acquire insurance policies to cover the risks. Within such legislation, consumers should be under an obligation to report their card missing within 2-3 days of the loss or theft to mitigate the misuse of the cards. In the event that the consumer does not report the loss, then it would only be fair to hold them liable for the misuse of the card.

The US has comprehensive legislation outlining the period within which the loss is reported and the applicable amount of liability that would accrue to the consumer. Such information should also be made clear to the consumer prior to issuance of a card. This is due to the fact that it forms an essential part of the contract. A consumer may be made aware of the fact that they may be liable to pay an amount as much as Kshs 15,000 in the event that they report misuse of their card after two days. The consumer might find this to be very costly and opt out of acquiring a card.

5.4.2 Prior notification of all charges applicable before payment is made

In Kenya, there is no express provision for ATMs to have a clearly displayed list of all charges applicable to various transactions in Kenya, despite this being an important category of e-commerce transactions. ATMs in Kenya should have a clearly written list of all charges applicable to various transactions carried out through the ATM. This is due to the fact that

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charges vary between banks. In addition, when a consumer transacts with a human teller, they can enquire about various charges prior to commencement of a transaction.

### 5.4.3 Establishment of point of sale in electronic transactions

Establishment of jurisdiction is a fundamental step when instituting legal proceedings against a party.\(^{240}\) The e-consumer protection legislation should clearly stipulate the geographical location where an electronic transaction is deemed to have taken place. Geographical jurisdiction can be established based on the location of the server(s) of the seller, the country in which the business is registered, the geographical location from which the business accepted to enter into contract among other methods.\(^{241}\) In situations where the buyer, seller and servers are in the same jurisdiction it is a pretty straight forward matter. However, globalization has encouraged cross-border trade and this is what creates the challenge. Such provision creates certainty and reduces the chances of one filing a case that is dismissed based on the court’s lack of jurisdiction.

### 5.4.4 Protection for voluntary submission of information

In an effort to curb malpractice with regard to consumer protection, laws should be enacted to give immunity to those who disclose improprieties to the relevant authorities. This would encourage those who would fear getting punished for their participation or failure to stop such acts. Such immunity should not be available to the employees of businesses which are already under investigation as such revelations of information would most likely not have been done in


good faith. Amnesty in such cases would speed up the collection of information and would act as a regulatory mechanism as businesses would fear engaging in improper activities due to the fact that anyone can easily report the wrongful activities.
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