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CORPORATE GOVERNANCE: INSIDER TRADING PERSPECTIVE IN KENYA

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DECLARATION

I, **OBADE SHARON ATIENO**, declare that this thesis is my original work, submitted in partial fulfillment of the Master of Laws (LL.M) program at the University of Nairobi's School of Law campus. It has never been submitted to this or any other university for a degree or examination. Furthermore, all references to texts, articles, papers, journals, and other materials have been acknowledged in full.

Signature...Date.........**9th September 2021**..

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DEDICATION

To my family, especially to my mother, Elizabeth Obade, who has been a constant source of encouragement throughout this academic journey.

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ABBREVIATIONS

CMA – Capital Markets Authority

CMFIU- The Capital Market Fraud and Investigation Unit

NSE -Nairobi Securities Exchange

ASIC – The Australian Securities and Investments Commission

FSCA – Financial Sector Conduct Authority

JSE- Johannesburg Stock Exchange

SEC – Securities Exchange Commission

ABSTRACT

The thesis examines corporate governance from the standpoint of insider trading. Furthermore, the study digs deeper into Kenya's legislative and supervisory framework's shortcomings in discovering, interrogating, prosecuting, and resolving insider trading. Insider trading and other unlawful market operations can suffocate financial markets' integrity and productivity in any country where they are practiced. To that extent, the average investor would eventually abandon the market, obstructing and crushing critical securities market activity such as capital generation. In this regard, Kenya has developed a good regulatory framework to overcome these barriers and improve its competitiveness in the financial markets. Even yet, insider trading happens to be a difficult crime to detect and prosecute. The lowest number of convictions and successful civil settlements indicate this.

In addition, the study considers four primary objectives: the efficiency of Kenya's regulatory framework, the effectiveness of Kenya's institutional structure, the lessons learned from Australia and South Africa, and the recommendations that can be adopted to avoid insider trading in Kenya. To achieve the objectives, a doctrinal research approach was adopted. Furthermore, in order to assess Kenya's regulatory framework's efficacy, legislation such as the Kenyan Constitution, 2010, the Capital Markets Act, cap 485A, the Companies Act, the Capital Markets (Securities) (Public Offers, Listings, and Disclosures) Regulations, and the Code of Corporate Governance Practices for issuers of Securities to the Public 2015 and the Stewardship Code, 2017 were all thoroughly examined. While Kenya has made tremendous progress in terms of securities legislation, the laws still have deficiencies that make pursuing market abuse techniques such as insider trading problematic.

Similarly, the study explores the role and efficacy of key institutions responsible for identifying and enforcing insider trading, such as the Capital Markets Authority, the Capital Markets Tribunal, the Nairobi Securities Exchange, Kenyan courts and the office of Registrar of Companies. Notably, effective insider trading prosecution continues to be a struggle for these institutions. The primary regulatory agency for market abuse, the Capital Markets Authority has flaws such as ineffective supervisory procedures, difficulties detecting and preventing insider trading, a lack of sophisticated market surveillance systems, and limited supervisory powers, to name a few.

Lastly, the study outlines the lessons that can be emulated from Australia and South Africa. It may

be claimed that Australia has some of the strictest anti-market-abuse legislation in the world. It's also plausible to claim that it's one of the most innovative and progressive anti-market-abuse legislations in the world. South Africa was also chosen for this study since it is Africa's forerunner in insider trading regulation. The Australian parliament has consistently passed a variety of legislation, rules, guidelines, and other necessary measures to combat insider trading in the Australian financial markets. Similarly, a number of preventative enforcement techniques, such as Chinese walls, whistleblower immunity legislation, and private rights of action, have been identified in Australia. South Africa, on the other hand, has made many improvements to its market abuse legislation in order to improve market abuse regulation. As a result, the Financial Markets Act of 2012, which added new civil remedies, criminal fines, administrative sanctions, and regulatory agencies, was approved. Furthermore, the Financial Sector Conduct Authority has established robust procedures for detecting, investigating, and penalizing insider trading offenses. By analyzing insider trading from the perspective of corporate governance, this study hopes to add to the current literature both regionally and internationally.

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CHAPTER ONE: INTRODUCTION

1.1 Background of the study

The perception of insider trading in Kenya has been sparked by corporate failures, which have captured the attention of both newspapers and electronic media. Whilst most well-known corporations frequently make headlines for insider trading, there is still a lot of confusion and debate over what constitutes insider trading. An insider is any individual connected to a company and is foreseen to have contact with unpublished information which when generated ordinarily influences the cost of securities**.**[1] Insider trading is the process whereby an individual or body corporate reveals price sensitive information which is unpublished and therefore encouraging another person to trade in securities.[2] In spite of that, the statistic of cases which have been successful on account prosecution of this offence have been countable since its commencement in Kenya. This research paper consequently explores to figure out and critique the current legal and institutional framework with cognizance to enforcement of insider trading in Kenya.

Governance is originally a politically worded phrase in public law.[3] Corporate governance is a contradiction in itself as there is lack of harmony in the intellectual sphere of the definition within both the corporate and consumer world.[4] Furthermore, the Cadbury Report in 1991 established the statutory definition of corporate governance, which characterizes corporate governance as the structure by which corporations are directed and controlled.[5]Moreover, Kenya's standing as a financial hub is based on its repute as a clean and equitable environment to do business, as well as overall market transparency and competitiveness.[6] If players and users believe that markets are vulnerable to misuse, industry assurance will suffer.[7] As a result, it is preferable to implement best

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[1] Capital Markets Act, Cap 485A, s. 2.
[2]Capital Markets Act, Cap 485A, s. 32B.
[3] Mitra N.L, 'Corporate Governance: A Sojourn To Find A Yardstick'' (2014) 56 Journal of the Indian Law Institute available at <http://JSTOR, www.jstor.org/stable/43953724> accessed 28 January 2020.

[4] Dr. Ozden Deniz, 'The Importance of Corporate Governance for A Well-Functioning Financial System: Reforming Corporate Governance In Developing Countries' (2014) 14 Duquesne Business Law Journal.
[5] Kristen J. Heisner, *Can Capital Market Law Approaches Be Harmonized with Essential Principles of Company Law*, (11th edn, European Business Law Review 2000).
[6] Weiwei Zheng, 'An Examination of Legal Regulations for Insider Dealing In The UK And The Lessons For China' (2017) 12 Frontiers L China.

[7] Ibid.

corporate governance practices. Over the years, the focus on corporate governance has risen exponentially due to many prominent corporate controversies, which have disturbed business.

Moreover, the evolution of Kenya's capital markets is seen in the history of Nairobi Securities Exchange. The 1920s to 1953 era is when the trading of shares commenced on a gentleman's agreement without a physical trading floor.[8] In 1953, representatives of the London Stock exchange (LSE) had been asked to recognize the formation of the Nairobi Stock exchange as an overseas stock exchange.[9] Moreover, Nairobi Stock Exchange (NSE) was registered in conformity with the Sociétés Act (1954) and had the duty to widen the capital market and regulate the commercial activities between 1954 and 1962.[10]

From 1963 to 1970, the government adopted a modern policy with the overall objective of switching social and economic ownership towards the citizens. [11] By 1968, there was 66 public sector financial instruments listed, 45% for the Kenyan government, 23% for the Tanzanian government and 11% for the Uganda Government. In that time, the NSE was a regional East African market in major listed industrial shares and public sector financial instruments.[12] Nonetheless, due to the unpredictability of East African Community members' political regimes, different agreements curtailed the freedom of movement between the East African countries.[13] In addition, in the 1980s, the Kenyan government recognized the importance of developing and implementing policy reforms to promote long-term material development and a competent and dependable financial industry.[14] As a result, the Capital Markets Act of 1990 established the Capital Markets Authority (CMA) (Cap 485A). The Capital Markets Authority's main goal was to establish an organization entrusted with nurturing and

[8] 'History Of Nairobi Securities Exchange' (*Nairobi Securities Exchange*, 2020) available at <https://www.nse.co.ke/nse/history-of-nse.html> accessed on 20 January 2020.

[9] Parkinson and John M., 'The Nairobi Stock Exchange in the Context of Development of Kenya / La Bourse De Nairobi Dans Le Cadre Du Processus De Développement Du Kenya' (1984) *Savings and Development* vol. 8, no. 4, pp. 363–372 available at <*JSTOR*, www.jstor.org/stable/25829900> Accessed on 20 January 2020.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] 'History of Nairobi Securities Exchange' (*Nairobi Securities Exchange*, 2020) available at <https://www.nse.co.ke/nse/history-of-nse.html> accessed 20th January 2020.

[14] 'Capital Markets Authority' (2020) available at <https://www.cma.or.ke/index.php?option=com_content&view=article&id=10&Itemid=167> accessed 20 January 2020.

stimulating the development of a well-functioning capital market in Kenya.[15]

With regards to transactions conducted by insiders such as directors based on material, non-public information amount to a breach of the fiduciary duties owed to the company, which stipulate that directors being the key decision makers, should act in the best interest of the company and not in their own interests.[16]Fiduciary duties include the duty of good faith, the duty to avoid conflict of interests and the rule against managerial opportunism. The duty of good faith compels directors to execute their powers in the best interests of the company, while the duty to prevent conflict of interests requires them to avoid placing themselves in a position where their personal interests might conflict with the company's. The duty to avoid a conflict of interest applies to the exploitation of any company property, information, or opportunity.[17] Furthermore, despite the fact that internationally accepted corporate governance standards call for equitable disclosure and shareholders' rights, insider trading is characterized by asymmetric information, with some stakeholders gaining an edge of knowing information that has not yet been communicated to the public and other stakeholders having no such advantage.[18]

Insider trading can also affect a company image, placing it at danger of being denied money owing to a lack of investor confidence.[19] The Capital Markets Act, which outlaws and criminalizes insider trading, is the main legislation controlling insider trading in Kenya. Regardless of the fact that Kenya has had an insider trading legislative structure consisting of laws, rules, and institutions in place for decades, insider trading is common and persistent, generating huge losses to corporations, shareholders, stakeholders, and the Kenyan economy.[20]Recent insider trading case is the Kenol Kobil scandal. In this respect, the Capital Markets Authority (CMA) in an official release to newsrooms stated that they had confiscated cash linked to 14 accounts that were frozen when the buyout of Kenolkobil by French firm Rubis Energy was announced.[21] Some 458 million shares were seized

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[15] Ibid.

[16] L. M. Musikali, 'The Law affecting Corporate Governance in Kenya: A need for Review' (2008) Vol. 19 No. 7 ICCLR 213, p. 214 accessed 11 November 2015; A. Cabot and B. Preber, 'Insider Trading' (Gaming Management, June 2008) accessed 12th November 2021.

[17] A. Dignam, Cases & Materials on Company Law (7th Edn, Oxford University Press 2011), p. 395

[18] P. Akivaga, 'Corporate Governance Watch: Insider Trading' (VIP sight Archives Africa-Kenya, 22 May 2011) accessed 12th November 2021.

[19] Ibid.

[20] Adili, 'Corruption and the Private Sector: The corporate governance crisis in Kenya's financial sector' (Global Corruption Report, 2009), p. 2 accessed 12th November 2021.

[21] Otieno Odhiambo, 'Capital Markets Regulator Now Ought To Bite Harder' (*Standard Media Group*, 2019)

from the suspects of the insider trade who wanted to gain from the takeover by the oil marketer. Unfortunately, many instances of insider trading in Kenya go unnoticed, and investigations take much too long to complete. In light of this, the purpose of this study is to examine the deficiencies of Kenya's legislative and institutional framework on insider trading in order to make legislative and institutional recommendations.

1.2 Statement of the problem

Illicit market offense habits such as insider trading may give boost to poor probity and productivity of the fiscal markets in any citizenry where such habits are prevalent. Once insider trading on the financial markets is accepted untamed, persons with insider insight shall have steady margin on the markets that carry such information and individuals without any information will be deemed constant financial failures. Furthermore, the latter group of people, which covers the extensive greater number of investors, would gradually comprehend the loser game they are playing in this ‘market for lemons’ and would regard that all transactions are thus biased against them. Gradually the typical investor would give up the market, impeding or crushing crucial activities of the stock market like capital formation.

As a result, these and other negative outcomes may affect the normal aims of financial markets in Kenya and other jurisdictions, either directly or indirectly. In this regard, Kenya has formulated the regulatory framework on insider trading in a bid to battle such obstacles and augment its competitive advantage in the financial markets. Insider trading is governed in Kenya by the Capital Markets Act. Insider trading is clearly prohibited and punishable under the Act's terms.[22] The Act, however, has flaws, such as a restrictive and erroneous definition of terms like "insider," "dealing," and "inside information."[23] The Act is distinguished by insufficient disclosure obligations, a narrow scope of application that applies only to securities issuers, and the absence of sanctions for noncompliance.[24] Insider trading offenses are not exhaustively listed in the Act, and the proposed punishments are insufficient to penalize or prohibit insider trading.[25] Furthermore, the Companies Act, the Capital

<https://www.standardmedia.co.ke/business/article/2001318135/capital-markets-regulator-now-ought-to-bite-harder> accessed 10 February 2020.

[22] Capital Markets Act, ss. 32A (1); 2; 32 B (1); 32C (1).

[23] Ibid.

[24] Ibid.

[25] Ibid.

Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, and the Code of Corporate Governance for Issuers of Securities to the Public all lack suitable measures regarding disclosure obligations and shareholder equality.

On the other hand, Kenya's institutional framework on insider trading has problems such as insufficient oversight and monitoring procedures, a weak whistleblowing mechanism, poor investor education, and the lack of an insider trading policy that can provide direction on insider trading legislation. The Capital Markets Act also fails to provide support and cooperation to other market participants and stakeholders. As a result, the perpetrators of insider trading will go unpunished, and insider trading cases will go undetected. As a result, this study examines how the aforementioned flaws obstruct the prosecution of insider trading, as well as what Kenya might learn from countries with more effective insider trading legal frameworks, such as Australia and South Africa. Based on the findings, the thesis makes reform recommendations.

1.3 Research objectives

The goal of this research is to:

1. Evaluate the effectiveness of the insider trading laws.
2. Examine the institutional framework's effectiveness in preventing insider trading.
3. Determine what lessons can be derived on insider trading from select jurisdictions.
4. Find out what recommendations may be made to prevent insider trading.

1.4 Research questions

This study explores to resolve the ensuing inquiries:

1. What are the insider trading laws and how effective are they?
2. What is Kenya's institutional structure for insider trading and how appropriate is it?
3. What lessons can be drawn from select jurisdictions?
4. What recommendations can be made to prevent insider trading?

1.5 Hypothesis

The following hypothesis will be tested in this study:

1. Kenya's existing legislative and supervisory framework governing insider trading is insufficient.

2. Kenya's best corporate governance practices have significantly reduced insider trading.

1.6 Theoretical Framework

The corporate governance threat of insider trading has been shown by divergent arguments. Agencies theory, theory of stewardship and sociological theory are all approaches analyzed in this study. The corporate governance approach, however, which properly analyzes insider trading, is the theory of the agency. The two alternative approaches to corporate governance simply show a correlation between corporate governance and insider dealings.

a) Agency Theory

Agency theory denotes the contract between the shareholder as the principal and director as the agent.[26] Jensen and Meckling (1976), former exponents of the argument, analyzed the agency's theory as a contract for one or more individuals to be appointed, by the shareholders, to perform certain functions for themselves, which would involve appointing the agent for a decision-making authority.[27] There are many instances in which directors treat public firms with undue regard to the shareholders in order to capitalize on that position. However, managers may take their shareholders' collective risk from a contrasting standpoint. After all, they are not risking their capital. Management includes taking safeguarded risks. Therefore, Agency theory determines the shareholders' level and boards' level as entities. In essence agency theories use governance and company performance data, for example audited accounts and reports, which is already within the public domain. It is difficult to interpret in this scenario whether the data shown is reliable, since it can be cooked as with Enron.

Since this theory is associated with insider business, it implies that a company's precepts of disclosure should be outlined in order to identify doubtful transactions. Corporate insiders like managers also owe their shareholders a fiduciary duty.[28] This fiduciary relationship provides accountability for disclosure of share price information before starting a corporate transaction with existing or prospective shareholders.[29] This theory is pertinent to this research since it discusses how agents misapply knowledge when trading by taking advantage of uneducated traders. Capital market regulation prohibits firms' insiders (agents) from trading on nonpublic information because it creates

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[26] Bob Tricker, *Corporate Governance: Principles, Policies, And Practices* (1st edn, Oxford University Press 2015).
[27] H. Kent Baker and Ronald Anderson, *Corporate Governance: A Synthesis Of Theory, Research, And Practice* (8th edn, John Wiley & Sons, 2010).
[28] Sarah Baumgartel, 'Privileging Professional Insider Trading' (2016) 51 Ga L Rev 71.
[29] Ibid.

a moral hazard problem. Insiders can profit by trading on non-public information, which can determine whether a company succeeds or fails. They may act on their discretion, causing a company's stock price to become more volatile.

b) Stewardship theory

According to stewardship theory, managers will act as responsible stewards of the assets they control on behalf of the owners. This argument deduces possible issues among both directors and shareholders and demonstrates an interest in the Directors, which is primarily comprised of insiders.[30] The principle of stewardship essentially regards managers as credible and places a high value on their personal reputations. It also identifies situations where managers aims are coordinated with the company's objectives and principles.[31] Despite the fact that some managers are trustworthy and perform their tasks in the company's interest, in contrast, countless contemporary cases, involve managers who are dishonest in their business.[32] Furthermore, while good governance standards are a useful starting point, they are insufficient to ensure that relevant players have a stewardship mindset.[33] Management and the board of directors are regarded as trustees for the company's shareholders and employees under corporate governance; stewardship takes this a step further.[34]

Furthermore, by implying that all categories of investors and shareholders acquire a sustainable ownership mentality, stewardship implies a fundamental change in how investors view the organizations in which they have an interest and their responsibilities to these organizations. Institutional investors have been chastised for their role in the great recession, as well as their lack of involvement and control over the investee companies.[35] Stewardship codes have been developed in an attempt to codify institutional investors' responsibility to their beneficiaries, with the belief that shareholders can play an important stewardship role. For instance, Kenya enacted the Stewardship Code for Institutional Investors 2017. The Stewardship Code's primary goal is to empower institutional investors to act as stewards on behalf of their clients or investors in order to encourage continuous improvement in corporate governance practices in publicly traded companies and other

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[30] Baker (n 20).

[31] Ibid.
[32] Ibid.
[33] Didier Cosin, 'A practical perspective: Stewardship fostering responsible log-term wealth creation, IMD Global board center' (2015) available at file:///C:/Users/Downloads/stewardship_2015.pdf accessed on 8th July 2021.
[34] Ibid.
[35] Ibid.

approved products. Some critics have claimed that the investor involvement rules put the company at risk of breaking insider trading laws.

c) Sociological theory

This approach is primarily concerned with onboard composition and its implications for the distribution of power and wealth in society. [36] Complications of interconnected management and centralization of privileged class management, which also are regarded as serious risks to equity growth. Often this confidential information of significance is usually inside that realm of a few of the company's top executives. If confidential material information is shared, it's indeed primarily for unfair addition of the very few who have already been in a position of top management.

This theory therefore affirms that the privileged class is assuming power concentration for its own enrichment in insider trading. Furthermore, an insider should not be able to use his position to undermine trust or obtain an unfair competitive advantage. As much as feasible, the market should provide equal opportunity for new entrants. Similarly, the most tempting component of insider trading is the unequal distribution of knowledge to the company's senior leadership, in blatant violation of shareholder equal rights. This therefore can resort to insider trading harming a company's professional image, limiting its own funding options as a result of investor distrust. Additionally, directors have a fiduciary duty to shareholders to act in their best interest which should be paramount as they act as stewards of the company.

1.7 Literature Review

The literature discussed here examines the relation of good governance and insider trading and pro- and con-insider trading arguments. It also explores the implementation of insider trading in Kenya, other jurisdictions. Each literary review aims to show that Kenyan literary works are not available to criticize the legislation and supervisory framework on insider trading in Kenya.

a) Corporate Governance and insider trading

Gakeri Jacob defines corporate governance as more than just a set of rules that assures decision-making is responsive to stakeholder groups in the broadest sense.[37] It is unmistakably assumed that

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[36] AC Fernando, *Corporate Governance: Principles, Policies and Practices* (Pearson Education India 2009).

[37] J. Gakeri, 'Enhancing Securities Markets in Sub-Saharan Africa: An Overview of the Legal and Institutional

corporate governance's purpose is to enhance corporate responsibility in order to attain the maximum degree of skill and profitability. Good corporate governance provides honesty, transparency, market accountability, and enforceability as a result. The characteristics of good corporate governance ensure that markets are honest, creating a fair playing field that can deter market manipulation. Despite the fact that Gakeri outlines main tenets of Corporate Governance, nevertheless he does not point out how illicit market practices such as insider trading undermines corporate governance and further how the same may affect the level playing field of the securities market. This study therefore aims to bridge the gap by clearly stipulating the shortcomings of legislation in relation to insider trading that may limit the achievement of a productive and fair market.

Anne Kotonya in her thesis on combating insider trading in Kenya's capital markets focuses on the securities market and the opportunities for reform.[38] She explores the inadequacies of the Capital Markets Act in curbing insider trading including the ambiguity in the meaning of insider information, lack of clarity in the determination of price sensitive information and the difficulties in assessing possession of insider information by corporate bodies. Although her thesis provides useful insights to this study, she did not focus on corporate governance and any other legislation on insider trading. Furthermore, she does not explore the institutional framework on insider trading and its inadequacies.

Mwaniki G. analyzes the examination of lawful insider trading on the Nairobi Securities Exchange using data published by the security market in his research on the influence of insider trading bans and regulation on security market returns in Kenya.[39] His research shows that government regulation of the stock market improves efficiency by lowering volatility and lowering anomalous returns. He does not, however, examine the flaws of insider trading regulations or if corporate governance has an effect on the lowering of anomalous returns after regulation.

According to proponents such as Kristian J. Heiser, corporate governance arose as a response of

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Arrangements in Kenya' [2011] 1(9) International Journal of Humanities and Social Sciences 134-169< http//www.ijhssnet.com/journals/vol_1_9_Special Issue_July2011/18.p.d.f> Accessed 23rd June 2021.

[38] A. Kotonya, 'Combating Insider Trading in Kenya's Capital Markets: Challenges and Opportunities for Reform' (2012) LL. M Thesis, University of Nairobi Digital Repository, College of Humanities and Social Sciences (CHSS) accessed 12 November 2021.

[39] Mwaniki, G. (2018). Effect of Insider Trading Prohibitions: Regulation on Security Market Returns in Kenya. The University Journal, 1(2), 77-96.

well-known earlier corporate companies such as Enron,[40] which resulted in a breach of significant societal budget expenditures due to unresolved creditors' claims.[41] A substantial number of jobs were lost as a result of this.[42] As a response, corporate governance was improved, with a focus on management and control systems during the company's development.[43] She also refers to the Organization for Economic Cooperation and Development's (OECD) compilation of recommendations, which were first published in 2005 and then again in 2015, and which proposals are appropriate for business organizations, such as legal entities, where the state executes property rights and exerts influence over entities. She however does not present any data on the various companies that improved as a result of corporate governance.

As per Rose Kyalo, the most appealing facet of insider trades is the uneven distribution of knowledge to those top leadership of the company, in outright neglect of shareholder equal rights.[44] Insider dealings can also damage a corporation's professional image, curtailing its own avenue for financing due to a reduction of investor confidence. Similarly, directors have a fiduciary obligation to shareholders.[45] Likewise, divulging confidential material would be detrimental to their greatest interests comparatively than beneficial to those at the very top of the corporate ladder. Her study however lacks a critical analysis of the principle of disclosure as a corporate governance principle and insider trading. Moreover, there is minimal discussion on the disclosure as a corporate principle in depth.

Henry G. Manne progressed two important contentions for insider trading after a critical analysis of statutory efforts to prevent it.[46] To start, he argues that insider dealings carries very limited implications on shareholders, further he also argues that corporate organizations are allowed to any

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[40] Enron was an energy-trading and utility company based in Houston, Texas, that perpetrated one of the biggest accounting frauds in history. Enron's executives employed accounting practices that falsely inflated the company's revenues and, for a time, making it the seventh-largest corporation in the United States. It was however mared with corporate corruption and accounting fraud that saw investors lose $74 Billion leading up to its bankruptcy.

[41] Heiser, Kristian J, 'Can Capital Market Law Approaches Be Harmonized with Essential Principles of Company Law' (2000) *European Business Law Review*, vol. 11, no. 2, p. 60-82.

[42] Ibid.

[43] Ibid.

[44] Rose M. Kyalo, 'A case for Review on the legal framework of insider trading' (2020) ICS Journal volume 1 available at https://www.ics.ke/downloads-center-2/category/7-governance-journal accessed on 22nd January 2020.

[45] Ibid.

[46] Sherman Roger, '*Papers on Non-Market Decision Making*' (1967) vol. 2, pp. 103–104 available at <*JSTOR*, www.jstor.org/stable/25066103> Accessed 22nd January 2020.

investment benefits they can generate.[47] This point of view can be examined from the perspective that insider trading has the potential to generate significant benefits while causing significant harm. Insider trading earnings can be used to compensate executives and, in some situations, to foster innovation, according to the main argument.

While using the efficiency argument, Henry G. Manne also asserts that insider dealings are advantageous to efficiency and should be made legal.[48] His reasoning is based on the premise that when small, powerful institutions have an exclusive access to the information, markets operate less effectively. [49] He also argues that in order for the market to be effective, knowledge must be communicated by many diversified competing companies who have corresponding access to confidential material.[50] His study however overlooks corporate ethics which is important in corporate governance.

The primary justifications against insider trading regard equity and the formation of a level field within the capital markets. As per Robert W. Mcgee, insiders do have fiduciary responsibility to not benefit from confidential information they have direct exposure to as a result of their status with the company.[51] He contends in the misappropriation theory, that it implies that the knowledge used for own benefit appertains to other individuals and exploiting that material contravenes rights to property.[52]Notably, his study does not explore the gaps in legislation on insider trading from a corporate governance viewpoint.

b) Disclosure as a Corporate Governance principle

Gitahi in his paper on the value relevance of corporate governance disclosure in annual reports underscores that corporate governance disclosure is significantly positively related to market value, measured by the average market price per share.[53] His findings show that corporate governance

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[47] Ibid.

[48] Ibid.

[49] McGee Robert W, 'Analyzing Insider Trading from the Perspectives of Utilitarian Ethics and Rights Theory' (2010) *Journal of Business Ethics*, vol. 91, no. 1, pp. 65–82 available at <*JSTOR*, www.jstor.org/stable/27749778> Accessed 22nd January 2020.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Gitahi J., 'Value Relevance of Corporate Governance Disclosure in Annual Reports: Evidence from Listed Banks in

disclosures have an impact on investor impressions and should therefore be included in annual reports, which are an important communication tool. He further underscores that disclosure enhances public confidence when making an investment decision. His paper however only focusses on listed banks and not listed companies. Furthermore, his paper does not analyze corporate governance failures that have resorted on account of non-disclosure.

Moreover, Adrian Fong implores that the principle of disclosure is among the main pillars of the Cadbury Report's corporate governance framework. [54] As the Cadbury Report states, "*an open approach to information disclosure helps the market economy work effectively, leads Boards to take effective action and enables shareholders and other companies to scrutinize firms more carefully*".[55] One of the most important responsibilities of directors is to ensure that shareholders and other stakeholders are informed about the company to which they have been assigned budgetary and operational results.[56] Essentially, any system of corporate governance around the globe, including the OECD and Cadbury Reports, clearly obliges the Executive Board to provide information to shareholders and investors about the operating and financial results of a company to enhance the accuracy of its business structure, current conditions and its long-term development.[57]His study however does not give an analysis of the corporate failures due to inadequate disclosure.

According to Fong, if a company's executives know more about the company than the shareholders, the company management may take advantage of the shareholders' ignorance to conduct the company in their own best interests.[58] Good corporate governance depends on the timely, accurate, and substantive disclosure of information which can be used by shareholders to effectively exercise their rights.[59] Shareholders who do not have the crucial knowledge to make enlightened determinations cannot perform their task in the corporate governance structure and will either choose

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[54] Adrian Fong, 'Practicing Corporate Governance Through Corporate Disclosure?' (2013) SSRN Electronic Journal available at <http://file:///C:/Users/Downloads/SSRN-id2342480.pdf> accessed 26 May 2021.

[55] A Cadbury, The Financial Aspects of Corporate Governance, Gee and Co. Ltd, London, 1992, s. 3.2

[56] United Nations Conference on Trade and Development, Guidance on Good Practices in Corporate Governance and Disclosure, New York (2006) available at <https://unctad.org/system/files/official-document/iteteb20063_en.pdf> accessed on 26th May 2021.

[57] Ibid.

[58]Adrian (n 56).

[59] M Fox, 'Required Disclosure in Corporate Governance', Law and Contemporary Problems, (1999) vol. 62, no. 3, pp. 113-127.

not to vote or rubber-stamp decisions. [60] Through efficient use of corporate disclosure, shareholders can make use the data to guide the company.[61] Therefore by reducing the danger of exploitation and expropriation, disclosure increases investor trust and confidence in the securities market. Investor trust is bolstered by a sufficient flow of information about the company, which is a core rule of securities legislation. Issuers are considered to be treating investors equally by disclosing, which is commonly regarded as fairness. This is especially relevant in nations like Kenya, which have a high concentration of ownership.

c)Compliance of insider trading in Kenya

When evaluating Capital Markets Authority legal precedents, Gakeri Jacob claims that an efficient regulatory system must contain an enforcement regime. [62] The effectiveness of rules and regulations is determined by how well they are followed. The core of investment protection is enforceability. Licensing or approval, inspection, inquiry, and penalization are all part of oversight software, which is used for both regulation and enforcement.[63] The Capital Markets Authority, as the primary government agency in charge of securities market regulation, takes precedence in enforcing the Capital Markets Act and other securities-related laws and regulations.[64]He however does not explore the inadequacies in the legal and institutional structure governing insider trading.

Seth Wekesa in his thesis titled 'Legal and regulatory framework governing stockbrokers in Kenya 'critically examines and analyzes the existing legal and regulatory framework governing operations of stockbrokers and investment banks.[65] He focusses on Capital Markets Authority's regulating tools such as licensing and registration, market surveillance, market intervention and imposition of criminal sanctions and penalties. He further opines that there are some powers which have not yet

[60] Adrian (n 56).
[61] Ibid.
[62] Jacob Gakeri, 'Regulating Kenya's Securities Markets: An Assessment of The Capital Markets Authority's Enforcement Jurisprudence' (2012) 2 International Journal of Humanities and Social Science <http://41.204.161.209/bitstream/handle/11295/81964/Gakeri_Regulating%20Kenya%E2%80%99s%20securities%20markets%20an%20assessment%20of%20the%20capital%20markets%20authority%E2%80%99s.pdf?sequence=1&isAllowed=y> accessed 11 March 2021.
[63] Stuart Bazley, Market Cleanliness Systems and Controls and Future Regulatory Enforcement, 28(11) COMP.L. 341 (2007); Jill E. Fisch, Top Cop or top Flop? The SEC at 75, 95 VA. L. REV.785 (2009) (Expressing the view that regulatory reforms in U.S. Securities markets should focus on enforcement and transparency).
[64] Ibid.
[65] Seth Wekesa, 'The legal and regulatory framework governing stockbrokers and investment banks in Kenya' (2009) LL. M Thesis, University of Nairobi Digital Repository, College of Humanities and Social Sciences (CHSS) accessed 12th November 2021.

been invoked by the regulator since inception and as a result caused investors to lose their savings to fraudster stockbrokerage firms. His study however does not take into account the various amendments since 2009 in the principal Act "Capital Markets Act" that have since enabled Capital Markets Authority to have more grasp in effecting its functions in the securities market.

d) Select countries and their enforcement regimes with regards to insider dealings

Corporate scandals such as Enron, according to scholars Clyde, Kathleen, and Barbara, promoted the implementation of sound corporate governance standards.[66] In response to the Enron and other business scandals, the United States Congress passed the Sarbanes-Oxley Act (SOX) in 2002, introducing the most extensive reforms since the 1930s and the first major corporate governance legislation change since the Foreign Corrupt Practices Act of 1977. [67] It enables managers to provide for and properly protect the precision of internal financial controls and all relevant systems, with the aid of the Executive board.[68] Moreover, they presume that a financial services company should prepare audits and verify management's internal control assessment. [69] For instance, Parmalat, an Italian dairy conglomerate, is yet another instance of historical fraudulent transaction.[70] It had been embroiled in huge accounting irregularities totaling close to $10 billion. In responding to the Parmalat misbehavior, the European Commission started a number of corporate governance interventions which have become the fundamental basis of the best corporate governance mechanisms available.

Most states in the United States, according to Frank M. Rasmussen, have policies in place to deal with corporate market manipulation to varying degrees.[71] He asserts that transparency is an overall premise of the basic underlying securities laws. The Securities Act of 1933 regulates disclosure. Moreover, he asserts that the Securities Exchange Act of 1934 extends to companies listed on a

[66] Clyde Stoltenberg and Kathleen, A Lacey and Barbara Crutchfield George and Michael Cuthbert, 'A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the US and European Union: The Impact of Tensions Created by Extraterritorial Application of Section 404' (2005) 53 Am J Comp L 457.
[67]Ibid.
[68] Foreign Corrupt Practices Act, 1977, s.404.
[69] Ibid.
[70] Parmalat products sold in North America include Archway and Mother's Cookies, Olivina margarine and Black Diamond and Balderson's cheeses, available *at* < http:// www.wsws.org/articles/2004/parm-j06.shtml> accessed on last 10th February, 2020.

[71] Rasmussen and Frank M, 'An Overview of Insider Trading Laws in the United States'(1981) *International Business Lawyer*, vol. 9, no. 10, p. 389-395.

national securities exchange. In fact, the Institution that regulates securities, the Securities Exchange Commission, prosecutors, and private civil rights of action are the bodies that apply the law in relation to market manipulation. Similarly, according to Ramzi Nasser, the Securities and Exchange Act of 1934 establishes criminal responsibility for insider trades.[72] The Securities and Exchange Commission may submit them to the Justice Department since starting criminal proceedings has a higher bar of proof.[73] Similarly, the Commission has the authority to bring civil cases in federal court, seeking injunctive relief, fines, and a civil penalty of up to three times the offender's profit margins.[74] Attorneys, accountants, and market professionals might all face legal action from the Commission in this regard.

According to Miriam H. Baer, in late 2016, the Supreme Court endeavored to explain the unlawful act of insider trading in ***Salman v. United States,***[75] which was highly watched. The issue concerned secondary and tertiary knowledge receivers, sometimes known as "remote tippees."[76] In doing so, the Court attempted to dispel any concerns that a person who "gifts" personal material to a friend or relative for the purpose of selling it is breaking the law.[77]With regards to United States in general, the scholars have indeed noted that the legal gains made in the United States have indeed improved over time and it has become one of the countries in the world that has expanded the meaning of insider trading beyond the limited scope applied in most countries. The shortcomings of the scholarly work reviewed however does not link corporate governance and insider trading.

According to Shapiro, market manipulation was not illegal in the United Kingdom until 1980. While business directors owed stringent fiduciary responsibilities to the corporate organization, they owed no responsibility to shareholders, according to common law.[78] Other intellectuals, such as Rider, really believe that just because insider trading isn't prohibited doesn't mean it's lawful.[79] Anti-insider trading regulations were in existence at both the Stock Exchange and the Panel on Take-Overs and

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[72] Ramzi Nasser, 'The Morality of Insider Trading in the United States and Abroad' (1999) 52 Okla L Rev 377.
[73] G. Lynch & M. Missal, Recent Civil and Criminal Prosecutions of Insider Trading Violations33-34 (Jan. 1987) (unpublished manuscript), presented at Fourteenth Annual Securities Regulation Institute (U.C.S.D. 1987).
[74] Ibid.
[75] 137 S. Ct. 420 (2016).
[76] Miriam H Baer, 'Insider Trading's Legality Problem' (2017-2018) 127 Yale LJ F 129.
[77] Ibid.
[78]Ibid.
[79] Rider, 'Self-Regulation: The British Approach to Policing Conduct in the Securities Business, With Particular Reference to the Role of the City Panel on Take-Overs and Mergers in the Regulation of Inside Trading' (1978) I J. COMP. CORP. L. & SEC. REG. 319.

Mergers, and both bodies initiated disciplinary action and aided in the expansion of London's securities market. These parts were re-enacted in 1985 as the Company Securities (Insider Dealing) Act, with certain changes. [80] The Financial Services Act of 1986, which made a substantial contribution to the British regulatory system and supported the expansion of London's securities market, updated the Insider Dealing Act.[81] The legal backdrop of the United Kingdom is especially crucial to research because it is a global leader in insider trading legislation. Shapiro's study however does not analyze the inadequacies of the supervisory framework in curbing insider trading.

Derek argues that the rising number of mergers and acquisitions in South Africa provided a favorable climate for insider traders.[82] He believes that the South African government established the Insider Trading Act to keep up with the expanding trend of monitoring and controlling insider trading (1998).[83] Similarly, Osode claims that there was no genuine regulation of insider trading in South Africa prior to 1973. The Companies Act 61 of 1973 had provisions intended to limit insider trading.[84] Because there were few prosecutions for insider trading in South Africa throughout the time these rules were in existence, the applicable law proved weak and ineffective. [85] Despite this, new regulations have been enacted with the goal of assisting in the regulation of insider trading. The attempts to manage insider dealings were significant, especially because South African law enforcement agencies clearly borrowed from two different legal regimes, the United States' and the United Kingdom's, in the composition of their insider trading law and policy, as well as the processes for enforcing the policies.[86] Bothe Derek and Osode's study mainly rely on the legislation of insider trading in South Africa. They don't mention any viewpoint that stems from corporate governance and further how the roles the institutions play in combating insider trading.

Despite policy reforms in South Africa, Thabang and Chitimira contend that the country's anti-insider trading system has flaws in terms of describing, investigating, litigating, and concluding insider

[80] Ibid.
[81] Ibid.
[82] Derek Botha, 'Control of Insider Trading in South Africa: A Comparative Analysis '(1991) 3 S Afr Mercantile LJ 1.

[83] Ibid.
[84]Osode, P., 'The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?' (2020) *Journal of African Law*, *44*(2), 239-263 available at <www.jstor.org/stable/1587458> accessed on 31st January 2021.
[85] Ibid.
[86] Derek Botha, 'Control of Insider Trading in South Africa: A Comparative Analysis '(1991) 3 S Afr Mercantile LJ 1.

trading offences.[87] Insider trading laws in South Africa, for example, do not clearly introduce the meaning of insider trading and other key meanings. Likewise, the Financial Markets Act fails to distinguish between criminal penalties for individuals and juristic persons. In Kenya, the applicable law has proven insufficient and ineffective, as there have been few prosecutions for insider dealings since the provisions on insider trading went into effect. Despite significant efforts to manage insider dealings, particularly since Kenya's law enforcement agencies clearly borrowed from different legal regimes, successfully prosecuting an insider trading offence remains a challenge.

1.8 Justification

Both jurists and economists have contributed to the research of securities fraud by keeping track of evolving securities legislation requirements and examining whether insider trading is market cost effective. Nonetheless, there remains a gap in corporate governance viewpoint on inside trading, both regionally and internationally. Aside from that, there hasn't been much research done on how effective Kenya's institutional and legal structures are at preventing insider trading. By investigating insider trading from a corporate governance viewpoint and assessing the effectiveness of Kenya's legal and institutional framework on insider trading, this study adds to the current literature and fills a gap in the literature.

The study's main output is expected to be recommendations for reforming Kenya's legal and institutional framework on insider trading in order to effectively combat the vice of insider trading, which undermines good corporate governance. Furthermore, the research is justified from the perspective of everyday investors. The findings of this study are also essential for regulators, since they will assist them understand the techniques used by insiders, which will aid in the development of legislation. It also provides an opportunity to analyze the efficiency of insider trading rules in ensuring that insiders and outsiders compete on an equal footing. Overall, both investors and regulators will benefit from the study.

1.9 Research Methodology

To address the challenges highlighted in the objectives and make relevant recommendations, the

[87] Thabang Terrance Mabina and Howard Chitimira, 'A Comparative Synopsis of the Statutory Prohibition of Insider Trading in Namibia and South Africa' (2019) 9 Juridical Trib 492.

doctrinal research technique was adopted.[88] Case law, legislation such as Constitution of Kenya, 2010, Capital Markets Act, Companies Act, Code of Corporate Governance practices to issuers of securities to the public, 2015, the Stewardship Code, 2017, and other legal sources were reviewed using this method.

To find relevant books, legal precedent, journal articles, and other publications, a number of libraries were visited. In addition, particular websites were used to gather data for this study. This is beneficial and crucial since it allows the researcher to gain better access to the perspectives of notable local and international researchers, as well as publishers. A collection of judicial precedents and legal concepts were also examined. The study also drew on lessons learned from Australia's and South Africa's anti-market-abuse enforcement frameworks. The enforcement structures in these countries have proven to be more effective. Apart from that, the key takeaways from their experiences were examined to determine whether they might be emulated in Kenya.

1.10 Scope and limits of the study

There are certain limitations to the research. First, the current research focuses on Kenya's legal and institutional environment for insider trading. Other markets, such as the money market, derivatives market, and foreign currency market, may be used for insider trading. Insider trading in one part of the financial market causes extraordinary volatility in other parts of the market. This study does not address the question of ripple effects.

Second, statutes from various developed and emerging nations should have been reviewed in order to gain a full understanding of regulatory procedures on insider trading. The current study focused on only three countries: Kenya, Australia, and South Africa, with a special focus on Kenya's insider trading issues and restrictions. The study of insider trading legislation in a larger number of nations, both developed and developing, could add to the research's depth.

1.11 Chapter breakdown

Chapter One: Introduction

[88] Manish Signh, 'Qualitative and Doctrinal methods of research' available at <http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/08._qualitative_and_doctrinal_methods_in___research/et/8155_et_et.pdf > accessed on 12th July 2021.

The first chapter covers the introduction and background of the study, and the research problem, theoretical framework, literature review, purpose of the study, study objectives, research hypotheses, justification for the inquiry, methodology and limitations.

Chapter Two: The Legal framework of insider trading in Kenya

Chapter two looks at the analysis and effectiveness of main insider trading laws such as Constitution of Kenya,2010, the Capital Markets Act, cap 485A, the Companies Act, Act no. 17 of 2015, the Capital Markets (Securities) (Public Offers, Listings, and Disclosures) Regulations, and the Code of Corporate Governance Practices for issuers of Securities to the Public 2015 and the Stewardship Code, 2017.

Chapter Three: The Institutional framework of insider trading in Kenya

Chapter three looks at the legal structures and enforcement agencies involved in insider trading such as the Capital Markets Authority, Capital Markets Tribunal, Nairobi Securities Exchange, Courts and the Registrar of Companies. It mainly investigates the systems for identifying, investigating, and prosecuting insider trading violations. Further, the Capital Markets Authority's decisions on insider trading are explored in further detail.

Chapter Four: Enforcement of insider trading in Australia and South Africa: Lessons for Kenya

The fourth chapter investigates theinstitutional frameworks that govern insider trading in Australia and South Africa in order to learn lessons that might be applied to Kenya in order to reduce insider trading. Both countries have strict insider trading laws that are well-known around the world.

Chapter Five: Conclusions and Recommendations

The final observations are found in Chapter five. It outlines the study's main concerns and proposes improvements. It is suggested that Kenya's insider trading regulatory structure be revamped in order to adequately address the issues raised in this study.

CHAPTER TWO
THE LEGAL FRAMEWORK OF INSIDER TRADING IN KENYA

2.1 Introduction

This chapter analyzes Kenya's legislative structure governing insider trading. Furthermore, it also thoroughly examines the elements of insider trading as defined by the Capital Markets Act, cap 485A. It is being investigated whether the legal provisions as written pose a barrier to the successful prosecution of an insider trading offense. This chapter will also look at other legislations that curb insider trading, such as the Kenyan Constitution of 2010, the Capital Markets Act, the Companies Act, the Capital Markets (Securities) (Public Offers, Listing, and Disclosures) Regulations, the CMA Guidelines on Corporate Governance Practices by Kenyan Publicly Listed Companies, and the Code of Corporate Governance Practices by Issuers of Securities and the Stewardship Code, 2017. Most studies on insider trading regulation, on the other hand, are based on developed jurisdictions with different economic, social, historical, and cultural characteristics than the developing world. As a result, the purpose of this chapter is to investigate the legal regime that governs insider trading and its effectiveness.

2.2 Constitution of Kenya, 2010

The Constitution continues to remain the highest law, and other acts have been predicated on it. Given the fact there are no clear and specific acknowledgments of insider trading, specific articles can be deduced. Also, because Kenyan citizenry enjoy sovereign power under the Constitution, they have the basic power to engage in profitable as well as other legitimate transactions. This authority is echoed in constitutional provisions in the bill of rights that help ensure, among other things, the right to privately owned property,[89] access to information,[90]equal treatment under the law,[91] freedom of speech, association, and organization .[92] The High Court of Kenya clarified that the right to property is the basic foundation of Kenya's market economy [93] and that since the Constitution supersedes all other laws, their provisions must be consistent with the Constitution.

[89] Constitution of Kenya, 2010, Article 40.
[90] Constitution of Kenya, 2010, Article 35.
[91] Constitution of Kenya, 2010, Article 27.
[92] Constitution of Kenya, 2010, Article 36.
[93] Republic V Minister for Finance & Another Ex-Parte Nyong'o & 2 Others [2007] eKLR.

The foundation of private property is critical for capital accumulation.[94]Moreover, despite the fact that information availability is vital in the financial markets, stockbrokerage firms restrict information access. This is related to the intrinsic value of information, which is determined by its ability to reduce risks, generate profits, and improve investor decision-making. Likewise, Article 47[95] includes the right to fair administrative action. It implies that everyone has a right to prompt, efficient, legal, and procedurally fair administrative action. It goes on to declare that if a person's right is violated, they are entitled to written explanations. Kenyan courts have used this section to invalidate decisions made by the Capital Markets Authority with undue regard to this provision. For instance, in ***Alnashir Popat & 8 others v Captial Markets Authority [2016] eKLR***, the Petitioners claimed that the Respondent had violated their right to fair administrative action for having failed to accord the Petitioners an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. On its part, the Respondent had insisted that it observed the right to fair administrative action as it sent the Petitioners notice to show cause setting out the particulars of the allegations made against them. That it also granted them sufficient time to prepare a response and gave them an opportunity to appear before the Respondent to be heard. It also claimed that the investigation process was continuous. The court however held that the Petitioners' right to fair administrative action was under an imminent threat of violation due to the perceived bias of the Respondent.

Similarly, in ***Aly Khan Satchu vs Capital Markets Authority***[96] was the most recent judicial decision on insider trading. Aly Khan Satchu filed a judicial review application on the Capital Markets Authority's enforcement notification dated 5th July 2019 finding him guilty under Section 32 (B) (i)(a) and 32 (B) (i)(b) (b). In revising the decision, the court stated that the ad hoc Committee formed to investigate the matter was made up of four CMA members. The court interpreted this as the CMA acting as the investigator, prosecutor, judge, and executioner, in complete violation of natural justice principles, Article 47 of the Constitution, and Section 4 of the Fair Administrative Action Act.

2.3 Capital Markets Act, Cap 485 A

[94] Ibid.
[95] Constitution of Kenya, 2010.
[96] (2019) eKLR

The Capital Markets Act is Kenya's principal legal basis regulating securities markets. [97] It is the legal foundation upon which the markets are run. According to the preamble, the aim of the legislation is to develop a Capital Markets Authority for the aim of encouraging and promoting the development of organized, equitable, and effective capital markets in Kenya. The Act criminalizes insider trading and imposes penalties for those that are found guilty.[98] The Capital Markets Act was assented to in 1989 and has since been amended 18 times with the most recent amendment being in June 2021. The objective of the amendments is to incorporate clearer regulatory provisions to fight market manipulation.[99] Part V of the Act specifically addresses insider trading. The provisions are divided into several sections, including application, insider trading, inside information, information publicly disclosed, and sanctions for insider trading.[100] This chapter examines the provisions relating to the fundamental concepts of the insider trading prohibition. The provisions dealing with punitive measures and penalties are also examined.

2.3.1 Elements of insider trading offence

a) Scope of securities and insider trading

Section 32 A (1)[101] states that insider trading is only permitted for listed securities and derivatives traded by Capital Markets Authority. The Act defines securities as price-affected securities and whether the information, if made public, is highly probable to substantially influence the price of securities.[102] Notably, the coverage of that section does not apply to unlisted companies which can also be charged with insider trading offenses. Furthermore, the limited scope excludes tendering processes in publicly traded companies where bids can be obtained prior to the tendering process. Similarly, other financial instruments which have been excluded include the derivative contracts, treasury bills and treasury bonds.

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[97] J. K. Gakeri, *'Enhancing Securities Markets in Sub-Saharan Africa: An Overview of the legal and Institutional Arrangements in Kenya'* (2011) Vol. 1 No. 9, IJHSS, p. 140 <www.ijhssnet.com/journals/vol_1_9_SpecialIssue_july2011/18.p.d.f> accessed 3rd February 2020.

[98] Capital Markets Act, cap 485 A.
[99] Rose Mwikali Kyalo, 'A Case for Review of The Legal Framework On Insider Trading' (2020) 1 ICS Governance Journal.
[100] Ibid.
[101] Ibid.
[102] Ibid.

It is important to note that the Act does not describe insider trading. However, the Act contemplates situations that could be considered insider trading, which is loosely defined in section 32B.[103] For starters, it entails encouraging another individual, whether or not that person is aware of it, to trade in financial instruments or their derivatives, which are price-affected financial instruments in connection to the insider's knowledge.[104] Before incurring any insider trading liability, the accused must be aware that he or she has insider information. Second, it involves an insider divulging information to another person except in the effective operation of his job responsibilities.[105] Moreover, the actual dealing in securities listed in a regulated market, whether explicitly or implicitly or through a broker or agent, by people who understand that he or she had information pertaining to such securities, constitutes an offense. This also implies that an insider who intentionally and obliquely participates in insider trading through a representative for his or her own personal benefit is culpable under the Act. It can be concluded that it is unclear who can be considered an agent for the purposes of the Capital Markets Act. In practice, however, agents can be characterized as licensed dealers who act in the best interests of market players.[106]

a) Scope of an insider

An insider is defined by the Act as someone who is or was associated with the company or is suspected of being associated with the company. Furthermore, an insider is someone who is thought to have reasonable access to confidential information of value that, if widely disseminated, would be expected to influence the price of the company's securities.[107] Another definition of an insider is someone who has direct access to insider information.[108] There are two types of insiders contemplated by the Act. To begin, there are primary insiders, such as directors, employees, or shareholders of an issuer of securities or financial instruments to which the inside information relates, as well as individuals who already had access to the inside knowledge through their job,

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[103] Ibid.

[104] Capital Markets Act Cap 485A, S. 32B.

[105] Ibid.

[106] Chitimira H., '*Unpacking Selected Key Elements of the Insider Trading and Market Manipulation Offences in South Africa, (*2016**)** Journal of Corporate and Commercial Law **&** Practice 24-41.

[107] Capital Markets Act Cap 485A S. 2.

[108] Capital Markets Act Cap 485A S.32A.

office, or vocation but were not officers or company employees.[109] Second, there were secondary insiders or tippees who were aware that the primary insider was the direct or indirect source of their inside information.[110].

The emphasis on individuals as insiders in the definition simply implies that juristic persons are not permitted. In this regard, the definition's scope is too narrow. Individuals could frequently engage in insider financial transactions through legal entities under their supervision without exposing their organizations to liability.[111] The omission of corporate entities and other legal entities from the definition of an "insider" is thus a significant flaw in the Act. As a result, the Capital Markets Act does not expressly prohibit the improper disclosure of price sensitive inside information relating to listed securities by juristic persons. Notably, the incredibly significant descriptions, such as "tipping" and "tippee," are not expressly defined in the same Act. Furthermore, a scenario involving a "remote tipee" is not contemplated by the Capital Markets Act. This is in reference to those who receive secondary or tertiary information. It can include situations such as a person gifting material confidential information to a friend or relative for the purpose of dealing with such knowledge. This is a significant disparity. Recent legal developments in the United States concerning insider trading point to the term "remote tipees" and their impact on insider trading.[112]

b) Statutory defences

It is worth noting that the Act makes no stipulation for statutory defences. It has been argued that there are countless examples in which insiders can be presumed innocent. For example, the unintentional offenders who traded in the affected listed securities for the benefit of insiders with price-sensitive inside information. As a result, modifications are needed to explicitly provide for

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[109]Howard Chitimra, 'An Overview Analysis of Selected Challenges in the Enforcement of the Prohibition of Insider Trading and Market Manipulation in the European Union and South African Regulatory Frameworks | Chitimira | Law, Democracy & Development'(2020) available at . <https://vpn.uonbi.ac.ke/proxy/2e4bc9bb/https/www.ajol.info/index.php/ldd/article/view/122595/112143> accessed on 5th February 2020.

[110] Ibid.
[111] Ibid.
[112] Salman vs United States 137 S. Ct. 420 (2016).

statutory defences in such cases. In other jurisdictions, such as the United Kingdom, the Criminal Justice Act 2003 provides for a variety of defences.[113]

Furthermore, the defence mechanisms are designed to ensure that particular innocent transactions and legitimate market practices are not hampered by laws prohibiting insider trading. The specific details state how an individual is not culpable if he illustrates that he didn't really expect the transaction to result in a financial gain or to avert a loss because the information requested was price-sensitive information about the financial instruments. The Capital Markets Act can as well allow for a similar approach to be instilled.

c) Scope of insider information

Inside information is defined as particular or precise information which was not initially made accessible and was obtained or discovered by an individual as an insider and that, if publicly revealed, is highly probable to have a significant impact on the financial or value of any securities.[114] The description would only apply to trustworthy and fact-based confidential inside information. Information must meet four criteria to qualify as inside knowledge under the Act. First and foremost, the information must be entirely factual. Incorrect and unverified knowledge, conjecture as to whether information is true, rumors and speculation, and promises are all prohibited. Trading based on speculation about the value of the securities, on the other hand, could still take place and harm unsuspecting outsiders. It is up to the Capital Markets Authority, the regulator, to determine what constitutes insider information in the case of insider trading. Second, the inside information must have come solely from an insider. As a result, instances in which information was obtained from sources other than insiders are not expressly included in the definition. This exclusion could lead to abuse. Whatever the case may be, the fact remains that price-sensitive information accidentally disclosed by insiders is not addressed by the description and thus could be used by someone else to engage in insider trading.

[113] Criminal Justice Act, 2003, s. 53.
[114] Capital Markets Act, Cap 485A, s.32C.

The information must not have been publicly disclosed, according to the Act.[115] Although the term "publication" is not defined in statute, there are numerous ways in which confidential material information is considered to have been reported.[116] Confidential information must be capable of having a significant impact on the price or valuation of securities after it is publicly disclosed. It could be argued that the Legislation's inability to provide adequate interpretations of these and other definitions contributes significantly to poor compliance. Finally, in order to avoid ambiguity in defining what constitutes public information, the Act defines what constitutes information made public. These scenarios include situations in which information is printed in accordance with securities exchange regulations or for the aim of guiding investors and their professional advisors. Furthermore, information contained in any records that are open to public scrutiny by virtue of any statute and can be easily acquired by those probable to deal in securities.

d) Other market abuse offences

Market manipulation is one of the offenses listed in the act.[117] According to the Act, market manipulation occurs when a person enters or carries out, intentionally or unintentionally, two or even more transactions in a company's securities that are likely to rise, decline, or normalize the market value with the purpose of facilitating another individual to buy, subscribe for, or desist from selling securities.[118]

Other market abuse offenses contemplated by the Act are listed below .[119] To begin, there is false trading and market rigging, which involves a person actively trading in the securities market of a securities exchange with the intent of creating a false or misleading impression, which is a violation of the Act.[120] Second, there is the fraudulent inducement of trading in securities, which involves an individual inducing another individual to sign up for, sell, or buy securities by causing or circulating a deceptive, inaccurate, or fraudulent statement, assurance, or projection.[121] Third, there

[115] Capital Markets Act Cap 485A S. 32 D.
[116] Ibid.
[117] Capital Markets Act Cap 485A S. 32F.
[118] Ibid.
[119] Capital Markets Act Cap 485A.
[120] Capital Markets Act Cap 485A, s. 32G.
[121]Capital Markets Act Cap 485A, s.32H.

is the use of manipulative devices, which entails using any device, whether directly or indirectly, to defraud another person.[122] Furthermore, there is the offense of front running, which involves a person in a market middleman who has insider knowledge on client orders with a price gap or is cognizant of such orders and impacts an own account transaction in the securities involved or in any related investments directly through any other individual, in order to benefit of the difference in price even before client order is accomplished.

Finally, the offence of obtaining gain by fraud involves any individual who, on his as well as her own initiative or in collaboration with another, acquires personal or financial gain through deceit, deliberate concealment, misrepresentation, or any deceitful means.[123] It appears that any actual dealing in non-listed securities that are traded on other trading platforms such as over-the-counter markets (OTC), organized trading facilities (OTFs), and multilateral trading facilities (MTFs) on behalf of other persons does not expressly amount to insider trading under the Capital Markets Act.

d) Insider trading penalties

Notably, a person who contravenes the insider trading offence shall be liable on a first offence to a fine not exceeding two million five hundred thousand shillings or imprisonment for a term not exceeding two years or both.[124] On a subsequent offence the person shall be liable to a fine not exceeding five million shillings or imprisonment to a term not exceeding seven years or both. In the case of a body corporate, the fine shall not exceed five million shillings on the first offence and on a subsequent offence shall not exceed ten million shillings.[125] It can be argued that the penalties are not punitive enough as the Act might have envisaged. For instance, a party who has benefited as a result of insider dealings can easily afford to pay the allocated fine. Consequently, a person who commits an offence of both insider trading and market manipulation is liable upon conviction to a fine not exceeding five million shillings or imprisonment to a term not exceeding two years.[126]

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[122] Capital Markets Act Cap 485A, s.32I.
[123] Capital Markets Act Cap 485A, s.32KA.
[124] Capital Markets Act Cap 485A, s.32E.
[125] Ibid.
[126] Capital Markets Act, Cap 485A, s.32L.

It could be argued that the current criminal penalties for insider trading are insufficient to deter all insider trading offenders. This is due to the fact that offenders may make large profits from their insider trading activities and thus be able to pay the prescribed fine and/or go to jail without necessarily forfeiting their illicitly obtained profits. Furthermore, because of the high evidentiary burden of proof in criminal cases, successfully prosecuting insider trading offenses is difficult. Furthermore, the Capital Markets Act establishes civil penalties such as the forfeiture of profits or the avoidance of losses.[127]

e) Disclosure obligations

Securities issuers are required to disclose information under the Capital Markets Act.[128] In this case, the main aspects of disclosure involve relaying any information that may enable Capital Markets Authority to assess the company's financial performance as well as the company's state of corporate governance. Similarly, the information relayed should be information that is likely to affect market activity in the price of its securities, or information that is likely to prevent the establishment of a fictitious market in its financial products. Because it only applies to securities issuers, the Act's disclosure obligation is narrow and limited. The Act exempts unlisted companies from the same requirements.[129]

2.4 Companies Act, no. 17 of 2015

Notably, the Statute outlines the broad responsibilities of the directors, which are based on common law and equitable principles The functions include the obligation to act within their power and authority,[130]to promote the success of the company,[131] to exercise independent judgment,[132] to

[127] Ibid.
[128] Capital Markets Act, s. 30F.
[129]Rose Mwikali Kyalo, 'A Case For Review Of The Legal Framework On Insider Trading' (2020) 1 ICS Governance Journal.

[130] Companies Act, No. 17 of 2015, s.141.
[131] Companies Act, No. 17 of 2015, s. 143.
[132] Companies Act, No. 17 of 2015, s. 144.

avoid conflict of interest[133] and to not accept benefits from third parties.[134] In order to ensure the company's success, the directors must continue to act in a way that benefits the shareholders greatly. Similarly, there is a growing list of non-exhaustive considerations that directors must be aware of. Similarly, the board of directors must consider the long-term implications of decisions, such as employee satisfaction and the need to strengthen the company's business relationships with suppliers, clients, and others. Furthermore, they must consider the impact on society and the environment, as well as the need to maintain a reputation for excellence in business practices and the need to act reasonably among members.

Besides that, the directors are responsible for avoiding potential conflicts of interest in relation to property, information or opportunity. In this regard, they must disclose any involvement in a specific transaction with the company, with the exception of matters that are unlikely to give rise to a conflict of interest or are already known to the directors. Moreover, in terms of disclosure requirements, directors must complete a report to support the company's financial statements. The report's components include: a good assessment of the company's operations, a synopsis of the primary potential risks confronting the corporation, and an understanding of the company's growth, effectiveness, or position to the extent permitted. In addition, an analysis based on financial performance indicators, including a declaration from each director that they are fully aware of all accurate financial information. They must also ensure that the company's auditor is informed. Given that such reports are now available to the public, directors will need to devote more time to preparing the report than in the past in order to meet the statutory requirements.

Despite the fact that the Companies Act, 2015 is a significant improvement in Kenyan company law, it is silent on the regulation of insider trading and other market abuses. Furthermore, despite the fact that the Companies Act 2015 is also based on the disclosure principle, which is critical in the regulation of insider trading, the Act's disclosure provisions are not stringent enough to protect shareholders' and stakeholders' interests from insider trading transactions. It is worth noting that no insider trading cases brought under the Companies Act have resulted in successful convictions. This could be due, in part, to a complete lack of important aspects governing insider trading. The terms "insider," "tippee," and "tipping," for example, are not defined statutorily or explicitly in the

[133] Companies Act, No. 17 of 2015, s. 146.
[134] Companies Act, No. 17 of 2015, s.147.

Companies Act.

2.5 Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

In accordance with Section 11 (3) (v) of the Capital Markets Act, the Capital Markets Authority issued the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, for use by both listed and non-listed public companies in Kenya.[135] The code supersedes the Guidelines on Corporate Governance Practices from 2002. It establishes principles as well as specific recommendations on structures and processes that businesses should implement in order to integrate good organizational culture into their business and cultural values.[136]

Similarly, the Code promotes for the implementation of guidelines that go far beyond what is legally required.[137] The methodology in the Code has transitioned from "Comply or Explain" to "Apply or Explain." This method is principle-based rather than rule-based, and it acknowledges that in some cases, a satisfactory explanation for any non - compliance will suffice. As a result, the method requires boards to accurately report any non - compliance to the Capital Markets Authority that could be appropriate in certain instances along with a firm commitment to progress toward full compliance.[138] The Code, on the other hand, contains mandatory provisions that are the minimum requirements that issuers must adopt, and these are mirrored in the Capital Markets (Securities) (Public Offers, Listing, and Disclosures) Regulations, 2002. Once mandatory provisions are imposed, it is stated that companies must comply with that given specification.

Furthermore, the code contains no principles for restricting insider trading.[139] It does, however, include a basic premise of timeous and balanced disclosure, which states that the board must foster timely and balanced disclosure of all valuable information pertaining to the company.[140] For influencing corporations and safeguarding investors, disclosure is a powerful instrument. It can assist in attracting investments and maintaining market confidence. Weak disclosure can lead to

[135] Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Principle 7.1, Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.

unethical behavior, a deterioration of market integrity, and a loss of investor confidence. Inadequate information can impede market functioning, raise capital costs, and lead to inefficient resource allocation. Stakeholders can learn about a company's actions, policies, and performance in terms of environmental and ethical norms, as well as its relationship with the communities where it operates, through disclosure. Companies that implement excellent governance can differentiate themselves through transparency and disclosure.

In addition, the guidelines state that companies should have practical internal corporate disclosure policies and processes that include stakeholder feedback. To summarize, the board should recognize that insider trading is unlawful and must ensure that no insider trading has occurred. Other instances where the board must disclose include whether there is an audit committee and whether that committee is independent, whether the board, the chairperson, the chief executive officer, and the company secretary have been evaluated in the annual reports, and whether a legal and compliance audit has been conducted amongst others.

In contrast, although the Code contains good guidelines, it is not binding. Also, the lack of penalties within the guidelines is a major issue since without any sanctions companies would easily disregard it. Also, the Guidelines seem to be more focused on the shareholders rather than stakeholders' interests. Shareholder interests concern the policies and structures that the Capital Market Authority has put in place to protect investors who are the owners of capital. On the other hand, there are stakeholders interests such as customers, creditors, community, and employees among other interest groups.

Notably, the Capital Markets Authority recently published its second state of corporate governance report for the fiscal year 2018/2019.[141] The report aims to increase public awareness of the state of governance of Kenyan securities issuers in order to motivate investors and various boards to incentivise continual improvement in practices. Mr. Paul Muthaura, the Capital Markets Authority Chief Executive at the time, noted that the 61 percent weighted overall score in 2018/19 was a commendable progress from the 55 percent weighted total score observed in 2017/18, when the first evaluation was undertaken. Seven (7) issuers exhibited leadership practices, seventeen

[141] Capital Markets Authority annual report 2018.

(17) exhibited good practices, twenty-one (21) exhibited fairness in their corporate entities, and eight (8) illustrated requiring improvement practices out of the fifty-three (53) issuers reviewed.[142] Similarly, he noted that more issuers were moving from needing improvement to fair, with the ultimate goal of having the majority of issuers on good and leadership rankings.[143] As a result, if this trend continues, good corporate governance will become an essential component of every company's business ties, and the market will be more stable, competent, self-sufficient, and appealing, with an emphasis on credibility.

Moreover, the Capital Markets Authority, reported a remarkable 72 percent improvement in the overall score from the previous year in 2019/2020.[144] Beginning in 2020, the Capital Markets Authority implemented a new process of meeting with issuers to discuss draft governance report findings. During the said engagements, clarifications and proposed recommendations were pursued. The Authority's findings in this regard became more transparent, comprehensive, and justifiable to each issuer.

2.6 The Capital Markets (Securities) (Public Offers, Listing and Disclosures)Regulations, 2002

The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 as enacted in 2002 in a bid to ensure corporate disclosure by listed companies was in conformity with best international practices. These Regulations mainly regulate public offerings, reporting requirements, and financial institutions listings. The Regulations, in broad sense, recommend the application process for securities public offerings, the requirements for information memoranda, the eligibility criteria for public offers, and the listing of securities on securities exchanges. Moreover, the Regulations also stipulate comprehensive disclosure rules for each market, as well as ongoing compliance requirements for publicly listed firms. Notably, the applicability of the Regulations' disclosure requirements is restricted to listed companies only. Furthermore, the

142 Ibid.
143 Ibid.
144 The Report on the State of Corporate Governance of Issuers of Securities to the Public 2020 available at <https://cma.or.ke/images/Docs/pdf/The_Report_on_the_State_of_Corporate_Governance_of_Issuers_of_Securities_to_the_Public-2020.pdf> accessed on 8th July 2021.

primary issue in Kenya is the compliance of disclosure requirements.[145]

Moreover, disclosure provides prospective investors with the necessary ingredients to analyze the risks connected with potential investments. By allowing investors to learn more about companies and their securities, disclosure reduces market information asymmetry. Better decision-making finally protects investors. Information accessibility is a powerful investor protection tool. It is impossible to overestimate the importance of disclosure in fostering and enhancing corporate governance. It has ramifications for corporate governance. During annual meetings, it allows investors to exercise their essential individual and corporate membership rights, such as voting on mergers and amending the articles of incorporation. It may also make it easier for them to supervise the operation of the organization. More importantly, it has the capacity to stifle private benefits of control, such as insider trading. It is arguable that transparency is critical in molding business conduct. On the one hand, it encourages corporate executives to be diligent, honest, and forthright, while on the other, it serves as a check on their performance.

2.7 The Stewardship Code for Institutional Investors, 2017

On June 23, 2017, the Stewardship Code for Institutional Investors was published in the Gazette. Moreover, it encourages the institutional financial world to act as responsible stewards for their beneficiaries, as well as to focus on promoting effective corporate governance and the long-term accomplishment of listed companies in capital markets.[146] The role of the Code is thus to standardize the key financial institutions' obligations into guiding principles that come with property rights, to provide guidance on how institutional investors act as responsible stewards of listed companies, and to strengthen the implementation of the Corporate Governance Code, which went into effect on 4th March, 2017. The Stewardship Code applies to asset owners such as pension funds, foundations amongst others and asset managers who invest in debt and equity markets of listed companies, with a central objective on Kenyan investors.[147] The Code takes a principle-based “apply or explain” approach, which means that institutional investors must apply the

[145] Criminal Justice Act, s. 53.
[146] The Stewardship Code for Institutional Investors, 2017.
[147] Ibid.

Stewardship Code's principles and best practices, and any deviation or non-adherence must be demonstrated.

It should be noted, however, that stewardship codes and standards world over, for the most part, provide guidance regarding institutional investors' responsibility to their clients and beneficiaries in terms of maintaining and improving value creation for their beneficiaries, as well as applying international best practices. They do little to improve communication between investors and the businesses in which they invest. Such dialogues should be encouraged in order to facilitate direct exchange. More guidance for asset owners, such as pension funds, on how to monitor their asset managers is also needed. The greatest risk of stewardship codes is that they become a checklist for investors to check off rather than a genuine engagement exercise between investors and the companies in which they invest. In order to fulfill their stewardship mandate, stewardship codes should also require reporting guidelines on disclosure of manager incentives and pay structures. Some critics have stated that the requirements for investor engagement pose a real risk of violating insider trading laws.

2.7 Conclusion

The Constitution of Kenya, Capital Markets Act, the Companies Act, the Code of Corporate Governance Practices For Issuers Of Securities To The Public 2015, the Stewardship Code of 2017, and the Capital Markets (Securities) (Public Offers, Listing, and Disclosures)Regulations, 2002 all point to one thing in this chapter. Despite the fact that Kenya has made tremendous progress in terms of securities legislation, the laws still have deficiencies that make prosecuting market abuse techniques like insider trading challenging. Furthermore, the Capital Markets Act, which is the primary law governing insider trading, should be revised to specifically include features of insider trading in order to broaden the scope of successful prosecutions. Furthermore, the Capital Markets Act should be updated to incorporate possible defenses in the instance of insider trading.

CHAPTER THREE

THE INSTITUTIONAL FRAMEWORK OF INSIDER TRADING IN KENYA

3.1 Introduction

The previous chapter examined the laws that govern insider trading. This chapter addresses the function and effectiveness of key selected role-players in Kenya who are largely responsible for detecting and enforcing insider-trading charges against this context. The Capital Markets Authority, the Capital Markets Tribunal, the Nairobi Securities Exchange, courts and the office of the Registrar of Companies are among these institutions. The purpose of this chapter is to see if the applicable insider trading provisions are being effectively executed by the role-players in order to detect, investigate, and prosecute insider trading.

3.2 The Capital Markets Authority

Parliament established the Capital Markets Authority (CMA) through an Act of Parliament, Cap 485 A. The Authority was founded with the approval of the Act on December 15, 1989, and it was inaugurated in March 1990. The following are the CMA's objectives, as listed in Section 11[148] regulating public offerings of securities such as stocks, bonds, and other financial products; championing new markets through innovation and market research; licensing and overseeing all capital market middlemen; ensuring that all market participants strictly adhere to the legal and institutional environment; and regulatory oversight of public offerings of financial instruments such as stocks, bonds, and other securities; examining the legal framework in light of market complexities, advocating for investor education and public awareness, and defending investors' interests.[149]

The Capital Markets Act empowers the Capital Markets Authority to bring civil and administrative proceedings against insider trading violators. The main benefit of relying on an independent body such as the Capital Markets Authority is the increased likelihood of obtaining more settlements and providing compensation to victims of insider trading activities. The main disadvantage is their

[148] Capital Markets Act, Cap 485A,s.11.
[149] Ibid.

bureaucracy when it comes to victims applying for and claiming compensatory damages. In this regard, the use of regulatory bodies has elicited a range of reactions from academics. In addition, the Authority has an Investigation and Enforcement Department to investigate insider trading practices and ensure conformity with the Capital Markets Regulatory framework. The Capital Markets Fraud Investigation Unit (CMFIU) falls under its purview, and its mandate is to investigate fraudulent activities involving capital market securities.

3.2.1 Capital Markets Fraud Investigation Unit (CMFIU)

(CMFIU) was established in May 2009 as a result of a collaboration between the Kenya Police and the CMA with the goal of bringing all financial instruments fraud investigations into one department.[150] Furthermore, one of the CMFIU's primary functions is to detect, prevent, and apprehend perpetrators of securities fraud.[151] Similarly, it gathers, analyzes, and disseminates relevant criminal intelligence information within the sector. In addition, it investigates and prosecutes identified securities market cases.[152]

The CMFIU, in particular, serves as a link between Capital Markets Authority as well as other investigating agencies.[153] It works with the Authority's Investigation and Enforcement Department to investigate and prosecute criminal offences, while the Authority's Investigation and Enforcement Department ensures that the Capital Markets Regulatory framework is followed.[154] Deception of investors and unauthorized dealings in their securities accounts, as well as profit collection and cash payments made by fraudsters posing as genuine investors, and unauthorized variance of personal information in securities accounts, are all fraud offenses investigated by the CMFIU.[155] The CMFIU pursues identified persons of interest after investigations are completed. For successful prosecution of anyone accused of criminal offenses, the burden of proof is relatively high, that is, beyond a reasonable doubt.[156] Fines of up to Ksh15,000,000.00 or imprisonment for

[150] Capital Markets Authority Annual Report 2018-2019.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.

up to 7 years are possible penalties.[157]

CMFIU received 35 complaints in the 2018-2019 fiscal year, with only one being referred for enforcement and action, three pending in court, and sixteen cases still under investigation.[158] As a result, the Authority took action against three individuals during this time period, specifically in the Kenol Kobil plc scandal. Mr. Andre Desimone (former CEO and Executive Director of Kestrel Capital(East Africa)Ltd), Mr. Aly Khan Satchu, and Mr. Kunal Kamlesh Bid (both stockbroking agents of Kestrel Capital(East Africa)Ltd, for their participation in insider trading of Kenol Kobil Plc shares prior to the takeover announcement in October 2018.[159] Authority imposed a variety of enforcement actions, including financial penalties, commission disgorgement, and disqualification from serving as a key officer and director of a publicly traded company, issuer, licensee, or any other Capital Markets Authority-approved institution. The Capital Markets Tribunal and the Court of Appeal are hearing appeals against the enforcement actions.[160]

Furthermore, the Capital Markets Authority recovered a total of Kshs. 477 million as a result of the signing of No Contest Settlement Agreements in the case of insider trading in the Kenol Kobil PLC Counter from March to May 2019.[161] Notably, the CMFIU received 40 complaints about fraudulent activities during the 2017-2018 fiscal year.[162] However, the CMA did not specify any insider trading enforcement action taken following the investigations in the report, and it is also unclear whether any of the 40 complaints received involved insider trading. Nonetheless, the Capital Markets Authority imposed Kshs. 113,481,196.07 in financial penalties for capital market legal and regulatory violations during the fiscal year 2017/2018.

3.2.2 Critique of Capital Markets Authority's role in fighting insider trading

a) Difficulties of detection and prevention

[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Capital Markets Authority Annual Report 2018.

Insider trading is detected by the CMA using a variety of approaches. First, the Capital Markets Act stipulates on securities issuer disclosure duties, which it monitors for compliance.[163] It stipulates that an issuer whose securities have been issued must furnish the Capital Markets Authority with any information necessary for the Authority to analyze the financial status and Governance Practices.[164] Similarly, whatever information necessary to create a fictitious market in its securities should be made public.[165] Finally, the said Authority should be informed of any information that could reasonably be expected to have a major impact on market activity in the price of securities.[166] Nonetheless, because the information disclosed by the issuers is not easily verifiable, it remains difficult for the Capital Markets Authority to detect any fraudulent transactions in this manner. Securities issuers can further manipulate the information they disclose to suit their needs.

Capital Markets Authority, for example, ensures compliance with its reporting duties by using the 2017 Code of Corporate Governance Practices for Issuers of Securities to the Public. The new code is founded on principles, and issuers are required to apply or explain how they have applied the rules of the Code. However, there are certain baseline corporate governance principles that must be followed by all issuers. The new code replaces the obsolete 2002 Guideline, which compelled issuers to either conform or explain their actions. Issuers must fill out a Corporate Governance Reporting Template and submit it along with their annual report within four months of the fiscal year's end. As a result, despite the fact that compliance is a legal necessity, securities issuers can nevertheless discover ways to engage in fraudulent activity while being in conformity with the Authority. Unless there is a whistleblower or the fraudulent operations are large-scale, the Authority still has no method of identifying them.

However, monitoring in partnership with the Nairobi Securities Exchange, which uses the Automated Trading System to track any prospective market abuse operations in the capital markets, is the Authority's best chance of detection. The Capital Markets Authority does not have its own surveillance system for detecting market manipulation actions in real time, which is a

[163] Capital Markets Act, Cap 485A, s. 30F.
[164] Ibid.
[165] Ibid.
[166] Ibid.

downside of this technique. As a result, in order to improve efficiency, the Authority might consider purchasing its own systems.[167]

b) Lack of market surveillance systems

The detection of insider trading is extremely tough. As a result, a variety of countries employ electronic market monitoring tools to detect the prevalence of fraudulent trading practices in capital markets.[168] In order to detect insider trading and other forms of market abuse, sophisticated and computerized surveillance systems are utilized to monitor market activity and trade trends.[169] Similarly, under the Capital Markets Act, the CMA's ability to regulate and monitor market activity is confined to persons who have been licensed and firms that have been listed. [170] As a consequence, it's unlikely that market oversight and surveillance by the CMA will uncover cases of insider trading.[171]

Nonetheless, CMA's detection mechanism for market trading data surveillance is based on abnormal trading patterns, and it collaborates with the NSE in market surveillance.[172] In most cases, the CMA depends on the Surveillance Division of the NSE to identify malicious transaction volumes and trading patterns. The main flaw in this process is that the CMA lacks its own technological system for market surveillance, making it difficult and time-consuming to identify the onset of illicit trading activities in capital markets. As evidenced by the low number of cases prosecuted to completion, the threshold for prosecuting insider trading is relatively high. Notably, technological advancements and regulatory developments have resulted in a dynamic evolution in securities markets in recent years.[173] This has increased risks presented to markets by trading

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[167] CMA Annual Reports 2018-2019 available at <file:///C:/Users/Sharon.Atieno/Downloads/Capital%20Markets%20Authority%20Annual%20Report%202018-%202019%20(1).pdf> accessed on 12th April 2021.

[168] Patrick, "Tech Boom Pressures ASX" (1999) Australian Financial Review 1 39; see further Prentice "The Internet and Its Challenges for the Future of Insider Trading Regulation" (1999) Harvard Journal of Law and Technology 265 332–356.

[169] Coffee, "The Dynamics of Capital Market Governance: Evaluating the Conflicting and Conflating Roles of Compliance, Regulation, Ethics and Accountability" (2007) ESRC/GOVNET Workshop Paper, Australian National University 2–75.

[170] Rose Mwikali Kyalo, 'A Case for Review of the Legal Framework on Insider Trading' (2020) 1 ICS Governance Journal.

[171] Ibid.

[172] CMA Annual Report and Statement of Accounts 2009

[173] CMA Annual Report 2017 available at < file:///C:/Users/USER/Downloads/CMA%20Annual%20Report%20-%202017.pdf> accessed on 22nd May 2020.

participants' illegal or unethical conduct. To guarantee fair and transparent transactions, the Authority has increased steadily its market surveillance capability.

Throughout the 2016/2017 fiscal year, the surveillance role generated substantial reports of suspected violations for further investigative process and adequate disciplinary action. As a result, the Authority began the process of obtaining consulting firm assistance to enhance its monitoring practices, capacity, and equipment to ensure optimized surveillance, a process that is still ongoing to this day. Furthermore, the Authority stated in its 2018 Annual Report that the Nairobi Securities Exchange (NSE) is upgrading its automated trading system, and the Central Depository and Settlement Corporation (CDSC) is installing a new central securities depository system. [174] In this case, the Authority's role is to collaborate with these bodies as the primary stakeholders. Nonetheless, obtaining sufficient and relevant equipment for CMA needed for market surveillance remains a challenge. Furthermore, the Authority has to keep pace with technological developments and, in conjunction with its development partners, is conducting a detailed review of its current surveillance needs to ensure it can sufficiently carry out its mandate.

b) Investor protection

One of the core objectives of the Capital Markets Authority is to protect investors' interests and to operate a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations.[175]Good Corporate Governance is essential for investor protection. Following the introduction of the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 (the Code), the Authority published the first Corporate Governance Scorecard, during the year 2018-2019.[176] The issuers' weighted overall score in the application of the Code was 55%.[177] While this is commendable, there is still room for

[174]CMA Annual Report 2018 file:///C:/Users/USER/Downloads/Capital%20Markets%20Annual%20Report%202018.pdf accessed on 22nd May 2020.

[175] Capital Markets Handbook available at file:///C:/Users/Sharon.Atieno/Desktop/PPM/Capital%20Markets%20Handbook.pdf accessed on 9th September 2021.

[176] CMA Annual Repot 2018-2019.

[177] Ibid.

improvement. During the year under review, the Board adopted more proactive enforcement strategies to address securities fraud prevention of fraud cases. [178]

In view of the critical contribution of sound financial reporting to confidence in capital markets, the Authority should continue to work with relevant stakeholders to ensure the arrangements on sound financial reporting remain effective. This includes the adoption of technology-driven approaches to enhance regulation and supervision, manage costs and efficiency of compliance for the industry. The enhanced use of technology will also enable greater efficiency in enforcement processes.

The Capital Markets Handbook serves as a public resource for information on capital markets concepts, products, procedures, and investor protection.[179] Its goal is to provide investors with information about the capital markets industry, licensed entities and approved institutions, key capital markets operations, the Authority's history, as well as its mission, strategic objectives, vision, and core values.[180] Moreover, education, awareness, and certification is a unit that raises public awareness, educates, and disseminates information about various aspects of capital markets and investor protection. This is accomplished through forums, both physical and/or virtual, as well as other initiatives. The challenge with this is that the information is usually not readily available to the potential investors and further the forums the Capital Markets Authority organizes in creating awareness are not widely publicized. A new investor has to carry out major research to be aware of how the market functions. Furthermore, the investor has to carry out due diligence, conduct their financial self-examination, dealing with only licensed entities and subscribing to alerts by the Capital Market

d) Weak investigation procedures

In 2009, the Capital Markets Fraud Investigation Unit (CMFIU) was formed. Its objective is to look into fraudulent actions affecting capital market securities in particular. The CMA has the

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[178] Ibid.

[179] Capital Markets Handbook available at file:///C:/Users/Sharon.Atieno/Desktop/PPM/Capital%20Markets%20Handbook.pdf accessed on 9th September 2021.

[180] Ibid.

authority under Section 13A to enter and examine the premises of anyone suspected of breaking the Capital Markets Act.[181] The sole requirement is that the investigating officer get a warrant from the Magistrates court providing the aforementioned powers. The warrant allows entrance into any location between dawn and nightfall in exchange for money or documents related to the investigation. Because the suspect may become aware of the authorities' operations and destroy or relocate papers or assets that could be used as evidence in the inquiry, this slows down the procedure. Likewise, section 13 B[182] empowers the Authority to have investigatory powers overs suspected insider traders. The appointment of agencies capable of recovering deleted electronic data, on the other hand, is a significant step toward detection and investigation.

e) Weak whistleblowing procedures

In July 2016, the Authority initiated an anonymous reporting platform to allow informants to disclose capital market improprieties as part of this initiative of providing equitable, organized, and efficient markets. [183] The platform, which can be accessed via the Authority's webpage, enables whistleblowers to share anonymous but credible evidence that has the capability to supplement and support the CMA's inquiry and enforcement actions. The public is encouraged to use this facility in an objective manner and participate actively in promoting accountability in capital market operational activities.

While the CMA will take all complaints carefully, anonymous complaints will have significantly less weight. The CMA may take them into account at its discretion, based on the seriousness of the accusation, its reliability, and the possibility of confirmation from other sources. Furthermore, there is no system in place to keep track of the status of complaints lodged with the Authority. To summarize, the Authority picks which cases to take up, hence the internet complaint procedure may not yield anything.

3.3 Capital Markets Tribunal

Its foundation is laid out in Section 35A. It is made up of a chairman who must have at least

[181] Capital Markets Act, Cap 485A.
[182] Ibid.
[183] CMA Annual Report 2017file:///C:/Users/USER/Downloads/CMA%20Annual%20Report%20-%202017.pdf accessed on 22nd May 2020.

seven years of experience as an advocate, a lawyer with seven years of experience in the corporate world, an accountant with seven years of experience, two individuals who have illustrated competence in the field of securities, and a secretary who must be a High Court advocate with five years of experience in corporate law.[184] The tribunal will have the authority of the High Court to call witnesses, take evidence under oath or affirmation, and order the production of books and other documents required for the appeal in the event of an appeal.[185] The tribunal may confirm, set aside, or amend the decision at issue, or even exercise any powers provided by the Authority, after considering the appeal.[186] Any party who disagrees with the tribunal's ruling has thirty days to file an appeal with the High Court.[187]

Notably, a party aggrieved by the regulator's decision must first seek an appeal at the tribunal before instituting proceedings in court. The challenge, however, is that the tribunal does not have a digest of cases that one can use to track the decisions emanating from it. Moreover, the Capital Markets Act does not set a deadline for reviewing appeals of Capital Market Authority rulings. As a result, the tribunal's sessions on appeals have been postponed. The Finance Act 2021 however has amended section 35A of the Capital Markets Act to incorporate a ninety-day time limit for hearing and deciding on an appeal. The modification will improve capital market efficiency and reduce the time it takes to resolve disputes.

3.4 Judicial proceedings

In Kenya, the civil and criminal prosecution of insider trading cases is solely the responsibility of the competent courts. As a result, courts have the authority to hear all insider trading cases referred to them by the Capital Markets Authority. Section 32L of the Act states that anyone who violates the provisions of Part V of the Act on Insider Trading and other market abuses commits an offense and is liable for conviction in the case of an individual to a fine not exceeding five million shillings or to imprisonment for a term of two years and payment of twice the amount of the gain made or loss avoided.[188]

[184] Capital Markets Act,Cap 485A, s.35A(1).
[185] Capital Markets Act,Cap 485A S.35A(5).
[186]Capital Markets Act,Cap 485A S .35A(16).
[187] Capital Markets Act,Cap 485A S.35A(22).
[188] Capital Markets Authority, Cap 485 A.

With regards to criminal prosecution, the Office of the Director of Public Prosecutions is the body mandated to institute and undertake criminal proceedings in Kenya.[189]The main challenge that may affect the institution in dealing with insider trading offence is the inexperienced prosecutors and investigators who are specialized in market abuse practices. Furthermore, there is delay in the court system occasioned by the backlog of cases. Despite the fact that expeditious resolution of cases is a requirement for delivery of justice, inordinate delays in the dispensation of justice continues to be a challenge in the judiciary.

Moreover, given that enforcement is a problem in financial crimes generally, criminal offences compete for scarce police resources with other seemingly more serious crimes.[190] As such, breaches of securities laws are unlikely to be seen as priority and it is worth considering whether the market regulator is better placed to conduct these prosecutions. Whether or not they have the capacity is a point of contention, considering that the prosecution in the Davidson and Kibaru cases were conducted by a special prosecutor appointed by the CMA from private practice. In ***Republic v Benard Mwangi Kibaru***[191], head of Buying and Merchandising at Uchumi Supermarkets, was invited to a board meeting. The meeting's agenda was an attempt to save the retailer and return it to profitability. Mr. Kibaru, who owned 111,400 shares in Uchumi as of April 26, 2006, then directed Drummond Investment Bank to sell them on his behalf. The court, however, ruled that Uchumi's poor performance and the withdrawal of its major shareholders was a matter that had been widely publicized in the press and thus did not constitute an offense under Capital Markets Act, sections 32A(1)(a) & 33. (I). The accused was fortunate in that the information he was accused of disclosing was already in the public domain via the media, so it did not meet the threshold of non-public information.

Additionally, the courts pronounced itself in the case of ***Republic versus Terrence Davidson.***[192]

[189] The Constitution of Kenya, 2010, Article 157.
[190] N. Dorn, 'The Metamorphosis of Insider Trading in the Face of Regulatory Enforcement' [2011], 19 (1) Journal of Financial Regulation and Compliance 75 – 84, 76. Accessed on 11th November 2021.
[191] Criminal Case No 1337 of 2008.

[192] Criminal Case No 1338 of 2008.

was charged with insider trading while serving as the Chief Executive Officer and Managing Director of Kenya Commercial Bank, the bankers of Uchumi Supermarkets. Davidson was also a shareholder of Uchumi and was one of the top 60 shareholders accused of using insider information to acquire 664,899 shares on December 2, 2005 and to sell 300,000 shares (worth Sh4.5 million) on May 9, 2006, based on information obtained through Uchumi connections and as KCB boss. In his defense, he stated that he purchased the aforementioned shares with a loan from Investments and Mortgages and that he needed to service the loan, which is why he sold the shares, and that the information memorandum of the Right Issue contained sufficient evidence that Uchumi was insolvent. In acquitting the accused, the court stated that the improvement in Uchumi's financial position was not price sensitive information that was likely to materially affect the company's share price. The fact of Uchumi's poor performance and the withdrawal of its major shareholders had been widely publicized in the press.

Notably, competent courts have played, and continue to play, an important role in enforcing insider trading laws. Nonetheless, the backlog and demand on Kenyan judicial services and the Director of Public Prosecutions may possibly be the cause for the lack of many insider trading convictions and settlements in Kenya so far. In order to improve the enforcement of insider trading regulations in Kenya, the formation of new specialized commercial courts staffed by professionals to deal with insider trading and general market abuse concerns should be seriously considered. In conclusion, the failure of successful prosecutions in insider dealings can further be attributed to the difficulty of proving the main elements of the crime beyond a reasonable doubt. Furthermore, as discussed in the previous chapter, the Capital Markets Act's provisions are too vague to impose criminal liability.

Lastly, we have established that the CMA conducts administrative proceedings relating to insider trading. The availability of a criminal justice system option for prosecuting offenses does not preclude administrative proceedings on the same. Furthermore, the Act recognizes that a single Act may have multiple consequences. Ordinarily, the purpose of an administrative penalty is to ensure compliance with the law and to provide the regulatory authority with a reliable means of enforcing it. The CMA is the regulatory authority in this regard. For the system to be viable, violations must be discouraged, and offenses punished.

3.5 Registrar of Companies

Under the Companies Act,[193] all registered companies were required to file annual returns with the Registrar of Companies.[194]Moreover, section709[195]obligates the directors of a company to ensure that the company's annual financial statements are audited in compliance of the law. In the case of public companies, financial statements sent to members has to give a "true and fair view" of the state of affairs and profit or loss of the company and its subsidiaries, if any.[196] Moreover, the company is also mandated to submit auditor's report to the Registrar of Companies. These disclosures are included in the company's public documents, which are accessible to the public. Similarly, all resolutions passed by members at general meeting (other than regular resolutions) are registrable within thirty days. The Registrar of Companies' office serves as a depository for the data. The goal of these standards is to ensure that information about the company's historical and current membership, directors, capital structure, important decisions, indebtedness, and financial reports is available for examination, thus promoting corporate governance disclosure.

3.6 Conclusion

This chapter looked at the Capital Markets Authority, the Capital Markets Tribunal and judicial proceedings. The effective prosecution of insider trading remains a challenge for these organizations. Furthermore, the Capital Markets Authority, as the primary regulatory agency for market abuse, has flaws such as ineffective supervisory procedures, difficulties detecting and preventing insider trading, a lack of sophisticated market surveillance systems, and limited supervisory powers, to name a few. Furthermore, the difficulty in referring insider trading offences to criminal prosecution also exhibits some challenges such as lack of trained prosecutors and investigators with regards to market abuse practices. The judiciary as an institution dealing with the cases has inordinate delays occasioned by backlog of cases. Overall, there is an evident difficulty on the reliance of criminal prosecution to curb insider trading. Similarly, as noted in the preceding chapter, the provisions of the Capital Markets Act are too broad and vague to entail criminal culpability.

[193] Companies Act, No. 17 of 2015.
[194] Companies Act, No. 17 of 2015, section 705.
[195] Ibid.
[196]Jacob Gakeri, 'Calibrating Regulatory Disclosure in Kenya's Securities Markets: Challenges and Opportunities for Investors' (2014) Vol. 4 No. 5, IJHSS, p. 134 accessed 15th November 2021.

CHAPTER FOUR

ENFORCEMENT OF INSIDER TRADING IN AUSTRALIA AND SOUTH AFRICA: LESSONS FOR KENYA

4.1 Introduction

The goal of this research is to criticize the current legislative and institutional framework in place to enforce insider trading. Following previous chapters that identified the limitations of Kenya's legislative and institutional framework, this chapter focuses on case studies of specific jurisdictions from which Kenya can learn. The countries mentioned above were chosen for this study for a variety of reasons. First, it could be argued that Australia has one of the world's most stringent market abuse legislation. It is also possible to argue that it is one of the world's most transformative and advanced market abuse laws.[197] Similarly, South Africa was chosen for this study because it is Africa's forerunner in insider regulation. Furthermore, it has developed a comparatively satisfactory anti-insider trading legislative regime under the Financial Markets Act 2012, the Protection of Funds Act, and the Financial Sector Regulation Act. Likewise, the Johannesburg Stock Exchange Limited (JSE) was named one of the best-regulated exchanges in the world by the World Economic Forum in 2016 and 2017.[198] The two countries, however, have different legal systems and different economic levels than Kenya. Nonetheless, they provide valuable lessons from which Kenya could benefit.

4.2 Australia

4.2.1 History of insider trading legal framework

The securities legislation enacted to oversee Australia's capital markets in the 1960s was considerably different from the present insider trading framework.[199] As a result, despite the federal government implementing a Consistent Companies Act that was supported by all states,

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[197] Ziegelaar "Insider Trading Law in Australia" in Walker & Fisse (eds) Securities Regulation in Australia and New Zealand (1994) 677-678.

[198] Mayekiso and Thabane (2016) available at <https://wwwjse.co.za/articles/j se-among-top-regulated-exchanges> accessed on 21st April 2021.

[199] Chapter Three in Lyon, 'An Examination of Australia's Insider Trading Laws' SJD Thesis, Deakin University (2003) 57.

little progress was made in terms of the uniformity of Australian legal standards for preventing insider trading.

As a result, Australia's Companies Act was updated to better manage insider trading.[200] This legislation, on the other hand, was confined to workers of the corporation who traded in the company's financial instruments while in possession of non-public information regarding the impacted financial instruments.[201] As a result, the New South Wales legislature suggested modifying the Securities Industry Act to add an insider trading clause. [202] This Act made anyone who transacted with another individual involved with or connected with a corporation in order to obtain a financial benefit liable in both civil and criminal court if that person possessed specific valuable confidential details about the corporation that were not widely known to the public.[203]

Following a review of insider trading legislation, more extensive civil methods for all insider trading victims were implemented. [204] The Securities Industry Act of 1980, on the other hand, confined the restriction on insider trading to individuals who were related to the corporation, either as officers or as shareholders.[205] Furthermore, insider trading was prohibited principally because of the fiduciary link that existed between the violators and the company in question.[206] Despite this, there have been few successful insider trading court proceedings brought under the Securities Industry Act of 1980.[207]The Griffiths Report, published in 1989, suggested the creation of an integral approach to regulate capital markets and implement insider trading rules in Australia.[208] As a result, the Corporations Act[209] was adopted at the federally, effectively outlawing insider trading by punishing workers of any firm who negligently disregarded their fiduciary duty by engaging in insider trading.[210] As a result, in the 1990s, Australia passed the Corporate Law Reform Act,[211] which established new policy aims for insider trading regulation, including market

[200] Ibid.
[201] Ibid.
[202] Securities Industry Act 1970
[203] Securities Industry Act 1970, s. 75A.
[204] Baxt, Black & Hanrahan Securities and Financial Services Law 503-504.
[205] Ibid.
[206] The Securities Industry Act 1980, s. 128(8).
[207] Capital Markets Act,Cap 485A, s.35A(1)..
[208] Lyon (n 210) 66.
[209] The Corporations Law 1989.
[210]The Corporations Law 1989, s. 232(2); (4); (5) & (6; Ziegelaar Securities Regulation in Australia and New Zealand 678
[211] Corporate Law Reform Act 1992

equity, fair access, and efficient markets.[212] The insider trading prohibition was also greatly improved by the Corporate Law Economic Reform Program Act. Since then, legislators have conducted evaluations of insider trading legislation, resulting in the Corporations Act of 2001, which is the current insider trading statute.

4.2.2The Corporations Act 2001

Historically, corporate law in Australia has been heavily influenced by company law in the United Kingdom. Its current structure is based on a single national statute, the Corporations Act of 2001.

a) Elements of insider trading: “insider”, “insider information” and “securities”

Notably, no Australian law, including the Corporations Act, defines the word "insider trading." As a result, the word "insider trading" is not prominently featured in Australian insider trading legislation. Furthermore, it is widely believed that insider trading occurs when a person uses confidential price-sensitive information about a company for personal gain.[213] As a result, all financial instruments are covered by the existing insider trading prohibition. It's important to note that the financial goods have been listed in great depth. Financial products include securities, derivatives, and interests in a managed investment scheme, as well as debentures, stocks, and bonds issued or intended to be issued by the government, pension plan products, and any other financial items that can be exchanged on a financial market. The list is extensive, leaving no room for complexities that can arise in the event of a financial instrument dispute.[214] The list is exhaustive, and it does not account for complications that may arise in the event of a securities dispute.

Additionally, an "insider" is characterized as somebody who has valuable price-sensitive proprietary information about a company's financial goods and is aware that such information is normally not available to the general public. Furthermore, using that information, the individual is

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[212] Ibid.
[213] Bostock “Australia’s New Insider Trading Laws” 1992 Company and Securities Law Journal 165 181; Tomasic Casino Capitalism?: Insider Trading in Australia (1991) 115-117
[214] Ibid.

banned from disposing of or purchasing such securities.[215] Nonetheless, everyone who fulfills the Act's definition of an insider is subject to the insider trading prohibition.[216] A company or partnership, like a natural person, is defined as a "person."[217] This plainly demonstrates that Australia's insider trading legislation is significantly more comprehensive than analogous legislation in other countries. Furthermore, the insider trading stipulations of the Corporations Act extend to conduct or omissions relating to financial products taken by any individual or foreign corporate body doing business inside or outside Australia.[218] As a result, it appears that all territorial limits and concerns that may have hampered outside Australia's compliance with insider trading legislation have been remedied.[219]

Insider information is information that isn't easily accessible and that, if it were, would have a major impact on the demand for or value of financial products.[220] However, publicly available data contradicts this, as it consists of easily observable issues, such as media reports, or matters that may be deduced, or concluded, from the preceding arguments. [221] In ***Mansfield v The Queen***,[222] expanded the definition of information to include potentially incorrect information. Even if the information on which the trade was made was erroneous, a person can be held guilty of insider trading. On appeal, the High Court dismissed the information, holding that "information" does not have to mean "knowledge given that contains objective truths." False knowledge is included in the definition of 'information.'

b)Remedies and Penalties

For breaking insider trading regulations, there are three sorts of remedies and punishments: criminal penalties, civil remedies, and civil penalties. For starters, breaking the insider trading regulations carries a penalty of $200,000 to $220,000 in Australian dollars.[223] The accused might face a fine of up to 2000 penalty units (Aus $220,000) or a maximum sentence of five years in

[215] The Corporations Act, s. 1043A read with s. 1042A & s. 1042C
[216] The Corporations Act. S 1043A
[217] The Corporations Act, s 1042G; s 1042H & s 1043A .
[218] The Corporations Act, S 1042B(a) & (b
[219] Berkahn & Su "The Definition of 'Insider' in Section 3 of the Securities Markets Act 1998: A Review and Comparison with Other Jurisdictions" (2003) Discussion Paper Series 218 9-10 (accessed 8th April 2021)
[220] Corporations Act, s. 1042A.
[221]The Corporations Act, S. 1042 C.
[222] (2012) HCA 49.
[223] The Corporations Act Schedule 3 items 311B & 311C of.

prison, or both, if convicted of insider trading. [224] A body corporate may also be penalized up to 10,000 penalty units (Aus $1 million) if found guilty, in addition to a maximum amount of five times the pecuniary penalty. [225]

Similarly, the maximum criminal punishment for corporations has been raised to $4,950, 000, or three times the profit made or loss avoided, whichever is higher, or ten percent of the corporation's annual income during the relevant period in which the crime was committed. [226] Furthermore, if the defendant is a firm manager and is found guilty, he will be barred from performing his duties for a period of five years, beginning on the day of the guilty verdict. [227] Furthermore, the Australian Securities and Investments Commission may prolong this time in extraordinary circumstances by petitioning a court for a longer disqualification order.[228]

Second, the Corporations Act, in particular, allows for a wide range of civil actions for insider trading, most of which are governed by the Australian Securities and Investments Commission.[229] Furthermore, the said Commission may commence a civil action for the benefit of the legal entity to recover civil damages if it deems it is in the public interest.[230] This is generally utilized when the issuer's directors are unable to act, especially when the insider in question has significant clout on the board.[231] Finally, filing a private right of action is an option for financial institutions or aggrieved parties who want to seek civil damages directly from insider trading violators.[232] Calculating the amount of money obtained by any person as a result of the violation of the law is one example of such damages. [233] As a result, the magnitude of damages as a result of these rulings may be greater than the Corporations Act's loss potential.

4.2.3 Institutional framework of insider trading in Australia

[224] *R v Hannes* (2000) 158 FLR 359.
[225] Watson & Young "A Preliminary Examination of Insider Trading Around Takeover Announcements in Australia" (1999) the Corporations Legislation Bill Explanatory Memorandum 112 accessed on 4th May 2021.
[226] The Corporations Amendment (No 1) Bill Explanatory Memorandum 3.11 accessed 8th April 2021.
[227] Ibid.
[228] ASIC v Rich [2003] NSWSC 186.
[229] The Corporations Act, s.1043L & s 1317HA.
[230] The Corporations Act, s. 1043L(6)
[231] Lyon & Du Plessis, 'The Law of Insider Trading in Australia' 125-130.
[232] Corporations Act, 2001, s. 1317J read with s. 1043L(2) to (5).
[233] Corporations Act, s. 1317HA(3).

4.2.3.1 The Australian Securities and Investments Commission (ASIC)

On 1st July, 1998, the Australian Securities and Investments Commission changed its name to the Australian Securities and Investments Commission. As a result, it may investigate any criminal charges involving insider trading and market manipulation under the Australian Securities and Investments Commission Act [234] and the Corporations Act, 2001 in addition to its primary function of regulating corporate and financial market regulation. The Australian Securities and Investment Commission's role can be broken down into the following sections:

a) Monitoring and investigations

The Australian Securities and Investments Commission has increased its authority to seek for and seize any proceeds of market manipulation in Australia.[235] As a result, the Commission may send notifications to the accused in order to inspect their property and, after obtaining a search warrant, compel such individuals to appear before it to answer questions and provide any other necessary information.[236]Similarly, the Commission also has the authority to investigate any market abuse violations. It may also collect statements and proof from available witnesses. Likewise, it may request reasonable assistance from any relevant body in connection with an ongoing inquiry.[237]

The Commission's investigative powers have recently been dramatically enhanced.[238] As a result, the Commission would no longer be required to submit a notice before getting a search warrant from a magistrate.[239] As a result, the Commission has the authority to remove any person guilty of market abuse violations from his managerial position in any company.[240] In this regard, the Commission (ASIC) may also impose an order barring offenders from accessing financial services or exercising any voting or other rights related to financial products.[241] It also has the power to revoke licenses and set different limits on them.

[234] Australian Securities and Investments Commission Act, s. 49.
[235]The Corporations Act, 2001, s. 1043O(f); (g) & (h); s 1323; s 1324 & s 920B(3).
[236] Ibid.
[237] Australian Securities and Investments Commission Act, s. 19(2)(a) & s 49.
[238] Corporations Amendment (No 1) Act
[239] Ibid.
[240] Ibid.
[241] The Corporations Act, 2001, s. 1043O(c).

b)Market Surveillance

The Commission is in charge of regularly monitoring the Australian stock exchanges in order to detect and combat market manipulation.[242] This indicates that the Commission's Market Surveillance team is now using the same surveillance technology as the Australian Stock Exchange. In addition, numerous former Australian Stock Exchange Surveillance Department workers with substantial market experience make up the Market Surveillance team.[243] As a result, through monitoring, public and media complaints, and collaboration from other enforcement bodies such as the Australian Stock Exchange, the Commission may detect an increase in market abuse operations.[244]

c) Disclosure and investor confidence

The Commission has implemented an E-Document lodgment system mechanism. The aforesaid method enables lodgment agents such as accountants, lawyers, and brokers to electronically and for free provide relevant documents to the Commission in order to expedite insider knowledge disclosure. The Commission is also in responsible of maintaining investor confidence in the securities markets.[245] They accomplish this, for example, by obtaining orders ordering the vesting of such products under its management in order to provide suitable safeguards for such investors, with the goal of enhancing commercial reliability, efficacy, long-term growth, and the company's overall expenses. The Australian Securities and Investments Commission's new Market Integrity Rules may be regulated and enforced by the Commission. Market participants in licensed markets, in other words, must follow the Market Integrity Rules.[246] Market participants in licensed markets, in other words, must follow the Market Integrity Rules.[247] Anyone who breaks the company's Market Integrity Rules could be fined $1 million.

[242]Howard Chitimra, 'Regulation of insider trading in Australia: A Historical and Comparative analysis' available at <http://www.saflii.org/za/journals/SPECJU/2015/1.pdf> accessed on 4th April 2021.
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] ASIC Market Integrity Rules (ASX Market) 2010.
[247] Ibid.

4.2.4 Lessons for Kenya from the Australian Experience

To begin, a detailed description of essential insider trading words should be included in the Capital Markets Act. To prevent criminals from escaping liability on technical grounds, insider, insider information, and possession should be widely defined. Insider trading is prohibited in Australia, for example, for anyone who fulfills the definition of an insider as stated by the Act. A legal entity (such as a company or partnership) and a natural person are both referred to as "persons." Legal people, on the other hand, are not included in the Capital Markets Act.

Second, unlike the Capital Markets Act, which restricts the financial products that can be traded as insiders, the Corporations Act of 2001 prohibits insider trading on all financial products, including securities, derivatives, or interests in a managed investment scheme, as well as debentures, stocks, or bonds issued or proposed to be issued by the government, and superannuation products. As a result, the number of possible applications is expanded.

Third, Kenya should follow Australia's lead and incorporate insider trading defenses in the Capital Markets Act, which is the primary insider trading regulation, to avoid scenarios in which innocent people face insider trading liability.

Moreover, Kenya could also take a page from Kenya's book and enforce exceptionally harsh sanctions when culpability is discovered. The goal should be to prevent and discourage all individuals from engaging in insider trading operations, just as it is in Australia. Insider traders in Kenya may also should also face very stringent penalties as a deterrence mechanism whether in civil or criminal proceedings. Similarly, the Australian market abuse framework uses civil remedies to combat market abuse. Kenya can adopt the same strategy. The Capital Markets Authority, for example, can pursue civil cases against individuals or businesses who conduct insider trading offenses, seeking civil remedies such as compensation, monetary fines, and orders for any losses suffered by prejudiced persons.

The Australian market abuse regime allows securities issuers and others who have been damaged by market abuse operations to seek compensation from the courts through private rights of action against the perpetrators. These private rights of action can also be utilised under Kenyan law to allow affected issuers and other aggrieved parties to seek compensatory damages and civil pecuniary penalties as soon as feasible and directly from perpetrators of insider trading abuses.

Furthermore, the Australian authorities rely on self-regulatory organizations to augment the work of the Australian Securities and Investments Commission in combatting market abuse. As a result, Kenya can choose a multi-functional regulatory approach similar to that employed in Australia, rather than the so-called one regulator model.

The Australian Securities and Investments Commission also uses investigation and information collection to prevent market abuse in relevant Australian financial markets. As a result, the Australian Securities and Investments Commission no longer needs to submit a notice before applying to a magistrate for a search warrant. This reduces the chance that the accused may delete evidence of market manipulation before the search warrant is issued. Kenya can take a position that makes obtaining the relevant evidence easier.

Surveillance is another instrument employed by Australia's Securities and Investments Commission to detect and prevent market abuse in the country's financial markets. The Australian Securities and Investments Commission, for example, use computer monitoring tools such as the Securities Market Automated Research Trading and Surveillance system to isolate and detect all potential market abuse activities in the country's financial markets. The NSE, on the other hand, is mainly reliant on the Capital Markets Authority for oversight. It's past time for it to invest in its own surveillance so that insider trading can be detected as soon as feasible.

In Australia, Chinese walls are being used to establish a culture in which all organizations develop their own internal principles, policies, and structures to limit the occurrence of market abuse techniques such as insider trading among the various sections of such companies.

Finally, whistleblower immunity is a preventative measure utilized in Australia, specifically by the Australian Competition and Consumer Commission, to encourage all individuals to report any instances of cartels and/or other major market abuse offences to it. Th same can be employed in Kenya.

4.3 Republic of South Africa
4.3.1 History of insider trading legislation in South Africa

Companies Act 46 of 1926, established the statutory prohibition of insider trading and other forms of improper trading by requiring all corporations to keep a register of debt securities held by its directors, is regarded as South Africa's first attempt to reduce insider trading.[248] Nonetheless, the 1926 Act proved ineffective and was superseded by the Companies Act 61 of 1973, in part because it did not explicitly prohibit insider trading, among other weaknesses.The 1973 Companies Act was more explicit than its predecessor, introducing a specific prohibition on insider trading, the violation of which resulted in a criminal offense.[249] Nonetheless, its provisions were flawed in that they were primarily limited to insider trading activities by directors, employees, officers, or shareholders of a company who traded in listed securities with unpublished price-sensitive inside information to the detriment of others (primary insiders). [250]As a result, secondary insiders such as tippees and unintentionally gained access to confidential price-sensitive inside material related to the affected securities were not statutorily prohibited from engaging in insider trading under the Companies Act.[251] The Companies Act of 1973 made no provision for civil or administrative sanctions, instead relying on criminal penalties to punish insider trading violations.[252]

On the basis of the mentioned constraints, the Companies Amendment Act 78 of 1989 enacted a prohibition on insider trading.[253] It went on to create an offense for willingly trading on the basis of unreleased pricing data about a security, either directly or indirectly.[254] Furthermore, the fine for violating the insider dealing prohibition has been increased from R8 000 to a maximum of

[248] H. Kawadza, 'The Liability Regime for Insider Dealing Violations in South Africa: Where We Have Been, Where We Are' (2015) 27 S Afr Mercantile LJ 383.

[249] Ibid.
[250] Thabang Terrance Mabina and Howard Chitimira, 'A Comparative Synopsis of the Statutory Prohibition of Insider Trading in Namibia and South Africa' (2019) 9 Juridical Trib 492.

[251] Ibid.
[252] ibid 240.
[253] H Kawadza (n 260).
[254] Ibid

R500 000, and the prison term has been increased from two to ten years, or both such fine and imprisonment.[255] Nonetheless, the prohibition on insider trading in these provisions was overly broad. As a result, while the statute applied to secondary insiders such as tippees and provided criminal and civil penalties for violators, its provisions were largely ineffective and inconsistently enforced by the relevant authorities.As a result, the Second Companies Amendment Act was enacted to revise the Companies Amendment Act and address its shortcomings .[256] Nonetheless, despite introducing several definitions for key terms such as "securities" and "company," as well as expressly prohibiting insider trading in all listed securities, the provisions of the Second Companies Amendment Act replicated the majority of the flaws that were originally incorporated in the Companies Amendment Act.[257]

Notably, the King Task Group into Insider Trading Legislation 1997 (King Task Group) recommended that adequate anti-insider trading legislation be enacted to address the shortcomings of the Companies Act and all of its amendments.[258] This resulted in the passage of the Insider Trading Act. Although this Act expressly prohibited insider trading, its provisions applied only to individuals and imposed less severe civil and criminal penalties on offenders.[259] These and other flaws led to the repeal of the Insider Trading Act by the Securities Services Act.[260] Because of these and other flaws, the Securities Services Act repealed the Insider Trading Act. Nonetheless, it had few defenses for insider trading offenses. Furthermore, the criminal penalties for insider trading under the Securities Services Act remained insufficient and deterrent in nature. The Financial Markets Act of 2012 repealed the Securities Services Act. Insider trading is currently prohibited in respect of all securities listed on a regulated market as defined in the same Act. It also imposes civil, criminal, and administrative penalties on violators.

4.3.2 Financial Markets Act, 2012

a) Concept of insider trading

[255] Ibid.
[256] Companies Amendment Act 69 of 1990 (Second Companies Amendment Act).

[257] Lyon (n 242)
[258] Insider Trading Act 135 of 1998 (Insider Trading Act),
[259] Lyon (n 242).
[260] Securities Services Act 36 of 2004 (Securities Services Act).

The term "insider trading" is not explicitly defined in the Financial Markets Act. It is possible to argue that the Act's failure to define these and other terms adequately has attributed to conflicting compliance of its stipulations.[261] Furthermore, while the Financial Markets Act defines terms such as "inside information," "insider," "market abuse rules," "person," "regulated market," and "market corner," terms such as "tipping" and "tippee" are not expressly defined in the same Act.

The term "insider" relates to an individual who has the company's confidential knowledge because he is a board member, member of staff, or shareholder of an issuing company to which the inside information relates. Furthermore, an individual can be referred to as an insider because he has access to the data through his employment, or profession and also where the direct or indirect source of the inside information was a director, employee, or shareholder.[262] As a result, two types of insiders were taken into account. To begin, there were primary insiders, such as directors, staff members, or shareholders of a company issuing securities about which inside information was disclosed.[263] As a matter of fact, the definition's focus on individuals as insiders implies that juristic persons were excluded.[264] . In this context, the definition's range is too limited.[265] Individuals could frequently deal in insider trading through legal entities under their command without revealing their corporations to liability. The Financial Markets Act's exclusion of corporate entities and other legal entities from the meaning of an "insider" can thus be considered as a significant shortcoming.[266]

Furthermore, inside information is defined as specific and precise information that had not previously been made accessible and was acquired or learned. Thus when this information publicly disclosed, it would be highly probable to have a significant impact on the price of any securities or financial instruments.[267] To begin, the information must be completely factual. Information that is incorrect or unverified, pure conjecture about whether data is true, rumours, and promises are

[261] H. Chitimira, 'A Historical Overview of the Regulation of Market Abuse in South Africa' (2014) 17 Potchefstroom Elec LJ 936.
[262] Financial Markets Act No. 19 of 2012, s. 77.
[263] Ibid.
[264] Ibid.
[265] Osode 2000 J Afr L 239-248.
[266] H. Chitimra (n 254).
[267] Financial Markets Act, s. 77.

all prohibited.[268] The terms "specific" and "precise" are not defined, and the courts must decide what information is specific or precise.[269] . Even though everyone comprehends the overall meaning of the words, not everybody understands the level of specificity or precision required for information to meet the criteria. This obscurity may allow others to engage in insider trading without fear of legal repercussions.[270]

Second, the inside knowledge must have come solely from an insider. [271] As a result, occasions where information is taken from sources besides insiders have been left out of the definition.[272] This omission could lead to market manipulation. Whichever the case may be, the fact still remains that valuable cost information accidentally leaked by insiders is not covered by the definition and could still be used to engage in insider trading by others.[273] Finally, the information should never have been publicly disclosed.[274] Finally, the private inside knowledge must have a material effect on the price or value of the securities after it is released publicly.[275] The term "material effect" is not defined in the Financial Markets Act, which is a weakness.[276]

b) Insider trading offences

To begin, actual trading in financial instruments for the purpose of profits and losses for one's own benefit or another person's loss is prohibited.[277] Second, according to the Act, one of the insider trading offenses is disclosure.[278] The dissemination of information by somebody who knew it was inside knowledge is sufficient to constitute an offense under the Financial Markets Act, regardless of whether or not it was acted on.[279] The prohibition, however, does not apply to innocent disclosure made by someone who was unaware that the information had not yet been made public.

[268] H. Chitimra (n 254).
[269] Ibid.
[270] The Financial Markets Act, s. 77 and s. 78.
[271] Ibid.
[272] H. Chitimra (n 254).
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Financial Markets Act, No. 19 of 2012, s.78.
[278] Financial Markets Act, No. 19 of 2012.
[279] Ibid.

Lastly, knowledge is another aspect of the offense. Anyone who knew he had inside knowledge and decided to trade in the affected financial instruments to earn a profit or avoid a loss could be required to pay the amount accordance with the relevant Financial Markets Act provisions. Finally, it is illegal to inspire or deter (tip) another individual to trade or hold back from securities trading.[280] Nonetheless, it is not stated clearly and expressly what constitutes illegal conduct or tipping on the part of an insider.[281]

c) Statutory Defences of insider trading

The Financial Markets Act provides some defenses for anyone accused of unintentional insider trading. Individuals will be exempt from liability only if they can demonstrate one of the defenses listed in the Financial Markets Act on a balance of evidence.[282] For example, an insider who allegedly involved in insider trading for his or her own account will be exempt from liability if he or she can demonstrate, on a preponderance of the evidence, that he or she only became an insider after giving the instruction to deal to an authorized user and that the instruction was not changed in any way after he or she became an insider.[283] However, the Financial Markets Act does not clearly state other instances where such instruction could be lawfully given to authorized users **by** insiders for them to avoid insider trading liability. Furthermore, an insider may avoid liability if he or she can show that he or she was acting during a transaction in which all stakeholders had access to the same inside information. This defense is intended to encourage the lawful conclusion of contracts and/or financial transactions between parties who share non-public inside information.[284]

The alleged offender may also avoid liability if he or she can demonstrate that trading in the affected securities was limited to parties with the same inside information and that those parties did not necessarily benefit from such trading.[285] In this regard, it appears that perpetrators of insider trading may be exempt from liability if they received no personal benefit from such trading. The

[280] Ibid.
[281] H Chitimira (n 273).
[282] Financial Markets Act, No. 19 of 2012, s. 78 (1)(b).
[283] Thabang Terrance Mabina and Howard Chitimira, 'A Comparative Synopsis of the Statutory Prohibition of Insider Trading in Namibia and South Africa' (2019) 9 Juridical Trib 492.
[284] Financial Markets Act, No. 19 of 2012, s. 78(1) (b)(ii).
[285] Ibid.

aforementioned defenses are also available to an insider who allegedly engaged in insider trading on behalf of another person.[286] Similarly, anyone accused of insider trading for an insider may be able to avoid liability if he or she invokes the same defenses .[287] Furthermore, the accused may escape liability if he or she can demonstrate, on a preponderance of probabilities, that he or she is an authorized user who acted on explicit guidelines from a client who was oblivious at the time of the transaction that the client was an insider.[288] Insiders who fail to take reasonable steps to determine whether their clients were insiders at the time of the transaction, on the other hand, may still be made accountable for insider trading.[289]

Insider trading culpability may be avoided if an insider can demonstrate that the inside information disclosed was necessary for the proper performance of the duties of his or her employment, office, or profession.[290] To avoid insider trading liability, the insider must also show that the disclosed inside information had nothing to do with any dealing in the affected listed securities.[291] The insider must also show that he or she informed all relevant parties that the information was classified as inside information.

d) Insider trading penalties

Notably, under the Financial Markets Act, any contravention of the insider trading prohibition will lead to civil, criminal, and administrative penalties. Insider trading violators face a penalty of up to R50 million, up to ten years in prison, or both the fine and imprisonment.[292] The only source of criminal and civil sanctions for insider trading is the Financial Markets Act. Furthermore, all insider trading cases are decided by the courts. Given this, it is critical to note that the Financial Sector Conduct Authority (FSCA) will only prosecute insider trading cases if the DPP declines to do so. As a result, under the Financial Markets Act, the Financial Sector Conduct Authority has limited prosecutorial authority in insider trading cases. According to the authors, current criminal penalties for insider trading are insufficient to deter all perpetrators of insider trading offenses .[293]

[286] Ibid.
[287] Ibid.
[288] Ibid.
[289] Lyon (n 242).
[290]Financial Markets Act, No. 19 of 2012,s. 78(4)(b).
[291] Ibid.
[292] Financial Markets Act, No. 12 of 2012, s. 109.
[293] Thabang Terrance Mabina and Howard Chitimira, 'A Comparative Synopsis of the Statutory Prohibition of Insider

This is due to the fact that offenders may make large profits from their insider trading activities and thus be able to pay the prescribed fine and/or go to jail without necessarily forfeiting their illicitly obtained profits.[294]

Similarly, the Financial Markets Act and the Protection of Funds Act both include administrative penalties for insider trading.[295] To be more specific, under the Financial Markets Act, anyone found guilty of insider trading faces a civil and/or administrative penalty not to exceed the profit made or that would have been made had that person dealt in the affected transaction, or the loss avoided in relation to that transaction.[296] Furthermore, insider trading violators will face administrative penalties such as an R1 million fine plus an amount not exceeding the profit made or would have been made or the loss avoided by the violators, as well as interest and legal costs as determined by the Financial Sector Conduct Authority's (FCSA) relevant committees**.**[297]

e) Disclosure obligations

The Act requires listed issuers of securities to promptly disclose any disposition of their securities.[298] Over the specified time period, this is to be executed to the exchange or registered issuers of securities. As a result, if the issuer fails to disclose the information to the exchange or registered issuers of securities, the exchange may withhold trading in those financial instruments unless the issuing company acquires a court order exempting it from such disclosure. As a result, the Exchange can track securities trades and identify any anomalies in the securities market.

4.3.3 Companies Act No. 71 of 2008

The Companies Act 71 of 2008 reaffirms the company as a process of attaining social and economic benefits for the South African economy, with effective marketing recognized as a principal objective.[299]Requiring disclosure of and access to information about companies promotes

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Trading in Namibia and South Africa' (2019) 9 Juridical Trib 492.
[294] Ibid.
[295] Ibid.
[296] Financial Markets Act, No. 19 of 2012, s.82.
[297] Ibid.
[298] Financial Markets Act, No. 19 f 2012.
[299] Financial Markets Act, No. 19 of 2012, s 7(d) and (c).

transparency, which is a goal of the Act.[300] Moreover, the statute empowers a company to request disclosure of beneficial interests. Similarly, the obligation to establish and maintain a disclosure register arises. It should be noted, however, that this obligation is only imposed on companies that meet the definition of a regulated company.[301] This definition encompasses all public companies, both listed and unlisted, as well as certain private companies. Also, the obligation to keep a disclosure register must be read in conjunction with the Companies Regulations 2011,[302] which specifies what information about disclosures must be kept in the company's securities register.[303]As part of its ongoing obligations, the Johannesburg Stock Exchange (JSE) Listings Requirements include the obligation to keep a register of disclosures. The application of the said provision is inconsistent as disclosure obligations only apply to publicly traded companies (listed or unlisted).[304] Furthermore, failure to comply is not a criminal offense under the relevant sections of the South African Companies Act 2008.[305] Nevertheless, it is a crime to knowingly provide false and misleading information when the Act requires a person to do so .[306]

Furthermore, the roles and responsibilities of directors have been codified. According to the Statute, a company's directors must exercise their powers and perform their functions in good faith, in the best interests of the company, and with the due care, skill, and dedication that would be presumed of an individual’s carrying the same or similar responsibilities as a director.[307] A director may not use his position as a director, or any information obtained while acting in that capacity to benefit himself or another person other than the company.[308]

4.3.4 Institutional Framework on Insider Trading in South Africa

4.3.4.1 Financial Sector Conduct Authority (FSCA)

The Financial Sector Conduct Authority is a South African autonomous body tasked with

[300] Companies Act 71of 2008,s.56(5).
[301] Ibid,s.117(1).
[302] Companies Regulations, 2011, regulation 32(3).
[303] S M Luiz, 'The Companies Act 71 of 2008 and the Disclosure of and Rights of Access to Information about Securities' (2014) 26 S Afr Mercantile LJ 167.
[304] Ibid.
[305] Ibid.
[306] Ibid.
[307] Financial Markets Act, No. 19 of 2012, S. 76(3).
[308] Ibid.

monitoring and enforcing market misuse regulations. The Financial Services and Markets Authority (FSCA) is in responsibility of investigating and, if required, enforcing market abuse in financial markets.[309]

a) Monitoring and investigations

The Financial Sector Conduct Authority lacks specialized surveillance devices to identify possible illegal trading and identify beneficial owners of securities held in nominee accounts. [310] To detect suspicious trading volumes and trading patterns, the Financial Sector Conduct Authority typically relies on the Johannesburg Stock Exchange's monitoring and surveillance Division.Similarly, the Financial Sector Conduct Authority employs the broker-dealer accounts platform to obtain the necessary information from other market players, such as brokerage firms, by analyzing their financial background in order to identify market abuse practices.[311] This enables the Financial Sector Conduct Authority to investigate a broker's trading history by reviewing his telephonic conversations, bank records, and other relevant trading records in order to detect unusual trading patterns that may indicate market abuse activity. [312]

The auction process platform is also used by the Authority to discourage insider trading.[313] Moreover, the Authority has the power to investigate all Johannesburg stock exchange transactions by evaluating volumes of securities traded, say at the end of the day, and such transactions are kept in a database for easy identification and detection of illicit trading activities that may result in market abuse.[314] This is known as the transactions database, which is said to be used it in some cases.[315]Since 1999, 416 cases have been investigated by the FSCA and its predecessors. **[316]** In 304 cases, there was either no evidence or lack of evidence that the Financial

[309] FCSA press release available at <https://www.fsca.co.za/News%20Documents/FSCA%20DMA%20Press%20Release%20-%2006% 20December> %202018.pdf#search=insider accessed on 9th April 2021.
[310] Barrow "Insider Trading Directorate" Business Report (2004-07-28).
[311] Ibid.
[312] Ibid.
[313] Loubser "Insider Trading and other Market Abuses (Including the Effective Management of Price-sensitive Information)" in the Insider Trading Booklet final draft 2006 (02-10-2006) 26-27 (accessed 9th April 2021)
[314] Ibidd.
[315] Ibid.
[316] FSCA Press Release, 6th December 2018, available at https://www.fsca.co.za/News%20Documents/FSCA%20DMA%20Press%20Release%20-%2006%20December%20 2018.pdf#search=insider accessed on 9th April, 2021.

Services Act had been infringed.[317] In 91 cases, the Directorate of Market Abuse decided to take enforcement action. To date, the penalties imposed on offenders total R138 million.[318]During the fiscal year 2018-2019, the Financial Sector Conduct Authority(FSCA) received 14 cases reported for investigative process, including 18 contraventions (7 for insider trading, 8 for market manipulation, 1 for false reporting and 2 assistance to foreign regulators).[319] Furthermore, the Authority imposed an R241 million administrative penalty on one Mr Markus Jooste and three others for insider trading violations.[320] Similarly, violations of Financial Markets Act, 19 of 2012 sections 78 (4) (a) and 78 (5) (the Financial Markets Act).[321]

b) Investor protection

In addition, the Financial Sector Conduct Authority may issue a press statement outlining the details of the proposed market abuse regulation, including the financial instruments affected and the offenders.[322] Authority use this public shaming tactic to dissuade individuals from engaging in market abuse activities for fear of negative consequences and reputational damage.[323]

c) Co-operation with other agencies

To combat cross-border market manipulation, the Financial Sector Conduct Authority has formed a multilateral strategic partnership with similar authorities in developed countries, including the Financial Services Authority of the United Kingdom and the Securities and Exchange Commission of the United States of America.[324]

4.3.5 Lessons for Kenya

South Africa's legal framework on insider trading can teach Kenya a thing or two. First, Kenya

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[317] Ibid.
[318] Ibid.
[319] FCSA annual report 2018-2019.
[320] Ibid.
[321] FSCA Press Release, 30th October 2020 available at https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20FSCA%20fines%20Markus%20Jooste%20and%20others%20%20R241%20million%20for%20insider%20trading%20breaches%2030%20October%202020.pdf#search=insider accessed on 9th April 2021.
[322] Ibid.
[323] Ibid.
[324] Ibid.

should follow South Africa's lead in defining insider trading terms by including meaningful provisions in the Capital Markets Act that define the term "insider." Corporate insiders such as directors, stockholders, and employees, as well as anyone who obtain access to inside information through their profession, employment, or office, as well as tippers and tippees of inside information, should be covered by the laws. The Capital Markets Act should include a clause specifying that "inside information" must be explicit or precise, similar to the Financial Markets Act.

Second, Kenya, like South Africa, should acknowledge that simply declaring that failure to disclose price-sensitive non-public information is an infraction on the part of the issuer of securities is insufficient; the punishment for failing to disclose should be prescribed. The punishment should be strong enough to dissuade such errors and achieve information equality. Another takeaway is that, in order to safeguard innocent parties from insider trading responsibility, Kenya should follow South Africa's lead and incorporate insider trading defenses in the Capital Markets Act, which must be demonstrated on a balance of probability by those charged with insider trading.

Third, like the Financial Markets Act in South Africa, the Capital Markets Act should incorporate statutory defenses. If an insider can show that the inside information given was necessary for the proper execution of his or her job, office, or profession, insider trading liability may be avoided. To escape liability for insider trading, the insider must additionally demonstrate that the revealed inside information had no bearing on any dealings in the concerned listed securities. The insider must also demonstrate that he or she told all relevant parties that the information was considered inside information. Furthermore, Kenya should follow South Africa's lead and strengthen the Capital Markets Act's insider trading sanctions. The mandatory prison sentence, as well as the amount of the fine, should be extended to at least ten years. The number of times a felon must disgorge his or her profit or loss should be increased to three or four times. In addition to criminal penalties, insider trading violators should face more civil and administrative penalties under the Act.

Finally, the CMA should have the resources necessary to detect and investigate insider trading instances in real time. For example, a sophisticated surveillance system is used to aid in the detection of insider trading scenarios. Lastly, Kenya should also get into more multilateral cooperation agreements with analogous authorities in the developed world, such as the Financial Services Authority of the United Kingdom and the Securities and Exchange Commission of the United States.

4.4 Conclusion

The Australian insider trading prohibition, as detailed in this chapter, strives to promote, among other things, equitable access to relevant non-public price-sensitive information, market efficiency, market fairness, market integrity, and public investor trust. Since the 1960s, the Australian parliament has constantly approved a number of regulations, rules, guidelines, and other required steps to prevent insider trading in the Australian financial markets. Similarly, it was recognized that a number of preventative enforcement tactics are used in Australia, including Chinese walls, whistleblower immunity laws, and private rights of action.

In contrast, in order to improve market abuse regulation, South Africa has made various adjustments and changes to its market abuse regulations. As a result, the Financial Markets Act of 2012 was approved later, adding new civil remedies, criminal fines, administrative sanctions, and regulatory agencies. In addition, the Financial Sector Conduct Authority has put in place strong processes for detecting, investigating, and prosecuting insider trading crimes. The Authority also has the power to impose administrative fines and refer other matters to the Director of Criminal Prosecutions. Nonetheless, the focus of this chapter was on the lessons that may be learned.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This study was driven by the need to identify, discuss and analyze the effectiveness of legal and institutional framework in the enforcement of insider trading in Kenya. This chapter seeks to summarize the study by highlighting the general observations and findings of the study and to make suggestions for reform based on the findings of the research. Moreover, it examines the recommendations that would be applicable for a sound securities legislation that promotes investor confidence. I have identified some gaps in the legal and institutional framework that have hampered effective detection, investigation, and prosecution of insider trading in Kenya.

5.2 Testing hypothesis

This study was predicated on two interrelated hypotheses being:

1. Kenya's existing legislative and supervisory framework governing insider trading is insufficient.
2. Kenya's best corporate governance practices have significantly reduced insider trading.

The first hypothesis was tested in this study's Chapters 2 and 3. In this hypothesis, the primary factors are "legislation," "supervisory framework," and "insufficiency." Because of the interdependence of these three elements, the legal and regulatory framework contains weaknesses, inequalities, and inconsistencies in the execution of insider trading prohibitions, which is the focus of this thesis. Furthermore, there are flaws in the institutional architecture that have impeded the discovery, investigation, and conviction of insider trading offenses. In this regard, the legal and institutional framework's shortcomings have a direct impact on the lack of successful prosecutions of insider trading offenders. As a result, this hypothesis was validated. Indeed, Kenya's current legal, legislative, and institutional framework for dealing with insider trading is insufficient to successfully combat the practice.

The second hypothesis was the focus of this study's Chapters 2 and 3. “Best corporate governance practices” and “significantly reduced insider trading” are the major variables in this hypothesis.

The desktop study on these two areas of the study found that both the Capital Markets Act and the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 appropriately address the corporate governance principle of disclosure. In addition, the Stewardship Code for Institutional Investors was implemented in 2017 to improve company governance with a focus on institutional investors. To summarize, the frameworks provide a policy of timely and balanced disclosure, openness, and accountability to all stakeholders. In order to ensure a level playing field for all investors, the board must encourage timely and balanced disclosure of all material facts about the company.

Companies should also establish internal corporate transparency policies and procedures that are practical and involve feedback from stakeholders, according to the guideline. To summarize, the board should reveal the company's information technology policy on insider dealings, and while acknowledging that insider transactions are illegal, the board should confirm that no known insider dealings occurred. As a result, the Capital Markets Authority released its second and third status of corporate governance report for the fiscal year 2018/2019 and 2019/2020 respectively.[325] The purpose of the reports is to increase public awareness of the condition of corporate governance among Kenyan securities issuers in order to empower investors and boards of directors to advocate continual improvement in practices. Mr. Paul Muthaura, then-CEO of the Capital Markets Authority, remarked that the 61 percent weighted overall score in 2018/19 was a significant improvement over the 55 percent weighted overall score obtained in 2017/18, when the first evaluation was done.

Furthermore, in 2019/2020, the Capital Markets Authority reported a stunning 72 percent improvement in overall score compared to the previous year.[326] Beginning in 2020, the Capital Markets Authority met with issuers to review draft governance report conclusions in a new procedure. Clarifications and recommended recommendations were sought during the said discussions. To each issuer, the Authority's findings became more transparent, thorough, and

[325] CMA annual report 2018.
[326] The Report on the State of Corporate Governance of Issuers of Securities to the Public 2020 available at https://cma.or.ke/images/Docs/pdf/The_Report_on_the_State_of_Corporate_Governance_of_Issuers_of_Securities_to_the_Public-2020.pdf accessed on 8th July 2021.

reasonable. As a result, excellent corporate governance has been shown to reduce insider trading since the market values honesty, stability, competitiveness, resilience, and investor appeal.

5.3 Summary of findings and conclusions

This study has interrogated four research objectives as outlined in chapter one. First, whether the legislative regime governing insider trading in Kenya effective. Secondly, whether Kenya's institutional framework on insider trading is effective in preventing insider trading. Thirdly, what experiences can Kenya learn from the legal and institutional frameworks in both developed and developing economies on insider trading. Lastly, to address the insider trading problem, the possible recommendations on insider trading.

Chapter two evaluated the effectiveness of the regulatory regime for insider trading in Kenya. The Constitution of Kenya, 2010, the Capital Markets Act, cap 485 A, the Companies Act of 2015, the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015, and the Stewardship Code for Institutional Investors, 2017 were all discussed in this chapter. The chapter concluded its inadequacy in the situations listed below under the principal act, the Capital Markets Act. Firstly, there's limited scope in the definition of terms such as securities which has been defined under the Act to refer to price-affected securities and if the information is likely to materially affect the price of securities if it is made public. The narrow scope however excludes tendering processes in publicly traded corporations, where bidders might be given advance notice of the process. Likewise, insider trading prohibitions in other financial products, such as derivative contracts and treasury stocks, are also absent from the Act. Moreover, unlisted corporations are not covered by that law, but they can be charged with insider trading as well.

Secondly, while the Capital Markets Act offers some definitions of relevant terms like "inside information" and "insider," other equally significant terms like "tipping" and "tippee" are not officially defined in the same Act. As a result, insider trading offenders may be able to generate a leeway in such cases. Furthermore, the definition's emphasis on individualsas insiders clearly implies that juristic persons are excluded. The definition's scope was too narrow in this situation. Individuals could readily engage in insider trading activities through juristic persons under their control without risking the responsibility of their corporations or companies.[327] As a result, the Act's exclusion of corporations and other legal entities from the definition of "insider" can be considered a severe shortcoming. As a result, the Capital Markets Act does not expressly ban the unlawful publication of price sensitive inside knowledge relating to listed securities by juristic persons.

Furthermore, a situation involving a "remote tipee" is not contemplated by the Capital Markets Act. This is in reference to the information's secondary and tertiary recipients. It can include scenarios like a person sending material non-public knowledge to a friend or family member for the aim of trading on it. This is a major problem because it increases the number of possible suspects. Similarly, it is unclear whether the insider trading restriction applies to unintentional offenders who unwittingly traded in the relevant listed securities for the advantage of insiders possessing price-sensitive inside information. As a result, statutory defenses in such cases are not expressly provided for under the Act.

Inside information has to be shared by an insider. As a result, instances where the information came from sources other than insiders are not explicitly included in the definition. This exclusion could open the door to abuse. Whatever the case may be, the fact remains that price-sensitive information spilled by insiders accidentally is not covered by the definition and could still be exploited by others to engage in insider trading. However, trading based on rumors or conjecture about the value of stocks may still occur, putting innocent outsiders at risk. Likewise, despite the Act's enumeration of various insider trading offenses, it appears that any actual dealing in non-listed securities on other trading platforms such as over-the-counter markets (OTC), organized trading facilities (OTFs), and multilateral trading facilities (MTFs) by insiders with relevant price-sensitive inside information on behalf of other persons does not constitute insider trading.

In terms of punishments, it may be claimed that they are not as severe as the Act could have intended. A party that has gained as a result of insider trading, for example, can easily afford to pay the fee. It could be claimed that the present criminal penalties for insider trading are insufficient to deter all offenders of insider trading crimes. This is due to the fact that criminals

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[327] Ibid.

could benefit handsomely from their insider trading activities and be able to pay the fine and/or serve time in prison without having to renounce their ill-gotten gains. Furthermore, the disclosure obligation contained in the Act is narrow and limited because it only targets issuers of securities. Unlisted companies do not have the same requirement as per the Act.[328]

The Companies Act, Act No. 17 of 2015, was also examined. Though the Companies Act of 2015 is a significant improvement in Kenyan company law, it is silent on insider trading and other market abuses. Furthermore, despite the fact that the Companies Act 2015 is based on the transparency principle, which is critical in the regulation of insider trading, the Act's disclosure measures are insufficient to protect shareholders and stakeholders from insider trading transactions.

Similarly, it was determined that the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 did not reflect principles on insider trading regulation in its assessment.[329] It does, however, include a principle of timely and balanced disclosure, which states that the board of directors must encourage timely and balanced disclosure of all material information about the company. Companies should also establish internal corporate transparency policies and procedures that are practical and involve feedback from stakeholders, according to the guideline. To summarize, the board should reveal the company's information technology policy on insider dealings, and while acknowledging that insider transactions are illegal, the board should confirm that no known insider dealings occurred. The challenge in enforcing the Code emanates from the fact that it is not binding and therefore corporations may not take the provisions with the seriousness it deserves.

Finally, the Capital Markets (Securities) (Public Offers, Listing, and Disclosures) Regulations was equally examined in Chapter 2. The fundamental result is that the scope of application of the Regulations' disclosure duties is confined to securities issuers exclusively. Furthermore, targeting

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[328] Mwikali Kyalo Rose, 'A Case For Review Of The Legal Framework On Insider Trading' (2020) 1 ICS Governance Journal.

[329] Ibid.

only the issuers of securities, while leaving out other insiders, is a severe flaw. Because it only applies to holders of the same class of shares and not to holders of various classes of shares, the scope of this legislation is therefore insufficient.

Chapter three evaluated Kenya's institutional framework on insider trading in terms of its ability to detect, investigate, and prosecute cases of insider trading. The primary shortcomings of Kenya's institutional framework on insider trading were identified as inadequate detection techniques, weak investigation procedures, bad market surveillance systems, weak whistleblowing procedures, limited supervisory function, and lack of an audit trail system. Furthermore, it was found that the difficulty of proving the main parts of the crime beyond a reasonable doubt is to blame for the lack of successful prosecutions in insider transactions. However, the civil and administrative remedies available to Capital Markets Authority under the Act can be used to correct this.

Chapter four looked at the enforcement frameworks in Australia and South Africa, as well as the lessons that could be learned from them. The Australian insider trading prohibition, as detailed in this chapter, strives to promote, among other things, equitable access to relevant confidential price-sensitive information, market efficiency, market fairness, market integrity, and public investor trust. Since the 1960s, the Australian parliament has constantly approved a number of regulations, rules, guidelines, and other required steps to prevent insider trading in the Australian financial markets. Similarly, it was recognized that a number of preventative enforcement tactics are utilized in Australia to discourage market abuse activities, including Chinese walls, whistleblower immunity laws, and private rights of action.

In contrast, in order to improve market abuse regulation, South Africa has made various adjustments and changes to its market abuse regulations. As a result, the Financial Markets Act of 2012 was approved later, adding new civil remedies, criminal fines, administrative sanctions, and regulatory agencies. In addition, the Financial Sector Conduct Authority has put in place strong processes for detecting, investigating, and prosecuting insider trading crimes. The Authority also has the power to impose administrative fines and refer other matters to the Director of Criminal Prosecutions. Nonetheless, the focus of this chapter was on the lessons that may be learned from the two jurisdictions.

5.3 Recommendations

5.3.1 Short-Term Recommendations

This chapter contains a number of proposals for improving the enforcement of insider trading regulations. The following are some suggestions under legislative, institutional or policy reforms:

a) Amendments to the Capital Markets Act

With regards to the limited scope of application in terms of definitions, Capital Markets Act should be amended to broaden the scope of application in defining the terms such as "insider" and "insider trading." The provisions of an “insider” should be broad enough to include corporate insiders such as directors, shareholders, and employees, as well as secondary insiders or tippers who gain access to inside information through their profession, employment, or office. Similarly, the Capital Markets Act should be amended to include remote insider tippers as insiders. This ensures that no one is exempt from insider trading penalties simply because they have no connection to the securities issuer.

Second, the Capital Markets Act should be updated to include a comprehensive definition of key insider trading terms. Insider, insider information, and possession should be broadly defined to prevent criminals from evading liability on technical grounds. For example, the insider trading prohibition should apply to anyone who meets the definition of an insider as defined by the Act.

Legal persons, on the other hand, are not covered by the Capital Markets Act. A natural person and a legal entity (such as a corporation or partnership) should both be referred to as "persons." Furthermore, to avoid ambiguity, the Capital Markets Act should include a provision stating that inside information must be specific or precise. Similarly, under the Capital Markets Act, insiders can only trade a limited number of financial instruments. As a result, it should be amended to make insider trading illegal on all financial products, including tender offers, derivative contracts, and interests in a managed investment scheme, as well as government debentures, treasury stocks, and bonds issued or proposed to be issued, and superannuation products.

Furthermore, the Capital Markets Act should be amended to include statutory defenses for innocent insider trading suspects. Such defenses are not contemplated by the Act as written. Insider trading liability may be avoided if an insider can demonstrate that the inside information provided was required for the proper execution of his or her job, office, or profession. To avoid liability for insider trading, the insider must also demonstrate that the revealed inside information had no bearing on any transactions in the listed securities in question. The insider must also show that he or she informed all relevant parties that the information was classified as confidential.

The Capital Markets Act should be revised to include specific provisions for the maximum penalties that can be imposed in Kenya on any individual or legal entity who commits an insider trading offense, whether civil, criminal, or administrative. Furthermore, the legal person should face even harsher penalties. The goal should be to avoid such failures in the future and to achieve information parity.

Furthermore, the Capital Markets Act should be amended to include a statutory private right of action for issuers of listed securities, as well as any other aggrieved party, to seek direct damages from the offenders. Similarly, the Capital Markets Act should be amended to include provisions that broaden the scope of the market abuse prohibition to include securities or financial instruments traded in Kenya on regulated markets, over-the-counter markets, organized trading facilities (OTFs), or multilateral trading facilities (MTFs), allowing the Capital Markets Authority to address market abuse issues.

Similarly, the Capital Markets Act should be reviewed to establish and include specific regulatory prohibitions on Internet-based market abuse practices in Kenya, and to specifically discourage the dissemination or publication of rumours, false, deceptive or misleading information through the Internet and/or through the electronic by insiders or any person who knows or ought to have known that such information is false, deceptive or misleading.

Furthermore, in order to help the Director of Public Prosecutions and/or the relevant courts in prosecuting insider trading cases in Kenya, the Capital Markets Act should be changed to expressly allow some rebuttable presumptions or lessen the evidentiary burden of proof in criminal cases.

b) Institutional reforms

Notably, whistleblower immunity is a preventative measure utilized in Australia, specifically by the Australian Competition and Consumer Commission, to encourage all individuals to report any instances of cartels and/or other major market abuse offences to it. This can be implemented in the Kenyan system under the Capital Markets Authority to encourage the use of many informants.

Likewise, Chinese walls are used to foster a culture in which all organizations develop their own internal principles, policies, and structures to limit the incidence of market abuse techniques like insider trading among the many departments of such companies. This can be strengthened in different firms to maintain the culture of protecting confidential information throughout distinct departments.

Kenya through Capital Markets Authority should also sign additional multilateral cooperation agreements with analogous authorities in the developed world, such as the United Kingdom Financial Services Authority and the United States Securities and Exchange Commission, to learn from their experiences.

Lastly, Capital Markets Authority should carry out proper investor education and create awareness on market abuse practices such as insider trading. This will be in a bid to sensitize the typical investor to be more informed. This can be achieved by conducting seminars, workshops, presentations, and conferences on insider trading practices, targeting both listed and unlisted companies, investors, financial journalists and other stakeholders. This will create a forum whereby the said groups can be educated on issues surrounding insider trading regulation, for example the dangers that insider trading poses to good corporate governance, securities markets, companies, investors and the overall economy

5.3.2 Medium-Term Recommendations

Medium -term recommendations which border mainly the institutional reforms which would be applicable especially to the Capital Markets Authority are as follows:

First, in the case of investigations, notice is usually required under the Capital Markets Act before obtaining a search warrant from a magistrate. This should be abolished in the case of market abuse prevention measures such as inquiry and information gathering. This lessens the possibility that the accused will delete evidence of market manipulation before the search warrant is issued. Kenya can take a position that makes obtaining relevant evidence easier.

Regarding market surveillance, the Capital Markets Authority should invest in its own computer surveillance system, such as the Securities Market Automated Research Trading and Surveillance system, to isolate and detect all potential market abuse activities in Kenya's financial markets in real time. This will also reduce the Nairobi Securities Exchange's reliance on market surveillance. It is also proposed that the Capital Markets Authority be given legal authority to intercept telephone data from suspected insider traders. . Furthermore, the CMA should be well-equipped with cutting-edge technology for real-time trade monitoring. The CMA's investigative powers should be explicitly defined and legally enshrined. During investigations, these organizations should be allowed to use alternative methods, such as wiretapping.

In terms of enforcement, the Capital Markets Authority could consider instituting a reward scheme to strengthen the whistleblowing culture. The Capital Markets Act should be amended to include specific insider trading whistleblower immunity protections and bounty payments to encourage everyone to report insider trading activity to the Capital Markets Authority

With regards to judicial proceedings, Kenya's competent courts have played an important role in enforcing market abuse legislation and continue to do so. Nonetheless, the Kenyan court system's backlog and the Director of Public Prosecutions' pressure may be to blame for the lack of numerous convictions and settlements in insider trading cases in Kenya to date. In this context, the establishment of extra-specialized commercial courts staffed by experts to deal with market abuse cases should be seriously considered in order to improve Kenya's market abuse enforcement. Similarly, the burden of proof in insider trading cases should be reduced in order to obtain more convictions, as many will be able to get away with it as it is.

Finally, with regards to Office of the Director of Public Prosecutions, resources should be allocated for purposes of training prosecutors and investigators who are specialized in securities law. This will enable the criminal justice system to be more efficient when prosecuting financial crimes.

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