

THE LEGAL FRAMEWORK FOR WHISTLEBLOWER PROTECTION IN KENYA AND  
EXAMINATION OF ECONOMIC CRIMES

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DECLARATION

I, **Georgette Jepchirchir Kogo** declare that this dissertation is my original work and has not been submitted for the award of a degree in any other University.

Signed \_\_\_\_\_ Date \_\_\_\_\_.

Researcher: **GEORGETTE JEPCHIRCHIR KOGO**

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This dissertation has been submitted for examination with my approval as the University lecturer.

Signed: \_\_\_\_\_ Date \_\_\_\_\_.

**DR. JOY MALALA**

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## CHAPTER ONE

### 1.1 ABSTRACT

Whistle blowing is important as it reduces illegality and encourages transparency in any organisation since it instils fear on the people committing the wrong and the consequences that come with it.<sup>1</sup> Economic fraud destroys shareholders value, threatens enterprises development, endangers employment opportunities and undermines good governance. There is need for enterprises to put up internal tools to fight economic fraud and corruption. Research indicates that use of effective guidelines and compliance programs are less vulnerable to economic crime.<sup>2</sup>

The key to uncovering economic crime is through whistleblowers.<sup>3</sup> Whistleblowers play such an important role which not only make them vulnerable but also weak and should therefore be protected against the pressures that face them.<sup>4</sup>

This research paper seeks to contextualize the role whistleblowers have played in Kenya particularly towards the fight against economic crime specifically corruption. It goes on to look at the available legislation to protect whistleblowers in Kenya and the possible theories that can explain the concept of whistleblowers. It discusses the pressures whistleblowers face and how they can be dealt with by looking at a case study on **David Munyakei**. It also goes on to do a comparative analysis of the legislation in the UK and the USA by giving an analysis of the various acts, how they have been criticized, and what to take into consideration when drafting whistleblower protection laws based on the critiques of the various acts. The UK laws and USA laws on whistleblower protection, although not perfect, offer a basis for Kenya to look at when drafting laws to do with whistleblower protection as the cases of corruption in these countries are not as rampant as it is in Kenya.<sup>5</sup> Moreover, recommendations on how Kenya can best protect whistleblowers are given. What the laws on protection of whistleblowers in Kenya should look at and finally, conclusion.

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<sup>1</sup> Bowie N E, 'Business Ethics Englewood cliffs: Prentice hall' (1982).

<sup>2</sup> PricewaterhouseCoopers, Investigations and Forensic Services, "Economic crime: people, culture and controls", 4th biennial Global Economic Crime Survey (2007), 22.

<sup>3</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime' journal of financial crime (2005), 131.

<sup>4</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime,' 133.

<sup>5</sup> [www.transparency.org/cpi2015/#results-table](http://www.transparency.org/cpi2015/#results-table); Transparency International, Corruption Perception Index (2015)

## 1.2 LIST OF ABBREVIATIONS

UK- United Kingdom

USA- United States of America

UNCAC- United Nations Convention Against Corruption

WPA- Whistleblower Protection Act

KACC- Kenya Anti Corruption Commission

EACC- Ethics and Anti Corruption Commission

AU- African Union

### 1.3 LIST OF CASES

Fidelis School v Boyle (2004) IRLR 268

Boulding v Land Securities Trillium Ltd (2006) UKEAT

Street v Derbyshire Unemployed Workers Centre (2004) IRLR 687

Bolton School v Evans (2006) IRLR, 500

Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic of Kenya (2000) eKLR

R v Whitaker (1914) 3 KB 1283 10 Cr.App.R245

Cooper v Slade (1857) 6 HL 746

United States v Nixon (1974) 418 US 683

Street v Derbyshire Unemployed Workers Centre (2004)

#### **Acts of Parliament**

Constitution of Kenya (2010)

Public Ethics and Officers Act (2003)

South Africa Public Interest Disclosure Act (2000)

South Korea's Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption and Civil Rights Commission (2008)

Whistleblower Protection Act (1989)

Sarbanes Oxley Act (2002)

Public Interest Disclosure Act (1998)

Witness Protection Act chapter 79 Revised Edition (2012)

Employment Rights Act (1996)

Employment Act cap 226 Revised Edition (2012)

New Zealand Protected Disclosures Act (2000)

False Claims Act 31 USC

Anti Corruption and Economic Crimes Act (Act No. 3 Revised Edition 2014)

#### **International instruments**

African Union Convention on Preventing and Combating Corruption ( 2003)

United Nations Convention Against Corruption (2003)

## 1.4 INTRODUCTION

Kenya faces corruption as one of its major problems in the country today. Whistle blowing is therefore encouraged as a way of reducing corruption in order to deter illegality. Examples of major whistleblowers include James Githongo, a former journalist who exposed the top officials in the country involved in the Anglo-leasing scandal.<sup>6</sup> He later fled to London for fear of his life. Oscar King'ara and Paul Oulu, made history as whistle blowers. They were human activists who exposed extrajudicial killings by the police who were later publicly executed.<sup>7</sup> Recent whistle blowers such as Jacob Juma, a billionaire who was assassinated due to his knowledge of the various irregularities taking place in government today. He exposed major scandals such as the NYS, the EuroBond, Lang'ata Primary land Grabbing, Weston Land Grabbing, Karen and many more.<sup>8</sup> David Munyakei was also noted for the role he played as a whistle blower in the Goldenberg scandal. He was fired from his job at the Central Bank of Kenya for exposing the illegal transactions between the Central Bank and Goldenberg International to the opposition government at the time.<sup>9</sup>

From the above examples, we see that whistleblowers have always faced discrimination or any other form of victimisation due to their disclosure. Moreover, they are often pressured to remain silent. Therefore need arises for proper and clear whistleblower protection laws to be set up.

## 1.5 What is corruption?

Corruption involves the act of deceit of the organisation or company in order to obtain a personal or collective advantage, avoid an obligation or cause loss.<sup>10</sup>

At common law by virtue of the case of **R v Whitaker**<sup>11</sup> it was held that where a person holds a position of trustee to perform a public duty, and takes a bribe to act corruptly in discharging that duty, an offence is committed by both parties. Accordingly, at common law the offence of corruption is inextricably linked with bribery, and perhaps should more accurately be defined as an offence of bribery and corruption. What is a corrupt act for the purposes of the above offence, however, is still not defined by this case. In the case of

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<sup>6</sup> Wrong M, 'It's our turn to eat: The story of a Kenyan Whistle blower', Harper Collins Publishers, 2009.

<sup>7</sup> <https://www.pwc.com/sg/en/risk-assurance/assets/financial-crime-sg-2014>.

<sup>8</sup> [www.tikenya.org/index.php/press-releases/337-kenya-needs-whistleblowers-for-the-war-against-corruption-to-succeed](http://www.tikenya.org/index.php/press-releases/337-kenya-needs-whistleblowers-for-the-war-against-corruption-to-succeed) on 11 February 2015.

<sup>9</sup> [https://en.wikipedia.org/wiki/Goldenberg\\_scandal](https://en.wikipedia.org/wiki/Goldenberg_scandal)

<sup>10</sup> G, 'Dishonesty in Cooperate Offences a need to Reform' Company Lawyer volume 23 (2002), 114.

<sup>11</sup> R v Whitaker (1914) 3 KB 1283, 10 Cr.App.R245

**Cooper v Slade**<sup>12</sup>, the concept of corruption was defined as, involves the act to be carried out dishonestly, but corruptly, that is purposely doing an act which the law forbids as tending to corrupt. This is hardly helpful, apart from determining that corrupt and dishonest are not coterminous concepts.

The World Bank defined corruption as the misuse of public office for private gain.<sup>13</sup>

Rose Ackerman a professor of law in Yale defined corruption as ‘an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of payoffs’

Shleifer and Vishny further define corruption as ‘the sale by government officials of government property for personal gain.’<sup>14</sup>

Ibrahim Shihata (World Banks general counsel) defined corruption as follows;

‘Corruption occurs when a function, whether official or private, requires the allocation of benefits or the provision of a good or service. . . . In all cases, a position of trust is being exploited to realize private gains beyond what the position holder is entitled to, even if the gain involved is not illicit under the applicable law.’<sup>15</sup>

The Anti-Corruption and Economic Crimes Act of Kenya defines Corruption to mean bribery, fraud, embezzlement or misappropriation of funds, abuse of office, breach of trust or an offence involving dishonesty.<sup>16</sup>

The act also defines corruption as bribery involving agents<sup>17</sup>, secret inducements for advice<sup>18</sup>, conflicts of interest<sup>19</sup>, abuse of office<sup>20</sup>, dealing with suspect property<sup>21</sup>, bid rigging<sup>22</sup> and improper benefits to trustee for appointment.<sup>23</sup>

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<sup>12</sup> Cooper v Slade (1857) 6 HL 746

<sup>13</sup> World Bank, ‘ Helping Countries Combat Corruption: the role of the World Bank, Poverty Reduction and Economic Management Network of the World Bank’ (1997) <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.html>

<sup>14</sup>Wolanin N, ‘Corruption and Anticorruption’ Accessed on the 23rd of June (2016)

<sup>15</sup> Ibrahim further stated as follows regarding corruption, ‘Attempts to influence the position holder, through the payment of bribes or an exchange of benefits or favours, in order to receive a special gain or treatment not available to others is also a form of corruption, even if the gain involved is not illicit under applicable law. The absence of rules facilitates the process as much as the presence of cumbersome or excessive rules does.

<sup>16</sup> Section 2, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

<sup>17</sup> Section 39, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

<sup>18</sup> Section 40, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

<sup>19</sup> Section 41, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

<sup>20</sup> Section 46, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

<sup>21</sup> Section 47, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

<sup>22</sup> Section 44, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

<sup>23</sup> Section 43, Anti Corruption and Economic Crimes Act (Act No. 3 2003. Revised Edition 2014)

Corruption according to Ibrahim Shihata is neither confined to the public sector nor is it limited to the payment and receipt of bribes. It is also found in the private sector and well established democracies. The degree of corruption, its scope and impact is different from one country to another. It may also vary within the same country from one place to another. While corruption of some form or another may inhere in every human community, the system of governance has a great impact on its level and scope of practice. Systems can corrupt people as much as, if not more than people are capable of corrupting systems.

## 1.6 BACKGROUND

The term whistle blowing is thought to have its roots in two different but related activities: First the term follows from the fact that police who blew their whistles attempting to apprehend a suspected criminal.<sup>24</sup> Secondly, it is thought to follow from the practice of referees during the sporting event who blow their whistle to stop an action.<sup>25</sup> In this case the basic justification for whistle blowing is that the whistle blower perceives something that he or she believes is illegal or unethical and reports it to the authorities for action to be taken.

Whistle blowing therefore, is the disclosure of illegal or unethical information to authorities or persons with authority to take action by persons who lack authority and power to make the change being sought. These persons must appeal to greater power and authority in order for change to take place.<sup>26</sup>

## 1.7 STATEMENT OF THE PROBLEM

The problem is that the culture of whistle blowing has not developed enough in Kenya. This is because of fear of retaliation or discrimination. Unclear laws, worsens the situation as whistleblowers lack faith in the disclosure system, which forces them to remain silent because of fear. Therefore, my research objective is to give guidance on how Kenya can deal with the pressures that face whistleblowers and to give recommendations on how legislation to protect whistleblowers in Kenya should be by doing a comparative analysis with the UK laws and USA laws on the protection of whistleblowers. I also intend to show the importance of whistleblowers towards the fight against corruption which is rampant in Kenya today.

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<sup>24</sup>Bowie N E, 'Business Ethics Englewood cliffs: Prentice hall' (1982).

<sup>25</sup> Bowie N E, 'Business Ethics Englewood cliffs: Prentice hall' (1982).

<sup>26</sup> Duska R, 'Whistle blowing and Employee Loyalty; Honest work A Business Ethics reader' (2007), 408-13.

## 1.8 RESEARCH QUESTIONS

1. Whether whistle blowers are protected in Kenya. If not, is there need to protect them?  
If yes, how are they protected?
2. What pressures do whistleblowers face? How can they be dealt with?
3. Is whistle blowing the answer to stop corruption?
4. How whistle blowers can be protected in Kenya.

## 1.9 RESEARCH OBJECTIVES

My research objectives are;

1. Review and assess the laws that protect whistleblowers in Kenya.
2. Assess the pressures that whistleblowers face.
3. Analyse the efficiency of whistleblower protection laws in combating Corruption.
4. Provide a guide as to how whistleblower protection laws in Kenya should be legislated.

## 1.10 JUSTIFICATION OF STUDY

From the past experiences in Kenya, we find that whistleblowers were highly victimised and faced a high risk of losing their lives for example in the cases of James Githongo and David Munyakei. We even find that the whistleblowers such as David Munyakei went to court for unfair dismissal but his matter was dismissed. Therefore, the law needs to address these pressures on whistleblowers and proper and clear legislation for their protection is required in order to instil the culture of whistle blowing so that employees or state officers will remain on their toes as they perform their duty. This will boost the fight against corruption, which is an area that affects Kenya today. I also intend to give a comparative analysis with countries such as the UK and the USA with best policies that protect whistleblowers and give directions as to how laws of Kenya for the protection of whistleblowers should take.

## 1.11 KENYA'S POSITION ON WHISTLEBLOWER PROTECTION

Kenya has various laws that have a bearing on whistle blowing. Such laws aim at reducing corruption and encouraging good governance. They assure any person who is a witness to a crime, protection from retaliation by those mentioned<sup>27</sup>.

The Kenya Anti Corruption and Economic Crimes Act provides protection on assistants, informers witnesses and investigators but does not specify on whistle blowers<sup>28</sup>. Section 41 Public Officer and Ethics Act<sup>29</sup> discourages whistle blowing as it states that 'A person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both'. The Witness Protection Act<sup>30</sup> only provides protection to witnesses. This means persons who agree to testify in court are the ones protected under this Act.

However the access to information bill was tabled in parliament and advocates for protection of whistle blowers. The bill allows the public to seek for any information from government, and obligates public servants to make sure they provide that information, or risk hefty fines or jail terms. It has been passed by parliament.<sup>31</sup>

These laws however do not prioritise whistle blowing and hence, no single law or institution established under these laws has promoted a culture of whistle blowing in Kenya to ensure that vices that are obstacles to Kenya's socio-economic development are eliminated.

The lack of comprehensive laws that protect whistle blowers has made the fear of disclosure of whistleblowers to rise due to retaliation creating the culture of silence thus hindering the fight of corruption in the country<sup>32</sup>.

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<sup>27</sup>OECD, Commentary on the OECD Guidelines for Multinational Enterprises.  
<http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>28</sup> Section 65, Kenya Anti-corruption and Economic Crimes Act (2003)

<sup>29</sup> Section 41, Public Officer and Ethics Act (2003)

<sup>30</sup>Section 3, Witness Protection Act chapter 79 (2006)

<sup>31</sup> Access to Information Bill (2015)

<sup>32</sup>Kichana P, 'Kenyan Laws Cannot Protect Whistle Blowers', August 2006 Transparency International Kenya  
<http://www.tikenya.org/documents/adili81.pdf>. on 27 July 2013.

## 1.12 LITERATURE REVIEW

Corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. Public and private sector employees have access to up-to-date information concerning their workplaces' practices, and are usually the first to recognize wrongdoings.<sup>33</sup> However, those who report wrongdoings may be subject to retaliation, for example intimidation, harassment, dismissal or violence by their fellow colleagues or superiors. In most countries, whistle blowing is even associated with treachery or spying<sup>34</sup>.

Whistleblower protection is important because it creates confidence to the whistleblowers particularly if they know the procedure. It supports an open organisational structure where employees are not only aware of the procedure but have confidence in reporting. The protection of both private and public whistle blowers will go a long way to curb corruption and fraud and it will enhance integrity and accountability and thus support a clean business environment<sup>35</sup>.

### 1.121 HISTORY OF THE FIGHT AGAINST CORRUPTION IN KENYA

The first anti-corruption legislation in the country was passed in 1956. The Prevention of Corruption Act<sup>36</sup> whose main objective was to punish those who engage in corrupt practices.<sup>37</sup>

Later, an issue arose as to the language of section 3 of the Act where a defendant was caught trying to bribe a public official and got away with saying that he was offering the bribe to the official to see if he would take it.<sup>38</sup>

This saw the passing of an amendment to the Prevention of Corruption Act in 1967. The amendment introduced culpability for both the giver and receiver of a bribe. This sparked a debate as other members of parliament claimed it was a conspiracy to silence whistleblowers.

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<sup>33</sup> United Nations Office on Drugs and Crime, UN Anti-Corruption Toolkit, 3ed, Vienna (2004), 67

<sup>34</sup> Banisar D, 'Whistle blowing: International Standards and Developments', Sandoval ed, *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, 2011. (hereinafter Banisar) and Transparency International, *Alternative zero Silence: Whistle blower Protection in 10 European Countries* (2009).

<sup>35</sup> HM Treasury *The financial challenge to crime and terrorism* (HM Treasury: London, 2007), 6.

<sup>36</sup> Cap. 65 (repealed)

<sup>37</sup> James T. Gathii, "Kenya's Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-corruption Commission under the 2010 Constitution," 6

<sup>38</sup> Asserted by Njonjo (Attorney General) in The Kenya National Assembly debate on the prevention of Corruption (Amendment) Bill, October 19 (1967), 942-43.

In fact, the debate as to what constitutes a gift as the likes of Shikuku suggested that public figures should not accept gifts irrespective of their nature.<sup>39</sup>

In 1991, following the pressure from the public as well as the international donor community, an Anti-corruption squad was established in Kenya.<sup>40</sup> It was a special investigative unit answerable to the criminal investigations department which was part of the Kenya police.<sup>41</sup> This Anti Corruption squad failed because it was understaffed and lacked adequate expertise to combat corruption. The squad was also part of an executive branch of government. It lacked independence hence feared to investigate high level corruption.<sup>42</sup>

The Anti corruption squad lasted three years before being disbanded having made little success in the fight against corruption.<sup>43</sup>

The Transparency International was established in 1993 to fight corruption globally.<sup>44</sup>

The Kenya Anti Corruption Act (KACA) was established. Its main establishment was seen as an attempt to retain financial aid with the World Bank. This was mainly because it had suspended its aid because of the vast cases of corruption in the country.<sup>45</sup> By this time the Kenya had been involved in various scandals involving billions of taxpayers' money. These scandals included the Goldenberg scandal (1990-1999), and the Turkwel hydroelectric power station scandal.<sup>46</sup>

The first director of KACA donated his private offices so that KACA would have a base for its operations.<sup>47</sup> This shows the minimal resources given to enforce this act. The act was established through an amendment to the Prevention of Corruption Act.

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<sup>39</sup> Kenya, National Assembly, Debates on the Prevention of Corruption (Amendment) Bill, October 19 (1967), 945-47 as expounded by Gathii J T, 'Kenya's Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-corruption Commission under the 2010 Constitution', 2010.

<sup>40</sup> Tuta K, 'Kenya's Anti-corruption Policy and Institutional Framework, Control of Corruption in Kenya, Legal-Political dimensions 2001-2004', Ben Sihanya ed, (2005), 66.

<sup>41</sup> Tuta K, 'Kenya's Anti-corruption Policy and Institutional Framework, Control of Corruption in Kenya, Legal-Political dimensions 2001-2004', 66.

<sup>42</sup> Tuta K, Kenya's Anti-corruption Policy and Institutional Framework, Control of Corruption in Kenya, Legal-Political dimensions 2001-2004', 66.

<sup>43</sup> Tuta K, Kenya's Anti-corruption Policy and Institutional Framework, Control of Corruption in Kenya, Legal-Political dimensions 2001-2004', 66.

<sup>44</sup> Transparency International website Available at: <http://www.transparency.org/whoweare/history>

<sup>45</sup> Gathii J T, "Kenya's Long Anti-Corruption Agenda: 1952-2010:Prospects and Challenges of the Ethics and Anti-corruption Commission under the 2010 Constitution"

<sup>46</sup> Odhiambo F, 'Determinants of Corruption in Kenya: Born and Bred to Bribe', Research Pro Solutions, 2015.

<sup>47</sup> Gathii J T, 'Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya' journal of international law (2009)

In 1998, KACA for the first time took to court senior officials from the ministry of finance. However the attorney general terminated the cases on the basis that his consent had not been sought first before institution of the cases.<sup>48</sup>The director was hence removed from office. He was replaced by Justice Aaron Ringera, who introduced a comprehensive strategy for investigating and prosecuting those found engaging in corruption.<sup>49</sup>However KACA was disbanded due to constitutionality issues following the Gachiengo decision.<sup>50</sup> In this case the court held that since the AG is the only one with powers to prosecute, he did not directly oversee the activities of the KACA therefore caused it disbandment.<sup>51</sup> The Anti Corruption Police Unit was later formed to replace KACA. It did not prosecute anyone for crimes on corruption.<sup>52</sup>

After the general elections, the Anti-Corruption and Economic Crimes Act was formed together with the Public Ethics Officers Act. The Anti Corruption and Economic Crimes Act established the Kenya Anti Corruption Commission (KACC).<sup>53</sup>

It carried out functions the same as that of the KACA. The Kenya Anti-Corruption Commission (KACC) was established to combat corruption and economic crimes through law enforcement prevention and public education<sup>54</sup>. Today it is known as Ethics Anti-Corruption Commission (EACC). According to the US Department of State, in August 2007 “the NGO Name and Shame Corruption Network Campaign claimed that KACC had accomplished little, despite the millions of shillings the government provided.<sup>55</sup>”

The report continues: On August 19, the NGO and the Centre for Law and Research International (Clarion) issued a report that claimed the KACC failed to investigate and prosecute influential persons and criticized its failure to address the Goldenberg and Anglo Leasing scandals. The KACC director told the media he had forwarded 284 cases to the attorney general for prosecution.

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<sup>48</sup> Kithome T, ‘Control of Corruption in Kenya; Legal-Political dimensions 2001-2004: Kenya’s Anti-corruption Policy and Institutional Framework’ (2011), 66.

<sup>49</sup> Gathii J T, ‘Kenya’s Long Anti-Corruption Agenda: 1952-2010: Prospects and Challenges of the Ethics and Anti-corruption Commission under the 2010 Constitution’.

<sup>50</sup> Stephen Mwai Gachiengo & Albert Muthee Kahuria v. Republic of Kenya (2000) eKLR

<sup>51</sup> Mwalimu M and Githongo J, ‘Transparency International, Judicial decisions and the fight against corruption in Kenya (2001), 9.

<sup>52</sup> Gathii J T, Kenya’s Long Anti-Corruption Agenda: 1952-2010:Prospects and Challenges of the Ethics and Anti-corruption Commission under the 2010 Constitution

<sup>53</sup> Gathii J T, Kenya’s Long Anti-Corruption Agenda: 1952-2010:Prospects and Challenges of the Ethics and Anti-corruption Commission under the 2010 Constitution

<sup>54</sup> Section 7, Anti-corruption and Economic Crimes Act (2003) (repealed)

<sup>55</sup> US Department of State 2008, Country Reports on Human Rights Practices 2007.

During President Kibaki's five-year tenure no top officials have been charged with corruption, despite numerous scandals.<sup>56</sup> According to Freedom House's report, KACC made slow progress with 32 successful convictions since 2003.<sup>57</sup>

The Public Ethics Act on the other hand was formed to advance ethics among public officers by providing a code of conduct enforceable in the form of legislation. The adoption of the new constitution was a great step towards the fight against corruption as the entire chapter 6 talks about the national values required by a public officer.<sup>58</sup>

### 1.122 INTERNATIONAL INSTRUMENTS ON WHISTLEBLOWING

United Nations Convention against Corruption states that state parties should incorporate domestic legislation to protect whistleblowers.<sup>59</sup>

This article was meant to cover indications of corruption that fall short of evidence. The ideal situation is where a whistleblower raises concerns in time so that action can be taken to prevent any offence. It does not necessarily mean that the whistleblower has concrete evidence to prove so<sup>60</sup>.

The convention applies to any person in this regard it refers to whistleblowers indirectly. Whistleblowers are usually inside persons, persons within the organisation who disclose wrong doing. However this article provides for any person in this regard citizens are also considered.

The convention also requires the whistleblower to have reasonable grounds to suspect the wrongdoing. This means that their reports should be protected even if they are mistaken. Good faith on the other hand is less clear and no definition has been provided.<sup>61</sup>

The persons to report to according to the convention are the authorities for example the Anti-Corruption Commission.<sup>62</sup> It however does not cover the media<sup>63</sup>.

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<sup>56</sup> Global Integrity 'Category IV Administration and Civil Service – Whistle-blowing Measure', (2008); Global Integrity Report Kenya, 30 January (2007) <http://report.globalintegrity.org/Kenya/2007/scorecard/60> – Accessed 11 December 2008.

<sup>57</sup><http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7422> on 11 December 2008.

<sup>58</sup> Constitution of Kenya (2010)

<sup>59</sup> Article 33, United Nations Convention against Corruption (2003)

<sup>60</sup> Transparency Intentional: Whistle blower protection and the UN convention against Corruption.

<sup>61</sup> Article 33, United Nations Convention Against Corruption (2003)

<sup>62</sup> Article 33, United Nations Convention Against Corruption (2003)

<sup>63</sup> Transparency Intentional: Whistle blower protection and the UN convention against Corruption.

The African Union Convention on Preventing and Combating Crime also requires state parties to ensure they adopt the necessary legislation to ensure the fight against corruption.<sup>64</sup> It requires the right to access information to be provided in domestic legislation so as to ensure transparency and accountability.<sup>65</sup> It also requires the private sector to impose necessary steps to curb corruption.<sup>66</sup>

The transparency intentional gives principles that present a guideline to existing whistleblower legislation to ensure their proper protection. They should be adapted to an individual country's political, social and cultural contexts, and to its existing legal frameworks. They take into account lessons learned from existing laws and their implementation in practice, and have been shaped by input from whistleblower experts, government officials, academia, research institutes and Civil Society Organisations (CSOs) from all regions. These principles will be updated and refined as experiences with legislation and practices continue to unfold.<sup>67</sup> Among them being confidentiality and anonymity of these whistleblowers.

A broad definition of whistle blowing is also necessitated. Reyder also talks about the importance of curbing financial crimes such as money laundering and ensuring accountability. He talks about the criminalization of financial crimes in the US and UK which are among the first countries to criminalize financial crimes.<sup>68</sup>

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<sup>64</sup> Article 2, African Union on Preventing and Combating Corruption (2003)

<sup>65</sup> Article 9, African Union on Preventing and Combating Corruption (2003)

<sup>66</sup> Article 11, African Union on Preventing and Combating Corruption (2003)

<sup>67</sup> 'Transparency International: International principles for whistle blower legislation' (2013).

<sup>68</sup> Ryder N, Financial Crime in the 21st century: Principles and policies, Edward Eglar Publishing, 2011.

## CHAPTER 2

### 2.1 THEORETICAL FRAMEWORK

#### 2.2 STANDARD THEORY

De George's theory of whistle blowing and the problem of duty<sup>69</sup>: This is the standard theory. He prescribes three positions; whistle blowing as morally prohibited, morally permitted and as morally required. He rejects that whistle blowing should be morally prohibited but he acknowledges that there is cultural resistance to whistle blowing. He states that the criteria for permissible whistle blowing are as follows: The firm through its product or policy will do serious and considerable harm to the public, whether in person of the user of the product or innocent bystander, or the general public. Once an employee identifies a serious threat to the user of the product or the general public he or should report to his immediate supervisor and make his or her moral concern known. Unless he or she does so, the act of whistle blowing is not clearly justifiable. If ones immediate supervisor does nothing about the concern or complaint, the employee should exhaust the internal and possibilities within the firm which involves taking the matter to the managerial area.<sup>70</sup>

De George states that whistle blowing becomes morally required if in addition to the three criteria above two conditions apply: The whistleblower must have documented evidence that would convince a reasonable impartial observer that the situation is correct and that the company's product or the practice poses a serious danger to the public. The employee must have good reason to believe that by going public the necessary changes will be brought about. The chance of being successful must be worth the risk one takes and the danger to which one is exposed.<sup>71</sup>

Critiques of the theory argue that De George sets the bar too high and that one would be justified in almost never engaging in whistle blowing; strong documentary evidence and good reasons to believe the company will change, this implies that even if a party believes that the organisation will do serious harm that person is not required to blow the whistle. De George's position implies that there is no moral duty for self sacrifice.<sup>72</sup> Accordingly whistle blowing is permissible but not required unless the two condition above are met. De George insists on the importance of following protocol in reporting whistle blowing matters however the primary

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<sup>69</sup> De George R T, Whistle blowing, Business Ethics, Macmillan Publishing Company 7 ed, New York , 1986, 221-38.

<sup>70</sup> Johnson R A, Whistle blowing: When it works and why, Boulder: Lynn Rienner publishers, 2003.

<sup>71</sup> Lahman LD, 'A primer on the federal false claims Act,' Oklahoma bar journal 76 no 12 (2005), 901-07.

<sup>72</sup> De George R T, 'Whistle blowing, Business Ethics', 393.

issue here is identifying the problem and finding a resolution.<sup>73</sup>In some scenarios reporting a matter internally may make the matters worse by informing the perpetrators that they have been detected. If the supervisor or other supervisors in the organisation were directly or indirectly involved in the offending action or policy, reporting the offence to them would worsen the situation and put the whistle blower at a great personal risk.<sup>74</sup>

### 2.3 COMPLICITY THEORY

Few, if any, whistleblowers are mere third parties. The whistleblowers are generally deeply involved in the activity they reveal. This involvement suggests that we might better understand what justifies (most) whistle-blowing if we understand the whistleblower's obligation to derive from complicity in wrongdoing rather than from the ability to prevent harm.<sup>75</sup> Any complicity theory of justified whistle-blowing has two obvious advantages over the standard theory. One is that complicity itself presupposes wrongdoing, not harm. So, a complicity justification automatically avoids the paradox of missing harm, fitting the facts of whistle-blowing better than a theory which, like the standard one, emphasizes prevention of harm.<sup>76</sup>

The second advantage is that complicity invokes a more demanding obligation than the ability to prevent harm does.<sup>77</sup> We are morally obliged to avoid doing moral wrongs. When, despite our best efforts, we nonetheless find ourselves engaged in some wrong, we have an obligation to do what we reasonably can to set things right. Just as complicity theory avoids the paradox of missing harm, it also avoids the paradox of burden.<sup>78</sup>

Complicity Theory one is morally required to reveal what one knows to the public (or to a suitable agent or representative of it) when<sup>79</sup>: what one will reveal derives from one's work for an organization; one is a voluntary member of that organization; one believes that the

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<sup>73</sup> De George R T, 'Whistle blowing Business Ethics', 394.

<sup>74</sup> Hoffman M and Schwartz M, 'The morality of whistle blowing: A commentary on Richard T De George, Business media Dordrecht, 2014, 1-11.

<sup>75</sup> Michael D, 'Avoiding the Tragedy of Whistle blowing,' Business and Professional Ethics journal 8, no. 4 (1989), 3-19.

<sup>76</sup> Duska R, Whistle blowing and employee loyalty; Honest work: A business ethics reader, Oxford University Press, New York, 2007, 408-13.

<sup>77</sup> McNulty R E and Hoffman E M, A Business Theory of Whistle blowing: Responding to the one trillion question' transaction publishers, 2010, 45-59.

<sup>78</sup> Johnson R A, Whistle blowing : When it works and why, Lynn Rienner Publishers, 2003.

<sup>79</sup> Michael D, 'Business and Professional Ethics: some paradoxes of whistle blowing' vol15 journal no1 (1986), 153.

organization, though legitimate, is engaged in serious moral wrongdoing; one believes that their work for that organization will contribute (more or less directly) to the wrong if (but not only if) you do not publicly reveal what you know; one should be justified that the above beliefs are true.<sup>80</sup>

In complicity theory the whistleblower has to be voluntary connected with the company in question and he must derive his information from his work at the organisation. This differs from standard theory because it does not specify how a whistleblower should come to know about the wrong doing.<sup>81</sup>

## 2.4 NATURAL LAW THEORY

The natural law theory addresses the morality and good.<sup>82</sup> It was advocated by Aristotle<sup>83</sup> and further propelled by Thomas Aquinas. According to natural law man is naturally inclined to do that which is good. Therefore, Natural law theory proposes that law should be governed by morality and what is good for the entire society.

John Finnis argues that natural law is not based on the human nature but rather in the notion of what is evidently good for human beings.<sup>84</sup> He explains human rights based all centrality of duties and argues that a person should not act in a manner that damages the basic good, regardless of how beneficial the result will be.<sup>85</sup> Human rights arise from respecting these goods and are subject to no exceptions. According to Finnis, these rights include the right: not to be deprived life, not to be deceived in factual communications, not to be condemned on false charges, not to be deprived the capacity to procreate and to be accorded respectful consideration to any assessment of the common good.<sup>86</sup>

Natural law forms the basis of human rights, Human rights are those rights that are universal to the entire human race and are applicable worldwide. They include right to life, security,

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<sup>80</sup> Goldberg D T, 'Tuning In to Whistle Blowing' Business and Professional Ethics Journal no. 2 (1988), 85-94.

<sup>81</sup> Michael D, 'Business and Professional Ethics: some paradoxes of whistle blowing' vol15 journal no1 (1986), 153.

<sup>82</sup> 'An ancient Greek philosopher and scientist born in 388 BCE and died 322 BCE.'

<sup>83</sup>William Sweet, 'Philosophical Theory and the Universal Declaration of Human Rights' (2003), 19.

<sup>84</sup> Finnis J, 'Natural Law and Natural Rights', OUP, 1980, 33.

<sup>85</sup> Finnis J, 'Natural Law and Natural Rights', 255.

<sup>86</sup> Finnis J, 'Natural Law and Natural Rights', 255.

liberty, equality before the law and freedom of movement and residence.<sup>87</sup> Thomas Aquinas distinguishes aspects of nature to be self-preservation, sexual responsibility, duty to educate the young, duty to strive for knowledge of God and to maintain amicable relationships with fellow human beings. According to him, human beings are inclined to stay in being and natural beings generally are inclined to reproduce and inclined to knowledge and social order.<sup>88</sup> It is clear that human rights emerged from natural law based on the fact that the aspects of nature as described by Aquinas are closely related to the current human rights in place.<sup>89</sup> Witness protection and human rights are interrelated. The mere fact that a witness needs protection implies that a certain human right to which he or she is entitled is being threatened. In most cases, it is often the right to life and freedom of movement. This paper will apply the natural law theory because it contains the concept of human rights, which is a fundamental aspect of witness protection.<sup>90</sup>

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<sup>87</sup> Universal Declaration of Human Rights, adopted and proclaimed by the UN through resolution 217(111) in (1948).

<sup>88</sup> Thomas Aquinas' Summa Theologica'.

<sup>89</sup> Thomas Aquinas' Summa Theologica.'

<sup>90</sup> Thomas Aquinas' Summa Theologica.'

## CHAPTER 3

### 3.1 PRESSURES THAT AFFECT WHISTLEBLOWERS

The fact that a person might know the illegalities that go on in a particular organisation does not necessarily mean that they will report the matter. There are a lot of pressures that can be brought to them to persuade them to remain silent.<sup>91</sup> These pressures must be faced if whistleblowers are to be adequately protected.

The main pressure that whistleblowers could face is direct threat of violence if the person reports what he has discovered.<sup>92</sup> In some cases, the threat does not need to be spelt out but is inferred from the reputation of the organisation for example reporting terrorist activity.<sup>93</sup> Direct threat may not only be to the person disclosing the illegal activity, but also to his or her family. Such threats should be taken seriously as they not only dissuade people from coming to report but also effectively silence witnesses.<sup>94</sup>

In such cases it may not be effective to merely arrest the suspect for threatening a witness as action can often be carried out even behind bars.<sup>95</sup> An adequate witness protection programme should be available so as to ensure that the person can disappear completely after giving evidence. This involves giving the witness and his family a completely new identity.

The Witness Protection Act establishes a witness protection agency to protect witnesses on behalf of the state.<sup>96</sup> One of the functions of the agency is to establish a witness protection programme.<sup>97</sup> However these provisions only cover witnesses and if whistleblowers don't go to court they will not be protected under this.

A threat to the breach of confidentiality is also a pressure that affects whistleblowers. This is particularly in the cases of a client. If one discloses information about a client. The law should be clear on this area as cases of defamation may be brought against the whistleblowers.<sup>98</sup>

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<sup>91</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime' journal of financial crime (2005), 131.

<sup>92</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime', 133.

<sup>93</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime', 133.

<sup>94</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime', 133.

<sup>95</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime', 133.

<sup>96</sup> Section 3(a), Witness protection act chapter 79 revised edition (2012)

<sup>97</sup> Section 3 (c) 1(a), Witness protection act chapter 79 revised edition (2012)

<sup>98</sup> Alexander R, 'The role of whistleblowers in the fight against economic crime', 137.

A threat of the whistleblowers employment is also a pressure that faces whistleblowers. An employee or member of staff who discovers a wrong doing may be reluctant to disclose any information because of fear of losing their job. This is particularly so where the criminal is in a more senior position. A case study of the case of **David Munyakei** illustrates this;

David Munyakei is a famous whistleblower in Kenya. He exposed the Golden Berg scandal. He was an employee at the Central Bank of Kenya where he noticed the illegalities going on in the government. The golden berg scandal involved the Kenyan government subsidizing exports of gold beyond the arrangements made where it paid the golden berg international 35% more than their foreign currency. No or minimal gold was actually exported. The scandal caused the country more than 10% of its GDP. The scandal involved many top officials at the time including the then president Daniel Arap Moi. Mwai Kibaki was also mentioned as being involved in the scandal.<sup>99</sup>

David Munyakei had evidence of the illegalities; he therefore gave this evidence to the opposition members of parliament. His disclosure caused his dismissal as an employee of the Central Bank of Kenya. He spent the rest of his life poor and unemployed. He died in the year 2006 leaving three daughters and a widow.

David Munyakei therefore got fired from his job. He was taken to court although the judge ruled that he had no case to answer, he did not get reinstated back to his job as the bank declare that it had no confidence in him.<sup>100</sup> This case shows how whistleblowers are treated, as it is often not the guilty party who will be dismissed for wrong doing but the party who blows the whistle.<sup>101</sup>

### 3.2 COMPARATIVE ANALYSIS

### 3.3 WHISTLEBLOWER PROTECTION IN THE UK

The United Kingdom has comprehensive laws that protect whistle blowing. The Public Interest Disclosure Act of 1998 was brought into force in 1999. The main aim of the act is to meet the need to provide protection for workers who wish to speak about matters of public concern.<sup>102</sup> This is mainly because of the victimisation or dismissal of such workers which deters them from speaking about the wrongdoings going on. The important aim of the

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<sup>99</sup> [https://en.wikipedia.org/wiki/Goldenberg\\_scandal](https://en.wikipedia.org/wiki/Goldenberg_scandal)

<sup>100</sup> "Goldenburg: Story of a whistleblower - Magazine". Theeastafrican.co.ke. 2013-09-21. Retrieved 2013-10-06.

<sup>101</sup> Rothschild and Miethe 1999; De Maria and Jan 1997

<sup>102</sup> Camp C, 'Openness and accountability in the workplace', (1999), 46

framers of the new legislation is to encourage a shift from the common workplace culture in which workers prefer to turn a blind eye rather than coming forward with their concerns, no matter how serious the concerns might be.<sup>103</sup> A recent survey in the UK and USA on 230 whistleblowers shows that 84% lost their jobs for informing their employer of fraud.<sup>104</sup>

Paul Van Buitenen was a Dutch assistant auditor who exposed major fraud and corruption that was going on within the European Commission. He had raised the matter internally but was threatened if he passed the matter to the European parliament. He was therefore dismissed from office with half pay while his proceedings were being heard in court. He was accused of imparting information to unauthorised persons however this argument did not hold any water as the European parliament is responsible in assessing how European money is spent.<sup>105</sup>

Mr Van Buitenen's suspension was lifted after the maximum four month disciplinary period was over. He was also threatened with fresh disciplinary action if he continued to expose further fraud and corruption that took place in Brussels.<sup>106</sup> This is one of the many examples of whistleblowers who have faced victimisation because of disclosing matters of public concern.

The Public Interest Disclosure Act and the Employment Rights Act defines protected disclosure, which in this case is any disclosure that a worker, reasonably believes that; a criminal offence has been committed or a person has failed to comply with obligations he or she is subject to, or the health, safety of an individual or environment is in danger or any disclosure that involves miscarriages of justice. It also involves the cover up of such malpractice.<sup>107</sup> This is what is known as qualifying disclosure. The act also talks about qualifying disclosure as that which one discloses to his or her employer or a person in authority.<sup>108</sup>

The framers of the act focused on the subject matter of the disclosure and to whom the subject matter is disclosed. The act protects persons who report in good faith, do not have a connection or participate in the illegality, reasonably believe that the allegations or

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<sup>103</sup> [http://www.paulvanbuitenen.nl/download/actualiteit/20080304\\_Summary\\_EP\\_Audit\\_report\\_06-02.pdf](http://www.paulvanbuitenen.nl/download/actualiteit/20080304_Summary_EP_Audit_report_06-02.pdf) 2008.

<sup>104</sup> In The Independent for January 28 (1999)

<sup>105</sup> [http://www.paulvanbuitenen.nl/download/actualiteit/20080304\\_Summary\\_EP\\_Audit\\_report\\_06-02.pdf](http://www.paulvanbuitenen.nl/download/actualiteit/20080304_Summary_EP_Audit_report_06-02.pdf) 2008

<sup>106</sup> (Accountancy Age, June 17 (1999).

<sup>107</sup> Section 1, Public Interest Disclosure Act (1998), Section 43(B), Employments Rights Act (1996)

<sup>108</sup> Section 1, Public Interest Disclosure Act (1998), Section 43(C), Employments Rights Act (1996)

information disclosed is true, reasonably believe that the disclosure is necessary or for public interest and do not report for private gain.<sup>109</sup>

The Employment Rights Act nullifies any agreement in the contract between the employer and the employee that prevents or precludes the worker from making the disclosure.<sup>110</sup> It also widens the definition of a worker to include a contract for service and of service and a person who does training with the organisation.<sup>111</sup> The act protects disclosure made to the media if the person disclosing the information shows that if he or she discloses the information internally he or she is likely to be victimised or be in danger or if the person shows that the matter is exceptionally serious.

The Act extends protection against unfair dismissal not just employees but also workers in an agency relationship or independent contractors.<sup>112</sup> This therefore reduces victimisation of the workers who disclose information.

In cases where a worker is unfairly dismissed because of protected disclosure, he or she can seek redress from the complaints tribunal.<sup>113</sup>

### 3.4 CRITIQUE OF THE PUBLIC INTEREST DISCLOSURE ACT

Although the Public Interest Disclosure Act raises awareness on the benefits of whistle blowing in the fight against corruption, it advocates instituting of internal disclosure procedures in a company as opposed to external disclosure which might end up destroying the reputation of a company, it has been criticised as it does not make it mandatory for employers to institute internal disclosure procedures.<sup>114</sup> This therefore indirectly tackles the culture of anti-whistle blowing. The Public Interest Disclosure Act should provide a safe alternative to silence as workers fear reprisals.<sup>115</sup> Admittedly, internal procedures could foster cover ups of corruption by employers as information may not be released to the public however, lack of internal disclosure procedures is likely to discourage whistleblowers from

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<sup>109</sup> Section 43 (h), Employment Rights Act (1996)

<sup>110</sup> Section 43(j), Employment Rights Act (1996)

<sup>111</sup> Section 43 (k), Employment Rights Act (1998)

<sup>112</sup> Section 23, Employment Rights Act (1996)

<sup>113</sup> Section 48, Employment Rights Act (1996), Section 5&3, Public Interest Disclosure Act (1998)

<sup>114</sup> Lewis D, "Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?" *Journal of Business Ethics* (2008) 82(2), 500.

<sup>115</sup> Corbitt T, "Employees' Family Rights and the Public Interest Disclosure Act 1998" *Criminal Law and Justice Weekly*. Issue 20, May (2003)

coming forward due to uncertainty. Having procedures in place will create transparency and certainty therefore its importance.<sup>116</sup>

Another critique of the Public Interest Disclosure Act is that it lacks statutory certainty. This is seen in the fact that the act protects ‘exceptionally serious failures’ which is left to the courts to determine which type of failure will qualify as such.<sup>117</sup> It would be productive to provide a specific list of exceptionally serious failures.<sup>118</sup>

The Public Interest Disclosure Act also makes no indication as to who protected disclosures should be made.<sup>119</sup> Where whistleblowers are not protected under the PIDA, they are subject to civil and criminal charges such as defamation.<sup>120</sup> The possibility of the employee being burdened to prove the disclosure against the employer is also a discouraging factor to whistleblowers not protected by this act.

The act protects disclosures made under good faith.<sup>121</sup> This however is not necessary as a disclosure made due to public interest holds more weight as compared to the motive. The removal of this requirement would enable more workers to fall under the scope of the Public Interest Disclosure Act as long as the disclosure is under public interest. Reasons for including the good faith requirement should be examined and other alternatives sought if the aim was to reduce malicious claims.<sup>122</sup> Heavy sanctions for example should be imposed for baseless claims. It has also been argued that cases are handled by less powerful courts. In this case the employment tribunal. The tribunal does not give adequate remedies for whistleblowers. More powerful courts such as the High court should be given power to handle these cases.<sup>123</sup>

Recourse for reprisals is inadequate. The act provides protection against dismissal for protected disclosure as the principal reason for the dismissal. This means that if the protected disclosure was necessary but not the principal reason for dismissal that it would be fair which

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<sup>116</sup> Lewis D, ‘Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?’ 504.

<sup>117</sup> Section 43 (H), Employment Rights Act (1996)

<sup>118</sup> Lewis D, ‘Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?’ 502.

<sup>119</sup> Section 43 (G), 43(H) Employment Rights Act (1996)

<sup>120</sup> Lewis D, ‘Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?’ 504.

<sup>121</sup> *Street v Derbyshire Unemployed Workers Centre* (2004) IRLR 687 (CA)

<sup>122</sup> Lewis D, Homewood S, ‘Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected?’ (2004)

<sup>123</sup> Section 10(4), South Africa’s Protected Disclosure Act (2000)

leaves the employee without recourse.<sup>124</sup> It is also difficult to prove the principal reason for dismissal if there are many contributing factors. This requirement increases the possibility of a whistleblower to lose a claim.

The Public Interest Disclosure Act also does not protect workers that attempt to make a disclosure.<sup>125</sup> It only protects those that have made a disclosure. If a worker faces reprisals if he or she investigates corrupt practices he is not protected as a disclosure has not been made.

The act does not protect workers from being blacklisted upon dismissal.<sup>126</sup>

Therefore reform is needed to ensure whistleblowers are protected throughout all stages of the disclosure process.

### 3.5 WHISTLEBLOWER PROTECTION IN THE USA

The USA also has many whistleblower laws at the state and federal level. The principal acts however are the Witness protection Act (1989), The Corporate and Criminal Accountability Act (Sarbanes-Oxley Act), and the False Claims Act. These acts will be examined in order to show how cases such as the one for David Munyakei should have been dealt with and to give recommendations on how the Kenyan legislation to protect whistleblowers should be.

### 3.6 WHISTLEBLOWER PROTECTION ACT 1989

Initially, federal workers were supported by the Office of the Special Counsel however the agency proved to be ineffective. Therefore the Whistleblower Protection Act was passed. The main purpose of the act is to strengthen and improve protection for the rights of federal employees, to prevent reprisals and to eliminate wrongdoing within the government.<sup>127</sup>

The Merit Systems Protection Board in which the Office of the Special Counsel (OSC) was part, was also created.<sup>128</sup> It was designed to protect whistleblowers against retaliatory discrimination. The act outlines the functions of the Office of the Special Counsel.<sup>129</sup> The OSC conducted only one hearing to restore a whistleblowers job.

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<sup>124</sup> Rad Kohanzad, "The Burden of Proof in Whistle blowing: *Fecitt and others v NHS Manchester* [2011] IRLR 111" *Industrial Law Journal* Volume 40 (2011), 218.

<sup>125</sup> *Bolton School v Evans* (2006) IRLR, 500

<sup>126</sup> *Templeton H 'Maxwell Pensions Scandal. Minutes of Evidence Taken before the Social Security Committee'* 25 February (1992), 380-388.

<sup>127</sup> Section 2 (b), Whistleblower Protection Act (1989)

<sup>128</sup> Section 3, Whistleblower Protection Act (1989)

<sup>129</sup> Section 1212, Whistleblower Protection Act (1989)

### 3.7 CRITIQUE OF THE WHISTLEBLOWER PROTECTION ACT

Since the passage of the 1994 amendments, there has been significant growth and patterns emerging that show protection of whistleblowers. However, according to Government Accountability project (GAP), the administration of the act still needs strengthening as well as its related advocacy organisation, the National Whistle blowing Centre.<sup>130</sup>

The act also requires public sector employees to disclose the illicit activities to their employer first. This becomes a weakness if the whistleblower has reason to believe that he or she will not get a fair hearing from the employer due to the likelihood of facing repugnance.

### 3.8 THE SARBANES OXLEY ACT

This act was created to protect corporate criminal fraud and strengthen corporate accountability. The Act requires that audit committees of the boards of public corporations establish procedures for ‘the confidential, anonymous submission by employees’ of complaints regarding internal accounting controls or auditing matters.<sup>131</sup>

The act provides some assistance and protection to whistleblowers as employees are not required to report to the employers first. They may complain to the Federal regulatory or law enforcement agency or a person with supervisory authority over the employee.<sup>132</sup>

The act entertains the right to take legal action in case of retaliation by a whistleblower.<sup>133</sup>

The act also provides for the employee to be awarded all relief necessary to make the individual whole. This includes compensation, reinstatement and special damages incurred as a result of discrimination.<sup>134</sup>

### 3.9 CRITIQUE OF THE SARBANES OXLEY ACT

The act does not give indemnity in case a confidentiality agreement is breached. Its impact is also limited to financial matters.

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<sup>130</sup>According to Thomas Devine, op cit, [www.governmentaccountability.org/](http://www.governmentaccountability.org/) and <http://www.whistleblowers.org/>

<sup>131</sup> Section 301, Sarbanes Oxley Act (2002)

<sup>132</sup> Section 403, Sarbanes Oxley Act (2002)

<sup>133</sup> Section 407, Sarbanes Oxley Act (2002)

<sup>134</sup> Section 304, Sarbanes Oxley Act (2002)

### 3.10 THE FALSE CLAIMS ACT

This act was designed to stop fraud within the government. It provides fifteen to thirty percent of the government's total recovery, the percentage depending on the extent to which the whistleblower took the action that enabled the recovery to take place. It was amended in 1986 to establish protections for whistleblowers, and to prevent harassing and retaliation against them.<sup>135</sup> The bill permits anonymous disclosure which has been copied by various states

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<sup>135</sup> False Claims Act (1863)

## CHAPTER FOUR

### 4.1 FINDINGS AND DISCUSSION

From the discussions above, we find that proper internal disclosure procedures is required in any organisation or company in order to aid in the fight against corruption.<sup>136</sup> According to the complicity theory and the standard theory, inside persons are the ones who are able to access vital information to the public that expose wrong doing in any company. The inside persons may be accomplices or employees of the organisation who have access to information. According to the natural law theory man is naturally inclined to expose wrongdoing.<sup>137</sup> This is because, according to Thomas Aquinas, man is naturally inclined to do that which is for the common good.

Therefore instituting of proper internal disclosure systems in a company is likely to facilitate disclosure as confidence of the whistleblowers is built. This will allow investigations to be carried out to apprehend the crime.<sup>138</sup> In some instances it may not be necessary to expose information to the media where the matter is not of serious concern.<sup>139</sup>

The United Nations convention against Corruption requires countries to set up a legal framework that protects whistleblowers to encourage the fight against corruption.<sup>140</sup> Its main objective was to ensure state parties meet the objectives set forth in the convention.<sup>141</sup> One of the objectives set forth is the protection of whistleblowers by requiring state parties to set up legal frameworks to protect whistleblowers against retaliation.<sup>142</sup> It covers all forms of harassment which is one of the strengths of the convention as it covers a wide scope. The convention also talks about the persons to be protected. Which in this case it identifies them as inside persons. It talks about the need for including ordinary citizens as protected persons' not just employees of a particular organisation.<sup>143</sup>

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<sup>136</sup> Instead of excluding the security services altogether, it would be preferable to devise special rules for the protection of information about international relations and intelligence. See, for example, the provisions of the New Zealand Protected Disclosures Act 2000.

<sup>137</sup> Thomas Aquinas' Summa Theologica'.

<sup>138</sup> Michael D, 'Business and Professional Ethics: some paradoxes of whistle blowing' (1986)

<sup>139</sup> Banisar D, Whistleblowing: International Standards and Developments, (2009) 27

<sup>140</sup> Article 33, United Nations Convention Against Corruption(2003)

<sup>141</sup> Article 63, United Nations Convention Against Corruption (2003)

<sup>142</sup> Article 33, United Nations Convention Against Corruption (2003)

<sup>143</sup> Article 37, United Nations Convention Against Corruption (2003)

The African Union Convention on Preventing and Combating Corruption main objective is to promote and strengthen mechanisms to detect, punish and eradicate corruption.<sup>144</sup> It also ensures effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in state parties.<sup>145</sup> It also aims at coordinating and harmonising the policies and legislation between state parties for the purpose of preventing, detecting and punishment and eradication of corruption.<sup>146</sup> The convention talks about the need of state parties to incorporate the right to access information in cases where transparency is required. This is in order to ensure accountability of the government resources is guaranteed.<sup>147</sup> The convention requires state parties to adopt legislation measures to combat corruption in the private sector.<sup>148</sup>

Therefore these two conventions provide a guideline for state parties to adhere to when incorporating whistleblower protection laws as whistleblowers play a major role in the fight against corruption.

In Kenya today, it is important that we implement laws that protect whistleblowers specifically, as currently the laws only have a bearing of whistle blowing as we have seen in the Witness Protection Act and the Access to information bill which is now law.

From the case of David Munyakei, we find that he was unfairly dismissed from his job and therefore was not able to get employed anywhere else because of blowing the whistle. His case however, should have been handled differently. The employments act talks about unfair dismissal<sup>149</sup> and instances where termination will be deemed to be unfair in any employment contract. Nevertheless, David Munyakei was a whistleblower therefore proper legislation is required to protect people who report information of great importance to the public as they face a risk of retaliation which was seen in this case.

The Public Interest Disclosure Act and the Employments Rights act of 1996 gives substantial protection to whistleblowers despite the various setbacks it has. It provides guidance as to how laws to protect whistleblowers in Kenya should be.

The Whistleblower Protection Act of the USA as well as the False Claims Act and the Sarbanes Oxley Act also provide a basis of reference for Kenya in incorporating whistleblower protection laws. The Whistleblower Protection Act provides protection for any

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<sup>144</sup> Article 2(1), African Union Convention on preventing and combating corruption (2003)

<sup>145</sup> Article 2(2), African Union Convention on Preventing and Combating Corruption (2003)

<sup>146</sup> Article 2(3), African Union Convention on Preventing and Combating Corruption (2003)

<sup>147</sup> Article 9, African Union Convention on Preventing and Combating Corruption (2003)

<sup>148</sup> Article 11, African Union Convention on Preventing and Combating Corruption (2003)

<sup>149</sup> Section 45, Employment Act cap 226 Revised Edition (2012)

disclosure made by an employee who he reasonably believes is a violation of law.<sup>150</sup> This is unlike the Public Interest Disclosure Act which only covers protected disclosure. The disclosure in the Whistleblower Protection Act (WPA) is protected on the condition that the disclosure is not prohibited under the law.<sup>151</sup> The act also strives to ensure that disclosure made to the congress is protected.<sup>152</sup>

The False Claims Act also shows the need for Kenya to incorporate laws that give rewards to whistleblowers to instil the culture of whistle blowing.

The Sarbanes Oxley Act on the other hand, mainly focuses on corporate accountability. The act requires transactions and relationships which are off the balance sheet to be disclosed.

Munyakei therefore should have been protected and compensated for the lose he incurred for exposing financial crime in the Goldenberg scandal.

These acts in a nutshell show the importance of having proper legislation that caters for whistleblowers as accountability and transparency in any organisation is enforced through clear and proper laws. Whistle blowing can be a powerful mechanism for bringing about a more ethical climate in our public and private institutions. Effective whistle blowing has a significant impact to many areas of the society. It has removed a president from office.<sup>153</sup> The challenge usually arises with the legislation to protect whistleblowers.

The UK laws as well as that of the USA on whistleblower protection therefore provide a guideline for Kenya in implementing legislation to protect whistleblowers. This is because although corruption affects most states, the UK and USA have tried to implement policies that ensure minimal corruption cases based on the corruption perception index.<sup>154</sup>

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<sup>150</sup> Section 2, Whistleblower Protection Act (1989)

<sup>151</sup> Section 2, Whistleblower Protection Act (1989)

<sup>152</sup> Section 1205, Whistleblower Protection Act (1989)

<sup>153</sup> United States v Nixon (1974) 418 US 683

<sup>154</sup> <http://www.transparency.org/cpi/2015> on 1 February 2016.

## CHAPTER FIVE

### 5.1 RECOMMENDATIONS AND CONCLUSION

In order for Kenya to ensure protection is accorded to whistleblowers of economic crimes since they play a vital role to curb corruption which is rampant in Kenya today, the following recommendations should be carefully considered;

It is important that whistleblowers are protected specifically. This means that proper legislation for whistleblower protection should be incorporated. A broad definition of a whistleblower is required to include any person who reasonably believes that wrong doing is taking place in a particular company. It does not have to be an employee or an inside person as provided in the Public Interest Disclosure Act but any citizen who believes that an illegal activity is taking place in a particular company.<sup>155</sup>

Whistleblowers should be able to have access to anonymity if they wish not to be identified as the sources of information due to fear for their lives.<sup>156</sup> They should be able to choose whether they want their personal information to be released to the public. Although, it is difficult for law enforcers to pursue anonymous claims<sup>157</sup> it is however important to avail the clause to the discretion of the whistleblowers so as to help reduce the fear of disclosure.

It is also important to ensure whistleblower policies and procedures are clear with regards to the entire process of reporting. This gives confidence to the whistleblowers as they are aware of the entire process.<sup>158</sup> Proper channels of reporting should be made clear in whistleblower legislation whether it is an internal disclosure or external disclosure to a body or to the public. Internal disclosure however is encouraged, external disclosure especially to the media should be the last resort.<sup>159</sup>

Private entities are also required to set up whistleblower policies, not just the public entities. This is because they correlate for example increased corruption in the private sector play a

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<sup>155</sup> U4 Anti-Corruption Resource Centre, Good Practice in Whistle blowing Protection Legislation (2009) 3.

<sup>156</sup> Article 64, South Korea's Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption and Civil Rights Commission (2008)

<sup>157</sup> UNCAC review on Fiji

<sup>158</sup> Section 10(4), South Africa's Protected Disclosure Act (2000) requires the relevant Minister to issue "practical guidelines which explain the provisions of this Act and all procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety". All organs of state must give every employee a copy of these guidelines or must take "reasonable steps to bring the relevant notice to the attention of every employee".

<sup>159</sup> Banisar D, 'Whistleblowing: International Standards and Developments', 27.

role in reducing the shareholder value.<sup>160</sup> The law should make it mandatory for private companies to institute internal disclosure mechanisms so as to ease the disclosure process.

It is important that the institutional framework for protection of whistleblowers is left to competent authorities for example the courts. Powerful courts should have jurisdiction to hear the matter. Bodies such as the EACC have failed as studies show that they have made one conviction since it was incorporated.<sup>161</sup>

There is need to ensure follow up is done when issues are reported. This will ensure proper investigations are done and completed in a timely fashion thus enable action to be taken to the concerned parties.<sup>162</sup>

It is important to avail rewards to whistleblowers so as to provide an incentive for them to come forward and disclose information. In this case they provide the whistleblower with a proportion of any funds recovered or penalties enforced as a result of the report. This is in accordance with False Claims Act. It is therefore important that the body tasked with giving rewards to be capable of dealing with such demands as it will lose disrepute when it falls short of its obligations.

Compensation is also necessary for whistleblowers in cases where they suffer from disclosing information.<sup>163</sup>

There should not be an investigation of a person's motive for making a disclosure.<sup>164</sup> Public interest should have more weight as compared to the motive behind the disclosure. Whistleblowers should be protected if they have reasonable grounds to believe that the information they disclose is true.

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<sup>160</sup>Guidelines on whistle blowing programmes for companies, International Chamber of Commerce (2008)

<sup>161</sup> Muigai G, Report on the task force on the review of the legal policy and institutional framework for fighting corruption in Kenya, 20<sup>th</sup> November 2015.

<sup>162</sup> Code of Practice for Whistle blowing Arrangements, British Standards Institute and Public Concern at Work (2008)

<sup>163</sup>Banisar D, Whistle blowing: International Standards and Developments (2009), 32.

<sup>164</sup>His Honour Judge McMullen QC observed in *Boulding v Land Securities Trillium* (UKEAT/0023/06/ RN): "the legislation is to be made to operate to protect those whose employers and colleagues may regard as eccentric and misguided in their response to an irregularity at work". It was accepted that Mr Boulding, who represented himself at the EAT, was "clinically depressed and suicidal at the times relevant to this case". Without having heard evidence from the respondent, the ET had acceded to the submission that there was no case to answer and awarded ?10,000 in costs. In the earlier case of *Morrison v Hesley Lifecare Services* UKEAT/0534/03/DM, the same judge had stated that "this legislation is designed to protect people who no doubt would be regarded as officious, at best and bloody minded at worst". Mr Morrison was found not to have acted in good faith and 10,000 costs were awarded against him.

Legislation should relieve individuals of criminal and civil liability. If reasonable belief turns out to be incorrect, defamation proceedings may be brought against the individual. This might deter individuals from disclosing information for fear of the criminal and civil liability that might incur.<sup>165</sup> Since persons who report in good faith are the ones protected, it is important to provide absolute privilege to persons who report the wrong doings.

Workers who disclose information should be entitled to a transfer if they are high likely to face discrimination at the work place.<sup>166</sup> Proper legislation should be set up to protect their interests and ensure they do not face retaliation or discrimination. Statutory protection should be put in place to outlaw post employment detriments or victimisation that arises or is in connection with the employment relationship. This will be in consistent with the notion that whistleblowers should be protected from all forms of discrimination.<sup>167</sup> This will help with the common problem of not providing reference to information obtained.

The burden of proof should shift to the employer to prove that the action he or she took to the employee is not related to the disclosure. This is with regards to the burden an employee would undergo to prove that the dismissal was as a result of the disclosure.<sup>168</sup>

Establishing of hotlines is also a way of facilitating reporting of wrong doing. This is seen in countries such as Indonesia.<sup>169</sup> Establishing hotlines in private companies also is a way of encouraging reporting in the private sector.

Adequate remedies should be provided for individuals who have been victimised for disclosing information. A full hearing and appropriate financial compensation should be given if the effects of the retaliatory measures cannot reasonably be undone.<sup>170</sup> Such remedies may take into account not only lost salary but also compensatory damages for suffering.<sup>171</sup>

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<sup>165</sup> A v X (2001), the ET found that the claimant had been threatened with an action for slander if he mentioned the incidents that had occurred to anyone.

<sup>166</sup> Section 4(2) & (3), South Africa's Protected Disclosures Act provides that an employee who reasonably believes that s/he may be adversely affected on account of having made a protected disclosure "must, at his or her request and if reasonably possible or practical, be transferred ... to another post" on not less favourable terms and conditions.

<sup>167</sup> *Fidelis School v Boyle* [2004] IRLR 268

*Boulding v Land Securities Trillium Ltd* (2006) UKEAT

<sup>168</sup> Section 4(2)a, South Africa Public Disclosure Act (2000)

<sup>169</sup> Corruption Eradication Commission of Indonesia (KPK), Whistleblower System, available at: <http://kws.kpk.go.id/>

<sup>170</sup> Council of Europe Parliamentary Assembly Resolution 1729 on the Protection of Whistleblowers, Article 6.2.5 (2010)

<sup>171</sup> Banisar D, 'Whistle blowing: International Standards and Developments', 32.

Whistleblower protection legislation should be supported by effective awareness-raising, communication, training and evaluation efforts.<sup>172</sup> Communicating to public or private sector employees their rights and obligations when exposing wrongdoing is essential. This is very crucial to help tackle the culture of anti-whistle blowing.

## 5.2 CONCLUSION

It is evident that whistle blowers of economic crimes are needed so as to aid in the fight against corruption. This makes it important for Kenya to incorporate steps towards ensuring that the law protects these whistleblowers in order to ensure the culture of anti-whistle blowing is done away with.

Taking into account the recommendations above, especially with regards to procedure to be followed in disclosure of information and the relevant authorities to deal with such disclosures is important. The procedures and bodies to deal with such cases should be clear in the law as these organisations will be the ones to ensure follow up and justice prevails.

In Kenya therefore an independent body with powers to prosecute should be established to deal with such cases.

Clear laws will enable whistleblowers to come forward and therefore creating awareness of the importance of whistle blowing will bear fruits as individuals will be encouraged to come forward to report.

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<sup>172</sup> The Recommendation stresses in its Principle 4 that “public servants need to know what protection will be available to them in cases of exposing wrongdoing”. It can be accessed at: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=129&InstrumentPID=125&Lang=en&Book=False>

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