UNIVERSITY OF NAIROBI

SCHOOL OF LAW

MASTER OF LAWS

MOTOR INSURANCE FRAUD IN KENYA: AN ANALYSIS OF THE EFFECTIVENESS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK IN CURBING INSURANCE FRAUD

A RESEARCH PROJECT SUBMITTED TO THE UNIVERSITY OF NAIROBI IN PARTIAL FULFILLMENTOF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTERS OF LAWS (LLM) UNIVERSITY

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DECLARATION

I Wanjiru Njuguna hereby declare that this is my original work and has not been submitted for the award of a degree or any other award in any other university. Where works by other people have been used, references have been provided.

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APPROVAL

This thesis titled Motor Insurance Fraud in Kenya: an analysis of the effectiveness of the legal and institutional framework in insurance in curbing insurance fraud has been done under my supervision and has been submitted to the University of Nairobi, School of Law for examination with my approval as the candidate's supervisor.

Signed: **Date:**

Supervisor: PROF MUSILI WAMBUA

DEDICATION

This thesis is dedicated to my parents, Mr and Mrs Peter Njuguna who kept reminding me I can make it. Thank you for your Prayers, Patience, Encouragement, Moral and Financial Support throughout the LLM Program. You are a blessing.

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LIST OF ABBREVIATIONS

AIO-African Insurance Organization

AKI-Association of Kenya Insurers

CBK-Central Bank of Kenya

CID-Criminal Investigation Department

CMA- Capital Markets Authority

DCI-Directorate of Criminal Investigation

EAC-East African Community

EAISA- East Africa Insurance Supervisors Association

IAIS-International Association of Insurance Supervisors

IASB-International Accounting Standards Board

IASC-International Accounting Standards Committee

ICP-Insurance Core Principals

ICT-Information Communication and Technology

IFAC-International Federation of Accountants

IFIU-Insurance Fraud Investigation Unit

IFRS -International Financial Reporting Standards

IRA-Insurance Regulatory Authority

JTI-Judicial Training Institute

JSC-Judicial Service Commission

KES-Kenya Shillings

KPMG- Klynveld Peat Marwick Goerdeleur

MOU- Memorandum of Understanding

NACOSTI-National Commission for Science Technology and Innovation.

NCLR-National Council for Law Reporting

ODPP-Office of the Director of Public Prosecutions

OECD-Organisation for Economic Co-Operation and Development

PAO-Professional Accounting Organizations

PHCF-Policyholders Compensation Fund

PSV-Public Service Vehicle

QMS-Quality Management System

RBA-Retirement Benefits Authority

SASRA-Sacco Societies Regulatory Authority

WIBA-Work Injury Benefits Act

LIST OF LAWS

The Insurance Act, Cap 487, 1987

The Motor Vehicle 3rd party Risks Act, 2013

The Statute Law (Miscellaneous Amendment) Act, 2017

The Insurance (Amendment) Bill, 2018

The Insurance (Amendment) Act no 11 of 2019

LIST OF CASES

African Merchant Assurance Company Limited versus William Murithi Kimaru suing as the administrator to the estate of Patrick Kuira Muriithi (deceased)Civil appeal no 34 of 2016 at Kisumu.

Gateway Insurance Co Ltd V Jamila Suleiman and Anor Civil appeal no 227 of 2017 at Mombasa.

Law Society of Kenya vs Attorney General High Court Petition no 148 of 2014 at Nairobi.

ABSTRACT

This study sought to analyse the effectiveness of the existing legal and institutional framework in curbing motor insurance fraud in Kenya.

The study establishes whether there's need to review the current Insurance legal and institutional framework as a whole and whether the amendments arising from the Insurance (Amendment) Act of 2019 were adequate.

The Insurance industry is a creature of the law as an insurance contract is a legally binding and enforceable contract between two individuals, the insurer and the insured.

Bearing this in mind, the triumph or collapse of the insurance business is significantly dependent on the legal and institutional structure.

This is because the legislation and institutional scaffold provides institutional and corporate governance regulations, market conduct regulations, enforcement regulations and other regulations and guidelines that are not within the scope of insurance but that affect insurance stakeholders. The Insurance industry will thrive where the law is effective with reference to the regulatory and supervisory aspects.

Insurance in Kenya is regulated by the Insurance Act (Amendment) 2006, CAP 487 of the Laws of Kenya. The Insurance Regulatory Authority is the legislative government outfit that is created by the Act control, manage and develop the insurance industry. Its goals are to endorse the awareness of consumers, their protection, inclusivity, competitiveness and ensure the stability of the industry so that it can deliver quality and effective client service to consumers.

This study also devolves into the roles of other key institutions involved in monitoring, evaluation and enforcement of insurance matters that include the Insurance Fraud Investigation Unit, the Judiciary and the Office of the Director of Public Prosecution.

Overall, it was concluded that the legal framework in place before enactment of the Insurance Amendment Act, 2019 had succeeded moderately in curbing insurance fraud. The Amendments on the other hand, revealed a progressive stride towards strengthening not only the legal framework but also the institutional framework which the study concluded provided a weak link .. The study recommended that the more attention should be drawn to the institutional framework to contain insurance fraud steadily .These recommendations included; enforcement of the Insurance Amendment Act, 2019 in terms of granting the IRA autonomy in management of the Insurance Industry, provision of technical training to personnel involved in monitoring and enforcement of insurance fraud, increase in capacity of personnel at the IRA

dealing with insurance fraud, training of other stakeholders such as prosecutors, judicial officers, and the public on insurance and its elements of fraud .

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1.0 CHAPTER ONE

1.1 Background

Insurance is a contract that involves two parties where one of them agrees to compensate the other for a loss of a specific element through specified perils in their agreement. The "insurer" is the individual who pays the compensation fees to the other person called the "insured". The insurer is also referred to as the "underwriter". The consideration between the individuals is called the "premium", and it is a sum of money payable during the contract. This entire agreement is contained in an insurance document called the "policy''.[1]

The national economy is a primary dependant of the insurance industry; this sector has a lot of positive impact on the economy because it provides avenues for investments, resources for financial security, and it encourages saving activities among the population.[2] In 2017, there was an expansion of 4.9% in the gross domestic product and a reduction from 2.71% to 2.68% in insurance penetration from 2016 to 2017.[3] The main key players of the insurance sector in the country are the companies, brokers, and agents. In 2017, for example, insurance agents were leading in sourcing premiums at 39.3%. They were closely followed by brokers who sourced 33.5% of the national premiums in the industry and 27.2% were gained directly by the companies.[4]

According to the Association of Kenya Insurers (AKI), the end of 2017 marked a positive increase with the key insurance players growing to 52 organizations.[5] There was also a 6.5 % growth in the gross insurance premium from 2016 to 2017. In 2016, the premium stood at Kshs.197 billion and it grew to Kshs.209.70 billion the following year.[6] During the same year, the industry registered a Kshs.12.01 billion profit before tax deductions. The industry's asset margin also expanded by 12.2%.[7]

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[1]'Definitionof Insurance'<https://www.thelawdictionary.org/insurance/> accessed on 26th March 2019.
[2]IRA,'Insurance Industry Annual Report (2017)' <https://www.ira.go.ke/images/docs/2017annual/Insurance-Industry-Annual-Report-2017.pdf>accessed 30 April, 2019.
[3] Ibid
[4]Ibid
[5]AKI,' Insurance Industry Annual Report (2017)'<https://www.akinsure.com/images/publications/AKI-Insurance-Industry-Annual-Report-2017---Final-Report-30.08.18.pdf> accessed 26th March, 2019.
[6]ibid
[7]ibid

Non-life insurance insures individuals, their legal liabilities, and their properties. This cover extends to companies as well. It is also called short-term or general insurance policy.[8] Non-life insurance in the country is categorized into 14 unique groups. These classes include Miscellaneous, Home and Industrial Fire, Marine, Medical, Aviation, Public Liability, Commercial and Private Motor, Engineering, Theft, Personal Accident, Work Injury, and Micro insurances.[9].

The general insurance sector was majorly dominated by the motor and medical segments categories.[10] These two segments made up approximately three quarters of the insurance revenue in the country in 2017; they jointly generated 66.5% of the total national revenue. Motor segment produced 35.8 % of the revenue and the medical category created 30.7% of the revenue.[11]

The motor insurance division is further categorized into two broad classes; the commercial and private sectors. In 2017, the private category registered a 5.05% growth while the private class reduced its revenue by 3.33%. Jointly, the two classes produced Kshs.21.52 billion worth of revenue to the economy. There were fifteen organizations that suffered losses under the Motor commercial Insurance business.[12]

From the statistics presented by the Association of Kenya Insurers and the Insurance Regulatory Authority in 2017; Motor Insurance encountered huge losses resulting from outrageous claims some of which were attributed to fraudulent activities in the industry.

Fraud is one of the causes of the collapse of many insurance organizations in the country. According to Mwangi, [13] Kenyan insurance business entities go through difficult financial situations by incurring huge payouts in forms of claims, a significant proportion of which is fraudulent.

Insurance fraud is the process of an insured of lying about their damages to gain unwarranted financial benefits from the insuring company. This form of extortion is illegal and it is subjected to an act of criminal offense. [14]

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[8] ibid
[9]ibid
[10]Supra 2
[11]ibid
[12]ibid
[13]Mwangi H.K,'The Relationship between Underwriting Profit and Investment Income for the General Insurance Industry in Kenya'(Master of Business Administration,University of Nairobi 2013)
[14]Derrig R, 'InsuranceFraud'(2002)69(3).Journal of Risk and Insuance 271-287.

It is estimated that thirty five percent of insurance claims are fraudulent with motor private and commercial insurance sectors registering the highest loss proportions in the industry attributed to fraud and fabricated claims.[15]

There are some insurance organizations that have collapsed in consequence of the hefty payouts made to fraudulent claims, leaving genuine insured persons uncompensated. The recent wave of collapse of insurance companies has affected insurance companies such as Lakestar insurance, united assurance, Invesco Insurance Company, Delta, Access and National Assurance and BlueShield Insurance.

In Kenya, fraudulent claims have negatively affected the industry by inflating premiums by up to 25%.[16] According to Klynveld Peat Marwick Goerdeleur's KPMG report, a global London based audit firm in the Financial Times, insurance premiums in Kenya could be 20% lower if it were not for Insurance Fraud.[17]

The Insurance industry is a creature of the law as an insurance contract is a legally binding and enforceable agreement between the two parties that have approved and signed the contract.

Bearing this in mind, the success or failure of the insurance industry significantly depends on the legal and institutional structure of the country.

This is because these structures provide institutional and corporate governance regulations, market conduct regulations, enforcement regulations and other regulations and guidelines that are not within the scope of insurance but that affect insurance stakeholders. The Insurance industry will only thrive where the law is effective in terms of the regulatory and supervisory aspects. This study analyses the effectiveness of the current legal and institutional framework in curbing Insurance fraud in Motor Insurance in Kenya.

It also aims to determine whether there is a need to review the current framework and find workable solutions within the legal and institutional framework to reverse the negative growth trend in the industry.

Cheptumo, in his research, "recommended changes in the police and judiciary, changes of fraud legislation, reformation of features of security documents including the national

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[15]Kennedy Kangethe, 'Fraud continues to thrive in insurance sector''' Capitalfm News (23 June 2016)>https://www.capitalfm.co.ke/business/2016/06/fraud-continues-thrive-insurance-sector/>accessed 27 March 2019.

[16]Paul Redfern, 'Insurance Fraud costing Kenyans dearly, says firm''' Nation News (4 July 2016) >http://www.nation.co.ke.business.> accessed 27th March 2019.

[17]ibid

identification cards, driving licenses, passports and title deeds, constant supervision of staff, employee screening and staff account management among others.[18]

1.2 Statement of the Problem

Motor insurance fraud is a major vice in the insurance industry that has resulted in the collapse of various insurance companies and continues to pose a significant challenge to the insurance industry. It is estimated that thirty five percent of insurance claims are fraudulent with motor private and commercial insurance sectors registering the highest loss proportions in the industry attributed to fraud and fabricated claims. In any business, regulation is needed to guide and regularize the business venture to ensure conformity with the expected standards in the market, it is therefore important to analyse the effectiveness of the legal and institutional framework in curbing motor insurance fraud and come up with proper recommendations

1.3 Justification of the Study.

The information gathered has been significant to government and enforcement agencies in their continued efforts to investigate and curb Insurance Fraud.

The Researcher studies Motor Insurance Fraud because it is one of the three insurance businesses that had negative growth on non-life insurance and secondly because it recorded the highest number of fraudulent claims and indicator that insurance fraud was a perennial problem that has not been resolved despite the existence of a legal and institutional framework before independence in Kenya.

The study will highlight the gaps in the legal and institutional framework that can be reviewed by policy makers to enhance the efficiency of the legal and institutional framework in curbing insurance fraud.

1.4 Statement of Objective.

[18] Cheptumo N.K, 'Response Strategies to Fraud –Related Challenges by Barclays Bank of Kenya '(Unpublished Doctoral Dissertation University of Nairobi (2010).

The research study focuses on the following specific objectives;

1. To analyse the extent to which the legal and institutional framework in insurance has succeeded in curbing insurance fraud in Kenya.
2. To determine whether there is need to review the legal and institutional framework with regard to curbing insurance fraud in Kenya.
3. To come up with legally enforceable recommendations suitable to the legal and institutional framework in insurance to curb fraud in the Motor Insurance sector and in the insurance sector.

1.5 Literature Review

General insurance and insurance fraud have for a long time been a perenial problem and as such there is a substantial amount of literature covering this. However, when it comes to regulation of Motor insurance fraud in Kenya, very little literature dwells on the issue. The Motor insurance industry being unique in Kenya makes it even more challenging.

Insurance Fraud in Kenya is manifested by frequent changes in insurers, uncharacteristic levels of cover, unclear ownership of good, excessive pressure to settle claims, inconsistent stories, prefabrication of facts, claimants creating scenes when seeking compensation, faking of deaths and inadequate investigations before settling claims(AKI,2005).[19]

Regulation is a key tool in insurance as insurance is a creature of the law. Regulation exists to ensure fair trading, to promote fair access to markets, and ensure price stability and satisfaction of social objectives.

A body can act as an insurer, only if it satisfies the regulatory requirements established by detailed and complex legislation.[20] In Kenya, Motor insurance is regulated by the Insurance Act, 487 Cap and the Motor Vehicle 3rd Party Risks Act, 2013 Cap 405. These regulatory requirements exist because of the very nature of most insurance businesses. The insured entrusts his money to the insurer, and in return receives only a promise of payment in the event of specified events happening. Regulation is important to ensure that insurers are able to meet their contractual obligation..

[19] AKI, 'Insurance Industry Annual Report'(2004)<https://www.akinsure.com/images/publications/AKI-Insurance-Industry-Annual-Report-2004-.pdf> accessed 26 March, 2019

The immediate principal object of regulation is to assure the performance by insurers of their obligations by prescribing safeguards against insolvencies[21]. Beyond that; the object is to reinforce the sense of security that insurance contracts provide for their holders and beneficiaries. The safeguards contemplated by Young are for example the introduction of a st., minimum capital requirements to safeguard against insolvencies, incorporation requirements to ensure compliance in terms of personal integrity and competency in the insurance industry, creation of the Insurance Fraud Investigation Unit to investigate and prosecute insurance fraud, provision of guidelines such as the claims management to safeguard insurers and the insured against false and fraudulent claims, application of ICT in data collection to avoid human error and reduce chances of interference and public education and awareness . This regulatory framework performs the overall objective of guarding policy holders against insolvency that in most cases as a result of fraudulent claims. It also creates an atmosphere for growth of the insurance industry.

Most measures of insurance regulation have been initiated to serve one or more of three main objectives: first, to avoid overreaching by insurers; second, to guarantee solidity and solvency of insurers; third, to attest that rating classifications and rates are reasonable and just.[22] .

There are two types of regulation these are ex ante regulation and ex post regulation.[23] Ex ante regulation refers to the anticipatory intervention that uses government specified controls to prevent socially undesirable actions or outcomes or to direct market activities towards socially desirable ends. This is applicable in Insurance through regulation provided in the act that provides for minimum capital requirements, qualification requirements of owners and directors of insurance companies, conditions for replacement of lost policies for instance through swearing of affidavits. These measures are meant to safeguard the industry from instances of fraud and false claims. Ex post regulation is meant to deal with specific assertions of anti-competitive behaviour or market abuse. It aims to redress proven misconduct through various enforcement mechanisms such as fines, imprisonments etc. This regulation affects both parties to a contract.

Enforcement on the other hand is the act of putting the law into effect and ensuring its obedience. [24] In Kenya, the insurance regulatory body (IRA) is mandated to ensure

[24] Black Henry Campbell, Black's Dictionary(Nolan Joseph and Nolan-Haley Jacqueline eds, 6th edn West Publishing Company 1990) 528

enforcement of the Insurance Act.[25]When dealing with insurance fraud, the IRA collaborates with the Insurance Fraud Investigation Unit from the Directorate of Criminal Investigation.[26] Insurance fraud is considered a violation of a contract in insurance that is of a criminal nature. It is well known that the main functions of criminal law are deterrence, remediation and public protection and retribution. The law governing in insurance in Kenya has been drafted to not only provide registration guidelines but also to cater for instances of criminal acts such as fraud. The legislation in place lists acts or omission considered as insurance fraud and the penalties for such acts or omissions.

Insurance fraud is considered a crime, a crime being an act or omission that is punishable by the law[27]

The role of the IFIU is investigation of acts or omissions considered insurance fraud according to the Act for prosecution in a Criminal court.

It is very important to ensure fast and efficient investigation of insurance fraud as slow fraud detection can increase the overall claim cycle time. This research seeks to establish the extent of the efficiency of the IFIU in investigation of insurance fraud based on the current legal and institutional framework in place and to compare the same with the Insurance Amendment Act, 2019.

Insurance fraud has resulted in numerous claims in civil division of the courts. Courts have previously issued huge payouts some of which have been fraudulent. Courts being enforcement agencies can play a huge role in ensuring deterrence as Lord Denning rightly put it, ‘’In theory the judges do not make the law, they merely expound it. But as no one knows that law until the judges expound it, it follows that they make it.[28] Lenient sentences and fines, huge payouts all arise from court decisions which greatly influence insurance fraud in the industry as they can either entice the commission of insurance fraud or discourage it.

Enforcers such as the courts and the IFIU need to be adequately trained and informed so as to make informed decisions with relation to insurance fraud.

There’s need for the government, regulator and service providers to cooperate to ensure that the regulations in place are workable and efficient. The role of the government is to create regulatory independence, reduce ownership of incumbents and identify appropriate financial obligations for the operators. The regulators role is to abide by values such as efficiency, transparency, independence and non-discrimination. The regulator also needs to identify and

[25] IRA, Insurance Regulatory Authority>https://www.ira.go.ke/< accessed on 17May, 2019
[26] Ibid

[28]Denning Alfred, The Changing Law(Stevens&Sons Limited 1953)

sanction anti-competitive practices, ensure access to resources and adopt neutral licensing and regulatory frameworks. The operator's role is to build up effective regulatory management capabilities and communicate proactively and intensively with the regulator.

The efficiency in insurance regulation should reflect the levels at which the organizations achieve the objectives of assisting their clients.[29]

Fraud being one of the major setbacks of the motor sector insurance industry in the country hence the need to evaluate the current legislation and intuitional framework to determine its viability and also to review the Insurance Amendment Act, 2019 in order to establish whether the amends are sufficient or there's need for additional regulation.

This study analyses the available material with regards to fraudulent claims in Motor Commercial insurance in Kenya and the legal regulatory framework thereto.

1.6 Research Questions

This research posits to answer the following questions:

I. How effective is the existing legal and institutional structure governing the insurance trade in Kenya in curbing motor insurance fraud
II. Are the provision introduced by the Insurance Amendment Act, 2019 adequate in containing motor insurance fraud in Kenya.
III. What reforms if any are needed in the legal and institutional framework in insurance in Kenya to curb Insurance Fraud?

1.7Hypothesis

I. The Hypothesis in this study is that the legal and institutional scaffold governing insurance in the country moderately succeeded in curbing insurance fraud through set guidelines issued by the IRA and the introduction of the Insurance Amendment Act, 2019. The moderate success in implantation has been attributed to gaps in the institutional framework.

[29]Mirrel .L.H (2005) Is Federal Regulation of Insurance Inevitable? Is it a Good Idea? The changing Climate of InsuarnceRegulation.Washington Perspective;>http//:www.insurancenewsnet.com< accessed 17th May, 2017

1.8 Theoretical Framework.

This research will be premised on two theories namely the deterrence and retributive theories. The aim of the research is to analyse the outcome of legal and institutional framework in curbing insurance fraud in motor insurance. The theories presented are suitable as insurance is a social contract that requires parties to comply with the policy requirements and in default to face penalties either arising from self-regulation that includes forfeiture or state regulation which may include cancellation of licenses, issuance of fines and penalties or even imprisonment. These theories are therefore useful to predict whether the regulation in place and the proposed amendments will prove adequate in curbing the crime that is insurance fraud

1.8.1 Deterrence Theory

The Deterrence theory is anchored on Utilitarianism. Utilitarianism as a whole is more concerned with morality than it is with the law.

Proponents of this theory argue that individual decide to obey or disrespect law after they have weighed the advantages and disadvantages of their actions.

Traditional philosophers such as Jeremy Bentham, Cesare Beccaria, and Thomas Hobbes are the main proponents of the deterrence theory.

The Insurance Act, Cap 487 and the Insurance Amendment Act, 2019 both apply deterrence principle where they contain provisions on offences with regard to insurance fraud and other similar offences that have punitive penalties for such acts or omissions to deter commission of such offences.

Hobbes published a work referred as the Leviathan 1651, where he argued that people are not good or bad. This philosopher posited that people create their own personalities by determining what they want in life and how they want to get these desires. According to this philosopher, people are greedy to achieve their self interest and they do not care if they hurt others in their quests to fulfil their desires. He recommended that people should put aside their egos so that there is no conflict in the society. Therefore, people mandate the government to be their caretaker and shield them from enemity caused by egocentric behaviours. Hobbes reiterated that the government was the legal enforcer of the social contract; it has the authority to use any degree of force to make sure every citizen obeys the social contract. The IRA can be depicted as the arm of government mandated to regulate, supervise and uphold the social contract in insurance. This it does by publishing of guidelines on insurance conduct and also by delegation of investigation of insurance fraud to the IFIU. Hobbes reiterated that the government should instil a much painful punishment to individuals who break the contract; the punishment should be severe than the gain that the law breakers derive from breaking the contract. The Insurance Amendment act has applied that logic by introducing section 205(5) which provides punitive penalties which states that on conviction an individual shall be fined ten times the amount defrauded or intended to be defrauded or to face a jail term of less than five years or both punishments. Such a penalty is bound to face a discourage commission of fraudulent acts[30]. The IRA being an enforcement agency has the authority to cancel or suspend licenses for non-conforming insurers and intermediaries it also collects fines for insurance malpractice as a form of punishment.

In 1764, Cesare Bonesana published his article challenging the mandate of the government to punish various law offenders. He sided with Hobbes and other elite philosophers in arguing that legislation should be weighed on their abilities to afford the "greatest happiness shared by the greatest number"[31] This argument posits that people are selfish and they will not engage in criminal activities if they outdo the benefits brought by these actions[32]. In According to Beccaria, immediate punishment offers the best mechanism for the state to control and limit criminal activities. The punishment that the government subjects law breakers to must be proportionate to the criminal activity so that there is an effect of deterrent on the action. Lastly, Beccaria posited that the graveness of a criminal activity should be pegged on its negative effect on the society. He insisted that the government should use pain and pleasure to prevent criminal activities; the pleasure received from breaking the law should be less than the pain inflicted through the punishment[33].

In 1780, Jeremy Bentham published an article explaining his renowned utility principle. He posited that "nature has placed mankind under the governance of two sovereign masters, pain and pleasure"[34] Bentham's argument was that a moral behaviour or action is that which

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[30]Leviathan,>https://www.ttu.ee/public/m/mart-murdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf<assessed on 30th April 2019

[31]Beccaria C (1963) On Crimes andPunishments (Introduction by H. Paolocci, Trans.). New York: Macmillan(Original Work Published 1764)

[32]ibid

[33]ibid

[34]Bentham, J (1948) An Introduction to the Principles of Morals and Legislation (with an introduction by W.Harrison, Ed) New York: Macmillan.

promotes “the greatest happiness of the greatest number”[35]. The responsibility of the government according to Bentham was “to uphold the contentment of the society... Noting that all punishment is mischief, he maintained, also, that all penalties, per se, are evil unless punishment is used to avert greater evil, or to control the action of offenders.[36]

Deterrence is divided into specific and general. General assists the state to reduce and prevent criminal activities. This type of deterrence serves as a classical example to other citizens who may have criminal perceptions by deterring them against the activities. Specific deterrence is designed—by the nature of the proscribed sanctions—it prevents a criminal offender from committing a similar offense later on. Supporters of this type of deterrence argue that the severe punishment of an offender stops him or her from repeating the crime. The Insurance regulation provides hefty fines to insurers for non-compliance with insurance regulations and also suspension of licences. This specific deterrence discourage industry players such as insurers and intermediaries from committing insurance related offences due to the fear of losing their licenses and making substantial losses due to the heavy fines imposed. As indicated the by Bentham the duty of the state is to promote happiness to society and as such fines against insurers and intermediaries are directed to the Policy Holders Compensation Fund to compensate victims of insolvencies.

In the modern world, the notion that sanctions reduce criminal activities through deterring law breakers has influenced the development of penal sanctions in various jurisdictions. Proponents of this philosophy are of the opinion that laws such as the “three strikes” laws, , severe penalties, prolonged sentences, and establishment of robust law enforcement agencies should be favoured. Jointly, these laws would reduce and manage the effects of criminal activities in the society by reducing number of offenders.

While the utilitarian view of punishment has featured prominently in criminal justice systems across all jurisdictions, it has its shortcomings. First, one of the main aims of utilitarianism is general deterrence, effective punishment. Second, incarceration is an ineffective method of preventing recidivism.

1.8.2 Retributive theory

The Retributive theory is based on Immanuel Kant, the eighteenth century German philosopher. He justified retributivism on moral and philosophical grounds. He argued that

[35]Moyer, I.L, Criminological theories: Traditional and non-traditional voices and themes. Thousand Oaks. CA: Sage 2001
[36]Supra n 55

judicial punishment should not be perceived as only a mechanism of promoting good for the law breaker and society but it should be meted on an individual for his or her criminal behaviour and actions.[37]

The retributive aim is to ensure that when punishment is meted, it should be proportionate to the crime committed. Not doing so, according to the retributivists, is injustice.[38]

The purpose of the retributivism is to ensure that those guilty of a crime deserve to be punished morally for their acts committed are punished and the innocent left unpunished Retributivism's main goal is to ensure that justice is served.

Retributivism is totally different from revenge in that what revenge involves is the response to wrongdoing that a person has done to another and it is affecting their self-respect[39].

The justification for retributivism is, punishment is a way of blaming and condemning the criminal, punishment communicates to the criminal that they have inflicted wrongful harm on someone and finally, crime gives the criminal an unfair advantage over others and punishment aims at correcting this[40]. The penalties, fines and suspensions and cancellations imposed on offenders by Insurance regulation serve as a means of ensuring justice is served as such penalties and fines are strictly imposed on insurers and individuals who have committed insurance related offences or misconduct and the penalties only serve as punishment and condemnation for acts or ommissions.

Critics to this theory are of the opinion that this theory can justify the punishment of the innocent in some instances when in a situation requiring prevention of harm the innocent may end up punished.

1.9 Research Methodology.

This research was conducted by collection of primary and secondary data and document inspections.

A survey research design was adopted in this case to analyse the effectiveness of the legal and institutional framework in tackling insurance fraud in the motor insurance sector. A

[37]Kant I, Metaphysical elements of justice, Hacket Publishing, 1797)138.

[38]Weinreb L, ' Desert, punishment and criminal responsibilty'L aw and Contemporary Problems, (1986) 47-80

[39] Murphy J and Coleman J, The Philosophy of law, Rowmam and Allanheld Publishers, NEW Jersey, (1984) 126.

[40] Altman A, Arguing about law; An introduction to legal Philosophy,Cengage Learning 2nd edition(2000) 121

survey design has the advantage of uniqueness in that the information gathered is not available from other sources.[41]

Primary data was collected through the use of a structured questionnaire which contained both open ended and close ended questions. The data was be captured in writing for anonymity purposes. The data was collected from subjects through a drop and pick method.

Secondary data was collected to supplement the primary data.

The population study was all players in the Insurance sector as all are affected by insurance fraud. This population was divided into two major groups that is insurer and regulators/enforcers. These key groups would provide sufficient information on the effectiveness of the legal and institutional framework. The population target within these spheres is individuals who from the legal, claims and enforcement departments.This is because insurer fraud commences at the industry level especially durings claims settlement hence the need to interogate insurer from claims department secondly the IRA is the key institution providing guidelines on Insurance conduct in Kenya thus actively involved in containing and monitoring insurance fraud making its input very significant in this study, it also houses the IFIU which is the key organ of the IRA dealing with investigation and prosecution of insurance fraud in Kenya, thirdly the Office of the Director of Public Prosecution was necessary as they authorize prosecution of fraud in a court of law and undertake the prosecution in collaboration the IFIU officers. The officers from ODPP would provide necessary information with regards to successes and failures in prosecution of such cases and also statistics on the number of cases presented before court and finally Judicial Officers handling civil claims which has been noted as one way through which insurance fraud is committed and criminal prosecution of insurance fraud would have insight on insurance fraud committed at the courts as well as the successes and challenges in insurance criminal cases. These respondents are all actively involved as enforcers or regulators hence the selection.

Insurers interviewed included AMACO insurance, CIC insurance, Britam, ICEA LION insurance, Directline insurance, Madison Insurance and Sanlam Insurance.

[41]Owens L(2005); Introduction to Survey Research design,>https://www.srl.uic.edu> accessed on 17 May 2019

The research revolved around qualitative collection and analysis of data. This was be done to grasp the fraud control strategies by regulatory and enforcement agencies and Insurance Companies in Kenya.

Library research; the research undertook to project the opinions of various authors on the legal and regulatory framework of the insurance industry in Kenya.
The internet was also an important source of information in this study.

1.10 Limitations.

The study was limited to scrutiny of the legal and institutional scaffold of insurance in the country in relation to motor insurance fraud.

This area of study has not been widely explored as major research has been conducted on general insurance and effects state regulation on insurance broadly and not insurance fraud and motor insurance.
Research has been conducted on Challenges in management of general insurance claims[42] and the assessment of fraud limitation by the companies in the industry[43]. However very little research has focused on the regulatory framework in insurance as a mechanism of curbing insurance fraud but instead focusing on the success of insurance industry as a whole.
The Insurance Amendment Act, 2019 which was enacted in July, 2019 is yet to be fully analysed or appraised.

1.11 Chapter Breakdown.

My research work herein was submitted in four chapters as broken down here below.

1.11.1Chapter One: Introduction

Chapter one gives an introduction of the area of study. It outlined the statement of the research problem, justification of the research, theoretical framework within which the research will be carried out, the literature review; the research objectives; the research hypothesis ; research questions; research methodology to be adopted, anticipated limitations when conducting the research; the scope of the research and chapter summary.

1.11.2 Chapter Two: The Legal and Institutional Framework governing Motor Insurance in Kenya

This Chapter analysed the current legal and institutional framework governing Motor insurance industry in Kenya. It focuses on Motor insurance fraud, and the regulation and institutions in place to deal with the vice. In its conclusion, is a finding that the current system has moderately succeeded in responding to the needs of both the industry and policy holders. This moderate trend being attributed to the gaps in institutional framework in terms of the capacity to act. This Chapter also reviews Insurance guidelines issued from 2012 to 2017 by the Insurance Regulatory Authority and the recent Insurance (Amendment) Act 2019 . Data analysed from Respondents is also discussed in this chapter

1.11.3Chapter Three: An Overview Of Claims Management In Kenya

This chapter discusses the enforcement mechanisms and their suitability. It further discusses the role of enforcement agencies in enforcement. Finally it discusses the importance of an efficient legal and institutional framework in facilitating enforcement. The chapter shall delve in considering the role of the courts and enforcement agencies such as the Insurance Fraud Investigative Unit and the Policy Holders Compensation Fund in this regard, it shall also espouse on the journey of determining fraudulent claims and the various challenges faced in each and giving a conclusive thought.

1.11.4 Chapter Four: Conclusion and Recommendations

Having introduced the research in chapter one, discussed Kenya’s legal and institutional framework in the insurance industry in chapter two and in chapter three looked at the courts and claims settlement, this final chapter entails the conclusions and recommendations arrived at in this study. This chapter summarizes the findings.

CHAPTER TWO

2.0 The Legal and Institutional Framework in governing Motor Insurance In Kenya

2.1 Introduction

This Chapter analyses the efficacy of Insurance Regulation in Kenya in dealing with motor insurance fraud. It examines how effective the regulatory and institutional framework has been in balancing the rights and obligations of the stakeholders in insurance while protecting the insurance industry from insurance fraud and other vices.

The legal history and contextual development of insurance regulation is outlined in this chapter following the justification of this study in chapter one where the key objective set, was to determine whether the legal and institutional framework in insurance in Kenya was sufficient in tackling insurance fraud in motor insurance sector .The legal history and contextual development laid out with a view of establishing the foundation of the development of insurance industry in Kenya.

The main area of study under the legal framework being, the Insurance Act, Cap 487, the Motor Vehicle 3rd party Risks Act, 2013 Cap 405, , Guidelines and rules formulated by the Insurance Regulatory Authority and the recently amended The Insurance (Amendment) Act no 11 of 2019 whilst in institutional framework the IRA, IFIU, PHCF and the courts are examined.

2.2 Legal Framework in Motor Insurance in Kenya

2.2.1 Context of Insurance Legislation

Insurance business commenced formally during the colonial period. This was undertaken by white settlers who had invested heavily in Kenyan land for agricultural purposes. During this period there was no national legislation in place and the business was regulated by the United‘s Companies Act of 1948.[44]

After independence the Insurance Act, cap 487 was enacted in 1986 and enforced in January 1987.The Act established the office of the Commissioner of Insurance and provided

[44] ‘History of Insurance in Kenya’>http://www.ira.go.ke/index.php/about-us/ira-history< accessed 30 May, 2019

regulation on establishment of insurance companies in terms of capital requirements, licensing requirements and policies among other essentials in the insurance business.[45]

Insurance regulation and the institutional framework have evolved rapidly since the enactment of the Insurance Act to safeguard the interests of insurers, insurance intermediaries and policyholders. There have been several amendments since its enactment to protect and facilitate growth of the industry as analysed below.

2.2.2 The Insurance Act Cap 487

This legislation was formulated in 1986 and it became effective the following year. The Act made provisions on local incorporation of insurance companies, the least amount of capital for start-up, elements of reinsurance, management, and the winding up process. The law also provided provision for a third party liability system in the public service vehicle sector which was intended to compensate accident victims.[46]

In 2003 the Insurance Act was amended to address the issue on poor corporate governance. Section 27 of the Act was amended to increase the number of the board of directors within the minimum set to at least (5) five members. The members were to have the requisite knowledge and experience in matters relating to insurance, actuarial studies, accounting, financing or banking.[47]This was to ensure that only competent individuals were engaged in the running of insurance companies with the ability to tackle issues on poor corporate governance and issues of mismanagement of the companies that as indicated earlier contributed significantly to collapse of the insurance industry.

Prior to the amendments insurance companies provided annual reports but with the amendments, the stakes were risen to quarterly reports to the Commissioner of Insurance. This was to ensure financial transparency in the insurance sector and to monitor the performance of the companies.

Before Legal Notice no 105 of 2004 was made policy holders were unable to recover their claims from collapsed insurance companies and were left exposed to risks that they had insured themselves against. The Policy Holders Compensation Fund (PHCF) was established to partially compensate victims of collapsed insurance companies. The fund was established

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[45] ibid
[46] Insurance Act Cap 487 1986
[47] Insurance Amendment Act 2003

under Policy Holders Compensation Fund (PHCF Regulations 2004.[48] This fund was established in line with international best practices in the field of insurance for creation of a fund to provide some protection to policy holders in the event that an insurance company became insolvent.[49]

In 2006, the Insurance Act was amended significantly to safeguard the Insurance Industry from Insurance Fraud and also the governing body empowered. In an attempt to counter fraud, the amendments made provisions that increased the paid-up capital for the organizations and placing a limit on the stake amount of an entity in a company to 25%. The amendments also stipulated that individuals with more than 20% shares in the companies could not have senior managerial positions.[50]

In 2010, the Finance Act2010 was amended further enhancing the regulatory and supervisory powers of the Insurance Regulatory Authority. The Act mandated the IRA's duty of supervision for the analysis of accounts of the companies.[51] This would greatly prevent fraudulent acts from within the insurance companies.

In 2011, further amendments were made that increased the supervisory role of the Insurance Regulatory Authority. The amendments made it a mandatory requirement for companies who wished to expand their operations to seek the consent of the authority.[52] The adjustment also gave the Authority the mandate to protect the properties of an insurer so that the interests of policy holders are also protected.

The Insurance Regulatory Authority (IRA) established the Insurance Fraud Investigation Unit (IFIU) in 2011, as a unit under criminal investigation department to work with IRA in countering insurance fraud.[53] This unit would comprise of trained personnel in the investigation of insurance fraud in the insurance industry.

2013 saw several amendments to the Insurance act that like the preceding amendments continued to empower the Authority. One such provision empowered the Authority to assess the professional and financial capability of an individual to own or manage an insurance

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48 'Policy Holders Compensation Fund' <https://www.pcf.go.ke/>accessed 20 June 2019

49 ibid

50 Insurance Act no 11 of 2006

51 The Finance Act 2010, s54

52 The Finance Act 2011, s 30(A)

53 'Insurance Fraud Investigation Unit'<www.ira.go.ke/images/docs/IFIU_PRESENTATION_-KITALE.pdf< accessed 27 March 2019

firm.[54] This provision was aimed at eliminating and deterring criminals from controlling or holding significant interest in financial institutions that do not fall under the ambit of the Banking Act.

The amendments also gave the Authority the mandate of conducting inquiries and investigations on licenses according to the provisions of other legislation[55]. The amendments further increased the Authority's mandate to include the protection of interests of insured individuals and their beneficiaries.

After the revision of Insurance Act in 2013, going forward all amendments were made based on the revised Insurance Act of 2013.

In 2016, the Insurance Act was amended to facilitate further monitoring of insurance business. This was through the Insurance (Amendment) Act, 2016 which came into force in 2017. This was done by the introduction of the requirement for actuarial investigation. The provision required all insurance companies to have an annual evaluation of their business by an actuary. The report has to contain details of the risks and issues that are affecting the financial condition of the company. This move ensured insurers acted in compliance with the Act as any deviance, fraud or money laundering could be easily flagged.[56]

Section 41 was repealed. It was replaced by a new provision that required all insurers to have adequate capital.[57]

2.2.3 Insurance Act, Insurance Guidelines

The Insurance guidelines are issued by the IRA pursuant to section 3A (1) (a), (b) and (g) of the Insurance Act which provides that the objects and functions of the Authority shall be to. They are meant to provide guidance and direction to insurance stakeholder on practice of insurance in Kenya, .At the moment there are 15 guidelines in place to make sure the industry has proper management, supervision, control, and it is regulated according to the legislation. These guidelines are regularly checked to make sure they are always in line with the changing legislation that governs the industry in the country. They are formulated according to principles of the Act and all legislation guiding insurance in the country.

The guidelines provided are as hereunder;

[54] Insurance Act 2013, s 2
[55]Insurance Act 2013, s 3(A) and (9)
[56]The Insurance Act s 57 and s 58 via Insurance (Amendment) Act. No 50 of 2016
[57]Insurance(Amendment) Act, No 50 of 2016

1. Guidelines on claims management for the insurance industry, 2012 aims to enhance efficiency, transparency, disclosure of information to policyholders during claims processing and to increase consumer satisfaction.
2. Guidelines on suitability of persons, 2013 is meant to ensure that the involved in the ownership, stewardship and management of insurers have competence integrity and moral fitness in fulfilling their roles.
3. Guidelines on insurance market conduct for intermediaries, 2011 sets minimum standards for proper conduct for intermediaries in performing their duties. Its main aim is to enhance best practices in the conduct of insurance business and to improve the image of the insurance industry.
4. Guidelines on risk management and internal controls for insurance and reinsurance companies 2013, aims to ensure that insurance and reinsurance companies are managed properly according to the legislation.
5. Guidelines on market conduct for insurers 2013 is aimed at offering guidance on insurance core principles in the conduct of insurance business by insurers to ensure that all the ethical; principles are complied with by insurers with a primary focus on fair treatment of customers.
6. Guidelines on market Conduct for insurance investigators and motor assessors, 2012 sets the minimum standards for proper conduct of insurance investigation and motor assessment.
7. Guidelines on external auditors to insurance and reinsurance companies, 2013 is in place to ensure that the financial statements are made in accordance with the international based standards adopted by ICPAK for public interest and protection. This guideline was formulated to make sure all insurance companies properly keep their financial books without error or fraudulent activities.
8. Guidelines on actuarial function for insurance and reinsurance companies, 2013 is meant to ensure that these companies have competent firms with actuarial divisions that are functional as it now a requirement of the law for the companies to have actuarial divisions to cater for the technical functions and promote transparency.
9. Guidelines on insurance products for insurance companies and intermediaries provide guidance on products sold by insurers and intermediaries to ensure that they are suitable to consumers, fairly priced and functional.These guidelines are also intended to address the issue of pricing, marketing and disclosures.

10. Guideline on valuation of insurance technical liabilities for general business, 2013 sets principles for consistent measurement and reporting of the insurance liabilities of all general insurers in order to determine solvency and the general soundness of a company for the protection of the policyholders.
11. Guideline on insurance risks for insurers, 2013 provides guidance for insurance on management of insurance risks by having effective risk management systems for identifying, assessing and mitigating risks in the insurance core business process.
12. Guidelines on Insurance Risks , 2013 provides guidance for insurance companies on management of insurance risks by advocating for effective risk management systems to be able to identify, assess and mitigate risks inherent in the insurer's core business processes.
13. Corporate Governance Guidelines for insurance and reinsurance companies, 2011.These guidelines aim to achieve stability in the insurance sector by encouraging implementation good corporate governance practices and development of appropriate policies for prudent management.
14. Guidelines to the Insurance Industry on the implementation of Proceeds of Crime and the Anti-money laundering Act, 2011 were issued pursuant to with section 3A of the Insurance Act and the Proceeds of Crime and the Anti-money laundering Act on 2009 to enable insurance companies to combat crimes related to money laundering. Guidelines are provided on detection and reporting of such instances as well as deterrence measures. This due to the fact that the insurance industry is susceptible to use for money laundering due to the heavy and consistent exchange of money in the business.
15. The Insurance(Valuation of technical provisions for general insurance guidelines, 2017 is meant to ensure that the assets of insurers are managed in a manner that is consistent with insurers' risk profiles, liquidity needs and liability profiles. It also sets out the expectations of the Authority regarding investment management which are consistent with international best practices and the Insurance Core Principles issued by the International Association of Insurance Supervisors (IAIS).

The guidelines can be viewed as the direct or more elaborate means of implementing the Insurance Act and the adopted international best practices as they are derived from provisions of the act. The study found the guidelines herein to have been more effective and technical in addressing and deterring motor insurance fraud.

2.2.4 The Insurance (Motor Vehicle Third Party Risks (Amendment) Act Cap 405.

The Insurance Motor Vehicle Third Party Risks Act was enacted in 1945 however it has had several amendments with the recent amendment being, the Insurance (Motor Vehicle Third Party Risks (Amendment) Act 2013.

The Insurance (Motor Vehicle Third Party Risks (Amendment) Act 2013 was enacted to amend and revise the Insurance (Motor Vehicle Third Party Risk) Act. The Act created legal provisions for third party risks compensation arising out of accidents from the use of motor vehicles.[58]

The insurance contract under this Act insures such persons, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.[59]

Prior to the amendments section 10 of the Act provided that it was the duty of the insurer to satisfy judgements against persons insured whilst section 11 made it an offence to utter false statements or documents in relation to the claims. The penalty for this offence upon conviction was a fine of Kshs. 5,000 or to 3 months imprisonment and additionally the claims could be avoided. [60] The 2013 Amendments increased the amount to Ksh.500, 000 and imprisonment for 1 year.[61]These amendments by increasing the penalties hoped to achieve deterrence based on the punitive amount and the longer prison sentence.

A new section 3A was introduced raising the standards of proof of claims on bodily injury where it stated that no judgement or claim would be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.[62]Further a new section 3B provided that an insurer had the right to obtain or verify information from the institution which issued

[58] Insurance(Motor Vehicles Third Party Risks) Act , s 4
[59] Insurance(Motor Vehicles Third Party Risks) Act , s 5(b)

[60] Insurance(Motor Vehicles Third Party Risks) Act , s 17

[61]The Insurance (Motor Vehicle Third Party Risk (Amendment) Act 2013, s 5.(a) and (b)

[62]The Insurance (Motor Vehicle Third Party Risk (Amendment) Act 2013, s 3(e)

the documents intended to be used to prove the claim and this right would be enforceable before passing of judgement, provided that this verification was done within a month.[63]

The Amendments went further to criminalize uttering of false statements and documents in great detail by introducing a new section 4A to the Act and stating the instances that such false representations would be made.[64]

It is quite evident that the 2013 amendments were meant to curb insurance fraud by claimants by increasing the standard of proof and to deter offenders by increasing the penalties for false representation.

2.2.5 The Insurance (Amendment) Act 2019

The Insurance (Amendment) Bill 2018 was passed in June 2019 and came into effect on 23rd July, 2019 as the Insurance (Amendment) Act 2019 no 11 of 2019.

The principal object of the Act was to amend the Principal Act by introducing legal provisions creating offences on insurance fraud and further directives to ensure transparency and disclosure by both the insurer and the assured. The amendments also provide more autonomy and independence to the Commissioner and the IRA in terms of regulation and supervision of Insurance in Kenya.

The amendments proceed by introducing index based insurance in section 2 that is meant to tackle the issues relating to quantifying of claims and compensation for losses to policyholders.[65]This move is considered positive and provides substantial direction in terms of compensation for losses as compared to the Principal act.

The amendment goes on to finally define insurance fraud as a deliberate deception to secure unfair or unlawful gain or to deprive a victim a legal right in an insurance transaction and the offence is elaborated sufficiently in the new inserted section 204 B.Th. penalties provided are quite punitive as provided in subsection 5 where if found guilty on conviction one shall be liable to a fine of ten times the amount defrauded or intended to be defrauded or to imprisonment for a term not exceeding five years or both. It is my considered view that this punitive sentence will serve as a deterrent to fraudsters.

The amendment also provides for recovery for loss in a civil suit under subsection 6 which states that notwithstanding subsection 4 any person who is responsible for the loss of any

[63]ibid

[64]The Insurance (Motor Vehicle Third Party Risk (Amendment) Act 2013, s 3(f)

[65] The Insurance (Amendment) Bill 2018, s 2(a) and (b)

moneys, property or assets shall be liable for recovery in a civil suit. This provision gives a sigh of relief because upon conclusion of a criminal case an injured party can still recover from the loss incurred from a fraudulent act or omission.

The new amendment also allocates more responsibility to the Commissioner in terms of group wide supervision to insurers by the introduction of section 5A to the Principal Act. The Commissioner is empowered to provide sanctions for non-compliance.[66]

The authority and autonomy of the Commissioner, the Board and the IRA are greatly enhanced by amendments to section 17, 31, 34 and 39 of the Principal Act reducing the back and forth to the Cabinet Secretary for Finance for approval in matters relating to the regulation of the Insurance sector.[67]

In order to safe guard the insurers' interests in cases of false claims made by the insured in terms of loss of policy, section 7 of the amendments amends section 106 of the Principal act by requiring the policy holder or beneficiary to swear an affidavit regarding the loss of original policy.

Previously under the Principal act, an insurer could assume risk prior to receiving premiums, this was a risky affair especially with regard to false claims but the 2019 amendments have addressed the issue by repealing section 156 of the Principal act and amending it to provide that that an insurer will only assume risk upon receipt of premiums .

This section further bars intermediaries from receiving premiums on behalf of the insurer[68] which provision has been greatly contested by intermediaries complaining that such a move locks them out of business.

This provision makes it an offence for an intermediary to receive premiums on behalf of an insurer and provides a penalty of 1 million shillings in contravention of the subsection payable to the policy holders compensation fund[69] whilst an officer or a director of an intermediary who contravenes the same upon conviction shall be liable to pay a fine not exceeding Ksh.100, 000 or imprisonment for 3 months or to both.

The amendment in section 156(5) of the Principal Act goes on to state that an insurer shall pay an intermediary commission due within thirty days upon receipt of the premium and failure to which the insurer shall be liable to a penalty of Kshs. 5 million on each contravention to be paid to the policy holders compensation fund raising the question on

[66] The Insurance(Amendment) Bill 2018, s 3
[67] The Insurance (Amendment) Bill 2018, s 4 s 5 and s 6)
[68] The Insurance Act, s 156(2)
[69] The Insurance Act, s 156(3)

commission to be paid to the intermediary on what grounds now that they have been barred from receiving premiums on behalf of the insurer.

The amendment also provides clear means of lodging complaints to the Commissioner against regulated entities in relation to the provision of insurance services.[70] The Commissioner's decision shall be binding upon the parties in dispute.[71] This may serve substantially as a way of dispute resolution in reducing the backlog in court.

2.3 Institutional Framework in Insurance in Kenya

The major enforcement agencies in insurance are the IRA, the IFIU, the Courts and the PHCF as outlined below

2.3.1 Insurance Regulatory Authority (IRA)

Insurance Regulatory Authority is a government body that is formulated to control and monitor the activities of the key players in the insurance industry in the country. This agency is controlled by a board that makes sure the key players in the industry adhere to the provisions of the legislation governing insurance in the country[72].

The insurance commissioner heads this board and it falls under the finance ministry.[73]

The major roles of the authority include; licensing and registration, regulatory framework, consumer protection and consumer education.[74]

The IRA also works together with global, local agencies, associations and journals like Central Bank of Kenya (CBK), Sacco Societies Regulatory Authority (SASRA), International Association of Insurance Supervisors (IAIS) as well as African Insurance Organization (AIO) for the aim of exchanging ideas and nurturing the growth of the industry. These cutting edge developments in the authority has made changes in the industry in the recent years that include: minimum capital requirements for both insurance and reinsurance companies,

[70] The Insurance Act , s 201A(1)
[71] The Insurance Act, s 204A(2)
[72] 'IRA'<www.ira.go.ke> accessed 20 May 2019
[73] ibid
[74] ibid

reporting on classes of insurance like micro insurance, maximum permitted expenditure and commission and also harmonization of regulations.[75]

The Authority has gained achievements in the recent past which include protecting and educating insurers and citizens through educational forums across the nation. This has also ensured there is competitiveness and stability in the industry by the incorporation of technology and quality assurance systems in the industry. These changes have led to the creation of a positive and conducive work culture in the industry[76].

In partnership with the Kenya Police, the Fraud Investigation Unit was launched to deal with insurance fraud and other industry malpractices. The unit is manned by 9 police officers deployed from the Criminal Investigation Department (CID) insurance industry.[77]

IRA faced challenges of implementation such as insufficient legal and institutional structure to manage budding issues that include brand assurance, agents, and development of new channels of distribution such as new distribution channels.

Public expectations towards the Authority are high. Regrettably, the allocated budget for the Authority and technical provisions are inadequate. The salary base of the Authority is far too low to attract qualified insurance professionals, especially when compared to wages paid by some insurance companies. In addition, market insiders question whether IRA will have enough politically backed powers to; for example, eliminate pseudo insurance companies from the market.

The Amendments to the Act granting the IRA, the Commissioner and the Board autonomy is a positive step towards better management of the IRA.

2.3.2 Insurance Fraud Investigation Unit (IFIU)

This unit was formed in 2011 under the criminal investigation department to assist the IRA with handling cases of fraudulent activities in the industry. Its role is to collect cases of fraud in the insurance industry, to conduct investigations on the reports by coordinating the process with other agencies, and to compile exhaustive reports on the findings and submit them for

[75] ibid
[76] ibid
[77] 'IFIU'<https://www.ira.go.ke/attachments/article/117/IFIU%20PRESENTATION.pdf> accessed 27 March 2019

arrest and prosecution.[78] To illustrate the roles undertaken by the unit we look at their submissions for the year 2015 and a quarterly report for the year 2018.

The unit reported that in 2015 the cases of fraud had increased by 21.8% from the previous year; the reported noted that a total of 106 cases were investigated by the unit in 2015. This increment in fraudulent cases amounted to Kshs.366.90 million[79].

4% of the 106 fraudulent cases were prosecuted and completed in court while 20% were still going through the court process. The criminal investigation department, according to the report, was helpful in collecting the evidence used in court for the prosecution of the fraudulent individuals and companies[80].

During quarter four of 2018, twenty six (26) fraud cases were reported to unit. Out of which twenty one (21) cases are under investigation, four (4) cases are pending in court while one (1) case was been withdrawn.[81]

2.3.3 The Judiciary

This is an independent body that is mandated to make sure there is prevalence of justice in the society. Article 159 of the Constitution describes the formation and functions of this body and its various officers[82].

This entity is the only body in the country that has the mandate of making sure that justice prevails according to the Constitution and other legislation. Disputes are resolved by this body to ensure the rights and freedoms of every individual are enjoyed without discrimination or unlawful prohibition[83].

The judiciary has several affiliate bodies that work under its guidance; some of these agencies include tribunals, Judicial Service Commission, and the Kenya Law. Together these agencies carry out the following duties:

1. They make sure there is justice
2. They formulate and put into practice judicial policies

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[78] ibid

[79] IRA, 'Fourth Quarter Release 2015'<http://www.ira.go.ke/images/docs/industry-release/Quarter%204%202015%20Industry%20Release.pdf accessed 5 May 2019

[80] ibid

[81]IRA 'Fourth Quarter Release 2018'<http://www.ira.go.ke/images/docs/quartly_2019/Q4-2018--Industry-Release.pdf> accessed 30 May 2019

[82]'Judiciary of Kenya'<http://www.judiciary.go.ke/about-us/overview/ accessed 20 June 2019

[83] ibid

3. They compile and discern case laws to make sure justice is delivered effectively

The objective of the judiciary and its affiliate agencies is to make sure justice is administered to all individuals without discrimination and in the correct manner and time while adhering the principles of the Constitution[84].

The courts determine criminal offences related to insurance fraud and other insurance related offices and also determine and awards damages in civil claims filed by insurers and policy holders.

Insurance fraud has penetrated the insurance claims in courts and it has proven difficult to differentiate genuine claims from fraudulent ones. The result has been catastrophic for insurers a number of which have closed down while others kept under receivership.

Courts claims management and enforcement being one of the main avenues for insurance fraud is thoroughly analysed in chapter 3 of this work.

2.3.4 Policyholders Compensation Fund (PHCF)

The Policyholders Compensation Fund (PHCF) was formulated in 2004. The legislation was formulated by the finance minister. This statute is operational up to date and it commenced its operations in 2005.[85]

The main aim of the fund is to shield insurance clients from insolvent insurers; it compensates the losses that customers get when insurance companies become insolvent[86].

The legislation only compensates companies that become insolvent on any of the listed categories;

i. Court winds it up because of bankruptcy.

i) It is unable to meet all the requirements listed for solvency by the Act.

ii) Creditors voluntarily agree to wind it up after a general meeting.

Eligible claimants to this fund include;

i. Any Policyholder holding a Kenyan policy except claims that came before the commencement of the Act

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[84] ibid

[85]'PHCF'<https://www.ira.go.ke/images/docs/POLICY%20HOLDERS%20COMPENSATION%20FUND.pdf> accessed 30 May 2019

[86] ibid

ii. A policy of re-insurance.
iii. A superannuation scheme

Settings required for Compensation-eligibility

1. The policy holder should fulfill all the conditions set out by the board.
2. If an individual has been assigned any rights by the policyholder.
3. Payments received by the policyholder that are connected to any liability of the insurer companies may be termed as part or complete payment.

The board consults with the Minister before issuing payments after publishing them on the Gazette through a notice. The amounts payable vary according to the different classes.

Compensation is only available for claims that arise after the appointment of a statutory director.

2.4 Data Analysis

The study analysed also the data primary collected from the field in connection to the secondary data. A sample size of 40 respondents was targeted but ended up receiving 31 positive responses. The population was divided into distinct categories from which individual participants were selected. The individuals included judges, magistrates, prosecutors, risk officers, legal officers from insurance companies and a risk officer from IRA. The responses returned represented a 77% reaction rate. This response rate was sufficient representation confirming the assertions that a rate of 50% provides adequate data for evaluation, 60% is good and any rate above 70% provides excellent data for usage.

Five structured questionnaires were used as one standard questionnaire could not pass the test to achieve the expected response as the parties played different roles in enforcement. The second section of the questionnaire catered for the general awareness levels of the respondents on insurance while the third section catered for enforcement.

The University introductory letter and permit from Nacosti were requisite for the respondents to grant the researcher audience.

The permit from Nacosti was issued a month after its application in September, 2019 and therefore some interviews were held off until it was issued.

2.4.1 Profile of the Respondents

Of the 31 respondents, 17 were female while 14 were male. This translated to 55% female respondents and 45% male respondents. The study established that more women were engaged in the insurance industry and legal practice even though by a small margin.

2.4.2 Professional Experience of the Respondent

The study sought to determine the number of years that the respondents had been involved in their various fields. The number of years the respondents had served in their current employment varied from 2 years to over 15 years. Majority, of the respondents had worked in their respective areas for over 3 years (45%) but less than 5 years, 32% had worked for 6-10 years and 16% had worked for over 10 years. This shows that there is stability within the industry. This implies that respondents have had ample time in their practice areas .This trend is positive because it implies that the respondents have taken sufficient time to settle within their areas of practice thus having more time and interest in learning and understanding the system they work for. This also shows that a vast majority of respondents interviewed were in a position to handle the research questions well by virtue of their designation and experience.

2.4.3 Regulation of the Insurance Industry

Majority of the Respondents (68%) were of the opinion that the insurance regulation was fair while the remaining 32% were equally divided with some arguing that the regulation was not good hence the numerous collapses to insurance companies and numerous litigation against insurance companies for failure to settle claims. The other 16% were aware of the new amendments to the Insurance Act and were of the view that such reforms would be effective in protecting the industry further especially due to stricter penalties for insurance fraud.

On development of the industry majority of the respondents 68% were of the view that the regulation had made the industry growth fair but that there was room for improvement especially by use of ICT. These sentiments were also expressed by those who rated growth of the industry poorly.

When it came to enforcement majority of the respondents rated it as bad or very bad .This comprised of 97% of the responses. This was attributed to the collapse of companies, lack of awareness of existence of the IFIU and very little prosecution of insurance fraud matters if any in courts despite the huge losses incurred in millions to insurers.

Majority of the Respondents were of the view that there was little or no consumer protection and education on insurance fraud sufficient in Kenya. This was attributed to the high number of claims in court against insurers and numerous fraud cases that were never prosecuted.

Majority of the Respondents were of the view that regulation on stability and fair competition was fair but couldn't substantiate much about it.

2.4.4 IRA'S Capacity to Curb Insurance Fraud in Kenya

97% of the Respondents were of the view that IRA lacked sufficient capacity to curb insurance fraud in Kenya. The Respondents opinion was that IRA either had inadequate personnel or lacked sufficient autonomy to fully tackle the vice.

The dissenting opinion was that the IRA had sufficient capacity and even had a department strategically placed, that is the IFIU with competent staff to tackle insurance fraud.

2.4.5 IRA Claims Management Guidelines

Majority of the Respondent were not aware of these guidelines as they had not had to deal with them practically. Respondents working in insurance companies and the IRA were the only respondents who were aware of these guidelines. Their view was that the guidelines were impeccable in deterring fraudulent motor insurance claims if fully complied with in terms of investigation, documentation and claims management.

2.4.6 Insurance Amendment Act, 2019

Majority of the Respondents just as with the Claims management guidelines were not aware or not familiar with the amendment act that came in to force in July, 2019.The 11% of the Respondents who were aware believed that the penalties imposed would encourage deterrence and the clarity of the offences on insurance fraud was positive in ensuring that offences related to insurance fraud were finally prosecuted without ambiguity.

2.4.7 Factors Fuelling Insurance Fraud

The Respondents were of the view that poverty, corruption and lay controls in the insurance industry fuelled insurance fraud.

2.4.8 Best Form of Regulation

All the respondents supported a joint effort in regulation as it would involve all stakeholders in the industry and such a move would foster cooperation and information sharing necessary to manage insurance fraud.

2.4.9 IRA's Role in Curbing Insurance Fraud

The Respondents were all aware of the regulatory role of the IRA but only few had knowledge on the existence of the IFIU. The study sought to establish whether the respondents were knowledgeable on the existence of the IFIU and the outcome was that majority of the respondents were not aware. The study also established that the IFIU was a small department within the IRA with officers vetted by the DCI before their secondment to the unit. The study also established that apart from vetting from the DCI, no other training was implored on them. The study also established that the unit had 11 employees which was quite alarming given the number of insurance fraud cases and the amount of millions lost countrywide to insurance fraud.

The study also established that the IFIU was based in Nairobi to cater for all cases of insurance fraud in the country.

The study also established that 159 cases were reported in 2017, 121 were pending investigation, 11 pending in court and 8 concluded with conviction.

The only logical conclusion from this was that the IFIU was insufficiently staffed to handle the numerous cases on insurance fraud and further that 159 cases in one year were too few to reflect the losses incurred by insurers.

The study also established that the IFIU received reports from insurers meaning that insurers were well aware of its existence however most did not report the cases to them.

The researcher also concluded that an effective legal framework could not work without any effective institutional framework. The respondents brought it out quite clearly that the missing linking in effectively curbing insurance fraud was anautonomous well trained enforcement institutions. The main point of emphasis was the need to increase the capacity and training of enforcement institutions such as the IFIU.

The findings of the study were to the effect that consumer awareness and protection on insurance fraud was at high low because even some professionals handling insurance matters were not aware of the IRA guidelines which were key in eliminating insurance fraud malpractices in motor insurance claims, the existence of the IFIU and the key amendments to the Insurance act. Training of professionals and public education on insurance and insurance fraud is necessary if the IRA is to fulfil its mandate effectively.

The second conclusion in this study is that enforcement especially from the IRA through the IFIU was wanting due to the small number of cases that were reported and the outrageous number of cases reported that were pending investigation, this could only be attributed to understaffing, the employees were overwhelmed hence little investigation done. It was quite alarming to find out that magistrates of over 10 years in practice had not prosecuted any insurance fraud cases. This could have been due to the establishment of the IFIU in 2011 but irrespective of the circumstance insurance fraud cases have increased but the statistics on prosecution remain poor.

CHAPTER THREE

3.0 An Overview of Claims Management in Kenya

3.1 Introduction

An insurance contract is created using the principles of insurance that include. These principles include utmost good faith, insurable interest, proximate cause, indemnity and contribution. The judiciary respects and adheres to these principles because they are contained in legislation.

Having outlined the legal and institutional framework in insurance in chapter two, this chapter attempts to analyse the effectiveness of the said framework in claims management at insurance companies and through the courts. This is because it is at this stage that fraud is at its peak.

The primary business in insurance is Marketing, Underwriting and Claims management .Claims management is handled by the claims department whose role is to ensure that claims are paid as per the insurance contract and within the stipulated time lines. The success of an insurance company is dependent on the company‘s ability to pay claims. Service delivery at this stage is the one that sets apart top insurance companies from the rest. A company that is unable to pay claims or has inordinate delays in payment of claims faces risk of closure and litigation for recovery of claims by policy holders and other injured parties.

In 2018, medical, motor private and motor commercial insurance had the highest amount of paid claims.[87]

Bearing this in mind, this chapter looks at claims management procedures with relation to the applicability of laws and guidelines addressed in chapter 2 in order to establish the successes and the challenges faced in settling claims as it is at this juncture that insurance companies incur losses greatly due to fraudulent claims .This chapter also delves into litigation in claims, investigation and prosecution of insurance fraud cases and the changes affecting claims management effected by the recently amended Insurance Amendment Act 2019 no 11 of 2019.

[87] Insurance Industry Report for the Period October-December 2018 http://www.ira.go.ke/image/docs/quartly_2019/Q4-2018--Industry Release.pdf< accessed 15 July 2019

3.2Insurance Fraud

Insurance fraud has been defined to refer to an intentional dishonesty by a person so that he can unfairly and unlawfully benefit from an insurance transaction.[88]A fraudulent claim is one where the insured person lies to the insurer about certain information so that he or she can be unlawfully compensated. The ultimate goal of insurance fraud as indicated in the Insurance amendment act, 2019 is financial gain. The result has been payment of huge amounts of claims by the insurer leading to collapse of some companies. Huge losses, statutory receivership and at times denial of awards to genuine claimants are some of the effects of insurance fraud. Insurance fraud can be steered by individuals within the insurance companies, intermediaries such as insurance brokers, assessors and investigators, police officers, doctors, advocates among others.

The remaining insurers have opted to increase the premiums to cushion themselves against risks of fraudulent claims which then affect the insured and reduce the uptake of insurance thereby affecting the industry and the economy. It is therefore important for insurers to embrace thorough scrutiny of claims to ensure they are legitimate.

3.3 The Procedure

The IRA issued guidelines on claims management in 2012 to enhance competence, lucidity, the disclosure of information to insured individuals during the process of claiming compensation and to increase consumer satisfaction.[89]

The customer expects payment of the claim without delay while the insurer has to ascertain the legitimacy of the claim and the amount payable before settlement .The insurer uses other service providers in insurance to ascertain the legitimacy of a claim. These service providers include investigators, assessors, garages, doctors, advocates and loss adjustors.

Section 203 of the Act mandates an insurance company to pay compensation fees in form of a claim to the insured within 90 days after the establishment of liability. Lack of compliance with this instruction leads to a 5% levy of all the charges that the insurer is yet to pay.

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[89] Guidelines on claims Management>http://www.ira.go.ke/images/docs/Guidelines1_on_Claims_Management.pdf> accessed 15July 2019

[89] Guidelines on claims Management>http://www.ira.go.ke/images/docs/Guidelines1_on_Claims_Management.pdf> accessed 15July 2019

The procedures in claims management include claims notification and acknowledgement, claims handling, claims recoveries and at times litigation.

3.3.1 Loss Notification and Acknowledgement

Insurance policies require that the insured should notify their insurer of a loss immediately, after which the insured is required to give further information by completion of a claims form.

Upon receipt of claim notification, the insurer shall take action immediately but not later than seven (7) working days to acknowledge the notification, to avail all appropriate claim form s and provide a list of documents to be provided by the claimant or any further information. For liability claims, the insured is required to forward all correspondences from the claimant or their advocates .It is the insured's responsibility to prove that they suffered a loss and the loss was caused by a peril which was covered by the policy .The claim must be accompanied by proof in the form of receipt for repairs and assessment and valuation reports.[90]

Delays in reporting of the loss is detrimental as the insurer misses out the opportunity to investigate facts when the matter is still fresh making it difficult to distinguish genuine claims from false claims .

3.3.2 Claims Handling

At this stage the claims department will review a claim before submitting a report to the claimant. Claims review includes the process of analyzing the report to assess the information concerning the claims. Claims that are genuine and admissible are paid without the need for additional evaluation immediately for expeditious purposes[91].

In instances where the claim is admissible but the insurer requires additional assessment to quantify the payment, the company will hire a service provider to assess the damage or loss and give quantifiable figures. Meanwhile, the insured person is told to wait for the assessment report feedback[92].

There are also cases where the insurance company deems it fit to conduct further investigation to determine the admissibility of the damage by the insured person. The

[90] ibid
[91] ibid
[92] ibid

policyholder will be told about this requirement and its necessity during the investigation process. The insurance company will eventually offer settlement to the policyholder immediately the report is back after the investigation[93].

The insurer is required to also give an explanation to the insured for offering different amounts from the amounts claimed. Where the insurance company believes it is not liable for the damages or loss, it is mandated to immediately inform the insured person about the issue and reasons for the assertions.[94]

An insurer will settle a claim when the liability is admitted and upon being satisfied that the claim is legitimate and as per the insurance contract covered. According to section 203 of the Insurance Act, claims should be paid by the insurer within a period of 90 days. If on reporting of the claim in the event where liability is disputed the claim delays as the matter will proceed to court for determination. Similarly upon court's determination the insurer is still required to settle the claim within 90 days of that determination.

3.3.3Claims Recoveries

There are four ways through with an insurer can recover all or part of their outlay. These methods include claiming compensation from a third party who caused the loss or damage, from a party with subrogation rights against, from reinsurer, and from sale of salvage.[95]

3.3.4. Claims

In 2010, the Minister of Finance introduced structured compensation in Motor Insurance Accidents cases where he set a maximum amount payable to injured third parties at Kenya Shillings Three Million.[96]This was meant to guide the courts on the quantum damages payable.

This was made via amendments to the Insurance Motor vehicle 3rd party Risk Act which was passed in 2013.Prior to the amendments there was no limitation imposed to the amount an insured or a third party could claim in respect of injuries or damages when involved in motor vehicle accidents.

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[93] ibid
[94] ibid
[95]
[96] Insurance(Motor vehicle 3rd Party Risks Amendment Act), 2013 sec 5(b)iv

The Law Society of Kenya filed a petition against the amendments seeking a declaration that sec 3(a), 3(b) and 6 of the Amendment Act were unconstitutional because they denied the victim's access to justice. They submitted that the provisions deprived a victim the opportunity for a fair judicial evaluation of his/her personal/unique circumstance.[97] The sections provided that the amount paid for compensation was not to be more than the maximum percentage of the sum specified in section 5(b)(iv) of the act which was Ksh.3M and further that the Minister could in consultation with the Director of Medical services and the Insurance Regulatory Authority, prescribe compensation for other categories of disablement not provided in the schedule of the Act and that the percentage of the sum specified in section 5b(iv) would include but not be limited to the medical expenses on the judgement on the claim.

Section 6 on the other hand was amended by introducing structured compensation liability schedule which laid out the maximum compensation at Ksh.3, 000,000.

They argued that those provisions took away the judicial independence of the court to determine compensation .Issues such as age, earning capacity, careers, and prospects in life would no longer have a weighty impact on the case as the amount to be paid by the insurer could not exceed Ksh.3, 000,000 irrespective of the situation.

The court declared section 3a, 3b and 6 of the Insurance(Motor Vehicle 3rdpartyrisks) Amendment Act, 2013 as being unconstitutional, null and hence void on the basis that the injured party was free to proceed and claim against the insured party where the court awards more than the insured Ksh.3,000,000.None of the provisions of the amendments in the act could prevent the injured party from making his claim and further that the schedule introduced by section 6 of the amendment act limited the ability of the court to determine the liability of the parties thus being unconstitutional to the extent that it limited the right to bodily integrity.[98]

The court however did not declare the maximum amount payable under section 5b (iv) of Kshs 3M unconstitutional. Despite this determination there have been varied court judgements some awarding judgments above Ksh.3M while other strictly applying the provisions of section 5b (iv) in their determinations and setting aside judgements that made higher awards.

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[97] Law Society of Kenya vs Attorney General in High Court Petition no 148 of 2014 at Nairobi
[98] ibid

In *African Merchant Assurance Company Limited versus William Murithi Kimaru suing as the administrator to the estate of Patrick Kuira Muriithi (deceased)*Civil appeal no 34 of 2016 ,the court in overturning the judgement of the Chief magistrate's court in Kisumu Civil case no 108 of 2015 dated 13th May, 2016 which had awarded damages Ksh,6, 105,999 together with costs of Ksh.295,000 with reliance on the Law Society of Kenya v Attorney General and 3 others stated that section 5 b(iv) was not declared unconstitutional and directed that the insurer was not obliged to pay any amount above Ksh.3,000,000 nor could the decree holder recover more than the Kshs 3M from the insurer but he could recover from the insured.

Similarly in *Gateway Insurance Co Ltd V Jamila Suleiman and Anor* Civil appeal no 227 of 2017 the court of appeal set aside judgement of Kshs, 3,053,275 issued in Chief Magistrate's Court Civil Case no 1951 of 2012 in Mombasa and substituted it to Ksh.3M inclusive of costs on the basis that section 5b(iv) of the Insurance Motor vehicle 3rd Party Risks Amendment Act 2013 stipulates that for one to comply with the requirements of section 4, the insurance policy must insure such individuals, or classes of persons that is stipulated in the policy in respect of any liability which the person or group of persons may incur regarding a bodily injury to a person caused by a or arising out of the motor vehicle on a road provided that a policy in terms of this section shall not be required to cover liability of any sum in excess of Kshs.3 million arising out of a claim by one person.

The court's interpretation of section 5b (iv) was that in respect of a claim by one person the insurer's liability ought not to exceed Ksh.3M as such the court could only enter judgement against the insurer up to a maximum of Kshs 3M but these provision did not bar a claimant entitled to file a declaratory suit against the insurer but to whom an award had been given exceeding Ksh.3M from filing a suit against the insurer.

3.3.5 Prosecution of Fraudulent Insurance Claims

The Insurance Fraud Investigation Unit is a division under the Criminal Investigation Unit mandated to investigate insurance fraud. It works with the IRA in investigation and prosecution of insurance fraud within the industry.

The unit's main roles include;-

1. Receiving reports of suspected insurance fraud.
2. Investigation of insurance fraud related offences.

3. Coordination in investigation of insurance related offences with other law enforcement state agencies.
4. Preparation of investigative reports for criminal investigation and administrative action
5. Arresting and prosecution of suspects in courts.

In the Fourth Quarter of 2018, 26 cases were reported to the IFIU out of which 21 cases were under investigation, 4 cases were pending in court and 1 was withdrawn.[99]

In the First Quarter of 2019, 30 fraud cases were reported to the IFIU 27 cases were pending investigation, 2 were pending before court and 1 was pending arrest of known accused.[100]

The types of cases are as listed below

TYPE OF CASE	Q4 YEAR 2018(NO OF CASES)	Q1 2019(NO OF CASES)
1. Theft by Agent	15	4
2. Theft by Insurance Company Employees	4	1
3. Fraudulent Motor(Damage/Theft)Claim	3	9
4. Fraudulent Medical Claims	2	2
5. Fraudulent Motor Accident(Injury Claims)	1	1
6. Fraudulent Personal Accident Claims	1	
7. Complaint against broker/agent		4
8. Fraudulent funeral claim		1
9. Forgery `of company		1

[99]Insurance Industry Report for the Period October-December 2018 <http://www.ira.go.ke/image/docs/quartly_2019/Q4-2018--Industry Release.pdf< accessed 15 July 2019
[100] Insurance Industry Report for the Period January –March 2018 <http://www.ira.go.ke/image/docs/quartly_2019/Q1-2019--Industry Release.pdf> accessed 15 July 2019

documents		
10. Fraudulent WIBA claims		1
11. Fraudulent life claim		1
12. Operating without being licensed		1
13. Issuing fraudulent bankers cheque		1
14. Others		1
15. Complaint against insurance companies		1
TOTAL	26	30

The number of cases reported is too small compared to the vastness of the insurance industry raising the question as to whether there has been adequate awareness of the existence of the unit to insurers and the insured.

Public awareness is necessary to enable the IFIU to fully achieve its mandate.

The statistics raise a lot of questions on the capacity of the IFIU in terms of capacity of the personnel. The percentage of cases still pending investigation is more than 75% of the cases reported and the number of cases pending in court is less than 10%. This statistics calls for increase in the number of personnel and increase in branches of the IFIU either regionally or in a devolved manner as the IFIU is only situated within the capital of the country whilst insurance business is carried out all over the country.

Training is also necessary to expedite conclusion of matters as from the statistics there's no case that has been concluded so far.

3.4 Conclusion

The study finds that the laws and guidelines in place to be specific and well drafted to ensuring that the acts and omissions amounting to insurance fraud are well defined and covered. The IRA's guidelines on claims management for example have succeeded quite substantially in providing guidance on motor insurance claims management in order to avert false and fraudulent claims. The Insurance Amendment Act, 2019 has also been drafted well enough to significantly deter insurance fraud and insurance malpractice with well defined provisions on insurance fraud and insurance malpractice and providing punitive penalties for such acts or omissions. Once fully implemented the Amendment act will significantly address insurance fraud with minimal reviews following to ensure efficiency in the industry.

The study that the moderate success in curbing motor insurance fraud is attributed to gaps in the institutional framework. The small number of cases being reported and prosecuted on insurance fraud as compared to the amount of losses incurred by the insurance industry raises a lot of questions on capacity of the Authority. The study argues that incapacity of the institutions involved in enforcement in terms of the number of employees, training and competency requirements of enforcement officers is a major setback in the implementation of the institutional framework in insurance. This lack affects reporting, investigation of cases, monitoring and prosecution of cases.

CHAPTER FOUR

4.0 Summary of Findings, Conclusions and Recommendations

4.1Summary of Findings

The object of the study was to analyse the effectiveness of the legal and institutional framework in insurance Kenya in curbing fraudulent insurance claims; to review the proposed Insurance (Amendment) Act 2019. The study was conducted during a period when the insurance act was facing amendments and therefore it was necessary to scrutinize the amendments in relation to curbing and prosecuting insurance fraud cases and to come up with workable recommendations to curb fraud in the Motor Insurance sector and in the insurance sector.

The study assessed whether the current legal and institutional framework in insurance governing motor insurance in Kenya and how success it had in curbing insurance fraud.

The study was motivated by the fact Motor Insurance was one of the three insurances businesses that has had negative growth on non-life insurance due to fraudulent claims and secondly because motor insurance recorded the highest number of claims in 2017 and lastly because very little research had been directed towards understanding the impact of an effective legal and institutional framework in curbing Insurance fraud in the motor insurance industry.

The study also succeeded in outlining the chronological development of the legal and institutional framework towards curbing of insurance fraud in Kenya

4.2 Conclusion

The study found out that the Insurance act at the time had not addressed the issue of insurance fraud adequately leaving room for mischief. The offences were not well defined and the penalty not tough enough to encourage deterrence. Despite this, the regulation could not be considered inadequate as the IRA had issued express guidelines especially on motor insurance that could be able to ensure that only legitimate claims were paid. These regulation sufficiently supplemented the Insurance act.

The study however found that despite the existence of a good legislation the tables were turned when it came to the institutional framework. Enforcement of the Act was wanting first of based on the number of cases reported and prosecuted by the IRA and IFIU in comparison to the amount of losses faced by insurance companies. The margin was so small and could not tally as insurance companies were losing millions annually to insurance fraud while the IFIU reported around 30 cases quartely.This discrepancy being an indicator that either insurers and the public were not aware of the existence of IFIU and the roles of the IRA as the regulator insurance . The output raised questions on the capacity of the IRA and the IFIU to fully tackle the vice in insurance.

The study also reviewed the Insurance Amendment Act, 2019 and compared it with the Insurance act. It was established that the amendments contained in the Amendment act had made great strides in outlining what constituted insurance fraud, specific acts and omission outlined bringing to an end the era of ambiguity in legislation. The act also enhanced the penalties tenfold. This was aimed at promoting deterrence.

The IRA and the Commissioner were also been allocated more responsibilities and duties in supervision and management with the hope that this kind of autonomy would enhance performance as it was noted interference normally hinders and slows down progress due to bureaucracy.

Enforcement agents such as judicial officers and prosecutors interviewed also brought out the fact that despite their roles in litigation claims and prosecution of insurance fraud matters they had not received any training on insurance.

It was also established that some of the enforcement agents were not aware of the amendments to the act.

It was also noted that majority of the interviews with 10 over years in practice had not encountered insurance fraud cases in court raising the alarm on enforcement and reporting of insurance fraud.

The main challenges confirmed by this study was the lack of an effective institutional framework in insurance to implement an effective legislation due to lack of public awareness and education leading to minimal reporting and prosecution of insurance fraud cases, incapacity of the IRA and IFIU to tackle numerous cases countrywide as they are based only in Nairobi and little exposure and training on to insurance to enforcement agents.

4.3 Recommendations

The study recommends the following actions;

4.3.1 Recommendations on the Legal Framework

The findings of the study were that the legal framework had improved progressively in addressing insurance fraud by the introduction of specific provisions outlining acts and omissions constituting insurance fraud. The legal framework also succeeded moderately in eradicating insurance fraud by providing strict guidelines to monitor false claims and malpractice however due to enactment in July, 2019 an appraisal would be necessary after a substantial amount of time to assess the effectiveness of the Act in terms of insurance fraud and also autonomy of the IRA.

4.3.2 Recommendations on Institutional Framework

Training of IFIU officers on the New Insurance Amendment Act, 2019 is necessary to ensure that the officers can competently and professionally deal with insurance fraud cases.

Training of judicial officers and prosecutors on insurance fraud, guidelines on insurance and the New Insurance Amendment Act, 2019 is necessary to ensure that cases are dealt with competently.

Consumer education awareness on the New Insurance Amendment Act, 2019, the IFIU's role in investigation and prosecution of insurance fraud cases is necessary to encourage reporting of cases.

Cooperation between the IFIU, IRA and insurance companies is necessary as the law and the guidelines present can only be well implemented if the parties work mutually.

Expansion of IRA and IFIU regionally or in counties to facilitate accessibility of their services nationally because as it stands the IFIU is only based in Nairobi thus limiting access to their services other regions. This goes hand in hand with increasing the number of personnel at IFIU.

4.4 Limitation of the Study

The study concentrated on consumers, insurers, judicial officers, prosecutors and the IRA. Intermediaries such as brokers and agents were not involved as they are strictly put not enforcers of the institutional framework.

4.5Suggestions for Further Study

The study concentrated on legal and institutional framework combined however the IFIU is very critical in curbing insurance fraud. Research should be conducted on the place of the IFIU in insurance fraud management, the effectiveness of this department to insurance regulation and monitoring

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APPENDIX 1: Sample Questionnaire 1

Topic: Motor Insurance Fraud in Kenya, **An Analysis Of The Effectiveness Of The Legal And Institutional Framework In Insurance In Kenya In Curbing Insurance Fraud.**

SECTION A: PERSONAL INFORMATION

1. Name(Optional)
2. Company(Optional)
3. Position
4. Number of years' experience in the current position(whether in current organization or from another organization)
5. Section department

SECTION B AWARENESS

1. On a scale of 1-5, how would you rate the performance of the insurance industry in Kenya ?

1	2	3	4	5

1 Excellent= 2= Good 3=Fair 4= Bad 5= Very Bad

2. What factors do you think have contributed to the current state of the insurance industry in Kenya?
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3. How would you rate the regulation of the insurance industry in Kenya with regard to the following aspects?

	A	B	C	D	E
Regulation					

Supervision					
Development of the industry					
Enforcement					
Consumer education and protection					
Ensuring stability and fair competition					

A=Excellent B=Good C= Fair D=Bad E=Terrible

4. What were your criteria for the decision in 3?

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5. Do you think the IRA has sufficient capacity to curb insurance fraud in Kenya?

1) Yes { } 2. No { }

If so how?

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6. Are the claims management guidelines issued by the IRA helpful in curbing insurance fraud in Kenya?

    1) Yes { } 2. No { }

If so how?

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7. Will the new Insurance Amendment Act, 2019 be effective in curbing insurance fraud in Kenya?

    1) Yes { } 2. No { }

If so how?

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8. What factors fuel insurance fraud in the Kenyan industry?
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9. What form of regulation is best suited to handle insurance fraud?

1	2	3

1= State regulation2= Self-regulation 3= joint effort

10. Was the establishment of the Insurance Fraud Investigative Unit sufficient to curb insurance fraud?

Yes { } 2. No { } 3. Don't knwo { }

If so how?
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SECTION C: ENFORCEMENT

11. Have you ever handled a case on Motor Insurance Fraud?

1. Yes { } 2. No { }

12. How long do such cases take?

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13. What are the penalties issued in insurance fraud offences upon conviction?

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14. What challenges do you face when handling insurance fraud cases?

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15. Have you handled civil claims on insurance?

1. Yes { } 2. No { }

If so,what factors determine awards in civil claims in insurance?

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16. Roughly how many civil claims on insurance do you handle quarterly?

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17. What is the approximate range in awards in civil claims? (in Kshs)

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18. Have you ever issued an award above the Kshs. 3 million to claimants in insurance claims?

1. Yes { } 2. No { }

If so what was your justification for the award?

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19. Have any of your judgements above Ksh.3M been appealed and successfully overturned?

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20. What is your opinion on the imposed Cap of Kshs. 3 million limit to be paid an insurer in insurance claims?

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21. Have you ever encountered a claim in court that you suspected to be fraudulent?

1. Yes { } 2. No { }

If so what we were the red flags in the claim and what action did you take?

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22. What challenges do you face when handling insurance claims matters?

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23. Have you acquired any special training on Insurance and Insurance Fraud?

2. Yes { } 2. No { }

If so, by whom?

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24. What other legal and institutional recommendations would you propose to strengthen the insurance regulation in Kenya?

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APPENDIX 2: Sample Questionnaire 2

Topic: Motor Insurance Fraud in Kenya, **An Analysis Of The Effectiveness Of The Legal And Institutional Framework In Insurance In Kenya In Curbing Insurance Fraud.**

SECTION A: PERSONAL INFORMATION

1. Name(Optional)
2. Company(Optional)
3. Position
4. Number of years' experience in the current position(whether in current organization or from another organization)
5. Section department

SECTION B AWARENESS

6. On a scale of 1-5, how would you rate the performance of the insurance industry in Kenya in 2017?

1	2	3	4	5

1 Excellent= 2= Good 3=Fair 4= Bad 5= Very Bad

7. What factors do you think have contributed to the current state of the insurance industry in Kenya? ……………………………………………………………………….

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8. How would you rate the regulation of the insurance industry in Kenya with regard to the following aspects?

	A	B	C	D	E
Regulation					

Supervision					
Development of the industry					
Enforcement					
Consumer education and protection					
Ensuring stability and fair competition					

A=Excellent B=Good C= Fair D=Bad E=Terrible

9. What were your criteria for the decision in 3?

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10. Do you think the IRA has sufficient capacity to curb insurance fraud in Kenya?

2) Yes { } 2. No { }

If so how?

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11. Are the claims management guidelines issued by the IRA helpful in curbing insurance fraud in Kenya?

    2) Yes { } 2. No { }

If so how?

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12. Will the new Insurance Amendment Act, 2019 be effective in curbing insurance fraud in Kenya?

    2) Yes { } 2. No { }

If so how?

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13. What factors fuel insurance fraud in the Kenyan industry?

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14. What form of regulation is best suited to handle insurance fraud?

1	2	3

1= State regulation2= Self-regulation 3= joint effort

15. Was the establishment of the Insurance Fraud Investigative Unit sufficient to curb insurance fraud?

Yes { } 2. No { } 3. Don't know { }

If so how?

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SECTION C: ENFORCEMENT

16. Have you handled insurance fraud cases?

1. Yes { } 2. No { }

If so,what are the penalties for such offences?

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17. Have you handled civil claims on insurance?

2. Yes { } 2. No { }

If so,what factors determine awards in civil claims in insurance?

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18. What is the approximate range in awards in civil claims?

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19. Have you ever handled appeals from the subordinate courts where judgements had been made for an award above the Kshs. 3 million to claimants in insurance claims?

1. Yes { } 2. No { }

If so what was your judgement on the appeal?

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What was the basis for your judgement?

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20. What is your opinion on the imposed Cap of Kshs. 3 million limit to be paid by an insurer in insurance claims?

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21. Have you acquired any special training on Insurance and Insurance Fraud?

    3. Yes { }   2. No { }

If so, by whom?

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22. What other legal and institutional recommendations would you propose to strengthen the insurance regulation in Kenya? We need a tribunal dealing with Insurance Matters to weed out abuses of the system by the legal practitioners.

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APPENDIX 3: Sample Questionnaire 3

Topic:Motor Insurance Fraud in Kenya, **An Analysis Of The Effectiveness Of The Legal And Institutional Framework In Insurance In Kenya In Curbing Insurance Fraud.**

SECTION A: PERSONAL INFORMATION

1. Name(Optional)
2. Company(Optional)
3. Position
4. Number of years' experience in the current position(whether in current organization or from another organization)
5. Section department

SECTION B AWARENESS

6. On a scale of 1-5, how would you rate the performance of the insurance industry in Kenya in 2017?

1	2		4	5

1 Excellent= 2= Good 3=Fair 4= Bad 5= Very Bad

7. What factors do you think have contributed to the current state of the insurance industry in Kenya? ………………………………………………………………………….

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8. How would you rate the regulation of the insurance industry in Kenya with regard to the following aspects?

	A	B	C	D	E
Regulation					

Supervision					
Development of the industry					
Enforcement					
Consumer education and protection					
Ensuring stability and fair competition					

A=Excellent B=Good C= Fair D=Bad E=Terrible

9. What were your criteria for the decision in 3?

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10. Do you think the IRA has sufficient capacity to curb insurance fraud in Kenya?

    3) Yes { } 2. No { }

If so how?

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11. Are the claims management guidelines issued by the IRA helpful in curbing insurance fraud in Kenya?

    3) Yes { }   2. No { }

If so how?

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12. Will the new Insurance Amendment Act, 2019 be effective in curbing insurance fraud in Kenya?

    3) Yes { }   2. No { }

If so how?

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SECTION C ENFORCEMENT

13. What roles does the IRA play in curbing insurance fraud in Kenya?

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14. Does the IRA have a specific department dealing with insurance fraud?

1. Yes { } 2. No { }

If yes,

a) How many employees handle insurance fraud matters at the IRA?

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b) What are the academic and professional qualifications of individuals working in this department?

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15. Does the IRA conduct investigations on Insurance Fraud?

Yes { } 2. No { }

If not, who does?

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16. Where and from whom do you get information on insurance fraud?

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17. What actions do you take against industry players implicated in insurance fraud?

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18. What actions do you take against individuals implicated in insurance fraud?

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19. How often do you conduct audits on insurance companies?

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20. What roles does the Insurance Fraud Investigation Unit (IFIU) play in curbing insurance fraud?

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21. How many employees work at the IFIU?

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22. What are the academic and professional qualifications of the employees at IFIU?

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23. What form of training does one require to work at the IFIU?

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24. How many cases of insurance fraud were reported to the IFIU in 2017?

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25. Who reports such cases?

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26. How many Insurance fraud cases reported in 2017 are?

- Under investigation
- Pending in court
- Concluded with conviction
- Concluded with acquittal
- Withdrawn

27. How many cases before court in 2017 on insurance fraud are?

- Withdrawn
- Pending in court
- Concluded with conviction

- Concluded with acquittal

28. Does the IFIU get support from insurance companies during investigation?

1. Yes { } 2. No { }

29. Has the IFIU had any impact in curbing of insurance fraud in Kenya since its establishment?

1. Yes { } 2. No { }

If so how

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If not why do you believe so?

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30. What challenges does the IRA faces in dealing with Insurance Fraud in the industry in Kenya?

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31. What recommendations on corrective actions for investigation and prosecution of insurance fraud related offences can you suggest?

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APPENDIX 4: Sample Questionnaire 4

Topic: Motor Insurance Fraud in Kenya**An Analysis Of The Effectiveness Of The Legal And Institutional Framework In Insurance In Kenya In Curbing Insurance Fraud.**

SECTION A: PERSONAL INFORMATION

1. Name(Optional)
2. Company(Optional)
3. Position
4. Number of years' experience in the current position(whether in current organization or from another organization)
5. Section department

SECTION B AWARENESS

6. On a scale of 1-5, how would you rate the performance of the insurance industry in Kenya?

1	2	3	4	5

1 Excellent= 2= Good 3=Fair 4= Bad 5= Very Bad

7. What factors do you think have contributed to the current state of the insurance industry in Kenya?
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8. How would you rate the regulation of the insurance industry in Kenya with regard to the following aspects?

	A	B	C	D	E
Regulation					

Supervision					
Development of the industry					
Enforcement					
Consumer education and protection					
Ensuring stability and fair competition					

A=Excellent B=Good C= Fair D=Bad E=Terrible

9. What were your criteria for the decision in 3?

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10. Do you think the IRA has sufficient capacity to curb insurance fraud in Kenya?

4) Yes { } 2. No { }

If so how?

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……………………If not why?

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11. Are the claims management guidelines issued by the IRA helpful in curbing insurance fraud in Kenya?

    4) Yes { }   2. No { }

    If so how?
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    ……………………

12. Will the new Insurance Amendment Act, 2019 be effective in curbing insurance fraud in Kenya?

    4) Yes { }   2. No { }

    If so how?
    ……………………………………………………………………………………………
    ……………………………………………………………………………………………
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    ……………………

13. What factors fuel insurance fraud in the Kenyan industry?

…………………………………………………………………………………………

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14. What form of regulation is best suited to handle insurance fraud?

1	2	3

1= State regulation2= Self-regulation 3= joint effort

15. Was the establishment of the Insurance Fraud Investigative Unit sufficient to curb insurance fraud?

Yes { } 2. No { } 3. Don't know { }

If so how?

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SECTION C: ENFORCEMENT

16. Have you ever handled a case on Motor Insurance Fraud?

2. Yes { } 2. No { }

17. How long do such cases take?

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…….

18. Are the investigating officers handling Insurance Fraud cases;
    a) { } Police officers from NPS
    b) { } Officers from the Insurance Fraud Investigation Unit(IFIU)

19. What are the penalties issued in insurance fraud offences upon conviction?

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20. Based on the number of cases that you handled on insurance fraud, what has been the most common outcome?
    1) Withdrawal { }
    2) Acquittal { }
    3) Conviction { }

In your opinion what factors contribute to such outcomes?

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21. What challenges do you face when handling insurance fraud cases?

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22. What is your opinion on the imposed Cap of Kshs. 3 million limit to be paid by an insurer in insurance claims?

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23. Does the Office of the Director of Public Prosecutions have a special unit dealing with insurance fraud?

1. Yes { } 2. No { }

24. Have you acquired any special training on Insurance and Insurance Fraud?

3. Yes { } 2. No { }

If so, by whom?

………………………………………………………………………………………

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25. What legal and institutional recommendations would you propose to strengthen the insurance regulation in Kenya?

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APPENDIX 5: Sample Questionnaire 5

Topic:Motor Insurance Fraud in Kenya; **An Analysis Of The Effectiveness Of The Legal And Institutional Framework In Insurance In Kenya In Curbing Insurance Fraud.**

SECTION A: PERSONAL INFORMATION

1. Name(Optional)
2. Company(Optional)
3. Position
4. Number of years' experience in the current position(whether in current organization or from another organization)
5. Section department

SECTION B AWARENESS

6. On a scale of 1-5, how would you rate the performance of the insurance industry in Kenya in 2017?

1	2	3	4	5

1 Excellent= 2= Good 3=Fair 4= Bad 5= Very Bad

7. What factors do you think have contributed to the current state of the insurance industry in Kenya?
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8. How would you rate the regulation of the insurance industry in Kenya with regard to the following aspects?

	A	B	C	D	E
Regulation					

Supervision					
Development of the industry					
Enforcement					
Consumer education and protection					
Ensuring stability and fair competition					

A=Excellent B=Good C= Fair D=Bad E=Terrible

9. What were your criteria for the decision in 3?

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10. Do you think the IRA has sufficient capacity to curb insurance fraud in Kenya?

5) Yes { } 2. No { }

If so how?

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……………………If not why?
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11. Are the claims management guidelines issued by the IRA helpful in curbing insurance fraud in Kenya?

    5) Yes { } 2. No { }

    If so how?
    ……………………………………………………………………………………
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    ……………………If not why?
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12. Will the new Insurance Amendment Act, 2019 be effective in curbing insurance fraud in Kenya?

    5) Yes { } 2. No { } 3. Don't know { }

    If so how?
    ……………………………………………………………………………………
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    ……………………If not why?
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13. What form of regulation is best suited to handle insurance fraud?

1	2	3

1= State regulation2= Self-regulation 3= joint effort

14. Was the establishment of the Insurance Fraud Investigative Unit sufficient to curb insurance fraud?

 1. Yes { } 2. No { } 3. Don't know { }

 If so how?

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15. What factors fuel insurance fraud in the Kenyan industry?

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SECTION C: ENFORCEMENT

16. In your opinion to what extent do you think your company suffers from insurance fraud?

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17. Does your company have in place documented processes to help in detecting fraudulent claims?

1. Yes { }   2. No { }

If so at what levels are the processes

1) Intermediary level { }
2) Underwriting level { }
3) Claims level { }
4) At settlement level { }

18. How does your company establish that a claim is fraudulent?

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19. How often does your company experience such cases?

1. Very often { } 2. Often { } 3. Rarely { } 4. Never { }

20. What actions do you take when it is established that a claim is fraudulent?

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21. To what extent does your company rely on intermediaries to validate the authenticity of a claim?

1. Great extent { } 2. Significant Extent { } 3. Moderate { } 4. Small Extent { } 5. No extent { }

22. What classes of insurance business are most exposed to insurance fraud?

Insurance class	
1. Aviation	

2. Engineering	
3. Fire Domestic	
4. Fire Industrial	
5. Public liability	
6. Marine	
7. Motor Private	
8. Motor Commercial	
9. Personal Accident	
10. Theft	
11. Work Injury Benefits(WIBA)	
12. Micro Insurance	
13. Medical	
14. Miscellaneous Insurance	

23. What actions does your company take on suspected fraudulent claims?

1. Cancel the policy and reject the claim { }
2. Report to Authorities { }

24. Where do you report fraud losses and claims?

1. AKI { } 2. IRA. { } 3. IFIU { } 4. NPS { }

25. Have you handled civil claims on insurance?

4. Yes { } 2. No { }

If so, what factors determine awards in civil claims in insurance?

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26. What is the approximate range in awards in civil claims?

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27. Have you ever appealed against an award of judgment above the Kshs. 3 million to claimants in insurance claims?

    1. Yes { }   2. No { }

    If so what was your justification for the appeal?

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28. What challenges do you face when handling insurance claims matters?

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29. Have you acquired any special training on Insurance and Insurance Fraud?

    5. Yes { }   2. No { }

If so, by whom?

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30. What other legal and institutional recommendations would you propose to strengthen the insurance regulation in Kenya? We need a tribunal dealing with Insurance Matters to weed out abuses of the system by the legal practitioners.

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