

A CRITIQUE OF THE LEGAL FRAMEWORK ON WHISTLEBLOWER PROTECTION FOR EMPLOYEES IN KENYA

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By

Gikonyo Vivian Wangeci

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Dr. Anne Kotonya

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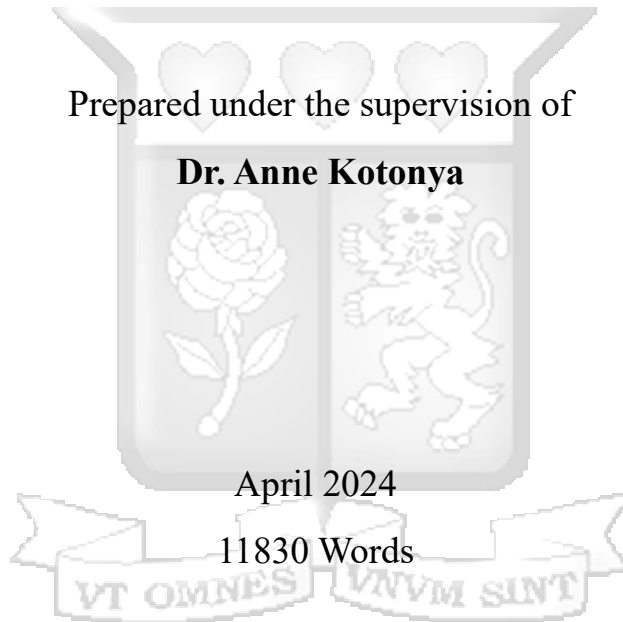
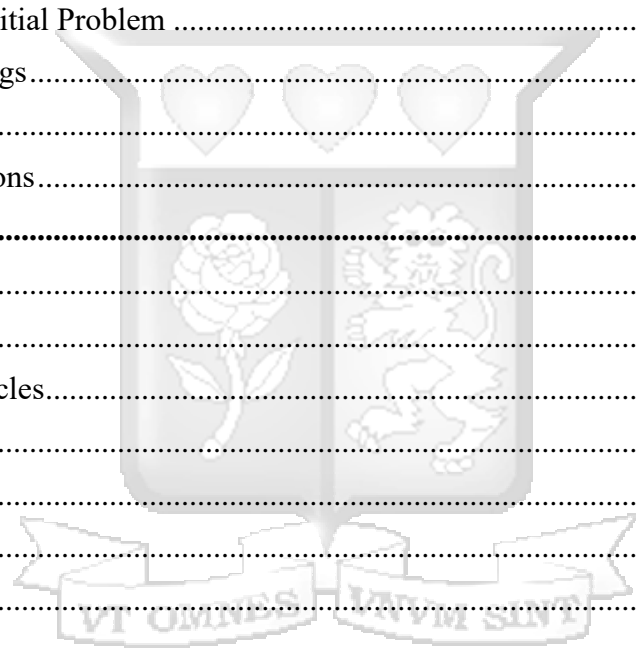


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Declaration

I, GIKONYO VIVIAN WANGECI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

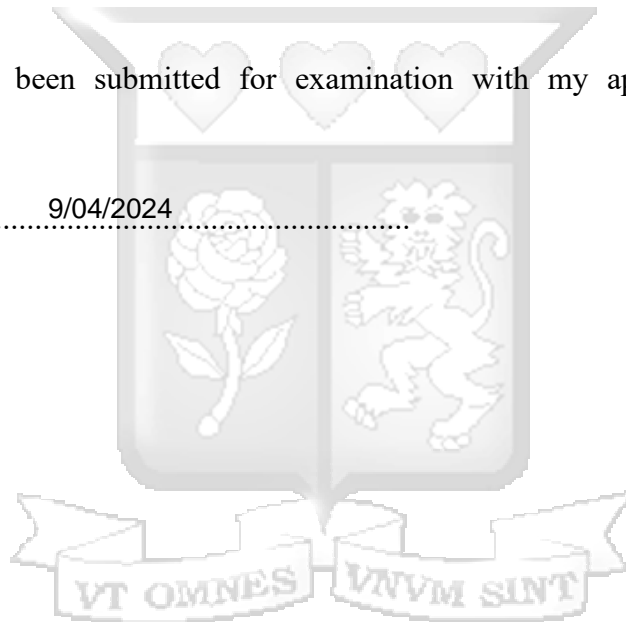
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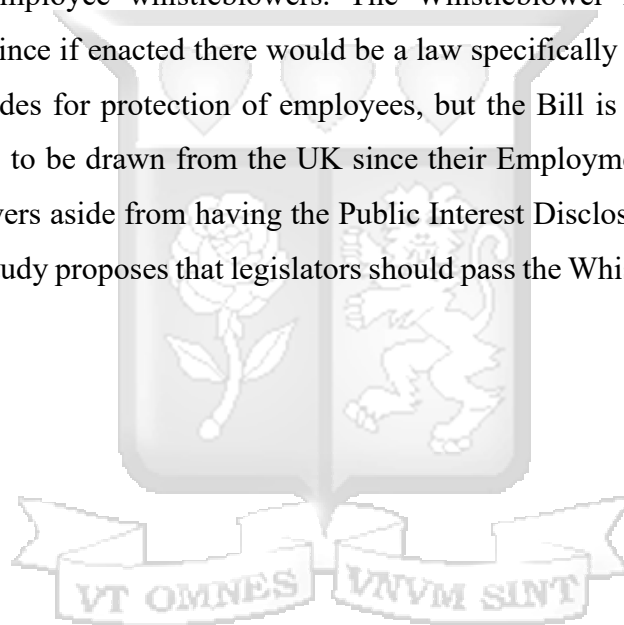
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Dr. Anne Kotonya.



Abstract

This dissertation is a critique of the Legal Framework on whistleblower protection in Kenya. This study is out to find out the effectiveness of the Bribery Act and section 65 of the Anti-Corruption and Economic Act in so far as it protects employee whistleblowers. Additionally, this study is also out to assess the strengths and weaknesses of the Whistleblower Protection Bill of 2023. Lastly, the study compares the UK laws on whistleblowing to that of Kenya and seeks to find out the lessons that could be learnt from the UK laws on whistleblowing. In conducting the study, primary and secondary sources of data collection are used in answering the questions. After analysing the Bribery Act and section 65 of the Anti-Corruption and Economic Crimes Act it is discovered that the laws indeed are sector specific and do not sufficiently protect employee whistleblowers. The Whistleblower Protection Bill would remedy the situation since if enacted there would be a law specifically on whistleblowing and that specifically provides for protection of employees, but the Bill is still yet to be enacted. There are also lessons to be drawn from the UK since their Employment Rights Act protects employee whistleblowers aside from having the Public Interest Disclosure Act which protects whistleblowers. The study proposes that legislators should pass the Whistleblower Bill into law to protect employees.



List of Abbreviations

UK – United Kingdom

UNCAC - United Nations Convention on Anti-Corruption



List of Cases

Emy Amwayi Mattakwa v Kenya Revenue Authority (2022) eKLR

Kennedy Maina Mirera v Barclays Bank of Kenya Limited (2021) eKLR.

Michael Kiptoo v Kenya Medical Training College & another; Ethics and Anti-Corruption Commission & another (2021) eKLR.

Spencer Sankale Olochike v Maasai Mara University; Transparency International Kenya & 22 others (Interested Parties) (2021) eKLR.



List of Legal Instruments

Anti-Corruption and Economic Crimes Act (No.3 of 2003)

Bribery Act (No.47 of 2016)

Constitution of Kenya (2010)

Employment Rights Act, UK (1996)

Public Interest Disclosure Act, UK (1998)

Whistleblower Protection Bill (2023)



CHAPTER 1: INTRODUCTION

1.1 Background

Whistleblowing is a term that has been defined by scholars as the disclosure by a member of an organization of illegal, unethical, harmful or illegitimate practices by an organization to relevant parties who might act.¹ Whistleblowing is a process that entails the whistleblower, the act of whistleblowing, the recipient of the complaint, and the organization implicated by the complaint.² The whistleblower often is normally a former or current employee who lacks the authority to control the wrongdoing of the employer.³

It is common for employee whistleblowers in the workplace to face retaliation from their employers.⁴ This retaliation can take many forms such as termination of employment, transfers, harassment, and workplace bullying amongst others. This therefore leads to employees facing a dilemma before deciding to whistle blow.⁵ Employees are torn between their duty to advocate for their clients and their desire to maintain their employment. They must decide on whether to risk their professional and personal happiness to report employers' violation.

The laws on whistle-blower protection come in to assist with this dilemma.⁶ This is because ideally the laws on whistleblowing should encourage reporting of employers' violations without risking retaliations such as termination of employment.

In Kenya there is an existing legal framework on whistleblowing which includes The Constitution of Kenya, Acts of Parliament such as the Anti-corruption and Economic Crimes Act, the Bribery Act and lastly there is a proposed Whistleblower Protection Bill of 2023 which is yet to become law.⁷ However, employees in Kenya still suffer the wrath of whistleblowing and often face victimisation at the place of work.⁸ This is because the existing laws are sector specific and do not directly protect employee whistleblowers at the workplace. The Bribery Act

¹ Domfeh K and Bawole N, 'Muting the whistleblower through retaliation in selected African countries' 11 *Journal of Public Affairs* 4, 2011, 335.

² Near P and Miceli P, 'Organizational Dissidence: The case of whistleblowing' 4 *Journal of Business Ethics* 1, 1985, 2.

³ Near P and Miceli P, 'Organizational Dissidence: The case of whistleblowing' 2-3.

⁴ Bjørkelo B, Ryberg W, Matthiesen S and Einarsen S, 'When You Talk and Talk and Nobody Listens: A Mixed Method Case Study of Whistleblowing and Its Consequences' 13 *International Journal of Organisational Behaviour* 2, 2008, 18.

⁵ Delk K, 'Whistleblowing—Is It Really Worth the Consequences?' 61 *Workplace Health & Safety* 2, 2013, 61.

⁶ Delk K, 'Whistleblowing—Is It Really Worth the Consequences?' 61.

⁷ Kichana P, 'Kenyan Laws cannot protect whistleblowers' Transparency International Kenya, 2006, 1-8. ⁸

⁸ Kichana P, 'Kenyan Laws cannot protect whistleblowers' 1-8.

is limited to bribery acts and corruption in protecting whistleblowers, and the Anti-Corruption and Economic Crimes Act is limited to corruption and economic crimes. There have been many reported cases where employees have lost their jobs, with some receiving threats because of whistleblowing.⁹ This has clearly been contributed by the lack of a clear legal framework that directly protects employees who act as whistleblowers in employment.

For example, in the case of *Emy Amwayi Mattakwa v Kenya Revenue Authority*, the claimant was an employee who was terminated from employment following their disclosure of irregularities concerning the release of containers at the port.¹⁰ The court in determining whether there was unfair termination relied on the Employment Act and the Constitution of Kenya in making their finding. The court ruled that the termination lacked a legitimate basis and constituted a violation of the employee's safeguard as a public officer under section 236 of the Constitution of Kenya. The claimant, acting as a whistleblower, was faulted solely for fulfilling their duty to whistle blow. In this case it is eminent that there is a lack of an Act or law that directly protects whistleblower employees from being terminated from employment or from other retaliatory actions by employers. The court in the case had to determine whether the employee is a public officer in order to be protected under section 236 of the Constitution and whether there is a valid reason for termination under the Employment Act.

Similarly, in the case of *Spencer Sankale Olochike v Maasai Mara University & others* the petitioner, a professional accountant and employee, acted as a whistleblower upon uncovering fraudulent activities within his scope of duties, as mandated by his profession.¹¹ Following his whistleblowing, the petitioner was subsequently terminated from his employment. The petition revolves around safeguarding the rights of employees who raise concerns about the behaviour of senior staff and subsequently face accusations of insubordination. Despite the dismissal of the petition, the petition raised important questions about the evolution of laws aimed at protecting whistleblowers from retaliation in their workplace.

⁹ *Emy Amwayi Mattakwa v Kenya Revenue Authority* (2022) eKLR and *Spencer Sankale Olochike v Maasai Mara University; Transparency International Kenya & 22 others (Interested Parties)* (2021) eKLR.

¹⁰ *Emy Amwayi Mattakwa v Kenya Revenue Authority* (2022) eKLR.

¹¹ *Spencer Sankale Olochike v Maasai Mara University; Transparency International Kenya & 22 others (Interested Parties)* (2021) eKLR.

In conclusion, whereas the laws generally on whistleblowing exist, they protect the act of whistleblowing but not the whistle-blower who in this case is normally the employee. The laws are inefficient in the protection of employees for whistleblowing.

1.2 Statement of the Problem

The Kenyan legal framework on whistleblowing has evident gaps.¹² The law does not directly protect employee whistleblowers in the workplace.¹³ The law that exists is sector specific for example the Bribery Act is only limited to acts of bribery and corruption.¹⁴ The Whistleblower Protection Bill of 2023 is an attempt to protect whistleblower in general, but this Bill is yet to be passed even after being proposed in 2021. Therefore, there is no law that sufficiently protects employee whistleblowers from retaliation by employers.

As a result, the situation in Kenya has been that employees often hold back sensitive information since there is a lack of a proper disclosure protection system and many fear the repercussions that come with relaying such information which includes termination from employment. This study will critique the legal framework on whistleblower protection for employees.

1.3 Research Objectives

1. To investigate the effectiveness of the Bribery Act of 2016 in protecting employee whistleblowers in Kenya.
2. To investigate the effectiveness of section 65 of the Anti-Corruption and Economics Act in protecting employee whistleblowers in Kenya.
3. To analyse the strengths and weaknesses of the Whistleblower Protection Bill.
4. To investigate the lessons that could be learnt from how the UK has drafted their laws on whistleblower protection.

¹² Kogo G, 'The Legal Framework for Whistleblower Protection in Kenya and Examination of Economic Crimes' unpublished, Strathmore University, Nairobi, 2016, 12.

¹³ Kichana P, 'Kenyan Laws cannot protect whistleblowers', 1-8

¹⁴ Preamble, *Bribery Act* (No. 47 of 2016) An Act of Parliament to provide for the prevention, investigation and punishment of bribery, and for convicted purposes.

1.4 Research Questions

1. How effective is the Bribery Act in protecting employee whistleblowers?
2. How effective is section 65 of the Anti-Corruption and Economics Act in protecting employee whistleblowers?
3. What are the strengths and weaknesses of the Whistleblower Protection Bill?
4. What lessons can Kenya learn from the UK laws on whistleblowing?

1.5 Hypothesis

Expanding the legal framework on whistleblower protection in Kenya to directly protect employees rather than being sector-specific would address the limitations of the existing laws on whistleblowing in Kenya.

1.6 Justification

Employees are the persons that are affected the most by the lack of a proper legal framework for whistleblowers. Employees are the whistleblowers and are the ones who face retaliation actions from employers when they whistle blow. This problem has been created by lack of proper laws on whistleblowing. That is why this study will be useful to law makers as they amend the laws on whistleblowing or as they enact new laws. Additionally, researchers who are also working on research on this topic would also benefit from this study.

1.7 Theoretical Framework

1.7.1 Public Interest Theory

The Public interest theory is a theory on regulation.¹⁵ The theory suggests that regulation aims to safeguard and promote the welfare of the public.¹⁶ The theory explains why government intervene through regulation which is to promote the general welfare rather than interest of individuals, what we are referring to as public interest. This theory is an economic theory attributed to Richard Posner who asserts that regulation arises in response to public demand for rectifying inefficient or inequitable market practices.¹⁷ The theory rests on two premises: firstly, that economic markets are highly delicate and prone to significant inefficiencies if left

¹⁵ Hantke-Domas M, 'The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?' 15 *European Journal of Law and Economics* 1, 2003, 165.

¹⁶ Hantke-Domas M, 'The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?' 165.

¹⁷ Posner R, 'Theories of Economic Regulation' Centre for Economic Analysis of Human Behaviour and Social Institutions, Working Paper Number 41, 1974, 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=259352

unregulated, and secondly, that government regulation entails minimal costs.¹⁸ This theory has been subject to critiques but the critique of interest to us is that there is an ambiguity on what is public interest, and that the theory lacks a framework to know whether public interest has been met.¹⁹ However, there are three main theories on Public interest namely the aggregative, the procedural, and the unitary approaches which have assisted to determine what constitutes public interest and whether a law serves the public interest which will be discussed below.²⁰

1.7.1.1 The Aggregative Approach

This was an approach taken by Jeremy Bentham who stated that public interest is the interest of the community.²¹ According to Bentham, the community's interest is the aggregate of the interests of its individual members.²² Therefore, to determine whether a law serves the public interest, one must evaluate its impact on the happiness or well-being of each individual member comprising the public and tally the outcomes. If the law benefits a greater number of individuals than those harmed by it, it can be deemed to be in the public interest.

1.7.1.2 The Procedural Approach

This approach maintains that the public interest arises from a democratic decision-making process. According to this approach, individuals and interest groups concentrate on advancing their own self-interest or the interests of their respective groups. Therefore, the results of a fair decision-making procedure are the public interest. This is different from the aggregative approach since here one does not tally whether the law benefits more individuals that harm them but rather the results of a democratic contest. In this approach if people democratically vote in a law, then that law is said to be in the public interest of the people.

1.7.1.3 The Unitary Approach

This approach, as articulated by Aristotle, conceptualizes the state as a form of partnership or association. Analogous to any partnership, its establishment is geared towards achieving a common good beneficial to all its members. The good pursued by the state encompasses the most comprehensive good and is applicable to all individuals.

In this perspective, the public interest is not derived solely from individuals' private interests. Instead, it stems from a comprehensive moral framework that equally encompasses both private

¹⁸ Posner R, 'Theories of Economic Regulation' 2.

¹⁹ Boot R, 'The Feasibility of a Public Interest Defence for Whistleblowing' 39 *Law and Philosophy* 1, 2019, 7.

²⁰ Boot R, 'The Feasibility of a Public Interest Defence for Whistleblowing' 7-13.

²¹ Bentham J, *An Introduction to the Principles of Morals and Legislation*, eds, Oxford University Press, Oxford, 1996,12.

²² Bentham J, *An Introduction to the Principles of Morals and Legislation*,12.

and public interests. Consequently, a law cannot be deemed to serve the public interest if it does not acter to the interest of all its members. Likewise, it cannot genuinely serve the interest of a specific individual if it does not align with the public interest as well.

The Public Interest theory is used to critique the legal framework in Kenya. Whistleblower protection laws were introduced by the government and were used to regulate by protecting whistleblowers who often suffer the wrath of whistleblowing. Therefore, this theory is useful in assessing whether the existing laws on whistleblowing are for the public interest using the different approaches on public interest discussed above.

The Public Interest theory is used to critique the existing whistleblower laws in Kenya by assessing whether the laws can be said to be of public interest given the three approaches that help define public interest. The theory is also used to assess the strengths and weaknesses of the Whistleblower Protection Bill using the same lens as that used in assessing the existing Acts.

1.8 Literature Review

Scholars in Kenya have argued that Kenyan laws cannot protect whistleblowers.²³ This argument by Philip Kichana amongst others is founded on the fact that the existing laws in Kenya on whistleblowing have shortcomings²⁴ It is their argument that employee whistleblowers should be protected since whistleblowing for them is a breach in the contract of employment and because disclosure by the whistleblower is in the public interest.²⁵

The shortcomings of the Whistleblower laws according to the scholars is founded on the fact that laws such as the Anti-Corruption and Economic crimes Act do not define an informer hence it is not to be assumed that a whistleblower is an informer and that the Act limits reportage to the Kenya Anti Corruption Commission and yet there more agencies such as the Kenya National Commission on Human Rights and the Kenya Police, among others, that might be more suitable. However, it is evident that whistleblowers are protected in Kenya. The issue is just that the laws are sector-specific and fail to protect employees.

²³ Kichana P, 'Kenyan Laws cannot protect whistleblowers' 1-8.
Webber Wentzel Dispute Resolution, '*Whistleblowing in Africa a Cross-Jurisdictional Guide*' 8 September 2022, 19.

²⁴ Kichana P, 'Kenyan Laws cannot protect whistleblowers' 1.

²⁵ Kichana P, 'Kenyan Laws cannot protect whistleblowers' 3.

There are existing laws on whistleblowing and the journey for establishing a legal framework in Kenya started when Kenya ratified the United Nations Convention on Anti-Corruption (UNCAC) in 2003 and in 2007 when it signed up to the African Union Convention on Preventing and Combatting Corruption. These instruments required a legal framework for whistleblowers.

The Constitution is one of the instruments in Kenya that protects whistleblowers.²⁶ Some existing Kenyan anti-corruption legislations cover aspects of whistleblower protection such as The Bribery Act (2016) which provides a definition of a whistleblower as ‘a person who makes a report to the Commission or the law enforcement agencies on acts of bribery or other forms of bribery. A whistle-blower under the Bribery Act is limited to acts of bribery and corruption.’²⁷

Additionally, the Anti-Corruption and Economic Crimes Act (2003) provides for the protection of informers.²⁸ There is an existing Whistleblower Protection Bill which would possibly provide a legal framework for whistleblowing in Kenya. The Bill though drafted in 2021, is still yet to become law in Kenya. The Bill was recommended in 2015 by a Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption. This prompted the later drafting of the Whistleblower Protection Bill.

An argument on the Whistleblower Protection Bill by Webber Wentzel is that it is anticipated that, once the Bill is in force, whistleblowers will receive substantial protection under the law.²⁹ The enactment of the Bill into law according to him would incentivise those who may otherwise fail to disclose improper conduct owing to a fear of reprisals.³⁰ However, even with the implementation of the Bill, employees will not be sufficiently protected. This is because the Bill introduces a disclosure procedure, which includes confidentiality, but that procedure is not mandatory for public and private bodies hence the fear of reprisals by employees will still be a challenge even with the implementation of the Bill.

In conclusion, Kenya requires a comprehensive legal framework to protect employees that come forth to disclose information regarding corrupt, illegal, fraudulent or hazardous activities.

²⁶ Article 236, *Constitution of Kenya*, (2010)

²⁷ Preamble, *Bribery Act* (No. 47 of 2016) An Act of Parliament to provide for the prevention, investigation and punishment of bribery, and for convicted purposes.

²⁸ Section 64, *Anti-Corruption and Economic Crimes Act* (No. 3 of 2003)

²⁹ Webber Wentzel Dispute Resolution, ‘*Whistleblowing in Africa a Cross-Jurisdictional Guide*’ 8 September 2022, 23.

³⁰ Webber Wentzel Dispute Resolution, ‘*Whistleblowing in Africa a Cross-Jurisdictional Guide*’ 8 September 2022, 23.

The next chapters outline the reasons for such a legal framework and the shortcomings of the existing laws on whistleblowing in Kenya. This is different from the works of other scholars since other scholars argue that there is no protection for whistleblowers, but the argument is that there is, just that it is sector-specific. Additionally, there is an agreement that Kenya needs a legal framework on whistleblowing, but few scholars critically analyse the shortcomings of the existing framework from an employee perspective since most scholars focus on a whistleblower generally and not an employee whistleblower.

1.9 Methodology

This study is based on qualitative research. The main sources of data are books, journal articles, and both Kenyan and foreign case law and reports. Additionally, this study makes use of primary sources such as the Constitution of Kenya, Employment Act, Anti-corruption and Economic Crimes Act, the Bribery Act and the Whistleblower Bill. The study is based on desk based research which is research based on collecting and analysing information from existing resources without conducting a field study.

In critiquing the legal framework of whistleblowing doctrinal analysis is used. This was mainly be done through books, journal articles and reports. For the lessons to be learnt from the UK Laws on whistleblowing, a comparative analysis of the UK laws and the Kenyan Laws on protection of employee whistleblowers was done. The comparative analysis relied on the UK laws since the already existing Kenyan laws on whistleblowing mirror UK laws and currently the UK have advanced their laws on Whistleblower Protection which is what Kenya hopes to achieve.

1.10 Chapter Breakdown

Chapter one serves as the introductory section of the study. It will set out, among others, the problem statement, research questions and objectives together with the justification of the study. Chapter two will then focus on analysing the legal framework of whistleblower protection in Kenya.

Chapter three will examine the strengths and weaknesses of the Whistleblower Protection Bill of 2023. Chapter four will study the lessons that could be learnt from how UK has drafted their laws on whistleblower protection.

Lastly, Chapter five will conclude and give recommendations.

CHAPTER 2: THE LEGAL FRAMEWORK ON WHISTLEBLOWING IN KENYA

2.1 Introduction

This Chapter looks at the existing legislation on whistleblowing in Kenya namely, the Bribery Act of 2016 and Anti-Corruption and Economic Crimes Act of 2003 and offers a critique on the Acts. In offering a critique, the guiding legal framework is the public interest theory to assess whether the whistleblower laws serve the public interest.

2.2 The Anti-Corruption and Economic Crimes Act

The Anti-Corruption and Economic Crimes Act of 2003, enacted by the Kenyan Parliament, aims to address corruption, economic crime, and related offenses through prevention, investigation, and punishment.³¹ Corruption encompasses acts such as bribery, fraud, embezzlement, abuse of office, breach of trust, and offenses involving dishonesty.³² Economic crime, as defined in the Act, refers to offenses involving dishonesty under any written law concerning the maintenance or protection of public revenue.³³

Under this Act, informers are accorded protection.³⁴ No action or proceeding, including disciplinary measures, can be initiated or upheld against an informer regarding their assistance to the Commission or an investigator, or their disclosure of information to the Commission or an investigator.³⁵ However, this safeguard for informers does not apply if the individual making the disclosure did not genuinely believe the information to be true.³⁶ Thus, a sincere belief in the truthfulness of the information is a crucial criterion for the protection of an informer.

2.2.1 A Critique of the Anti-Corruption and Economic Crimes Act

One of the critiques to the Act is that an informer has not been defined in the Act.³⁷ Therefore one cannot assume that an informer extends to a whistleblower. There have been difficulties in relating the Anti-Corruption and Economic Crimes Act as an Act protecting whistleblowers. The main questions being who is an informer under the Act? And is a whistleblower an

³¹ Preamble, *Anti-Corruption and Economic Crimes Act* (No 3 of 2003).

³² Section 2, *Anti-Corruption and Economic Crimes Act* (No 3 of 2003).

³³ Section 2, *Anti-Corruption and Economic Crimes Act* (No 3 of 2003).

³⁴ Section 65, *Anti-Corruption and Economic Crimes Act* (No 3 of 2003).

³⁵ Section 65(1), *Anti-Corruption and Economic Crimes Act* (No 3 of 2003).

³⁶ Section 65(2), *Anti-Corruption and Economic Crimes Act* (No 3 of 2003).

³⁷ Kichana P, 'Kenyan Laws Cannot Protect Whistleblowers' Transparency International Kenya, 2006, 3.

informer? This is because there is no direct reference to a whistleblower in the Act but just the mere mention of an informer.

With regards to employees, employee whistleblowers are not directly protected under the Act. Firstly, the law in itself is sector specific.³⁸ This is evident in the preamble as the Act is concerned with issues relating to corruption and economic crimes. Additionally, it is unclear whether the provision of protection of informers extends to employees. In the case of *Spencer Sankale Olochike v Maasai Mara University; Transparency International Kenya & 22 others* (The 'Mara Heist' Case) the petitioner raised concerns regarding the interpretation of Article 65 of the Anti-Corruption and Economic Crimes Act 2003, coupled with Article 236 of the Constitution, regarding the protection of whistleblowers from retaliatory actions by their employers.³⁹ The petition stemmed from the petitioner, an employee of the respondent, whistleblowing and exposing the university's top leadership for financial malpractice and other corrupt activities. Subsequently, the petitioner was terminated from employment. Thus, the petition focuses on safeguarding the rights of employees who challenge the behaviour of senior staff and subsequently face accusations of alleged insubordination.

Despite the acknowledgment in the submissions of the 1st and 3rd interested parties in the case that the petition introduces novel and distinctive facts, with potential benefits for labour practices concerning both employees and employers, the raised issues remained unresolved. The judges concluded that the petition did not present a significant legal question, leading to its dismissal. Therefore, there is still no clarity on how employees, if at all they are, protected under the Anti-Corruption and Economic Crimes from retaliatory activities of employers.

Regarding public interest theory, the Anti-Corruption and Economic Crimes Act does not serve the public interest as understood under the aggregative approach and the unitary approach. The Act can only be said to be in the public interest since it is an Act of Parliament and therefore through public participation and voting by members of parliament the law came into force. Therefore, to some extent it can be said to be in the public interest. However, under the aggregate approach of public interest, a law is said to be in the public interest if the law benefits more individuals than individuals that are harmed by it and under the unitary approach a law is

³⁸ Preamble, *Anti-Corruption and Economic Crimes Act* (No 3 of 2003).

³⁹ *Spencer Sankale Olochike v Maasai Mara University; Transparency International Kenya & 22 others (Interested Parties)* (2021) eKLR.

in the public interest if it benefits all the members of the society. The Anti-Corruption and Economic Crimes Act leaves out employees in protecting whistleblowing. The Act limits itself to acts of bribery and corruption and if an employee whistle blows outside these categories, they lack legal protection under the Act. The law therefore cannot be said to be in the public interest since it does not serve all the members of society's interest as per the unitary approach of public interest.

2.3 The Bribery Act

The Bribery Act of 2016 is an Act of parliament in Kenya whose objective is to provide a legal framework for the prevention, investigation and punishment of bribery and related offences.⁴⁰ The Act is modelled on the United Kingdom's Bribery Act of 2010 and hence are quite similar.⁴¹ Prior to the Bribery Act the legislative framework that governed corruption and bribery were the Anti-Corruption and Economic Crimes Act of 2003. The Bribery Act is an improvement to the Anti-Corruption and Economic Crimes Act which only provided for bribery as a form of corruption, but the Bribery Act covers bribery in totality.⁴² The Bribery Act unlike the other legislations, applies to both public and private entities.⁴³ The definition of private entities is wide and covers companies incorporated in Kenya, foreign companies, partnerships or charities that carry on business wholly or partly in Kenya.⁴⁴

The Bribery Act is the primary legislation governing the protection of whistleblowers.⁴⁵ The Act defines a whistle blower as a person who makes a report to the Ethics and Anti-Corruption Commission or the law enforcement agencies on acts of bribery or other forms of bribery.⁴⁶ The Bribery Act protects whistleblowers from intimidation and harassment because of whistleblowing in bribery related cases.⁴⁷ A person who demotes, admonishes, dismisses from

⁴⁰ Preamble, *Bribery Act* (No 47 of 2016).

⁴¹ McCusker R, 'Comparative Analysis of the UK Bribery Act 2010 and Anti-Bribery Legislation in Ukraine, Indonesia, and Kenya' Westminster Foundation for Democracy anti-corruption and integrity series 3, 2021, 2834, <https://www.wfd.org/what-we-do/resources/comparative-analysis-uk-bribery-act-2010-and-anti-bribery-legislation-ukraine> on 13 January 2024.

⁴² Preamble, *Bribery Act* (No 47 of 2016).

⁴³ Section 4, *Bribery Act* (No 47 of 2016)

⁴⁴ Section 2, *Bribery Act* (No 47 of 2016).

⁴⁵ Webber Wentzel Dispute Resolution, 'Whistleblowing in Africa a Cross-Jurisdictional Guide' 8 September 2022, 19.

⁴⁶ Section 2, *Bribery Act* (No 47 of 2016).

⁴⁷ Section 21 (1), *Bribery Act* (No 47 of 2016).

employment, transfers to unfavourable working areas a whistleblower is punishable under the law.⁴⁸ Additionally, the Act also provides for Witness protection and provides for a Witness Protection Agency.⁴⁹

The Cabinet Secretary has a duty under the Act to publish guidelines to assist private and public entities in implementing the procedures in preventing bribery and corruption.⁵⁰ In compliance with the provisions of the Act, the Cabinet Secretary published guidelines to assist public and private entities in the preparation of procedures for the prevention of bribery and corruption in 2020.⁵¹ In the said guidelines, the public and private entities should have procedures that shall provide effective measures for protection of whistle blowers, informants and witnesses. The measures include maintaining confidentiality on identity, details of the report and source of information; establishing reporting channels for informants or whistleblowers who have suffered reprisal owing to report or information they provided on bribery or corruption; taking appropriate action on reports of retribution or victimization of informants, witnesses and whistleblowers; instituting protection measures under the Witness Protection Act and regulations.⁵²

2.3.2 A critique of the Bribery Act

The Bribery Act being the primary legislation for whistleblowers is very sector specific.⁵³ From the preamble it is evident that the Act only covers corruption and bribery related offenses. A whistleblower is also only protected to the extent that they whistle blow on a bribery related case as provided in the Act. However, it is evident that whistleblowing is not limited to only bribery and corruption, but our laws only protect whistleblowers to that extent.

An example of whistleblowing that extends beyond bribery and corruption is the news reported incidence that took place at Mukumu Girls High School .⁵⁴ In that incidence, the cook of Mukumu Girls High School was dismissed from his position at the school after sharing information with the media which exposed the school. The school was exposed for its poor

⁴⁸ Section 21 (2), *Bribery Act* (No 47 of 2016).

⁴⁹ Section 21 (3), *Bribery Act* (No 47 of 2016).

⁵⁰ Section 12(1), *Bribery Act* (No 47 of 2016).

⁵¹ Guidelines under section 12(1), *Bribery Act* (No. 47 of 2016).

⁵² Guidelines under section 12(1), *Bribery Act* (No. 47 of 2016).

⁵³ Preamble, *Bribery Act* (No 47 of 2016).

⁵⁴ <https://nation.africa/kenya/counties/kakamega/mukumu-girls-cook-sacked-for-speaking-to-journalists-infood-poisoning-saga-4314090> on 13 January 2024.

sanitation in the kitchen which led to outbreak of an illness in the school that claimed the lives of three students and one teacher. Additionally, in the case of *Kennedy Maina Mirera v Barclays Bank of Kenya Limited* the whistleblowing was on lapses in the security and operational procedure at the Branch and that the Claimant was demanding sexual favours from staff members.⁵⁵ This has no relation to Bribery and Corruption and if an employee whistle blows on a matter that has nothing to do with corruption or bribery, they are not protected under the Bribery Act. The question then becomes, what law accords such employees protection? Also, can we then say the Bribery Act serves the public interest if it serves only the interests of a few? This is because the public interest according to unitary approach means the good to be pursued by the state is the most comprehensive good and to all people.

Another flaw of the Bribery Act is that even though the Act protects whistleblowers, it does not aptly protect employee whistleblowers even in corruption and bribery related cases.⁵⁶ Firstly, the Bribery Act is silent on the procedure for an employee to make a protected disclosure.⁵⁷ The Act only provides guidelines on measures that an organisation should put in place to enable the reporting, recording, processing, and dissemination of whistleblower reports for action and feedback. Secondly, the problem that employees face when they whistle blow is termination, transfers, harassment, and workplace bullying amongst other retaliatory acts. Even when termination occurs because of whistleblowing, case law has shown that courts rely on the Employment Act to determine whether there was wrongful termination for example rather than invoking section 21 of the Bribery Act which protects a whistleblower and criminalises dismissal from employment because of whistleblowing.

In the case of *Michael Kiptoo v Kenya Medical Training College & another; Ethics and Anti-Corruption Commission & another* the claimant had fit the definition of a whistleblower under the Bribery Act as he had made a complaint against a professor and the Vice Chancellor of the university vide a letter to the Ethics and Anti-Corruption Commission on corruption activities.⁵⁸ The claimant argued that he was victimised for whistleblowing since he was dismissed from service on ground of loss of a mattress placed in an ambulance where he was

⁵⁵ *Kennedy Maina Mirera v Barclays Bank of Kenya Limited* (2021) eKLR.

⁵⁶ Webber Wentzel Dispute Resolution, 'Whistleblowing in Africa a Cross-Jurisdictional Guide' 8 September 2022, 21.

⁵⁷ Webber Wentzel Dispute Resolution, 'Whistleblowing in Africa a Cross-Jurisdictional Guide' 21.

⁵⁸ *Michael Kiptoo v Kenya Medical Training College & another; Ethics and Anti-Corruption Commission & another* (2021) eKLR.

the driver, and which got lost 17 months before his dismissal. The court ruled that the Claimant was victimised and harassed for his whistle blowing complaints or activities to the Ethics and Anti- Corruption Commission. However, instead of the court relying on section 21 of the Bribery Act which protects whistleblowers from termination of employment because of whistleblowing, the court relied on section 5 (3) (b) of the Employment Act which prohibits harassment of employees and relied on the Employment Act to rule on unfair termination.

The reason for this is that when it comes to employees, the Employment Act governs employees and all employee activities. Therefore, when an employee is terminated from employment because of whistleblowing, practice has shown that the rules on termination of employees will be invoked rather than the whistleblowing laws since there are no laws on whistleblowing specific to employees. One must show that the matter is a bribery and corruption matter, and that the person fits the description of a whistle-blower under the Bribery Act and was since terminated for whistleblowing to be protected under the Bribery Act. The Bribery Act in this case cannot be said to be in the public interest since it does not achieve the comprehensive good of all people as per the unitary approach since employee whistleblower are left out under the Bribery Act. In theory employees are protected to the extent that they whistle blow on a bribery related matter under the Bribery Act, but practice has shown that when employees take such matters to court the court has been seen to rely not on the Bribery Act but the Employment Act to make its findings.

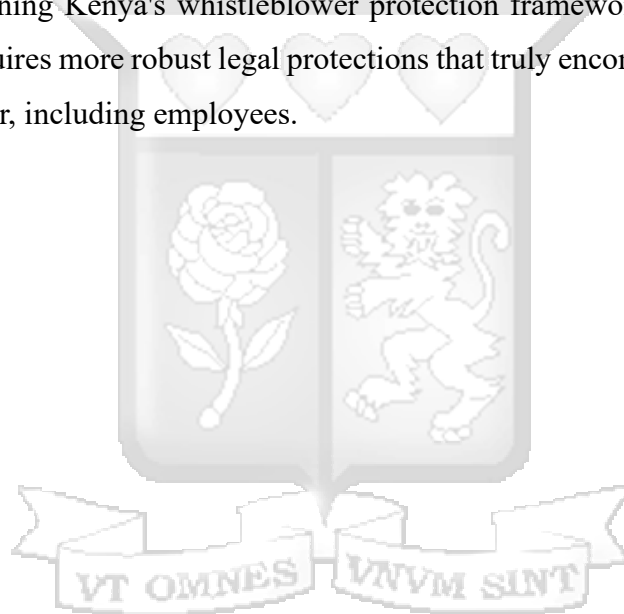
Lastly, the Bribery Act assumes that all whistleblowers disclose accurate information at all times. It does not pre-empt a situation where one intentionally discloses false information disguised as information relating to a protected disclosure or allegations regarding corrupt behaviour.

2.4 Conclusion

The Anti-Corruption and Economic Crimes Act, while aiming to combat corruption, offers limited protection for whistleblowers. Its ambiguous definition of "informer" leaves employees vulnerable. The Mara Heist case has show that even when employees expose corruption, they may lack clear legal recourse against retaliation. The Act also serves a public interest by tackling corruption, but it falls short by failing to protect all who whistle bow, contradicting the the unitary approach of public interest theory: benefiting all members of society.

The Bribery Act attempts to be the main shield for whistleblowers, focusing on bribery-related offenses. While it defines and protects whistleblowers, its reach is narrow, excluding non-bribery concerns. While employees are theoretically protected, the Act lacks clear reporting procedures for them, and courts often rely on the Employment Act, neglecting specific whistleblower protections. This raises questions about the Act's true commitment to the public interest, considering it leaves out non-bribery whistleblowing and fails to effectively shield employees.

Ultimately, both Acts have significant limitations in protecting whistleblowers, particularly employees. This chapter exposes the need for broader whistleblower legislation that encompasses diverse concerns, clarifies employee protection, and establishes clear reporting procedures. Strengthening Kenya's whistleblower protection framework to align with public interest principles requires more robust legal protections that truly encompass everyone willing to speak truth to power, including employees.



CHAPTER 3: THE WHISTLEBLOWER PROTECTION BILL

3.1 Introduction

Kenya has already enacted anti-corruption laws, such as the Anti-Corruption and Economic Crimes Act of 2003 and the Bribery Act of 2016.⁵⁹ However, these laws need to actively promote whistleblowing protection amongst employees. The Whistleblower Protection Bill of 2023, which aims to create a culture of whistleblowing in Kenya and unify all relevant laws, was tabled by Parliament to address this gap. The Bill is yet to become law and is currently tabled before parliament and has since undergone the first stage reading.

This chapter analyses the Whistleblower Protection Bill and assesses its strengths and weaknesses. The public interest theory is of importance in assessing the strengths and weaknesses.

3.2 Strengths of The Whistleblower Protection Bill

The Whistleblower Protection Bill of 2023 is a Bill for an Act of Parliament aimed at establishing a framework within Parliament to facilitate the reporting of improper conduct within both public and private sectors. Its primary objectives include protecting individuals who come forward with such disclosures from retaliation and addressing associated issues.⁶⁰

Firstly, a strength of the Bill is that it defines a whistle-blower therefore creating no doubt as to who whistleblowers are and therefore protected under the Bill.⁶¹ A whistleblower according to the Bill is any individual who, in compliance with this Act, discloses any data, information, fact, or incident pertaining to improper conduct.⁶² Defining is the first step of protecting and defining whistleblowers remedies a problem under the Anti-Corruption and Economic Crimes Act where an informant is not defined hence uncertainty of whether employee whistleblowers are informants and hence protected as such. On top of defining whistleblowers, Part VI of the Whistleblower Protection Bill focuses primarily on protecting whistleblowers including clauses that cover protecting informants from retaliation at work, handling retaliation in contracts, and how to file a complaint against retaliation.⁶³ The Bill offers orders for remedy in

⁵⁹ Onyango G, 'Whistleblowing behaviours and anti-corruption approaches in public administration in Kenya,' 9, *Economic and Political Studies*, 2,2021,232.

⁶⁰ Preamble of The Whistleblower Protection Bill (2023).

⁶¹ Section 2, The Whistleblowers Protection Bill (2023).

⁶² Section 2, The Whistleblowers Protection Bill (2023).

⁶³ Part VI, The Whistleblowers Protection Bill (2023).

circumstances of retaliation and secures confidential information revealed by whistleblowers.⁶⁴ The rights of whistleblowers are also expressly outlined in the Whistleblower Protection Bill.⁶⁵ These rights include information secrecy, immunity from criminal or civil liability, and protection from retaliation.⁶⁶ The protection also covers people who are connected to the whistleblower or require protection for additional grounds that the Commission deems adequate.⁶⁷ Furthermore, the purpose or motivation of the whistleblower is not taken into account when evaluating their eligibility for protection.⁶⁸ Section 25 forbids retaliation in the workplace, guaranteeing that an employer or an agent operating on behalf of an employer cannot negatively impact the terms of employment of an individual who provides information in compliance with the Bill.⁶⁹

Additionally, the Bill directly protects employee whistleblowers since the Bill suggests that all governmental and private organizations create and uphold documented policies and processes for handling and investigating employee disclosures.⁷⁰ Following the enactment of this Bill, employers will have to adopt a whistleblower policy that includes workplace retaliation and employee protection guidelines. It shall be illegal for employers to fire, demote, suspend, or harass a worker who reports inappropriate conduct to the Commission.⁷¹ Employee whistleblowers are protected from any form of retaliation resulting from disclosing information on improper conduct. Reprisal is any action resulting in harm, loss, intimidation, harassment, or bullying. It includes interference with a person's right to a lawful job, livelihood, or freedom through demotion and suspension. Other forms of adverse discrimination entail termination treatment in connection with employment, adverse treatment affecting the person's career, profession or trade, the imposition of disciplinary action or any other discriminatory measures that would negatively impact the exercise of rights protected by this Bill. These provisions directly protect employees as the Bill is not limited in its application as is the case in the Bribery Act and Anti-Corruption and Economic Crimes Act.

This prompts the question of public interest since the Bill is not limited in its scope to certain sectors and applies to employees. It is evident that at the centre of the Bill, is the public interest.

⁶⁴ Section 29, The Whistleblowers Protection Bill (2023).

⁶⁵ Section 24, The Whistleblowers Protection Bill (2023).

⁶⁶ Section 24(1), The Whistleblowers Protection Bill (2023).

⁶⁷ Section 24(2), The Whistleblowers Protection Bill (2023).

⁶⁸ Section 24(4), The Whistleblowers Protection Bill (2023).

⁶⁹ Section 25, The Whistleblowers Protection Bill (2023).

⁷⁰ Part V, The Whistleblowers Protection Bill (2023).

⁷¹ Section 25, The Whistleblowers Protection Bill (2023).

The Bill encompasses several objectives, including the protection of whistleblowers and the promotion of ethics and integrity, particularly among State officers and public officials within public entities.⁷² The Bill also aims to protect the public's trust in the management of both public and private entities by managing, looking into, and recommending changes to improper behaviour and retaliation.⁷³ It also intends to create incentives for those who assist in these efforts, enhance processes and systems that support the administration of justice, and offer a framework for public involvement in preventing inappropriate behaviour.⁷⁴ However, the key objective of the Whistleblower Protection Bill is to uphold national values and governance principles while safeguarding whistleblowers and serving the public interest.⁷⁵ The Bill aims to make it easier for major and serious issues within public or private organizations that are thought to be illegal, harmful, or detrimental to the public interest to be disclosed and investigated.

The Bill can be deemed to serve the public interest since it addresses the interest of all as per the unitary approach by including employees amongst others and not just some of the members in the society. The Bill only falls short of serving the public interest since it has not yet been enacted therefore has not undergone public participation and voting by members of parliament to be considered a law that serves the public interest under the procedural approach.

Another strength of the Whistleblower Protection Bill is that it describes the protocols for handling and investigating disclosures including clauses pertaining to sharing Act information, designating a designated official to manage disclosures, and providing legal protection for disclosures.⁷⁶ This is an improvement from the Bribery Act which lacked a procedure for disclosure. The Bill stipulates what must be disclosed, requires disclosures to be made in writing, and describes what must be done after receiving a disclosure.⁷⁷ Furthermore, it is mandatory to provide the Commission with a copy of any written disclosure.⁷⁸ The Bill acknowledges the possibility of anonymous disclosures, enabling people to voice concerns

⁷² Uys T and Anton S, 'Morality of principle versus morality of loyalty: The case of whistleblowing,' 3, *African Journal of Business Ethics*, 1,2008,1.

⁷³ Section 7, The Whistleblowers Protection Bill (2023).

⁷⁴ Brown A, Paul L, John M and Chris W, '11. Best-practice whistleblowing legislation for the public sector: the key principles,' *Whistleblowing in the public sector*,2008,261.

⁷⁵ Article 10, The Constitution of Kenya (2010).

⁷⁶ Part IV, The Whistleblowers Protection Bill (2023).

⁷⁷ Section 12(2), The Whistleblowers Protection Bill (2023).

⁷⁸ Section 19, The Whistleblowers Protection Bill (2023).

without revealing their identity which encourages a whistleblowing culture.⁷⁹ Together, these clauses create a safe and well-organized framework for the Bill's disclosure procedure.

Regarding implementation and enforcement of whistleblower laws, one of the main obstacles to whistleblowing in Kenya is the lack of an organization in charge of monitoring the implementation of whistleblower laws.⁸⁰ The Bill recognizes this and suggests establishing the Commission on Administrative Justice, whose job shall be to supervise the Bill's execution.⁸¹ It would give the Commission the authority to create whistleblowing policies and procedures, look into any disclosures of improper behaviour, forward protection requests to the Witness Protection Agency, educate the public about the advantages of whistleblowing, and create initiatives that support a culture of whistleblowing in Kenya.⁸² The Whistleblower Protection Bill provides for enforcement, violations, and sanctions giving the Commission the authority to petition the High Court for enforcement orders.⁸³ It lists the following offenses: obstruction, fraud, evidence destruction, false charges, and failing to report knowledge of inappropriate conduct within two days.⁸⁴ The Bill requires the handling of classified material and limits some disclosures, including those pertaining to Cabinet discussions or information shielded by the advocate-client privilege.⁸⁵ The Cabinet Secretary creates rules for regulating disclosures and handling classified material in accordance with the Commission's directives.⁸⁶

The Whistleblower Protection Bill also outlines the requirements for public and commercial entities to create and implement whistleblower policies and procedures.⁸⁷ The Commission is required to release guidelines to support these entities in developing relevant policies within six months of the Bill's enactment.⁸⁸ The rules address a number of topics, such as the designation of officers, the receipt and referral of disclosures, information confidentiality, sharing the findings of investigations, and compliance reporting.⁸⁹ Public and commercial entities must adhere to the criteria when creating their policies and processes, and the

⁷⁹ Section 20, The Whistleblowers Protection Bill (2023).

⁸⁰ Onyango G, 'Whistleblowing behaviours and anti-corruption approaches in public administration in Kenya,' 234.

⁸¹ Section 5, The Whistleblowers Protection Bill (2023).

⁸² Section 8, The Whistleblowers Protection Bill (2023).

⁸³ Part IX, The Whistleblowers Protection Bill (2023).

⁸⁴ Section 41, The Whistleblowers Protection Bill (2023).

⁸⁵ Section 44(1)(b), The Whistleblowers Protection Bill (2023).

⁸⁶ Section 44(6), The Whistleblowers Protection Bill (2023).

⁸⁷ Part V, The Whistleblowers Protection Bill (2023).

⁸⁸ Section 22, The Whistleblowers Protection Bill (2023).

⁸⁹ Section 22(2), The Whistleblowers Protection Bill (2023).

Commission must approve them.⁹⁰ In the case that the organization fails to offer proof of the existence of sufficient protocols intended to encourage reporting of wrongdoing and discourage misconduct, it shall be considered a crime to fail to set up such policies.⁹¹ Therefore, the Bill is not sector specific as is seen to apply to both the public and private sector.

3.3 Weaknesses of The Whistleblower Protection Bill

One of the challenges that is evident in the Bill is that the requirement of public and private bodies to have a whistleblower disclosure procedure is not mandatory.⁹² The Bill merely suggests that public bodies should have such a procedure in the policies, and it is not mandatory. The Bill even provides that public and private bodies who fail to have such procedures for disclosure, disclosures shall be made to the Commission until such procedures are put in place.⁹³ The Bill uses the term ‘may’ rather than ‘shall’ in referring to public bodies establishing disclosure procedure making it not mandatory.⁹⁴ There are even no fines imposed for public or private bodies who fail to do so. This is a major flaw in the Bill since the essence of the Bill is to protect employees and ensure that employees who whistle blow are protected. A disclosure procedure includes a procedure on confidentiality and therefore the Bill falls short by making it optional for public and private bodies to have protected disclosure procedures.

Additionally, the Bill fails to sufficiently protect employees since the Bill only envisages limited instances where disclosures can be made to the Commission.⁹⁵ Disclosures as provided by the Bill, can be made to the Commission, a registered newspaper or media house, Parliament, Judiciary, a police officer amongst others.⁹⁶ The Bill only gives certain instances where a disclosure can be made to the Commission. Those instances include when the subject-matter of the disclosure involves the supervisor or the chief executive or head of the public or private entity where the person works, where a person reasonably believes that a matter presents an imminent risk of a substantial and specific danger to the life, health or safety of individuals, or to the environment then such disclosures can be made the Commission. However, it is of importance for employees to make disclosures to the Commission since they are directly mandated by the Bill to receive and investigate disclosures of improper conduct, receive and

⁹⁰ Section 22(4), The Whistleblowers Protection Bill (2023).

⁹¹ Section 23, The Whistleblowers Protection Bill (2023).

⁹² Part IV, The Whistleblowers Protection Bill (2023).

⁹³ Section 12 (6), The Whistleblowers Protection Bill (2023).

⁹⁴ Section 12 (9), The Whistleblowers Protection Bill (2023).

⁹⁵ Section 15(5), The Whistleblowers Protection Bill (2023).

⁹⁶ Section 15(3), The Whistleblowers Protection Bill (2023).

investigate complaints of reprisal and ensure the protection for whistleblowers. The Commission is mandated to protect whistleblowers and only they can refer a whistleblower to a Witness Protection Agency for Whistleblowing hence it is a flaw to have limitations on when one can make a disclosure to the Commission. Therefore, limiting when an employee can seek redress to the Commission is a flaw of the Bill.

Moreover, the Bill makes it an obligation for any person who has knowledge that improper conduct has occurred or is likely to occur and who does not make a disclosure under the Bill within two days thereof, commits an offence.⁹⁷ Firstly, the Bill creates a relatively short timeline to make a report improper conduct. Also, given the fact that its an obligation to report improper conduct, therefore having a Whistleblower Reward Scheme is unfounded. This is because by making it an obligation, one does not voluntarily whistle blow but because they are required to do so, so why reward whistle-blowers? The reasons given for rewarding for example employees is because of the consequences they receive for whistleblowing. However, this should be what the Commission should take into consideration in rewarding remedies such as compensation and not having a reward scheme for something which is a duty rather than voluntary.

Lastly another undoing of the Bill is its slow process in implementation.⁹⁸ The fact that the Bill is not yet an Act means that the provisions in the Bill are not binding, and one cannot be said to violate a provision of a Bill since it is yet to be enacted. The Whistleblower Bill of 2023 was drafted in 2021 and until now the Bill is still yet to become law. Considering that if the Bill becomes law, it could possibly resolve the challenges of the whistleblower laws in Kenya, the Bill status is a major drawback in the progression of whistleblower protection in Kenya.

3.4 Conclusion

The Whistleblower Protection Bill is an improvement of existing whistleblower laws in Kenya as it attempts to remedy the shortcomings of the existing laws in protecting employee whistleblowers. The Bill does so by introducing a procedure for disclosure, directly protecting employee whistleblowers by making it a requirement for employers to have a whistleblowing policy and by preventing employers from taking retaliatory actions against the employee when they whistle blow.

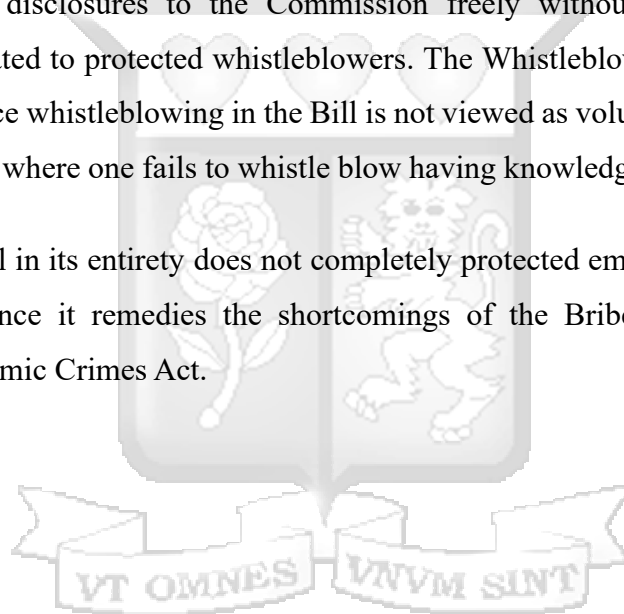
⁹⁷ Section 42, The Whistleblowers Protection Bill (2023).

⁹⁸ Report on Taskforce on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, 2015,123

Therefore, the Bill has several strengths since the Bill protects a wider range of whistleblowers compared to existing laws, including employees and those raising non-bribery concerns and offers clearer definitions to key terms like "whistleblower" and "improper conduct" which are clearly defined, reducing ambiguity and uncertainty. The Bill also offers comprehensive safeguards against retaliation, including legal remedies, confidentiality, and support services for whistleblowers and has clear and accessible procedures which are outlined for reporting disclosures, investigating allegations, and providing timely remedies.

On the flipside the Bill also has shortcomings which require streamlining for employees to sufficiently be protected by law when they whistle blow. The Bill needs to make it mandatory for public and private bodies to establish disclosure procedures that protect employees, allow employees to report disclosures to the Commission freely without limitation since the Commission is mandated to protect whistleblowers. The Whistleblower Reward Scheme is also not necessary since whistleblowing in the Bill is not viewed as voluntary but an obligation of which is an offense where one fails to whistle blow having knowledge of improper conduct.

In Conclusion, the Bill in its entirety does not completely protect employees but is a step in the right direction since it remedies the shortcomings of the Bribery Act and the Anti-Corruption and Economic Crimes Act.



CHAPTER 4: A COMPARATIVE ANALYSIS OF THE UK LAW ON WHISTLEBLOWER PROTECTION

4.1 Introduction

The UK passed the Public Interest Disclosure Act of 1998 in response to a number of significant occurrences, such as the Lloyd's of London affair and the Matrix Churchill Trial.⁹⁹ The government was aware of exports to Iraq that might have been used for military purposes, as the Matrix Churchill Trial demonstrated, underscoring the necessity of caution when revealing information pertaining to national security.¹⁰⁰ Whistleblowers who voiced concerns about financial irregularities encountered adverse consequences in the Lloyd's of London crisis, emphasizing the need for legal protections for those who reveal financial fraud.¹⁰¹ These scandals highlighted the significance of developing a legislative framework that protects whistleblowers from retaliation and promotes their actions in the public good.¹⁰²

The United Kingdom has extensive laws on whistleblowing that the Kenyan government could benefit from in its quest to implement a proper law on whistleblower protection.¹⁰³ In 1999, the Public Interest Disclosure Act of 1998 went into effect and its primary goal of the Act is to address the requirement of offering protection to employees who want to discuss issues of public interest.¹⁰⁴ This is primarily due to the fact that employees are victimized or fired, which discourages them from speaking out about improper conduct.¹⁰⁵ The legislation's key goal was to promote a change from the prevalent workplace culture where employees would sooner look the other way than voice their concerns, regardless of how serious those issues may be.⁹⁸

⁹⁹ Levi M, 'Equal before the law? Politics, powers and justice in serious fraud prosecutions,' *Crime, Law and Social Change*, 24,1995,321.

¹⁰⁰ Cliffe L, Ramsay M, Bartlett D and Bartlett D, 'The Scott Inquiry: Matrix Churchill and the Arms to Iraq Affair. The Politics of Lying: Implications for Democracy,' 2000,137.

¹⁰¹ Lui A, 'Protecting whistle-blowers in the UK financial industry,' *International Journal of Disclosure and Governance*, 11,2014,197.

¹⁰² Gobert J and Punch M, 'Whistleblowers, the public interest, and the Public Interest Disclosure Act 1998,'63, *The Modern Law Review*, 1,2000,28.

¹⁰³ Vinten G, 'Whistleblowing: the UK experience Part 2,' 42, *Management Decision*,1,2004,143.

¹⁰⁴ Camp C, 'Openness and accountability in the workplace',1999, 46.

¹⁰⁵ Estlund L, 'Free speech and due process in the workplace,' *Labor and the Constitution*, Routledge, 2014, 325.

⁹⁸ Morrison W, 'Employee voice behavior: Integration and directions for future research,'5, *Academy of Management annals*,1,2011,385.

4.2 Overview of Whistleblowing Protection in the UK

The Employment Rights Act set the foundation for the development of whistleblowing protection laws in the UK. Any clause in the employment contract between the employer and the employee that restricts or prohibits the worker from disclosing information is void under Act.¹⁰⁶ Additionally, it broadens the definition of a worker to include individuals who participate in organization-sponsored training programs as well as contracts for services.¹⁰⁷ It also safeguards information disclosed to the media if the person reveals it indicates that if they reveal it internally, they risk being victimized or put in danger, or if they demonstrate that the material is extremely severe. The Act provides protection against wrongful termination to independent contractors as well as employees who work for an agency resulting to less victimization of employees who reveal information.¹⁰⁸ If an employee is wrongfully terminated due to protected disclosure, they have the right to file a complaint with the complaints tribunal.¹⁰⁹

4.2.1 The Public Interest Disclosure Act

The Public Interest Disclosure Act of 1998 is an essential protection for employees in a variety of industries, preventing them from being subjected to unfair treatment or being called out by their employers for reporting misconduct that is in the public interest.¹¹⁰ With the exception of professionals who are truly self-employed, volunteers, police officers, and members of the intelligence services, the Act covers the majority of workers in the public, private, and nonprofit sectors.¹¹¹ It creates a climate that fosters the reporting of misconduct by protecting workers against unjust dismissal in the event that their employment is terminated as a result of a protected disclosure.¹¹²¹¹³¹³⁰⁵

The Act's effect on charities, which are included in the voluntary sector and are therefore subject to the law, is one of its most noteworthy features.¹¹⁴ Employees of charities are given protection

¹⁰⁶ Section 43(j), Employment Rights Act (1996)

¹⁰⁷ Section 43 (k), Employment Rights Act (1996).

¹⁰⁸ Section 23, Employment Rights Act (1996).

¹⁰⁹ Section 48, Employment Rights Act (1996), Section 5&3, Public Interest Disclosure Act (1998).

¹¹⁰ Lewis D, 'The public interest disclosure act 1998,' *Indus. LJ* 27,1998, 325.

¹¹¹ Charity Commission for England and Wales, 'The Public Interest Disclosure Act,' GOV.UK, 15 April 2020,

¹¹² .

¹¹³ Gobert J and Maurice P, 'Whistleblowers, the public interest, and the Public Interest Disclosure Act 1998,' 63, *The Modern Law Review*,1,2000, 28.

¹¹⁴ Ashton J, '15 years of whistleblowing protection under the Public Interest Disclosure Act 1998: Are we still shooting the messenger?' 44, *Industrial Law Journal*, 1,2015, 32.

under this law when they report wrongdoing that occurs within or relates to their organizations.¹¹⁵ The Act is noteworthy for its capacity to streamline disclosures to regulatory agencies such as the Charity Commission, thereby augmenting accountability and openness in charitable organizations.¹¹⁶ This clause encourages employees to report directly to the Charity Commission any concerns they may have regarding criminal activity, legal infractions, injustices, threats to their health and safety, harm to the environment, or wilful concealment of such information.¹¹⁷ This helps ensure that charities and donations made for charitable purposes are managed effectively.

4.2.2 Protected Disclosure

The Public Interest Disclosure Act and the Employment Rights Act define protected disclosure as any disclosure that a worker reasonably believes has resulted in a criminal offense, that someone has broken the law, that someone has neglected their obligations, that someone's health or safety is in danger, or that there has been an injustice.¹¹⁸ It describes the concealment of such misconduct as qualifying disclosure. Qualified disclosure is also information disclosed to a person in authority or one's employer.¹¹⁹ The Act's framers placed a strong emphasis on the disclosure's subject content and the recipients of it. Individuals who report in good faith, do not have any connection to or involvement in illegal activity, reasonably think that the information or allegations provided are truthful, reasonably believe that the disclosure is essential or for the public interest, and do not report for personal gain are all protected by the Act.¹²⁰

4.3 Critique

The Act protects disclosures made in good faith although it is not necessary since a disclosure made out of public interest is given more consideration than the justification for the disclosure.¹²¹ As long as the disclosure is in the public interest, more workers would be subject to the Public Interest Disclosure Act if the good faith clause is removed. If the goal was to

¹¹⁵ Charity Commission for England and Wales, 'The Public Interest Disclosure Act,' 2.

¹¹⁶ Vickers L, 'Whistling in the wind? The Public Interest Disclosure Act 1998,' 20, *Legal Studies*, 3, 2000, 434.

¹¹⁷ Charity Commission for England and Wales, 'The Public Interest Disclosure Act,' 4.

¹¹⁸ Section 1, Public Interest Disclosure Act (1998), Section 43(b), Employment Rights Act (1996).

¹¹⁹ Section 1, Public Interest Disclosure Act (1998), Section 43(c), Employment Rights Act (1996).

¹²⁰ Section 43 (h), Employment Rights Act (1996).

¹²¹ *Street v Derbyshire Unemployed Workers Centre* (2004), The United Kingdom Industrial Relations Law Reports.

lessen malicious claims, the relevant officials should review the justifications for the good faith criterion and seek alternative solutions such as application of harsh penalties for baseless accusations.¹²² There has also been a contention that courts with less authority, such the Employment Tribunal, handle such cases. These matters ought to be assigned to more qualified courts, like the High Court.¹²³

The Public Interest Disclosure Act's lack of statutory clarity is a further point of criticism demonstrated by the fact that the statute only covers exceptionally serious failures with the courts having the last say over what constitutes an exceptional failure.¹²⁴ It would be beneficial to provide a comprehensive list of exceptionally crucial failures.¹²⁵ Furthermore, the Public Interest Disclosure Act does not specify to whom protected disclosures must be made.¹²⁶ Whistleblowers who are not covered by the PIDA may face criminal and civil prosecutions, including defamation.¹²⁷ For whistleblowers who are not covered by this Act, the burden of having to prove their allegations against the employer is a major deterrent.

Additionally, the Act does not protect workers who attempt to make a disclosure; rather, it only protects those who have already disclosed.¹²⁸ If a worker faces reprisals during investigation of corrupt practices, he or she is not subject to protection under the Act. Moreover, the Act fails to protect workers from being blacklisted in case of dismissal or voluntary resignation.¹²⁹ Similarly, 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, it would be just, leaving the employee without recourse.¹³⁰ In light of the critique above, there is need to ensure the protection of whistleblowers during the entire disclosure process.¹³¹

¹²² Lewis D and Homewood S, 'Five years of the Public Interest Disclosure Act in the UK: are whistleblowers adequately protected?' *Web journal of current legal issues*, 5, 2004,6.

¹²³ Section 10(4), South Africa's Disclosure Act (2000).

¹²⁴ Section 43 (H), Employment Rights Act (1996).

¹²⁵ Lewis D, 'Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?' *Journal of Business Ethics*,2,2008,502.

¹²⁶ Section 43 (G) and 43(H), The United Kingdom Employment Rights Act (1996).

¹²⁷ Lewis D, 'Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?' 504.

¹²⁸ Bolton School v Evans (2006), The United Kingdom Industrial Relations Law Reports.

¹²⁹ Templeton H 'Maxwell Pensions Scandal. Minutes of Evidence Taken before the Social Security Committee' 25 February 1992, 382.

¹³⁰ Bouloy, K, 'The Public Interest Disclosure Act 1998: Nothing More than a Cardboard Shield,' *Manchester Rev. L. Crime & Ethics* 1,2012, 1.

¹³¹ V Wim and D Lewis, 'The content of whistleblowing procedures: A critical review of recent official guidelines,'108, *Journal of Business Ethics* ,2012,254.

4.4 Relevance to The Kenyan Context

Currently, the only potential reform towards ensuring the protection of whistleblowers in Kenya is the Whistleblower Protection Bill of 2023 which is yet to be implemented.¹³² However, there is a need for reforms which are necessary to fill any gaps that may arise during application. Firstly, there should be a definition of protected workers just like in the UK law to ensure that all people capable of disclosing valuable information are protected.¹³³ Kenyan authorities should also ensure the law creates awareness on the great impact of whistle blowing in eradicating corruption.¹³⁴ The Bill prohibits disclosure that may be grounds for offence. However, to ensure that a whistleblower is free from civil and criminal charges and the burden of proving their innocence, the law should demand that employers ought to prove beyond reasonable doubt that the disclosure constituted an offence.¹³⁵

Prior to formal legislation aimed at protecting whistleblowers, the charity Protect, formerly known as Public Concern at Work assisted about 40,000 people in voicing concerns through its help line since its founding in 1993.¹³⁶ After 25 years, its work is still crucial and it helps more than 2,500 cases annually, helping people make their way through the legal and regulatory system. Additionally, it offers professional guidance to organizations looking to implement or enhance speak-up and whistleblowing policies.¹³⁷ The charity also influenced the creation of the UK Public Interest Disclosure Act, which is still the model legislation used worldwide.¹³⁸ It has also successfully advocated for improvements to PIDA, intervened in significant Court of Appeal and Supreme Court cases, and influenced the development of an EU whistleblowing directive.¹³⁹

¹³² Masinde S, 'Towards Whistleblower Protection in Kenya: A Journey of Fits and Starts,' *Global South Dialogue on Economic Crime*, para 7 [Towards Whistleblower Protection in Kenya: A Journey of Fits and Starts – GSDEC](#) on 5 January 2024.

¹³³ Section 43(K), The Public Interest Disclosure Act (1998).

¹³⁴ Lewis D, 'Ten Years of Public Interest Disclosure Legislation in the United Kingdom: Are Whistleblowers Adequately Protected?', 500.

¹³⁵ Rad K, 'The Burden of Proof in Whistle blowing: Fecitt and others v NHS Manchester [2011] IRLR 111', 40, *Industrial Law Journal*, 2011, 218.

¹³⁶ Karen J, 'The short history of whistleblower protection,' *ACCA*, 1 January 2019, para 3.

¹³⁷ Van P, Meghan, Muhammad I and Kate Kenny, 'When employees speak up: Human resource management aspects of whistleblowing,' *The Emerald Handbook of Work, Workplaces and Disruptive Issues in HRM*, Emerald Publishing Limited, 2022, 540.

¹³⁸ Karen J, 'The short history of whistleblower protection,' para 4.

¹³⁹ Yurttagül L, 'Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union: An Emerging Consensus,' 2021, 1.

In 2018, it launched a unique benchmark whistleblowing tool to help organizations evaluate their whistleblowing arrangements and culture against best practices.¹⁴⁰ Protect keeps pushing for societal change that will appreciate and not condemn those who come out with information about matters of public concern.¹⁴¹ In addition, it is advocating for additional reforms to strengthen PIDA's protections, such as making people aware that disclosures made in the public interest cannot be suppressed by non-disclosure agreements.¹⁴² After the Whistleblower Protection Bill is finally enacted, the commission should follow the Protect example to promote a whistleblowing culture. Lastly, the Act should expressly prohibit employer use of settlement agreements to prevent the disclosure of improper conduct.¹⁴³

4.5 Conclusion

The UK's whistleblowing laws, starting from the Employment Rights Act, offer a valuable benchmark for Kenya. As Kenya seeks to enact its own whistleblower protection legislation, it stands to learn from the Public Disclosure Act of the UK. The PIDA defines protected workers which is crucial, as is emphasizing the critical role whistleblowing plays in combating corruption. Shifting the burden of proof to employers, requiring them to demonstrate harm caused by disclosures, is another vital step.

Looking beyond legislation, organizations like Protect offer valuable guidance. Their experience in fostering a culture of open communication and supporting whistleblowers can be instrumental in shaping Kenya's approach. Additionally, the Bill should explicitly prohibit employers from silencing whistleblowers through settlement agreements.

In conclusion, the UK's PIDA provides a framework for whistleblowing which fosters a culture that supports whistleblowers. Kenya can adopt relevant aspects of the UK laws to strengthen its own whistleblowing and thus protecting employee whistleblowers.

¹⁴⁰ Kenny K, Wim V, and Marianna F, 'The whistleblowing guide: Speak-up arrangements, challenges and best practices,' *John Wiley & Sons*, 2019.

¹⁴¹ Karen J, 'The short history of whistleblower protection,' para 4.

¹⁴² Karen J, 'The short history of whistleblower protection,' para 5.

¹⁴³ Thompsons solicitors, 'Guide to whistleblowing in the UK,' Solicitors Regulation Authority, 10 March 2020,

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter summarises all the arguments made in the previous chapters and propose the way forward in shaping the legal framework on whistleblowing to protect employee whistleblowers.

5.2 Restating the Initial Problem

The initial problem is that the legal framework in Kenya on whistleblowing has gaps.¹⁴⁴ The gaps being that the law does not directly protect employee whistleblowers in the workplace since the existing law is sector specific.¹⁴⁵ Due to this, employees restrain from whistleblowing because of fear of retaliation by employer. The Whistleblower Protection Bill of 2023 has tried to remedy the situation, but the Bill is still yet to be passed.

5.3 Research findings

The study was set out to determine the effectiveness of the Bribery Act and section 65 of the Anti-Corruption and Economics Act in protecting employee whistleblowers, the strengths and weaknesses of the Whistleblower Protection Bill and the lessons that can be learnt from the UK laws on whistleblowing.

Regarding the effectiveness of the Bribery Act, the study showed that the Bribery Act is the primary legislation in whistleblowing and has advanced whistleblower protection since it encompasses all forms of bribery and not just corruption, criminalizes retaliation against individuals reporting bribery or related offenses. Though it criminalizes retaliation for exposing bribery and offers broader coverage, it focuses solely on bribery and leaves out other areas, like the Mukumu School incident, which was non-bribery related, unprotected. Additionally, while aiming to safeguard employee whistleblowers, the Act lacks clear reporting procedures and relies on the Employment Act for termination cases, potentially neglecting its own protections. Finally, it assumes whistleblowers always provide accurate information.

The Anti-Corruption and Economic Crimes Act is ineffective in protecting whistleblower as the Act has an ambiguous definition of "informer," which fails to explicitly mention

¹⁴⁴ Kogo G, 'The Legal Framework for Whistleblower Protection in Kenya and Examination of Economic Crimes' 12.

¹⁴⁵ Kichana P, 'Kenyan Laws cannot protect whistleblowers', 1-8

whistleblowers and creates uncertainty for potential whistleblowers. In protecting employee whistle-blowers, employees are particularly vulnerable under the Act. The Act's focus on corruption related crimes and is therefore sector specific. Also, from a public interest perspective, the Act benefits fewer individuals than it could by excluding employees and limiting its scope. This contradicts both the aggregative and unitary approaches to public interest, which emphasize benefiting the majority and serving all members of society, respectively hence the Act does not serve the public interest.

The Whistleblower Protection Bill could potentially remedy the challenges faced by the existing Acts. The Bill introduced a disclosure procedure which was lacking in the Bribery Act, defines a whistleblower, directly protects employee whistleblowers by making it a requirement for employers to have a whistleblowing policy and by preventing employers from taking retaliatory actions against the employee when they whistle blow.

However, the Bill is yet to be passed even after being proposed two years ago. The Bill makes it optional to have a disclosure procedure for public and private bodies which insufficiently protects employees because a public body may or may not enact policies which incorporate protected disclosure procedures. Lastly, from the UK Laws Kenya can learn quite a bit and can adopt whistleblower protection laws not just in the Bill but even incorporate it in the Employment Act and can even extend protection to independent contractors as well.

5.4 Conclusion

It is evident that there is a need for whistleblower protection for employees.¹⁴⁶ Existing legal framework as explored in the chapters have some flaws which although they were to be remedied would still not sufficiently protect employee whistleblowers.¹⁴⁷ What is needed is a legislation that separately and specifically protects employee whistleblowers such as that of the Whistleblower Bill of 2023. Kenya can also borrow from the Employment Rights Act of the UK since the UK Acts have provisions such as defining protected workers and provide for employee protection when they whistle blow in the Employment Act 2007. This therefore proves my hypothesis that expanding the legal framework on whistleblower protection in

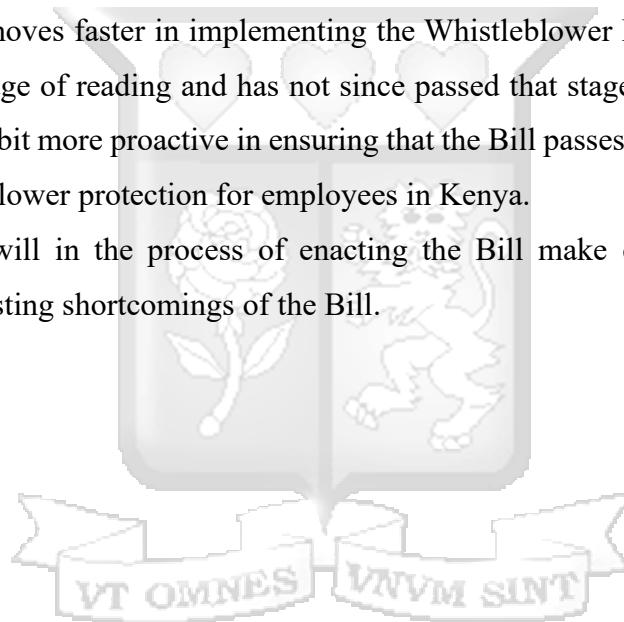
¹⁴⁶ <https://tikenya.org/2023/07/21/the-need-for-whistleblower-protection-legislation-in-kenya/> on 14 January

¹⁴⁷ <https://tikenya.org/2023/07/21/the-need-for-whistleblower-protection-legislation-in-kenya/> on 14 January 2023

Kenya to directly protect employees rather than being sector-specific would address the limitations of the existing laws on whistleblowing in Kenya.

5.5 Recommendations

- a) That the term informer should be defined under the Anti-Corruption and Economic Crimes Act. The definition of an informer should include a whistleblower for section 65 to apply to whistleblowers.
- b) That the Bribery Act should include a process for disclosure. This would create certainty as a whistleblower will be aware of how to make a protected disclosure and will be assured that they will not face any consequences for whistleblowing because they will be protected under the Act from termination and such other retaliatory actions.
- c) That Parliament moves faster in implementing the Whistleblower Bill of 2023. Currently it is at the first stage of reading and has not since passed that stage. There is need for the legislature to be a bit more proactive in ensuring that the Bill passes all the stages promptly to ensure whistleblower protection for employees in Kenya.
- d) That Parliament will in the process of enacting the Bill make changes to the Bill to streamline the existing shortcomings of the Bill.



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