SECURING THE PROTECTION OF WHISTLE-BLOWERS IN THE FIGHT AGAINST CORRUPTION: MOVING BEYOND WITNESS PROTECTION IN KENYA'S CRIMINAL JUSTICE SYSTEM

A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LLM)

BY:

JULIE WAHONYA

(REG. NO. G62/75060/2014)

TO:

THE UNIVERSITY OF NAIROBI

(SCHOOL OF LAW)

DATE: FRIDAY, 12TH NOVEMBER 2021

TABLE OF CONTENTS

DECLARATION OF ORIGINALITY

Candidate's Name: Julie Wahonya.

Registration Number: G62 /75060/2014.

College: Humanities and Social Sciences.

Faculty/School/Institute: School of Law.

Department: Public Law.

Course Name: Master of Laws (LLM).

Title of the Paper: Securing The Protection of Whistle Blowers in the Fight Against Corruption: Moving Beyond Witness Protection in Kenya's Criminal Justice System.

DECLARATION:

1. I understand what Plagiarism is and I am aware of the University's policy in this regard.
2. I declare that this research paper is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's

work or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.

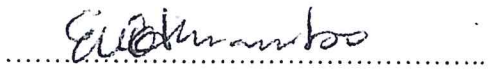
3. I have not sought or used the services of any professional agencies to produce this work.
4. I have not allowed and shall not allow anyone to copy my work with the intention of passing it off as his or her own work
5. I understand that any false claim in respect of this work shall result in disciplinary action in accordance with the University of Nairobi Plagiarism Policy

JULIE WAHONYA

(Candidate)

WEDNESDAY, 12TH NOVEMBER 2021

This research paper has been submitted with my approval as the University supervisor:



ELIZABETH WANGARI ODHIAMBO

UNIVERSITY OF NAIROBI SCHOOL OF LAW

WEDNESDAY, 12TH NOVEMBER 2021

DEDICATION

I dedicate this research paper to my parents for firmly encouraging me to pursue my studies to completion; my loving husband Meshack John Odhiambo for your financial, emotional and, social support; to my beautiful daughters Tara, Tamara and Teresa for your queenly patience whenever I sat up late into the night, reading, researching and writing.

ACKNOWLEDGMENTS

I acknowledge the Almighty God for good health and finances throughout the study period.

My sincere appreciation goes to my Supervisor, Elizabeth Wangari Odhiambo. You are the constant spring of wisdom from whence I drew support, guidance, lessons, and inspiration to soldier on with and complete what would, otherwise, have been an impossible task.

Dr. Muthomi Thiankolu, my Reader; here's the fruit of your continuous, firm, timely reviews and comments.

It would be remiss of me if I did not hand a bag of gratitude to my employer for providing me with the two necessary ingredients for completing this assignment: time and information.

To my family and friends who stood with me during the time of this study; I lack adequate words to thank you enough for your unfathomable love and support.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights.
AU	African Union.
AUPCC	African Union Convention on Preventing and Combating Corruption.
CAJ	Commission on Administrative Justice.
CIA	Central Intelligence Agency.
DPP	Director of Public Prosecutions.
EACC	Ethics and Anti-Corruption Commission.
IEBC	Independent Electoral and Boundaries Commission.
KEMSA	Kenya Medical Supplies Authority.
MOU	Memorandum of Understanding.
NSA	National Security Agency.
OECD	Organisation for Economic Co-operation and Development.
UNCAC	United Nations Convention Against Corruption.
UNODC	United Nations Office on Drugs and Crime.
US	United States of America.
WPA	Witness Protection Agency.

LIST OF STATUTES

Kenyan Statutes

The Access to Information Act, 2016.

The Anti-Corruption and Economic Crimes Act, 2003.

The Bribery Act, 2016.

The Constitution of Kenya, 2010.

The Employment Act, 2007.

The Evidence Act, 1963.

The Proceeds of Crime and Anti-Money Laundering Act, 2009.

The Victims Protection Act, 2014.

The Whistle-blower Protection Bill, 2018.

The Witness Protection Act, 2006.

United States Statutes

The Dodd-Frank Act, 2010.

The False Claims Act, 1986.

The Federal Mine Health and Safety Act, 1977.

The Sarbanes Oxley Act, 2002.

The Water Pollution Control Act, 1948.

South African Statutes

The Defence Act, 2002.

The National Environmental Management Act, 1998.

The Protected Disclosures Act, 2000.

LIST OF INTERNATIONAL STATUTES, DECLARATIONS AND GUIDELINES

The African Commission on Human and Peoples' Rights.

The African Union Convention on Preventing and Combating Corruption.

The G-20 Guiding Principles for Whistle-blower Protection.

The OECD Recommendations on Improving Ethical Conduct.

The United Nations Convention Against Corruption.

LIST OF CASES

Kenya Cases

Michael Sistu Mwaura Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others, High Court of Kenya (Nairobi) Constitutional Petition No. 230 of 2015.

Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others, Civil Appeal (Nairobi) No. 13 of 2015.

Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another, Employment and Labour Relation Court (Nakuru) No. 126 of 2014.

Peter Njuguna Mwangi v Witness Protection Agency, High Court of Kenya (Nairobi) Miscellaneous Application No. 2 of 2013.

Philomena Mbete Mwilu v Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) High Court of Kenya (Nairobi) Constitutional Petition No. 295 of 2018.

Republic v Director of Public Prosecutions & 4 others Ex parte - Senator Johnson Nduya Muthama, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 424 of 2014.

Samuel Kiprono Chepkonga v Kenya Anti-Corruption Commission & Another, High Court of Kenya (Nairobi) Civil Suit No. 181 of 2007.

Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another, High Court of Kenya (Nairobi) Civil Suit No. 1729 of 2001.

Tom Odege & Another v Lawrence Ochieng Nyaguti, High Court of Kenya (Nairobi) Civil Suit No. 382 of 2015.

United States Cases

Garcetti v Ceballos, 547 U.S. 410 (2006).

Pickering v Board of Education, 391 U.S. 563 (1968).

Realty Trust, Inc v Somers 138 S Ct 767 (2017).

Vermont Agency of Natural Resources v United States ex rel Stevens 529 U.S. 765 (1999).

South African Cases

Lephoto v National Institute for Humanities and Social Sciences and Another [2017] ZALCJHB 442.

Ngobeni v Minister of Communications and Another [2014] ZALCJHB 96; [2014] 35 ILJ 2506 (LC).

Swanepoel v Minister van Veiligheid en Sekuriteit [1999] 4 SA 549 (T).

ABSTRACT

There have been numerous cases of corruption in Kenya. However, most of them fail at the prosecution stage due to the unavailability of witnesses. Those who raise the red flag on corruption in the public and private sectors, the whistle-blowers, are key players in the successful prosecution of corruption cases. This is because the information they have is vital for investigations into, and the eventual prosecution of the cases. There has, however, been a trend in Kenya where most whistle-blowers fail to furnish the investigative authorities with some crucial information or make certain disclosures. The reason for holding back such information is due to the widespread victimization, threats, and violation of their rights. This can be attributed to inadequate legal mechanisms for whistle-blower protection. The resultant hesitancy of whistle-blowers has slowed – if not fully bogged – down prosecution of corruption cases because there are no adequate guarantees on their protection. This paper seeks to examine and answer three questions. The first is whether the legal frameworks in Kenya as currently constituted are committed to the protection of whistle-blowers to aid the fight against corruption. The second is to identify whether mechanisms exist in the private and public sectors to protect whistle-blowers and to assess whether they are adequate. Lastly, this study seeks to explore whether other common law jurisdictions, that is, the United States and South Africa, have been able to ensure the protection of whistle-blowers, hence enhancing their fight against corruption. This paper makes three findings. First, Kenya does not have a legal framework that is committed to comprehensively protect whistle-blowers. The frameworks that mention whistle-blowers are lacking in provisions that expressly state how whistle-blowers should be protected. Secondly, there is no express protection of whistle-blowers in the private sector. This stems from inadequate legal frameworks and internal policies for the

protection of whistle-blowers. This, however, does not imply that corruption does not take place in the private sector. Thirdly, unlike Kenya, the United States and South Africa have taken steps to ensure the protection of whistle-blowers. In the United States, the existence of a comprehensive legal framework offers protection to whistle-blowers in public and private sectors. This is enhanced by the existence of federal and state legislation. In South Africa, the protection of whistle-blowers in public and private sectors is enhanced through formulating whistle-blower protection laws. The existing whistle-blower protection mechanisms in Kenya do not offer sufficient protection. This greatly hampers successful prosecution of corruption cases as whistle blowers are not willing to disclose any information without protection exposing them to retaliation, thereby frustrating the national anti-graft war. This paper, therefore, recommends the enactment of the Whistle-blower Protection Bill of 2018, with the necessary amendments. The paper also recommends that the government should encourage whistle-blowing by introducing a monetary incentive for those who make disclosures that ultimately lead to the successful prosecution of corruption cases. The paper also recommends the formulation of internal whistle-blower mechanisms in private companies to encourage those intending to blow the whistle on corrupt do not lose their employment and their identity is not disclosed. The paper recommends the use of a two-tier protection mechanism for the whistle-blower. The paper recommends institutional reforms including EACC and CAJ, the bodies envisioned by the Whistle-Blower Protection Bill, 2018 to implement the Bill. Lastly, the paper recommends Kenya should make steps towards the realization of the State obligations and commitments made in the international and regional instruments on whistle blower protection through implementation of those instruments by enacting the Whistle-blower Bill, 2018.

CHAPTER ONE: INTRODUCTION

1.1 Background and Context

Over the past years, there have been disturbing incidences of wanton theft, pilferage, and corruption in the public and private sectors in Kenya. The trend has been mostly experienced in public institutions compared to the private sector. A lot of research ink and paper have alluded that the greatest challenge to economic development in most countries has been fraud and that it leaves the public with so much debt. Those who reap heavily are the few well-connected people who gain access to public funds for personal gain. These cases go unreported. That way, the partakers of graft escape the wheels of justice that would have held them accountable for their actions.

There have been instances where strong-willed persons, commonly referred to as whistle-blowers, seeking to protect the public from wanton theft, have raised the red flag. Whereas one would have thought that society should appreciate and protect whistle-blowers from known and unknown threats, they have been left to their fate. In a bid to fight corruption, the Government of Kenya has created institutions to wrestle the vice. However, there has been a worrying trend where whistle-blowers face threats from and intimidation by corruption suspects, even as the existing anti-graft institutions offer them feeble protection, if at all. This has raised a big question mark on the commitment and efficiency of those agencies whose core mandate is to beat corruption.

1.1.1 The Concept of Whistleblowing

Several scholars have, variously, propounded diverse theories on the concept of whistleblowing and its origins. Two analogies come to mind. Firstly; the one likening whistleblowing to a game where a referee is expected to blow a whistle in case of a foul play or when there is a wrong committed in the course of the game, hence the need to

call the perpetrator out for a warning or punishment. Secondly, that of police officers to whistle blow whenever there are wrongdoings to attract the public attention or to alert the public to an issue.[1] Indeed, these two analogies put into context the key functions of whistleblowing within a polity.

The generally accepted and often-used definition of whistleblowing is *any form of disclosure by a member of an organization or members of the public of any action or inaction that is illegal, morally and ethically incorrect practices to any person, entity, or an institution that may be able to institute a course of action that would lead to the dispensation of justice. Whistle-blowers, thus, can be people who are within an organization or government or just members of the public.*[2] The definition, however, seems to restrict the term to *information that is given to the relevant authorities.* However, there are certain circumstances when the information may not be reported to the authorities but made in the public domain.

Park and other authors in explaining the concept of whistleblowing in their journal articles, outline the importance of ensuring that the safety of whistle-blowers is enhanced. They provide three ways through which whistle-blowers can choose to act. They opine that the first is to do so either formally or informally. Formally would mean following the needed channels in place to raise concerns that may adversely affect an entity or a public body. The informal approach would be through getting in touch with a third party who then blows the whistle and informs people about the wrongdoings. The second way in which they suggest whistle-blowers can do this is through anonymity or via a written record. The last way in which they can act is through internal

---

[1] Oluyemisi Bamgbose, 'Whistle Blowing; The Whistle Blower; The Whistle Blowing Act" A Simple Expose /An Easy to Read Discourse On the Concept of Whistle Blowing' (2017) 20 African Journal For The Psychological Studies of Social Issues 316.

[2] Russell Mannion, *The Conceptual Underpinnings of Whistleblowing* (Cambridge University Press, Cambridge, 2018), p.88.

mechanisms within an institution or through external means which include bodies charged with fighting corruption.[3] They further state whichever method a whistle-blower chooses, it must be done in a way that protects the rights of the whistle-blower. In most instances, due to ineffectiveness in the relevant institutions, whistle-blowers are forced to use public or anonymous means to expose corruption.

The underlying impact of whistleblowing, whether done privately or publicly, is always intended to achieve the goal of organizational disruption. It is this disruption that is intended to ensure that the inactions or actions of those in public offices that are not in line with ethical or legal standards are checked.[4] This is under circumstances where those actions or inactions lead to public harm.[5]

1.1.1.1 Historical Background of Whistleblowing in Kenya

The historical background of Kenya's whistle-blowers is littered with intimidation, frustrations, casualties, and deaths. Though there have been several legal instruments to protect them, no significant help has emanated from these initiatives. Worse still, there have been certain legislations that have worked to limit whistleblowing in the public sector by public officers. For example, the Public Officer and Ethics Act expressly bars public officers from revealing certain inefficiencies or corruption that may take place within its' ambits.[6] To further discourage the act of whistleblowing, the piece of legislation imposes punishment and places liability on public officers should they reveal information that is material in nature.

---

[3] Heungsik Park, 'Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey, and the U.K.' (2008) 82 Journal of Business Ethics 929.

[4] Fred Alford, *Whistle-blowers: Broken Lives and Organizational Power* (Cornell University Press, New York, 2002), p. 54.

[5] Harold Hassink, Meinderd de Vries and Laury Bollen, 'A Content Analysis of Whistleblowing Policies of Leading European Companies' (2007) 75 Journal of Business Ethics 25 <https://www.jstor.org/stable/25123973> Accessed 18 June 2020.

[6] The 2003 Public Officer Ethics Act, s 41.

The inexistence of a clearly defined legal instrument outlining the need for protection of whistle-blowers has, perhaps, been the reason for the continuous intimidation of whistle-blowers in Kenya. Some examples would suffice. David Munyakei, a clerk who worked with the Central Bank of Kenya (CBK) in the early 1990s is, perhaps, one of the most prolific whistle-blowers. While clearing cheques for payment, he was able to identify an anomaly in the description of the documents. The cheques were for processing payment of alleged gold that at the time was inexistent in Kenya. He sneaked the documents out of the CBK and handed them over to opposition leaders who then tabled them in Parliament.[7] The findings revealed wanton theft that was taking place at the expense of taxpayers. However, instead of being treated as the hero, he was, he was arrested and detained. On his release, Munyakei went into hiding because of threats on his life.[8] The whistle-blower was consequently dismissed from his job. Regardless, the dossier he had slipped to the Members of Parliament led to the House investigations into what would later come to be known as the Goldenberg Scandal.

Fast forward to 2004, another whistle-blower, John Githongo, a former journalist who was a Permanent Secretary of Ethics and Governance (now defunct) in the then Government of President Mwai Kibaki, when he blew the lid on the Anglo-Leasing deal; a government procurement facilitated corruption involving fraudulent 'deliveries' of military and forensic laboratory equipment.[9] Despite the important role that he played, Githongo was fired and subjected to threats and intimidation. Fearing for his life, he fled the country in January 2005.

---

[7] Billy Kahora, *The True Story of David Munyakei: Goldenberg Whistle-blower* (Kwani Trust, Kenya, 2008) pp. 45-49.

[8] Luis Franceschi, 'A History of State Capture in Kenya: The Goldenberg Scandal' (*Daily Nation*) <https://www.nation.co.ke/kenya/blogs-opinion/blogs/dot9/franceschi/a-history-of-state-capture-in-Kenya-the- goldenberg-scandal-225000> Accessed 16 June 2020.

[9] Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (Harper Perennial Publishers, New York 2010), p. 170.

In late August 2019, the acting Chief Finance Manager at the Maasai Mara University in Narok County, Spencer Sankale – alongside other witnesses - gave an exclusive interview to Citizen TV. In that expose, they blew the whistle on the wanton siphoning of public money for personal gain by the Vice-Chancellor and a cabal of high and low-level officers within the institution. Immediately the story was aired – and picked by other media houses in Kenya - the whistle-blowers reported that they were constantly threatened and felt insecure.[10] Even though they were able to apply for witness protection over the infamous Mara Heist, nothing has been done to ensure their safety.

1.1.2 Whistleblowing, Bill of Rights and the Criminal Justice System

Reporting cases of corruption is always done with the public interest in mind.[11] In most instances, the persons raising the red flag on instances of corruption feel more encouraged to do so while under protection. To ensure personal safety, apprehensive whistle-blowers ask that their identities be not exposed so that they speak anonymously to avoid victimization. The victimization that whistle-blowers face falls under the category of rights protected by the Bill of Rights in the Constitution of Kenya, 2010. Article 27 of the supreme law outlines one of the fundamental rights of every person as being freedom from discrimination. When whistle-blowers seek protection, they are always afraid of facing discrimination from within their institutions, within the country, or by outsiders.

The fear of discrimination by whistle-blowers goes beyond that of curtailing their rights and freedom of expression, which is also protected under the Constitution. This

[10] Citizen Team, 'Mara Heist: What Happened to Spencer Sankale?' *Citizentv.co.ke* <https://citizentv.co.ke/news/mara-heist-what-happened-to-spencer-sankale-306365/> Accessed 16 June 2020.

[11] Raluca Dimitriu, 'Romania: First Steps to Whistle-blowers' Protection' in Gregor Thüsing and Gerrit Forst (eds), *Whistleblowing - A Comparative Study* (Springer International Publishing, New York, 2016), p. 3.

freedom is protected under several legal instruments that guarantee the freedom to receive as well as disseminate information, with the attendant justifiable limitations.[12] Factors such as public order or national security, however, limit this right enjoyed by everyone, including whistle-blowers. However, whistle-blowers must always be protected when they reveal information that is against the ruling class.[13] Their identity should be concealed to ensure their protection as key prosecution witnesses.

The role of witnesses in the prosecution of cases cannot be downplayed. Interference with the information they possess and withhold alters the progress and eventual outcome of the cases, which inevitably leads to a grave miscarriage of justice.[14] Although whistle-blowers are not expressly mentioned as witnesses under section 3 of the Witness Protection Act, the provision can be constructively amended to cover them. The burden to provide information that is to be used in criminal proceedings comes along with the risk of threats, intimidation, and victimization from third parties such as the accused persons. The chain of risks involved would then warrant their protection under the criminal justice system.

More often, the chain of risks that come with uncovering the lid on impropriety sometimes, leaves whistle-blowers as victims of crimes committed by other persons.[15] The Victim Protection Act does not provide for the mechanism for their protection (whistle-blowers). The Act provides, among others, the right to non-discrimination or non-victimization. The legislation has, however, not been constructively interpreted to cover whistle-blowers who become victims after the fact. The gaping loopholes in most

[12] Wim Vandekerckhove, 'Freedom of Expression as the "Broken Promise" of Whistle-blower Protection' (2016) 6 the Human Rights Review 173.
[13] Charles Frederick Alford, 'What Makes Whistle-blowers So Threatening?' (2016) 5 International Journal of Health Policy and Management 71.
[14] Firman Wijaya, 'Legal Protection for Whistle-blower in Criminal Justice System of Indonesia' (2020) 47 Directory of Open Access Journals 277.
[15] John McCoy, 'The Whistle-blower Protection Act - Workplace Fairness' (2012) 3 Journal on Workplace Fairness 16.

of the legal instruments that ought to protect whistle-blowers, thus, present a violation of their rights to a fair hearing, privacy, access to justice, equality, and protection against any form of discrimination as provided for under the Bill of Rights. The legal instruments have a bearing on whistle blower protection but they do not seem to make whistleblowing the main focus hence no law or institution established under these laws takes the lead in promoting the culture of whistleblowing in Kenya.

1.2 Statement of the Problem

The central problem analyzed in this study is two-pronged. First, the study seeks to look at the current legal frameworks in Kenya to establish whether they adequately offer protection to whistle-blowers. In analyzing this first ambit, the study points out the key loopholes in these laws to ensure there is protection for whistle-biowers for effective prosecution of corruption cases within the Kenyan judicial system. Secondly, this study makes a comparative analysis with other jurisdictions to explore how they have been able to strengthen their whistle-blower mechanisms for effective prosecution of corruption cases. The study acknowledges the loopholes that may exist in the current legal dispensation, then proposes a raft of solutions to them.

1.3 Objectives of the Study

This study has three objectives. Firstly, to investigate whether the existing legal frameworks in Kenya show a commitment to the protection of whistle-blowers in the fight against corruption in Kenya.

Secondly, the study identifies some of the existing mechanisms for the protection of whistle-blowers in the private and public sectors and assesses whether or not they are adequate.

Finally, this study identifies and explores how some common law jurisdictions have been able to protect whistle-blowers in enhancing their fight against corruption.

1.4 Research Questions

The paper seeks to answer three questions. The first is whether the existing legal frameworks in Kenya adequately ensure the protection of whistle-blowers to enhance the fight against corruption. The second is to find out the whistle-blower protection measures instituted in the private and public sectors and their adequacy. The third is to find out how other common law jurisdictions have addressed whistle-blower protection for efficiency in their fight against corruption.

1.5 Hypothesis

Whistle-blowers play an important role in revealing information that can be used to curb illegal activities. However, the current legal frameworks in Kenya do not ensure their protection. This results in threats and intimidation, thereby frustrating the efforts to fight corruption.

1.6 Theoretical Framework

1.6.1 Natural Law Theory

Natural Law theory revolves around what is morally right and wrong.[16] The foundational underpinning of this theory is, thus, morality. The moral theory was propounded by an ancient, Greek philosopher, Aristotle, and Thomas Aquinas, an Italian Dominican theologian who was also a Roman Catholic Saint. They stressed the need for a law to be founded on what was morally right rather than what is considered right, even when it is morally wrong.[17] This theory supports the concept of

[16] John Finnis, *Natural Law Theories* (Clarendon Press, Oxford, 2002), p. 397.
[17] Ana Marta González, *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Princeton University Press, Princeton, 2016),p. 7.

whistleblowing in the sense that, corruption is not morally right as it is propelled by the selfish nature of human needs.

Thomas Aquinas opined that law is divided into four main categories. These included eternal law, divine law, natural law, and man-made law. He postulated that the first two categories were laws guiding human relationships with God, while the last two were majorly for the relationship between human beings. He opined that natural law, which was a law of God that is revealed to humans through nature and reason ought to guide man-made laws.[18] Man-made laws, therefore, had to be in tandem with what is naturally and morally right. These man-made laws, since they are revealed to humans through reason, can or may not be written. Therefore, a person ought not to have a written form of direction to do what is right.

Based on the above, there is always no man-made law that compels persons to reveal information that may be wrong within an institution. The natural law concept of discerning what is right from wrong and revealing them guides a whistle-blower. Natural law can also be termed to guide the principles of human rights. The universality of human rights is always founded on natural law principles.[19] The role played by whistle-blowers in revealing corruption that may take place within their area of occupation or other spheres, therefore, calls for the need for protection, freedom from discrimination, right to life among other rights that should be protected.[20] Whistle-blowers act in a morally right way and should, therefore, be protected.

---

[18] Peter James Stanlis, *Edmund Burke and the Natural Law'* (Transaction Publishers, New Jersey, 2015), p. 12.
[19] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 33 Human Rights Quarterly 712.
[20] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 33 Human Rights Quarterly 718.

1.6.2 The Standard Theory of Whistleblowing

The Standard Theory of Whistleblowing was first propounded by Michael Davis. It borrows from the natural law theory because it is pegged on moral grounds. Davis posits that the main reason persons, whether or not working within an organization, disclose information is because the act of whistleblowing is morally right.[21] He asserts that whistle-blowers (internal whistle-blowers) can be likened to the Good Samaritan, who by chance, happen to find some information that ought to be revealed to persons to prevent harm. He asserts that the harm may be caused as a result of an action, inaction, omission, policy, or anything that may injure other persons.

The theory permits disloyalty among employees by revealing information or whistleblowing under four main circumstances. First is where the product being produced or a policy espoused by the company would lead to a considerable amount of danger or harm to the public.[22] On the product, Davis asserts that the product should cause harm to either user or just an innocent bystander or both. Second is where a whistle-blower has been able to spot or identify a threat or harm likely to be caused by the organization and has reported the said harm to the superiors who have in turn not been able to act to redress the situation.

Since there are always internal mechanisms in an organization to address any harm by the company, the theory presents that these mechanisms should first be exhausted.[23] After the exhaustion of these mechanisms and no action has been taken, the whistle-blower is justified to carry out whistleblowing tasks. Third, the theory permits

---

[21] Michael Hoffman and Mark Schwartz, 'The Morality of Whistleblowing: A Commentary on Richard T. De George' (2015) 127 Journal of Business Ethics 771.

[22] Michael Davis, 'Some Paradoxes of Whistleblowing' Business & Professional Ethics Journal (1996) 15 Business & Professional Ehics Journal 13.

[23] Michael Davis, 'Some Paradoxes of Whistleblowing' Business & Professional Ethics Journal (1996) 15 Business & Professional Ehics Journal 15.

whistleblowing with a caveat. Davis states that the whistle-blower should have material evidence or information that if revealed, should be able to convince a reasonable person that there is a threat to the public, which ought to be protected. The fourth and last assertion by proponents of this theory is that the revelations by the whistle-blower should be impactful to the extent of preventing the occurrence of harm or mitigating its effects.

The standard theory, however, provides three paradoxes concerning whistleblowing. The first paradox is important in this research as it addresses the threats that whistle-blowers are likely to face. It calls for the need for the protection of whistle-blowers. The paradox presented by the theory is what is called the *Paradox of Burden*. This means that the whistle-blower more often will face numerous risks, including financial risk resulting from the loss of a job.[24] The proponents of this theory stress how whistleblowing can be costly to those who volunteer to give information, which may be important for the protection of the public from harm.

1.7 Justification

The justification for this study is premised on the fact that there are scanty legal provisions that provide for the protection of whistle-blowers in Kenya. The scarcity of journal articles on the theme of this study also makes this research impactful in the literature on the aspect of whistle-blower protection in Kenya in specific. The study will thus supplement the existing literature on whistle-blower protection in Kenya thus contributing to knowledge addition and provision of recommendation that, if and when effected, will ensure improvement in ensuring that those who expose graft are kept off harm's way.

---

[24] Michael Davis, 'Avoiding the Tragedy of Whistleblowing' Business & Professional Ethics Journal (1989) 8 Business & Professional Ethics Journal 27.

1.8 Literature Review

The available literature on whistleblowing majorly outlines the importance of having concrete legal mechanisms to protect them from any adverse retaliation. Existing pieces of information outline some of the ways through which whistle-blowers can be protected. This review, thus, critically analyses some of this literature and shines the torch on some of the identified loopholes. This is presented in two broad ways: literature on the effect of whistleblowing and exploration on the protection of whistle-blowers.

1.8.1 Whistleblowing Effects

Many scholars outline that the ultimate reason why most people in private and public sectors are reluctant to volunteer certain crucial information on corruption in their possession is the fear of the likely adverse effects that such an action might ultimately have on them.[25] An associate in the New York office of Gibson, Dunn, and Crutcher, Leonardo Labriola, in an Article titled *Paying Too Dearly for a Whistle: Properly Protecting Internal Whistleblowers*, provides an analysis of the impact of whistleblowing on those who do so. He states that whistle-blowers, especially those in the corporate world, pay dearly for their whistle.[26] This comes in various forms such as discrimination, differential treatment, and victimization, among others.

The price they pay stems from their role in exposing elaborate financial ethical malfeasance and/or violations of law that take place in their places of work.[27] Labriola outlines that the greatest threats to these whistle-blowers stem from the same laws that

[25] Lucas Doney, 'Caught Between Conscience and Career: Expose Abuse without Exposing Your Identity' (2019) 13 Journal on Government Oversight 33.
[26] Leonardo Labriola, 'Paying Too Dearly for a Whistle: Properly Protecting Internal Whistleblowers' (2017) 85 Fordham Law Review 2839.
[27] Janet Near and Marcia Miceli, 'After the Wrongdoing: What Managers Should Know about Whistleblowing' (2016) 59 Business Horizons 105.

ought to protect them. These mainly include corporate policies and standards that encourage the culture of silence in the face of graft that taints the image of companies leading to huge losses.[28] Further, the author observed that in cases where a culture of integrity is weak, the initiation of policies that encourage internal whistleblowing is halted.[29] This, therefore, means that employees are discouraged and stopped from making public certain information that, in the estimation of the body corporate, may be harmful to the image of and result in the loss of income to the company.

The article outlines some of the means through which certain corporate entities have tried to encourage internal whistleblowing. It identifies rewards as a means of encouraging more people within corporate entities to blow the whistle on irregularities.[30] The article further outlines how some corporate entities have spearheaded measures to ensure that they do not reveal the identities of those who may make disclosures on internal maleficence.[31]

1.8.2 Protection Mechanism Literature

Based on the adverse effects of whistleblowing, most scholars who have written on whistleblowing tend to present solutions through which corporate entities may encourage the protection of whistle-blowers.[32] These are majorly through financial security like monetary rewards and/ or protecting the identity of the person who has

---

[28] Dori Meinert, 'Whistle-Blowers: Threat or Asset?' (2011) 56 Society for Human Resource Management 26.

[29] Harold Hassink, Meinderd de Vries and Laury Bollen, 'A Content Analysis of Whistleblowing Policies of Leading European Companies' (2007) 75 Journal of Business Ethics 25.

[30] Leonardo Labriola, 'Paying Too Dearly for a Whistle: Properly Protecting Internal Whistleblowers' (2017) 85 Fordham Law Review 2841.

[31] Harold Hassink, Meinderd de Vries and Laury Bollen, 'A Content Analysis of Whistleblowing Policies of Leading European Companies' (2007) 75 Journal of Business Ethics 30.

[32] Alina Tugend, 'Opting to Blow the Whistle or Choosing to Walk Away" (2013) 11 International Journal of Health Policy and Management 71.

revealed the maleficence.[33] The shortcomings in some of the publications that tend to provide monetary compensation as a reward do not take into consideration those who are morally and ethically grounded. This is because such persons are not always motivated by money but are just motivated or driven by their moral and ethical groundings.

Based on the system of offering rewards as a means of promoting whistleblowing, most scholars do not take into account the security of third parties who may not be members of the corporate entity. This leaves them exposed with no form of protection in comparison to internal whistle-blowers.

A publication by the Kenya Human Rights Commission asserts that the Witness Protection Act, which forms the WPA, as currently constituted, does not in any way offer protection to whistle-blowers.[34] In presenting various focus areas including economic crimes, fraud among others, the publication asserts that witness protection, especially when it came to whistle-blowers, was at its lowest.[35] The dismal protection offered by the legal instrument was due to a lack of express mention of their role in the criminal justice system.

The publication outlines the various roles played by witnesses in the investigation of cases of graft and how they subsequently lead to the successful prosecution of those cases. Due to this role, these civilians should be given state protection.[36] However true

---

[33] Tanya Marcum and Jacob Young, 'Blowing the Whistle in the Digital Age: Are You Really Anonymous: The Perils and Pitfalls of Anonymity in Whistleblowing Law' (2019) 17 DePaul Business and Commercial Law Journal 216.

[34] Lionel Nichols, "The International Criminal Court and the End of Impunity in Kenya' (2015) 16 Journal of International Criminal Justice 286.

[35] Lionel Nichols, "The International Criminal Court and the End of Impunity in Kenya' (2015) 16 Journal of International Criminal Justice 292.

[36] Dan Kuwali and Frans Viljoen, 'By All Means Necessary: Protecting Civilians and Preventing Mass Atrocities in Africa' (2017) 6 Journal of International Criminal Justice 514.

this notion is, another publication by the United Nations High Commissioner for Refugees (UNHCR), *Countries at Cross the Crossroads*, asserts that there are still cases of witness intimidation by the investigative bodies. It gives an example of Francis Nyaruri, a journalist who was murdered while reporting on local corruption.[37] The cases presented in the publication lay bare the ineffectiveness of the WPA.

The publication, though, is an essential part of the study, is limited to the protection of witnesses rather than whistle-blowers. Even though the Witness Protection Act outlines the need for the protection of witnesses, the Agency charged with the duty does not treat whistle-blowers with the same importance as may be needed.

A.J. Brown asserts that there is an increased need to formulate laws that seek to protect whistle-blowers.[38] This has been prompted by the role whistle-blowers play in the protection of public interest rights as well as the sleaze in government agencies. Even though there are certain international instruments such as the United Nations Convention against Corruption (UNCAC)[39] and the G-20 Anti-Corruption Action Plans, the protection of whistle-blowers in several states is still minimal. This is due to scattered legal instruments seeking to protect them. There is no single instrument expressly identifying and enumerating the channels whistle-blowers can use; how their rights and freedoms can be protected; how their identity can be protected to heighten

[37] Tanya Marcum and Jacob Young, 'Blowing the Whistle in the Digital Age: Are You Really Anonymous: The Perils and Pitfalls of Anonymity in Whistleblowing Law' (2019) 17 DePaul Business and Commercial Law Journal 216.

[38] Alex Brown, 'Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 23 Journal of International and Comparative Labour Studies 99.

[39] Katarina Weilert, 'United Nations Convention against Corruption (UNCAC)–After Ten Years of Being in Force' (2016) 19 Max Planck Yearbook of United Nations Law Online 216.

their protection, among others.[40] The scattered nature of the requisite legal instruments prevents the proper protection of whistle-blowers.

Brown further argues that the protection of whistle-blowers in many countries has not been efficient as a result of the stampede in looking for an ideal model law. These ideal laws to protect the whistle-blowers, he opines, do not properly do so as they fail to consider the unique needs of the state.[41] They are always based on copied models that are considered to be ideal from other states without assessing the unique situations in their states. Brown, thus, renders that there is no single ideal legislation that can comprehensively cover whistle-blower protection. Therefore, he suggests the need to have a combination of various scattered instruments and a single (which he terms "standalone") one to ensure comprehensive covers for, and protection of whistle-blowers.[42]

Brown presents a combination of laws that would be comprehensive in ensuring the protection of whistle-blowers. However, the article fails to assess the efficiency of various scattered laws and a single one. His assertions on this model suffer a blow because having a combination of scattered legislations and the standalone one would lead to confusion should there be a conflict in the buffet of the legal instruments. Also, his assertion may not answer the question of how to protect whistle-blowers in Kenya where there are very few legal instruments that directly mention and cater for the protection of whistle-blowers. His sentiments of ideal protection through various

[40] Katarina Weilert, 'United Nations Convention against Corruption (UNCAC)–After Ten Years of Being in Force' (2016) 19 Max Planck Yearbook of United Nations Law Online 231.
[41] Alex Brown, 'Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 23 Journal of International and Comparative Labour Studies 101.
[42] Alex Brown, 'Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 23 Journal of International and Comparative Labour Studies 107.

instruments may not be applicable in Kenya as there is no standalone legal instrument comprehensively covering the protection of whistle-blowers.

1.9 Methodology

The methodology for this research study included desk reviews of primary and secondary sources and an analysis of comparative studies of the legal framework of the United States and South Africa. The primary sources reviewed for this study included statutory laws and subsidiary legislations. The secondary sources consisted of case laws, books, journals, working papers, newspaper articles and internet resources. The comparative analysis was conducted with two common law countries; namely the United States and South Africa which have developed robust legal frameworks for the protection of whistle-blowers.

1.10 Scope and Limitations

Although whistleblowing is a method of bringing to the attention of the justice system the wrongs done within the private and public sectors, this research study will concentrate much on whistleblowing that relates to large-scale cases of corruption within the public sector.

The study is mainly concerned with the protection of whistle-blowers who give out material information relating to corruption in the public sector. It balances how the rights of whistle-blowers can be protected. This includes those who are government employees as well as private citizens who blow the whistle.

1.11 Chapters Outline

The study is organized into five chapters. The first chapter gives a brief background to the research, looking at what the concept of whistleblowing entails and the historical background on instances of whistleblowing. The background further looks at the

connection between whistleblowing, the Bill of Rights, and its role in the criminal justice system. The study then outlines the problem statement and the research objectives. The theoretical underpinnings of the study are discussed in this chapter, together with a literature review. It then outlines the methodology that will guide the study and the scope and limitation of the study.

Chapter two examines the legal framework underpinnings of the study. It goes further to analyze the legislations that allude relate to and touch on whistleblowing. They are the Constitution of Kenya, the Anti-Corruption and Economic Crimes Act, the Witness Protection Act, and the Victim Protection Act, among others. It further analyses the legal gaps in these laws and structural disconnects within the entities that ought to ensure whistle-blower protection.

Chapter three analyses the protection of whistle-blowers in the public sector as well as their role in the private sector, using various selected case laws. The chapter also looks at some of the reasons why whistleblowing as a concept of initiating criminal charges has not been effective and efficient in countries with endemic cases of corruption, such as Kenya.

Chapter four is a comparative study of whistle-blower protection and the legal framework in the United States and South Africa. The chapter will also briefly discuss the reason for the choice of the selected common law countries. Various precedents that have been set in these selected countries will also be analyzed and how they ensured that whistle-blowers are protected in the course of trials and thereafter. The current and emerging trends towards whistle-blower protection in cases of corruption are also analyzed. The chapter sets out to answer the question as to whether laws on whistle-blower protection are in single legislation or are scattered, as is the case of Kenya, and the impact of the same.

Chapter five sets out the conclusions and recommendations of the research study.

CHAPTER TWO: THE LEGAL FRAMEWORKS FOR WHISTLE-BLOWER PROTECTION

2.1 Introduction

The previous chapter critically analysed how whistle-blowers, over the past years, have been shying away from providing information that may be helpful in the fight against corruption in the Kenyan criminal justice system. The ability of the agencies charged with investigating and prosecuting corruption cases has largely been hindered by the failure of whistle-blowers to provide information that may have probative value. One of the reasons for this has been the lack of frameworks that would ensure the protection of whistle-blowers from the fear of threats of victimization, thus encouraging them to provide information necessary for the successful investigation and prosecution of corruption cases.

This chapter analyses the existing regional and international legal frameworks for the protection of whistle-blowers. It further looks at the various regional and international guidelines that have been put in place to guide the formulation of legal frameworks for the protection of whistle-blowers, hence playing a pivotal role in the fight against corruption and other economic crimes. Since the research is premised on the Kenyan situation, this chapter will also have an in-depth look at the instruments that have been continuously interpreted and or implied as to the legal frameworks for the protection of whistle-blowers in Kenya.

In the analysis of the legal instruments that allude to the protection of whistle-blowers, this chapter will also look at how courts have continuously treated these legal instruments in Kenya. Further, the chapter will outline some of the existing gaps in

most of these instruments that harden the protection of whistle-blowers, thereby frustrating the war against graft and cousin economic crimes.

2.2 International and Regional Statutes and Instruments on Whistle-blower Protection

The nature of whistle-blower protection depends on the type of instruments. For instance, the context in which the United Nations and the Organization for Economic Co-operation and Development (OECD) deal with whistle-blower protection is determined by their historical backgrounds, geographical coverage and mandate. Whereas regional instruments such as the African ones mainly take into account regional issues, global instruments primarily take into account the entirety of their geographical spread. The instruments are useful in determining the basics of whistle-blower protection such as those entitled to report and the procedure for protection. They also provide the basics for the procedure for reporting and the manner of protecting reporting individuals. Consequently, they provide valuable insight into what is expected of an effective and efficient whistle-blower protection framework.

2.2.1 The United Nations Convention Against Corruption

The UNCAC is a landmark global anti-corruption treaty adopted by the UN General Assembly on 31st October 2003. It became operational two years later, and had, by May 4th, 2017, been ratified by 181 countries in the world. Kenya was the first country to both sign and ratify the Convention on 9th December 2003. The UNCAC points to the fact that the international community identified corruption as a global concern. Article 33 of the Convention provides for the systems of whistle-blower protection. The Article suggests to state parties to incorporate appropriate protection measures into their

domestic legal systems.[43] Further, it provides that the reporting person should do so in line with the offense provided in the Convention *based on reasonable grounds and in good faith.* In comparison to other instruments, UNCAC is more comprehensive. It makes provisions for the public willing to report corruption. State parties are called upon to protect every reporting, notwithstanding their status. Also, UNCAC expressly distinguishes between witnesses and whistle-blowers. While the provisions of Article 32 touch on witnesses, whistle-blowers are expressly provided for in Article 33.

One of the similarities between UNCAC and other instruments such as OECD is that individuals can report either in good faith or on reasonable grounds. However, Article 33 is not a mandatory provision since it allows states to only 'consider' the contents of the Article. It has also received little criticism from scholars because it is generally a straightforward provision.[44] However, an attempt to deeply decipher the text of the article brings to light some uncertainties that can act as a stumbling block to its effective implementation. For instance, in a disclosure scenario, states would need to determine the exact meaning of sufficient 'fact' or 'information.' The interpretation of the term 'fact' by different states has not been uniform. Besides, UNCAC fails to define Article 33 terms, thereby, leaving the interpretation task to each state party. Some of the relatively ambiguous terms not elaborated on include 'unjustified treatment', 'competent authorities', 'reasonable grounds', and 'good faith.' Also, countries have taken different approaches to interpret what qualifies as sufficient information. While others have taken the multiple hurdles approach, some have taken the specific offense approach and the reasonable belief approach. Kenya is yet to legislate on these matters.

[43] United Nations Convention Against Corruption 2003, A/RES/58/4.
[44] Mathias Huter, Ruggero Scaturro, and U. N. C. A. C. Coalition, 'UNCAC in a Nutshell' (2019) 2 Transparency International 49.

2.2.2 The African Union Convention on Preventing and Combating Corruption

The AU Convention on Preventing and Combating Corruption (AUPCC) was adopted in Maputo on 11th July 2003 and became operational in 2006 and is currently ratified by 44 of the 55 AU member states. Until recently, it was the only Convention that expressly provided for whistle-blower protection. One of the features of the Convention is that it tackles corruption both in the public and the private sectors. It also promotes accountability and transparency. Kenya established Kenya Leadership and Integrity Forum (KLIF)[45] as a mechanism through anti-corruption initiates are design and implement by stakeholders in their sectors. Kenya also enacted several legal instruments to combat corruption which however there remains inherent weaknesses and ambiguities in the legal framework for fighting corruption for instance the anti-corruption laws do not criminalize some offence such as illicit enrichment and influence peddling as prescribed by the UNCAC and the AUPCC.[46] The provisions of the Convention of whistleblowing protection are found in Article 5.[47] It requires that state parties adopt measures for citizen disclosure that deal with consequent fears of reprisals.

It is common for whistle-blowers to face severe retaliation, negatively affecting their social, economic, political, and civil rights. Therefore, state parties are even expected to protect the identities of informants and other witnesses. One similarity between this Convention and UNCAC is that it follows the UNCAC approach by using the term 'citizen.'[48] It allows for divergence in interpretation. While it may be interpreted to mean any person originating from any of the 44 state parties that have ratified it, the AU Convention deems the term 'citizen' to include a citizen in one of the countries.

[45] The 2006 African Union Convention on Preventing and Combating Corruption, Art. 5, 12 and 13.
[46] National Ethics and Anti-Corruption Policy, Sessional Paper No.2 of 2018 p.8.
[47] The 2006 African Union Convention on Preventing and Combating Corruption, Art. 12 and 13.
[48] The 2006 African Union Convention on Preventing and Combating Corruption, Art. 5, 12 and 13.

However, the implication of the use of the term 'citizen' is that those working or living in any AU country but are not citizens, such as migrant workers, are not accorded whistle-blower protection.

2.2.3 The African Commission on Human and Peoples' Rights

According to the Commission, legislation on freedom of information must be anchored on relevant instruments. Some of the ACHPR normative laws applicable to whistleblowing include the Model Law on Access to Information for Africa and the Declaration of Principles on Freedom of Expression in Africa. While the Declaration does not expressly provide for whistle-blower protection, it does provide for the freedom of expression that should only be limited by law.[49] Therefore, it allows whistle blower the freedom of expression and protects them from arbitrary actions. Principle XV protects the source of information, which can be relied on to protect whistle-blowers. However, the protection is inadequate due to the non-existence of an express provision to cater for the safety of those who step forward and provide information on corruption.

Currently, there is a draft for the modification of the Declaration of the Principles on Freedom of Expression in Africa. First, Article 80 of the draft provides that as long as a person acts in good faith in releasing or disclosing information on the environment, safety, or health threats and any wrongdoing, they cannot be subjected to any criminal or civil sanction. Besides, the Declaration requires states to establish legal regimes, including independent institutions for protecting whistle-blowers.[50] However, the states

[49] The 2002 African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session Part IV.
[50] The 2006 African Union Convention on Preventing and Combating Corruption, Art. 81.

must adopt judicial, administrative, and legislative measures to give effect to the Declaration and facilitate its implementation.[51]

The Commission's Model Law on Access to Information for Africa is also required to guide states when adopting or reviewing their legislative instruments on access to information. Furthermore, the Declaration requires states to submit in their periodic report to the Commission the measures they have taken to comply with its provisions.[52] It points to the binding nature of the draft Declaration. While the draft Declaration was adopted in 2020, its launch has been postponed due to the COVID-19 crisis. Besides, the Special Rapporteur has in the past recommended to Nigeria that it should develop a whistle-blower regime and ensure uniformity between public institutions.[53]

2.2.4 The G20 Guiding Principles for Whistle-blower Protection

During the 2010 summit in Seoul, South Korea, of the international forum that brings together the governments and central bank governors of the 19 major economies and the European Union, in the G20 (or Group of Twenty), whistle-blower protection was recognized as a priority in the international anti-corruption war. The G20 Anti-Corruption Action Plan was adopted, which prioritized the protection of whistle-blowers. Following the summit, some experts from the G20 countries were mandated to formulate and implement, from 2010 to 2012, whistle-blower protection rules.[54] The experts extensively analysed and synthesized existing practices and legal frameworks, the OECD and World Bank experiences regarding whistle-blower protection. Their

---

[51] The 2006 African Union Convention on Preventing and Combating Corruption, Art. 102.
[52] The 2006 African Union Convention on Preventing and Combating Corruption, Art. 103.
[53] The 2002 African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session Part IV.
[54] Daniel Banisar, 'Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (2011) 3 G20 Anti-Corruption Action Plan Protection of Whistle-blowers 10.

work led to the adoption of the G20 Anti-Corruption Action Plan Protection of Whistle-blowers, which provided for Six Guiding Principles.

First, the G20 Guiding Principles include the formulation of clear legislative systems on whistle-blower protection and the creation of competent authorities. The legal and institutional framework should protect the disclosing employees from retaliatory actions meant to discipline or discriminate against them so long as the disclosure was based on reasonable grounds and done in good faith.[55] Second, the scope and type of the protected disclosures of persons protected need to be clearly defined by the legislation. Third, the whistle-blower - protections provided by the legislation need to be comprehensive and robust, such as through the provision of due process and identity protection in case of anonymity. Fourth, the prescribed channels and procedures of reporting should be clearly defined. Fifth, the legislation should ensure that the existing protection mechanisms are effective and this includes the establishment of a body tasked with complaints receipt and investigation and providing a variety of remedies. Lastly, the legislation's implementation should be accompanied by periodic evaluation, training, communication and creation of awareness.

2.2.5 The OECD Recommendation on Improving Ethical Conduct

For more than 20 years, the OECD has been evaluating whistle-blower protection practices and developing guidelines. The first document that resulted from this exercise was the Recommendation on Improving Ethical Conduct in the Public Service in 1998. Principle 4 in the document, although regulating whistle-blower protection, does not go

[55] Daniel Banisar, 'Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (2011) 3 G20 Anti-Corruption Action Plan Protection of Whistle-blowers 14.

beyond the public sector.[56] Through the principle, public servants' whistleblowing is linked to the right to freedom of expression. This approach requires that public servants know their duties and rights on whistleblowing. The principle also provides for whistleblowing protection as a procedure. Those involved are required to adhere to specific procedural rules.

Furthermore, through its recommendation for States to work towards improving their policies on whistle-blower protection, the OECD allows States to interpret the provisions restrictively or broadly. A narrow interpretation will only take into account ethical conduct in public service. As for a broad interpretation, it goes beyond corruption in the public sector category to other forms of misconduct. Besides, Principle 4 fails to mention in its reporting a principle that has become a norm in most international instruments: good faith. However, the 2017 OECD Council recommendations on Public Integrity expanded the scope of guidelines on whistle-blower protection.[57] Unfortunately, Kenya is not a member of OECD hence not bound by its guiding principles and recommendations.

2.3 Legal and Institutional Frameworks for Whistle-blower Protection in Kenya

One of the significant challenges Kenya currently faces is corruption and the dearth of a comprehensive law dedicated to whistleblowing weakens the country's efforts in fighting graft. There have been allegations of systematic whistle-blower victimization leading to a culture of silence in both the private and public sectors. Mum-is-the-word is a culture that arises from the fear of retaliation due to lack of protection. For clarity

[56] OECD, 'Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service' (2020) OECD/LEGAL/0298 6 <https://legalinstruments.oecd.org/public/doc/129/129.en.pdf> Accessed on 20 July 2020.

[57] OECD, 'Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service' (2020) OECD/LEGAL/0298 12 <https://legalinstruments.oecd.org/public/doc/129/129.en.pdf> Accessed on 20 July 2020.

and certainty, it is the considered view of this research study that the whistle-blower protection legal framework should move away from a fragmented approach and adopt a cohesive and seamless approach. Some of the fragmented legislative approaches to whistle blowers in Kenya are akin to a bash-and-clash enterprise in the quest for a single solution. They include the Constitution of Kenya, the Witness Protection Act, the Victims Protection Act, the Anti-Corruption and Economic Crimes Act, the Bribery Act, the Employment Act, the Proceeds of Crime, and the Anti-Money Laundering Act.

2.3.1 The 2010 Constitution of Kenya

By dint of Articles 2(5) and 2(6) of the Constitution, the spirit of the whistle-blower protection exists in Kenya. This Supreme Law provides that any whistle-blower instrument ratified by Kenya and that the general rules of international law on whistle-blower protection forms part of the Kenyan law. For instance, Kenya ratified UNCAC in 2003, which means it forms part of the laws of Kenya.[58] Various rights in the Bill of Rights can be used to encourage whistleblowing and also protect public-spirited persons intending to uncover the lid on corruption and related misdeeds.

Firstly, the right to freedom of expression as contained in Article 33 is and is an important provision for whistle-blower protection. However, sub-article 3 bears a caveat to the effect that a person exercising this right must respect the reputation and rights of others.[59] The whistle-blower must therefore exercise due diligence before disclosing any information as the Article brings forth issues of defamation, slander, and libel. In the case of *Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others*,[60]

---

[58] UNODC, 'Review by Democratic Republic of the Congo and New Zealand of the Implementation By Kenya of Articles 5-14 And 51-59 Of The United Nations Convention Against Corruption for The Review Cycle 2016-2021' <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2015_09_28_Kenya_Final_Country_Report.pdf> Accessed on 22 July 2020.

[59] The 2010 Constitution of Kenya, art 33 (3).

[60] Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others (2020) eKLR

the Court of Appeal determined that while whistle-blowers can provide information, they must do so to the specified enforcement authorities in the Witness Protection Act. They must respect the right to privacy to avoid violating Article 50(4) of the Constitution. The case shows how the courts are trying to balance the rights of whistle-blowers and those of others, such as the government, even as it emphasizes the need to follow the right procedures.

Considering that there is no express institution offering whistle-blower protection, this Article can be used against disclosures of certain information that do not adhere to its provisions. Therefore, while people are free to impart information,[61] they must ensure they do not go beyond the constitutional limits.

Secondly, Article 31 that guarantees every person the right to privacy can be relied on to protect the confidentiality of revealed information as an entitlement to whistle-blowers. Thirdly, Article 28 requires people to respect and protect the inherent dignity of others. Therefore, a whistle-blower should not lose his human dignity because of whistleblowing. Then there is Article 29 which ensures that a person's freedom and security are not interfered with from both private and public sources. Consequently, if one denies, violates, infringes, or threatens any of the rights in the Bill of Rights that whistle-blowers are entitled to, the latter has a right to institute court proceedings under Article 22 for enforcement of their rights.

Other constitutional provisions that can be relied upon to protect whistle-blowers include Articles 27, 19, and 20. Considering one of the retaliatory mechanisms used by the accused person or his/her agent include discrimination, Article 27 can be relied upon

[61] The 2010 Constitution of Kenya, art 33 (1) (a).

to protect the disclosing person from being discriminated against based on employment or any other ground.[62]

2.3.2 The 2006 Witness Protection Act

The Act establishes the WPA. This is the entity that offers special protection, on behalf of the State to threatened and intimidated witnesses who are willing to testify in court. According to section 4 of the Act, only witnesses in criminal proceedings are offered protection but the section is silent on the protection of whistle-blowers. The section proceeds to provide the categories of persons who can qualify as witnesses.[63] Furthermore, whenever it is read together with section 4(2) (c), the interpretation of the provision is not inclusionary but exclusionary. The Director of the WPA is given the discretion to consider the sufficiency of reasons before offering protection to those not contemplated in the stipulated categories. In *Peter Njuguna Mwangi v the Witness Protection Agency*,[64] Peter Njuguna claimed to have gone into hiding after exposing the illegal alienation of public land. He instituted a claim against the WPA for failing to protect him although he was a witness in the *High Court Criminal Case No. 313 of 2000* that entitled him to protection.[65] However, the WPA declined to protect him. The claimant stated that he had reasons to believe that the public would grant him the necessary resources and protection for sacrificing to ensure the public utility land was protected. The court declined to order the WPA to protect the claimant or reimburse the expenses he had incurred. In its decision, the court appeared reluctant to interfere with the WPA Director's discretion.

---

[62] The 2010 Constitution of Kenya, art 33 (1) (a).
[63] The 2006 Witness Protection Act, s 4.
[64] Peter Njuguna Mwangi v Witness Protection Agency (2013) eKLR.
[65] Peter Njuguna Mwangi v Witness Protection Agency (2013) eKLR.

According to the court, section 5(7) of the Witness Protection Act does not allow the protection of a witness to be seen as a means of encouragement, persuasion, or reward. The court also looked at the factors that the WPA Director needs to consider in section 6(1), such as the seriousness of the offence. The Director cannot include a witness to the Witness Protection Programme if they lack sufficient information to determine the situation of the witness as per section 6(2). However, the court noted the provisions of section 16 of the Act that allow it to order witness protection. The court has to satisfy itself that the party concerned or the witness has knowledge of the offense, their life is endangered because of being a witness, section 7 of the Act requiring a Memorandum of Understanding to be signed between the WPA and the witness has been adhered to, and the likelihood of the person to comply with the MoU.

Having looked at the case and the high standard the WPA Director needs to uphold, one wonders whether whistleblowing can be considered as a sufficient reason to offer protection. Whistle blowers give information that is useful in preventing, mitigating corruption and economic crimes. Therefore, if a whistle-blower is threatened, they need to be accorded protection. Furthermore, section 3B (1) of the Act requires one to have vital information that could be interpreted broadly to offer protection to whistle-blowers so long as they act as witnesses.[66]

The Director may, according to section 9 of the Act, include temporarily, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with law enforcement agencies. The requirements for inclusion and admission criteria will have to be complied with and if it becomes apparent after investigations that the whistleblower will not be a

[66] The 2006 Witness Protection Act, s. 17.

witness, he or she will be discharged from the Witness Protection Programme. The Act, therefore, does not have an admission criterion for whistle-blowers who do not want to be witnesses, making it a weak and non-accommodative legal framework for protection to whistle-blowers. The decision significantly lies with the Director's discretion.

2.3.3 The 2014 Victim Protection Act

The purpose of this Act is to protect victims of an offense in Kenya and to give different remedies. According to the Act, a victim is someone who suffers some damage, loss, or injury resulting from an offense, thereby, broadening the definition beyond the complainant or his close and extended family to include community members. The Act also provides the vulnerable members of the society as a special category of victims who qualify, based on their special characteristics, such as disability, gender, and age. However, whistle-blowers can also qualify as vulnerable due to the nature of their voluntary task, the nature of the offence, and their dependency on the accused notwithstanding.[67]

According to section 2 of the Act, one can qualify as a victim, although the offense committed against them has not been reported to the police. This section can be construed to mean that a whistle-blower can be protected under the Act solely based on the fact that an unreported offence has been committed against them by the person they disclosed the information. Further, according to section 4(3), if a police officer or a court of law sufficiently believes that the offender, accused person, or his or her agent is likely to retaliate against or intimidate the victim, the victim is referred to the WPA.

[67] The 2006 Witness Protection Act, s 17.

The Act also protects the confidentiality and privacy rights of victims. It mandates the investigating law enforcement agency to ensure the victim's personal information is protected unless the victim publicizes the information he or she consents to the publication.[68] They are also entitled to self-protection, their family, and property from corruption, abuse, bribery, tampering, fear, harassment, and intimidation.[69] The victims must be secured from further harm as the first step of action, such as having them placed in a safe place if they are vulnerable.[70] However, the protection of whistle blowers as victims is cumbersome due to the need to ascertain whether a whistle-blower is a victim despite the possibility of broadening the interpretation of the term victim. The failure of the Act to expressly protect whistle-blowers makes it highly ineffective.

2.3.4 The 2003 Anti-Corruption and Economic Crimes Act

The Act does not expressly provide for the protection of whistle-blowers. However, the same appears to be indirectly provided for under Part VIII of the Act on the protection of informers. While the Act protects investigators, witnesses, informers, and assistants, it neither directly refers to whistle-blowers nor their role in fighting corruption.[71] Besides, there is no definition for the term 'informer' in the Act. This can be construed by some to mean a whistle-blower. Section 65 (1) seems to have envisaged the retaliatory measures that one could take against employees assisting the EACC or investigators. The section appears to grant immunity from prosecution to such persons concerning the matter at hand. A broad interpretation of the provision can mean that it offers protection to whistle-blowers against judicial suits and other types of retaliation

[68] The 2006 Witness Protection Act, s 8.
[69] The 2006 Witness Protection Act, s 10.
[70] The 2006 Witness Protection Act, s 11.
[71] The 2003 Anti-Corruption and Economic Crimes Act, s 2.

that may include disciplinary action. The significance of this section is in its ability to secure the interests of whistle-blowers.

However, section 65 (1) is qualified by section 65 (2) that requires the informant to believe that the information he or she provides is true. It recognizes the fact that the right to information is not absolute and is accompanied by some duties. The informant needs not be verify the truth of the information but should only believe that it is true. This is in line with Article 35 of the Constitution on the right of access to information. The whistle-blower's actions merely need to be in good faith because they lack the competency and equipment to verify the information's fecundity. Therefore, it is prudent that the body that will rely on the information judicially, first, ascertains its reasonableness and credibility.[72]

Furthermore, section 65 (3) allows for the maintenance of the anonymity of persons who have disclosed or assisted in the disclosure of information to investigators or the EACC. Whistle-blower protection can be actualized by maintaining their anonymity as per the provisions of this section. Whistle-blowers can choose to remain anonymous, and the Act assures them that their anonymity will be protected even during the prosecution of the case. Similarly, section 65(4) obligates the court to ensure their anonymity is maintained and the persons involved protected. This obligation on the part of the court is fulfilled by ensuring the concealment of trial documents that may lead to the identification of the person who disclosed or assisted in disclosing the information.[73] However, the operation of subsections (3) and (4) is not absolute as the court is allowed

[72] Thomas Mboya Oluoch & another v Lucy Muthoni Stephen & another [2005] eKLR.
[73] Samuel Kiprono Chepkonga v Kenya Anti-Corruption Commission & another [2014] eKLR. In this case, the whistle-blower's anonymity was maintained despite the court finding the prosecution as malicious and lacking in reasonable ad probable cause.

to overlook them so long as it is in the interest of justice as provided in section 65(5). It appears as if justice is accorded more weight than the protection of whistle-blowers.

2.3.5 The 2016 Bribery Act

The Bribery Act, 2016 applies to and places obligations on both public and private sector individuals in the fight against corruption. When it comes to whistle-blower protection, the Act makes harassing, intimidating, or disclosing any information concerning witnesses, informants, or whistle-blowers - an offense.[74] Law enforcement agencies are also mandated to put in place mechanisms for protecting the identity of witnesses and informants. It also tasks the EACC with the duty of assisting entities and interested persons in coming up with whistle-blower protection procedures. The WPA under the Witness Protection Act determines the degree of protection.[75] However, developing reasonable mechanisms for protection is only limited to law enforcement agencies, leaving other stakeholders out, thereby undermining enforcement.[76] Also, while the Act offers protection to whistle-blowers from retaliation, it does not provide remedial action for whistle-blowers who suffer detrimental action. The lack of institutions to regulate corrupt practices in the private sector undermine, promotion of whistleblowing. Further, the poverty of regulations creates hurdles for effective and efficient implementation of the Act.

2.3.6 The 2007 Employment Act

The Employment Act cushions against unfair dismissal of employees by employers, and this is a protection mechanism for whistle-blowers. The legislation refers to the circumstances when termination under any employment contract is deemed unfair. An

[74] The 2016 Bribery Act, s 21.
[75] The 2016 Bribery Act, s 21(3).
[76] The 2016 Bribery Act, s 21(4).

employer is expected to be guided by fairness, justice, and equity which mandates him or her or it to provide a written and/or formal justification for any termination of an employee.[77] The Act also provides for remedies for unfair termination.[78] An employee can be dismissed from his or her employment and may not be employed elsewhere due to whistle-blowing. However, considering he or she was a whistle-blower, it begs for dedicated legislation for protecting whistle-blowers, away from the reliance on the unfair dismissal section of the Employment Act.

2.3.7 The 2009 Proceeds of Crime and Anti-Money Laundering Act

The Act provides protection of informers and keeping information confidential to offenses committed under the Act. However, the legislation has a caveat to the extent that:

a. Where the information is for purposes of assisting the Financial Reporting Centre or authorized officer to carry out its functions; and
b. Where the informer will be required to give evidence in court in either civil or criminal proceedings for the administration of justice.[79]

The challenge with this section is that it does not guarantee protection to informers who report money laundering offenses under the Act. This inevitably discourages persons from making disclosures for fear of reprisals and victimization. To resolve this, absolute protection should be provided to the informers before, during, and after court proceedings. This will be adequately achieved if whistle-blower-specific laws are put in place.

[77] The 2007 Employment Act, s 45.
[78] The 2007 Employment Act, s 49.
[79] The 2009 Proceeds of Crime and Anti- Money Laundering Act, s 20.

2.3.8 The 2018 Whistle-blower Protection Bill

The Whistle-blower Protection Bill, 2018 is a positive step towards having a cohesive and clear law on the protection of whistle-blowers. Section 11 of the Bill provides for the improper conduct that applies to whistle-blowers both in the private and the public sectors.[80] However, section 6 stipulates that it is the CAJ to determine the public bodies that the Act applies to by developing the necessary guidelines. Therefore, the operation of the Bill (if Parliament approves it to law) to the private sector will not be absolute. In setting the guidelines, CAJ needs to consider the operations, size, nature of the public bodies, and the public interest linked to them. In that respect, the draft legislation does not cover the private sector.

The Bill provides for the disclosure process under sections 12 to 20 by requiring private and public bodies to establish and maintain written procedures that take into account the minimum procedures for receiving, reviewing, investigating a disclosure, and referring to the appropriate public body. It is important to note that it makes provisions for anonymous disclosures. Still, it requires that an affirmation mark and writing be put in place asserting the person's honest belief in the veracity of the information.[81] Also, sections 21 to 23 of the Bill mandate both the private and public sectors to develop processes and policies of whistleblowing based on stipulated requirements. Part VI of the Bill provides for mechanisms of whistle-blower protection, ranging from complaints or contracts reprisal to how reprisal complaints can be lodged. The entitlements of whistle-blowers include disclosed information confidentiality, immunity from suit or prosecution, and protection against reprisal.[82]

---

[80] The 2018 Whistle-blower Protection Bill.
[81] The 2018 Whistle-blower Protection Bill, s 20.
[82] The 2018 Whistle-blower Protection Bill, s 24.

More significantly, the Bill establishes the Whistle-blower Reward Fund.[83] If a whistle-blower discloses information leading to an accused person's arrest and conviction, they are entitled to a monetary reward.[84] However, section 44 provides for disclosure limits, which include protected information, such as those protected by advocate-client privilege, Cabinet or National Security Council deliberations, health information, and classified information. While the Commission is mandated to investigate any reprisal complaint or disclosure, it may decline to do so and give reasons if it determines that the allegations were made in bad faith, were vexatious or frivolous.[85]

However, to effectively protect whistle-blowers, the Bill needs further amendments. First, it needs to define disclosure to avoid the ambiguity that may arise during interpretation. In its current form, the Bill does not define what disclosure means. Second, to cover the private sector fully, the term 'person' should be used in the Bill in a generic sense that adheres to the definition in Article 260 of the Constitution to include both natural and juristic persons. Third, the Bill should also provide for mechanisms of dealing with whistle-blowers with nefarious intentions.

2.4 Conclusion

Considering whistleblowing is one of the ways of fighting corruption, mechanisms need to be put in place to protect those who willingly and in their own volition give information to uncover corruption and related felonies. The existing regulatory framework in Kenya does not prioritize whistle-blower protection. However, some of the existing laws aimed at entrenching good governance and reducing corruption also touch on whistleblowing. The main issue is that there is no law specifically dedicated

[83] The 2018 Whistle-blower Protection Bill, s 34.
[84] The 2018 Whistle-blower Protection Bill, s 37.
[85] The 2018 Whistle-blower Protection Bill, s 8(3).

to whistle-blowers to ensure legal certainty and clarity. Besides, there is no operational institution or law that directly promotes the whistleblowing culture in Kenya by providing the necessary protection.

A reading of the existing legislation in Kenya on whistle-blower protection reveals that the current legal framework is a farce. Therefore, one of the recommendations of this chapter is that whistle-blower protection law should be enacted as a matter of priority to accord those risking their livelihoods and lives by exposing and disclosing corruption scandals the protection they need. In Africa, Kenya is lagging in enacting specific laws on whistle-blower protection. The enactment of the Whistle-blower Protection Bill of 2018 whose provisions are in line with the basic standards set by international instruments, especially the G20 Principles is long overdue.

CHAPTER THREE: ANALYSIS OF WHISTLE-BLOWER PROTECTION IN THE PRIVATE AND PUBLIC SECTORS IN KENYA

3.1 Introduction

The Black's Law Dictionary defines a whistle-blower as "an employee who reports an employer of wrongdoing to a governmental authority or a law enforcement agency."[86] In Kenya, the Bribery Act defines a whistle-blower as "any person who gives a report to the EACC or law enforcement on bribery or allegations of bribery."[87] In most cases, whistle-blowers have concerns over some moral, ethical or illegal activity that the employer or any other person within an organization or company is doing. Therefore, whistleblowing can occur in the private or public sector. The common act reported are mainly on corruption, racism, nepotism, economic misconduct, or other social vices occurring within an organization. This paper mainly focuses on the link between whistleblowing and corruption.

Scholars have studied whistleblowing from a political, legal, psychological, and economic standpoint.[88] This shows the multifaceted character of the phenomenon. While the concept resides within the ambit of labour law, it has close links with other areas such as public law, ethics, and criminal law. An approach to address it should, therefore, cover all these areas of law. This chapter will attempt to explain who constitutes a whistle-blower and their characteristics. It then proceeds to examine the effectiveness of whistleblowing as a tool of fighting corruption and the effect of

[86] Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (9th ed, West Publishing Corporation, Minnesota, 2009), p. 412.
[87] The 2016 Bribery Act, s 2.
[88] Kate Kenny, *Whistleblowing: Toward a New Theory* (Harvard University Press, Cambridge, 2019), p. 13.

whistleblowing on the whistle-blower. The legal status of the phenomenon is then analysed to explain areas that need to be covered by any proposed law on the prevention of corruption.

3.1.1 Who Engages in Whistleblowing

Generally defined, whistleblowing is the act of raising the alarm to alert others about a dangerous situation. Whistleblowing is mainly done by employees disgruntled against their superiors or any other person. They then decide to bring out the problems to the public scene.[89] Government employees have been instrumental in bringing to light corruption scandals, economic misappropriation, and other social (in) justice issues occurring in their offices. Organizations in the private sector are increasingly witnessing the frequency of whistle-blowers from board members, internal auditors, and employees.[90] A whistle-blower may report internally to the management or resort to external reporting. Internal reporting is, however, easily dealt with by the organization without involving the public.

3.1.2 Characteristics of Whistle blowers

There is a myriad of characteristics on what constitutes a whistle-blower. The first common characteristic is a link with an organization. Most whistle-blowers - have a close link with an organization arising from either current or previous employment. Whistle-blowing could occur to actions that are taking place while the whistle-blower is still a member of the organization or sometime after leaving it.[91] Second, whistle-

---

[89] Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (9th ed, West Publishing Corporation, Minnesota, 2009), p. 412.

[90] Jessica Mesmer-Magnus and Chockalingam Viswesvaran, 'Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation's' (2005) 62 Journal of Business Ethics 118.

[91] Janet Near and Marcia Miceli, 'Organizational Dissidence: The Case of Whistle-Blowing' (1985) 4 Journal of Business Ethics 91.

blowers always seek anonymity while sharing the secrets of the organization. They may do this through secret media interviews or anonymous calls to law enforcers.

Another defining characteristic of a whistle-blower is that most of them lack the power or authority to effect the change to address the wrongdoing. Most of them are low-level employees who have witnessed the wrongdoing but lack the powers to address the issues. Board members engaged in whistleblowing may also have lacked the backing of other board members to effect the change in the organization. As a result, whistle-blowers resort to public reporting and informal means to address the wrongdoing.[92] Internal auditors and the office of the Ombudsman are, on the other hand, required to whistle-blow when they encounter illegal acts in the performance of the duties.

3.2. Effectiveness of Whistle blowers as a tool for Fighting Corruption

Accountability and transparency are crucial components and indispensable pillars of any democratic society. Several mechanisms have been put in place by governments to ensure this is achieved both in the private sector and public sector. At the core of accountability and transparency is the right to access and disseminate information, to which, disclosure of the information remains key. Whistleblowing generally aims at encouraging disclosure and access to information by the public. Therefore, it is important to analyse its effectiveness in ensuring accountability.

3.2.1 Legal Protection

Firstly, as mentioned in the above paragraph, a society that claims to be democratic ought to encourage various aspects of whistleblowing. In this regard, having comprehensive legal protection of whistle-blowers helps in determining its

[92] Janet Near and Marcia Miceli, 'Organizational Dissidence: The Case of Whistle-Blowing' (1985) 4 Journal of Business Ethics 94.

effectiveness.[93] Legal protection is ensured by having comprehensive statutes that determine procedural and substantive factors affecting whistle-blowers. Legal protection encourages and protects those who blow the whistle and help cushion them from some of the adverse effects of their actions. In their paper titled *What Makes Whistleblowing Effective*, Apaza and Chang state that various researches in countries such as the United States, Israel, and Russia show that having effective whistleblowing laws within a country is a determinant in reducing corruption.[94]

3.2.2 Mass Media

Mass media is another important determinant tool of an effective whistleblowing practice within a country. External whistle-blowers mostly use the media to air their grievances and to publicize their wrongdoings. This is usually due to fear of reprisal from their employers or after internal mechanisms of the organization failed to address their claims.[95] The presence of independent and free media within a country provides a huge boost for whistle-blowers. The weaker the media freedom, the less effective whistleblowing becomes. Dictatorship and authoritarian governments often curtail so much media freedom. They discourage and discredit media stations, thereby dampening the spirits of whistle-blowers. Perhaps the most paramount fear of the journalists - and mostly those in the public sector - is the persecution they risk facing if they air stories harvested from whistle-blowers.

---

[93] Carmen R Apaza and Yongjin Chang, 'What Makes Whistleblowing Effective' (2011) 13 Journal on Public Integrity 18.
[94] Carmen R Apaza and Yongjin Chang, 'What Makes Whistleblowing Effective' (2011) 13 Journal on Public Integrity 20.
[95] Carmen R Apaza and Yongjin Chang, 'What Makes Whistleblowing Effective' (2011) 13 Journal on Public Integrity 23.

3.2.3 Characteristics of the Organisation

As stated earlier, misdeeds may occur in either public or private organizations. Each of these has distinct features, characteristics, and cultures. For instance, public organizations like government departments are mostly bureaucratic and often very slow to change. On the other hand, most private organizations are quick to adapt to changes. Furthermore, governmental departments have some form of strong political influence in their administration. This affects their rate of responsiveness, adaptation, and implementation of change(s).

The results of these stark differences result in the different ways whistleblowing will impact an organization. The more bureaucratic an organization is, the less responsive it will be to change.[96]Change threatens the organizational structure, the administrative traditions, and the organizational culture in such organizations. It makes them more reluctant to positively incorporate critiques and address allegations made against them.[97]Political influence in government departments also scuttles their response to claims made by whistle-blowers. In Kenya, for example, identity politics often come to play when various government departments are accused of corrupt practices, thereby slackening the effectiveness of the evidence provided by whistle-blowers.

3.2.4 Risk Factors on the Whistle-blower

Whistle-blowers often experience various setbacks after providing valuable information to either the public or law enforcement agencies. Some of the backlash, which shall be discussed below, discourages many people making them shy away from

---

[96] Janet Near and Marcia Miceli, 'When Whistleblowing Succeeds: Predictors of Effective Whistle-Blowing.' (1990) 20 Academy of Management Proceedings 312.

[97] Janet Near and Marcia Miceli, 'When Whistleblowing Succeeds: Predictors of Effective Whistle-Blowing.' (1990) 20 Academy of Management Proceedings 315.

disclosing valuable information. More often than not, these obstacles impact the personal and professional life of the whistle-blower.[98] Lack of motivation and the reluctance to undergo the consequences of their actions reduce the number of those willing to disclose crucial information on corruption scandals to the public. An apt example in this regard is the case of Edward Snowden, a former employee, and subcontractor of the US spy agency the Central Intelligence Agency (CIA). He copied highly classified information and released it to the public. The information involved a telephone tapping and hacking by the National Security Agency (NSA) in 2013.[99] Before Russia came to his aid, Edward Snowden sought asylum from many countries. They shut the door for him.

3.3. Effects of Whistleblowing

3.3.1 Psychosocial Effects

Psychosocial factors generally relate to an individual's thoughts and behaviour and his or her interactions within society. Society plays a crucial role in contributing to the mental well-being of a person. Various negative mental states like stress and depression are often linked with external factors surrounding the individual. In both internal and external whistleblowing, the results of disclosure, one way or another, will find their way out to other people other than the agencies or the person who received the information.

[98] Hengky Latan, Christian M Ringle and Charbel Jose Chiappetta Jabbour, 'Whistleblowing Intentions Among Public Accountants in Indonesia: Testing for the Moderation Effects' (2018) 152 Journal of Business Ethics 600.

[99] Hengky Latan, Christian M Ringle and Charbel Jose Chiappetta Jabbour, 'Whistleblowing Intentions Among Public Accountants in Indonesia: Testing for the Moderation Effects' (2018) 152 Journal of Business Ethics 602.

Organizational response to whistle-blowers varies depending on the value placed on the disclosed information. Some organizations may address the complaints made by the disgruntled employee and in some cases even reward the employee.[100]Certain organizations which depend on the wrongdoing will, however, employ various techniques to prevent the disclosure from occurring. Organizations may threaten the employee, try to coerce, discredit or resort to character defamation once the disclosure occurs.[101] In cases where these methods are used, the whistle-blowers end up losing their job. This affects their professional lives. The changes may result in the high level of stress for the whistle-blowers, leading to depression and other negative psychosocial effects.

3.3.2 Retaliation

In many cases, internal disclosures do not have any negative effects on the whistle-blowers. This is because it is always viewed as loyalty to the organization. In cases where top management is reluctant to address the issues raised by the whistle-blower, external disclosure is resorted to. Julio Andrade states that traditionally, the ethical problem of whistleblowing was seen in the context of the conflicting loyalty of the employee.[102]As a result, breaching this organizational loyalty amounts to disloyalty to the top management who may have regarded the raised issue as trivial.[103] Higher

[100] Hengky Latan, Christian M Ringle and Charbel Jose Chiappetta Jabbour, 'Whistleblowing Intentions Among Public Accountants in Indonesia: Testing for the Moderation Effects' (2018) 152 Journal of Business Ethics 603.

[101] Hengky Latan, Christian M Ringle and Charbel Jose Chiappetta Jabbour, 'Whistleblowing Intentions Among Public Accountants in Indonesia: Testing for the Moderation Effects' (2018) 152 Journal of Business Ethics 606.

[102] Julio A Andrade, 'Reconceptualising Whistleblowing in a Complex World' (2015) 128 Journal of Business Ethics 118.

[103] Julio A Andrade, 'Reconceptualising Whistleblowing in a Complex World' (2015) 128 Journal of Business Ethics 121.

management of the organization then retaliates against the employee perceived to be disloyal through various mechanisms.

Miceli, Near, and Dworkin state that unlike in revenge, organizations retaliating do not result in the infliction of damage or injury to the employee.[104] The organizations aim to discredit the employee and avoid further dissent and whistleblowing from occurring. It is an attempt to control the employee or seek to take action against the employee following the disclosure by an employee.[105]The rationale for retaliation is the perceived or actual harm occasioned to the organization by the employee's disclosure. Organizations may, however, find it hard to engage in discrediting campaigns against former employees. In other cases, current employees may be fired from their positions and their professional lives ruined by top management.

3.3.3 Compensation

As already mentioned, internal disclosures are less costly to organizations since they can be remedied within the internal structures. Civil and criminal suits or reputational damage may occur if the employee uses external reporting of any maleficence in the organization which may end up costing the management heavily. Certain employers may provide incentives to employees who use internal dispute resolution mechanisms. Practitioners in the private sector use financial incentives to encourage whistleblowing, even though the effectiveness of these incentives is yet to be established.[106] Other incentives may include promotion within the company.

---

[104] Marcia Miceli, Janet Pollex Near and Terry Dworkin, *Whistle-Blowing in Organizations* (Psychology Press, United Kingdom, 2008), p. 15.
[105] Marcia Miceli, Janet Pollex Near and Terry Dworkin, *Whistle-Blowing in Organizations* (Psychology Press, United Kingdom, 2008), p. 17.
[106] Clara Xiaoling Chen, Jennifer Nichol and Flora Zhou, 'The Effect of Incentive Framing and Descriptive Norms on Internal Whistleblowing' (2017) 34 Contemporary Accounting Research 76.

Information regarding corruption scandals is important public information. It is vital and in the interest of the public for the information to become public knowledge. Continued internal disclosure may hamper the government's efforts to tackle corruption since most of the scandals will be dealt with internally. Various organizational codes of conduct may include penalties such as demotion or dismissal for failure to use internal mechanisms. This discourages employees from making known to the public crucial information. Such backlash for using internal mechanisms explains why the government faces an uphill task in improving the attitudes of employees to disclose information.

Available studies have shown substantial improvement in employee attitudes to disclose where there are adequate protection and provisions for financial compensation. Between 2002 and 2013, South Korea's Anti-Corruption and Civil Rights Commission received 28,246 reports, 220 of which were corruption cases.[107]Out of the corruption cases, the Commission recovered over $60 million and provided compensation of over $6.4 million. The percentages of the incentives ranged from 4% to 30%.[108]While one cannot say that compensation is the only motivation for whistle-blowers, incentives help to at least cushion the whistle-blowers from some of the negative consequences of disclosure.

3.3.4 Stigma

Whistle-blowers may undergo social stigma after disclosing information. At the workplace, for example, resentment may ensue, leading to other employees viewing the

[107] Yongjin Chang, Mark Wilding and Min Chul Shin, 'Determinants of Whistleblowing Intention: Evidence from the South Korean Government' (2017) 40 Public Performance & Management Review 674.

[108] Yongjin Chang, Mark Wilding and Min Chul Shin, 'Determinants of Whistleblowing Intention: Evidence from the South Korean Government' (2017) 40 Public Performance & Management Review 679.

act as betrayal and excluding the whistle-blower from the social settings at the office. Furthermore, organizations engaging in smear campaigns and defaming a whistle-blower may lead to him or her being side-lined. This stigma negatively impacts the quality of social and economic life of the whistle-blower, leading to other negative psychosocial effects.

3.4. Legal Issues Surrounding Whistle-blowers Protection and Prevention of Corruption

Competing interests arise in the protection of whistle-blowers in the statutes. Legislations and case law ought to balance with certainty these interests to ensure adequate protection for the whistle-blower to achieve effective prevention of corruption in Kenya. Also important in the anti-graft war is effective legislation and critical analysis of the legal questions surrounding whistleblowing.

3.4.1. Protection against Retaliation

Section 21 of the Bribery Act enhances the protection of whistle-blowers against retaliation by employers. It provides as follows:

> *A person who demotes, admonishes, dismisses from employment, transfers to unfavourable working areas, or otherwise harasses and intimidates a whistle-blower or a witness under this Section is guilty of an offense and shall be liable upon conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year or to both.*[109]

[109] The 2016 Bribery Act.

Employers who retaliate against their employees, therefore, face a criminal conviction. However, the whistle-blower should also be protected from civil suits by the employers arising from breach of confidentiality agreements or official secret laws.

3.4.2 Anonymity

Anonymity, the act of not naming the person, remains a key component in encouraging whistleblowing to flourish in a country. Most employees wish to remain anonymous during whistleblowing to prevent their identities from being known. Anonymity protects them from job loss or the stigma in the aftershock of the disclosure. The Bribery Act provides for reasonable mechanisms to protect the identity of informants and witnesses of agencies such as law enforcement institutions and courts.[110] Those who volunteer information to unearth misdeeds are also afforded witness protection by the Witness Protection Agency in instances where the whistle-blower has made a disclosure and becomes a witness as a result or faces threats to life or personal security.

3.4.3 Limits

Disclosure in the public sector presents concerns as to the limits on the nature of the information. Global concerns such as terrorism have forced countries to tighten their national security measures.[111] While it is important to limit the disclosure of some information crucial for the security of a State, it is hard to ignore the impact of corruption on the State.[112]Corruption is a public interest and a global issue. It then brings a conflict of whether disclosure of corrupt practices in the national security

[110] Yongjin Chang, Mark Wilding and Min Chul Shin, 'Determinants of Whistleblowing Intention: Evidence from the South Korean Government' (2017) 40 Public Performance & Management Review 679.

[111] Tetiana Kobzieva, 'Ethical and Legal Grounds for The Whistleblowing of Corruption Offenses' (2019) 22 Journal of Legal, Ethical and Regulatory 5.

[112] Tetiana Kobzieva, 'Ethical and Legal Grounds for The Whistleblowing of Corruption Offenses' (2019) 22 Journal of Legal, Ethical and Regulatory 8.

agencies and other sensitive national information tramples the need to keep such information private.

The Constitution protects the right of access to information by providing that every citizen has a right to access information held by the State.[113]The State is obligated to publish and make available any information affecting the nation. The Access to Information Act[114] outlines grounds on which disclosure of information may be restricted, but it states that the provisions may be overridden where the public interest in disclosure outweighs the harm to protected interests. The courts retain the discretion to determine if the disclosure outweighed the protected interest. It is, therefore, crucial for legislators to provide a delicate balance between the disclosure by whistle-blowers and certain protected information of the state. Private entities do not have this protection since it mostly applies to public ones.

3.4.4 Effective Administration

African countries are always ranked among the most corrupt in the world. Transparency International's 2019 Corruption perception index showed that 16 were among the top 100 worldwide. Botswana, Seychelles, and Cape Verde Island were in the top 50.[115] Factors such as understaffing and under-resourcing of the whistleblowing agencies are some of the reasons given for rampant corruption.[116]At the core of the legal protection for whistle-blowers is an effective administrative body. In most jurisdictions, offices

[113] The 2010 Constitution of Kenya, art 35(1).
[114] The 2016 Access to Information Act, s 6(4).
[115] Oliver Nnamdi Okafor, 'Deployment of Whistleblowing as an Accountability Mechanism to Curb Corruption and Fraud in a Developing Democracy' (2020) 33 Ahead-of-print Accounting, Auditing & Accountability Journal 1332.
[116] Oliver Nnamdi Okafor, 'Deployment of Whistleblowing as an Accountability Mechanism to Curb Corruption and Fraud in a Developing Democracy' (2020) 33 Ahead-of-print Accounting, Auditing & Accountability Journal 1335.

such as the Ombudsman and Anti-Corruption Commissions are the bodies charged with handling complaints raised by whistle-blowers.

In Kenya, the EACC is the body tasked with receiving complaints and allegations of bribery and other forms of corruption. An effort needs to be made to ensure that the EACC effectively fulfils its functions by providing it with a wider mandate such as providing incentives to whistle-blowers. In 2015, the Nigerian government provided incentives of 2.5-5% of the total recovered funds to the whistle-blowers. .[117] Incentivised whistleblowing by agencies initiates positive citizen behaviour. This promotes accountability in the private and public sectors. The EACC should also provide clear procedures to be followed by whistle-blowers to avoid confusion. The mandate of the EACC should be expanded to include the investigation of claims of discrimination by whistle-blowers and award them for their disclosure if it results in substantial recovery of money; make recommendations to the authorities who are required to take action such as initiating criminal proceedings; receive complaints of retaliation, and have the power to order a public body to restore a public servant and prevent any future victimization.

3.4.5 Addressing Whistle-blower Concerns

Kenyan legislation addresses some concerns faced by whistle-blowers in disclosing information. However, there is a lacuna in the protection of other negative effects faced by whistle-blowers. Firstly, the law should provide for protection even in situations where the evidence provided by the informants turns out to be false information as long

[117] Oliver Nnamdi Okafor, 'Deployment of Whistleblowing as an Accountability Mechanism to Curb Corruption and Fraud in a Developing Democracy' (2020) 33 Ahead-of-print Accounting, Auditing & Accountability Journal 1336.

as it was made in the individual's reasonable belief.[118] Secondly, legislation should ensure the protection of persons mistakenly believed to be whistle-blowers and providing clear guidelines for both internal and external disclosures.[119]The EACC should ensure that reasonable effort is made to prevent psychosocial aftershocks of whistleblowing through adequate mental health care for disclosing employees.

3.5 Kenyan Context of Whistleblowing

Kenya's post-colonial history is dotted with cases of corruption. Successive governments have unsuccessfully tried to beat graft. The gravity of the ever-ballooning spate of corruption has become clearer, thanks to increased media coverage of such cases. As a result, there has been a general rise in people's awareness of some underhand dealings in the public and private sectors. A good number of incidences of corruption have been exposed by public-spirited employees in both the public and private sectors. Their efforts have been boosted by internal auditors (especially in the private sector) and the Auditor-General after scrutinizing government books. Some of these initiatives have led to public demands for the recognition and protection of whistle-blowers.

3.5.1 Instances of Whistleblowing in Kenya

Kenya is constantly ranked among the most corrupt countries in the world by Transparency International. The fight against corruption seems to be lost as cartels win both their say and way. Politicians, international donors, non-state actors, and the

---

[118] Transparency International Kenya, 'Comprehensive Legislation on Whistle-blower Protection in Kenya' (2015) Policy Brief 1 4 <https://tikenya.org/wp-content/uploads/2017/06/policy-brief-no-1-2015-comprehensive-legislation-on-whistle-blower-protection-in-kenya-1.pdf>. Accessed 26 August, 2020.

[119] Transparency International Kenya, 'Comprehensive Legislation on Whistle-blower Protection in Kenya' (2015) Policy Brief 1 6 <https://tikenya.org/wp-content/uploads/2017/06/policy-brief-no-1-2015- comprehensive-legislation-on-whistle-blower-protection-in-kenya-1.pdf>. Accessed 26 August, 2020.

general public have proposed strategies to fight corruption in its different forms. However, high acquittal levels and the slow pace of prosecution of corruption cases have conspired to leave in their wake a dismayed, disappointed, and discouraged citizenry. Encouraging whistleblowing, therefore, presents an opportunity for the government and the private sector to hand the anti-graft war the requisite additional ammunition. The Building Bridges Initiative report recognizes the integral part whistleblowing can play in curbing corruption. The report proposes a five percent pay-out for any whistle-blower who gives information that leads to arrest and conviction.[120] In 2018, the Attorney General proposed an incentive of paying a whistle-blower 10 percent of the recovered funds in a corruption case.[121]Incentivising whistleblowing will improve citizen motivation to unearth impropriety and also help in the fight against corruption.

The combined roles of whistle-blowers and the media have unearthed many scandals in Kenya, paving the way for investigations and subsequent prosecutions. Eight days before the October 26, 2017 repeat presidential election, Dr. Roselyne Akombe, a commissioner with the IEBC dramatically quit the team. She alleged that the commissioners were partisan and had bungled the General Election, causing the Supreme Court to throw out results of the presidential wing of the polls. Among others, Dr. Akombe the whistle-blower fingered the IEBC's last-minute decision to change the gazetted polling stations.[122]Fearing for her life, Dr. Akombe quietly returned to the US but was quick to challenge the IEBC to disclose the legion of challenges the Commission faced in organizing free, fair, and credible elections. Another incident

---

[120] Stella Cherono, 'BBI: Whistle Blowers to Be Paid 5pc of Cash Recovered from Graft' *Daily Nation* (Nairobi, 26th November 2019) 6.

[121] Stella Cherono, 'BBI: Whistle Blowers to Be Paid 5pc of Cash Recovered from Graft' *Daily Nation* (Nairobi, 26th November 2019) 7.

[122] Haron Ochodo, 'Former IEBC Commissioner Roselyn Akombe Responds to Her Fake Death News' *The Standard Newspaper* (Nairobi, 24 June 2019) 14.

involving public-spirited individuals took place in August 2019. Famously known as the 'Masaai Mara Heist', some officers in the Finance department at the Maasai Mara University in Narok County volunteered information to Citizen TV about financial impropriety within the institution. It was alleged that the university had lost a lot of money in questionable deals. Subsequent investigations by the Directorate of Criminal Investigations revealed how top management at the university colluded with some junior staff to fleece the institution of more than KSh.171 million through an elaborate scheme involving irregular and illegal processing of cheques.[123] Despite the TV station airing the expose – which was later picked up by several media houses - in August 2019, the arrest and prosecution of the university's Vice-Chancellor and her accomplices occurred nearly a year later.[124]

The most recent incident on the growing list of scandals in Kenya is the theft of funds raised locally and internationally to fight Covid-19. It involved the Ministry of Health and the Kenya Medical Supplies Authority (KEMSA). Following the investigative work by Nation TV journalist Dennis Okari, the documentary exposed how KEMSA officials handpicked companies and awarded them multibillion shillings contracts under the cover of the health crisis.[125] Investigations into the matter, including a joint one by the two Houses of Parliament, were agreed in their verdict that KEMSA abused procurement procedures and awarded huge tenders to several underserving suppliers. These examples point to the critical role played by whistle-blowers in exposing corruption, leading to the arrest and prosecution of some culprits.

---

[123] Benjamin Muriuki, 'DPP Orders Arrest of Maasai Mara University VC Mary Walingo over Ksh.177M Scandal' *Citizen Digital* (Nairobi, 24 August 2020) 2.

[124] Benjamin Muriuki, 'DPP Orders Arrest of Maasai Mara University VC Mary Walingo over Ksh.177M Scandal' *Citizen Digital* (Nairobi, 24 August 2020) 3.

[125] Paul Wafula, 'Lobbies Want Accounts of Covid-19 Millionaires Frozen, Probe Hastened' *Daily Nation* (Nairobi 24 August 2020) 11.

3.5.2. Case Law and Whistleblowing in Kenya

In as much as whistle-blowers play a major role in the fight against corruption, their position in Kenyan courts remains precarious. The quality of evidence provided by whistle-blowers is always contentious when determining the admissibility of the same. The Constitution states in Article 50(4) that the admissibility of evidence obtained in a manner that infringes on the Bill of Rights is not admissible.[126]The rationale is that the evidence obtained in such a manner infringes on the right to a fair trial or administration of justice. This particularly applies to documentary evidence given by whistle-blowers - in anonymity.

Courts are generally reluctant to grant admissibility to documentary evidence obtained from employees of public institutions in anonymity. This is because Article 35 of the Constitution provides for the right of access to information held by the State.[127]The Evidence Act in section 80 supplements this position by providing that every public officer shall provide to any person having the right to such documents, any copy of the document.[128] The Access to Information Act, furthermore, provides the entitlement of individuals to any information held by the State and any public officer.[129]

The reluctance of the courts to admit evidence obtained by way of whistle-blower information was witnessed in *Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others*.[130] In this case, the Petitioners challenged the procurement contracts relating to the Standard Gauge Railways project in Kenya. The Petitioners had received anonymous documents relating to correspondence between the Ministry of Transport, the office of the former Deputy Prime Minister, the Embassy of China, the Attorney

[126] The 2010 Constitution of Kenya, art 50(4).
[127] The 2010 Constitution of Kenya, art 35(1) (a).
[128] The 1963 Evidence Act, s 80(1).
[129] The 2016 Access to Information Act, s 4(1) and s 5.
[130] Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others (2020) eKLR.

General among other governmental departments. The Court of Appeal was cautious in admitting the documents obtained in such a manner, stating that the Constitution and the Evidence Act provide for the procedure to be followed to obtain evidence from public officials.

The court noted as follows:

> *Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accord with Article 35 of the Constitution. The appellants did not need to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.*[131]

The High Court in *Michael Sistu Mwaura Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others* addressed the question of whether charges can be preferred against a whistle-blower by the police.[132] The court,[133] in relying on the decision of the High Court in *Republic v Director of Public Prosecutions & 4 others Ex parte - Senator Johnson Nduya Muthama* [2015] eKLR stated as follows:

> *The mere fact that a person offers to furnish the police with evidence does not in my view bar the police from subsequently preferring charges against him if in their opinion the cumulative effect of the evidence collected*

---

[131] Okiya Omtatah Okoiti & 2 Others v Attorney General & 4 Others (2020) eKLR para 63.
[132] Michael Sistu Mwaura Kamau & 12 others v Ethics and Anti-Corruption Commission & 4 others [2016] eKLR para 296.
[133] Republic v Director of Public Prosecutions & 4 others Ex parte - Senator Johnson Nduya Muthama [2015] eKLR.

identifies that person as the culprit...Caution must, however, be taken in light of the provisions of Article 50(4) of the Constitution.

In *Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another*, the Employment and Labour Relations Court protected the identity of whistle-blowers in employment. The claimant the Assistant Manager of Procurement at ICPAK had his contract terminated after a whistle-blower gave adverse information to the management.[134] The court noted that the employer was not obliged to hold a quasi-judicial investigation and cross-examination of witnesses during the disciplinary committee meeting and was not obliged to disclose the identity of the whistle-blower. There is a need to balance confidentiality and protection of the whistle-blower by the employer. This case is particularly important in internal disclosures to prevent stigma at the workplace of any person who discloses information to the employer.

In contrast, the High Court in *Tom Odege & Another v Lawrence Ochieng Nyaguti* held that certain messages alleging misappropriation of funds by the Plaintiffs were defamatory. The defendant stated that his intention in releasing the messages was not to disparage the Plaintiffs, but was meant to be a wake-up call on the impropriety within the union by the Plaintiffs.[135] The defendant acted as a whistle-blower for the members of the union. However, the court stated that the allegations were false and, therefore, defamatory. Judge J.K Sergon interrogated the defendant's intention in sending the messages and held that since the defendant was planning to vie for the seat of Secretary-General to the Union, the messages were not intended to whistle-blow, but rather to defame.

[134] Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR.
[135] Tom Odege & another v Lawrence Ochieng Nyaguti [2016] eKLR.

The above case can be used by employers in retaliatory attacks against whistle-blowers. The Courts need to back whistleblowing even where the allegations turn out to be untrue as was recommended by Transparency International.[136]Judge Sergon was, however, right in his ruling since he interrogated the intention of the defendant. Courts ought to strike a delicate balance due to the thin line between whistleblowing and defamation. On the other hand, whistleblowing has received support from the court in the fight against corruption and other crimes. The High Court noted the important role played by whistle-blowers by stating that:

> *...if the issue of punishing crimes was to be left to the victims of such crimes, there will be the question of whether the victims.... would be in a position to take up the matter. We agree with the DPP that if we were to constrict the word 'complainant' to the victim or institution that has suffered loss, we risk many crimes going without detection, investigation or prosecution. Those responsible for reporting crime may have a reason not to. There could be fear of recrimination, self-incrimination or victimization... This is perhaps why whistleblowing is encouraged and protected in the fight against corruption and crime generally...."*[137]

3.6 Conclusion

Many research has highlighted the important link between whistleblowing and the fight against corruption. In Kenya, even though some legislative provisions protect whistle-

[136] Transparency International Kenya, 'Comprehensive Legislation on Whistle-blower Protection in Kenya' (2015) Policy Brief 1 4 <https://tikenya.org/wp-content/uploads/2017/06/policy-brief-no-1-2015- comprehensive-legislation-on-whistle-blower-protection-in-kenya-1.pdf>. Accessed 26 August, 2020.

[137] Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR.

blowers, the protection accorded to them is still fragmented and ineffective. This provides a leeway for organizations with tendencies to dominate their employees and engage in retaliation against dissents.[138]To prevent all the negative effects of whistleblowing while reaping from its benefits in fighting corruption, active effort needs to be taken by the government to fast track the enactment of a legislative framework to govern the practice of whistleblowing.

[138] The 2016 Bribery Act, s 13.

CHAPTER FOUR: COMPARATIVE ANALYSIS

4.1 Introduction

States have taken different regulatory approaches in the protection of whistle-blowers, hence helping in dealing a blow to criminal activities such as corruption and other forms of economic crimes. Indeed, whistle-blower protection has developed in most States and has widened from the public to include the private sectors. Anti-corruption measures have been failing and States are looking into more measures to fight the scourge.[139] Whistleblowing has developed in different jurisdictions and has aided States in fighting crime.[140]

Technological development has made it hard to detect fraud and States have taken the initiative to promote whistleblowing.[141] Other jurisdictions such as the U.S have put in place laws to protect whistle-blowers to promote the fight against abuse of power, breach of legal obligations, gross mismanagement, and embezzlement of public resources.[142]

In this comparative analysis, I take into consideration the whistle-blower protection mechanisms in the U.S and South Africa. The first reason for the choice of the U.S is the existence of a two-tier government system: Federal government and state government. Both levels of government make laws to protect whistle-blowers. This makes it a suitable jurisdiction for study because Kenya also has a two-tier system of

[139] Anita Orlova, 'Developing and Actualizing a Multifaceted Approach to Fighting Corruption,' (2017) 24 Journal on Actual Problems of Economic and Law 409.
[140] Elletta Sangrey, Terry Dworkin and David Lewis, 'Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest,' (2004) 59 University of Miami Law Review 880.
[141] Elletta Sangrey, Terry Dworkin and David Lewis, 'Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest,' (2004) 59 University of Miami Law Review 884.
[142] Terry Dworkin and Elletta Sangrey, 'Internal Whistleblowing: Protecting the Interest of the Employee, the Organization and Society,' (1991) 29 American Business Law Journal 266.

government: national and county. The comparison will, thus, analyze whether it can be viable to have laws both at the national and the county governments that are geared towards the protection of whistle-blowers.

The South African legal framework for the protection of whistle-blowers has been considered to be the most comprehensive of all African countries.[143] For that, it becomes a suitable jurisdiction of study to the Kenyan context. Additionally, the legal systems in the two countries are related as they both apply the common law.

4.2 The United States of America

4.2.1 Introduction

The history of commitment to the protection of whistle-blowers in the U.S can be traced to as early as 1777, shortly after the country had attained its independence although it was not well documented in the laws.[144] The inexistence of federal legislation saw most whistle-blowers suffer wrongful prosecution and subsequent imprisonment. Despite numerous risks associated with whistleblowing during that era, there were still numerous people who petitioned the federal government against the gross violation of human rights by certain factions.

The continued inexistence of legal instruments to protect those committed to protecting the public prompted the federal government to come up with legislation to cater for those who had material non-public information that related to a violation in the public interest[145] such as gross violation of human rights or corruption. The step towards the protection of whistle-blowers became evident in 1791 with the ratification of the

---

[143] Patricia Martin, 'The Status of Whistleblowing in South Africa' (2013) 16 Open Democracy Advice Center 137.
[144] Stephen Kohn 'The Whistle-Blowers of 1777' *New York Times*(US 12 June 2011) 21.
[145] Connor Berkebile, 'The Puzzle of Whistle-blower Protection Legislation: Assembling the Piecemeal' (2018) 28 Indiana International and Comparative Law Review 30.

amendments.[146] The key amendment that sought to protect whistle-blowers was the First Amendment whose purpose, among others, was to ensure the protection of private citizens from suppression due to any embarrassing information they may have against the government. Whistle-blower protection was further enhanced in 1863 with the enactment of the substantive law in the U.S.[147] The law that sought to fortify the protection of whistle-blowers was the False Claims Act. After the enactment of the federal legislation, steps were taken to further protect whistle-blowers both in the public and private sectors.

4.2.2 How Whistle-blowers Are Protected

The legislative framework for the protection of whistle-blowers is done in two distinct but closely related systems at the Federal and State government levels.[148] Most of the legal instruments that have been formulated are intended to take the approach of protection of whistle-blowers from both internal and external perspectives. Internal whistleblowing can be termed as reporting any misconduct or any information that is related to violation of rights in the internal structures of an organization, while the external alternative deals will disclosures to the external organs of the organization or government. The U.S advocates for either of the two means of whistleblowing.[149] The protection of whistle-blowers who either use external or internal means originated and

---

[146] Connor Berkebile, 'The Puzzle of Whistle-blower Protection Legislation: Assembling the Piecemeal' (2018) 28 Indiana International and Comparative Law Review 30.

[147] OECD, 'Whistle-blower Protection in the Private Sector- The U.S Approach' (2016) OECD/LEGAL/0298 116 <https://www.oecdilibrary.org/docserver/97892642526398en.pdf?expires=1602314814&id=id&accname=guest&checksum=5F3B82578E1E725C6325A00EF4467974> accessed 10 October 2020.

[148] Jenny Mendelsohn, 'Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing,' (2009) 8 Washington University Global Studies Law Review 725.

[149] Tom Devine, 'Whistleblowing in the United States', in Richard Calland & Guy Dehn (eds), *'Whistleblowing Around the World: Law, Culture and Practice*,' (Oxford University Press, Oxford 2004), p. 83.

developed both as a result of common law doctrines as well as the statutes. These two legal foundations in the U.S are all geared towards among other things, the protection of whistle-blowers from any form of retaliation that may negatively or adversely affect them. As a result, whistle-blowers are protected from job losses or any forms of retaliation that may emanate from the public as well as from the private sector.[150] These mechanisms also aim to protect the information with whistle-blowers for successful dispensation of justice.

4.2.2.1 The False Claims Act

This Act[151] was enacted during the war period in 1863 upon the realization that the army generals were making procurement of items at highly inflated prices. The war also led to a sharp decline in certain goods within the country. This allowed the military who were supplying such goods to inflate their prices. This piece of legislation was to save the country from wanton pilferage by various people and to expose and stop those who were engaged in corrupt dealings. It also sought to reward and protect whistle-blowers from any form of retaliation.

The Act also introduced the concept of *qui tam,* defined as one that allows, encourages, and authorizes private citizens to bring a cause of action against any institution involved in fraudulent dealings on behalf of the United States. In *Vermont Agency of Natural Resources v United States ex rel. Stevens,* while relying on section 37 of the Act, the U.S Supreme Court outlined that as a way of ensuring that there is the protection of public funds, private citizens were allowed to institute legal proceedings on behalf of the government and that such persons had to be accorded protection.[152]The Act,

---

[150] Cynthia Estlund, 'Free Speech and Due Process in the Workplace' (1995) 71 Indiana Law Journal 724.

[151] The 1863 False Claim Act (FCA), 31 U.S.C. §§ 3729 – 3733.

[152] *Vermont Agency of Natural Resources v United States ex rel Stevens* 529 U.S. 765 (1999w/).

therefore, encouraged private citizens to be more willing to bring such suits on behalf of the government and to clinch monetary reward upon successful conviction. On the other hand, there was also a penalty imposed on whistle-blowers who knowingly volunteered false information. Similar sanctions were meted out on employers who induced their employees to bring claims they knew to be false. As a way of protecting whistle-blowers against retaliatory attacks by their employers where the employee sued or brought a *qui tem* action against their employers, the Act provides provisions for their protection. Section 37 of the Act stipulates that where an employee has been dismissed or discharged by their employers as a result of bringing a *qui tem* action, or where they have faced threats or harassment from their employers, they can bring action against their employers at the Federal District Court. The court may opt to have the employees reinstated to their previous position and/or grant compensation and damages as well as award them the cost for the suits. The Act also protects those in private enterprises from victimization as a result of the information they may have leaked to the relevant bodies.

4.2.2.2 The Sarbanes Oxley Act

The Act (SOX[153]) came into force after a scandal that rocked Enron Corporation, a key corporate company in the U.S.[154] The whistle-blower, Sherron Watkins who was the then Enron's Vice President of Corporate Development sent an anonymous message stating that there were huge irregularities in the company's books of accounts. She called for investigations by an independent auditor. The company wanted to dismiss her but could not since doing so would have resulted in a lawsuit. Months later after

[153] The Sarbanes-Oxley Act 2002.
[154] George Benston, 'The Quality of Corporate Financial Statements and Their Auditors before and after Enron' (1984) 29 Policy Analysis Quarterly 497.

whistleblowing, Enron instituted bankruptcy proceedings.[155] The scandal greatly damaged the image of corporate bodies in the U.S that saw most investors restraining from investing in them. The SOX legislation came into force to enhance the concept of corporate transparency and accountability, and also to increase investors' confidence in corporate entities in the U.S.

The Act sought to enforce whistle-blower protection and broaden the concept of whistleblowing in public and private entities. Among other measures, it provided the need to reinstate whistleblowing employees immediately upon being dismissed as a result of their action. Indeed, the SOX Act protected the information and whistle-blowers to ensure that they can effectively and efficiently report without the fear of job termination.[156] The legislation also covered certain discriminatory aspects that may arise from whistleblowing such as demotion or decrease of salaries or any other benefits.

The Act introduced provisions through which employees could institute civil suits to lay claim against wrongs suffered as a result of whistleblowing. The employees covered under the Act include those who suffered any adverse or negative treatment as a result of retaliation. The legislation presented the employees of companies being traded publicly to present to the authorities any information that related to frauds or any fraudulent dealing that help investigative bodies in successfully lodging cases against those accused.

---

[155] Kathleen Brickey, 'From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley' (2003) 81 Electronic Journal 327.

[156] George Benston, 'The Quality of Corporate Financial Statements and Their Auditors before and after Enron' (1984) 29 Policy Analysis Quarterly 500.

The Sarbanes Act further strengthens the protection of whistle-blowers through the imposition of criminal charges against wrongful dismissal or dismissal founded on information provided about the whistleblowing activities. Section 1107[157] of the Act, provides for punishment such as fining of employers or even imprisonment or both when it is established by a court that dismissal came as a result of whistleblowing activity instituted or reported by an employee.

4.2.2.3 The Dodd-Frank Act

The Act came into force to enhance the protection of whistle-blowers - and also fill certain gaps that existed in the SOX Act of 2002. Key among its provisions is the aspect of protection of whistle-blowers in the business sector.[158] However, it did not effectively cover companies that had subsidiaries and the operations of the subsidiary depended on the parent company. The Act, through section 922 (h) provides for private rights of action that required one to be able to institute protection orders in anticipation of any retaliatory effect that may result from being a whistle-blower.[159] The Act also provides that in circumstances where one has already suffered retaliation as a result of whistleblowing, they can claim rights to protection, compensation, or reinstatement provided they can show that they provided material information to the Securities Exchange Commission; they were at the forefront of initiating or even testifying in an on-going investigation based on the material information they provided, or that they made any required disclosures and are not protected under the SOX Act. This

[157] George Benston, 'The Quality of Corporate Financial Statements and their Auditors before and after Enron' (1984) 29 Policy Analysis Quarterly 503.
[158] Martin Neil Baily, Aaron Klein and Justin Schardin, 'The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth' (2017) 3 The Russell Sage Foundation Journal of the Social Sciences 20.
[159] Kathleen Brickey, 'From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley' (2003) 81 Electronic Journal 330.

legislation serves to fortify and establish more protection mechanisms for whistle-blowers.

The SOX Act provides a relatively lower monetary reward to whistle-blowers. The Dodd-Frank Act increased it to encourage cases of those volunteering information for the successful prosecution of crimes related to securities. The Act, unlike others legislated before it, allows whistle-blowers who would not like their identities to be known to release such information anonymously. This may be for various reasons such as the fear of being victimized and protection of their identities. However, before the whistle-blowers receive the cash bounty, their identity is always revealed to enhance accountability and transparency.

However, this Act has continuously been narrowly interpreted to only protect those who report any information to the Securities Exchange Commission relating to any fraudulent trading that may take place in the securities market. It is for this reason that in *Digital Realty Trust v Somers*, the Supreme Court adopted the narrow definition of retaliation attack.[160]

4.2.3 Additional Protection Mechanisms

The U.S also uses the doctrines of common law to protect the interests of whistle-blowers. One of such circumstances is where the whistle-blower has been unlawfully terminated from work as a result of disclosing information.[161] These relate to employees both in the public and private sectors.[162] However, it is limited to external

[160] *Digital Realty Trust, Inc v Somers* (2017) 138 S Ct 767 (Supreme Court). <https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf> Accessed 16th October 2020.

[161] Martin Neil Baily, Aaron Klein and Justin Schardin, 'The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth' (2017) 3 The Russell Sage Foundation Journal of the Social Sciences 22.

[162] Elleta Callahan and Terry Dworkin, 'Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistle-blowers' (1994) 32 American Business Law Journal 152.

whistleblowing.[163] The rationale for this is that internal whistleblowing does not always have the same public impact as external whistle-blowing is often treated as having been done in the interest of the public.[164] Common law also operates with the principles of the right of employers to be able to terminate the employment contracts of their employees at will. This makes common law not the best option for the protection of whistle-blowers in the U.S. It is also due to the at-will employment doctrine that presumes employer and employee can terminate the employment contract at any time for any reason.[165]

Unlike employees in the private sector where protection mechanisms are limited, those in the public sector are extensively protected.[166] The first legislation that greatly protects them is based on the First Amendment that protects the right to expression. This, therefore, means that no one should be limited from expressing themselves as long as it is within the limit of their right to expression. The protection of public employees has further been buttressed by cases such as *Pickering v Board of Education*[167] that assert that public officers have a duty to whistleblowing and also report to the necessary structures on matters of public interest. In the decision of *Garcetti v Ceballos,*[168] the court stated that when public officers make statements on official duty, they do so as employees and not citizens, hence they are not protected by the First Amendment. This operated as an exception to the rule. Whistle-blower

[163] Elleta Callahan and Terry Dworkin, 'Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistle-blowers' (1994) 32 American Business Law Journal 154.
[164] Robert Vaugn, 'State Whistle-blower Statutes and the Future of Whistle-blower Protection' (1999) 51 Administrative Law Review 581.
[165] Robert Vaugn, 'State Whistle-blower Statutes and the Future of Whistle-blower Protection' (1999) 51 Administrative Law Review 585.
[166] Elleta Callahan and Terry Dworkin, 'Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistle-blowers' (1994) 32 American Business Law Journal 160.
[167] *Pickering v Board of Education*, 391 U.S. 563 (1968).
[168] *Garcetti v Ceballos*, 547 U.S. 410 (2006).

protection could not be extended to the person who in their course of duty was expected to disclose.

The scattered but definite legislations in the U.S make it easier for whistle-blowers. The additional laws that have been implemented in this regime of whistle-blower protection at the federal level include the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Health and Safety Act, the Age Discrimination Act, and the Health Safety Act. Others are the Civil Rights Act (protecting whistle-blowers who report to the government)[169], the Clean Air Act, the Safe Drinking Water Act, the Water Pollution Control Act, and the Federal Mine Health and Safety Act. For example, the Clean Air Act under section 33 provides that it is illegal for one's employment to be terminated for filing a report. The Act provides for protection for both external and internal whistle-blowers in both the public and private sectors. Most of the legislations have criminalized the reprisal or dismissal of employees who whistle-blow. They protect public sector disclosures on violations of laws, gross mismanagement, waste of public funds, abuse of power, or actions that can cause danger to public health and safety. Disclosure to the media is only protected where it has not been prohibited by law and not required by executive order to be kept secret.

Other whistle-blower laws are at the state level in general and also topic-specific statutes. Forty-seven out of the 50 U.S States have the general legislation on whistle-blower protection. The qualification and classes of protection vary from one state to another. This also touches on the whistleblowing procedures.

[169] Luis Franceschi, 'A History of State Capture in Kenya: The Goldenberg Scandal' *Daily Nation* (Nairobi, 21 November 2019) 14.

States such as Texas provide for protected disclosures. Not all forms of whistleblowing are protected. States such as California and Connecticut only protect disclosures that are reported to external government bodies. New York and Ohio require whistle-blowers to report, first, internally before reporting to an external authority. In all the states, none of them gives protection to reports made to the media or non-governmental bodies.

In most States, external whistleblowing can only be done to a public body.[170] External whistleblowing also has a reward system that is as high as 30% of the fine that is paid for one who has engaged in wrongdoing.[171] The U.S laws on whistleblowing have evolved a lot compared to many jurisdictions across the world. A lot of jurisdictions have also borrowed from the U.S practice. However, having different laws in these states has made it to be a patchwork of laws, creating uncertainty.[172]

4.2.4 Strengths, Weaknesses and Lessons from the U.S Whistle-blower Protection Mechanisms

The U.S has various legal instruments both enacted at the federal level and the state level to ensure effective and efficient protection of whistle-blowers. The fact that there are express provisions protecting whistle-blowers provides an avenue through which they can give information to investigative agencies. The provisions in both the federal and state legislations provide the first step towards the protection of whistle-blowers. The existence of the two-tier system of rules and legislation in the U.S makes it easier for the protection of whistle-blowers. There are certain circumstances when the federal

[170] Jeff Joireman and John Thorton, 'The Influence of Organizational Justice on Accountant Whistleblowing,' (2014) 43 Journal for Accounting, Organizations and Society 710.
[171] Bruno Frey and Reto Jegen, 'Motivation Crowding Theory' (2001) 15 Journal of Economics Survey 589.
[172] Orly Lobel, 'Linking Prevention, Detection and Whistleblowing: Principles for Designing Effective Reporting Systems' (2012) 54 South Texas Law Review 37.

government may not capture a certain important aspect of whistle-blower protection. This may be as a result of the difference in the legal underpinnings in different states. This may make it hard for the federal laws to cover aspects of whistle-blower protection that may be specific to every State. The existence of the state government and the ability to enact laws, thus, makes it easier for them to capture certain aspects that may have been left out by the federal laws. On the other hand, there are those aspects of whistleblowing that may not be protected by the laws. Under such circumstances, the federal laws provide for their protection.

Reward and punishment systems are important in not only promoting the culture of whistleblowing. They also help in protecting whistle-blowers in various ways. The Dodd-Frank Act provides monetary bounty to those who convey certain information on impropriety in the companies or public agencies. This helps to do away with the culture of fear and secrecy, hence, promoting whistleblowing. The Acts also provide for punishments for employers who dismiss their employees for being whistle-blowers and imposes penalties on employers who dismiss their employees for disclosing. This protects whistleblowing employees from discrimination and victimization at the place of work.

Various lessons can be picked from the U.S approaches. First, there is a need to legislate laws that expressly provide whistle-blower protection. In Kenya, no legislation expressly provides a framework for the protection mechanisms for whistle-blowers, hence exposing them to victimization. Secondly, the existence of a two-tier system of government can also be used to protect whistle-blowers. In the U.S, there are federal as well as state laws specifically addressing this issue. Kenya, the national and county government should borrow a leaf from the U.S. To strengthen the protection of whistle-blowers, both levels of government should be encouraged to pass legislation to

provide for those who risk their careers and lives to raise the red flag on graft and related improprieties within the public and private sectors.

4.3 South Africa

4.3.1 Introduction

South Africa has taken steps to protect whistle-blowers. It has formulated a raft of initiatives to ensure that those who reveal certain information on any offense or misconduct within the public or private sectors to the right authorities are protected. The key legislation that is committed to the protection of whistle-blowers in South Africa is the Protected Disclosures Act.[173] Before the implementation of the legislation, there was a general fear of reprisal or victimization among the public to disclose information on criminal activities or misconduct within their knowledge.[174] The Protected Disclosures Act caused a robust change in the legal frameworks and encouraged whistle-blowers to provide information for the successful prosecution of offenses and misconduct in public and private sectors.

4.3.2 Frameworks for Protection

Just like in many jurisdictions in Africa, the legal terrain in South Africa is awash with scattered laws dealing with various aspects of disclosure of information necessary for the arrest and successful prosecution of graft and related cases. However, the main instrument that seeks to protect whistle-blowers is the Protected Disclosures Act.

[173] The Protected Disclosures Act, 2000.
[174] Orly Lobel, 'Linking Prevention, Detection and Whistleblowing: Principles for Designing Effective Reporting Systems' (2012) 54 South Texas Law Review 39.

4.3.2.1 The Protected Disclosures Act

The Protected Disclosures Act provides procedures on protection from occupational detriment for public and private sector employees who disclose information of unlawful or corrupt conduct by their employers or fellow employees.[175]

Among others, the Act puts the responsibility of what it ring-fences as 'protected disclosure' on every employer and employee to give information whenever they notice criminal or other misdeeds that may be detrimental to the legitimate interests of the South African society.

It was enacted to protect whistle-blowers from reprisal or any retaliation that may come as a result of disclosure. This, therefore, means that only information that falls under the ambit of the provisions of the Act is protected and leaves out those who may disclose certain information that is not within the definition of public disclosure.[176]

The Act does not give employees immunity, as such, but only provides action against reprisal. This means that an informant who makes public certain material aiming to shield against a wrong he/she had previously committed is not protected. In short, this piece of legislation only offers protection to those employees who are treated in a discriminatory, unwarranted or victimized way as a result of the disclosure.[177] Employers or state operatives are stopped from unjustified actions such as transfer, demotion, or harassment against an informant because of the disclosure to authorities. It is also important to note that the act of disclosure does not in any way offer protection to the employee for crimes or misconducts that he performs after the disclosure. Under

[175] The Protected Disclosures Act, 2000.
[176] Orly Lobel, 'Linking Prevention, Detection and Whistleblowing: Principles for Designing Effective Reporting Systems' (2012) 54 South Texas Law Review 37.
[177] Uchechukwu Nwoke, 'Whistle-Blowing as a Corporate Governance Mechanism: South Africa and Nigeria in Perspective' (2019) 19 Journal of Corporate Law Studies 421.

such circumstances, the employer is allowed in good faith to take action against the employee.

In *Lephoto v National Institute for Humanities and Social Sciences*, the court in relying on the Act reiterated that there are certain actions for which whistle-blowers must be protected.[178] The case outlined them to include being subjected to frivolous disciplinary action, wrongful dismissal, transfer to other stations against their will, denial of transfer or promotion, or subjection to unfavorable terms of employment as a result of whistleblowing.[179] These detrimental actions provide a platform within which courts can act where there is a claim of detrimental treatment or actions as a result of whistleblowing.

Even though the Act provides the channels that need to be followed for disclosure for one to be protected, there are, however, certain circumstances where the protection is guaranteed where one makes a general disclosure. A general disclosure can be defined as a disclosure made to a body other than the ones stipulated by the Act.[180] The Act states that under such circumstances, for there to be a guarantee of protection for whistle-blowers, the disclosure needs to be done without any hidden interest. The disclosures that are made in good faith by whistle-blowers warrant their protection under the Protected Disclosures Act. The employee making the disclosure must also have a strong belief that the disclosure that he/she is making is true.

---

[178] *Lephoto v National Institute for Humanities and Social Sciences and Another* (JS274/16) [2017] ZALCJHB 442.

[179] Orly Lobel, 'Linking Prevention, Detection and Whistleblowing: Principles for Designing Effective Reporting Systems' (2012) 54 South Texas Law Review 40.

[180] Josan Meijers, 'The Protection of Whistle-blowers Challenges and Opportunities for Local and Regional Government' (2012) 12 the Academy of Political Science Quarterly 58.

Additionally, the whistle-blowers are protected by the Commission for Conciliation, Mediation, and Arbitration (CCMA). This is the body that offers remedies to employees who claim that they have suffered reprisal as a result of disclosures of certain information. The Commission which derives its authority from the Labour Relations Act (No. 66 of 1995) outlines in its provisions the need to have an inAZdependent arbitrator to offer conciliation and protection to employees who claim that they have suffered reprisal after making a disclosure that is considered to be protected.[181] Among other functions, the CCMA establishes whether the complainant made a disclosure. This is then followed by a determination on whether the disclosure that was made by him or her is protected by the Protected Disclosures Act. The last aspect that is considered is whether there has been a retaliatory attack leading to reprieve. The action if done by the employer must result from the employee making the protected disclosure.

Courts have been able to strengthen the concept of whistle-blower protection. In *Ngobeni v Minister of Communications and Another,* the court pronounced that the role of the whistle-blower cannot be overemphasized.[182] This is due to the pivotal role that they play in helping bring to light, among other offenses and misconduct, corruption cases. The courts, thus, stated that they need to be protected not only from physical harm but any discrimination that may arise from their workplace.

4.3.3 Additional Protection Mechanisms

Just like in the case of the U.S, South Africa also has other numerous legislations which, though do not expressly talk about whistleblowing, offer certain protections to people who are aggrieved as a result of disclosure of certain protected information. The

[181] Josan Meijers, 'The Protection of Whistle-blowers Challenges and Opportunities for Local and Regional Government' (2012) 12 the Academy of Political Science Quarterly 60.

[182] *Ngobeni v Minister of Communications and Another* (J08/14) [2014] ZALCJHB 96; (2014) 35 ILJ 2506 (LC). < http://www.saflii.org/za/cases/ZALCJHB/2014/96.html> Accessed 16th October 2020.

Defence Act of 2002 outlines that a person who uses the known channel to make certain disclosures shall not be subjected to any discrimination, reprisal, or victimization. The Act under section 104 (7) outlines that any person who attempts to stifle or in any way tries to undermine the redress of any grievance is guilty of an offense and liable to imprisonment for not more than five years. This means that whistle-blowers within the military agency are also protected, provided that the information so disclosed does not undermine national security.

Environmental protection is an important aspect in every jurisdiction. As a result, South Africa enacted the National Environmental Management Act (No. 107 of 1998) which has provisions on environmental protection and encourages people who may have information on environmental pollution to disclose. Section 31(4) thereof outlines that disclosures or a person who offers such information are accorded protection regardless of whether they are employed or not.

The South African courts have also emphasized the need to have protection mechanisms for whistle-blowers. In the case of *Swanepoel v Minister van Veiligheid en Sekuriteit* the court emphasized that those who blow the whistle on certain important information should be given protection by the involved state agencies.[183] The protection also includes having the identity of the informant concealed in cases where they would not wish to have their identities in the public domain, provided the disclosure has been made in good faith. The case further stated that where circumstances demand that informants remain anonymous, a cause of action is necessary against whoever intentionally reveals their identity.

[183] *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549 (T). < https://collections.concourt.org.za/handle/20.500.12144/28190> Accessed 16th October 2020.

4.3.4 Strengths, Weaknesses and Lessons from the South Africa Whistle-blower Protection Mechanisms

The Protected Disclosures Act in South Africa is important because it protects whistle-blowers from any malicious actions that may result from disclosing. It is, thus, efficient and effective in ensuring that informants have their employment protected and are shielded from any retaliatory attack that may be caused by their revealing certain important information to legal entities.

The Act also outlines the steps whistle-blowers should take for their protection. This acts as a double-edged sword for protection to both the informant and the information disclosed. A clear strength resident in the Protected Disclosures Act is that it does not limit those it protects; including a wide range of employers and employees in the public and private sectors.

The absence of legislation committed to the protection of whistle-blowers is extremely detrimental to the State as most corruption cases go unreported. As is the Kenyan case, the inexistence of a specific whistle-blower protection law also presents an avenue through which informants may be victimized without any redress. Kenya, just like South Africa, needs to enact laws that will enhance the protection of whistle-blowers by, among others, allowing them to conceal their identities even as they disclose information on corruption and related misdeeds.

As defenders of human rights, the courts should also be at the forefront in protecting whistle-blowers, Kenyan courts should, just like those in South Africa, pronounce themselves on and outline the important role played by whistle-blowers in unearthing graft and criminal cases, and ensuring their successful prosecution. This is the only way to ensure enhanced commitment to the protection of whistle-blowers.

4.4 Conclusion

The comparative analysis has explored some ways through which whistle-blower protection has been enhanced in the U.S. and South Africa. Various literature points out that there can never be a comprehensive protection instrument, there, however, can be various ways through which steps can be made to ensure that the existing loopholes are mitigated.

In the U.S, whistle-blower protection has been enhanced through formulating laws that prevent informants from suffering any discrimination based on their disclosure. They are protected from unfair dismissals and even any discriminatory act that may emanate from them blowing the whistle. Additionally, the criminalization of those found to have discriminated or victimized their employees due to disclosure further enforces the protection of whistle-blowers. The existence of a two-tier government level at which laws are enacted is also an additional measure that makes informants protected.

In South Africa, whistle-blower protection has also been enhanced through the formulation of laws that seek to protect them. Although the Protected Disclosures Act is the main legislation in this sphere, there are other laws such as the National Environmental Management Act, the Labour Relations Act, the Defence Act, that widen the scope of protection for informants and the information they disclose. The courts in South Africa have also pronounced themselves on the need to have whistle-blowers, including the need for anonymity where a request to that effect is made.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The Chapter sums up the findings of the research study and presents a raft of recommendations.

5.2 Summary of the Study

The research sought to critically analyze whether the legal frameworks protect whistle-blowers in the public and private sectors in Kenya. This was undertaken to ensure that the protection mechanisms are adequate and functional to ensure successful prosecution of corruption and related economic crimes. The study looked at the adequacy of the legal frameworks in the protection of whistle-blowers in Kenya.

The approach adopted by the paper included the analysis of existing laws, journal articles, books and other publications to ascertain the adequacy of whistle-blower protection. A comparative analysis of the general landscape of laws on whistle-blower protection in the U.S and South Africa was done to draw lessons from other common law jurisdictions.

The objectives of the research study were:

i. To investigate whether the legal frameworks in Kenya as currently constituted are committed to the protection of whistle-blowers to support the fight against corruption.

ii. To identify some of the mechanisms which have been put in place within the public and private sectors to protect whistle-blowers and to assess whether they are adequate.

iii. To identify and explore how some selected common law jurisdictions have been able to ensure the protection of whistle-blowers hence enhancing their fight against corruption.

The study was guided by the statement that the current legal frameworks as currently constituted do not in any way ensure the protection of whistle-blowers, resulting in threats and intimidation, thereby frustrating the fight against corruption.

5.3 Study Findings

Currently, Kenya does not have a legal framework committed to comprehensively protect whistle-blowers. The existing frameworks only mention whistle-blowers but do not expressly provide for their protection. For example, legislation such as the Witness Protection Act has various inadequacies that leave room for discrimination of informants as it does not clearly define a whistle-blower. It establishes The WPA; an underfunded and largely ineffective outfit whose sole purpose is to protect witnesses to various criminal cases but does not offer similar services to whistle-blowers. This is also the case with other legislations such as the Anti-Corruption and Economic Crimes Act and the Bribery Act which only mention whistle-blowers but do not offer them protection.

The existence of these loopholes in the protection of whistle-blowers led to the formulation of the Whistle-blower Protection Bill of 2018. To date, the National Assembly is yet to pass the Bill. However, the Bill contains glaring loopholes that may easily expose whistle-blowers to discrimination and victimization. For instance, the proposed law does not provide elaborate mechanisms through which anonymous disclosures can be made; leaves out the aspect of seeking the consent of whistle-blowers before making their identities public, and does not qualify disclosures. The weaknesses

in the Bill make it a poor apology for adequate protection of whistle-blowers for enhanced effective, efficient, and just dispensation of justice in corruption cases.

It is important not to confine whistle-blower protection to the public sector but to expand it to the private sector to protect investors in Kenya. Doing so would also encourage transparency, accountability, and responsible trading in all aspects of public life. There is no express protection of whistle-blowers in the private sector due to a lack of legal or policy frameworks.

The absence of internal policies that outline the protection mechanisms for whistleblowers in the private sector also presents an opportunity for abuse, discrimination, or victimization. Other jurisdictions have taken a great step in trying to ensure protection for whistle-blowers. The comparative analysis undertaken in this study looked at how whistle-blowers are protected in the U.S and South Africa. In the former, it is evident that there are various measures for enhanced protection of whistle-blowers, including the existence of a comprehensive and specific legal framework applicable to both the public and private sectors. The adequacy of the protection measures for informants is further enhanced by the existence of both federal and state laws. The existence of the culture of encouraging whistleblowing through monetary reward to those who disclose has led to prosecutions of those involved in economic and corruption cases.

South Africa has also ensured the protection of whistle-blowers through formulating specific laws. The Protected Disclosures Act, though comprehensive, is still backed by other laws that also protect whistle-blowers in cases where they are not expressly provided for under the main legislation. The laws have been able to protect those in the public and private sectors. This has enhanced the protection of whistle-blowers in South Africa though not as comprehensively as the protection mechanisms in the U.S.

5.4 Conclusion

From the study, there is sufficient evidence that the existing whistle-blower protection mechanisms in Kenya do not offer much protection to the informants. This greatly hampers the successful prosecution of corruption cases. The lack of protection mechanisms presents the first challenge towards the fight against corruption which still reigns supreme both in the public and private sectors. It is, therefore, important to formulate specific laws for the protection of whistle-blowers to encourage a culture of whistleblowing to assist in the anti-graft war. Kenya should borrow ape other jurisdictions that have been able to ensure protection for whistle-blowers. For a start, informed changes harvested from wide consultations should enrich amendments to the Whistle-blower Protection Bill, 2018 before its enactment.

5.5 Recommendations

5.5.1 Legislation of Whistle-blower Protection Laws

The measure that should be taken to enhance whistle-blower protection in Kenya is having Parliament discuss and pass the Whistle-blower Protection Bill, 2018 with the necessary amendments. The existence of a law that expressly and specifically protects whistle-blowers will ensure adequate protection of informants and reduce their victimization, where it exists. The laws should also cover both the public and private sectors to protect everyone.

The existing laws that deal with corruption and those that mention whistle-blowers should be amended to enhance their protection. For instance, anti-corruption laws should be tweaked to criminalize some offenses such as illicit enrichment, bribery in private sectors, and influence-peddling as prescribed by UNCAC and AUCPCC. The Anti-Corruption and Economic Crimes Act should be amended to define a whistle-

blower and specify the roles of such an informant in graft. Further, the Bribery Act regulations should be gazetted.

5.5.2 Encourage Private Companies to Formulate Internal Whistle-blower Mechanisms

There is a need to protect those in the public and private sectors. This is premised on the fact that investors are more willing to put their money in sectors where there is transparency and accountability. As a way of ensuring that there is the protection of whistle-blowers, private companies should be encouraged to formulate internal policies that encourage whistleblowing and disclosure of information to the necessary structures hence ensuring that economic and corruption cases are reported to the relevant authorities. This will encourage investors to have trust in private entities and the nation at large.

5.5.3 Two-Tier Protection Mechanism

Kenya has a two-tier government system: the national government and the county governments. Kenya can borrow from the U.S system and formulate whistle-blower-specific laws at both the national and county levels. Such a system ensures that the citizenry is catered for at both levels and that the laws passed complement one another. It is a sure way of ensuring and providing whistle-blowers with comprehensive protection wherever they are.

5.5.4 Encourage Culture of Whistleblowing

As a concept, whistleblowing has not widely been initiated and accepted in all spheres of public and private sectors for fear of repercussions. To address this anomaly, monetary rewards should be offered to those who make disclosures that lead to the successful prosecution of corruption cases. This will encourage more people to make

disclosures. However, all efforts must be made to ensure that the disclosures made are true, and are neither informed by malice nor the thirst for financial gain. Non-disclosure of identities of informants – unless through their consent – will also encourage more people to take a risk and raise the red flag in instances of graft and other forms of impropriety.

5.5.5 Institutional Reforms

The Whistle Blower Protection Bill, 2018 envisions that the CAJ (also known as the Office of the Ombudsman) shall be the implementer of the Act once enacted. There is, therefore, a need to strengthen its oversight capabilities, expand its mandate to receive complaints, provide advice and protection to whistle-blowers. The mandate of EACC should also be expanded to include the investigation of claims of discrimination by whistle-blowers, receive complaints of retaliation and create an award mechanism where a disclosure results in substantial recovery of public funds. The EACC should be given the power to order a public body to restore a public servant and prevent any future victimization. It should also make recommendations to the authorities for appropriate action such as initiating criminal proceedings.

5.5.6 Commitment to International and Regional Instruments on whistle-blower Protection

Article 2(6) of the Constitution of Kenya states that any convention or treaty ratified by Kenya shall form part of the Laws of Kenya. Kenya has committed to various international and regional instruments for promoting whistle-blower protection. This includes the UNCAC and AUCPCC. Kenya ratified the UNCAC on 9th December 2003 that requires member states to enact appropriate legislation to protect persons who report corruption incidences. Further, the African Union Convention on Preventing and

Combating Corruption anticipates whistleblowing and requires countries that are parties to adopt legislative and other measures to protect informants and witnesses in corruption and related offenses. Kenya should therefore make steps towards the realization of those State obligations and commitments through the implementation of the instruments on whistle-blower protection by enacting the Whistle-blower Bill, 2018.

BIBLIOGRAPHY

Books

Alford F, *'Whistle-blowers: Broken Lives and Organizational Power'* (Cornell University Press 2002).

Dimitriu R, 'Romania: *First Steps to Whistle-blowers' Protection' in Gregor Thüsing and Gerrit Forst (eds), Whistleblowing - A Comparative Study* (Springer International Publishing 2016).

Garner B A and Black H C, *Black's Law Dictionary* (West Publishing Corporation, Minnesota 2009).

González A.(ed), *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Routledge Publishers, United Kingdom 2016)

James S P, *'Edmund Burke and the Natural Law'*, (Transaction Publishers, New Jersey, 2015).

Kahora B, *The True Story of David Munyakei: Goldenberg Whistle blower* (Kwani Trust, Kenya 2008).

Kenny K, '*Whistleblowing: Toward a New Theory*' (Harvard University Press, Cambridge 2019).

Miceli M P, Near J P and Dworkin T M, *Whistle-Blowing in Organizations* (Psychology Press, United Kingdom 2008).

Nichols L, '*The International Criminal Court and the End of Impunity in Kenya'* (Springer Publishing, New York 2015).

Wrong M, *'It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower'* (Harper Perennial, New York 2010).

Journal Articles

Apaza C R and Chang Y, 'What Makes Whistleblowing Effective' (2011) Journal on Public Integrity.

Andrade J A, 'Reconceptualising Whistleblowing in a Complex World' (2015) Journal of Business Ethics.

Baily M N, Klein A and Schardin J, 'The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth' (2017) The Russell Sage Foundation Journal of the Social Sciences.

Bamgbose O, 'Whistle Blowing; The Whistle Blower; The Whistle Blowing Act" A Simple Expose /An Easy to Read Discourse On the Concept of Whistle Blowing' (2017) African Journal for The Psychological Studies of Social Issues.

Benston G J, 'The Quality of Corporate Financial Statements and Their Auditors before and after Enron' (2009) Policy Analysis Quarterly.

Brickey K F, 'From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley' (2003) Electronic Journal.

Brown AJ, 'Towards 'Ideal' Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) E-Journal of International and Comparative Labor Studies.

Berkebile C, 'The Puzzle of Whistle-blower Protection Legislation: Assembling the Piecemeal' (2018) Indiana International and Comparative Law Review.

Callahan E and Dworkin T,' Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistle-blowers,' (1994) American Business Law Journal.

Chen C X, Nichol J E and Zhou F H, 'The Effect of Incentive Framing and Descriptive Norms on Internal Whistleblowing' (2017) Contemporary Accounting Research.

Chang Y, Wilding M and Shin M C, 'Determinants of Whistleblowing Intention: Evidence from the South Korean Government' (2017) Public Performance & Management Review.

Estlund C, 'Free Speech and Due Process in the Workplace,' (1995) Indiana Law Journal.

Davis M, 'Some Paradoxes of Whistleblowing' (1996) Business & Professional Ethics Journal.

Davis M, 'Avoiding the Tragedy of Whistleblowing' (1989) Business & Professional Ethics Devine T, 'Whistleblowing in the United States', Richard Calland & Guy Dehn, 'Whistleblowing Around the World: Law, Culture and Practice,' (2004) Politic, Law and Economics Journal.

Donnelly J, 'The Relative Universality of Human Rights' (2007) Human Rights Quarterly.

Dworkin T, and Sangrey E, 'Internal Whistleblowing: Protecting the Interest of the Employee, the Organization and Society,' (1991) American Business Law Journal

Frederick C A, 'What Makes Whistle-blowers So Threatening?' (2016) International Journal of Health Policy and Management.

Frey B and Jegen R, 'Motivation Crowding Theory,' (2001) Journal of Economics Survey.

Joireman J and Thorton J, 'The Influence of Organizational Justice on Accountant Whistleblowing,' (2014) Journal for Accounting, Organizations and Society.

Kuwali D and Viljoen F, 'By All Means Necessary: Protecting Civilians and Preventing Mass Atrocities in Africa' (2017) Journal of International Criminal Justice.

Kobzieva T, 'Ethical and Legal Grounds for the Whistleblowing of Corruption Offenses' (2019) Journal of Legal, Ethical and Regulatory Issues.

Martin P, 'The Status of Whistleblowing in South Africa' (2013) Open Democracy Advice Centre 137.

Mendelsohn J, 'Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing,' (2009) Washington University Global Studies Law Review.

Labriola L, 'Paying Too Dearly for a Whistle: Properly Protecting Internal Whistle-blowers' (2017) Fordham Law Review

Lobe.l O,'Linking LPrevention, Detection and Whistleblowing: Principles for Designing Effective Reporting Systems,' (2012) South Texas Law Review.

Latan H, Ringle C M and Jabbour C J C, 'Whistleblowing Intentions Among Public Accountants in Indonesia: Testing for the Moderation Effects' (2020) Journal of Business Ethics.

Malek J, 'To Tell or Not to Tell? The Ethical Dilemma of the Would-Be Whistle-blower' (2010) Centre for Accountable Research.

Mannion R, 'The Conceptual Underpinnings of Whistleblowing' (2018) Fordham Law Review.

Marcum T M, and Young J, 'Blowing the Whistle in the Digital Age: Are You Really Anonymous: The Perils and Pitfalls of Anonymity in Whistleblowing Law' (2014) DePaul Business and Commercial Law Journal.

Meinert D, 'Whistle-Blowers: Threat or Asset?' (2011) Society for Human Resoirce Management.

Mesmer-Magnus J R and Viswesvaran C, 'Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation' (2005) Journal of Business Ethics.

Michael W F and Schwartz M S, 'The Morality of Whistleblowing: A Commentary on Richard T. De George' (2015) Journal of Business Ethics.

Near J P and Miceli M P, 'After the Wrongdoing: What Managers Should Know about Whistleblowing' (2016) Business Horizons.

Near J P and Miceli M P, 'Organizational Dissidence: The Case of Whistle-Blowing', (1985) Journal of Business Ethics.

Nwoke U, 'Whistle-Blowing as a Corporate Governance Mechanism: South Africa and Nigeria in Perspective' (2019) Journal of Corporate Law Studies.

Okafor O N, 'Deployment of Whistleblowing as an Accountability Mechanism to Curb Corruption and Fraud in a Developing Democracy' (2020) Accounting, Auditing & Accountability Journal.

Park H, 'Cultural Orientation and Attitudes Toward Different Forms of Whistleblowing: A Comparison of South Korea, Turkey, and the U.K.' (2008) Journal of Business Ethics.

Sangrey E, Dworkin T and Lewis D, 'Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest,' (2004) University of Miami Law Review.

Vandekerckhove, W, 'Freedom of Expression as the "Broken Promise" of Whistle-blower Protection' (2016) The Human Rights Review. Journal of the Center for Research and Studies on Fundamental Rights.

Vaugn R, 'State Whistle-blower Statutes and the Future of Whistle-blower Protection,' (1999) Administrative Law Review.

Weilert A K, 'United Nations Convention against Corruption (UNCAC)–After Ten Years of Being in Force', (2016) Max Planck Yearbook of United Nations Law Online.

Wijaya F, 'Legal Protection for Whistle-blower in Criminal Justice System of Indonesia' (2020) Directory of Open Access Journals.

Websites

ACPHR, 'Press Release' <https://www.achpr.org/pressrelease/detail?id=3> accessed 22 July 2020.

Citizen Team 'Mara Heist: What Happened to Spencer Sankale?' (Citizentv.co.ke) <https://citizentv.co.ke/news/mara-heist-what-happened-to-spencer-sankale-306365/> Accessed 16 June 2020.

Finnis J, 'Natural Law Theories' <https://plato.stanford.edu/entries/natural-law-theories/> accessed 17 June 2020.

G20 Anti-Corruption Action Plan Protection of Whistle-blowers, Annex, Principle 1. <https://www.oecd.org/corruption/48972967.pdf> accessed 22 July 2020.

Huter M, Scaturro R and U. N. C. A. C. Coalition, 'UNCAC in a Nutshell' (JSTOR, 2019) 2 <https://www.jstor.org/stable/pdf/resrep20477.pdf> accessed 22 July 2020.

OECD Council, Recommendation on Public Integrity, 2017, para 9b. < https://www.oecd.org/gov/ethics/recommendation-public-integrity/> Accessed on 20th July 2020.

OECD Recommendation on Improving Ethical Conduct (1998) OECD/LEGAL/0298, 6. < https://legalinstruments.oecd.org/public/doc/129/129.en.pdf> Accessed on 20th July 2020.

OECD, 'Whistle-blower Protection in the Private Sector- The U.S Approach' (2016) 103-107<https://www.oecd-ilibrary.org/docserver/9789264252639-8-en.pdf?expires=1602314814&id=id&accname=guest&checksum=5F3B82578E1E725C6325A00EF4467974> accessed 10 October 2020.

Transparency International, 'Results - 2019 - CPI' (Transparency.org) <https://www.transparency.org/en/cpi/2019/results> accessed 25 October 2020.

United Nations High Commissioner for Refugees, 'Refworld | Countries at the Crossroads 2012 - Kenya' (Refworld) <https://www.refworld.org/docid/505c172f8.html> accessed 29 June 2020.

UNODC, 'Country Review Report of Kenya' <https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2015_09_28_Kenya_Final_Country_Report.pdf> accessed on 22nd July 2020.