

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**ELECTRONIC RETAILING IN KENYA: ADDRESSING CONSUMER PROTECTION
LEGAL AND IMPLEMENTATION CHALLENGES**

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requirements for the award of the Degree of Master of Laws (LLM)**

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Declaration

I, **JUDITH MURUNGI**, do hereby declare that this thesis is my own original academic work in substance, form and style and has never been submitted to any other University or learning institution for the award of a degree or other qualification. I also declare that all the sources of my secondary information used in this study have been duly acknowledged.


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Date: ...20th October 2021.....

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Dedication

In honor of my mother, the late Joan Juliet Muboine.

“May your soul rest in peace.”

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Abbreviations and Acronyms

ABA – American Bar Association

ADR- Alternative Dispute Resolution

ASEAN- Association of South Eastern Nations

ATM- Automatic Teller Machine

B2B – Business to Business

B2C- Business to Consumer

CA- Communications Authority of Kenya

CBK – Central Bank of Kenya

CCK – Communication Commission of Kenya

CIPIT- Centre for Intellectual Property and Information Technology Law

CMA – Capital Markets Authority

COVID 19- Coronavirus Disease 2019

DBI- Delaware Blockchain Initiative

DTC- Direct-To-Consumer

DNVB- Digitally Native Vertical Brands

DVD- Digital Versatile Disc

EAC – East African Community

E-Commerce- Electronic Commerce

E-Contract- Electronic Contract

EEA- European Economic Area

E-Retailing – Electronic Retailing

EDI- Electronic Data Interchange

E-Retailing – Electronic Retailing

EU – European Union

ESC- E-Commerce Service Center

E-SIGN – Electronic Signature in Global and National Commerce Act

G20- Group of 20

GDP- Gross Domestic Product

GIZ- German Cooperation Agency

THPB- Theory of Planned Behavior

ICOs- Initial Coins Offerings

ICT – Information and Communication Technology

IDTT- Industrial Development Think Tank

IOT –Internet of Things

IPR – Intellectual Property Rights

ITC- International Trade Center

KBA- Kenya Bankers Association

KE- CIRIT/CC- National Kenya Computer Incident Response Team- Coordination Center

KICA – Kenya Information and Communication Act

KNBS – Kenya National Bureau of Statistics

MINICOM- Rwandan Ministry of Trade and Commerce

MSMES- Micro, Small and Medium Enterprises

NCCUSL- The National Conference of Commissioners on Uniform State Laws

ODR- Online Dispute Resolution

OECD – The Organization for Economic Cooperation and Development

PAN- Payment Card Number

P2P – Peer to Peer

SMES- Small and Medium Size Enterprises

TAM- Technology Advancement Model

UCC- Uniform Commercial Code

UETA- The Uniform Electronic Transactions Act

UNCTAD – United Nations Conference on Trade and Development

UNCITRAL – United Nations Commission on International Trade Law

USA- United States of America

USD- United States Dollar

List of Cases

Anarita Karimi Njeru v Republic [1979] 1 eKLR

CIS v Directors, Crawford International School & 3 others [2020] eKLR

Hakizmana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & Another [2017] eKLR

Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR

National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR

Nonny Gathoni Njenga & Anor v Catherine Matisa and Anor [2014] eKLR

Samwel Kazungu Kambi v Nelly Ilongo & 2 others (2014) eKLR

Wiseman Talent Ventures Limited v Capital Markets Authority [2019] eKLR

List of Legislation and International Conventions

Kenya Laws

The Constitution of the Republic of Kenya, 2010

The Capital Markets Act, Chapter 485A

The Consumer Protection Act, No.46 of 2012

The Competition Act No. 12 of 2010

The Evidence Act, Chapter 80

The Finance Act, No.23 of 2019

The Law of Contract Act, Chapter 23

The Kenya Information and Communications Act, Chapter 411A

The Sale of Goods Act, Chapter 31

USA Laws

The Uniform Electronic Transactions Act

The Uniform Commercial Code

The Electronic Signature in Global and National Commerce Act

Regulations

The Kenya Information and Communications (Consumer Protection) Regulations, 2010

The Kenya Communications Regulations, 2001

The Kenya Information and Communications (Dispute Resolution) Regulations, 2010

List of International Instruments

U.N Convention on the use of Electronic Communications in International Contracts ,2005

UNICITRAL Model Law on Electronic Commerce

Policy

National Information and Communications Technology (ICT) Policy Guidelines, 2020

CHAPTER ONE: INTRODUCTION

1.0 Introduction

Chapter one constitutes introduction, historical background of the study, problem statement, the research questions, general and specific objectives and hypotheses. It also shows the justification of this study, the theoretical framework, methodology, literature review and the chapter breakdown.

This study interrogates the legal challenges facing the implementation of consumer protection in electronic retailing (e-retailing) in Kenya. It analyses the strengths, weaknesses and the challenges in implementation of the existing laws on consumer protection in electronic retailing in Kenya.

This study argues that although there are existing laws on consumer protection and electronic retailing, nevertheless the existing legal framework on consumer protection does not comprehensively cover issues that are pertinent to consumer protection in electronic retailing in Kenya. The study seeks to propose necessary reforms to the existing legal framework so as to ensure that consumer protection in electronic retailing in Kenya is comprehensively realized.

1.1 Historical background

Electronic retailing is one significant form of trade that has grown in Africa and in Kenya specifically. E-commerce in Kenya is growing exponentially. There are various online retailers in Kenya such as Amazon and eBay. It has been noted that the online market is led by Jumia and is followed by Facebook.¹

¹ Luke Mulunda, 'E- Commerce Revolution' (*Nairobi Business Monthly*, 7 February 2018) <www.nairobibusinessmonthly.com> accessed 17 June 2019.

In 2015, a survey by Consumer insight found that the percentage of people who engaged in electronic retailing in Kenya was at 7%. In 2016, the growth of internet users was recorded as 37.7 million² according to the Communications Authority Sector.³

In 2016, the Communication Authority of Kenya in collaboration with the Kenya National Bureau of Statistics (KNBS) made an analysis on the participation of private enterprises in e-commerce. This was done under the National ICT Survey. It revealed that there were private enterprises which did not participate in e-commerce was at 39%. The limitation to this survey was that it focused by and large on private enterprises and that it did not analyze households and individuals. However, the survey is credited for the significant effort made to establish findings on e-commerce penetration levels in Kenya.⁴

In June 2017, The World Stats Report revealed that Kenya had 43,329,434 internet users. This amounts to 89.4% of the population.⁵ According to Statista, it was established that in the year 2017, the e-commerce sector in Africa's revenue amounted to \$16.5. The report projected that the revenue would increase by the year 2022 to \$29 billion.⁶ Notably, most people in Kenya carry out their e-retailing transactions using their smart phones and others do use laptops or desktops and iPads. The mobile phones seem to be the most used medium for electronic retailing for its convenience and the ease with which it makes the goods accessible to the consumers.

² Moses Kemibaro, 'Kenya's latest 2016 Mobile & Internet Statistics' (*Moses Kemibaro pure digital passion*, 1 October 2016) <<https://moseskemibaro.com/2016/10/01/kenyas-latest-2016-mobile-internet-statistics/>> accessed 8 December 2017.

³ Kenyan WallStreet, 'Kenya's Mobile Penetration hits 88% to 38 Million Users' (*Kenyan WallStreet*, 8 January 2016) <<https://kenyanwallstreet.com/kenyas-mobile-penetration-hits-88-to-38-million-users/>> accessed 8 December 2017.

⁴ Communications Authority of Kenya, 'The Development of E- Commerce in Kenya' (*Communications Authority of Kenya*) <<https://ca.go.ke/industry/ecommerce-development/>> accessed 28 February 2020.

⁵ Internet World Stats Report, Usage and Population Statistics <<https://www.internetworldstats.com/af/ke.htm>> accessed 8 December 2017.

⁶ Ibid.

In 2017, electronic retailing continued to grow and new online retailing markets sprouted an example was a new online market named Hashmart. It joined the other already existing brands like Kilimall, Jumia and Masoko and other online markets. Some of the products it offered for sale included smart phone brands like Samsung, Tecno, Infinix and other various home appliances. Hashmart attracted more customers because of it had leverage over others in terms of the quality of products, longevity of products and its ability to maintain high levels of response to customer needs.⁷

The Communication Authority of Kenya noted that e-commerce in Kenya was noted to grow towards Kshs 4.3 billion and there were prospects of it growing even more to Kshs 10 billion as in the year 2018. It is without a shadow of doubt that online retail is going to continue to grow rapidly. This is attributed to the linkage between the increased use of mobile and electronic technology in Kenya.⁸

It was revealed that there was an increment in the number of firms that sold their products online. The percentage that informed this conclusion was 27%. This was revealed by a report made by the Communications Authority of Kenya (CA) in conjunction with the Kenya National Bureau of Statistics (KNBS). It further provided an account for 32.1% of the enterprises which were not selling goods online as yet. It revealed that this was attributed to the lack of suitability of their commodities to be sold online.⁹

⁷Otiato Ogutu, 'Retailer Stirs up market with e-commerce platform' (*The Standard*, 3 August 2018) <<https://www.standardmedia.co.ke/article/2001290472/retailer-stirs-up-market-with-e-commerce-platform>> accessed 17 June 2019.

⁸ Ibid.

⁹ Nairobi Business Monthly, 'The growth momentum for ecommerce in Kenya is unstoppable' (*Nairobi Business Monthly*, 7 February 2018) <www.nairobibusinessmonthly.com/the-growth-momentum-for-ecommerce-in-kenya-is-unstoppable> accessed 17 June 2019.

There was significant increase in internet connectivity in Kenya. The report revealed that in the year 2018, the percentage was at 60%. It further made projections to formal retail at 30%. The percentage of online shoppers was estimated at 0.5%.¹⁰ This exponential growth in electronic retailing was attributed to the high turnover that it offered which pointed to a turn over as high as twenty five times over the physical retail stores. It is therefore depicted that the year 2018 was very significant in regard to the growth of electronic retailing in Kenya. A report by Euromonitor attributed the growth to the increased mobile phone penetration as well as disposable income.¹¹

The United Nations Conference on Trade and Development also known as UNCTAD in 2018 ranked Kenya as number seven in e-commerce uptake in Africa. It was also ranked eighty fifth internationally. This was according to the United Nations Conference on Trade and Development (UNCTAD) Business-to-Consumer Index. The report revealed an increase of e-commerce uptake in the African continent. This was attributed to the increased annual rate of 18% which superseded the international rate of 12%.¹²

The internet functions as the market place where various buyers and sellers meet to exchange different kinds of commodities and services. It encourages the use of electronic payments such as mobile money or electronic banking. Evidently, there is a significant increase in the use of the internet for trading and retailing as each year goes by and the year 2018 marked an exponential growth in the same which points to the need to ensure adequate protection for the consumers in electronic retailing.

¹⁰ Ibid.

¹¹ Euromonitor International, 'Internet Retailing in Kenya' (*Euromonitor International*, March 2019) <<https://www.euromonitor.com/internet-retailing-in-kenya/reportonitor> > accessed 17 June 2019.

¹² Meshack Kipturgo, 'Rising e-commerce calls for efficient, reliable logistics' (*Business Daily*, 5 March 2019) <<https://www.businessdailyafrica.com/coporate/shipping/e-commerce-calls-for-efficient-reliable-logistics/4003122-5010834-ho54to/index>> accessed 17 June 2019.

In the year 2020, the world was hit with the pandemic, COVID-19. In the wake of preventive mechanisms such as enforcement of curfew, movement restrictions, closure of certain businesses and social distancing many businesses both locally and internationally boosted their operations on the digital spaces. As a result, there has been a notable influx in electronic retailing pointing to the relevance of carrying out transactions in the digital space in this day and age where countries are ravaging with the COVID-19 pandemic.

It is noted that the disease altered the retail landscape and more buyers opted to purchase commodities online. Most businesses which were offline took their activities online while those that were already existing online scaled up their operations. The scope of commodities available on the various e-retailing platforms ranges from fresh produce, clothes, shoes, electronic gadgets, alcoholic drinks, household items, medicine to mention but a few.¹³

All consumers need to do is to click a button on any of their respective devices and their orders will be delivered. Electronic retailing is credited for its efficiency and ease; however, the consumers still have fears about the downside such as being susceptible to fraud. The growth of e-retail shows the relevance of promoting consumer protection in e-retailing.

1.2 Problem Statement

The rise in electronic retailing in Kenya has seen exponential growth. Unlike in the past, there are currently many websites on which anyone in Kenya can sell products and make money.¹⁴ This has led to the increased participation in e-retailing. There exists various legislation in Kenya covering consumer protection and electronic transactions like: the Consumer Protection

¹³ Xinhua, 'Feature: Kenya experiences explosion of digital marketplaces amid COVID-19 Pandemic' (*Xinhua*, 1 May 2020) < http://www.xinhuanet.com/english/2020-05/01/c_139023902.htm > accessed 27 March 2021.

¹⁴ Ibid.

Act,¹⁵ the Kenya Information and Communications Act,¹⁶ the Contract Act¹⁷, the Sale of Goods Act,¹⁸ the Evidence Act¹⁹ and many others.

However, there is still lack of specific, comprehensive or stand-alone legislation that addresses issues that are pertinent to consumer protection in electronic retailing. It is noted that although there are existing laws that can be relied on in the event that any challenge arises in the course of electronic retailing there are still gaps that are not addressed in the existing Acts and regulations which leaves the consumers in e-retailing arrangements exposed and vulnerable to scenarios such as fraud and not having a clear mechanism to address the disputes that arise.

There is also lack of legislation that covers after-sale services in e-retailing arrangements which includes: support in regard to warranty, service training, repair or upgrades. An example of one of such situations is where a consumer of services in e-retailing purchases a commodity online and is not availed goods as agreed in the contract. Challenges may arise in regard to how to deal with the situation yet there were no provisions on how to go about such an occurrence and at times its difficult for the consumers to locate the sellers of the commodities so as to seek any form of redress. Some sellers don't have any mechanism at hand to enable to consumers seek solutions to such incidents which deprives consumers of adequate protection as they transact through the various online platforms.

There are various laws relied on such as the Constitution, the Consumer Protection Act²⁰, the Contract Act²¹ and the Sale of Goods Act²² among many others are evoked in order to resolve

¹⁵ The Consumer Protection Act, 2012.

¹⁶ The Kenya Information and Communications (Amendment) Act, 2013.

¹⁷ The Contract Act, Cap 23.

¹⁸ The Sale of Goods Act, Cap 31.

¹⁹ The Evidence Act, Cap 80.

²⁰ The Consumer Protection Act, 2012.

²¹ The Contract Act, Cap 23.

issues that arise from electronic retailing. In the case of *CIS v Directors, Crawford International School & 3 others*²³ the petitioners sought to rely on Article 46²⁴ as they stated that there had been a significant infringement of their rights as consumers. The matter was before the Constitutional Court. The issue as to whether they had grounds to bring this matter before this Court arose.

It was found that based on the Constitution was applicable to this matter. The relevant articles relied on were Article 46(3)²⁵. Other applicable laws included the Consumer Protection Act. This is an Act of Parliament that has its basis under Article 46(2)²⁶. It aims at implementing the rights created by Article 46²⁷. While the petitioners were of the view that the dispute ought to be seen through the lens of the Constitution the respondents argued that this is a contractual dispute and as a result it ought to be addressed under the existing legal framework which on contracts such as the Contract Act. They further stated that there was no need to rely on constitutional provisions. They further argued that the Constitutional Court could not involve itself in contractual disputes.

In *National Bank of Kenya Ltd v Pipeplastic Samokilt (K) Ltd & another*.²⁸ It was stated that a Court of law does not have the locus to rewrite a contract between the parties. It is trite law that a contract is legally binding. The exception is when vitiating factors such as fraud, undue influence and coercion are pleaded and proved. Despite this, the court can exercise its power where the contracts are unconscionable, unfair or oppressive. Also where it is evident that there was abuse

²² The Sale of Goods Act, Cap 31.

²³ [2020] eKLR.

²⁴ 2010, Constitution of Kenya.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ [2001] eKLR.

of procedure in the process of contract formation or where the provisions of a contract deprive a party to the contract of the chance to make a meaningful choice. Contracts ought to be just and shouldn't be based on harsh terms.²⁹

The above is an illustration as to how many laws come into play while resolving a dispute in regard to consumer protection in electronic retailing. A consumer may also not be able to ascertain what the most appropriate avenue to lodge a dispute is and yet the law expects the consumers to exploit all other avenues before they can use other channels such as the Constitutional channels in the quest for redress despite the fact that they are constitutionally entitled to consumer protection.

The existing legal regime on consumer protection does not provide for Online Dispute Resolution (ODR) and neither does it regulate it. Considering the fact that the transactions involving the sale of goods and contract are initiated on online platforms. It would be prudent to have mechanisms that cater for ODR and also hold the seller of goods accountable. Issues normally arise as to jurisdiction in e-retailing transactions since some of the transactions are carried out across borders.

Online Dispute Resolution is helpful in solving cross border disputes that may arise in e-retailing hereby solving the issues around jurisdiction when it comes to resolving matters.³⁰ The lack of specific legislation on (ODR) leaves many consumers stranded when it comes to lodging matters or obtaining redress in regard to transactions conducted across borders.

²⁹ Ibid.

³⁰ Esther Van den Heuvel, 'Online Dispute Resolution As A Solution To Cross Boarder E-Disputes' (*Esther Van den Heuvel*) <<http://www.oecd.org/digital/consumer/1878940.pdf>> accessed 26 March 2021.

E-retailing enables transactions across the world. However, there are some challenges that arise in terms of resolution of disputes that arise during e-retailing. Some of the challenges include: litigation may involve a long process, it is time consuming and costly.

Online Dispute Resolution (ODR) is a type of Alternative Dispute Resolution (ADR) used on online platforms. Its advantages include: making redress easy ,creating consumer trust online markets and fostering the growth of e-retailing.³¹ Therefore, the use of ODR to solve disputes that arise in e-retailing is suitable and the lack of provisions for it in the existing legal framework leaves e-retailing customers deprived of an avenue to easily resolve disputes that arise in the course of carrying out transactions.

More so, there are no provisions in the existing legal framework that clearly streamline what the elements of a valid contract in the electronic retailing context. There are no requirements as to disclosure of information about the goods, details about the address and contact of the seller. There is still need for clarity as to what the terms and conditions are for the contracts that are entered into by buyers and sellers in e- retailing arrangements. These amongst other issues beg the question as to whether the existing legal framework comprehensively covers the issues that arise in e-retailing arrangements.

The application of traditional common law principles to contracts in e-retailing is problematic. It is therefore important to consider a range of issues that include contract. There is need for clear regulation on issues such as electronic signatures and their authentication.³²

³¹ CLS Oxford, 'What should the ideal ODR system for e-commerce consumers look like? The Hidden World of Consumer ADR: Redress and Behavior' (*CLS Oxford*, 28 October 2011) <https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf> accessed 1 April 2021.

³² Timothy Beale, 'E-Commerce and Contract Law' (March/April 2011) *au Journals* 35 <<http://138.25.65.17/au/journals/PrecedentAULA/2011/26.pdf> > accessed 26 March 2021.

There is lack of clarity in regard to regulation on blockchain and cryptocurrencies. This is despite the fact that the use of blockchain technology can increase consumer protection due to its reliability when it comes to solving issues such as fraud. Its use has been adopted by the big players in electronic retailing. Some of the major electronic retailing platforms that have embraced the use of the digital tokens include: PayPal Holdings, Overstock and Shopify.³³

In 2020, the High Court gave a greenlight to the Capital Markets Authority (CMA) to proceed with investigations and inquiry into the operations of Kenicoin cryptocurrency. Safaricom consequently shut down its pay bill till Number that was to be used by speculators and investors of Kenicoin after an aggressive campaign by the CMA. As a result, the cryptocurrency was brought to a screeching halt.³⁴

In *Wiseman Talent Ventures v Capital Markets Authority*³⁵ the Plaintiff was involved in the business of trading in cryptocurrencies in Kenicoin. The Application was supported by an affidavit of the Applicant, the sole proprietor of the Plaintiff business. It was argued that cryptocurrency usage was to the end of ensuring a high degree of safety in financial transactions.³⁶ The mandate of the CMA to deal with cryptocurrencies was questioned. The recent acts of the CMA in issuing public statements aimed at cautioning the users of cryptocurrencies was deemed unrealistic and an apprehension of fear amongst the users.

³³ John Mwaniki, 'Does Alibaba Accept Bitcoin' (*Interactive Crypto*, 26 January 2021) <<https://www.interactivecrypto.com/does-alibaba-accept-bitcoin#:~:text=Although%20Alibaba%20does%20not%20accept,major%20e%2Dcommerce%20giants%20do.&text=So%2C%20let%20us%20see%20which,embraced%20this%20digital%20token%20world,>> accessed 27 March 2021.

³⁴ Jackson Okoth, 'Kenyan Court Rules Against Kenicoin Cryptocurrency' (*The Kenyan Wall Street*, 29 September 2020) <<https://kenyanwallstreet.com/kenyan-court-rules-against-kenicoin-cryptocurrency/>> accessed 27 March 2021.

³⁵ [2019] eKLR.

³⁶ Ibid.

As a response to the question as to whether cryptocurrency/bitcoin/Kenicoïn should be regulated in Kenya the court conceded to the Applicant/Plaintiff's keen observation that there is lack of a clear legal response regarding regulation of budding cryptocurrency usage in Kenya.³⁷ On the other hand, the Court also agreed with the Respondent that the applicability of the other laws such could not be invalidated by the lack of a regime pertinent to the use of cryptocurrency.³⁸

It is upon this premise that the importance of having a regulatory framework on the use of blockchain technology in Kenya is advocated for. Some other countries in the world such as USA which have legal regimes that regulate this area in a bid to boost consumer protection in their jurisdictions.³⁹

This is because the application of the general regime to the issues pertaining the use of cryptocurrencies may not cover all the issues involved as comprehensively as the specific legal regime would. There is also a lack of certainty and difficulty encountered as one decides which law is the most suitable for the particular situation on e-retailing out of the many existing laws which each touch the area in piecemeal.

This study therefore examines the existing legal framework on consumer protection in electronic retailing in Kenya with a view to suggest reforms or the formulation of a legal framework pertinent to consumer protection in electronic retailing in Kenya in a bid to comprehensively address the unique issues that arise in electronic retailing arrangements as shown above.

1.3 Research Questions

The following are the research questions;

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

- (1) What legal framework provides for consumer protection and electronic retailing in Kenya?
- (2) What are the strengths and weaknesses of the existing laws on consumer protection in electronic retailing in Kenya?
- (3) What are the legal and implementation challenges of consumer protection laws in electronic retailing in Kenya?
- (4) What comparative parallels in practice can be drawn from the most progressive jurisdictions in regard to electronic retailing?
- (5) What reforms should be made to the existing laws on consumer protection in electronic retailing in Kenya?

1.4 Objectives of the study

The objectives of this study are divided into categories which are the general and specific objectives.

1.4.1 General Objective

The general objective of this study is to analyze the existing legal framework on consumer protection in electronic retailing in Kenya.

1.4.2 Specific Objectives

The Specific objectives of this study are as follows:

- (1) To examine the legal framework on consumer protection in electronic retailing in Kenya.
- (2) To examine the strengths and weaknesses of the existing laws on consumer protection in electronic retailing in Kenya.

- (3) To examine the legal and implementation challenges of the law on consumer protection in electronic retailing in Kenya.
- (4) To ascertain the best practices in progressive jurisdictions namely: The United States of America, South Africa and Rwanda. The goal is to pick lessons on how the existing legal regime can be modified so as to appropriately address the unique nature of electronic retailing in Kenya.
- (5) To ascertain what reforms should be made to the existing laws on consumer protection in electronic retailing in Kenya.

1.5 Hypotheses

The Hypothesis of this study is as follows;

- (1) The disaggregated legislative framework has substantially contributed to the failure to protect consumers in electronic retailing.
- (2) Consumers in electronic retailing transactions are not sufficiently protected under the existing laws due to a lack of a comprehensive legal framework on electronic retailing.

1.6 Justification of the study

Kenya has registered an increase in internet connectivity. Its growth is recorded at a rate of 60% and formal retail invasion at a percentage of 30% as in the year 2018. There are projections that Kenya will continue to register significant exponential growth in e-retailing year after year.⁴⁰ This depicts the importance of having a legal framework to guide the entire process of electronic retailing such as from the inception of the electronic retailing contract, display of goods, purchase, protection from fraud and provision for avenues to seek redress, the use of blockchain technology and a mechanism for online dispute resolution.

⁴⁰ Euromonitor International, 'The growth momentum for e commerce in Kenya is unstoppable ' (*Euromonitor International*, March 2018)<<https://www.euromonitor.com/internet-retailing-in-south-africa/report>> accessed 7 December 2017.

Since technology is ever advancing, there is need for the law to progress with it and to address the technological changes. This may include the need for the law to embrace new technological solutions such as the use of blockchain technology so as to protect consumers from fraud. This study outlines the proposed reforms to existing laws and also proposes the creation of a legal framework pertinent to electronic retailing so as to ensure the highest standard of consumer protection.

1.7 Theoretical Framework

The Theories that underpin this study include: the theory of Planned Behavior (THPB), the Sociological theory and the Positivist theory of law. They explain how consumers respond to the existing laws and how the law ought to adapt to the changes in society.

The Sociological theory argues the law is meant for the society and therefore the law ought to be amended to meet the needs of society. The Positivist theory provides for sanctions in the law that protects the consumers.

1.7.1 Theory of Planned Behavior

This theory was proposed by Ajzen.⁴¹ It assists in the investigation of the factors which can influence consumer behavioral choices. He shows the nexus between intention, attitude, subjective norms and perceived behavioral control. He states that intentions are used to apprehend the motivational factors that impact behavior, they are signs of how much effort they are planning to portray a particular behavior.⁴²

⁴¹ Lutz Sommer, 'The theory of planned behavior and the impact of past Behavior' (2011) 10 *International Business & Economics Research Journal* 91 <<http://www.file:///C:/Users/Teddy/Downloads/930-1-3671-1-10-20110106.pdf>> accessed 7 December 2017.

⁴² Ngoc Thang Ha, 'The Impact of perceived risk on consumers' online shopping intention: An integration of TAM &TPB' (2020) 10 'Management Science Letters' 2029

In e-retailing, there is a higher perceived due to challenges such as the buyer not being in direct contact with the seller or not being able to physically see and touch the commodities so as to determine their authenticity before the purchase of the same.⁴³ Therefore, perceived risk is a factor that negatively impacts a consumer's option to shop online in an electronic retailing transaction.

In e-retailing consumer attitude is influenced by the good or bad ratings from other purchasers of the items offered on the various platforms or websites. This shows the effect of consumer attitudes on the purchase of goods. The article further reveals the effect of subjective norms such as social pressures such as those which arise from friends, family or other groups on conducting certain behavior.⁴⁴

The article analyzes the effect of perceived risk. It illustrates what the effect of the awareness of the bad consequences or uncertainty in participating in a certain transaction affects consumers. Consumers in e-retailing are susceptible to a number of risks. These have been characterized by Pavlou to include: financial and privacy risk where private information may be publicized illegally, security risk which includes credit card information risk. Consumers may hesitate to participate in e-retailing due to the fear of these risks.⁴⁵

The theory of planned behavior is criticized for its lack of room to accommodate issues of variability in response by various consumers.⁴⁶ The theory tends to assume that consumers will continue to assume a particular pattern which may not always be the case. This theory is

<https://www.researchgate.net/publication/339597478> The impact of perceived risk on consumers' online shopping intention An integration of TAM and TPB> accessed 11 February 2021.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶Falko F. Sniehotta, Justin Presseau & Vera Araujo- Soares, 'Time to retire the theory of planed behavior' (2014) 8 ' Health Psychology Review' 1 <<http://www.tandfonline.com/doi/abs/10.1080/17437199.2013.869710> > accessed 7 December 2017.

important because it examines consumer attitudes towards electronic retailing transactions. It portrays the basis of the fear of the consumers to participate in electronic retailing transactions due to the existence of perceived risk. This theory shows how the electronic retailing transaction is different from a normal transaction that involves a physical interaction with the buyer, seller and commodities since it is carried out in an entirely virtual environment.

The theory causes us to see the need for better regulation and laws in the area of consumer protection in e-retailing so as to boost the consumer's trustworthiness in transactions of this nature by ensuring that they are protected from risks such as fraud among many others so as to boost their participation in electronic retailing transactions.

In this study, this theory will be used to show the nexus between the degree of consumer protection and consumer participation in e-retailing. In chapter three the existence of fraud in e-retailing is seen as one of the legal and implementation challenges in e-retailing in Kenya. Once consumers are unsure about how protected they are as they transact online they are unable to participate in online transactions.

The applicability of this theory is also shown in chapter four which is a comparative study – lessons from USA, South Africa and Rwanda. For instance, in South Africa where electronic retailing is growing rapidly the growth is attributed to various factors which include the confidence of consumers in online transactions. This is because through practices such as tokenization the consumers are assured of safety which in turn increases their engagement in e-retailing. The theory can be used to show the gravity of the importance of ensuring that consumers are granted consumer protection in e-retailing since its presence increases their confidence and trust hereby encouraging more consumers to participate in e-retailing.

1.7.2 Sociological Theory

This is propounded by Roscoe Pound. He argues that law is a tool for social engineering. It ought to respond to the needs of society. He argues that the study and interpretation of the law should not be done in isolation of the realities and lived experiences of society. He strongly advocates for integration between societal needs and the law as it is stated in the books. This is what is understood as the concept of the law in books versus the law in action. To which he demonstrates the importance of studying the law in action.⁴⁷ The sociological approach argues that the law can be modified so as to suit the needs of the society.

Sociological jurisprudence is a method of social sciences that aims at using the social sciences to study the role of the laws a living force for the good of society.⁴⁸ The law is an tool of social control backed by the supremacy of the state. “The sociological jurists propose to study the law in action based on the hypotheses that the law in action bears some weighty relationship with the law in the books, and to proceed then to establish in what way the hypotheses is or is not substantiated and needs qualification.”

However, the sociological school of thought has been criticized for looking at the law as a whole and neglecting the historical background of the law. It is also criticized for looking at the law in isolation of its implementation and enforcement.⁴⁹

⁴⁷Manmeet Singh, ‘Sociological Jurisprudence’ (*Legal Service India .com*, 2016) <http://www.legalservicesindia.com/article/userarticles.php?aut_id=2888> accessed 7 December 2017.

⁴⁸ James A. Gardner, ‘The Sociological Jurisprudence of Roscoe Pound’ (1961) 7 *Villanova Law Review* 1 <https://www2.warwick.ac.uk/fac/soc/sociology/staff/sfuller/social_theory_law2015-16/roscoe_pound_the_sociological_jurisprudence.pdf> accessed 7 December 2017.

⁴⁹ Arlene Sheskin, ‘A Critical Review and Assessment of the Sociology of the Law’ (1978) 3(2) ‘Mid-American Review of Sociology’ 109 <<https://www.kuscholarworks.ku.edu/bitstream/handle/1808/4846/MARSV3N2NC2.pdf;jsessionid=87BD127464544163409340A1EE9AF5F5?sequence=1>> accessed 7 December 2017.

The theory of sociological jurisprudence is relevant to this study because it argues that the law has to suit the needs of society. In relation to technology, the law ought to adapt to the pace at which the technology is developing and thus there is a need to amend the laws so as to suit the needs of the society. Therefore, the existing laws ought to be amended so as to respond to rapid technological growth. There have been advancements in the area of electronic retailing such as the use of blockchain technology in a bid to ensure security of electronic transactions. However, there is still no comprehensive legal framework addressing the use of the same in electronic retailing in Kenya despite the fact that its use can boost security in electronic retailing.

This theory therefore is suitable in showing how society and technology are in an ever evolving process and the law should not drag behind the recent or future technological developments. As society technology evolves, so is it required that there be relevant laws that address the technological developments in terms of regulation. There has also been a societal change in the way e-retailing is carried out post 2020 due to the effect of the COVID-19 pandemic. It has boosted e-retailing, more businesses have begun to operate on online platforms and it is projected that there will continue to be rapid growth in e-retail.⁵⁰

More businesses and people are currently transacting online in a bid to reduce human contact so as to control the spread of the deadly virus. With the increase of the use of the internet for transactions there is need for the law to provide for the best ways to ensure safety and protection against fraud which involves embracing the recent developments in the use of blockchain technology.

⁵⁰ UNCTAD, ‘ COVID-19 has changed online shopping forever, survey shows’ (*UNCTAD*, 8 October 2020) < <https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows>> accessed 1 April 2021.

This theory has been applied in this study under chapter five which covers the conclusions and recommendations. There is a recommendation towards the adoption of the use and regulation of blockchain technology for e-retailing. Under the chapter, there are suggestions pointing to the need to provide regulation for this new area which has proved to have benefits in e-retailing. This shows how technology is ever advancing and therefore there is a need for the provisions of the law to also progress with the rate at which technological advancements are occurring in order to protect consumers.

1.7.3 Positivist Theory

Jeremy Bentham and John Austin propound that law is a command of the sovereign that is backed by sanction. This school of thought argues that the law is separate from morality. The theory has been criticized for assuming that it is the state that gives and takes away the rights of the citizens. This is because it refers to the sovereign which is the state and neglects the inherent rights which are given by God as propounded under the natural law school of thought.⁵¹

Jeremy Bentham is credited for his constructive thinking and zeal displayed towards advocating for legal reforms in England. It is noted that proper legislation has become the most important method in era.⁵² This theory is relevant because it depicts the importance of law making processes and the need for the legislative bodies to make necessary reforms to the existing laws in order to provide appropriate solutions to the society's needs.

This study upon analyzing the existing legal regime in chapter two proposes reforms which seek to provide solutions to the failure to realize wholesome consumer protection in electronic

⁵¹ Thomas F. Broden, 'The Straw man of Legal Positivism' (1959) *Notre Dame Law School NDL Scholarship Journal Articles* <https://www.scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1902&context=law_faculty_scholarship> accessed 7 December 2017.

⁵² Manmeet Singh, 'Analytical Legal Positivism' (Legal Service India .com) <<http://www.legalservicesindia.com/article/2228/Analytical-Legal-Positivism.html>> accessed 1 April 2021.

retailing under chapter five. Some of the recommendations to existing laws include providing for regulations that guide the use of blockchain technology and Online Dispute Resolution (ODR) under chapter five. This shows the importance of having mechanisms in place to ensure consumer protection and easy access to remedies in e-retailing.

1.8 Methodology

This study is based on qualitative research. Documentary research methodology has been used in this study. There has been the use of texts and documents as source materials. Examples of the public documents relied on include government statistical publications, newspapers and reports. Some of these documents are available in libraries.

The study uses both secondary and primary data modes of data collection. The primary sources entail the actual law and some of the primary sources relied on in this study include: Statutes, The Constitution, Acts, Regulations and cases. Secondary data has also been used in this study. The secondary sources have been used because they restate the law and further discuss, analyze and critique its provisions on the subject in question. Examples of the secondary sources used in this study include: scholarly journals, books, reports and articles.

Also, international comparative methodology will be used in this study. This will include the comparison of practices and their implications in regard to consumer protection and their benefits in the countries: USA, Rwanda and South Africa. The reason for choosing these three countries is because they have registered a level of success in ensuring that there is consumer protection in electronic retailing in the respective jurisdictions and there are lessons we can pick from them.

From USA, the codification of laws on consumer protection in electronic retailing and the use of blockchain technology to promote consumer protection can be adopted for Kenya. From Rwanda, we see a level of government involvement in training programs and the creation of E-Commerce Service Center (ESC) amongst other measures have helped to boost consumer protection in e-retailing. These measures can be adopted to ensure that consumer protection in electronic retailing in Kenya is realized. From South Africa, there has been the use of measures such as tokenization to ensure that the electronic transactions are secure and this has increased consumer trust in electronic retailing hence seeing a rise in its growth. The use of tokenization therefore can be adopted and promoted in Kenya in order to promote consumer safety and trust in electronic retailing.

1.9 Literature Review

Existing literature concerning this area of study categorized as follows; electronic retailing, unregulated issues, the law is lagging behind the rate at which technology is developing and consumer attitude and behavior.

1.9.1 Electronic Retailing

Matthias Schu in a book entitled “Online Growth Options for Retailers: Three Essays on Domestic and International Growth Strategies with Online Retailing”⁵³ shows how e-retailing is booming and he gives a description of its competitive features. He outlines the advantages of e-retail to include: increment of efficiency, growth of market share, an avenue for expansion into

⁵³ Matthias Schu, *Online Growth Options for Retailers: Three Essays on Domestic and International Growth Strategies with Online Retailing*, (Gabler Verlag, 2017).

new markets and that e-retail is lucrative. He attributes the exponential growth in online shops to the increment of internet users globally.⁵⁴

He provides various definitions of key terms such as retailing, wholesaling, retail format and retail channel. He evaluates the factors that lead either store retailers or wholesale companies to create online channels for their business activities. He identifies the different factors which positively or negatively affect online retailers. He paints the picture of the new trends in the areas of retail research and management. He shows how various models such as the Technology Advancement Model (TAM) are applicable to e-commerce in terms of implementation of new technologies.

He delves deep into what the driving force behind the establishment of online shops is. He assesses the other possible driving forces and their impact such as institutional pressure. He mentions that there is a scarcity of resources in some countries which hinders the starting up of online shops. The book focusses largely on online retailers and it shows the various theories, intentions and factors that influence online retailers to launch into online retail.

However, little is mentioned about the online consumer and their needs such as consumer protection. This study will focus on the online consumer and how they can attain consumer protection as they transact online. It will also show how selected theories are applicable to consumer protection in e-retailing. While this book focuses on Europe as a case study, this research will focus on Kenya and also propose reforms to the existing legal framework on consumer protection in e-retailing within the Kenyan context.

⁵⁴ Ibid.

Dr. Ha Huong in a book entitled “Consumer Protection in e-retailing in ASEAN”⁵⁵ evaluates consumer protection on the online market within the parameters of Association of South East Asian Nations (ASEAN) countries. Reference is made to various e-retailing platforms such as Lazada in Singapore, Shopee in Vietnam and Zalora in Malaysia as the case studies in this book. He acknowledges that e-retailing has grown rapidly due to the COVID-19 Pandemic. He is cognizant of the various challenges that arise in ensuring consumer protection in e-retailing despite the fact that it also has some advantages. This book paints a clear picture on consumer protection on the online marketplace in the ASEAN countries.⁵⁶

The book clearly analyzes the major issues surrounding consumer protection. These include product quality, privacy, jurisdiction and security. It examines the policy or governance approach adopted by different sectors so as to address the issues of e-consumer protection. It shows how a multi-sector governance framework can help in ensuring consumer protection in e-retailing and makes a proposal for the adoption of the same.⁵⁷

Overall, the book is interdisciplinary in nature. It gives a description of consumer protection in e-retailing strictly within the ASEAN context. It clearly illustrates how various theories are applicable to the major issues in safeguarding consumers in e-retailing in the ASEAN countries. It shows the significant role played by governance and policy regulation in ensuring protection of online consumers.⁵⁸

However, this book’s parameters in carrying out research on consumer protection in e-retailing is limited to ASEAN countries. This is also evident in the case studies and the regulation or

⁵⁵ Ha Huong, *Consumer Protection in E-Retailing in ASEAN*, (Business Expert Press 2021).

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

policies referred to. This study will look at consumer protection in e-retailing with specific reference to the Kenyan context. It will analyze the existing legal framework and will also provide recommendations having examined other jurisdictions such as USA, Rwanda and South Africa. This study will show how Kenya can pick some lessons from these jurisdictions which can be adopted in a manner suitable to Kenya so as to promote consumer protection in e-retailing in Kenya.

Jane K. Winn in a book entitled “Consumer Protection in the Age of the ‘Information Economy’ (Markets and the Law) shows a linkage between various theories and consumer protection. Attention is drawn to how consumer protection laws are related to technological innovations. The book provides fresh perspectives on these topics.⁵⁹ An analysis on what consumer protection means in the twenty first century is given. The book seeks to assess whether there can be a fair balance between innovators and consumers in intellectual property law. It shows the contrast between the new business provisions and the traditional law of contract. It also assess the relevance of information privacy.⁶⁰

However, USA and Europe are the major countries relied on. It also refers to provisions of regulations based within these particular jurisdictions. This study will look at consumer protection in e-retailing with specific reference to Kenya. It will show the strengths and the weaknesses of the existing legal framework including the Contract Act provisions amongst other applicable laws and will seek to propose recommendations which are applicable within the Kenyan context.

⁵⁹ Jane K. Winn, *Consumer Protection in the Age of the ‘information Economy’* (Markets and the Law), (Ashgate Pub Co 2006).

⁶⁰ Ibid.

Nicolas Goldstein in an article entitled “The Future of E-commerce in Africa: A Mere Illusion?” acknowledges the growth of e-commerce internationally. He is cognizant that e-commerce is steadily growing in Africa. He relies on a report from Statista which reveals that the value of e-commerce in Africa as in the year 2017 was 16.5 billion dollars. There are projections that this value will continue to raise exponentially. A report from a consulting firm called McKinsey estimates that the value increase to 75 billion dollars by the year 2025.⁶¹

He explains how The United Nations Conference on Trade and Development also referred to as UNCTAD makes considerations as it ranks countries. He identifies the criterion followed in this process. They include the number of people in the country with access to bank accounts, the percent of a country’s population that enjoys access to internet. There is also a consideration in regard to how secure web servers are and the reliability of postal services within the specific country. Countries like Mauritius, Nigeria and South Africa scored well while some of the African countries are not doing well.⁶²

He states that there is a need to ensure that hindrances in e-retailing in Africa are addressed. He mentions the need to develop infrastructure such as internet and the spectrum of its coverage logistics, postal service efficiency and to provide clear mechanisms to guarantee data protection rights of the consumers.⁶³

However, he does not provide examples of other jurisdictions where such proposed solutions and more have been applied and have proved to be successful in promoting e-retail. In this study, reference is made to jurisdictions such as USA where there is regulation of blockchain

⁶¹ Nicholas Goldstein, ‘The Future if E- Commerce in Africa, a mere Illusion?’ (*africa.com*,2019) <<https://www.africa.com/the-future-of-e-commerce-in-africa/>> accessed 17 July 2019.

⁶² Ibid.

⁶³ Nicholas Goldstein, ‘The Future if E- Commerce in Africa, a mere Illusion?’ (*africa.com*,2019) <<https://www.africa.com/the-future-of-e-commerce-in-africa/>> accessed 17 July 2019.

technology, South Africa in regard to the use of tokenization in order to promote the safety of online transactions and Rwanda to show how government involvement in training e-commerce users and other collaborative programs have led to the increase of knowledge and skills in the use of e-retail platforms has been carried out. This study will also assess the existing legal framework on consumer protection in e-retailing in Kenya and also propose reforms.

According to an article by Business Today entitled “Online retailers ride a rising e-commerce tide”⁶⁴ Kenya is ranked among the African countries with the booming e-commerce markets. It is characterized by a wide range of e-retail players such as Jumia, Kilimall and other international ones like eBay, Etsy and Amazon amongst many others. The Communications Authority in Kenya estimated e-commerce at Kshs 4.3 billion and shooting towards Kshs 10 billion in 2018. This denotes the increased rapid growth of electronic retailing in Kenya and therefore points to the need of a proper legislative regime in order to ensure that the lucrative trade is carried out smoothly within the confines of the law.⁶⁵

The article does not show how to come up with the legislation that concerns e-retailing in the various jurisdictions. Most of the written work points more to the definition of e-retailing, its advantages over the brick and mortar shops and the disadvantages. Most of the statistical data that is available points to the increase in electronic retailing in the various jurisdictions.

This study will go beyond mentioning the advantages and disadvantages of e-retailing and will go further to state ways in which Kenya can respond to the issues surrounding e-retailing and how Kenya can legally respond to these issues. The aim of this study is to analyze the strengths and shortcomings of the existing laws on consumer protection in e-retailing in Kenya. It will

⁶⁴ BT Correspondent, ‘Online retailers ride a rising e-commerce tide’ (*Business Today*, 26 2018) <<https://businesstoday.co.ke/online-retailers-ride-rising-e-commerce-tide/>> accessed 17 July 2019.

⁶⁵ Ibid.

further state recommendations in regard to consumer protection in e-retailing. It shows how Kenya as a country can respond to the challenges that arise in e-retailing.

1.9.2 Unregulated issues

Dr. Njaramba Gichuki in the book entitled “Law of financial Institutions in Kenya”⁶⁶ argues that there is need to have comprehensive policy on Information Communication Technology in addition to the already existing one.⁶⁷ He further states that the existing policy merely states the theoretical aspects and does not go ahead to provide a mechanism of implementing the same policy.⁶⁸ This points to the need to ensure proper implementation of the existing laws.

He analyses the provisions of the Evidence Act⁶⁹ and cites the limitation in the wording of the statutes that refer only to computers and neglect other technological devices that are used in electronic transactions like phones.⁷⁰ He states that there is a loophole in the legal framework for the lack of law regulating mobile money transactions. He further argues that there is a need to ensure that the laws specify the minimum standards of technology in order to reduce the risk of information being accessed.⁷¹

In this book, not much attention is given to the nature of e-retailing and the intricate issues surrounding it such as what theories apply to it, the legal and implementation challenges that are affecting e-retailing in Kenya and possible solutions to ensure consumer protection in e-retailing. This study will give a picture on the unique nature of e-retailing and its importance in this day and age. It will also analyze the existing legal framework on consumer protection in e-retailing in Kenya. It will further include various lessons that can be borrowed from USA, Rwanda and

⁶⁶ Njaramba Gichuki, *Law and Financial Institutions in Kenya*, (2nd edn, Law Africa 2013).

⁶⁷ The National Information and Communications Technology Policy of March 2006.

⁶⁸ Njaramba Gichuki, *Law on Financial Institutions in Kenya*, (2nd edn, Law Africa 2013) p 259.

⁶⁹ Section 65(5) (C), Section 106 B of the Evidence Act, Cap 80, Laws of Kenya.

⁷⁰ Njaramba Gichuki, *Law on Financial Institutions in Kenya*, (2nd edn, Law Africa 2013) p 251.

⁷¹ Ibid.

South Africa on how the challenges can be solved and it will also provide recommendations to the existing legal framework on consumer protection in e-retailing in Kenya.

Adam J Mambi, in the “ICT Law Book”⁷² clearly shows that there is a record of lack of updated laws in relation to information technology. This coincides with the argument that technology is always developing at an ever increasing speed and therefore there is a need to ensure that the laws are regularly updated to suit the rate at which technology is developing. He further states that the consumer protection most of the time appears to be one sided and by and large tends to protect the offline consumer and in turn very little attention is usually given to consumer protection of consumers in electronic transactions.

The book does not explicitly show the ways in which a country like Kenya can respond to the technological advancements and their effects on consumer protection in e-retailing. This study will show the ways in which the existing legal framework in Kenya can respond to the technological advancements. In this study the various areas that are in need for regulation in light of the increased technological advancements are mentioned and the applicable laws that would require reforms to accommodate these changes are also shown to the end that consumer protection in e-retailing is realized.

Calvin Hennick, in an article entitled “The Benefits of Blockchain Technology Across Industries” illustrates how retailers are now adopting the use of blockchain so as to lower costs, and to empower the consumers. He notes that the increment of participants in e-retail has incidentally increased the number of people integrating cryptocurrency in their shopping.⁷³

⁷² Adam J Mambi, *ICT Law Book, a Source book for Information & Communication Technologies and Cyber law* (Mkuki na Nyota Publishers Ltd 2010).

⁷³ Calvin Hennick, ‘The Benefits of Blockchain Technology Across Industries’ (*BizTech*, 31 October 2019) <<https://biztechmagazine.com/article/2019/10/benefits-blockchain-e-commerce>> accessed 24 March 2021.

Blockchain makes provision for the use of new currencies in e-retailing. Hennick further refers to cryptocurrency as a digital currency which ensures security through the use of advanced cryptography.

Fraud in electronic transactions can be controlled by the use of crypto-currencies because it is very difficult to counterfeit and reuse each currency or to cancel a transaction that has been completed.⁷⁴ However, it can also be used in e-retail, supply management, money transfer and securing digital IDs. The use of blockchain transaction notes, *inviqa*, is cheaper than the cost of conventional e-commerce. This supports the argument that the blockchain technology lowers transaction costs. Blockchain also provides improved data security due to its decentralized nature.⁷⁵

The nature of blockchain is to the effect that it limits the creation of any loopholes which may be manipulated by hackers who may attempt to carry out unauthorized transactions. Blockchain technology provides more guaranteed consumer protection because every single node on the network retaliates.⁷⁶ Therefore, this article shows the benefits of the use of blockchain technology in electronic retailing and it shows that it is a way to enhance consumer protection since it is built to counter occurrences of fraud much more than the traditional way of conducting electronic retailing.

This article does not go further to show how a country that is considering the use and regulation of blockchain technology can go about the regulation of the same. In this study, a case study of the state of Delaware in the United States of America is referred to so as to illustrate how a

⁷⁴ Jake Frankenfield, 'What is cryptocurrency?' (*Investopedia*, 7 March 2021) <<https://www.investopedia.com/terms/c/cryptocurrency.asp>> accessed 24 March 2021.

⁷⁵ *Ibid.*

⁷⁶ Calvin Hennick, 'The Benefits of Blockchain Technology Across Industries' (*BizTech*, 31 October 2019) <<https://biztechmagazine.com/article/2019/10/benefits-blockchain-e-commerce>> accessed 25 March 2021.

country can provide for the regulation of the use of blockchain technology. From this example Kenya as a country is able to pick some ideas on how to handle the issues surrounding the use of blockchain technology.

Muthoni Njogu in an article entitled “Blockchain & Cryptocurrency Regulation 2021 | Kenya” mentions that Kenya is rated amongst ten countries internationally in cryptocurrency holdings and blockchain- related transactions. She notes that as of January 2018, Kenya’s Bitcoin holding represented over 2% of Kenya’s Gross Domestic Product (GDP), a considerable percentage given that ten countries have a similar level of GDP invested in cryptocurrencies. She notes that cryptocurrencies there is no law regulating the use of cryptocurrencies in Kenya and neither is there any backing from the Central Bank concerning cryptocurrencies.⁷⁷

Consequently, cryptocurrencies may be treated as securities but not as currencies.⁷⁸ This article shows the lack of clear laws or regulations on the use of crypto-currencies in Kenya despite its benefits. This article does not show how blockchain technology can be regulated in Kenya. In this study, there will be reference to USA where there is regulation for the use of blockchain technology. This study shows how Kenya can take the next steps having realized the benefits that accrue from the use of blockchain technology. It provides ways in which the existing legal framework may be amended in order to include provisions that will foster the growth of e-retailing and overall promote the protection of consumers in e-retailing in Kenya.

⁷⁷ Muthoni Njogu, ‘Blockchain & Cryptocurrency Regulation 2021 | Kenya’ (*Global Legal Insights*, 23 October 2020) < <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/kenya>> accessed 25 March 2021.

⁷⁸ *Ibid.*

Pablo Cortés in a book entitled “ Online Dispute Resolution (ODR) for Consumers in the European Union”⁷⁹ looks at electronic commerce in the European Union. He states that under e-commerce the parties involved may be in different jurisdictions and are able to contract by simply using electronic devices. He analyzes the challenges surrounding traditional litigation in resolving disputes that arise in e-retail. Some of the challenges include: inconvenience, high costs incurred and the process is time consuming. He suggests that countries ought to consider the new methods of dispute resolution which can help resolve cross boarder issues.⁸⁰

In this book he shows the relevance of ODR in the resolution of disputes. He shows the relationship between safeguarding consumers rights and access to justice in the era of electronic commerce. The book displays a European perspective on consumer protection policy in e-retailing. Reference is made to Wales, Ireland and Spain in regard to how the small claims procedures there operate. The book also analyzes issues such as conflict of laws and enforcement within the EU.

He provides a projection of what ODR holds in store for European consumers and the effect its use has on e-retailing in general. He further identifies the challenges surrounding the use of ODR. In this book he reveals why it is important to create legislation aimed at closing the existing cranny between the prospects of ODR services and the reality of its use. He states that the use of ODR ought to rely on the European Regulatory Model if it is to aid in solving disputes so as to realize proper enforcement of consumer rights.⁸¹

The book also entails a topic on ODR in which it is broken down to include the definition and growth of ODR, its historical evolution, opportunities and challenges surrounding ODR, dispute

⁷⁹ Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union*, (Routledge Research in IT and E-Commerce Law, 2011.)

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

avoidance, dispute resolution and various European practices responsible for the increased usage of consumer ODR. It further analyses challenges of ODR, equitability and due process, implementation and the role of modern technology. It also analyzes how consumers can seek redress with the support of technology. Court processes and arbitration, cross border disputes with specific reference to the European small claims procedure are also some of the aspects looked at in this book. It further looks into issues that surround online arbitration and mediation and the regulatory approach of the same within the EU with reference to Wales and England.

This book shows the importance of regulating ODR in the EU. It shows how both regulation and self-regulation are important in ODR. However, it does not shed any light on the failed expectations of the use of ODR. In it, the objectives of regulating ODR and international and regional regulatory initiatives are clearly discussed. It gives the rationale of ODR regulation at the EU level. The book further shows the various actions that can be taken to ensure maximum effectiveness of ODR.

It clearly illustrates how the EU has made steps in the use of ODR. There has been creation of awareness about the use of ODR, the stipulation of requirements like inclusion of mandatory ODR clauses in contracts. The EU further stresses the importance of having procedural and legal standards in regard to the use of ODR. The EU further carries out various measures so as to promote efficacy to the ODR process. This is done by ensuring that ODR decisions are lawfully enforced.

The book largely relies on the EU context. This is seen through the examples and the legal framework referred to. This study proposes the adoption of the use of ODR due to its benefits and further goes on to look at the existing legal framework in Kenya and makes recommendations to the use of ODR in order to promote consumer protection in e-retailing. The

study cites examples of jurisdictions where the use of ODR has been regulated and cites how lessons can be picked from these jurisdictions in order to aid the process of regulating the use of ODR within the Kenyan context.

1.9.3 The law on technology is lagging behind

Joy Malala in a working paper entitled “Consumer protection for mobile payments in Kenya: An Examination on the fragmented Legislation and the complexities it presents for mobile payments” addresses major questions surrounding the area of consumer protection.⁸² These key questions include; who is a consumer? What is the justification for the protection of consumers? She further analyses the problems that are created by the evolution of new technologies and how the law lags behind in addressing the new technological development.

Her writing refers to the protection of consumers in mobile payment only. This study shall go beyond mobile payment consumers and also cater for the consumers in other electronic platforms like Facebook, Jumia, and Pigiame. It will cover the various legal issues and challenges that arise under the existing legal framework and provide recommendations to the existing laws in order to enhance consumer protection in e-retailing.

Raj, Pethuru, Saini, Kavita, Surianarayan and Chellammal in a book entitled “Blockchain Technology and Applications”⁸³ refer to blockchain as an emerging technology which has significantly caught the attention of a number of businesses world over which include but are not limited to: financial businesses, IT companies and business organizations. Some of these entities have started using it while others are considering the use of the blockchain technology in

⁸² Joy Malala, ‘Consumer protection for mobile payments in Kenya: An examination on the fragmented legislation and the complexities it presents for mobile payments’ 2014 WPS/ 02/14 KBA Centre for Research on Financial Markets and Policy Working Paper Series 1 <<http://www.kba.co.ke/downloads/Working%20Paper%20Paper%20WPS-07-13.pdf>> accessed 3 December 2017.

⁸³Raj, Pethuru, Saini, Kavita, Surianarayan and Chellammal, *Blockchain Technology and Applications* (Auerbach Book/ CRC Press 2021).

order to improve their businesses processes. It is being used to improve security, creating decentralized applications and smart contracts. The. This book shows how blockchain sheds light on the technological aspects that form the nature of blockchain technology and various aspects associated with it. They include cloud computing and data analytics.

The book further explains in great detail what amounts to data confidentiality and integrity. It shows how authentication distributed consensus protocols and algorithms work. It also illustrates more intricate aspects about blockchain systems such as design criteria and systems interoperability and sociability integration with other technologies including cloud computing and big data analytics across all industry verticals. This book shows how this new technology can be beneficial across various sectors such as having its use incorporated in the provision of various services such as :healthcare, financial services and government supply chain and retail.⁸⁴ It also looks at blockchain components and concept, blockchain and Internet of Things (IOT) security, the interaction between blockchain and social media and artificial intelligence.⁸⁵

The book does not show how a country that is willing to adopt the use of blockchain technology can provide for its regulation. In this study, reference is made to jurisdictions like USA which have had regulation for the use of blockchain technology. This provides an example of how a country can go about the process of regulating the use of blockchain technology in order to enjoy its benefits within the confines of the law.

Sadat Mulongo Luanani in an article entitled “E- Commerce Rights; - Applicability of consumer Protection laws in Online Transactions in East Africa”⁸⁶ carries out an extensive study on Kenya.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Sadat Mulongo Luanani, ‘E-Commerce and consumer rights: Applicability of consumer protection laws in online transactions in East Africa’ (2017) (4)(1) *International Journal of scientific Research* <http://www.ijssrit.com/uploaded_all_files/2424749391_v7.pdf> accessed 3 December 2017.

The article states that according to research carried out in January 2017 electronic transactions had not fully fledged. Online shopping at this point in time was still at initial stages and he further mentions that there are challenges in online consumer protection.⁸⁷

The article notes that e-commerce has provided East African Traders with a wide platform to buy and sell products. It mentions that there is still a challenge with data protection and that consumers have made complaints about the misuse of their data. The article mentions that there exist laws on consumer protection such as the Consumer Protection Act⁸⁸, the Kenya Information and Communication Act⁸⁹, and Law of Contract Act⁹⁰ but it is not clear as to whether these laws are applicable to online consumers.

It stresses the need for the East African governments to invest in the enactment of laws and regulatory infrastructure that support online purchasing. It further states that the East African governments ought to consider the creation of policies systems which will boost the current internet penetration rates across East African member states in order for e-commerce to thrive within the region.⁹¹

However, this article does not give examples of jurisdictions that have laws and regulations that have boosted online purchasing. This study provides examples of jurisdictions such as USA where there are regulations that promote consumer protection in e-retailing with the view that Kenya could pick a leaf in terms of regulating the area of e-retailing more comprehensively.

⁸⁷ Ibid.

⁸⁸ No. 46 of 2012

⁸⁹ Chapter 411A

⁹⁰ Chapter 23

⁹¹ Ibid.

The article does not mention other laws such as the Constitution of Kenya⁹², the Sale of Goods Act⁹³, the Capital Markets Act⁹⁴, the Evidence Act⁹⁵, the Kenya Information and Communications (Dispute Resolutions Regulations⁹⁶, the Kenya Information and Communications (Consumer Protection) Regulations⁹⁷, the Finance Act⁹⁸ and the National ICT Policy⁹⁹. It does not look at the existing provisions in these Acts and policy. This study includes an analysis of the provisions of the provisions of these Acts and further gives recommendations to the existing legal framework in order to ensure consumer protection in e-retailing in Kenya.

Muthoni Njogu in an article entitled “Blockchain & Cryptocurrency Regulation 2021 | Kenya”¹⁰⁰ gives an illustration of how the law on technology is lagging behind is evidenced by the fact that although there has been progress on the international scene in regard to the use of blockchain technology Kenya still does not have a specific law on how the blockchain technology can be used in electronic retailing. She points to the fact that there is lack of specific cryptocurrency laws in Kenya. Her findings are that the general regime of the law applies whenever issues in regard to the use of cryptocurrencies arise. The article reveals that the Government of Kenya has been hesitant to clearly pronounce itself on the recognition of cryptocurrencies.

The Government of Kenya’s hesitancy towards the use of cryptocurrencies is evident through the public statement made by the Central Bank of Kenya (CBK). It issued a public statement in December 2015 aimed at informing the public that use of cryptocurrencies like Bitcoin was not

⁹² 2010.

⁹³ Chapter 31.

⁹⁴ 485A.

⁹⁵ Chapter 80.

⁹⁶ 2010.

⁹⁷ 2010.

⁹⁸ 2019.

⁹⁹ 2020.

¹⁰⁰ Muthoni Njogu, ‘Blockchain & Cryptocurrency Regulation 2021 | Kenya’ (*Global Legal Insights*, 23 October 2020) < <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/kenya> > accessed 25 March 2021.

legally recognized in Kenya. The announcement stressed that there is no protection afforded to the users of the virtual currencies in case of any challenges such as the crypto currency platforms failing to sustain the businesses. This pointed to the fact that the users of cryptocurrencies are using them at their peril since they are not characterized as legal tender in Kenya.¹⁰¹

The (CBK) has consistently warned investors about transacting with cryptocurrencies. Financial institutions have been cautioned against transacting with institutions which transact in virtual currencies. This shows that the government is skeptical about the use of cryptocurrencies and has not fully embraced them as an acceptable way to transact. On 21st February 2018 another warning was issued by The Capital Markets Authority (CMA) to investors against taking part in Initial Coins Offerings (ICOs). This stipulated that the CMA hadn't rubber stamped any ICOs and therefore the offerings on the market were unauthorized and unpredictable investments. This potentially exposed investors to risks. Evidently, the regulation of cryptocurrencies is still a grey area.

Kenya has made some progress in regard to technological advancements. In 2018, effort was made towards developing a roadmap for new technologies. This was through the constitution of the Distributed Ledger Technology. Numerous recommendations were passed. They include: a recommendation by the team for a digital sovereign cryptocurrency by the Government that is attainable and can be internationally tradable in conformity with the G20 Summit recommendation on the need for digital currencies so as to promote global financial inclusion. Developing a Fintech legal and regulatory sandbox. Ensuring implementation of the use of

¹⁰¹ Ibid.

blockchain technology in service delivery in sections of the public sector like health, land transactions and in handling elections.¹⁰²

This article shows how the law lags behind the developments in technology which consequently hinders the adoption of blockchain technology in electronic retailing in Kenya thus depriving consumers of the benefits that accrue from its use such as protection from fraud and minimized transaction costs.

However, it does not show how Kenya should go about the process of regulating the use of blockchain technology. In this study, there will be reference made to USA where there has been regulation of blockchain technology. There is reference to the instrument that regulates its use and there are various provisions that can be referred to in this regard. This example serves as a way to show how other jurisdictions have been able to circumnavigate the issues that arise in e-retailing by ensuring that there is regulation for the use of blockchain technology.

1.9.4 Consumer attitudes and behavior

Roberta C. Nacif in a book entitled “ Online Customer Loyalty : Forecasting the Repatronage Behavior of Online Retail Customers”¹⁰³ shows a co-relation between consumer purchasing behavior and the effect of technologies. The main argument is that the use of technologies affects consumer purchasing to a large degree. This is because the use it enhances purchase without necessarily having direct contact since the shopping is carried out via technological interface as opposed to the traditional brick-and-mortar setting and this is intriguing to corporations since they are able to purchase independently.

¹⁰² Ibid.

¹⁰³ Roberta C. Nacif, *Online Customer Loyalty: Forecasting the Patronage Behavior of Online Retail Customers* Deutscher Universitätsverlag (2003).

The book critically analyses consumer behavior while they purchase items online. Attention is drawn to the consumer's attitude and transactional history and the factors that determine whether or not a consumer is most likely to make a repurchase from the same seller of the item. In this book a method of determining consumer's motivation as they purchase online is given. The book gives an understanding of consumer loyalty and states the theoretical and conceptual framework that formulates the basis for consumer's motivation in continuing to purchase items from specific suppliers.

In this book, the significance of consumer attitudes and beliefs is stressed. It shows why understanding consumer behavior is paramount. The book draws the nexus between consumer attitudes and behavior.¹⁰⁴ In this book, reference is made to various theories to explain consumer attitudes and behavior however, the linkage between the theories, consumer protection and e-retailing is not clearly shown. The theory of planned behavior will aid to illustrate the importance of the relationship between the online retailers and consumers in this study. Furthermore, it will unfold the relevance of this theory to securing consumer protection in e-retail.

Icek Ajzen in an article entitled "Consumer attitudes and behavior; the theory of planned behavior"¹⁰⁵ analyses the theory of planned behavior. It explains how consumers make decisions in regard to the products they choose. He explains that there are behavioral beliefs, attitude and perception of the consumers that influence their decisions in regard to which commodities to consumer.¹⁰⁶

¹⁰⁴ Ibid.

¹⁰⁵ Icek Ajzen, 'Consumer attitudes and behavior; theory of planned behavior applied to food consumption decisions' (2015) (70) (2), *Rivista di Economia Agraria*, Anno LXXX 125 <https://www.researchgate.net/publication/295547003_Consumer_attitudes_and_behavior_The_theory_of_planned_behavior_applied_to_food_consumption_decisions> accessed 3 December 2017.

¹⁰⁶ Ibid.

The theory states that the consumer's behavior is considered as a function of intention to perform the behavior in question precisely, the behavior of a consumer is based on attitude.¹⁰⁷

The article covers various models such as the multi-attribute decision model which is an approach where consumers are assumed to be rational, making decisions based on the information availed to them.

It comes into play when consumers are faced with the need to make decisions among competing brands or products. It also refers to the subjective expected utility model which makes provisions for uncertainty concerning the results of a consumer's determination. It states that this theory is a prominent social-psychological model for comprehending and prognosticating human behavior. It analyzes the mind behind consumer decisions, their behavioral beliefs and it refers to the beneficial and non-beneficial results of performing the behavior and subjective values or analysis of these results.¹⁰⁸

The article explains how behavioral beliefs and attitude influence consumer behavior. It further makes reference to an example of predicting food consumption intentions and behaviors. The article does not show how this theory can also be used to understand or predict the behavior of consumers in e-retailing in order to help guide processes such as regulation in order to promote consumer protection in e-retailing. The article does not directly show the linkage between the theory and e-retailing and how it can be applied therein. In this study the linkage between this theory and e-retailing will be shown.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

Joey F. George in an article entitled “The Theory of Planned Behavior and Internet Purchasing”¹⁰⁹ mentions that privacy is one of the major concerns to consumers when it comes to making any purchases online. This is specifically in regard to the personal information that the consumers leave at the disposal of the sellers of the commodities on the various online platforms. The article illustrates the nexus between the theory and various beliefs such as perceived behavioral control and the general purchasing behavior of consumers online. It shows that the theory can be used to predict and explain consumer intentions and behavior.¹¹⁰

It is therefore stated that the more the consumers have trust in the online retailing transaction, the more they are likely to participate in it. This points to the need to ensure that electronic retailing transactions are safe and that the privacy of consumers is ensured so as to boost their participation in transactions of this nature.

However, it does not explain how this theory’s applicability can be extended to consumer protection in e-retailing. In this study, the co-relation between this theory and consumer protection in e-retailing will be shown as the theory is discussed and how it affects consumer protection in e-retailing especially with reference to the aspect of perceived risk and its effects on consumers in e-retailing.

Serianu Cyber Threat Intelligence Team in a report entitled “The Kenya Cyber Security Report 2016”¹¹¹ acknowledges that technology has greatly advanced. It also cites that many businesses are now opting to conduct their affairs on the internet however, this makes them vulnerable to

¹⁰⁹Joey F. George, ‘The theory of planned behavior and Internet purchasing’ (Joey George, 27 January 2014) <https://www.researchgate.net/publication/220146884_The_Theory_of_Planned_Behavior_and_Internet_Purchasing> accessed 2 February 2021.

¹¹⁰ Ibid.

¹¹¹The Kenya Cyber Security Report, (2016) Serianu <<http://www.serianu.com/downloads/KenyaCyberSecurityReport2016.pdf>> accessed 3 December 2017.

attacks. The report states that lack of awareness among technological users is one barrier that Kenyan organizations encounter in the use of technology.¹¹²

The report seeks to clearly analyze the current top threats, risks and levels of awareness in Kenya. It acknowledges that there have been a number of threats and breaches which has led to the increase of cybercrime and lack of protection of consumers on online platforms.¹¹³ It also cites that consumer protection has been hampered due to the increase in online scams and identity theft which arises from the recent integration with electronic payments and financial institutions.

The article also shows that there is insufficient technical training of employees and that there is lack of sufficient knowledge on how to guard against things like scams or manipulation of information online. The challenge of lack of knowledge among the users of the internet provides the online scammers with opportunities to manipulate unsuspecting consumers on electronic commerce platforms. The article further states that there are still challenges in terms of regulation, implementation and enforcement of the law in regard to protecting consumers online. This is attributed to the fact that most of the laws are simply borrowed from other jurisdictions without necessarily evaluating what the needs of the Kenyan market are and how best can the use of the internet be regulated from a Kenyan perspective.¹¹⁴

The report includes proposals so as to ensure internet safety. These include: better education of users of the internet so as to create awareness about consumer protection while using the internet. There is need to ensure that there is better encryption and privacy so as to protect the internet users. The law and policy makers are encouraged to improve their understanding of the Kenyan

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

society and cyber community in order to pass legislation and policy which is applicable to the Kenyan context as opposed to borrowing legal provisions from other jurisdictions which may not be suitable for Kenya.¹¹⁵

However, the report does not show how these measures can be applicable to ensuring consumer protection in e-retailing in Kenya. This study will show how the government of Rwanda has been able to increase government training programs and partnerships with Alibaba in order to boost e-retailing. This is an example of how the government in Kenya can engage in training programs and partnerships so as to help promote consumer protection in e-retailing.

The report states that there is need for better laws and regulation in the fight against cybercrime. However, it does not make broad reference to the existing legal regime in Kenya that seeks to respond to issues that arise in the course of e-retailing neither does it refer to its weaknesses as a basis to propose recommendations.

This study will analyze the existing legal framework in Kenya. It will provide an analysis of the existing legal framework in Kenya on consumer protection in e-retailing. It will then provide some recommendations in this area and will also include examples of jurisdictions such as USA where there is regulation of the use of blockchain technology.

The report looks at e-commerce in broad terms and makes a lot of reference to organizations, companies and the like and makes no reference to individuals who are buying goods from online platforms yet it is a common way of transacting in this day and age. It does not intricately look into the issues that surround e-retailing such as fraud in e-retailing, cross boarder issues, contract issues and the issues that arise in seeking remedies in e-retailing in Kenya. This study looks at e-

¹¹⁵ Ibid.

retailing in Kenya and it addresses consumer protection legal and implementation challenges. It analyzes the existing legal regime and it seeks to provide solutions to solve the issues that surround e-retailing which hamper consumer protection.

This report proposes the Serianu framework of cyber security and it largely concentrates on its applicability within SMES. The proposals made therein which include but are not limited to Vulnerability and Threat Management, having a Cyber Security Program Governance and Strategy as solutions for the small and medium sized businesses.¹¹⁶ However, little information is given about how individual consumers in e-retailing can attain consumer protection on the various platforms. This study will focus on consumer protection in e-retailing and will give some proposals to promote the same such as the use of ODR to ensure that consumers have access to ways in which they can seek redress conveniently.

Mwencha, Peter Misani, Muathe, Stephen Makau and Thuo and John Kuria, in an article entitled “Security, Privacy and trust issues surrounding E-commerce in Kenya”¹¹⁷ discuss the major issues that concern e-commerce in Kenya. The article defines e-commerce, gives the various classifications of the same and analyses e-commerce in Kenya. It then gives an in-depth study on the security, privacy and trust issues which pose as the threats to the growth of electronic transactions in Kenya.

The article gives various definitions of e-commerce from various scholars and organizations. It also includes the definition from the African Union (AU) which has defined it as “all economic activity which goods are offered or provided remotely or by electronic means.” According to the

¹¹⁶ Ibid.

¹¹⁷ Mwencha, Peter Misani, Muathe, Stephen Makau and Thuo, John Kuria, ‘Security, Privacy & trust issues surrounding E-Commerce in Kenya’ (15th Annual Strathmore University Annual ICT Conference, 5-6 September 2014)<http://www.business.ku.ac.ke/images/stories/docs/partime_lecturers/Mwencha_Muathe_Thuo_2014_Security_Privacy_Trust%20Issues%20Surrounding%20E-Commerce%20in%20Kenya.pdf> accessed 2 December 2017.

AU, the field of e-commerce also encompasses services like availing information online, commercial communications, research tools among others. It is immaterial whether these services are paid for by the recipients or not. It outlines the categorization and advantages of e-commerce. The article states that there has been growth in e-commerce in Kenya which is predicted to keep increasing at a rapid rate.¹¹⁸

The article analyzes the security and trust issues surrounding e-commerce in Kenya. It refers to security as the consumers' insights about their wellbeing in online transactions as well as their financial protection from unapproved access. It also shows that there is still a problem of lack of cyber security in Kenya and this points to the fact that consumers are still not afforded protection from such occurrences. It also analyses the issues surrounding privacy and it defines privacy as the power of an individual to regulate the terms under which their personal information is obtained and used. It indicates that there is a debate as to how privacy of consumers can be attained while respecting the rights of the service providers.¹¹⁹

The article also illustrates the concept of trust and how it relates to e-commerce. It refers to trust as belief in the system characteristics, particularly belief in the capability, steadfastness and security of the system in the face of risk. It is important that the consumers are persuaded that the system will safeguard them at all costs. It also states that there has been a notable lack of trust of consumers in the practice of online shopping and online services. The article credits the government of Kenya for having enough laws to protect the privacy of consumers in Kenya. The

¹¹⁸ Ibid.

¹¹⁹ Ibid.

article states that there is a need to frequently review the regulatory framework, implementing the industrial best practices.¹²⁰

However, it does not provide for a mechanism in which the policies that are suggested will be implemented. It also has not shown what particular provisions of existing laws in Kenya need to be subjected to reforms and for what specific reasons. This study will bridge the gap and provide for ways in which reforms can be made to the existing legal framework in order to ensure consumer protection in electronic retailing transactions in Kenya is fully realized. In line with promoting consumer trust this study will analyze how ODR can be used to ensure that consumers can solve their disputes on the online platforms. This is because having consumers assured of a convenient, fast way to solve the disputes that arise from e-retailing will increase their trust and in turn boost e-retailing in Kenya.

1.11 Chapter breakdown

1.11.1 Chapter One; Introduction

This chapter entails the contents of the research proposal, background of the problem, statement of the problem, theoretical or conceptual framework and literature review. It also includes the objectives, research questions, assumptions, hypotheses, methodology and chapter breakdown.

1.11.2 Chapter Two; The legal and regulatory framework governing consumer protection in electronic retailing in Kenya

This chapter analyzes the existing legal framework on consumer protection in electronic retailing in Kenya. Some of the laws, regulations and policies looked at include: the Constitution of the Republic of Kenya¹²¹, the Kenya Information and Communication Act¹²², the Sale of Goods

¹²⁰ Ibid.

¹²¹ 2010.

Act¹²³, the Law of Contract Act¹²⁴, the Consumer Protection Act¹²⁵, the Competition Act¹²⁶, the Capital Markets Act¹²⁷, the Evidence Act¹²⁸, the Kenya Information and Communications (Dispute Resolutions) Regulations¹²⁹, the Kenya Information and Communications (Consumer Protection) Regulations¹³⁰, the Finance Act¹³¹ and the National ICT Policy Guidelines.¹³²

1.11.3 Chapter Three; The legal and implementation challenges of consumer protection laws on electronic retailing in Kenya

This chapter gives an analysis of the effectiveness of laws on consumer protection in Kenya and the legal challenges encountered in the process of implementing these laws in Kenya. Some of the challenges that will be looked at include: fraud in electronic retailing, cross border issues, contract issues, lack of sufficient data on factors hindering growth of e-retailing and the various challenges which arise while consumers seek remedies.

1.11.4 Chapter Four; Comparative Study- lessons from USA, South Africa and Rwanda.

Under this chapter, there will be a comparative study between Kenya and other progressive jurisdictions like USA, South Africa and Rwanda in regard to consumer protection in electronic retailing and to ascertain the best practices in electronic retailing in order to draw lessons from these jurisdictions.

This is because there are lessons to pick from each of these countries in the quest to ensure consumer protection in e-retailing. From USA we see the importance of regulating the use of

¹²² Chapter 411A.

¹²³ Chapter 31.

¹²⁴ Chapter 23.

¹²⁵ 2012.

¹²⁶ 2010.

¹²⁷ 485A.

¹²⁸ Chapter 80.

¹²⁹ 2010.

¹³⁰ 2010.

¹³¹ 2019.

¹³² 2020.

blockchain technology. From South Africa we can adopt the use of tokenization to secure e-retailing. From Rwanda we can learn how to increase government participation through activities such as boosting training programs and partnerships in e-retailing.

1.11.5 Chapter Five; Conclusion and Recommendations.

Having given the introduction to this study, identifying the legal and regulatory framework governing consumer protection in in electronic retailing in Kenya, the legal and implementation challenges of consumer protection laws in Kenya and the comparative study which entails lessons from USA, South Africa and Rwanda this chapter will give the conclusion and recommendations towards enhancing effective legal and regulatory framework so as to fully realize consumer protection in electronic retailing in Kenya.

Some of the issues that will be addressed in this chapter include: recommendations to the existing laws, unification of the laws that relate to consumer protection in e-retailing, adoption of blockchain and the regulation of blockchain technology, increasing government program based training on e-retailing, adoption of tokenization so as to secure the e-retailing transaction and provision of regulation of Online Dispute Resolution as a way to solve the issues that arise in the course of e-retailing. This chapter then gives the conclusion to the entire study.

CHAPTER TWO: THE LEGAL AND REGULATORY FRAMEWORK GOVERNING CONSUMER PROTECTION IN ELECTRONIC RETAILING IN KENYA.

2.0 Introduction

This chapter gives an overview of the legal and regulatory framework governing consumer protection in electronic retailing in Kenya. Consumer protection is whereby government safeguards consumer interests and activities of consumer organizations through regulation. The major goal is to accord consumers protection and avenues to enforce their rights as consumers. The existing laws such as the Kenya Information and Communications Act (KICA) do not define “electronic retailing”. There are no laws pertinent to e-retailing. There is still lack of a regulatory framework on the use of blockchain and cryptocurrencies despite the benefits they carry in securing e-retail.

The existing legal framework is limited in the scope in which it addresses e-retailing.¹³³ The KICA has a limited definition of the term electronic and there is no clear definition of what amounts to an electronic transaction or electronic retailing.¹³⁴ There is lack of clear provisions to govern the sale and purchase of goods and services on online platforms either between individuals and public or private entities. There are no clear guidelines as to how the entire e-retailing transaction occurs from the point of ordering goods online, payment and delivery of the goods.¹³⁵

E-retailing is classified as Business to Business (B2B) and Business to Consumer (B2C). Consequently, e-retailing companies find it vital to ensure that their business models are suitable

¹³³Victor Nzomo, ‘ Electronic commerce and the Law in Kenya: An Introduction’ (*Strathmore University ,Center for Intellectual Property and Information Technology Law CIPIT*, 1 November 2017) <<https://blog.cipit.org/2017/11/01/electronic-commerce-and-the-law-in-kenya-an-introduction>> accessed 27 November 2018.

¹³⁴ Ibid.

¹³⁵ Ibid.

for internet use.¹³⁶ Under this nature of business, it is imperative to note that strong distribution channels are key in ensuring that there is a smooth movement of products from the seller to the consumer.¹³⁷

Business to consumer (B2C) e- retailing stands out as a form of electronic retailing among the companies and the internet users. This is where companies directly sell finished goods or products to various consumers by the use of company websites. Customer relations are pivotal to this trade and its essential that they are properly maintained.¹³⁸

The other category is Business to business (B2B) e-retailing. This kind of electronic retailing involves the sale of commodities from one company to another. Examples of retailers in this category may include: software developers and wholesalers. It entails wholesalers selling the bulk of goods from their manufacturing centers to the businesses. It is then the businesses which sell the products to consumers.¹³⁹

The advantages of e- retailing are that companies that are involved in e-retailing have the capacity to move products faster and that they can reach a wider range of customers in different locations and across the world. It also enables the companies that are involved in to close the stores that are unprofitable so as to proceed with the ones which are profitable. The use of automated sales and checkout enables the companies involved in electronic retailing to cut down on the need for employees hence cutting on the costs incurred. It also enables easy tracking of consumer habits and behavior in order to ascertain the consumer patterns so as to respond to their needs.

¹³⁶ Marshall Hargrave, 'Electronic Retailing (E- tailing)' (*Investopedia*, 22 March 2021) <<https://www.investopedia.com/terms/e/electronic-retailing-e-tailing.asp>> accessed 18 July 2019.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

However, there are some disadvantages that have been illustrated in regard to carrying out e-retailing. Firstly, it is noted that it is very costly to create and maintain the company websites where the commodities are sold. It does not permit the consumers emotional experiences during shopping. They are unable to exercise all their five senses that include the touching, smelling of commodities before they can purchase the commodities. They can only see these commodities as they are displayed on the online website. This is detrimental to the consumers because they are not able to physically interact with the commodities before they conclude the purchase. The lack of this arises into disappointments when the commodities delivered to them don't match their expectations.

Examples of online retailing companies include: Amazon.com. It is a large online retailer.¹⁴⁰ Another is Alibaba Group, China's biggest online retailer. It operates within China and globally. Most of the e-retailing companies have significantly made profits and are attracting more customers. It is also estimated that online retailing companies will continue to register significant growth as the years go by. This is attributed to the increase of technology uptake across the world and the convenience of e-retailing amongst other reasons.¹⁴¹

Kenya stands out as one of the booming e-commerce markets within the African continent. It has numerous players in its online retail market.¹⁴² With a 79 % internet penetration, e-retailing is steadily growing in Kenya. Mobile phones are largely used in this process.¹⁴³

In Kenya, some examples of the existing e-retailing companies include: Jumia, Amazon, Kilimall, eBay, Masoko, Pigiame and others, In the year 2018, a new Electronic retailing

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² BT Correspondent, 'Online Retailers ride in a rising e-commerce tide' (*Business Today*, 26 September 2018) <<https://businesstoday.co.ke/online-retailers-ride-rising-e-commerce-tide/>> accessed 18 July 2019.

¹⁴³ Ibid.

company hit the retail market. Hashmart which was started in the year 2017. Hashmart stood out for its ability to select the trending items and then share them with the consumers online.¹⁴⁴

Other existing online platforms include: Jiji, an online market place where persons or various companies can sell their new or used commodities. Jumia is a business to consumer online retailer that offers a wide assortment of products. It's domain name is www.jumia.co.ke. Checki.co.ke is an online classifieds platform for cars which links buyers to sellers. It involves car dealers, importers and private sellers. Its domain name is www.checki.co.ke. Kilimall is a Business to Consumer online shopping mall which offers a wide variety of products like electronic devices, clothing, home appliances and much more. Its domain name is www.kilimall.co.ke. Vitu Mob is a cross-border online platform which enables Kenyans to ship and track their goods directly from North America or Europe to East Africa.

The Communication Authority of Kenya analyzed the rate at which e-commerce was growing in Kenya between 2018 and 2019. The findings were that there was significant growth registered. Analysts have projected exponential growth in e-retail. The growth is attributed to the integration between mobile and electronic technology.¹⁴⁵

2.1 The legal and regulatory framework governing consumer protection in e-retailing in Kenya

There are various laws in Kenya which are applied when various issues in e-retailing arise. There are laws that govern aspects such as contracts, sale of goods, use of electronic evidence, capital markets, competition law, finance amongst other factors surrounding electronic retailing.

¹⁴⁴ Otiato Guguyu, 'Retailer stirs up market with e-commerce platform' (*Standard Media*, 3 August 2018) <<https://www.standardmedia.co.ke/article/2001290472/retailer-stirs-up-market-with-e-commerce-platform>> accessed, 18 July 2019.

¹⁴⁵ Ibid.

Provisions in regard to consumer protection are seen in the Constitution of Kenya and various Acts which will be discussed here in. The country has various laws, regulations and policies which are aimed at ensuring the smooth running of e-retailing. In this chapter, the specifically mentioned laws will be analyzed in regard to their applicability to consumer protection in e-retailing in Kenya.

2.1.1 The Constitution of Kenya, 2010

All existing laws derive their validity from the Constitution. This Constitution provides for consumer protection. Under it, various provisions towards the rights of the consumers do exist. It therefore shows how the rights of consumers can be safeguarded.

It is worth noting that the Constitution covers the consumers in general but it does not categorically address the consumer protection issues that arise in electronic transactions. Credit must be given where it is due. It is a notable move of progress to see that the current Constitution has provisions for consumer protection. The 1963 Constitution did not make any provision towards consumer protection.

The Constitution of Kenya 2010, therefore in its progressive nature, it is able to cater for the rights of the consumers and even provide for the remedies for the persons who are aggrieved as a result of delivery of faulty goods.

Consumer rights are provided for under the Constitution. The Parliament has the mandate to make legislation in line with promoting consumer protection and legislation governing fair and decent advertising by either public entities or individual persons.¹⁴⁶ It further provides for enforcement of these rights is through the process of litigation in the courts of law established by

¹⁴⁶ Constitution of The Republic of Kenya, 2010.

the law in the Republic of Kenya implying the High Court of Kenya and the other subordinate courts of law given the jurisdiction. The above provisions under the Constitution of Kenya point to the fact there is a concern for consumer protection in regard to electronic transactions in Kenya.

In the case of *CIS v Directors, Crawford International School & 3 others*¹⁴⁷ the Petitioners argued that their rights as granted under Article 46 of the Constitution had been stepped upon. They relied on Article 46(3) and they argued that this was an issue that had its basis within the constitutional provisions on consumer rights. The Respondents on the other hand argued that the Petitioners should have addressed the issue under contract law instead of attempting to rely on constitutional provisions mentioned. The Court however found Article 46 of the Constitution on consumer rights applicable to the dispute.

The challenge that arises when consumers attempt to rely on the constitutional provisions on the right to consumer protection in e-retailing by approaching the Constitutional court to lodge such a matter is that various questions arise such as : whether the case brought before the Constitutional Court discloses any constitutional questions for determination by the Constitutional Court ,whether the case meets the principles on pleadings in constitutional petitions as enunciated in the case of *Anarita Karimi Njeru v Republic*.¹⁴⁸

Another issue is whether the issues that arise in the Petition emanate from contractual obligations between private parties and formed a subject matter for litigation in an ordinary civil suit. These are some of the issues that arose in the case of In the case of *CIS v Directors, Crawford*

¹⁴⁷ [2020] eKLR.

¹⁴⁸ [1979] 1 eKLR.

*International School & 3 Others*¹⁴⁹ it was revealed that various issues do arise when the Courts attempt to rely on constitutional provisions in order to enforce consumer rights. The case showed that it is not easy to satisfy the Court that the threshold for a constitutional petition is met despite the fact that the issue in contention has a constitutional basis in regard to Article 46 on Consumer Protection.

Court in this case found that just because the issues of the case arise from contractual relationships they shouldn't be disqualified for constitutional interpretation. The circumstances of this case which entailed the inadequacy of the remedies was a consideration the Court made in extending constitutional application to this case. This case illustrates how the Constitution comes into play in regard to solving disputes that may arise from contractual relations. It also shows the hurdles that may be encountered to prove that the case meets the constitutional threshold and that all the other existing remedies are inadequate. There is still a challenge encountered in determining whether a case that may arise in e-retailing is a civil or constitutional matter and the courts of law have passed different decisions based on the unique circumstances of each case.

In the case of *Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & Another*¹⁵⁰ the Petitioners sought to rely on the provisions of Article 46 of the Constitution. The Court held that the Petition did not raise any constitutional issues. The Court stated that the alleged breach of an implied term in the contract did not qualify for constitutional interpretation. The court in these circumstances stated that this was a case that needed to be evidentially proved. In this case, the Court revealed that Petitioner actually had remedies in tort or breach of contract claim in a civil rather than a Constitutional Court. This depicts the lack of clarity on the position as to whether matters that arise from the nature of e-retailing transactions can also be considered by the

¹⁴⁹ [2020] eKLR.

¹⁵⁰ [2017] eKLR.

Constitutional Court if the parties involved choose to seek justice by relying on the constitutional provisions.

2.1.2 The Kenya Information and Communication Act, Chapter 411A

The Kenyan Government aims at supporting the growth of e-commerce. It aims at promoting the development of the e-commerce sector. It has established the Communications Authority (CA). The Act refers to avenues such as broadcasting and multimedia telecommunication.¹⁵¹ It defines e-commerce as the trading or the facilitation of trading in products or services using computer networks, such as the internet among others. It recognizes that e-commerce may either be domestic or international.¹⁵²

The Communication Authority has played a significant role in ensuring telecommunications licensing. This has resulted into increased access to the internet across the country. The effect of this is that the more people can access the internet, the easier they can participate in e-retail.¹⁵³

Section 83J of the KICA recognizes that offer and acceptance can be depicted through electronic messages. This provision of the law therefore points to the fact that an electronic messages can create valid and enforceable contracts.¹⁵⁴

This therefore applies to electronic contracts. However, there is need for the legislation to include provisions on issues such as Online Dispute Resolution (ODR) and to clearly stipulate how an aggrieved party in an electronic contract can seek appropriate redress.

¹⁵¹ Communications Authority of Kenya, 'e- Commerce Development' (*Communications Authority of Kenya*) <<https://ca.go.ke/industry/ecommerce-development/%3E>> accessed 28 February 2020.

¹⁵² Ibid.

¹⁵³ Communications Authority of Kenya, 'e- Commerce Development' (*Communications Authority of Kenya*) <<https://ca.go.ke/industry/ecommerce-development/%3E>> accessed 28 February 2020.

¹⁵⁴ Victor Nzomo, ' Electronic commerce and the Law in Kenya: An Introduction' (*Strathmore University ,Center for Intellectual Property and Information Technology Law CIPIT*, 1 November 2017) <<https://blog.cipit.org/2017/11/01/electronic-commerce-and-the-law-in-kenya-an-Introduction>> accessed 17 December 2018.

The KICA provides for the provision of government e-Government Services.¹⁵⁵ However, it does not enlist the scope of goods or services that are to be provided by electronic retailers to consumers. This would be relevant in order to ensure proper regulation and consumer protection in e-retailing.

The CA plays a regulatory role. It ensures reliability of electronic records. It ensures that electronic signatures are authentic. It ensures that electronic records are reliable. It aims at ensuring that electronic records are reliable and that the services delivered by public sectors are reliably secured. It aims at ensuring that fraud is controlled in electronic transactions. It provides for online payments with an aim of securing consumers.

This apparent through the payment of taxes which has greatly eased cross border trade.

The Kenya Revenue Authority which tracks the payment of taxes and the entry of goods has deployed computer systems across the country. This has led to revenue assurance and also eased trade with the neighboring countries.¹⁵⁶ The authority has made guidelines to guide courier service providers in delivery of goods. This enables consumers to have the satisfaction that their goods being delivered safely.¹⁵⁷

The provisions of the Act under Part VIA address licensing, electronic records among others. It has provisions on electronic signatures. However, there is lack of provisions on the regulation of online platforms. The provisions on licensing do not extend to e-retailing. This poses a gap and exposes consumers to challenges such as fraud or lack of proper avenues of getting redress.

¹⁵⁵ Ibid.

¹⁵⁶ Communications Authority of Kenya, 'e- Commerce Development' (Communications Authority of Kenya) <<https://ca.go.ke/industry/ecommerce-development/%3E>> accessed 28th February 2020.

¹⁵⁷ Ibid.

¹⁵⁸More so, consumers cannot enjoy protection under the Consumer Protection Regulations¹⁵⁹ which apply in instances where the Authority's licensees offer services.

2.1.3 The Sale of Goods Act, Chapter 31

The Act regulates sale of goods in Kenya. It defines a contract of sale of goods and the elements of a sale of goods contract. It addresses issues of ownership of property and the transfer of risk. It also makes provisions for price. It further provides for remedies available to consumers in the event of breach of contractual terms.

The Act provides for consumer protection by ensuring that the goods are in good condition. It provides for the protection of consumers through the various warranties and implied terms.¹⁶⁰

The Act further provides for remedies available to the buyer or seller having elucidated the duties of either the buyer or the seller. The remedies are provided for under Section 51 to Section 54 of the Act.

2.1.4 The Law of Contract Act, Chapter 23

In Kenya, the Law of Contract Act is based on common law principles governing contract law. A contract is an agreement entered into by two or more parties with an intention to create a legal obligation. The aim of the law is to ensure that the parties to a contract have a legal basis to enforce their contracts. It also ensures that consumers are availed with the actual commodities as stipulated in the contract. It protects consumers by ensuring that the terms of the contract are fair.

¹⁵⁸ Ibid.

¹⁵⁹ 2010.

¹⁶⁰ Ibid.

It also provides remedies for consumers in the event of breach of the stipulated contractual terms.¹⁶¹

According to the Act, the validity of a contract is established if the elements of a valid contract are present. There ought to be the meeting of the minds of the parties involved. The parties should have the required contractual capacity and the contract obligations should be capable of execution. It is expected that the formalities are observed in order to make the contract enforceable under the law.¹⁶²

The provisions of the Act Under Section 3 provide for a requirement of a contract for the sale of land to be in writing and signed by all parties involved. It also stipulates the requirement of attestation by a witness. However, the Act is not clear as to how such provisions can be extended to e-retail contracts.

Electronic Contracts like the other traditional contracts are also agreements that can be enforced by law between parties to do or not to do certain actions with an intention of creating legal relations. The difference that exists between the electronic contracts and the traditional contracts is that electronic contracts are executed electronically through interconnected networks.¹⁶³

It is problematic to ascertain what amounts to an offer or an invitation to treat in electronic retailing. It is often hard to determine whether the display of goods on a company website amounts to an offer or an invitation to treat. Contract law stipulates that for there to be an offer there must be an intention to create legal obligations. There are challenges when it comes to

¹⁶¹Kenya Laws Online, 'Kenya Contract Law' (*Kenya Laws Online*, 6 June 2013) <<https://kenyalawsonline.blogspot.com/2013/06/kenya-contract-law.html>> accessed 12 December 2018.

¹⁶² Ibid.

¹⁶³Asherry BP Magalla, 'E- Contracts Law in Recently Kenya: What We Must Learn From Kenya In Terms Of Electronic Contracts' (*academia.edu* 8 August 2013) <https://www.researchgate.net/publication/282330695_WHAT_WE_MUST_LEARN_FROM_KENYA_IN_TERMS_OF_ELECTRONIC_CONTRACTS> accessed 17 December 2018.

applying the traditional law of contract principles to e-retail contracts due to how dynamic the use of the internet is.

The display of goods in contract law is not an offer but an invitation to treat. In e-retail there are circumstances where an online website serves as both an advertising point and a shop at the same time. It is usually difficult to determine whether the display of goods is an advert or an offer. This is because the same platform serves the purpose of advertising and selling. Another issue arises in determining whether the virtual display of goods on various websites that cut across the world duly amounts to an offer in contract law.

Under the law of contract, the traditional model of offer and acceptance becomes questionable in the view of modern technology and how it is being used. In most cases the internet trader will set up cyber – trade site from which business will be conducted. In most cases of internet trade, it will be difficult to tell whether knowledge of the acceptance ever reached the attention of the offerer or if it is a company, come to the knowledge of a person authorized to contract on behalf of the company.

More difficulty is encountered in determining whether there has been acceptance in e-retail contracts. There are challenges in ascertaining at what point acceptance occurs and how the seller of the items on a virtual platform acknowledges acceptance. There are instances where the buyer is unable to receive any response in regard to confirmation and this causes a loophole in trying to prove that there is indeed a valid contract between them. There are hardly any ways in which capacity to contract such as age can be determined in e-retail. There are hardly any e-commerce platforms that have measures to verify the contractual capacity of the people who make orders. It is also hard to establish whether there are any vitiating factors in e-retail contract

because the contracts are entirely virtual. This makes it hard to prove their existence and effect in the contract formation process.¹⁶⁴

The Act basically addresses the traditional contract. While it is true that a contract remains a contract regardless of whether it is conducted online and the fundamental principles of contract law do apply, it is imperative to note that online contracts do require a higher standard of protection for consumers because they are more vulnerable.

2.1.5 The Consumer Protection Act, 2012

This Act aims at protecting 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 further provides for rescission of an agreement and rights that accrue to ensure *restitutio in integrum*.

It establishes the Kenya Consumers Protection Advisory Committee. It came into operation in December 2013. Its functions include the following: advising the Cabinet Secretary on all aspects of consumer protection, creating and amending regulations to protect the rights of consumers, linking with similar organizations, locally and abroad in furtherance of the objectives of the committee, promoting the education of consumers on consumer's rights.

More to that, facilitating the institution of dispute resolution mechanisms and diverting complaints to the relevant bodies to deal with them assessing the enforcement of consumer protection laws. The function of the committee is to ensure that consumer protection is given as much attention and scrutiny as it deserves due to its necessity in a manner more credible and more efficient than that which is done by the Kenya Bureau of Standards.

¹⁶⁴ Ibid.

In regard to electronic retailing, the Act makes provisions under Section 31 on disclosure of information on internet agreement that places a requirement for disclosure on the seller. It places a responsibility on a supplier to avail the consumer with an opportunity to either accept or decline the agreement and to rectify errors immediately prior entering into it. This section ensures that the consumer has access to information. It avails the consumer an opportunity to print and keep the agreement.¹⁶⁵

Section 32 requires a supplier to deliver a copy of the internet agreement in writing to a consumer within a specified period after the consumer has entered into the agreement. Section 33 provides for cancellation of internet agreement. The above provisions on the internet agreement aim at availing the consumer with the relevant information.¹⁶⁶

However, these provisions do not extend to e-retail agreements. Currently, many online retailers merely display goods and the consumers proceed to transact without being availed any copy of the contract before they proceed to transact. Since there is nothing legally binding between the retailers and the consumers the consumers at times are not able to ably go about enforcement of remedies arising out of any occurrences in the electronic transactions. Such include instances where there are defective goods, under delivery or any other thing.

The Act shows how a consumer can seek remedies. The consumer may institute court proceedings under the High Court. There is an option of arbitration. However, there is a limitation attached to it as stipulated under Section 88. If a consumer acknowledges its use in an agreement, it disqualifies the consumer from commencing an action in the High Court. Section 88(2) provides for an avenue to explore other ways to solve disputes as provided for in the law

¹⁶⁵ The Consumer Protection Act, 2012.

¹⁶⁶ Ibid.

by either a consumer, supplier or any other party after the commencement of an action in the High Court.¹⁶⁷

However, the above provisions on alternative dispute resolution as an option to explore in seeking redress do not include Online Dispute Resolution (ODR). The use of ODR could be beneficial to e-retailing. It could assist in solving disputes in a faster, convenient manner and would also address the issues that are a result of cross border transactions.

2.1.5 The Competition Act, 2010

This Act was aims at boosting and protecting competition in the national economy. It plays a significant role in consumer protection as it shelters consumers from unjust and deceptive market conduct by either sellers or manufacturers of commodities. In the quest to do this it establishes the Competition Authority and the Competition Tribunal.

The parameters of the definition of a consumer in this Act are limited to one who purchases or offers to buys goods or services otherwise apart from the purpose of resale. The Act seeks to protect consumers by ensuring that there are consumer bodies which are avenues to promote the views and concerns of consumers. It establishes the Competition Authority of Kenya under Section 7. It has a responsibility over consumer bodies and it also aims at availing consumers with all the relevant information in line with their rights and obligations.¹⁶⁸

The Act fails to cater for the e- consumer in electronic retailing in that it does not put into consideration the geographical distance that may pose as a barrier between the consumer and the supplier of the goods. It also does not provide for a clear remedy for the consumer in the event

¹⁶⁷ Ibid.

¹⁶⁸The Competition Authority Act, 2010.

that there is insufficient information of the supplier of the goods which leaves the consumer in great difficulty as they attempt to discover who they can claim from.

Price obfuscation is where some online retailers engage in moves to cause consumers hardship in searching and comparing prices of commodities on online platforms. For example, an online retailer may easily manipulate the internet to his advantage by advertising substandard commodities at a low price on a comparison website. The online retailer strategically withholds the price of the high quality goods on the comparison website. The aim of this is to attract consumers to their websites in the hope of them obtaining fair prices for commodities.

However, the retailers tend to display goods of higher quality and higher prices on their websites as opposed to those displayed on the comparison websites. These are known as add-on pricing schemes. Competition law comes into play in displaying how the margin the earned on high quality commodities are most likely to be competed away by the drastic reduction of prices of the substandard goods. This is a tactic to increase consumers. Consumers will only be aware of the additional prices when they are at the retailer's website. This practice is harmful to consumers because it is deceitful, frustrating and misleading to consumers since they only get face to face with the actual price of commodities while at the online retailer's website.¹⁶⁹

There is also a scenario where similar products displayed on various online platforms have different prices. There is need to ensure that the provisions of the Competition Act extend to these online platforms so as to regulate the prices in order to protect unsuspecting consumers from paying too much for particular items. This is because as illustrated above, the display of goods on the internet can be manipulated to favor certain pricing of commodities over the others.

¹⁶⁹Gerald Singham & Mark Tan, 'Singapore: The Benefits and Harms of e-commerce on Competition Law' (*Dentons*, 12 April 2017) < <https://www.mondaq.com/trade-regulation-practices/585566/the-benefits-and-harms-of-e-commerce-on-competition-law>> accessed 2 April 2021.

Also, the designers of the various online platforms determine the degree of information about the commodities they will give the consumers, they determine what side and angle of the commodity pictures they will display. The unscrupulous retailers are also in a position to modify the appearance of the commodity online by use of filters, cropping or even Photoshop to lure a consumer. There is lack of clarity as to whether the provisions of this Act do extend to various online retailers who are on various online platforms such as Facebook, Instagram and WhatsApp.

2.1.6 The Capital Markets Act, Chapter 485A

The Capital Markets Authority is established under this Act in section 5. It is at the helm of public offers and securities. Examples of securities include shares; debt instruments; depository receipts; and asset-backed securities. The Act has a wide definition of securities. This gives room for the Act to include cryptocurrencies as securities. It states that the definition of securities encompasses any other instrument prescribed by the Capital Markets Authority (CMA) to be a security.¹⁷⁰

In the case of *Wiseman Talent Ventures Limited v Capital Markets Authority*.¹⁷¹ In this case the CMA was challenging Wiseman Talent Ventures Limited in its action of raising funds through an Initial Coins Offering (ICO). The bone of contention was whether the CMA which was the Defendant had the legal basis to handle issues relating to the use of cryptocurrencies. It was raised by the Plaintiff that the CMA by involving itself in this case was acting beyond its powers.

¹⁷⁰Muthoni Njogu, 'Blockchain & Cryptocurrency Regulation 2021 | Kenya' (*Global Legal Insights*, 23 October 2020) < <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/kenya>> accessed 25 March 2021.

¹⁷¹[2019] eKLR.

The CMA, pointed the court to the lack of regulatory approval in regard to this issue. From a perspective of consumer protection, the CMA sternly warned public investors and the general public against indulging in the ICO by the Plaintiff. In deciding this case, The Honorable Judge applied the Howey Test. She agreed with the CMA that in the absence of a specific legal regime for cryptocurrencies, the jurisdiction of the general law regime could not be thrown out of the window in resolving cryptocurrency related issues.

She ably demonstrated the nexus between cryptocurrency and securities as defined under the CMA. She elucidated that cryptocurrencies satisfied the requirements for securities as stipulated in the Howey Test. These include a money investment, the existence of an anticipation of profit from that investment, the money investment is characterized as a common enterprise and the profit related to this investment either comes from the third party or the efforts of the promoter. However, it is noted that the CMA is yet to designate cryptocurrencies as securities.

2.1.7 The Evidence Act, Chapter 80

This Act addresses the validity of electronic contracts. The Act stipulates various presumptions by the court concerning electronic signatures. There is a presumption that all electronic agreements including electronic signatures of the parties were concluded by their digital signatures. The court shall presume that every electronic agreement containing electronic signatures of the parties was concluded by digital signature of the parties. The presumptions are under Section 106F of the Act. Overall, electronic signatures and electronic agreements are deemed valid.

- (a) The Act provides for the considerations made by Court in determining the validity of electronic signatures under Section 106D. Section 106C sets out the requirement for proof of electronic signatures. The Act outlines the form of proof required in the process of verification of electronic

signatures under Section 106D of the Act. The Court may give directions to the effect that an electronic signature certificate is produced by that particular person or the provider of the certification or any other person to apply the procedure listed on the electronic signature certificate and verify the electronic signature purported to have been affixed by that person.

Under Section 65, the conditions required for admissibility are set out. The Act provides that in the event that there is to be use of primary evidence the document itself seeking to be relied on as primary evidence must be presented. In the case of *Samwel Kazungu Kambi v Nelly Ilongo & 2 others*¹⁷² court made reference to the provisions under sub-section (4) of Section 106B that requires a certificate confirming the authenticity of electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have a signature of the person in charge of the applicable device or administration of the involved activities.

The case of *Nonny Gathoni Njenga & anor v Catherine Masitsa & anor*¹⁷³ was one where court found that the DVDS sought to be relied on did not fulfill the requirement of a certificate of evidence as stipulated in the Act. This Act is credited for making provisions for electronic evidence to be used as a means of ensuring that electronic evidence is admissible in court. However, the Act does not refer anywhere to electronic retailing and how evidence can be gathered in terms of electronic retailing.

The Evidence Act fails to make mention of how this kind of evidence can be used in a scenario where an electronic retailing situation transaction has taken place in more than one country. This creates difficulties in the attempt to resolve issues that arise in electronic retailing transactions which involve various jurisdictions with each being governed by its own legal regime.

¹⁷² [2017] eKLR.

¹⁷³ (2014) eKLR.

2.1.8 The Kenya Information and Communications (Dispute Resolutions) Regulations, 2010

The definition of a consumer in this Act is limited to one who uses communication services or products offered by a licensee. The scope of definition of a dispute is also limited to defined as a contention between a licensee and another, a consumer and a licensee, where one or both parties have failed to reach an amicable resolution after due effort has been made. A licensee is defined as any person who has been licensed by this Act.¹⁷⁴

The regulations provide for the powers of the Commission and initiation of proceedings.¹⁷⁵ However, from the definition of who a consumer is and who a licensee is the definition does not apply to persons who are involved in electronic retailing transactions. The regulations therefore clearly provide a mechanism for hearing of disputes only to consumers who are using communication services and they do not accommodate any electronic retailing transactions.

The regulations do not address the issue of an enforcement mechanism for the disputes which may arise in electronic retailing transactions such as the use and regulation of Online Dispute Resolution which could be very helpful to solve disputes online and to solve the issues that arise in terms of jurisdiction.

2.1.9 The Kenya Information and Communications (Consumer Protection) Regulations, 2010

The regulations define a customer under Section 2 as a person who uses the services or purchases the services of a particular licensee or vendor, without necessarily being a subscriber to that

¹⁷⁴The Kenya Information and Communications (Dispute Resolution) Regulations, 2010.

¹⁷⁵ Ibid.

licensee or vendor. A licensee is a person who is licensed under the Act.¹⁷⁶ A vendor is defined as a person who carries out the business of selling, reselling or distributing ICT terminal equipment used for the provision of licensed services.¹⁷⁷

The regulations provide for the rights of a customer under Section 3 to include: the right to information about rates, terms and conditions available and the proposed products and services, the right to be charged for only the products and services they have subscribed to. The right to personal privacy and protection of unauthorized use of personal information among other rights.¹⁷⁸

The regulations seem to be more inclined to communication service providers. The definitions of key terms such as vendor, licensee and customer under these regulations do not include the seller, buyer under an electronic retailing. The provisions do not directly address consumer protection in e-retailing for goods that may not necessarily belong to the category of communication services. This therefore limits their applicability to electronic retailing transactions.

2.1.10 The Finance Act, 2019

The Finance Act was assented to with an amendment to the Income Tax Act of Kenya. It provided for the subjection of income tax to goods and services within digital market places for the purpose of Value Added Tax (VAT) purposes. A digital marketplace is defined as “a platform that enables the direct interaction between buyers and sellers of goods and services

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

through electronic means.” However, there are still issues of ambiguity in defining the term “digital marketplace.” In January 2021 the amendments are set to come into effect.¹⁷⁹

In line with the above, the Kenya Revenue Authority announced new regulations that would subject users of digital marketplaces to pay digital tax at a rate of 1.5% on the gross transaction value. Kenya lacks clear regulation on the cryptocurrencies despite move by the Kenya Revenue Authority’s to encourage the Central Bank of Kenya to recognize them.

However, based on the amendment the Kenya Revenue Authority asserts that cryptocurrency platforms fall under the “digital marketplace” definition since they create a platform for buyers and sellers of crypto through electronic means. Kenya’s use of cryptocurrencies is growing rapidly. Kenya is rated among the top five African countries with high volumes of peer-to –peer (P2P) Bitcoin trading.¹⁸⁰

The Kenya Revenue Authority is set to create a special tax unit to monitor and tax transactions using data- driven detection. The tax will be levied on income accrued from digital services in the Kenyan digital market places. In respect of a resident person or a non-resident person with a permanent establishment in Kenya, the tax will represent an advance tax, and empower the Commissioner of Income Taxes at the Kenya Revenue Authority to appoint agents for the purpose of collection and remittance of the digital services tax. This tax extends to Kenyan crypto currency businesses.¹⁸¹

¹⁷⁹ Muthoni Njogu, ‘Blockchain & Cryptocurrency Regulation 2021 | Kenya’ (*Global Legal Insights*, 23 October 2020) < <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/kenya>> accessed 25 March 2021.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

Despite the above provisions in regard to tax collection in the “digital marketplaces” it is still hard to establish how these new regulations will be implemented on the Crypto Peer to Peer Platforms operating in Kenya.¹⁸²

2.1.11 The National ICT Policy Guidelines, 2020

The government of Kenya has an objective to provide a proactive framework in tandem with the technological realities and dynamics of the ICT sector for the good of Kenyans. The policy is credited for advocating for the generation of mobile high speed, securing ubiquitous ICT infrastructure, enhancing cyber security among others. It provides an a fertile ground for advancements in the economy and ICT.¹⁸³

The policy is in line with Vision 2030 (Economic, Social and Political) and the United Nations Sustainable Development Goals (UN SDGs). It aims at increasing accessibility to ICTs, especially broadband, to all Kenyans and flawless connectivity to the East African Community (EAC) member states. It aims at promoting cohesion at both regional and international levels and strengthening Kenya’s significant progress in Fintech and capital markets.¹⁸⁴

The Policy takes into consideration the aspects of globalization and the recent advancements in technology. It mentions that these changes have constantly affected the traditional approach to the management of public affairs and service delivery. It is paramount that the polices and regulations passed are in tandem with the changes arising from technological advancements.¹⁸⁵

The Policy clearly shows that the government is cognizant of the fact that there is significant increase in the use of the internet and that it will continue to grow in the near future. It addresses

¹⁸² Ibid.

¹⁸³ Communications Authority of Kenya, ‘The National ICT policy Guidelines 2020’ (*Communications Authority of Kenya*, 2020) <<https://ca.go.ke/document/national-ict-policy-guidelines-2020-2/>> accessed 11 February 2021.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

other aspects and the role of the government such as in regard to markets and broadcasting to mention but a few. However, it still does not address issues such as regulation for the use of Online Dispute Resolution (ODR) as a way to solve disputes.

2.2 Conclusion

In a nutshell, Kenya is not devoid of legislation that handles issues in the event of any breach or any other occurrence that may arise during the process of electronic retailing. This chapter has shown how the provisions of the various existing Acts are relevant to e-retailing. However, the existing legislation only addresses these issues in piecemeal seeing to the fact that the aspect of electronic retailing has not been viewed as an entire trade on its own with its own unique circumstances that ought to be addressed in a way different from the traditional contract or contract of sale of goods. It also shows that there is still lack of clarity as to what the stand on the use of new technology such as blockchain is. There is still lack of guidelines or regulation in regard to ODR as a solution to disputes that arise in e-retailing.

CHAPTER THREE: THE LEGAL AND IMPLEMENTION CHALLENGES OF CONSUMER PROTECTION LAWS ON ELECTRONIC RETAILING IN KENYA.

3.0 Introduction

This chapter focuses on the legal and implementation challenges of consumer protection laws on electronic retailing in Kenya. Some of the issues that will be tackled include: fraud in e-retailing, cross border issues, contract issues and challenges that arise in seeking remedies. This chapter will show how despite the existence of a legal framework on consumer protection in e-retailing as shown in the previous chapter there are still some challenges in implementing the law and therefore this leaves consumers in a state of vulnerability to activities such as fraud among other difficulties they encounter as they trade electronically.

There has been an increase in the number of consumers who access to the internet and consequently engage in electronic retailing. Some developing countries have made significant inroads into electronic retailing however the vast majority of developing countries are lagging behind.¹⁸⁶ This therefore accentuates the need for intervention from organizations, stakeholders and law and policy makers in order to realize comprehensive consumer protection in electronic retailing in Kenya.

According to a report from The Communications Authority, as at the year 2016, Kenya now has over 90% mobile penetration. Within the period of April to June 2016, the mobile, mobile subscriptions reached 39.7 million up from 38.3 million subscriptions recorded last quarter. This

¹⁸⁶ H.E Dr. Syed Tauqir Shah, 'eTrade for all Initiative' (*UNCTAD, e- Commerce and the digital economy/ eTrade for all*) < <https://unctad.org/topic/ecommerce-and-digital-economy/etrade-for-all>> accessed 2 April 2019.

translates to an increase 3.7 percent or 1.4 million new mobile subscriptions recorded last quarter.¹⁸⁷

The same coincides with the increase of the use of mobile money. The report further states that there are now 26.3 million mobile money subscribers in Kenya. At the same time, a total of 227.3 million mobile commerce transactions were made which translated to Kes 404.1 billion in terms of purchases made. The person to person mobile money transfers recorded in this interval was valued at Kes 429.4 billion. This no doubt indicates that Kenya is one of the leading countries in mobile money transactions.¹⁸⁸

In the year 2019, it has been noted that Kenya is a rapidly digitizing nation with 46.6 million subscribers with a penetration rate of 97.8%. Over 98% of Kenya's internet subscribers access the internet through mobile phones.¹⁸⁹ Facebook, Instagram and Twitter were noted to have contributed 15% of the online shopping in Kenya.¹⁹⁰ These are some of the sites where electronic retailing is carried out.

An online transaction may be defined as a way of conducting business by utilizing computer and telecommunication technology to exchange data or conduct business.¹⁹¹ Electronic transactions have further been defined as any business transaction that has been negotiated over an online

¹⁸⁷ Moses Kemibaro, 'Kenya's Latest 2016 Mobile & Internet Statistics' (*Moses Kemibaro, Pure Digital Passion*, 1 October 2016) <<https://moseskemibaro.com/2016/10/01/kenyans-latest-2016-mobile-internet-statistics/>> accessed 2 April 2019.

¹⁸⁸ Ibid.

¹⁸⁹ Alice Munyua, 'Kenya considers protection of privacy and personal data' (*moz://a Open Policy & Advocacy*, 2 January 2019) <<https://blog.mozilla.org/netpolicy/2019/01/02/kenya-considers-protection-of-privacy-and-personal-data/>> accessed 23 July 2019.

¹⁹⁰ Evelyne Musambi, 'Beware of the nightmare that is online shopping in Kenya' (*Nation Media Group*, 15 March 2018) <<https://nairobi.news.nation.co.ke/news/nightmare-online-shopping-kenya>> accessed 23 July 2019.

¹⁹¹ Anisha Kumar 'Jurisdictional Challenges while doing online transactions' (*iPleaders Intelligent Legal Solutions*, 3 March 2017) <<https://blog.ipleaders.in/jurisdictional-challenges-while-doing-online-transactions>> accessed 11 February 2019.

system and where the parties interact electronically rather than by physical exchange or contract.¹⁹²

It is evident that there has been an exponential growth in e-retailing and that it is estimated to even grow more rapidly in the days ahead. However, there are still some issues that exist in e-retailing which hinder consumer protection as it ought to be. In this chapter, attention will be drawn to these issues.

3.1 Fraud in electronic retailing

E-retailing is much more susceptible to fraud. Although less than 10% of credit card transactions occur in an online environment, they still account for nearly 70% of the fraud associated with the credit cards. Fraudsters can easily manipulate the internet by using anonymity to commit crime to various consumers on online platforms in various remote locations. Some of these occurrences include identity theft. This includes stealing personal identification information such as bank account number or credit number and using it repeatedly for completing transactions in the actual individual's name. Another form is account hacking. This is characterized by unauthorized access to an organization's or customer's account and then engaging in fraudulent activities.¹⁹³

Lastly, phishing which involves the acquisition of confidential data from a user where a fraudulent hacker poses as a trusted party. In this type of fraud, the attacker sends malware in hyperlinks or attachments in emails which appear to be have been sent by legitimate organization. Once the user clicks on the hyperlink or attachment, the user's system then gets

¹⁹² Law Teacher, 'Challenges of e commerce to traditional contracts' (*LawTeacher*, August 12 2019) <<https://www.lawteacher.net/free-law-essays/contract-law/challenges-of-e-commerce-to-traditional-contracts-contract-law-essay.php>> accessed 11 September 2019.

¹⁹³ Paul Muriku Kanyaru and Josephat K. Kyalo, 'Factors affecting the Online Transactions in the Developing Countries: A Case of E-Commerce Business in Nairobi County Kenya,' *Journal of Educational Policy and Entrepreneurial Research (JEPER)* Vol 2, no.3 (2015) : 1-7 <<http://business.ku.ac.ke/images/stories/docs/factors%20online.pdf>> accessed 29 February 2020.

infected with a malware.¹⁹⁴ The fraudsters then proceed to use the malware in the next online transaction where the malware is activated and used in stealing personal and private information such as personal identification number or credit card number that the fraudster can use to steal money from the users account.¹⁹⁵

One of the challenges is that most of the electronic retailing transactions are carried out on phones and not computers. Most mobile devices lack anti-malware and anti-virus defenses which have majorly been built for desktops and laptops. This makes many users of mobile phones for electronic retailing susceptible to attacks by fraudsters. Also, the fraudsters are using refined techniques for initiating fraud- related attacks in internet transactions due to the lack of robust theft and fraud protection systems.¹⁹⁶

Many consumers are unaware of the potential risks. It is important to boost consumer awareness so as to enable consumers to secure their online transactions.¹⁹⁷ Despite the existence of the use of passwords and pins, it is noted that the same have been used by other people in the art of manipulation of the systems which in turn have resulted into fraud. The solution to this could then be the use of fingerprints. Unlike the pins and passwords which may be manipulated, the use of the fingerprint requires the exact consumer to be present.¹⁹⁸

It is reported that fraudsters used electronic cards to acquire goods worth over 62 million from Jumia in 2017 giving the online shopping platform a taste of fraud. Jumia further stated that in addition to seller fraud and fraudulent transactions with legitimate consumers, sellers are also

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ DPO, 'Top 5 Challenges in online payment and how to overcome them' (*DPO Group*, 21 October 2017) <<https://blog.directpay.online/top-5-challenges-in-online-payments-and-how-to-overcome-them>> accessed 11 February 2019.

engaging in fictitious or “phantom” transactions with themselves or with collaborators in order to artificially inflate their own ratings on the Jumia online platforms so as to build their own reputation based on those rankings.¹⁹⁹

It is further reported that a group of consumers in Kenya fraudulently used electronic payment suppliers to acquire approximately \$550,000 (Sh.62.3 million at the current exchange rates) in goods on the Jumia market place in December 2017.²⁰⁰ It is noted that such instances are very detrimental to electronic retailing. This is because the victims of consumer fraud lose confidence and integrity in the electronic retailing and in the certainty of payment.

In the same vein, in September 2018, the Communications Authority of Kenya asked Kenyans to exercise caution while shopping online. The Communications authority mentioned that fraudsters had created look –a- like e- commerce websites and mobile applications to steal from unsuspecting buyers with an aim of enticing the unsuspecting buyers with non-existent deals. It was noted that the criminals enticed the unsuspecting buyers through deals via e- mail, SMS, Social media pages and through telephone calls. They were also requesting for registration fees for the goods and services. The Communication Authority advised Kenyans to watch out for unavailable physical addresses, customer care helplines, suspicious telephone numbers, email addresses and websites.²⁰¹

The Communication Authority also advised Kenyans to take precautionary measures by verifying information about online shops before making any payments, desisting from sending

¹⁹⁹ Paul Wafula, ‘Jumia gets a taste of online fraud’ (*Nation Media Group*, 13 March 2019) <<https://www.nation.co.ke/business/Jumia-gets-taste-online-fraud/996-5023610-f6evpn/index.html>> accessed 23 July 2019.

²⁰⁰ Ibid.

²⁰¹ James Kariuki, ‘CA warns Kenyans over rise of online shopping fraud’ (*Business Daily*, 26 September 2018) <<https://www.nation.co.ke/business/CA-warns-Kenyans-over-rise-of-online-shopping-fraud/996-4778640-cjndg/index.html>> accessed 23 July 2019.

money to phone numbers that pose as sales representatives and avoiding mobile apps with unverified sources. The Communication Authority also cautioned online buyers against revealing personal information such as passwords, user names and ATM pins to third parties.²⁰²

In the year 2019 reports of fraud online were still surfacing. It was noted that an expansion of mobile applications on popular online stores increased the vulnerability of Kenyans to cyber-attacks and fraud. A report from the Communications Authority (CA) covering October to December 2018 revealed an increase in malware attacks, targeting mobile devices which led to the defrauding of a large number of unsuspecting Kenyans on online applications.²⁰³

It is further reported that in a period of three months, the National Kenya Computer Incident Response Team – Coordination Center (National KE- CIRIT/CC) detected 10.2 cyber threats, up from 1.8 million reported in the in the preceding quarter, nine million of which were malware attacks. The (National KE-CIRT/CC) is a multi-agency collaboration framework and Kenya’s national point of contact on cyber security matters.²⁰⁴

There was an increase in the cases of malware and the sale of stolen data and credentials including personal data and credit card information. It was noted that the cyber criminals were targeting their attacks on the end- users who have limited skills on cyber security skills. This illustrates the prevailing threats to the cyber security of consumers in electronic retailing who do not know much about cyber security.

²⁰² Ibid.

²⁰³ TechTrendsKE, ‘Fake mobile applications exposing Kenyans to cyber Fraud’ (*TechTrendsKE*, 3 April 2019) <<https://techtrendske.co.ke/fake-mobile-applications-exposing-kenyans-to-cyber-fraud-ca-report/>> accessed 29 February 2020.

²⁰⁴ Ibid.

It has been noted that fraud in electronic retailing can be dealt with by the use of fraud detection tools and software as well as through encryption.²⁰⁵ There is also a need to ensure that online merchants adopt new security measures as traditional techniques of authenticating individuals²⁰⁶ via passwords and user names are no longer considered sufficient.

3.2 Cross border Issues

Kenya is one of the countries that quickly welcomed the economic globalization and information age. According to the Communications Authority of Kenya the country of 49 million people had 30.8 million internet/ data subscriptions by September 2017. There are various giant international e- retailers have opened shop in the market in Kenya. They include: Amazon, eBay, Etsy and others. This has widened the consumer options since consumers are able to purchase items from any part of the world by the click of a mouse.²⁰⁷

Goods in e-retailing are purchased from borderless online markets across the world. Cross – border electronic retailing offers the advantage of enabling the consumers purchase goods from various countries. There is an expanding market for business to customer (B2C) supply shares the importance of income and distance factors with the traditional business to business suppliers across borders. (B2B). Through electronic retailing the internet is credited for making the world

²⁰⁵ Paul Muriku Kanyaru and Josephat K. Kyalo, 'Factors affecting the Online Transactions in the Developing Countries: A Case of E-Commerce Business in Nairobi County Kenya,' *Journal of Educational Policy and Entrepreneurial Research (JEPER)* vol.2, no.3 (2015) : 1-7 <<http://business.ku.ac.ke/images/stories/docs/factors%20online.pdf>> accessed 29 February 2020.

²⁰⁶ Ibid.

²⁰⁷ Wenhao Zhang, 'What Kenyan e-commerce firms can learn from the Chinese experience' (*How we made it in Africa*, 1 January 2018) <<https://www.howwemadeitinafrica.com/kenyan-e-commerce-firms-can-learn-chinese-experience/60669/>> accessed 29 February 2020.

much flatter. There have been claims of “death of distance” which no doubt has made electronic retailing across borders possible.²⁰⁸

The Organization for Economic Cooperation and Development (OECD) identifies a number of benefits that can be reaped from electronic retailing. Electronic retailing transforms the market place by changing the manner in which business is carried out. Electronic retailing replaces the traditional intermediary transactions and results into the broadening of new markets as well as products. Electronic retailing has significantly increased interactivity within the economy and has created the opportunity for small firms to reach the world. Through electronic retailing people are able to communicate as well as carrying out business in virtually any location. This has broken the barriers created by geographical and economic boundaries.²⁰⁹

However, Cross border payments can be slow, inefficient²¹⁰ and are much more costly and yet in today's era, we find that they are inevitable. For the various jurisdictions, there is a need to ensure that mechanisms are put up to ensure that there is efficiency in the cross border transactions.

Jurisdiction which refers to the territory within which a court or government has the authority to exercise its power is a challenge in e-retailing. This is because while all of the contracting is done online on different websites at a time, it is often difficult to establish the jurisdiction the offeror will be held accountable if there is any misconduct or breach of the contract. This is also

²⁰⁸ Thai Young Kim, Rommert Dekker & Christian Heji, ‘Cross Border Electronic Commerce: Distance Effects and Express Delivery in European Union Markets’ *International Journal of Electronic Commerce* vol.21, no.2 (2017):184-218 <<https://www.tandfonline.com/doi/full/10.1080/10864415.2016.1234283?src=recsys>> accessed 29 February 2020.

²⁰⁹ Paul Muriku Kanyaru and Josephat K. Kyalo, ‘Factors affecting the Online Transactions in the Developing Countries: A Case of E-Commerce Business in Nairobi County Kenya,’ *Journal of Educational Policy and Entrepreneurial Research (JEPER)* vol.2, no.3 (2015) : 1-7 <<http://business.ku.ac.ke/images/stories/docs/factors%20online.pdf>> accessed 29 February 2020.

²¹⁰ Ibid.

because the activities carried out on the internet are worldwide. In such a scenario it would imply that there is difficulty in determining the jurisdiction.²¹¹ This unlikely to happen in traditional contracts because the parties meet face to face and it is obvious what the applicable jurisdiction for each traditional contract is.

The purchase of goods online involves buyers and sellers from various countries which may have different regulations in regard with e-commerce. A number of countries are likely to lack specific frameworks applicable to e-retailing. There is difficulty in establishing the location and identity of the service providers online and this creates lack of trust in e-retailing.²¹²

There is difficulty in establishing where the contract has been concluded. Justice S. Muralidhar has explained that for the court to determine a matter while using the traditional approach to jurisdiction considers whether it is pecuniary, territorial or subject matter jurisdiction. There is difficulty in determining territorial jurisdiction while using the internet. This is because by its nature, the internet is borderless and one cannot define its bounds since it crosses over from one country to another.²¹³

Jurisdiction focusses on territorial limits whereas activities on the internet are by their nature very worldwide. For instance a website built in one country can be accessed by users across the world.²¹⁴ Two arguments have arisen in the quest of determining jurisdiction. It has been argued

²¹¹ Nol Djek, 'The Challenges of Electronic Commerce in Relation to Traditional Law' (*James Cook University, StuDocu*, 2016/17) <<https://www.studocu.com/en-au/document/james-cook-university/legal-concepts/essays/la1104-essay-the-challenges-of-electronic-commerce-in-relation-to-traditional-law/2944199/view>> accessed 29 February 2020.

²¹² UNCTAD, 'Consumer Protection in E- Commerce' (*UNCTAD*, 26 April 2017) < <https://unctad.org/meeting/e-commerce-and-consumer-protection>> accessed 1 June 2019.

²¹³ Anisha Kumar ' Jurisdictional Challenges while doing online transactions' (*iPleaders Intelligent Legal Solutions*, 3 March 2017) <<https://blog.iplayers.in/jurisdictional-challenges-while-doing-online-transactions> accessed 1 July 2019.

²¹⁴ Law Teacher, 'Challenges of E Commerce to Traditional Contracts' (*Law Teacher*, 12 August 2019) <<https://www.lawteacher.net/free-law-essays/contract-law/challenges-of-e-commerce-to-traditional-contracts-contract-law-essay.php>> accessed 11 October 2019.

that the issue of the jurisdiction can be then limited to the area and the residence of the consumer. Others do argue that the jurisdiction should be determined by the location of the business.²¹⁵

However, it is clear that it is difficult to determine the jurisdiction in the electronic transactions since in most cases both the seller and the consumer never meet face to face. Chances are high that either of the parties may fail or deliberately disclose the wrong details about their location.

The result of this is that the parties to this transaction may then be stranded as to where they are to institute legal proceedings in the event that there is any problem that arises in regard to breach of contract by any of the parties.

3.3 Contract Issues

The principles of the law of contract that govern online transactions continue to evolve as the online transactions continue to progress. Today, it is possible to start and conclude an entire contract online. There are challenges encountered in enforcing an electronic contract as contrasted with the traditional contract.²¹⁶

Electronic retailing contracts do share some similarities with the traditional contracts. However, they do differ in the sense that all electronic contracts are established online and it is usually uncommon for the contracting parties to meet face to face. Also some of the components of the electronic contract are hard to prove.²¹⁷

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Nol Djek, 'The Challenges of Electronic Commerce in Relation to Traditional Law' (*James Cook University, StuDocu*, 2016/17) <<https://www.studocu.com/en-au/document/james-cook-university/legal-concepts/essays/lal104-essay-the-challenges-of-electronic-commerce-in-relation-to-traditional-law/2944199/view>> accessed 29 February 2020.

There is difficulty in determining offer and acceptance in an electronic retailing transaction, the meeting of the minds, proving contractual capacity, establishing jurisdiction and enforceability of the online retailing contract. Contract law requires that the parties in the contract are of the same mind. There must be a meeting of minds which is also referred to as the *consensus ad idem*. This is the basis of acceptance in the traditional contract. This is usually established among contracting parties to show that they are fully aware of the terms and conditions of the contract.²¹⁸

In the electronic transactions, there seems to be a loophole in regard to the fulfillment of this requirement for a valid contract. This is because in electronic transactions, the agreement is made through the use of electronic devices and there is no meeting of the minds. For instance when one buys off a commodity from the website, there is no active human mind on the side of the vendor which points to the fact that there has not been the meeting of minds.²¹⁹ The other issue that arises is the fact that one may not be sure whether they are dealing with a legal person or whether the party that is entering into a contract has the actual contractual capacity.

Determining enforceability is another challenge that arises in the electronic transactions. Most of the contracts in the electronic transactions are by nature click wrap agreements or contracts. It has been noted that the e-commerce platform's policy on returning goods is not sufficient to protect consumers even as e-retailing continues to grow rapidly. There is also no system to check on the quality of goods and there is no good consumer grievance mechanism. In November 2018, Safaricom launched an e-commerce platform named "Masoko". However, Safaricom disclosed

²¹⁸Ibid.

²¹⁹ LawTeacher, 'Challenges of E-Commerce to Traditional Contracts' (LawTeacher, 12 August 2019) <<https://www.lawteacher.net/free-law-essays/contract-law/challenges-of-e-commerce-to-traditional-contracts-contract-law-essay.php>> accessed 11 October 2019.

in its 2018 Sustainable Business Report that it had to reduce the number of vendors from 200 to about 100 due to quality scrutiny.²²⁰

3.4 Seeking Remedies

There is a possibility that there may be multiple service providers at the different stages e-retailing. This causes the challenge of lack of clarity as to which service provider particular is liable in case of breach. There is lack of access to easy and effective redress enforcement. It is argued that consumers in electronic retailing usually have limited options in terms of remedies especially if the value of the product bought is low.

There is a challenge when it comes to seeking remedies on “small claims” matters.²²¹ This is because the costs of obtaining legal redress may exceed the value of the product. For instance, if one bought a commodity worth Kshs 3000 from an online platform and thereafter or during the course of the transaction encounters a challenge that warrants him or her to seek legal redress, they are likely to encounter a challenge where the legal consultancy fee amounts to Kshs 3000 or more.

It is in these circumstances where the consumer may desist from seeking legal redress because they will incur costs beyond the value of the commodity purchased online. Such a situation points to the fact that there is a need to ensure that there is a provision made for legal redress for the small claims arising from e-retailing.

It is argued that such amounts may seem small however, if we look at it in line with the high number of online consumers who may be affected by the similar circumstances it amounts to a

²²⁰ Patrick Alushula, ‘Regulatory gaps that leave you exposed when you shop online’ (*Business Daily*, 19 December 2018) <<https://www.businessdailyafrica.com/corporate/tech/gaps-leave-you-exposed-when-you-shop-online/4258474-4902636-13kpmtn/index.html>> accessed 23 July 2019.

²²¹Ibid.

very large amount of money which the online retailing company or business may get away with to the detriment of the e- retailing consumers.²²² Therefore, there is a need for the creation of an agency or a mechanism that can respond to the grievances of online consumers.

3.5 Lack of sufficient data on the factors hindering growth of e-retailing

There is lack of sufficient data in regard to the factors hindering the growth of e-retailing. Information in regard to availability of online products, consumer awareness, accessibility to the internet, as some of the factors hindering the growth of e-retailing is not readily available. There is difficulty in collection or access to data and at times the available data is insufficient.²²³

There is still need to attain all the relevant information for instance regarding factors that hinder governments or regulatory authorities from passing certain laws in regard to consumer protection. Some may be political or economic reasons. Having this data will greatly assist in informing the basis for law and policy reform in the area of consumer protection.²²⁴

3.6 Conclusion

“For the world has changed and we must change with it.”²²⁵ It is therefore important for us to note that as much as the existing laws seem to hold on to their traditional tenets , seeking to thereto maintain its own logics, the revolution created by information and communication technology cannot be wished away.²²⁶

²²² Ibid.

²²³ Communications Authority of Kenya, ‘Development of e-commerce in Kenya’ (*Communications Authority of Kenya*) <<https://ca.go.ke/industry/ecommerce-development/>> accessed 28 February 2020.

²²⁴ Ibid.

²²⁵ The White House, President Barack Obama, ‘Inaugural address by President Barak Obama’ (*The White House President Barack Obama*, 10 June 2016) <https://obamawhitehouse.archives.gov/realitycheck/the_press_office/President_Barack_Obamas_Inaugural_Address> accessed 29 February 2020.

²²⁶ Onyango Peter Onyoyo, ‘Examining “Electronic Fraud” in Kenya and the impact on Commercial Justice’ (*University of Nairobi Research Archive*, 2014)

Evidently, the increment of online transactions also increases the chances of compromising consumer protection in e-retailing such as fraud. This no doubt results into losses for both the seller and the consumers in electronic retailing transactions. This chapter shows the existing challenges despite the existence of a legal framework and how they affect consumer protection in e-retailing.

CHAPTER FOUR: COMPARATIVE STUDY - LESSONS FROM USA, SOUTH AFRICA AND RWANDA.

4.0 Introduction

This chapter examines the ways by which various jurisdictions namely: The United States of America with specific reference to the State of Delaware, Rwanda and South Africa have responded to the need to protect consumers in e- retailing. The comparative study is paramount because through it, Kenya may pick lessons from the following country's various approaches on promoting consumer protection so as to inform the basis to call for reforms to the existing legal regime on consumer protection in e-retailing in Kenya.

4.1 United States of America- The State of Delaware

The state of Delaware is credited for laying a groundwork for e- commerce and the legislation in this State has been credited for ensuring that electronic transactions are treated legally synchronized with paper transactions.²²⁷The state of Delaware has a track record of being at the forefront of the U.S commercial law and it has retained that position as the most prominent state for corporate incorporations.²²⁸

Delaware evaluates and upgrades its corporate laws per year. The state stands out for regulating blockchain. It has a blockchain legislation initiative to this effect.²²⁹ This points to the fact that the laws in this State are cognizant of the rapid developments in technology and they easily adapt

²²⁷ Sussex County Online, 'Digital Signatures now legal in Delaware ' (*Sussex County Online*) <<https://www.sussexcountyonline.com/news/localnews/700/digitalsignatures.html>> accessed 20 December 2018.

²²⁸ Ibid.

²²⁹ David Lucking, 'Delaware Passes Law Permitting Companies to Use Blockchain Technology to Issue and Track Shares' (*Allen & Overy*, 26 September 2017) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/delaware-passes-law-permitting-companies-to-use-blockchain-technology-to-issue-and-track-shares>> accessed 1 March 2020.

to include provisions on the use and regulation of blockchain technology so as to ensure protection of consumers in e-retailing.

Delaware continues to amend its laws in order to accommodate the usage of blockchain technology in the process of corporate record keeping. There was implementation of legislation to this effect in 2017. This illustrates how the state of Delaware continues to carry out consultation, amendment of laws to include blockchain applicability and consequently following through with the implementation of these laws through its blockchain initiative.²³⁰

Since the state of Delaware has conducive legislation environment for the use of cryptocurrencies the state has witnessed an increment in the number of people who shop with it. The retailers are therefore seeking out new ways of securing electronic retailing transactions and bettering the use of the new currencies.²³¹

There are and will continue to be advancements in the use of blockchain technology in e-retailing. There are prospects for the spread of blockchain technology across the world. There are numerous big e-retail companies like Alibaba and Walmart which have embraced its use and are already channeling hefty amounts of money to the use of blockchain technology in e-retail. It is evident that its use is likely to spread like a wild fire globally as the years go by.²³²

Blockchain technology is preferred because it is cheaper, it simplifies the process of sellers transacting electronically. It has proved to be secure, transparent and has the ideal characteristic

²³⁰ Ibid.

²³¹ Calvin Hennick, 'The Benefits of Blockchain Technology Across Industries' (*BizTech*, 31 October 2019) <<https://biztechmagazine.com/article/2019/10/benefits-blockchain-e-commerce>> accessed 1 March 2020.

²³² DApp Builder Team, 'How Block Chain Will Improve E-Commerce' (*DAPPS Builder*, 27 July 2018) <<https://medium.com/ethereum-dapp-builder/how-blockchain-will-improve-e-commerce-773a17837f13>> accessed 1 March 2020.

of being self-managing since there is no need for a third party. These advantages grant blockchain technology a cutting edge over the traditional transactions.²³³

The blockchain networks make them trustworthy, transparent, secure and most importantly self-managing. This is contrary to the traditional transactions that require a third party to process and Blockchain makes it possible for buyers and sellers to transact directly on an automated, independent system.²³⁴

In the year 2019, the state of Delaware passed the historic blockchain regulation. The bill was passed with without much opposition. The rationale of the bill was to extend the advantages of the use of blockchain technology which was embedded in an amalgamation between the law and technology to e-retailers and consumers.²³⁵

The state of Delaware has embraced the use of smart contracts. This arrangement involves the use of blockchain- based agreements which execute automatically when all the parties involved satisfy the terms of the contract required. These agreements may cover shopping, transfer of data or any other aspect as the parties involved may require.²³⁶

In the e-retailing setting, smart contracts operate after each of the parties have satisfied their contractual obligations. The buyer of commodities checks out of the seller's website. The buyer does not need to involve any other party since the money paid is held in the smart contract. The seller then carries out approval upon ascertaining that the right amount for the commodity has

²³³ Ibid.

²³⁴ DApp Builder Team, 'How Block Chain Will Improve E-Commerce' (*DAPPS Builder*, 27 July 2018) <<https://medium.com/ethereum-dapp-builder/how-blockchain-will-improve-e-commerce-773a17837f13>> accessed 1 March 2020.

²³⁵ Michael Del Castillo, 'Delaware House passes Historic Blockchain Regulation' (*Coindesk*, 1 July 2017) <<https://www.coindesk.com/delaware-house-passes-historic-blockchain-regulation>> accessed 1 March 2020.

²³⁶ DApp Builder Team, 'How Block Chain Will Improve E-Commerce' (*DAPPS Builder*, 27 July 2018) <<https://medium.com/ethereum-dapp-builder/how-blockchain-will-improve-e-commerce-773a17837f13>> accessed 1 March 2020.

been paid. The seller then approves the transfer of property and consequently arranges for the shipping of the commodities to the buyer through the assigned shipper. It is only upon the fulfillment of these requirements that the money held in the smart contract is released to the seller. Usually, the smart contracts include a seller's online wallet and that is where the money is deposited. The use of smart contracts is safe, transparent, create trust between buyers and sellers. It aids in securing data of consumers since there is no need to divulge sensitive private information to an intermediary. It gives a consumer control and it largely protects consumer rights.²³⁷

Blockchain provides avenues through which supply chains can be verified. There are challenges encountered in shipping and delivery of goods. There may be delays experienced in delivery due to the bureaucratic procedures involved in the shipping process in terms of documentation. The process is further frustrated by increased costs in terms of delivery and the fact that it may in one way or the other be subjected to errors.²³⁸

The Delaware Blockchain Initiative (DBI) regulates the use of smart contracts and blockchain technology under state corporate law. This has enabled numerous companies to understand how to incorporate its use in their businesses which in turn promotes consumer protection.²³⁹ Therefore, it is evident that the State of Delaware has adopted the use of blockchain technology as a way to provide consumers with the highest level of protection as they carry out electronic transactions. The State has made a significant move in ensuring that there are regulations to this effect and this step is significant to promoting the growth of e-retailing. This is because the

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Craig A.de Ridder, Nathalie Prescott and Mercedes K. Tunstall, 'Recognition of Smart Contracts, Legal developments encourage the use of smart contracts in the United States' (*Pillsbury*, 1 June 2017) <<https://www.pillsburylaw.com/en/news-and-insights/recognition-of-smart-contracts.html>> accessed 1 March 2020.

guarantee of secure transactions boosts the consumer confidence in the transactions and therefore more people feel comfortable participating in e-retailing.

4.1.1 The Uniform Electronic Transactions Act (UETA)

In 1999, The National Conference of Commissioners of Uniform State Law also known as the Uniform Commissioners drafted the UETA. This is a model code and it is not legally binding on any state. However, a state can only be bound by it if it takes a deliberate effort to adopt it as part of its state code.²⁴⁰

It aimed at creating a favorable environment for consumers and businesses to transact across the various states. The strategy was to ensure that the laws governing transactions in these various states were identical. This would ease trade within the states.²⁴¹ It provided a legal basis for the integration of electronic communications in transactions where the parties involved have consented to transacting electronically. The Act strengthens the position of e-retailing and it sets it at the same level as the traditional paper based e-commerce.²⁴²

The Act provides a basis for establishing the validity and enforceability of electronic contracts. It works in tandem with the Electronic Signatures in Global and National Commerce Act (ESIGN Act) to this effect. It covers electronic signatures in either commercial or government transactions.²⁴³ Its application is not universal but rather adopted on a case by case basis.

²⁴⁰ Fullerton and Knowles, 'The Uniform Electronic Transactions Act (UETA)' (*Fullerton and Knowles*, 5 May 2018) <<https://fullertonlaw.com/newsletters-published/the-uniform-electronic-transactions-act-ueta>> accessed 2 March 2020.

²⁴¹ Ibid.

²⁴² Sandra Norman- Eady, Chief Attorney, 'Uniform Electronic Transaction Act' (*OLR Research Report 2000 -R-2006*, 27 November 2000) <<https://www.cga.ct.gov/2000/rpt/2000-R-1076.htm>> accessed 2 March 2020.

²⁴³ Ibid.

Individual states have the volition to adopt or reject its applicability within their respective jurisdictions.²⁴⁴

It stipulates the requirements for parties to engage in an electronic transaction. It stipulates the nature of contract to which e-signatures may be applicable and what is considered to determine the validity of the electronic transaction. It further indicates that each circumstance is unique and therefore a different interpretation may be relied on depending on circumstances surrounding the application of the particular electronic transaction. It also makes provisions for notarization of documents in terms of electronic signature recognition and electronic submission.²⁴⁵

4.1.2 The Uniform Electronic Transactions Act in The State of Delaware

The state of Delaware is used as a case study in this thesis due to the reliance of many consumers on electronic transactions as well as its detailed consumer protection legislation. There have been recent developments in regard to legislation of electronic contracts across the globe. This may be attributed to the increased internet penetration and the increase in electronic transactions.²⁴⁶

This legislation aims at promoting electronic transactions by bridging the divide between the traditional requirements of writing and signature and electronic signatures in electronic transactions. It aims at creating laws for uniform applicability in order to boost the growth of dependable and secure electronic transactions.²⁴⁷

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ William R. Denny, 'Electronic Contracting In Delaware: The E- Sign Act and The Uniform Electronic Transactions Act' (*Potter Anderson Corroon LLP*, 1 November 2004) < <https://www.potteranderson.com/newsroom-publications/102.html> > accessed 14 December 2018.

²⁴⁷ Ibid.

4.1.3 The History of Electronic Contracting Legislation in The State of Delaware

Electronic Data Interchange (EDI) was the way in which electronic contracting took place among companies back in the day. It is the transfer of business data amongst numerous computer systems in an organized format so as to facilitate reception of information from one company to another in an electronic form. It was considered advantageous because it reduced the time spent and costs incurred in using written documents to convey communications.²⁴⁸

Despite its advantages, very few companies were able to use it due to the fact that it was costly and accessibility to its use was quite bureaucratic. However, as the times changed and the internet created an avenue for various companies and individuals to transact electronically.²⁴⁹

August 1 1996 was a remarkable day because the American Bar Association (ABA) promulgated the ABA Digital Signature Guidelines with an aim to address the challenges in e-commerce. Coincidentally, The United Nations Commission On International Trade Law (UNCITRAL) approved its Model Law On Electronic Commerce that very year. It aimed at serving as a model law to guide member states on regulating e-commerce.²⁵⁰

UETA was drafted in 1997 by The National Conference of Commissioners on Uniform State Laws (NCCUSL) which was a law – drafting advisory body within the United States. UETA derived directly from the UNCITRAL Model Law. In July 1999, NCCUSL adopted UETA and it was forwarded to the states for their thoughtful consideration or even application as they each would deem fit.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

As of November 1st 2000, 22 states had adopted UETA, although there were numerous differences within the various state enactments. At this point in time UETA was still pending adoption in 6 more states. The state of Delaware made a significant move of signing UETA into law. This was by way of the state's Governor On July 14, 2000. However, there were some concerns relayed as to whether the law would actually manifest uniformity and thoroughly protect consumers.²⁵¹

4.1.4 Guiding themes of the UETA and e-sign

These were the major pointers that informed the rationale of the legislation. The general position was that electronic commerce ought to be promoted. The mind was to liberate the growth of e-commerce from the strangulation of traditional laws and regulation which did not recognize e-commerce.²⁵²

4.1.4.1 Procedural and not substantive

The laws purposed to guide in terms of the procedure to be followed in electronic transactions. They aimed at ensuring that there were no hindrances to electronic retailing. This was contrasted with the substantive laws in regard to electronic commerce.²⁵³

4.1.4.2 Minimalism

The laws in this context were not to the end of outlining rules and regulations to abide by in electronic commerce. However, they entailed the minimalistic approach whereby the laws served the purpose of accommodating technological changes and advancements between technology and businesses. It aimed at ensuring that the laws on e-commerce were as fair as those governing

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

traditional contracts and that the general legal regime was in tandem with the acceptable international laws and standards of electronic commerce.²⁵⁴

4.1.4.3 Freedom of Contract

The laws were not intended to favor one technology or business implementation model over another. They were not aiming at retarding the evolution of new technologies or models. The approach was basically promoting freedom of contract and limiting the effects of any structural or legal impediments to electronic commerce.

4.1.5 The Provisions of the Uniform Electronic Transactions Act in The State of Delaware

Section 12A -101 is marked as the Short Title of this piece of legislation. The section further provides that and it states that the Act may be cited as The “Uniform Electronic Transactions Act.”²⁵⁵

Section 12A-102 provides for definitions of terms in relation to electronic transactions. Some of the terms defined include, agreement, automated transaction and The Act makes provisions for an electronic postmark certificate. This is a provision aimed at availing evidentiary proof concerning a particular electronic transaction The two definitions clearly encompass electronic transactions. The definition of terms is broad and specific to electronic transactions. This indicates an intention to secure the consumers in electronic retailing by ensuring that there is

²⁵⁴ Ibid.

²⁵⁵ Justia US Law, ‘2014 Delaware Code Title 6- Commerce and Trade Chapter 12A. Uniform Electronic Transactions Act 12A-101’ (Justia US Law) <<https://law.justia.com/codes/delaware/2014/title-6/chapter-12a/section-12a-101/>> accessed 2 March 2020.

guaranteed security and assurance of proper delivery of the commodities they purchase in an electronic transaction.²⁵⁶

The scope of applicability of this Act to electronic transactions is provided for under Section 12A- 103. It shows how it can be applied to issues surrounding the use of electronic records and electronic signatures. These include the agreement between parties to a contract to execute their contract electronically and their conduct.²⁵⁷

Section 12A-106 ensures that this Act aids the interpretation of electronic contracts within the provisions of the general law. To this end, it ensures that electronic contracts satisfy the generally recognized and acceptable legal requirements.²⁵⁸

Section 12A -108 stresses the need to ensure that information required as per the electronic agreement is duly provided, sent or delivered. It therefore provides for a responsibility to ensure that delivery of information and ensures that there is no hindrance to the recipient from printing or retaining an electronic record pertinent to the electronic transaction. This provision provides for transparency and promotes consumer protection.²⁵⁹

Section 12A-109 of the Act provides for the criteria followed in order to establish attribution of electronic records or signatures. They include but are not limited to the time of creation or adoption of the electronic signature, what the parties to the agreement agreed on or any other consideration as provided for under the law.²⁶⁰

²⁵⁶ Justia US Law, '2014 Delaware Code Title 6- Commerce and Trade Chapter 12A. Uniform Electronic Transactions Act 12A-101' (Justia US Law) <<https://law.justia.com/codes/delaware/2014/title-6/chapter-12a/section-12a-101/>> accessed 2 March 2020.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

Section 12A-110 of the Act provides for various rules that are applicable in the face of mistakes or changes as they electronically transact. The rules provide for the need to promptly notify the other party to the transaction of the error and that the individual did not intend to be bound by the electronic record received by the other party. It requires the parties involved to follow reasonable instructions given in regard to that particular electronic transaction.²⁶¹

Section 12A -111 of the Act points out the requirements for the recognition of notarized and acknowledged electronic signatures. It requires fulfillment of the specific instructions mentioned there in coupled with the accompaniment of all required information by law with an attachment consisting the specified electronic signature or record.²⁶²

Section 12A-112 The Act makes it mandatory to satisfy the requirement of the law that the record of information be retained when required to do so. It further makes provisions for the accessibility of information on the electronic transactions available for further reference which requirement may further stipulate that the information is required in its original form. This secures electronic transactions and promotes consumer protection.²⁶³

Section 12A- 113 provides that electronic signatures are duly recognized for evidentiary purposes. It promotes their use and categorically castigates the exclusion of electronic signatures due to the fact that they are not written traditionally. This gives electronic signatures the same standing in the eyes of the court as the written ones.²⁶⁴

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

Section 12A- 115 provides for the considerations taken into account in determining time and place of sending receipt in electronic transactions. It emphasizes the need to properly address or direct to an information processing system that has been assigned to receive electronic records so as to ensure that the information sent can be accessible to the recipient. The section mentions the general rule and the exceptions related to sending and acknowledging of receipt. This provision ensures that there is indeed proper sending on the part of the seller and confirmed receipt of what has been sent by the seller to the consumer. This boosts electronic retailing by ensuring that the commodities the buyers request for are truly sent to them.²⁶⁵

Section 12A- 116 provides for transferable records. It defines the characteristics of a transferable record. It states the guidelines to be followed in the event of transferring records. This section of the Act provides for the various guidelines that are to be followed in order to ensure that it is done in a manner that protects the consumers in electronic retailing. These provisions provide solutions to problems such as fraud which may easily occur when there is no adherence to such provisions. This is because in the absence of the measures that are to be followed in terms of authorization to transfer there are loopholes which can be easily manipulated by fraudsters.²⁶⁶

Section 12A- 117 provides for choice of forum. The Act provides that the parties to the electronic contract are at liberty to choose an exclusive judicial forum. It further stipulates the determinants in choice of forum depending on various circumstances which may arise in the course of an electronic transaction. Some of the factors considered include enforceability of a contract and the specific provisions of the electronic contract.²⁶⁷

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

The above provisions in regards to electronic transactions shows that there is need to ensure that there is a unified code on consumer protection in electronic retailing in Kenya. The Uniform Electronic Transactions Act in the state of Delaware shows that it is possible to have one piece of legislation that covers all the areas that affect electronic retailing. This Act has provisions on definitions of key terms, electronic signatures, admissibility of evidence, requirements in terms of sending and receiving, information, automated transactions, notarization, what to do in the event of an error, electronic records and jurisdiction.

The Act breaks down procedure and rules that are to the end of ensuring consumer protection in electronic retailing. This serves as a solution to the existing problem of fragmentation of laws in regard to consumer protection in electronic retailing. This piece of legislation is also seen to be accommodative of the recent developments in technology like blockchain technology. This aids in promoting secure the electronic transactions. This shows that the laws ought to take into account such developments as they occur in order to comprehensively protect consumers.

4.2 South Africa

South Africa's population is 55.91 million people. Its Gross Domestic Product (GDP) is 294.84 billion USD. The World Bank GDP per capita rankings allocate it the 30th position amongst the richest countries. Its GDP per capita is currently at 4,826 USD and is expected to reach 5,352 USD by 2021.²⁶⁸ E-commerce is rapidly growing in South Africa. It is estimated that there are 18.43 million e-commerce users in South Africa. The projection in consideration with this rate is that there will continue to be an exponential growth in e-commerce in South Africa. There are

²⁶⁸ Cairn Smith, 'How e commerce is exploding in South Africa' (*fin24*, 16 March 2018) <<https://www.fin24.com/Economy/how-ecommerce-is-exploding-in-sa-20180316>> accessed 23 July 2019.

prospects that by 2021 there will be an increment of 6.36 million people participating in e-retailing within South Africa.²⁶⁹

In a span of four years the amount of money spent in e-retailing is projected to register a sharp increment. This is commensurate with the increment in e-commerce users in South Africa. The estimation is that by that time 24.79 million people will spend an average of 189.47 USD on e-retailing.²⁷⁰ There has been research conducted to ascertain how much time various South African online retailers spend on the various e-retailing platforms. The findings were that the majority which accounted for about 42% spent between three and above hours online and the other percentages included various intervals between two hours and thirty minutes. This alone points to the fact that many people are interested and are readily participating in e-retailing in South Africa.²⁷¹

The above illustrations point to the exponential growth of e-retailing in South Africa coupled with prospects of steady increase as the years go by. The factors catalyzing this growth include accessibility to internet and a significant level of mobile penetration. More so, the increased growth attests to the fact that consumers trust and have confidence in the reliability of the e-retailing arrangements in place. There have been changes in the way most retailers conduct business. Majority of the traditional brick and mortar retailers have recently opted to transact online. As a result of this, the consumers have significantly shifted their allegiance from the brick and mortar retail to electronic retailing due to its various advantages inclusive of convenience.²⁷²

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

There are various platforms through which online retailers are selling their goods. Some are even using social media platforms like WhatsApp, Instagram and Facebook to mention but a few. Various online retailers have websites where they display and sell their goods. Online retailers are exploiting all avenues to ensure that they can create digital presence, enhance or personalize customer experiences in order to get more customers. The use of these platforms assists the retailers to have a wider scope of reaching out to numerous customers both domestically and internationally.²⁷³

Majority of South Africans have access to smart phones, laptops and other devices which aid their participation in e-retailing. It was noted that 55% of the South African population has access to smart phones. This is attributed to the added to its affordability and it has boosted the number of people able to participate in e-retailing.²⁷⁴

Various e-retailing platforms offer a variety of goods ranging from clothes, electronic devices, scholarly materials and much more. However, it was noted that fast foods and groceries are the most purchased commodities by South Africans through the various platforms. There is also a significant trend of e-retailing transactions taking place between South African consumers and other e-retailers across the world. This is because there are various international e-retailing companies like Alibaba, eBay and others that have facilitated the increment in cross border e-retail.²⁷⁵

²⁷³ Ibid.

²⁷⁴ Graham Du Plessis, ‘#Mobile commerce: The growth of mobile shopping in South Africa’ (*Bizcommunity*, 13 July 2018) <<https://www.bizcommunity.com/Article/196/822/179452.html>> accessed 23 July 2019.

²⁷⁵ Ibid.

4.2.1 Tokenization

In a bid to ensure that there is secure and trustworthy, convenient interaction during the online transactions, South Africa has addressed the issues of data breaches by the use increased use of payment tokens. There is a view to ensure that the entire payment is converged into a cloud. Tokens are said to protect the payment of data and they act as a surrogate to the credit card.²⁷⁶

Tokens are seen as a way to ensure that there is reduced chances for the facilitation of activities that may amount to fraud. This is because the domain and the user are strictly limited to a specific device, merchant or a specific transaction type or channel.²⁷⁷ In the year 2018, there was a record of 25% growth over the year of 2017 of growth in electronic retailing in South Africa. This was a surprise and contrary to speculations that had earlier been made that the growth of e-commerce would slow down to 20% in the year 2018.

The COVID-19 pandemic has led to an increase in electronic retailing. This therefore increases the need to ensure that online transactions are secure. Mastercard announced that it will offer merchants with assistance in regard to the use of tokenization, e-commerce, and recurring billing card- on-file program in South Africa. The aim was to protect consumers and to facilitate their transactions with ease when storing Mastercard cards in merchant databases.

The Mastercard Digital Enablement service (MDES) for Merchants, uses tokenization to protect, quicken and ease online and in-app Mastercard purchases. It extends this benefit to all other services which consumers purchase using their Mastercard such as payment of household utility bills.²⁷⁸

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Mastercard, 'Mastercard boosts online security capabilities as E-commerce accelerates in South Africa' (Mastercard, Engagement Bureau, 19 August 2020) <<https://newsroom.mastercard.com/mea/press->

Consumers can be protected from online fraud through the use of tokenization. This is attributed to the fact that it uses encryption of sensitive consumer data by in turn replacing the consumer's Mastercard numbers with digital tokens. Consumers are secured because there is no loophole for manipulation since each transaction is unique and has a token of its own. The use of tokenization eliminates information residues in the electronic system which could easily be manipulated by fraudsters to the detriment of the unsuspecting consumer. This consequently results into higher approval rates for online retailing since it largely minimizes online fraud.²⁷⁹

South Africa has been able to promote security in electronic retailing by the use of tokenization. Through this, there has been increased trust in the online transactions and this has led to the increase in electronic retailing.

4.3 Rwanda

The government of Rwanda has made concerted effort towards making Rwanda a regional electronic hub. This is evident through various campaigns carried out in Rwanda to promote digitalization within the country. A lot has been done in order to boost Information Communication Technology (ICT) in Rwanda. This is through various activities like partnerships, training, establishment of various avenues such as a favorable environment for ICT investors to boost ICT in Rwanda. There have been measures to promote a cashless economy ('singombwa Cash') and to carry out various measures to accelerate growth of electronic retailing in Rwanda.²⁸⁰

[releases/mastercard-boosts-online-security-capabilities-as-ecommerce-accelerates-in-south-africa/](#) > accessed 31 March 2021.

²⁷⁹ Ibid.

²⁸⁰ ITC, 'Enabling the future of e-commerce in Rwanda' (*ITC/ecomConnect*) <<https://ecoemploi.org/enabling-the-future-of-e-commerce-in-rwanda/>> accessed 23 July 2019.

There have been projects to ensure that electronic retailing is carried out in the right way. An example is that Rwanda boosts its Small and Medium Sized Enterprises (SMEs) to favorably transact electronically. Through a Project: “Rwanda: Enabling the Future of E- Commerce,” assistance is rendered to SMEs by equipping them with relevant skills, information and guidance on how to sell and market their products online. This project is implemented by the promotion of Economy and Employment Program (Eco- Emploi) / (German Cooperation Agency) GIZ on behalf of the Rwandan Ministry of Trade and Commerce (MINICOM).²⁸¹

As a result, consumers are availed a wide range of products made in Rwanda on the various e-retail platforms. This in turn boosts the economy. It also contributes to consumer protection since the SME retailers are trained and guided on the basic accepted practice in e-retail which includes appreciating the very essence of consumer rights and consumer protection.²⁸² E-Commerce service centers have been created in Rwanda. They serve the essential purpose of availing logistics to SMEs in regard to e-commerce. They provide an avenue for SMEs to be regulated and for a secure process of online payment.²⁸³

Micro, Small and Medium Enterprises (MSMEs) encounter challenges such as unreliable delivery systems. The International Trade Center (ITC) in collaboration with DHL a leading international delivery service provider have come up with solutions to this challenge in Rwanda. This shows that the government of Rwanda has been involved in ensuring that the costs of the commodities is favorable for the consumers since it participates in ensuring that there are minimized costs incurred by the suppliers of the commodities consequently protecting consumers from hiked prices due to transport costs incurred by the sellers of goods. The

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

government of Rwanda is credited for all its strategic moves in promoting e-commerce. Its collaboration with various international and local organizations aims at not only promoting e-commerce but also ensuring that clear standards and measures are in place to promote consumer protection in e-commerce.

4.3.1 Role of E-Commerce Service Center (ESC) Rwanda

The E-Commerce Service Center (ESC) in Rwanda partnered with DHL and designed an innovative facility to boost e-commerce. The facility which will merge the provision of warehousing and transportation facilities with value added services. This is geared towards serving both local and global markets. It will avail Rwandan exporters with access to first class warehousing facilities, digital photo center and a training center amongst numerous incentives.²⁸⁴

The E-Commerce Service Center (ESC) further provides advisory services to the smaller firms, it provides photography services and it also assists in the creation of digital identity for the sale of online commodities including last mile delivery services.²⁸⁵ The government intervention also boosts consumer protection in electronic retailing in Rwanda. This is because issues to do with quality assurance are dealt with. This also enables the consumers to be shielded from scenarios of misrepresentations that may be displayed since the center ensures that the commodities are given proper digital representation.

4.3.2 Government training programs and partnerships with Alibaba to boost Electronic Retailing.

The Electronic World Trade Platform (eWTP) is an Alibaba –led initiative that aims at addressing the challenges faced by SMEs in global trade via e-commerce. Rwanda stands out as

²⁸⁴ ITC, ‘Rwandan business eye e-commerce success’ (*International Trade Centre*, 7 December 2018) <<http://www.intracen.org/news/Rwandan-businesses-eye-e-commerce-success/>> accessed 23 July 2019.

²⁸⁵ Ibid.

the first country within the African continent to join eWTP. Rwanda also extended its membership for another three years. Rwanda has made efforts to provide capacity-building at all key stakeholders in the digital economy and has boosted training for them so as to equip them with the relevant skills to promote consumer protection in electronic retailing.²⁸⁶

SMEs benefit from eWTP by acquiring operational infrastructure and various incentives like commerce logistics mobile and skills training among others. It also exposes SMEs to the international economy. Usually this would only be available to only multinational companies. This also provides an opportunity to ensure that the entities carrying out electronic retailing are conscious enough to ensure that consumers are protected since they are equipped with skills and relevant training from successful global companies carrying out electronic retailing.²⁸⁷

4.4 Conclusion

Having looked at the laws and the various approaches the various jurisdictions namely: The United States of America with specific reference to the state of Delaware, South Africa and Rwanda there are some lessons Kenya can pick and good practices it can adopt in order to ensure consumer protection in electronic retailing in Kenya.

In light of the above, from the State of Delaware in the United States of America we have seen the importance of adopting the use of block chain technology, its benefits once incorporated in electronic retailing and how it can help eradicate fraud which occurs in electronic transactions, a problem Kenya is still dealing with regardless of the existence of numerous legislation on the same.

²⁸⁶ Milcah Lukhanyu , ‘Alibaba, Rwanda Government Launch a 4-year e-commerce training program for Rwandan Students’ (*reed.co.uk*, 2019) < <https://techmoran.com/2019/09/09/alibaba-rwanda-govt-launch-a-4-year-e-commerce-training-program-for-rwandan-students/>> accessed 30 March 2021.

²⁸⁷ Alizila Staff, ‘Rwanda First in Africa to join Alibaba- Led (eWTP)’ (*Alizila*, October 31, 2018) < <https://www.alizila.com/rwanda-first-in-africa-to-join-alibaba-led-ewtp/>> accessed 31 March 2021.

The state of Delaware has further gone ahead to adopt the Uniform Electronic Transactions Act (UETA) which has provisions which intricately responds to most issues that arise during the course of transactions in electronic retailing. Having such a piece of legislation in Kenya would no doubt assist in ensuring that the provisions on details concerning electronic retailing are found in one place hence solving the problem of the disaggregated legal framework in this area. It would also ensure that other issues that arise in electronic retailing such as jurisdiction issues, online dispute resolution which are not clearly provided for in existing legislation are provided for therein.

Furthermore, having looked at South Africa and Rwanda which countries are thriving in electronic retailing, we can borrow a leaf in terms of the best practices in these countries in order to boost electronic retailing in this jurisdiction. From South Africa the use of payment tokens can be adopted in order to fight fraud. This will build the trust of the consumers in electronic retailing and will boost it. From Rwanda, the government can proceed to create more programs to promote more training on e-retailing so as to ensure that the retailers have the necessary skills and knowledge to carry out electronic retailing. These countries have shown how the measures they have taken have helped to solve the challenges encountered in e-retailing so as to afford the consumers substantial consumer protection.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter covers the conclusion and recommendations of this study. Electronic retailing in Kenya is increasing by the day. The country has made significant strides in ensuring that there exists a legislative framework concerning electronic retailing and consumer protection. Evidently, the country is not devoid of legislation in relation to consumer protection in electronic transactions.

However, despite the fact that there exists a legal framework on consumer protection and electronic transactions there are still prevailing challenges in terms of implementation of these legal provisions. This is evidenced by the prevalence of fraud in electronic transactions and the loss of consumer confidence in the electronic retailing.

This study through its research questions aimed at providing answers as to what the legal framework on consumer protection in electronic retailing in Kenya is. This was done under chapter two. Furthermore, it analyzed the existing legal framework on electronic retailing and the strengths and weaknesses as it set out the legal and implementation challenges. This was done under chapter three. There was a comparative study under chapter four between USA, South Africa and Rwanda from which various lessons on how to enhance consumer protection in electronic retailing were learned through the various practices in each of these countries.

This study's hypothesis is that the disaggregated legislative framework has substantially contributed to the failure to protect consumers in electronic retailing. This research argues that there is need to ensure that there is a comprehensive legal framework addressing the issues of consumer protection in electronic retailing.

The government ought to come up with measures to ensure that electronic retailing is categorically addressed in one piece of legislation instead of having to refer to various pieces of legislation.

This chapter seeks to address the last research question on what reforms can be made to the existing laws on electronic retailing in Kenya. Having analyzed the legal challenges encountered in the implementation of the existing legal framework on electronic retailing in Kenya. The reforms to the law on electronic retailing in Kenya under this chapter are to the end that there will be relevant changes made to the legal, regulatory and institutional framework in order to boost consumer protection in electronic retailing in Kenya.

5.1 Recommendations

Consumer Protection is an integral part of electronic retailing. In the absence of assured consumer protection very little is to be obtained from electronic retailing. Therefore, it is very paramount for the government to ensure that the consumer protection in electronic retailing. This will in turn build consumer confidence and increase their participation in e-retailing.

The legal challenges encountered in the course of electronic retailing are a reality not only on Kenya but also in other jurisdictions. Some of these challenges include fraud, difficulty in finding the applicable law due to having a disaggregated legislative framework and many others.

As a result of these challenges, states, stakeholders, businesses are urged to devise appropriate strategies and to create reforms to the existing legislative framework in order to protect consumers in e-retailing.

5.1.1 Recommendations to existing laws

These are the proposed recommendations to various existing laws and National ICT Policy Guidelines²⁸⁸ which have been assessed in chapter two. Some of the laws that are referred to include, the Sale of Goods Act²⁸⁹, the Kenya Information and Communication Act²⁹⁰, the Consumer Protection Act²⁹¹ among others referred to in this study.

5.1.2 The Sale of Goods Act, Chapter 31

The Act does not make any provisions for Online Dispute Resolution (ODR) as an avenue for dispute resolution in e-retailing. The scope of remedies provided for under this Act does not include ODR yet the same Act comes into play during e-retailing. The lack of provisions on ODR deprives consumers of the enjoyment of the benefits that accrue from the use of ODR inclusive of solving the difficulties that arise during dispute resolution when there is involvement of various jurisdictions.

Online Dispute Resolution (ODR) is a protuberance of Alternative Dispute Resolution (ADR) which originated in the United States in the 1970's. Alternative Dispute Resolution was an experiment to discover other avenues of dispute resolution as opposed to using courts of law. It was proved to work and it incorporated negotiation and mediation in the process. ODR merely began as Alternative Dispute Resolution plus technology. However, it continued to evolve and its applicability stretched to e-retailing.²⁹²

²⁸⁸ The National ICT Policy Guidelines, 2020.

²⁸⁹ The Sale of Goods Act, Chapter 31.

²⁹⁰ The Kenya Information and Communication Act, Chapter 411A.

²⁹¹ The Consumer Protection Act, 2012.

²⁹² Erika Rickard, Online Dispute Resolution Moves from E-Commerce to the Courts, Technology executive discusses use of internet to solve civil cases, (PEW, June 4, 2019) < <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/06/04/online-dispute-resolution-moves-from-e-commerce-to-the-courts>> accessed 3rd August 2021.

As the internet penetration continued to expand in the late 1990's so did the usage of ODR. At that time, e-retailing websites like eBay experienced exponential growth but the challenge was that there was no fast and convenient way to resolve disputes arising from them. There were interventions made by experts in the field of ODR to assist the various e-retailing companies to solve disputes. The result was that consumers were satisfied with the convenience and speed at which the disputes were solved. It was followed by an increase in the number of people transacting online due to the confidence they had in the system. eBay hit an impressive figure of 60 million disputes resolved per year through Online Dispute Resolution. It is amazing to note that such a figure of resolved disputes by ODR superseded the number of disputes resolved by the entire United States civil court mechanism.²⁹³

ODR has various advantages such as convenience since it can be used by anyone wherever they are at their convenience. It is accessible and quick as opposed to struggling to get a lawyer to legally represent the aggrieved party and to be subject to waiting for days, months or years for a case to be heard. Disputes in ODR can be solved in days or weeks, overall in a shorter span of time than it would be by proceeding to court. It is also much faster in terms of getting redress.²⁹⁴ Therefore it is proposed that the Sale of Goods Act be amended to include provisions on Online Dispute Resolution (ODR) to quicken the possibility of obtaining redress once there is breach. This will in turn increase the consumer's willingness to participate in e-retailing.

5.1.3 The Law of Contract Act, Chapter 23

The Law of Contract Act provides for a traditional contract and the provisions of this Act do not clearly regulate electronic retailing contracts. This is because despite the fact that both online and traditional contracts are contracts they each have different nature and underlying

²⁹³ Ibid.

²⁹⁴ ibid

aspects. The result is that the provisions in the Act do not wholesomely cover the issues that arise in online contracts.

For instance, by nature of the online contracts where consumers buy commodities by seeing them virtually and not being able to exercise their five senses in order to ascertain the quality of the goods they need to be accorded consumer protection and by virtue of the contracts being online consumers also have a lower bargaining power and in most times they suffer from unilateral imposition of terms with limited or inaccessible remedies. The Act provides for remedies that can be used within the specific jurisdiction to which it applies and yet by the nature of online transactions, they take place beyond one jurisdiction. The Act does not have provisions on Online Dispute Resolution (ODR).

It's on this premise that it is proposed that the provisions of this Act are amended to include provisions that encapsulate the nature of online transactions in order to afford online consumers consumer protection. This includes incorporating provisions that could guide the process of ODR so as to provide avenues to solve disputes online even those across the domestic jurisdiction.

5.1.4 The Kenya Information and Communication Act, Chapter 411A

The Act under Part VIA of the Act provides for electronic transactions. There in are provisions on things such as: requirement for a license, legal recognition of electronic records and signatures and electronic fraud amongst others. These provisions are applicable to some circumstances that may arise in e-retailing however, the Act in this section on electronic transactions does not explicitly address the issues of e-retailing.

There is need to make provisions that cover electronic retailing as an aspect under electronic transactions. This calls for need to amend this provisions so as to widen its scope in terms of

electronic transactions. The Act could look into regulation of e-retailing by making provisions in regard to issues such as what is required by electronic retailers in terms of ensuring that they deliver the right goods as per what they display on the online platforms, it could provide for the liability of online retailers, it could also include the various remedies available. It could also include regulations on ODR. Therefore, it is important that the Act includes provisions pertinent to e-retailing under its section on electronic transactions.

5.1.5 Consumer Protection Act, 2012

The Act provides for consumer rights under Part II, unfair practices under Part III, rights and obligations respecting specific consumer agreements under Part IV, Sectors where advance fees are promoted under Part IV. Part V provides for repairs to motor vehicles and other goods. Part VII provides for credit agreements. Part VIII provides for leasing. Part IX provides for consumer remedies. Part X provides for Consumer Protection Committee and Part XI provides for general.

Section 32 provides stipulates the requirement of availing a copy of the written internet agreement to the consumer within a prescribed period after entering into the agreement. The Act avails the consumer an opportunity to cancel the internet agreement under Section 33. However, it is not clear whether this provision extends to e-retailing. There is need for clarity in these provisions so as to ascertain whether all e-retailers are required to mandatorily have copies of agreements in writing and availed to the consumer.

There is no reference to Online Dispute Resolution as an avenue to solve disputes. There is need to explore it as a way in which online disputes can be solved. The provisions of this Act tend to broadly cover very many aspects of consumer protection but they do not fully provide for all the aspects of an online retailing experience from display of goods, purchase online and suitable and

convenient measures to solve disputes on online platforms. Therefore, there is need to include these provisions that directly address e-retailing in this Act.

5.1.6 The Competition Act, 2010

Competition Law is the field of the law that is aimed at controlling prohibited conduct or unfair acts that affect the market. It limits the conclusion of specific contracts that directly or indirectly affect competition as well as the prohibition of abusive practices. Competition is considered to be very healthy for the market since it creates efficient conditions for those who participate in it and to this end it ensures that the final recipient of the good receives quality products and services without any interference from abusive behaviors that affect the producer and the consumer.²⁹⁵

It is noted that competition law is facing a big challenge arising from technological advances and digitization of the market. As a result, there is difficulty in its regulation and the time it takes to adopt to technological changes.²⁹⁶ It is also further noted that the growth of e-retailing is commensurate to the increase in competition amongst e-retail markets. This has an effect on consumer choice and it facilitates innovation in product allocation. However, this is coupled with the potential to encourage anti-competitive behavior.²⁹⁷ With the rapid changes in technology, it is important for the provisions of this Act to be in consonance with the developments in technology so as to afford consumers safety as they transact online.

²⁹⁵ New Challenges of Competition Law against the rise of Electronic Commerce, Ine's Maria Delgado and Rene' Antonio Ga'lvez Delgado,Articulo's originales,< <https://www.redalyc.org/journal/6002/600265029002/html/>> accessed 10th August 2021.

²⁹⁶ Ibid.

²⁹⁷ OECD, Implications of E-commerce for competition policy, <https://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm> accessed 10 August 2021.

5.1.7 The Capital Markets Act, Chapter 485A

The Capital Markets Act (CMA) defines the term “security” and identifies some types of securities such as: shares, debt instruments amongst others. Its definition of securities may be interpreted widely to include cryptocurrencies. However, the CMA has not yet designated cryptocurrencies as securities. It is considerably vital that the CMA clearly states the position on how to handle the use of cryptocurrencies.²⁹⁸ There is need for a clear stand on cryptocurrencies so as to enable adoption of its use in the promotion of consumer protection in e-retailing.

5.1.8 The Evidence Act, Chapter 80

The Act provides for admissibility of electronic evidence. However, there are still some challenges surrounding the applicability of the provisions. Under Section 106B there is still uncertainty as to whether the requirement of a certificate is mandatory. It is proposed that the provisions relating to the adducing of the certificate ought to be removed in favor of a presumption of admissibility of e-evidence.²⁹⁹

The argument is based on the premise that Section 106B in detailing the use of the certificate, mandates an impractical and ineffective solution to a complex problem that often calls for adhoc approaches for instance the certificate would fail to establish authenticity or reliability of the electronic evidence. It has further been argued that requiring a certificate may be a very difficult requirement to comply with. Considering the nature of the internet which is widely used by different people in different jurisdictions on various platforms it is difficult to retrieve such evidence from outside the Kenyan jurisdiction.

²⁹⁸ David Geral,Irene Muthoni and Brian Kalule, unscrambling Blockchain: Regulatory Frameworks in Cryptocurrency, Bowmans < https://www.bowmanslaw.com/wp-content/uploads/2018/09/Unscrambling-Blockchain_Session-1_Regulatory-Frameworks.pdf> accessed 13 August 2021.

²⁹⁹ Isaac Rutenberg, Stephen Kiptiness and Abdulmalik Sugow, Admission of Electronic Evidence: Contradictions in the Kenyan Evidence Act, < <https://cipit.strathmore.edu/wp-content/uploads/2021/05/Admission-of-Electronic-Evidence-Contradictions-in-the-Kenyan-Evidence-Act.pdf>> accessed 11 August 2021.

This is because such evidence which is compounded as viral media is transmitted between large numbers of social media users and it may consequently not be traceable to the originator of the data. The original device used to obtain the original data may be unavailable and yet the data may still be available to be used in the legal proceedings. The requirement of a certificate for admissibility effectively precludes this type of evidence and consequently hampers the submission of any evidence that is originally stored on platforms that are beyond the Kenyan borders.³⁰⁰

5.1.9 The Kenya Information and Communications (Dispute Resolutions) Regulations, 2010

The Regulations define a consumer as any person who uses communication services or products offered by a licensee. A dispute is defined as any matter that is in contention between a licensee and another, a consumer and a licensee, where one or both parties is aggrieved by the conduct of the other and the parties have failed to reach an amicable resolution after due effort has been made. The definition of a licensee is limited to any person who has been licensed under this Act. The above definition of terms is limited within those specific parameters so as to determine the scope of application of these terms. This therefore excludes online retailers and consumers in a setting of e-retailing where there are goods involved.

The recommendation is on the broadening of the definition terms in order to include e-retailing consumers and sellers so as to make the avenue of dispute resolution available to e-retailing and to also include online retailers into the category to which these Regulations apply. In the same vein provisions for Online Dispute Resolution (ODR) could also be made in order to promote the ease and convenience with which disputes which arise during e-retailing could be resolved.

³⁰⁰ Ibid.

5.1.10 The Kenya Information and Communications (Consumer Protection) Regulations, 2010

Under these regulations, “customer” refers to any person who uses the services or purchases the products of a particular licensee or vendor, without necessarily being a subscriber to that licensee or vendor. The term “licensee” refers to a person licensed under the Act. As a result, by definition of terms, the consumers and sellers are excluded from the applicability of these provisions.

The Regulations address the issues of consumer protection with a narrow scope in definition of terms that causes it not to be applicable to the electronic retailing. Therefore, there is need to ensure that the scope of definition is widened in order to accommodate electronic retailing as well.

5.1.11 The Finance Act, 2020

This is an Act that amends the laws relating to various taxes and duties and for matters incidental thereto. The commencement date for the various sections of this Act are as follows: sections 2, 3, 4, 5, 6, 7, 8 (a), 9, 16, 18 and 19, the 1st January, 2021; (b) section 13 (a) (i) and (iv), 13 (d), 14 (a) and 22 (a) (i) on 1st July, 2021; and (c) all other sections, on the date of assent.³⁰¹ Miscellaneous fees and levies under Part VI, the Tax Appeals Tribunal under Part VII and Miscellaneous under Part VIII.³⁰²

Section 12E provides for digital service tax which is payable by a person who accrues income from providing services through a digital market space as long as the person is a resident person or a non-resident person with a permanent establishment in Kenya shall offset the digital service

³⁰¹ Section 1, Finance Act,2020.

³⁰² The Finance Act, 2020.

tax paid against the tax payable for that year of income. The Act further states that this tax shall be due at the time of transfer of payment for the service offered by the service provider.³⁰³

The Act does not provide for how the digital tax will be collected in regard to the use of cryptocurrency and blockchain technology as a whole. The Act ought to categorically address its applicability to the use of cryptocurrency. It ought to synchronize with the government policy on digital economy as well as the best practices which are globally recognized.³⁰⁴

5.1.12 The National ICT Policy Guidelines, 2020

The policy makes provisions for blockchain and digital currency under technology trends. It defines and illustrates how blockchain technology can be incorporated in formation of “smart contracts.” It shows how it can be utilized to assist in verification of land ownership, election processes and monitoring digital assets. It depicts the advantages of the use of blockchain technology such as being invariable and the ease with which attempts to tamper with it are easily noticed.³⁰⁵

The policy does not include an analysis on the regulation of blockchain. The status quo is that the regulation on blockchain is not clear and there is need to address it. The policy does not make reference to the use of Online Dispute Resolution (ODR) as an avenue for redress. ODR could assist in dispute resolution because it is fast and convenient for consumers. It greatly helps in solving disputes across borders. It is important to consider this venture of dispute resolution so as to boost electronic retailing and the use of technology which is an aspect overall advocated by this policy.

³⁰³ The Finance Act, 2020.

³⁰⁴ Muthoni Njogu, ‘Blockchain & Cryptocurrency Regulation 2021 | Kenya’ (*Global Legal Insights*, 23 October 2020) < <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/kenya> > accessed 25 March 2021.

³⁰⁵ The National Information and Communications Act.

5.2 Unification of the Laws Relating to Electronic Retailing.

The United States of America has a unified law on electronic retailing. Reference is made to the Uniform Electronic Transactions Act in the State of Delaware. It responds to issues pertinent to electronic retailing as a whole and it eliminates the need to refer to very many pieces of legislation and some of which may not be able to categorically embrace in totality the nature of a contract that is conducted online.

This is a recommendation to the effect of creating a unified code where all the provisions in the already existing laws that are applicable to electronic retailing are tailored to directly address the issues that are encountered in electronic retailing in Kenya.

In Chapter one and two of this research, it was noted that Kenya is not devoid of laws that address the issues that arise in the course of electronic retailing. However, it has been mentioned that one of the problems this study seeks to respond to is the disaggregated legal framework on electronic retailing.

Under this, the recommendation is that provisions in the various Acts in regard to issues encountered in electronic retailing be properly consolidated from the various Acts such as the Kenya Information Act, Contract Act, the Sale of Goods Act, the Consumer Protection Act, Evidence Act amongst others into one particular unified code. The aim is to ensure that all the relevant provisions on consumer protection in e-retailing are availed in one piece of legislation. Through this, there will be provisions made to include all issues that arise in e-retailing from contract formation, remedies, regulation of the use of ODR, regulation of blockchain technology among others.

In Chapter three, challenges that arise out of the uniqueness of the electronic retailing transaction were elucidated. It would be helpful to have these additional issues such as regulation of a smart contract or rather an electronic retailing contract be clearly spelt out in the unified code on electronic retailing. The challenge with provisions under the current Contract Act and Sale of Goods Act is that the provisions categorically address the traditional contract. Challenges then arise in the event that one attempts to establish the fundamental ingredients of a valid contract such as offer, acceptance, capacity, the meeting of the minds and others when it comes to an electronic retailing contract.

More issues arise in determining under what jurisdiction one can attempt to enforce their rights in the event of a breach arising out of a contract in electronic retailing where the transaction has taken place in various jurisdictions. There is therefore a need to ensure that provisions on such issues are redefined to include the specifications in electronic transactions.

More so, some of the existing Acts do not address or define some of the situations in electronic retailing. An example is the Sale of Goods Act which has various provisions on goods, transfer of property in the goods, rules as to delivery and other provisions still leaves out clearly explaining or defining a sale that is done electronically. The Act also has provisions that do not include circumstances under delivery of goods that are purchased online.

An illustration that the provisions in the existing Acts have blanket provisions on sale of goods which may be applicable to electronic retailing but they fall short in failing to provide solutions to the problems encountered in an electronic retailing transaction. This then creates the existence of loopholes which can easily be manipulated to facilitate activities such as fraud which then hampers effective protection of consumers in electronic transactions in Kenya.

More so, there is a need to create a regulatory body that directly addresses issues that are pertinent to electronic retailing. The lack of a regulatory body means that many things can go on without any accountability. The regulatory body would have functions such as: registering the online retailing companies and regulating how e-retailing businesses is carried out. This will create the possibility of tracking the authenticity of commodities that are being sold. It will solve the problem of anonymity and will help the online retailing consumers to have a way to seek remedies when there is breach of e-retailing contracts. This will also curb fraud since there will be strict measures which will limit the indulging of fraudsters.

The unified law on electronic retailing will help to streamline issues such as ways in which the electronic retailing contract can be enforced. It ought to also clearly specify the available remedies to an aggrieved parties and could also further make provisions for Online Dispute Resolution (ODR) which would assist the consumers to have an avenue to settle disputes much more easily.

5.3 Adopt Blockchain and Blockchain Regulation for Electronic Retailing

Blockchain offers much more potential for electronic retailing business. The main current uses of its use include payment supply chain and decentralized market places. Blockchain is a “distributed ledger” with the ability to record transactional data and stores it across different computers. It is the amalgamation of transactions whose outcome is a “block” and each block is linked to the one prior and following resultantly creating a “chain.” There is no central control of the data because the blockchain is stored on numerous computers globally. As a result, the use of

blockchain is credited to be safe, reliable and invariable.³⁰⁶ This shows why it is important to adopt regulation for its use due to its ability to secure electronic retailing.

5.3.1 Immediate blockchain uses

Cryptocurrencies such as Bitcoin use a blockchain to record the transactions involving cryptocurrency. There is no need for an intermediary because crypto currency adopts the similar safeguarded transaction advantages related to blockchain. This requirement of an intermediary may be required by other entities such as banks, payment. Therefore the use of crypto currencies in electronic retailing makes transaction costs cheaper for both the sellers and the buyers in the electronic retailing transaction.³⁰⁷

Leading online retailers which include but are not limited to: Expedia, Overstock, and Microsoft welcome the use of crypto currencies like bitcoin. As a result, these platforms have realized an increment in the number of customers or users of their platforms. This is attributed to the number of advantages associated with the use of crypto currencies. There are low or no payment costs incurred and the currencies can be internationally.³⁰⁸ The use of blockchain technology therefore provides benefits to both the electronic retailer and consumer.

Blockchain technology is credited dealing with the convolution of the supply chain. It also provides a substitute to the use of paper and manual work during the process of shipping goods across different countries. The use of blockchain technology eliminates the bureaucracy in trade. It provides convenient ways in which the parties involved can keep tabs on the shipment.³⁰⁹ The

³⁰⁶ Brandon Bidlack, '3 Immediate Blockchain Uses for Ecommerce Companies' (*PracticalECommerce*, 14 May 2019) <<https://www.practicalecommerce.com/3-immediate-blockchain-uses-for-ecommerce-companies>>, accessed 4 March 2020.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

consumers all through this process are guaranteed that the process is safe and trustworthy and this builds the consumers trust in the electronic retailing transaction.

Blockchain helps in the process of confirmation of the validity and in checking authenticity matters. The quality of inventories gives the consumers the reassurance of what they are paying for. Examples of companies which aid in implementing its supply include Provenance and Codex Protocol.³¹⁰

The use of blockchain promotes expansion. There has been significant of decentralization in electronic retailing as a result of its use. Various markets have sprouted and the retailers are offered the opportunity to sell anything. Examples include: Rare Bits which is a market place for crypto-collectibles and Wax which is for online games. OpenBazaar and BitBay are also examples of open markets that have come up.³¹¹

5.3.2 Kenya's regulatory environment for the use of blockchain in electronic retailing

There is no regulatory framework governing blockchain technology in Kenya as yet. However, there are some avenues that indicate that it is gradually being embraced. An example is that the National Land Commission has embraced the use of the blockchain network in ensuring accountability of ownership of land. Blockchain technology assists to fight against fraud in the process of land sale and can also help in the process of securing land titles.³¹²

Despite the above move, the Law Society of Kenya filed a law suit to thwart the process of incorporating the use of blockchain technology in digitizing title deeds. Firstly, no laws have

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Baker McKenzie, 'Blockchain and Crypto Currency In Africa, a comparative summary of the reception and regulation of Blockchain and Crypto currency in Africa' (*Baker McKenzie , Johannesburg , 2018*) <https://www.bakermckenzie.com/-/media/files/insight/publications/2019/02/report_blockchainandcryptocurrencyreg_feb2019.pdf> accessed 4 March 2020.

been passed with an aim to regulate the use of blockchain technology. There is a lot of hesitancy amongst regulators and there is a fear that these efforts could still be susceptible to reversal by a successive executive. Also, challenges may arise in the process of solving some of the numerous cases on land ownership before the Courts if digital records alleging ownership of land arise prior to proper resolution of the dispute by the Judiciary. There is an anticipated clash between the original records on land ownership and digital records on the same.³¹³

Despite the consistent warnings issued by the CBK about the volatility of cryptocurrencies, there is evidence that they are being used. It has been noted that some business in Nairobi have been transacting with Bitcoin. By 22nd February 2019 Bitcoin transactions in Kenya are estimated to be worth over \$1.5m as revealed by the Blockchain Association of Kenya.³¹⁴

Tony Mwonera, the Chief Executive of Healthland Spa located in Nairobi mentioned that he has been transacting by way of Bitcoin payments ever since 2018. He said “I decided to adopt the use of crypto-currencies because there was so much theft in my business.” He attests to the safety of the cryptocurrency and reveals that he has readily embraced technological advancements. Consumers at Healthland Spa also mentioned to the BBC that they enjoyed the convenience of paying for services by the use of cryptocurrencies.³¹⁵

It is reported that about only 40,000 people in Kenya have used the virtual currencies in transactions. This is a relatively small number. The reason for the low penetration of the use of crypto currencies in Kenya can be attributed to the fact that the CBK is firm in denying people transacting in cryptocurrency an opportunity to open bank accounts. The banks do not

³¹³ Ibid.

³¹⁴ Mary –Ann Russon, ‘Crypto-currencies gaining popularity in Kenya’ (*BBC News*, 22 February 2019) <<https://www.bbc.com/news/business-47307575>> accessed 4 March 2020.

³¹⁵ Ibid.

accommodate cryptocurrencies. This poses a challenge to those who transact with them since there is difficulty in readily converting them into cash or mobile money.³¹⁶

According to the Capital Markets Authority it is important to address the lack of regulation and a common approach towards the use of cryptocurrencies and ICOs. There is a proposal for concerted effort among relevant financial sector regulators so as to brainstorm a way forward in regard to cryptocurrencies and ICOs. There is also a suggestion for the establishment of a special arm consisting of regulators with an aim to categorically address matters concerning regulation of cryptocurrencies in Kenya.³¹⁷

The barrier of hesitancy of regulators towards embracing technological advancements should be overcome. They could explore the avenue of creating principles or guidelines to regulate cryptocurrencies and ICOs. The aim is to ensure that there is a practical way in which new technological advancements are accepted while affording consumers with consumer protection and also mitigating financial peril arising from activities such as money laundering and terrorism financing.³¹⁸

It is evident that incorporation of blockchain in electronic retailing goes beyond its association with bitcoin. It is beneficial in the sense that the use of it resultantly removes significant layers of complexity from global supply chains.³¹⁹ It therefore promotes transparency during the course of electronic retailing and promotes consumer protection.

³¹⁶ Ibid.

³¹⁷ Muthoni Njogu, 'Blockchain & Cryptocurrency Regulation 2021 | Kenya' (*Global Legal Insights*, 23 October 2020) <<https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/kenya>> accessed 25 March 2021.

³¹⁸ Mary –Ann Russon, 'Crypto-currencies gaining popularity in Kenya' (*BBC News*, 22 February 2019) <<https://www.bbc.com/news/business-47307575>> accessed 4 March 2020.

³¹⁹ Angela Scott –Briggs, 'Blockchain, Is Blockchain the New Internet?' (*TechBullion*, 27 December 2017) <<https://www.logistics.dhl/ke-en/home/insights-and-innovation/insights/blockchain.html>> accessed 8 March 2020.

5.4 Increasing government program based training on electronic retailing

Retailers play a significant role in e-retailing. However, most of the electronic retailers in their various capacities do not have the relevant skills to carry out this trade and neither do they ably comprehend the demands associated with it nor their responsibility to the consumers as stated in the various legislations. It is therefore important for the government to intervene and provide an avenue for training. The government of Rwanda has made significant steps to this effect.

The government of Rwanda deliberately begun a project to help Rwandan Micro, small and medium sized enterprises (MSMEs) to assist in linking them to international markets and to boost e-retailing. It was launched in 2017 with an aim providing an avenue to easily carry out market research to understand consumer behavior at a wider coverage and to assess the opportunities for electronic retailing for Kigali. It carried out over eight hundred interviews with the local consumers to understand their consumer behavior patterns. The interviews yielded fruit in revealing what the consumers wanted.³²⁰

The government of Rwanda has also facilitated advanced e-commerce training where a team of ITC experts carry out the process of coaching a team of local trainers. This was done through various workshops with an aim of equipping the local trainers with skills to run their electronic retailing companies. This training enables them to understand the demands of electronic retailing and addresses issues such as how to build trust between the consumers and the suppliers of goods in online transactions.³²¹ Such training enables the sellers of commodities on various online platforms to understand the dynamics of electronic retailing and the obligations that they have to the consumers. This helps to boost consumer protection since the sellers of the commodities on the various online platforms are aware of their responsibilities towards consumers.

³²⁰ Ibid.

³²¹ Ibid.

The government of Rwanda teamed up with Alibaba and started a four-year training program to teach students about the fundamentals of cross-border e-commerce. The program is to be funded by the government of Rwanda under the Higher Education Council of Rwanda. This serves as an avenue to promote the growth of the digital economy in Rwanda. E-Commerce in Rwanda is also boosted through partnerships Rwanda makes with giant e-commerce companies. An example is Rwanda's partnership with Alibaba Executive Jack Ma. Through it he committed himself to support the magnification of the digital economy in Africa and opened up Alibaba Business Schools to equip Rwandan teachers with skills and knowledge on e-commerce. In addition, Rwandan e-commerce startup founders visited Hangzhou for training and benchmarking under the Netpreneur program and the eFounders Fellowship. These are steps in the right direction so as to equip students, teachers and e-commerce users with the knowledge and skills required to have successful e-commerce platforms and good practices.³²²

The above examples reflect an effort by the government of Rwanda to avail opportunities for training various stakeholders in electronic retailing so as to equip them with the necessary skills to carry out the business while being conscious of the need to protect consumer rights. The government of Rwanda has partnered with leading global electronic retailing companies such as Alibaba and also provided avenues for various online retailing startup companies in the country to learn from them on how to carry out electronic retailing the right way. The same training is dispensed to students and teachers and this increases the knowledge on how consumers can be protected in electronic retailing.

³²² Milcah Lukhanyu , Alibaba, Rwanda Government Launch a 4-year e-commerce training program for Rwandan Students , (*reed.co.uk*, 2019) < <https://techmoran.com/2019/09/09/alibaba-rwanda-govt-launch-a-4-year-e-commerce-training-program-for-rwandan-students/>> accessed 30 March 2021.

The government of Kenya can invest in training the startups in the country on how to carry out electronic retailing, the demands that it carries and also the responsibility the various online retailing platforms have to the consumers. This can be done through training the various leaders of the startups so that they can dispense the knowledge to their local teams. It will also create a uniform standard of operation in the area of electronic retailing with an aim to promote consumer protection in electronic transactions. The government can also lobby for partnerships with leading global electronic retailers like Rwanda has done with Alibaba so as to ensure that there is training on how best electronic retailing can be carried out.

5.5 Adoption of tokenization so as to secure electronic retailing transactions.

Security in electronic retailing is a fundamental concern and it is therefore necessary to adopt mechanisms that ensure that the consumers are protected from fraud. To this end, South Africa has adopted Tokenization as a solution to the fraud menace. Significantly, the increase in electronic retailing transactions could be attributed to the level of safety consumers know that they are guaranteed while participating in the transactions on various online platforms.

In South Africa, retail has been shaken up by online retail platforms. They have advantages such as widening the customer base for companies and businesses, the ease of understanding consumer preferences, the ability to personalize customer experiences among others.³²³ South Africa has noted a rise in E-commerce sales growing at a rate of 20-35% annually. According to a report entitled *Online Retailing in South Africa: Review by the Industrial Development Think Tank (IDTT)* e-retailing is projected to continue growing rapidly in South Africa. It is estimated that a Durban based online store is reported to grow by 300% year – on-year. In the year 2017 it

³²³ Sha'itsa Goga, Anthea Paelo and Julius Nyamwena, 'Online Retailing in South Africa: An overview' (*Centre for Competition, Regulation and Economic Development, University of Johannesburg Working Paper 2/2019*) <<file:///C:/Downloads/IDTT2eCommerce1WorkingPaper2.pdf>> accessed 15 March 2020.

was approximated to reach R10 billion.³²⁴ The following are some of the measures that can be used to protect consumers in e-retailing.

From South Africa, we can adopt the use of payment tokens to combat fraud during electronic retailing.³²⁵ Tokenization is referred to as the replacement of sensitive information from consumer's credit cards and purchases for 'tokens' that are generated instantly and randomly.³²⁶ The tokens ensure that the entire payment is converged into a cloud. They carry the benefit of protecting the transaction.

Payment tokens are generated from the PAN and automatically issued in real time. They are generated per transaction, per merchant. Therefore, a consumer in an online retailing transaction has their sensitive PAN substituted by a token and not transmitted during the transaction, even though a fraudster is able to get a hold of it they will be unable to use it for another transaction.³²⁷

Network Tokenization is beneficial in protecting both the businesses and the consumer in an electronic retailing transaction from the financial hits of data theft. It also helps to build trust between the sellers and the consumers in an electronic retailing transaction. Trust is a very essential issue when it comes to electronic retailing.

Protecting payments data is a top priority in electronic retailing. The lack of which can cause consumers to avoid engaging in electronic retailing. It also provides a method in which

³²⁴ Melitta Ngalonkulu, 'E- Commerce sales in SA grow 20-35% annually' (*Moneyweb*, 30 December 2019) <<https://www.moneyweb.co.za/news/south-africa/e-commerce-sales-in-sa-grow-20-35-annually/>> accessed 15 March 2020.

³²⁵ Carin Smith, 'How ecommerce is exploding in South Africa' (*Fin24*, 16 March) <<https://www.fin24.com/Economy/how-ecommerce-is-exploding-in-sa-20180316>> accessed 15 March 2020.

³²⁶ Myles Dawson, 'Preventing Fraudulent Payments With Tokenization' (*IITProPortal*, 21 November 2019) <<https://www.itproportal.com/features/preventing-fraudulent-payments-with-tokenisation/>> accessed 15 March 2020.

³²⁷ Ibid.

consumers in online retailing can secure their payment details. This therefore implies that when the consumer is making the next payment he or she does not need to re-enter the payment details. Lastly, it is also a very convenient method of carrying out payments.³²⁸

The government of Kenya can work towards enhancing the use of tokenization since it serves as the solution to fraud in online retailing. It also carries with it other multiple benefits such as convenience to the consumers in electronic retailing. It has also been credited for creating a seamless payment experience to the consumers in electronic retailing which is very beneficial to the consumers.

5.4 Provide for regulation of Online Dispute Resolution (ODR)

In the European Union, there has been adoption of the application of Regulation (EU) No 524/2013 to regulate Online Dispute Resolution. These regulations create an ODR Platform. The ODR platform in existence was formed in January 2016. The members of the public were able to gain access to its usage on February 15th 2016. The Commission did this with the support of ODR experts designated by member states. This was a process preceded by thorough tests by the Commission and as a result the ODR platform is in accordance with the legal specifications.³²⁹

As at this point in time the report states that it was only Belgium, Germany, Luxembourg and Poland which had notified the Commission that their laws permit business-to-consumer disputes as long as they involve a consumer habitually resident in the identified member states. It handles disputes involving consumers and traders from the European Economic Area (EEA) countries

³²⁸ Ibid.

³²⁹ European Commission, Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes https://ec.europa.eu/info/sites/default/files/com_2019_425_f1_report_from_commission_en_v3_p1_1045545_0.pdf 25th September 2019, accessed 9th August 2021.

which include Iceland, Liechtenstein and Norway which have 460 ADR entities registered in the platform. The platform from its first and second year of functioning which is between 2017 and 2018 is reported to have attracted over 8.5 million visitors and 120,000 consumer-to-business disputes.³³⁰

About 56% of the disputes are domestic and 44% are cross-border. Majority of the disputes are about airlines which amounts for 13.2% followed by clothing and footwear at 10.9% and information and communication technology at 6.8%. According to the report consumers complained mostly about the delivery of product service which constituted 23%. This was followed by lack of compliance with the ordered goods at 15% and the product being faulty at 12%. An insignificant 0.1% of the cases on the platform were used for business-to –consumer disputes.³³¹

There has been a high number of visitors to the platform which proves that the customers are satisfied with the platform. The platform is used to solve cross border disputes because there is an avenue for consumers to communicate in various languages. The Commission has also gone ahead to participate in creating awareness through a communication campaign so as to improve the trader's awareness of engagement in the platform. This helps address the problem of lack of knowledge about how to use ODR platforms. Once consumers are aware of how to use it, more people will feel comfortable participating in e-retail.³³²

There has been an increase in the registered traders from 54% in 2018 by another 24% in the first five months of 2019. A study carried out came to the conclusion that 80% of the users of the platform are satisfied with it. The Commission is geared towards executing an action plan to

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

promote its responsiveness to the various consumer needs. The Commission avails consumers with relevant information concerning their rights as consumers. It gives them timely information about how to obtain redress and channels them to the tools and facilities needed to enable the consumers to obtain redress swiftly.³³³

Member states which include Norway and Liechtenstein have a specific ODR contact point. The European Consumer Centre is a home to twenty-one ODR contact points. There is an authority which hosts them. For instance, the Hungary ODR contact point is hosted by the Arbitration Board of Budapest and the one in UK is hosted by the Chartered Trading Institute. The contact points play a significant role in providing information and help in regard to cross-border disputes which arise. In Liechtenstein and Norway, the ODR points are also required to provide part of their services to also solve domestic disputes. This widens the applicability of ODR.³³⁴

Follow up is done by way of the Commission having meetings with the various points at least twice a year. Cohesion is also enforced through the maintenance of an ICT tool. Through this tool the various points are able to share the best practices and information in order to make the provision of ODR services more efficient in the various jurisdictions. The efficacy of this network is affirmed by the increased number of queries received through it. This shows that the people trust it. It has been noted that most contact groups receive over 500 queries in a year.³³⁵

Article 14 of the ODR regulations necessitates online traders and market places to provide a link to the ODR platform on their business websites. This requirement is beneficial because it channels the consumers to the ODR platform in order to enable them get redress. It is also an important requirement because it provides awareness about the platform as an avenue for seeking

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Ibid.

redress. The Commission occasionally conducts a webscraping exercise whereby it ascertains the compliance of the various websites to the requirement stipulated under Article 14. In 2017 when such an activity was carried out the compliance rate was at 28%. It was also revealed that the provisions under Article 14 were contributing greatly to the effectiveness of ODR. Despite this positive step, the Commission continues to relentlessly ensure that the Member States and EEA countries put in place and adhere to the requirements of Article 14 of the ODR regulations.³³⁶ This is in order to ensure that the online consumer rights are protected.

This depicts how Online Dispute Resolution can be used to solve the many issues such as the costs and time taken to get redress, territorial barriers among many others that have been mentioned in this study. Countries in the European Union with the help of experts have created regulations for the same. A Commission could be established to oversee the use of the ODR platform and to ensure that it keeps relevant to the needs of consumers. The Kenyan government can consider working together with member states of the East African Community and other states so as to create a platform for ODR within the region. This would help to solve issues that arise in the solving of disputes across various jurisdictions.

The use of ODR could be at both the regional level and the national level as well so as to ensure that disputes are easily solved. The government of Kenya could also look into having a Commission to oversee the ODR platform and to ensure that it serves the consumers in a satisfactory manner. The Commission could also carry out sensitization and education about the use of the platform so as to create awareness and to constantly monitor how the platform is functioning. The regulation of ODR would help to solve disputes that arise during e-retailing in

³³⁶ Ibid.

Kenya and this would carry with it all the benefits of ODR as mentioned herein which would increase consumer protection in e-retailing.

5.7 Conclusion

In a nutshell, the above countries namely: The United States of America (USA), Rwanda and South Africa have depicted ways in which they have managed to boost electronic retailing in their various jurisdictions. From the United States of America, the use of the Unified Electronic Transactions Act (UETA) which incorporates provisions pertinent to the nature of electronic transactions has played a significant role in ensuring consumer protection in electronic retailing. More so, the adoption of the use of blockchain technology has promoted high levels of security in electronic retailing thus helping to avert occurrences of fraud in electronic retailing.

From Rwanda, the hands on involvement of the government in the area of electronic retailing is significant and has yielded fruit in regard to consumer protection. This is because the government has invested in creating an avenue for training for the electronic retailers and has set up guidelines on how the transactions online ought to occur. This has boosted consumer protection because the sellers of commodities are guided on the basics of carrying out trade on electronic platforms. South Africa has also adopted the use of tokenization in electronic retailing which as promoted consumer protection because it secures the transactions and has also increased the consumer's trustworthiness in the e-retailing transactions.

In light of the above, electronic retailing is a thriving and relevant area in the economy of Kenya. Considering the fact that it has become a suitable way to trade in this day and age. There is need for the government to look into the creation of a legal framework that is pertinent to electronic retailing. This chapter entails the various amendments that can be made to existing laws in order

to ensure that they cover issues concerning consumer protection in e-retailing more comprehensively.

The aim is to make provisions in regard to blockchain technology in a bid to ensure safety of electronic retailing transactions, hereby covering the unregulated issues that exist in the area of electronic retailing inclusive of provisions on Online Dispute Resolution. It could also make provisions towards tokenization and furthermore provide for an avenue for training for electronic retailers which would provide them with the necessary skills to carry out electronic retailing. The above are the approaches that can be borrowed from these jurisdictions in order to ensure that there is comprehensible consumer protection in electronic retailing in Kenya.

Overall, this study has analyzed the existing legal regime in Kenya in regard to consumer protection in e-retailing. It has shown what the legal and regulatory challenges concerning consumer protection in e-retailing are and has illustrated how various jurisdictions namely; USA, South Africa and Rwanda have handled these issues and has provided the various lessons Kenya can pick from these countries. The study ends with recommendations to the existing framework and other measures that can be used to ensure that the consumers in e-retailing in Kenya can be protected as they carry out their transactions.

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